FEDERAL LAW UPDATE

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SUING AND DEFENDING GOVERNMENTAL ENTITIES
July 12-13, 2007
San Antonio, Texas

CHAPTER 18

Robert S. Davis

- **Personal Information**

Robert Davis was born in Dallas, Texas, on September 16, 1962.

- **Professional Experience**

After graduating from law school, Mr. Davis served as Briefing Attorney to the Honorable Justice Sue LaGarde, 5th Judicial District Court of Appeals in Dallas, Texas from 1988 to 1989. Thereafter, Mr. Davis was appointed as Law Clerk to United States District Judge William M. Steger from 1989 to 1991. Mr. Davis is a Regional Counsel for Texas Association of Counties and has extensive experience in representing governmental entities and government officials in all types of litigation. Mr. Davis also has extensive experience in first party and third party litigation for major insurance carriers, drafting coverage opinions for insurance carriers and in medical malpractice litigation for private practitioners as well as county health authorities. Since 1994, Mr. Davis has tried 77 lawsuits in state and federal court to verdict, and he has handled approximately 95 appellate cases during that same period. He was admitted to the Texas bar in November, 1988. Mr. Davis was also admitted to practice before the United States District Court for the Eastern District of Texas in 1990, the United States Court of Appeals for the 5th Circuit in 1991, the United States District Court for the Northern District of Texas in 1991, the United States District Court for the Western District of Texas in 1991, the United States District Court for the Southern District of Texas in 2001 and the Supreme Court of the United States in 1998. Mr. Davis has written papers for and made numerous presentations to such entities as the State Bar of Texas, Texas Sheriff's Association, Texas Association of Counties, Texas Jail Association, and Texas Chief Deputies' Association.

- **Educational Background**

Mr. Davis received his preparatory education at Trinity University in San Antonio, Texas, where he received a Bachelor of Science Degree in History in 1985. Mr. Davis' legal education was at Southern Methodist University, where he graduated with a Juris Doctor Degree in 1988. During law school, Mr. Davis served as the assistant legislative liaison for Dallas District Attorney Henry Wade and his successor, Dallas District Attorney John Vance. During the period of time that Mr. Davis worked for Mr. Wade, the Texas Governor's Office published a paper written by Mr. Davis on recidivism and the need for increased prison capacity, and excerpts of the paper were published by the major news media in Texas.

- **Professional Development**

Mr. Davis served as President of the Smith County Young Lawyers Association from 1994 to 1995, Co-Chairman of the Eastern District of Texas Historical Committee from 1996 to 1997. Mr. Davis is currently a member of the Smith County Bar Association, Gregg County Bar Association, Harrison County Bar Association, Eastern District of Texas Bar Association, and the Defense Research Institute. Mr. Davis is the author or co-author of several publications and papers

including: “Civil vs. Criminal Liability for School District Employees,” 2006 Texas Association of School Board’s Risk Management Fund Members’ Conference; “Bail Bond Handbook,” Texas Association of Counties, 2005; “Jail School,” Chief Deputies Conference, June 2005 and 2006, and Texas Jail Association Annual Conference, May 2005 and 2006; “House Bill 4 - The Newest Version of Tort Reform,” Suing & Defending Governmental Entities 2004; “Winning Writing: Summary Judgment Practice in Texas State Courts,” Suing & Defending Governmental Entities 2003; “Bail Bonds: Emerging Liability Issues,” 1999 Regional Law Enforcement Workshop Series, February 1999; Co-Author, “Jail Litigation: From Class Action Lawsuits to Pro Se Litigation,” 1999 Fall Law Enforcement Regional Workshops - Mitigating Liability in County Jails, November 1999.”Civil Rights Litigation Update,” Texas Association of Counties, Northeast Texas Seminar, August 29, 1998; “Anatomy of a Law Enforcement Lawsuit,” County Management Institute Seminar, April 8, 1998; “Jail Litigation: From Pro-Se Lawsuits to Class Actions,” State Bar of Texas Seminar Suing and Defending Governmental Entities, 1997; “Bail-Bond Forfeitures,” Northern and Eastern County Judges Association of Texas, 1997; “A Court Divided: The 5th Circuit Court of Appeals and the Politics of Judicial Reform,” 52 TEX. B. J. 706 (1989)(book review); “The Choice: Increased Prison Capacity or Increased Recidivism,” published by the Governor’s Office of the State of Texas, 1986; “Using Abstract Questions to Develop Critical Thinking Skills in Social Studies,” Holt, Rinehart & Winston, Inc. 1984; and “Selecting a United States President in 1984,” MaGraw Hill Book Company, 1984.

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This project could not have been completed without the help of Christi J. Kennedy, Ginger Young, Lee Correa, Stuart R. Hene and Hope Sorensen. Thank you for your patience and hard work.

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I. INTRODUCTION

This paper contains the most significant cases decided in the last year by the U. S. Supreme Court and the Fifth Circuit Court of Appeals.

II. FOURTH AMENDMENT CASES

A. Los Angeles County, California v. Rettele, 550 U.S. ___ (2007), 127 S.Ct. 1989 (May 21, 2007)

***Issue*:** Whether two deputies violated the plaintiffs' Fourth Amendment rights when they proceeded with a search after seeing that the occupants were a different race than the suspects and when the deputies forced the two occupants to get out of bed and stand unclothed for a period of time.

***Facts*:** On December 11, a deputy obtained a valid search warrant for two houses in Los Angeles County, California in connection with his investigation of a fraud and identity-theft ring. The suspects were known to be African-Americans and one had a registered 9-millimeter handgun. In support of the search warrant, an affidavit cited many sources indicating that the suspects resided at the home. The deputies were unaware that the suspects had moved from the residence three months earlier. During the search, the deputies found two occupants in a bedroom in the residence. These two occupants were of a different race than the suspects. The deputies ordered the occupants out of bed and required them to stand for a few minutes before allowing them to dress.

***Procedural History*:** The occupants brought suit against the deputies and others accusing them of violating their Fourth Amendment right to be free from unreasonable searches and seizures. The District Court granted summary judgment to all named defendants. The Court of Appeals for the Ninth Circuit reversed, finding that both deputies violated the Fourth Amendment and were not entitled to qualified immunity. The Supreme Court granted certiorari.

***Holding*:** The Supreme Court reversed the judgment of the Court of Appeals finding that the occupants' Fourth Amendment rights were not violated, and therefore, qualified immunity was not an issue. The Supreme Court remanded the case for further proceedings consistent with their findings.

B. *Scott v. Harris,* 550 U.S. 1769__ (2007), 127 S.Ct. 1769 (April 30, 2007)

***Issue*:** Whether it is consistent with the Fourth Amendment for a law enforcement officer to attempt to stop a fleeing suspect who is endangering the public by ramming the suspect's vehicle from behind.

***Facts*:** In March 2001, a Georgia county deputy attempted to pull over the suspect's vehicle after he was found to be going 73 miles per hour in a 55-mile-per-hour speed zone. As the officer pursued the suspect's vehicle, the suspect sped up and attempted to flee the officer. The officer radioed his supervisor informing him of the license plate number and that he was in pursuit of a fleeing vehicle. The chase mostly took place on a two-lane road, reaching speeds of more than 85 miles per hour. Deputy Scott joined other law enforcement officers in the chase after hearing about it on the radio. The suspect pulled into the parking lot of a shopping center and continued fleeing from police. The suspect evaded a police trap by colliding with Scott's police car. Scott became the lead police car in the chase after the suspect left the parking lot and once again began speeding down a two-lane highway.

After chasing the suspect for almost 10 miles, Scott radioed his supervisor to ask permission to employ a "Precision Intervention Technique" maneuver to stop the suspect's vehicle. After receiving permission to stop the vehicle, Scott applied his push bumper to the rear of the suspect's vehicle causing the suspect to lose control, overturn and crash. The suspect was badly injured and was rendered a paraplegic as a result of the crash.

***Procedural History*:** The suspect filed suit against Scott alleging excessive use of force resulting in an unreasonable seizure in violation of the Fourth Amendment. Scott filed a motion for summary judgment based on qualified immunity and the District Court denied the motion. On appeal, the Eleventh Circuit affirmed the District Court decision to allow the case to proceed to trial. The Court of Appeals found that Scott's action could be construed as the use of "deadly force" if the circumstances are taken from the suspect's point of view. Under the above assumption, Scott violated the suspect's Fourth Amendment rights. The Supreme Court granted certiorari.

***Holding*:** The Supreme Court found that in a qualified immunity case, courts must answer the following threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" In other words, did Scott's actions violate the Fourth Amendment? Although courts usually adopt the plaintiff's version of the facts when deciding on a qualified immunity summary judgment; here, there is a videotape of the events in question. The videotape greatly differs from the suspect's version of the facts, especially regarding the danger the suspect posed to the public during the chase. The Supreme Court noted that when ruling on a summary judgment, the facts must be

construed in the light most favorable to the nonmoving party *only if there is a "genuine" dispute as to those facts*. The Court reasoned that because the videotape showed the facts as they actually happened, the suspect's version should not have been adopted. The Court found that Scott clearly did not violate the Fourth Amendment.

Next, the Court found that Scott's actions of ramming the suspect's vehicle were objectionably reasonable. To determine this, the Court balanced the nature and quality of the intrusion on the suspect's Fourth Amendment rights against the importance of the governmental interests. Here, the risk of injury to the suspect was balanced against the risk of injury to the public. The Court considered the fact that the suspect posed an actual and imminent threat on the public, as evident from the videotape, the numerous members of the public at risk as opposed to the single suspect, and the innocence of the public compared with the culpability of the fleeing suspect. As a result, the Court found that Scott did not violate the Fourth Amendment and was entitled to summary judgment. The Court reversed the order of the Court of Appeals.

C. *Wallace v. Kato*, 549 U.S. ___ (2007), 127 S.Ct. 1091 (February 21, 2007)

***Issue*:** Whether police officers violated the Fourth Amendment right to be free of false-arrest when they arrested a suspect and the charges against him where later dropped.

***Facts*:** On January 19, 1994, a 15 year old suspect was located and transported to the police station for questioning regarding the shooting death of a man two days before. The suspect was questioned through the night and into the early morning hours when he signed a confession and waived his *Miranda* rights.

***Procedural History*:** Before trial, the suspect attempted to suppress his confession at the station alleging it was the product of an unlawful arrest. The Trial Court denied the motion to suppress and he was convicted of first-degree murder. The Appellate Court found that the officers arrested the suspect without probable cause and thus violated the Fourth Amendment. In the second round of appeals, the Court found that because of the suspect's illegal arrest, his statements were inadmissible. On April 10, 2002, prosecutors dropped the charges against the suspect.

On April 2, 2003, the suspect filed a lawsuit against the officers and the city of Chicago alleging unlawful arrest. The District Court granted summary judgment to the officers. The Court of Appeals affirmed the granting of summary judgment. The Court noted that the statute of limitations barred the suspect's claim because his cause of action accrued at the time of his arrest, not when his conviction was set aside. The Supreme Court granted certiorari.

***Holding*:** Because federal law looks to the law of the State for the length of the statute of limitations, the period is two years, or the time allowed for State personal-injury torts. The standard rule is that accrual begins when the plaintiff can first file suit and obtain relief. Thus, the statute of limitations here would seem to accrue as soon as he was allegedly wrongfully arrested. However, the uniqueness of false arrest/ imprisonment dictates a special rule because if a suspect is falsely arrested he may not have access to legal process. Therefore, he would not be able to sue while he is imprisoned.

The statute of limitation should begin to accrue when the false imprisonment ended. False imprisonment ends when a suspect is held pursuant to legal process. Therefore, the statute of limitation began to run when legal process was initiated against the suspect. The Court found that following this rule, the suspect's claim was not timely and affirmed the ruling the Court of Appeals.

D. *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006)

***Issue*:** Whether police officer, police chief, and City violated Plaintiff's Fourth Amendment right by the seizure of his DNA sample with a seizure warrant based in large part on anonymous tips in response to publication of FBI profile for serial killer suspect.

***Facts*:** Beginning in 2001, a serial killer terrorized south Louisiana and sparked a massive law enforcement search. Over the span of a year, three women were brutally raped and murdered in Baton Rouge, Louisiana. From DNA evidence left at the crime scenes, the State crime lab was able to link all three murders to the same, then-unknown male perpetrator. The FBI created a profile which projected the perpetrator would be between 25 and 35 years of age, employed in a job that required physical strength, and financially insecure. Based on a bloody footprint from the crime scene, the perpetrator was believed to wear a size 10 to 11 shoe. The profile was released to the public. The Task Force received more than 5000 anonymous tips. After analyzing the tips, the investigators talked to more than 600 men, including Kohler, to collect oral saliva swabs for comparison.

The Task Force received two anonymous tips that Kohler was a person to be checked. Investigators also learned that Kohler had been previously convicted of burglary in 1982, was unemployed, had last been employed as a welder, and had previously worked in the area where one of the victim's cell phone had been discovered. Kohler refused to give Officer Hamilton a saliva swab for his DNA. Kohler was aware of the media profile and told Hamilton he had size 13 feet and wore a size 14 work boot, that he had received a full pardon for his conviction, and that investigators could check his work records for his whereabouts on the dates of the

three murders. Hamilton informed Kohler that if he had to get a warrant for the DNA swab, the court order would go into the public records. Kohler declined to give a sample. Shortly thereafter, another investigator, Johnson requested that Kohler give a sample. Kohler again declined. Johnson prepared an Affidavit for Seizure Warrant, obtained a warrant, served the warrant on Kohler, obtained the sample, and filed the affidavit, warrant, and warrant return with the court clerk. The affidavit contained the facts that Johnson relied upon to establish probable cause, but did not contain the exculpatory information provided by Kohler. Almost immediately, Kohler was identified by the media as a suspect in the serial killer investigation who had refused to cooperate with police. Two months later, Kohler learned from a newspaper that he had been cleared because his DNA was not a match to the serial killer.

***Holding*:** The circumstances set forth in the affidavit failed to provide a nexus between Kohler's DNA and the serial killings. The court reiterated the rule from *Illinois v. Gates* that a police officer seeking the issuance of a search warrant must present an affidavit containing facts sufficient to "provide the magistrate with a substantial basis for determining the existence of probable cause." Probable cause exists when reasonably trustworthy facts are sufficient to lead a prudent person to believe that the items sought constitute fruits, instrumentalities, or evidence of a crime. The supporting affidavit must make it apparent that there is some nexus between the items to the seized and the criminal activity being investigated.

In finding that the search warrant was not supported by probable cause, the court noted that anonymous tips are rarely enough to provide probable cause for a warrant, there was no evidence that the tips were corroborated, and that the other facts contained in the warrant failed to provide a nexus between Kohler and the serial killings because the facts did not establish a fair probability that Kohler was the serial killer.

The court also considered Kohler's claim that Johnson violated his Fourth Amendment rights by omitting exculpatory information from the warrant affidavit precluding review by the magistrate of all material facts, as discussed in *Franks v. Delaware*. The court declined to extend *Franks* to include liability for omitting information from a facially invalid warrant. The court also considered Kohler's claims that the police chief and City were liable for Johnson's conduct in obtaining the warrant. There was no evidence that the police chief was involved in the investigation, obtaining the warrant, seizing the evidence or failing to supervise Johnson, and the court affirmed the district court's dismissal of the police chief. Further, Kohler had failed to identify any policy, practice, or custom causally related to the deficient warrant application. Summary judgment in favor of the City was affirmed as well.

E. *Meadours v. Ermel*, 483 F.3d 417 (5th Cir. 2007)

***Issue*:** Whether district court erred in analyzing officers' actions collectively instead of considering conduct of each officer separately where Plaintiff claimed officers used excessive force by killing A man who they attempted to subdue to provide mental health assistance.

***Facts*:** Meadours' sister contacted 911 to request mental health assistance for her brother, whose mental state had steadily deteriorated following September 11, 2001 attacks. Meadours was paranoid, delusional, thought his neighbors were out to get him, and believed that if his feet touched the ground while the sun was out he would die. Four city officers and an EMS unit responded to the 911 call. For seven to eight minutes, two officers met with the sister, who discussed Meadours' behavior, requested that he be taken for treatment, and warned the officers that Meadours was large and strong, possessed a number of tools that could be used as weapons, and feared involuntary hospitalization. The officers decided to secure the scene before EMS approached Meadours. As the officers neared the house, all interior and exterior lights were turned off. Officers Dalton and Martin approached the front of the house, and Officer Kominek the rear. As Kominek entered the backyard, he saw Meadours sitting in a swing wearing four to six baseball caps and a tool belt with a stuffed animal attached. Meadours stated, "Hello, Bob, Police Department." Meadours stood up, and Kominek could see he was holding a large screwdriver. Martin and Dalton joined Kominek, and they repeatedly commanded Meadours to drop the screwdriver. Meadours refused. Martin called Officer Ermel to join them with a beanbag shotgun. Meadours became increasingly aggressive, kicking something in the ground. The officers felt Meadours was a threat to himself and others, and that they could not leave or allow Meadours to leave. Meadours again refused to drop the screwdriver. Ermel instructed two officers to prepare to subdue Meadours and the third officer to cover Ermel while he fired the beanbag shotgun at Meadours. Ermel fired one beanbag round that struck Meadours in the upper thigh, and Meadours ran, jumped over a fence, and climbed on a doghouse, still in possession of the screwdriver. Ermel fired a second beanbag, but Meadours remained atop the doghouse with the screwdriver. At this point, there is a factual dispute about how Meadours was knocked off of the doghouse. Officers contend that the third beanbag round knocked Meadours off the doghouse, but Plaintiffs contend that a bullet in his thigh knocked him off. After Meadours fell/jumped off of the doghouse, he ran toward a door leading to the garage, with the screwdriver held in a "stabbing grip." Kominek was standing near the door. The remaining officer, fearing that Meadours was

charging Kominek, repeatedly fired their service weapons, killing Meadours. Twenty-three shots were fired, with fourteen shots striking Meadours. After considering the summary judgment evidence, the district court granted the City summary judgment, but, considering the officers to have acted in unison, denied the officers' qualified immunity summary judgment because "there exists a genuine issue of material fact as to whether the force they utilized" was unreasonable.

***Holding*:** The district court erred in considering the officers' actions collectively because it found they acted in unison. This decision impermissibly extends the holding in *Jacobs v. West Feliciana Sheriff's Department* (the defendants did not act in unison, and so the court examined each individual's entitlement to summary judgment separately).

The court additionally reiterated its standard regarding the review of a denial of summary judgment on qualified immunity grounds: "we can only review the district court's conclusion that issues of fact are material (a legal question), but we may not review the conclusion that those issues of fact are genuine (a fact question)."

Interestingly, the court declined to extend the Texas Supreme Court's ruling in *Newman v. Obersteller*, that the "bars any suit or recovery" language of Tex. Civ. Prac. & Rem. Code Ann. §101.106 is an unequivocal grant of immunity and bars recovery for intentional torts.

F. *Freeman v. Gore,* 483 F.3d 404 (5th Cir. 2007)

***Issue*:** Whether Plaintiff had defeated Defendant officers' qualified immunity summary judgment by alleging the violation of a clearly established right in that she was arrested without a warrant and without probable cause *because* she refused to let officers into her home unless they had a search warrant. The court also considered the denial of the officers' summary judgment on Plaintiff's excessive force claim.

***Facts*:** Sheriff's Deputies Gore, Bragg and Allison attempted to serve a felony arrest warrant on Kevin at his mobile home. When the deputies received no response to their knocks at the door of the mobile home, they called a telephone number that they had on file for Kevin. The deputies heard the phone ring inside the mobile home.

Eventually, a woman, later identified as Kevin's sister, Sheila, answered the phone. She told the deputies that she was not inside Kevin's mobile home, but rather was at the house next door, which belonged to their mother, plaintiff Freeman. Kevin's mobile home sat very near Freeman's house, and the deputies noticed that wires and cables ran between the two residences. When asked why she had answered Kevin's phone, the sister responded that it was a cordless phone that could pick up calls next door. At some point during this conversation, Sheila stepped out of the house next door and informed the deputies that Kevin was not at his home.

While Gore was speaking with Sheila, Freeman emerged from her house and began yelling at the deputies. When the deputies asked Freeman whether they could enter her home to search for her son, Freeman responded that the last time deputies searched her house, they had trashed it, and that she would not permit the deputies to enter her home unless they had a search warrant for her address. Gore then told Freeman that he could arrest her if she did not permit the deputies to search her home. Freeman responded by saying the deputies would just have to arrest her. Gore instructed Freeman to place her hands behind her back, and Allison handcuffed her and placed her in the back of his patrol car. After Freeman was handcuffed and placed in the patrol car, Gore received consent from Sheila to search the house, but the deputies, apparently convinced by that point that Kevin was not inside, did not enter the house.

The district court noted that it was undisputed that Freeman spent at least some time in the patrol car without air conditioning or ventilation. The parties differ as to the amount of time that Freeman spent in the car, however. Freeman asserts that she was in the car without air conditioning for between 30 and 45 minutes. Freeman also claims that, despite knowing that she had a heart condition, the deputies did not allow her daughter to retrieve her nitroglycerin. The deputies offer contradictory accounts of how long Freeman was in the patrol car, ranging from 5 to 10 minutes, to 30 to 45 minutes. In addition, Bragg stated that he turned on the air conditioning after approximately 30 seconds or one minute.

Gore contacted one of his supervisors and informed him that he had arrested Freeman for the offense of Hindering Apprehension. During that conversation, the supervisor instructed Gore that he could not search Freeman's house without a warrant. Gore disagreed, and another supervisor informed him that he could neither search Freeman's house nor arrest her. After that conversation, Gore released Freeman from the patrol car and removed the handcuffs.

The district court denied the deputies' qualified immunity summary judgment motion. The court held that Plaintiff had alleged the violation of a clearly established right in that she was arrested without a warrant and without probable cause *because* she refused to let officers into her home unless they had a search warrant. The court also denied the deputies qualified immunity on Plaintiff's excessive force claim because it found that there was an issue of material fact based on Freeman's allegations that the deputies twisted her arms behind her back while handcuffing her, "jerked her all over the carport," and applied the handcuffs too tightly, causing bruises and marks on her wrists and arms.

***Holding*:** Although the district court recited an accurate legal standard for the probable cause determination, several passages from the district court's

opinion suggested that it improperly focused on the deputies' subjective motivations for detaining Freeman, citing *Devenpeck v. Alford*, 543 U.S. 146, 153-54 (2004) ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.") The Fifth Circuit then noted that the deputies were entitled to reversal only if the appellate court, applying the correct legal standard, determines that they are entitled to summary judgment. The court then concluded a reasonable officer would have known that he could not lawfully search Freeman's home, and Freeman was not, therefore, interfering with the exercise of any authority granted to the deputies by law. Further, the court noted that the deputies did not have probable cause to arrest Freeman for Interference with Public Duties or Hindering Arrest or Apprehension, as a reasonable officer would know that Freeman's conduct did not meet all elements of these offenses. The court affirmed the denial of summary judgment on the unlawful arrest claim.

However, noting that an excessive force claim is independent of whether law enforcement had the power to arrest, the court concluded that Plaintiff's allegations of injury did not violate the constitution and discussed that deputies did not use excessive force by leaving Freeman in the patrol car for 30 to 45 minutes and its prior holding that "minor, incidental injuries that occur in connection with the use of handcuffs to effectuate an arrest do not give rise to a constitutional claim for excessive force."

G. *Hampton v. Oktibbeha Co. Sheriff Dep't,* 480 F.3d 358 (5th Cir. 2007)

***Issue*:** Whether four county sheriff's department officers were entitled to qualified immunity where one of the four officers provided false information to secure an arrest warrant that led to Plaintiff's arrest and prosecution.

***Facts*:** Plaintiff Hampton was the director of Quad County Alternative School. Sheriff's Deputy Gitchell entered the school with an arrest warrant for a student. Hampton asked to see the warrant and said that he would retrieve the student if he was shown the warrant. Gitchell refused, became louder, and his speech became more aggressive. Hampton did nothing physically to prevent Gitchell from entering the building or searching for the student. In fact, a member of the school's staff held open the door that led to the classrooms. After a discussion on his police radio, Gitchell asked Hampton to go outside so that Hampton could see the warrant. Gitchell waved the warrant in Hampton's face, and while Hampton did not touch the warrant, he could see the student's name on it. Hampton indicated that this was sufficient, and he instructed the school's staff to retrieve the student from his class and turn him over to the deputy.

Prior to Gitchell departing with the student, Sheriff Department Supervisor Lindsey and Deputy Whitfield arrived at the school and told Hampton that the Sheriff's Department did not permit school personnel to see an arrest warrant for a youth. The three officers returned to the Sheriff Department and discussed the situation with Sheriff Bryan, who instructed them to fill out an affidavit, obtain a warrant, and place Hampton under arrest. Gitchell then swore out an affidavit that stated that Hampton unlawfully obstructed the arrest of the student by Hampton's refusal to turn the student over to the officers, which purportedly violated Mississippi law in that he did "obstruct or resist by force, or violence, or threats, or in any other manner, his lawful arrest or the lawful arrest of another person."

After procuring a warrant based on Gitchell's affidavit, Gitchell and Whitfield returned to the school and arrested Hampton. Hampton eventually prevailed on the criminal charges. The testimony of the officers showed that Hampton did nothing other than ask to view the warrant. Hampton did not use force, violence, or threats.

Hampton sued under section 1983 and claimed that the four officers deprived him of his constitutional right to liberty and due process when they conspired to submit false and incomplete information in order to secure a warrant for the arrest of plaintiff. Gitchell, Lindsey, Whitfield, and Bryan moved for summary judgment on the basis of qualified immunity. The district court denied summary judgment to Gitchell stating, "there is a factual issue as to whether [Gitchell] acted reasonably, and a factual issue exists that would defeat summary judgment." In addressing the role of the other officers in the activities forming the basis for the § 1983 action, the district court denied qualified immunity, stating that "[b]ecause of the parties[']differing versions, the Court is unable to ascertain the nature of [the other officers'] role[s]. In light of the Plaintiff's averments, the Court finds that there is a factual issue as to whether [these officers] acted reasonably, and a factual issue exists that would defeat summary judgment." The officers filed an interlocutory appeal.

***Holding*:** The court affirmed the denial of summary judgment as to Gitchell, accepting as true the Plaintiff's evidence that Gitchell recklessly provided false information in procuring the warrant. However, the court reversed and rendered judgment in favor of the three other officers. Relying on its previous holding in *Michalik v. Hermann*, 422 F.3d 252, 261 (5th Cir. 2005), the court noted that liability for procurement of a warrant is appropriate against (1) the affiant officer or (2) an officer who actually prepares the warrant application with knowledge that a warrant would be based solely on the document prepared. The evidence was clear that

Gitchell alone prepared the affidavit and presented it to the judge, and the court dismissed all claims against the other officers who did not participate in obtaining the warrant as described in Michalik.

H. *Martinez-Aguero v. Gonzalez,* 459 F.3d 618 (5th Cir. 2006)

***Issue*:** Whether aliens stopped at the border have a constitutional right to be free from false imprisonment and the use of excessive force by law enforcement personnel.

***Facts*:** Plaintiff Maria Martinez-Aguero is a citizen and resident of Mexico who visits the United States once a month to accompany her aunt to the El Paso Social Security office. Though she normally enters the country using a valid border-crossing card (a visitor visa), her card had become invalid when the former Immigration and Naturalization Service decided to issue biometric, machine-readable cards for increased security. On July 3, 2001, Martinez-Aguero went with her aunt and mother to the U.S. consular office to apply for new cards and asked how she could legally enter the United States while waiting for the cards to arrive in the mail. Officials told her she could get a stamp on her old cards that would allow her to travel in the interim. For the next three months she used the stamped card to cross the border without incident. On October 4, Martinez-Aguero and her aunt made their usual bus trip to El Paso. United States immigration officials stopped the bus within the zone outside the port of entry but within the territorial United States. According to Martinez-Aguero Gonzalez, an INS border patrol agent, ordered Martinez-Aguero and her aunt off the bus and requested to see their documents. He told Martinez-Aguero that her visa had expired, so she could not enter the country. Martinez-Aguero asked to speak to someone in authority, and Gonzalez replied in Spanish, "I am in charge!" Martinez-Aguero asked him why he would not help her, because he also was Mexican. This agitated Gonzalez, who pointed to patches on his uniform and shouted, "Look at me! I am not a Mexican! Look at my uniform!" He then yelled profanities at them in Spanish and threw their visas to the ground. Martinez-Aguero picked her visa up and made a sarcastic remark to her aunt about Gonzalez's bad language, which he apparently overheard. She and her aunt began walking back in the direction of Mexico when Gonzalez yelled, "Stop in the name of the law!" Martinez-Aguero alleged in her affidavit that Gonzalez grabbed her arms, twisted them behind her back, pushed her into a concrete barrier, which hit her in the stomach and then started kicking her with his knees in her lower back." Another agent then took Martinez-Aguero into an office and handcuffed her to a chair. Martinez-Aguero further alleged that Gonzalez came in and showed her scratches on his arms and told her that he was going to claim that she cut him with her fingernails. Shortly thereafter, Martinez-Aguero, who is epileptic, suffered a seizure while still handcuffed to the chair. She was given oxygen, and when she recovered she was questioned by officials before being permitted to leave. She suffered another seizure after arriving home and was taken to the hospital. She claimed she suffered from recurrent seizures (before the beating she had not suffered a seizure for 17 years), memory problems, back injuries, and continual pain. She contends she cannot walk long distances or adequately clean her house anymore.

Martinez-Aguero sued Gonzalez for false arrest and excessive use of force under the Fourth and Fifth Amendments in a *Bivens* action. Gonzalez moved for summary judgment, asserting qualified immunity. The district court denied the motion, and Gonzalez filed an interlocutory appeal.

***Holding*:** The court held that Plaintiff was entitled to Fourth and Fifth Amendment protection when stopped "at the border," but within the territorial United States. The Fourth and Fifth Amendments do not have extraterritorial application; in other words, they offer no protection to those outside the United States. In the immigration context, courts have applied an "entry fiction" that excludable aliens are treated as if detained at the border despite their actual physical presence in the United States. The court declined to extend the entry fiction to the Fourth and Fifth Amendments, noting that the federal government enjoys "broad discretion in the immigration context because the power to decide which and how many outsiders may join our society is critical to national self-determination." Thus, the court considered that the Fourth and Fifth Amendment guarantees applied to Martinez-Aguero because she was within the geographic boundary of the United States. The court also discussed the Supreme Court's 1990 decision in *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990), which limited the class of aliens entitled to Fourth Amendment protection to those aliens which are present in the United States and "who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community," and *Johnson v. Eisentrager,* 339 U.S. 763 (1950), which rejected the extraterritorial application of the Fifth Amendment. The court noted these opinions, but determined that Martinez-Aguero was entitled to constitutional protections even under the more exacting *Verdugo-Urquidez* standard. The Fifth Circuit considered *Verdugo-Urquidez* of questionable precedential value because only four justices joined the majority opinion, with Justice Kennedy concurring in the result.

I. *Mack v. City of Abilene,* 461 F.3d 547 (5th Cir. 2006)

***Issue*:** Whether Mack's Fourth Amendment rights were violated by a series of warrantless searches of his vehicles.

***Facts*:** City of Abilene police officers applied for and received an arrest warrant for Mack and a search warrant for his apartment based on information obtained from a confidential informant. The next day, Mack left his place of employment, a restaurant, and walked across a parking lot toward his parked Suburban. As he approached the vehicle, Mack remotely unlocked the doors and started the engine. Immediately thereafter, he was intercepted by two officers. Mack confirmed his identity, and one of the officers placed him under arrest. The officers searched Mack, found no weapons or contraband, handcuffed him, and placed him in a police vehicle. The officers then advised Mack that the officers had an arrest and search warrant for him and his apartment. The officers then searched the Suburban after placing him in a patrol car. A search of the vehicle revealed no weapons or contraband. The officers transported Mack to his apartment complex in a police vehicle, with one officer driving Mack's vehicle to the complex. The officers obtained a key and searched Mack's apartment. Again, no contraband was found. The officers searched Mack's Suburban a second time and found one marijuana seed. Then, the officers searched Mack's Cadillac, which was parked in the apartment complex lot, but found nothing illegal. Consequently, Mack was released and no charges were filed against him.

Mack filed suit under section 1983 alleging his arrest was illegal because there was no probable cause supporting the arrest warrant, and that the searches of his vehicles were illegal.

***Holding*:** The court held that the arrest warrant was valid and Mack's arrest was constitutional, that the searches of the Suburban were constitutional in light of the automobile exception to the warrant requirement, but that the search of the Cadillac was unconstitutional.

In determining the warrant was valid, the court noted that courts pay great deference to a magistrate's determination of probable cause. The Fourth Amendment requires that "the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing." The court discussed the facts relating to the informant and his observations and held that the magistrate had a substantial basis for finding probable cause. Specifically, the informant stated that he had seen Mack with marijuana at Mack's apartment within the previous 48 hours. The officer applying for the warrant established the veracity of the informant by stating the informant had provided him with correct information in the past. Further, the informant was described as being lawfully employed and having no felony convictions.

The court also concluded the searches of the Suburban were constitutional. Officers may conduct a warrantless search of a vehicle if the vehicle is readily capable of being used on the highways, is found stationary in a place not regularly used for residential purposes, and officers have probable cause to believe the vehicle contains contraband or evidence of a crime. The informant had told officers that Mack sometimes hid marijuana in his 1999 green Suburban and gave officers the license plate number. The court concluded this information was reliable and that officers had probable cause to search the Suburban at the time of arrest and at the apartment complex.

The court, however, found the search of the Cadillac unconstitutional. The informant had not provided any information that would establish probable cause that contraband or evidence of a crime would be found in the Cadillac, and so the automobile exception did not apply. Officers attempted to justify the search of the Cadillac as being parked on the curtilage of Mack's apartment and therefore subject to search under the search warrant for that apartment. The court noted, however, that the district court's findings did not support a conclusion that the parking lot was part of the curtilage of Mack's apartment.

J. Criminal Cases

1. *United States v. Gomez-Moreno*, 479 F.3d 350 (5th Cir. 2007)

The District Court denied a motion to suppress evidence obtained as a result of a warrantless search of a residence. The 5th Circuit found that the 'knock and talk' strategy used was unreasonable, and therefore, the officers created the exigent circumstances. As a result, the Court held that the search of the residence was unreasonable under the Fourth Amendment and the evidence should have been suppressed.

2. *United States v. Meridith*, 480 F.3d 366 (5th Cir. 2007)

The District Court denied a motion to suppress evidence obtained as a result of a visual inspection and subsequent pat down of a disabled person while he remained seated in the vehicle. The 5th Circuit found that the officer's actions were reasonable under the circumstances. Accordingly, the Court held that the evidence was properly admitted.

3. *United States v. Barrera*, 464 F.3d 496 (5th Cir. 2006)

The District Court denied a motion to suppress evidence obtained when officers entered the home of the defendant in an attempt to execute an arrest warrant for his brother. The 5th Circuit found that the officers used sufficient due diligence and reasonably believed the

defendant's brother lived at the residence and was inside when the warrant was executed. The Court held that the evidence was properly admitted.

4. *United States v. Jenson*, 462 F.3d 399 (5th Cir. 2006)

The District Court denied a motion to suppress evidence obtained during a traffic stop. The 5th Circuit found that the officers detained the driver for an unreasonable length of time with no justification. As a result, the Court held that the evidence should have been suppressed.

5. *United States v. Estrada*, 459 F.3d 627 (5th Cir. 2006)

The District Court denied a motion to suppress evidence discovered in a hidden compartment of a gas tank. The 5th Circuit found that the driver was not detained for an unreasonable length of time because there was reasonable suspicion to extend the detainment. The Court held that the evidence was properly admitted.

6. *United States v. Dilley*, 480 F.3d 747 (5th Cir. 2007)

The District Court denied a motion to suppress evidence obtained from a storage unit after receiving consent to search the unit from a person who also denied ownership of the unit. The 5th Circuit found that the consent to search was valid, free and voluntary. As a result, the Court held that the evidence was properly admitted.

7. *United States v. Hernandez*, 477 F.3d 210 (5th Cir. 2007)

The District Court denied a motion to suppress evidence obtained by Border Patrol Agents as a result of a tip regarding the smuggling of illegal aliens. The 5th Circuit found that reasonable suspicion supported the traffic stop because the event occurred close to the border and was on a known smuggling route. The Court held that the evidence was properly admitted.

8. *United States v. Flanders*, 468 F.3d 269 (5th Cir. 2006)

The District Court denied a motion to suppress evidence of child pornography discovered on a computer and storage drives during the execution of a search warrant obtained with a probable cause affidavit. The 5th Circuit found that the officers' reliance on the search warrant was objectionably reasonable and the good-faith exception to the exclusionary rule rendered the evidence admissible regardless of the validity of the search warrant. As a result, the Court held that the evidence was properly admitted.

9. *United States v. Pope*, 467 F.3d 912 (5th Cir. 2006)

The District Court denied a motion to suppress evidence obtained during a two-stage evidentiary search of a residence. The first stage involved a search warrant for evidence of a prescription-drug operation. Using information obtained during the first stage, the second search warrant was issued for evidence of a methamphetamine lab. The 5th Circuit found that the officer's affidavit was not "bare bones" and his reliance on the subsequent warrant was reasonable and in good faith. As a result, the Court held that the evidence was properly admitted.

10. *United States v. Freeman*, 482 F.3d 829 (5th Cir. 2007)

The District Court denied a motion to suppress evidence discovered in a backpack located in a train's shared sleeping car after one of the occupants consented to a search of the car. The 5th Circuit found that the officer could have reasonably construed the consent to search the car to include the closed but unlocked backpack. Also, it was reasonable for the officer to believe the backpack belonged to the occupant who consented to the search. Accordingly, the Court held that the evidence was properly admitted.

11. *United States v. Taylor*, 482 F.3d 315 (5th Cir. 2007)

The District Court denied a motion to suppress evidence obtained during a warrantless search of the defendant's girlfriend's residence. The 5th Circuit found that because the defendant was an overnight houseguest at the residence during the execution of the warrant, the officers' actions did not violate the Fourth Amendment. The Court held that the evidence was properly admitted.

12. *United States v. Jaime*, 473 F.3d 178 (5th Cir. 2006)

The District Court granted a motion to suppress evidence obtained in a search of a bus passenger's suitcase while the bus was stopped at a immigration checkpoint. The 5th Circuit found that the passenger's consent to the search was valid although the consent was given while she was being illegally detained. The Court held that the evidence should have been admitted.

13. *United States v. Maldonado*, 472 F.3d 388 (5th Cir. 2006)

The District Court denied a motion to suppress evidence discovered during a warrantless protective sweep of a trailer. The 5th Circuit found that exigent circumstances existed to justify the warrantless search and the exigent circumstances were not manufactured by law enforcement. The Court held that the evidence was properly admitted.

14. *United States v. Newman*, 472 F.3d 233 (5th Cir. 2006)

The District Court denied a motion to suppress evidence obtained after searching a residence. The 5th Circuit found that the information available to the officers when they entered the residence was enough to establish probable cause. Also, there were exigent circumstances justifying the warrantless entry because the officers had reason to fear for their safety and it would have been unreasonable for them to turn around and leave when they observed a person jump the fence and leave the yard. The Court held that the evidence was properly admitted.

15. *United States v. Bruno*, --- F.3d ---- (5th Cir. 2007), 2007 WL 1454359 (May 18, 2007)

The District Court granted a motion to suppress evidence obtained as a result of the execution of a narcotics search warrant at a residence. The 5th Circuit noted that the exclusionary rule is not applicable to Fourth Amendment knock-and-announce violations. The Court found that suppression is not available as a remedy for this case. Therefore, the Court held that the evidence should have been admitted.

16. *United States v. Martinez*, --- F.3d ---- (5th Cir. 2007)

The District Court denied a motion to suppress evidence obtained on an investigatory stop based on an informant's tip. The 5th Circuit found that the stop was not supported by reasonable suspicion and that the girlfriend's consent to search her residence was insufficient to dissipate the taint of the illegal stop. Therefore, the Court held that the evidence should have been suppressed.

17. *United States v. Perez*, --- F.3d ---- (5th Cir. 2007)

The District Court denied a motion to suppress evidence discovered during the search of an address which had more than one occupant. The 5th Circuit found that there was probable cause to believe that evidence of child pornography would be found in the residence and that the fact that there were two additional house mates at the residence did not eliminate probable cause. The Court held that the evidence was properly admitted.

18. *United States v. Brathwaite*, 458 F.3d 376 (5th Cir. 2006)

The District Court denied a motion to suppress evidence obtained through the use of a hidden camera in an invited confidential informant's purse. The 5th Circuit found that the videotaping of living quarters by a consenting informant was not a "search" within the meaning of the Fourth Amendment. However, the statements made by the defendant regarding the possession of guns in his house should have been suppressed because the use of the statements violated his *Miranda* rights.

19. *United States v. Fields*, 456 F.3d 519 (5th Cir. 2006)

The District Court denied a motion to suppress evidence obtained as a result of the search of a vehicle because of the automobile exception to warrant requirements. The 5th Circuit found that the fact that the vehicle crashed as the driver evaded police did not preclude application of the automobile exception. The Court held that the evidence was properly admitted.

20. *United States v. Fishel*, 467 F.3d 855 (5th Cir. 2006)

The District Court denied a motion to suppress evidence obtained during a traffic stop. The 5th Circuit found that it was proper during the traffic stop for the officer to examine the driver's license and vehicle registration, as well as, question the driver about his travel plans and itinerary. The Court held that the evidence was properly admitted.

21. *United States v. Stevens*, --- F.3d ---- (5th Cir. 2007)

The District Court denied a motion to suppress evidence obtained during the search of a residence after the officer's were given consent to search. The 5th Circuit found that the failure of officers to give *Miranda* warnings to the homeowner before asking for consent to search the residence did not prohibit the use of the statement granting consent. The Court held that the evidence was properly admitted.

III. STATE CREATED DANGER CASES

A. *Breen v. Texas A&M University*, 485 F.3d 325, (5th Cir. 2007) (April 24, 2007)

***Issue*:** Whether Defendant University officials were entitled to summary judgment on the basis of

qualified immunity from liability for Plaintiffs' claims under state created danger liability theory.

***Facts*:** Plaintiffs, including the estates of deceased victims, injured survivors, and relatives of affected students, filed suit against Texas A&M University and its officials for injuries and death arising from the 1999 bonfire construction disaster. In a previous opinion relating to this same case, the Fifth Circuit ruled that Plaintiffs had alleged facts sufficient to satisfy the elements of state-created danger, that (1) the defendants had created or increased the danger to the students, and (2) that the defendants acted with deliberate indifference. *See Scanlan v. Texas A&M*, 343 F.3d 533 (5th Cir. 2003). *Scanlan* did not expressly announce that it was adopting the state-created danger theory, but explicitly recited the elements of a state-created danger claim, applied them to the pleadings, and decided that the plaintiffs had stated a claim upon which relief could be granted.

***Holding*:** The *Breen* panel held that *Scanlan* recognized the state-created danger theory as a valid legal theory. As such, at least for purposes of further appeals in these consolidated cases, the state-created danger theory is a valid legal theory and is a claim upon which relief can be granted under the law of the case doctrine. This panel holding conflicts with at least three prior published panel decisions from the Fifth Circuit that discussed *Scanlan*. *See Longoria v. State of* Texas, 473 F.3d 586 (5th Cir. 2006) (Chief Judge Jones, writing for the court, stated "This circuit has never sustained a section 1983 claim predicated upon the state-created danger theory, and we decline to do so today. . . . Moreover, the district court's intimation that our decision in *Scanlan* provides a potential basis for . . . state-created danger claims is incorrect. Since *Scanlan*, we have explicitly rejected this theory of liability."); *Rios v. City of Del Rio*, 444 F.3d 417 (5th Cir. 2006); *Beltran v. City of El Paso*, 367 F.3d 299 (5th Cir. 2004); and *Rivera v. Houston Indep. Sch. Dist*., 349 F.3d 244 (5th Cir. 2003).

Although *Breen* recognized *Scanlan*'s approval of the state-created danger theory, the court affirmed the district court's grant of summary judgment to the defendant officials on the ground that the theory was not clearly established in 1999 when the bonfire tragedy occurred.

B. *Longoria v. State of Texas*, 473 F.3d 586 (5th Cir. 2006)

***Issue*:** Whether district court erred in using factual disputes as a blanket justification for denial of summary judgment to the defendants as a class, without considering defendant officers' individual roles in the disputed incidents.

***Facts*:** After midnight on May 27, 2000, Plaintiff Longoria, a prisoner at a TDCJ unit, was stabbed twenty-eight times by fellow inmates Peralez and White. Due to their suspected membership in the Texas Syndicate ("TS") prison gang, Longoria, Peralez, and White were housed near one another in a lockdown unit (or "pod") because of recent hostilities that had broken out between the TS and a rival gang. After inspecting the toilet and shower area for weapons, Officers Farr and Staggs strip-searched inmates Peralez and White and took them to the third-tier shower area. Shortly thereafter, Officer Rogers removed Longoria from his cell in order to escort him to a routine lockdown interview. Longoria claims he told Rogers that Peralez and White were in the showers and wanted to kill him. Rogers allegedly assured Longoria that if anything happened he would be protected. Officer Rogers then handcuffed him and removed him from the cell. As Longoria and Officer Rogers walked along the corridor, Peralez and White emerged from the showers armed with shanks and began running toward them. Longoria fled. Although unarmed, Rogers initially attempted to stand between Longoria and his attackers, but was pushed aside as they chased Longoria. Officers Farr and Staggs, who were inspecting Peralez's and White's cells for contraband, heard the commotion, were approached and threatened by White, and ran away to alert other guards and obtain weapons and tear gas. Peralez and White chased Longoria through the now-sealed pod, tackled him and began stabbing him in the chest and neck. Longoria finally broke free and fled to the first-floor common area where he collapsed and was met by arriving officers. He was seriously injured.

Longoria was likely targeted by the TS because he had become a jailhouse informant. On several occasions in the months preceding the attack, Longoria had provided gang-related information during meetings with investigators. Major Hudson instructed Officer Johnson to interview Longoria on two occasions, March 15 and March 22, 2000, concerning an attack on another gang member ordered by the TS. Longoria admitted that he had been a TS prospect since his arrival at the unit, but he no longer desired to be associated with the gang. Longoria did not express any fear for his safety or request a life endangerment investigation during these interviews, but did request to be removed from lockdown because he was no longer affiliated with the TS. Officer Johnson, however, had obtained information from the prison administration that Longoria had been a TS leader at another unit and had a history of manipulative and "slick" behavior. Based on Officer Johnson's reports, Major Hudson discounted much of Longoria's information and, because he was a TS member, kept him on lockdown status. A few weeks later, Longoria again contacted prison officials and offered information about the murder of a TS member. After briefing Officer Scott and Officer Stafford, Longoria again requested to be removed from lockdown, stating that he was not a TS member and felt that his life would be endangered if other inmates were to learn that he was meeting with

prison officials. Major Hudson was then informed of the meeting by Officer Scott but decided to take no action to rehouse Longoria. In the days following his meeting with Scott and Stafford, Longoria had made several additional written requests to be removed from lockdown. In neither of his letters dated April 2 and May 22 did Longoria express any concern for his safety. Longoria claims, however, that he sent at least two additional letters sometime in early May to Major Hudson and Officers Scott and Johnson in which he made life-endangerment claims and stated that TS members knew of his meeting with Officers Scott and Stafford and had ordered a revenge "hit" on him. Major Hudson attested that neither of these letters were found in Longoria's case file, nor could Hudson confirm that any prison officials received these letters. On May 26, 2000 — the day of the attack — Longoria approached Sergeant Vann in the pod's common area and informed her that the TS was planning to murder him. Longoria requested a life endangerment investigation, immediate removal from lockdown, and reassignment to protective housing. In response to Longoria's assertions, Vann telephoned STG Officer Johnson, who at the time of the call was processing a large group of newly arrived inmates. Johnson halted her intake interviews and told Vann that she would contact Officer Glass, a member of the Inmate Classification Committee, to make a determination concerning the validity of Longoria's life endangerment claim. Officer Johnson then consulted with Officer Glass, who recommended that since Longoria notified Sergeant Vann of his claims, it was ultimately Vann's responsibility to initiate a life endangerment investigation. Following Glass's instructions, Johnson told Vann to initiate an investigation if Vann determined that one was necessary. Johnson then passed the telephone to Officer Glass, who informed Vann to proceed with an investigation if Longoria had a legitimate claim. Glass further explained to Vann that, because neither Glass nor Johnson was authorized to reassign Longoria to a new cell, Vann needed to contact Major Gray. After unsuccessful attempts to locate Major Gray, Vann notified the ranking security officer on duty, Captain Langley, of Longoria's claim and explained that Longoria was a TS member currently relegated to lockdown status. Because of the minimal exposure to other inmates that Longoria would have on lockdown status, Langley determined that immediate housing reassignment was not necessary and that a life-endangerment investigation should be undertaken prior to any change in Longoria's assignment. Early the next morning, the attack occurred.

The district court denied summary judgment due to the existence of disputed material facts, including the authenticity of the May 22 letter, the amount of notice given by Longoria to the responsible prison officials, their responses to this notice, and the events on the morning of the attack. Because Farmer requires an evaluation of both subjective knowledge and objective reasonableness, the court held that use of these factual disputes as a blanket justification for denial of summary judgment to the defendants as a class, without further considering their individual roles in the disputed incidents was error. Regarding Farr, Staggs and Rogers, the court determined that their presence in the pod at the inception of the attack and their failure to intervene did not amount to deliberate indifference. Pursuant to Texas Department of Criminal Justice policy at the time of the incident, officers escorting lockdown-status inmates to and from their cells did not carry weapons. In the event of an armed attack between inmates, officers were instructed, first, to insure their own safety by leaving the pod and, second, to obtain armed reinforcements. The court declined to require unarmed prison guards to physically intervene in altercations between armed inmates or risk being found deliberately indifferent. No rule of constitutional law requires unarmed officials to endanger their own safety in order to protect a prison inmate threatened with physical violence. The officers violated no "clearly established" law by failing to intervene while unarmed. Finally, there was no evidence that Farr, Staggs, or Rogers were aware of Longoria's activities as an informant, that he had previously requested to be removed from lockdown, or that he had made a life-endangerment claim to Officer Vann on the evening before the attack. Officer Rogers thus did not act unreasonably when he escorted an unwilling Longoria from his cell while Longoria was warning that the inmates in the shower wanted to kill him. Because neither Farr, Staggs, nor Rogers had any knowledge of a substantial threat to Longoria's safety, as a matter of law they did not act with deliberate indifference. The court went on to consider the participation of each individual officer, determining that all officers were entitled to qualified immunity except Major Hudson and Officer Johnson.

IV. INMATE CASES

A. *Jones v. Bock*, 127 S.Ct. 910 (2007)

B. *Williams v. Overton*, (actions consolidated) ___ (2007)

C. *Walton v. Bouchard*, (actions consolidated) ___ (2007)

***Issue*:** Whether it is proper under the Prisoner Litigation Reform Act for some district to impose limits on prisoner complaints in federal court such as automatic dismissal of the prisoner's complaint if exhaustion of grievances is not alleged, permitting only those lawsuits that named defendants who were also named in grievances.

***Facts*:** *Jones* - In November 2000 a prisoner was injured in a vehicle accident while in the custody of the Michigan Department of Corrections ("MDOC"). Several months later the prisoner was given a work assignment that he was not able to perform because of his injuries. He was made to complete the assignment despite his protests an as a result aggravated his injuries.

Williams - A prisoner suffering from non-involuting cavernous hemangiomas in his right arm was incarcerated at MDOC. His condition caused pain, disfigurement and immobility. The MDOC doctor recommended surgery to relieve pain and MDOC denied the surgery stating that the risk was too high for what they considered a cosmetic procedure.

Walton - An African-American prisoner at MDOC assaulted a guard and was sanctioned with indefinite "upper slot" restriction. After several months, the prisoner learned that two white prisoners received only three months sanction for the same infraction.

***Procedural History*:** *Jones* - The prisoner unsuccessfully sought redress for his injuries through the MDOC grievance process. Consequently, he filed a lawsuit alleging deliberate indifference to medical needs, retaliation and harassment. A Magistrate recommended that the suit proceed with regard to two officers because the prisoner has exhausted his administrative remedies regarding those two officers and that the suit be dismissed for failure to state a claim regarding the other defendants.

The District Court found that the prisoner had failed to meet his burden of proof regarding the exhaustion of his administrative remedies because he did not provide copies of his grievances with his complaint. Although the defendants produced copies of the grievances with their motion to dismiss, the Court found that the prisoner's burden could not be met by the defendants. The Sixth Court of Appeals agreed. The Supreme Court granted certiorari.

Williams - The prisoner filed a grievance complaining about his quality of medical care and requesting the surgery. He filed an additional grievance sting that he was denied a single occupancy cell. Both grievances were denied and the prisoner filed a lawsuit. The District Court found that the prisoner had failed to exhaust his remedies regarding his medical care claim because he did not identify the defendant in his lawsuit in the grievances he filed earlier. The grievance regarding the single occupancy cell was adequately exhausted; however, because of the total exhaustion rule, the entire claim was dismissed. The Supreme Court granted certiorari.

Walton - The prisoner filed a grievance alleging racial discrimination. The grievance was denied and the prisoner filed a lawsuit claiming racial discrimination. The District Court dismissed the lawsuit because the prisoner failed to name all the defendants in his grievance pursuant to the total exhaustion rule. The Sixth Court of Appeals affirmed the dismissal. The Supreme Court granted certiorari.

***Holding*:** The Supreme Court was sensitive to the challenges District Court's face regarding managing their dockets. However, the Court states that adopting different and more onerous pleading rules for specific categories of cases should only be done through established rule-making procedure, not on a case-by-case basis. Therefore, the Court reversed the judgments of the Court of Appeals and remanded the cases.

D. *Ashcraft v. Wooten*, 2006 WL 227592 (5th Cir. 2006) (August 3, 2006)

***Facts*:** Prison inmate brought § 1983 action against warden, assistant, warden, and a prison officer arising out of an attack on him by a schizophrenic.

***Procedural Posture*:** The US District Court for the Southern District of Texas denied motion for summary judgment on based of qualified immunity. The warden, assistant warden, and officer filed an interlocutory appeal.

***Issue*:** Whether officer and warden had knowledge of schizophrenic who attacked an inmate?

***Rule*:** The denial of a motion for summary judgment based upon qualified immunity is a collateral order capable of immediate review.

***Holding*:** That a prison warden enjoyed qualified immunity from liability in inmate's § 1983 action arising out of attack of inmate by a schizophrenic, where there was no evidence that the warden had knowledge of any problem with attacker or danger to inmate.

***Reasoning*:** Whether a prison official had the requisite knowledge of a substantial risk is a question of fact.

The record displays no evidence to warrant the claim that the warden had knowledge of any problem with Benton or danger to Ashcraft.

As for the assistant warden and the officer, Katragada served on the Unit Classification Committee which received a medical health history form describing Benton. Also, there was a fact issue raised that Laird had knowledge of the schizophrenic attacker.

***Disposition*:** The appeal from the assistant warden and the officer are dismissed for lack of jurisdiction, but the court reverses the denial of summary judgment as to Wooten, the warden.

E. *Baranowski v. Hart*, ____ F.3d ____, 2007 WL 1306851 (5th Cir. 2007) (May 4, 2007)

***Facts*:** The inmate, Baranowski filed a complaint seeking declaratory and injunctive relief for violations of the 1st and 14th amendments. The inmate alleges, as a member of the Jewish faith, that the defendants denied Jewish prisoners access to Sabbath services while

depriving them of worship and fellowship and holy day services, meals and observances and discriminating against Jewish prisoners and favoring other faith groups.

***Procedural Posture*:** The defendants moved for summary judgment and the US District Court for the Southern District of Texas entered an order granting summary judgment in favor of the defendants. The summary judgment evidence showed that restrictions on the inmate's religious observances were justified by valid penological interests related to prison staffing, space limitations, and the financial burden of accommodating his requests. The inmate then appealed.

***Issue*:** Whether the defendants impeded the inmate's free exercise of religion under the 1st amendment?

Whether the defendants violated the inmate's equal protection rights?

Whether the inability to practice and observe Judaism is in violation of RLUIPA?

***Rule*:** Under *Turner*, a prison regulation that impinges on an inmate's constitutional rights is valid if it is reasonably related to legitimate penological interests. Four Factors: (1) whether a valid and rational connection exists between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact of the accommodation on prison guards, other inmates, and the allocation of prison resources generally; and (4) whether there are ready alternatives to the regulation in question.

To succeed on an equal protection claim one must prove purposeful discrimination resulting in a discriminatory effect among persons similarly situated. However, the 14th amendment does not demand that every religious sect or group within a prison have identical facilities or personnel; rather the officials must afford reasonable opportunities.

RLUIPA mandates that no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution…unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

***Holding*:** That the defendants did not impede the inmate's free exercise of religion under the 1st amendment.

That the defendants did not violate the inmate's equal protection rights.

That there is no substantial burden placed on the inmate to constitute a violation of RLUIPA.

***Reasoning*:** Pursuant to the *Turner* rule, the record demonstrates that the prison policies at issue here are logically connected to legitimate penological concerns of security, staff and space limitations, and that there are no obvious or easy alternatives.

The inmate failed to provide any evidence that showed that the prison officials afforded superior treatment to other religions.

The requirement of an outside volunteer did not place a substantial burden on the plaintiff's religious exercise. However, there may be a substantial burden upon the inmate practice of his faith by the prison not providing kosher food for every meal. Therefore the compelling interest test must be applied. In applying the compelling interest test, TDCJ's budget is not adequate to cover the increased expense of either providing a separate kosher kitchen or bringing in kosher food from the outside and that TDCJ's ability to provide a nutritionally appropriate meal to other offenders would be jeopardized.

F. *United States v. Caldwell,* 448 F.3d 587 (5th Cir. 2006)

***Facts*:** On June 14, 2000, Gobert was on work release from prison when his garbage truck collided with another car causing his right leg to be crushed. Gobert underwent surgery performed by Dr. Morris. On June 26, 2000, Gobert was admitted into the 24 hour unit at EHCC. Caldwell, Gobert's primary physician examined Gobert on three occasions during a span of 2 and a half months. Then on September 6, 2000 Gobert was released from prison. He then sought private medical treatment and was diagnosed with osteomyelitis.

***Procedural Posture*:** Gobert filed suit alleging that the appellant's, the physician's, failure to treat his injured and infected leg, which constituted in a violation of Gobert's 8th amendment rights. After denial of the motion to dismiss, the physician appellants moved for summary judgment and now appeal the denial of qualified immunity.

***Issue*:** Whether the district court erred in concluding as a matter of law that officials are not entitled to qualified immunity on that given set of facts?

Whether Caldwell purposefully neglected Gobert's medical needs, specifically whether the answer to this question turns on genuine disputed issues of fact?

***Rule*:** Under the collateral order doctrine, a district court's order denying qualified immunity, to the extent that it turns on an issue of law is immediately appealable, as it is distinct from the merits of the case. It is not appealable if it is based on a claim regarding the sufficiency of the evidence.

Qualified immunity provides government officials performing discretionary functions with a shield against civil damages liability, so long as their actions could reasonable have been thought consistent with the rights they are alleged to have violated.

To determine immunity ask (1) whether the plaintiff has demonstrated a violation of a clearly established federal constitutional or statutory right and (2) whether the official's actions violated that right to the extent that an objectively reasonable person would have known.

Finding a violation of the 8th amendment's prohibition of cruel and unusual punishment requires a 2 prong test: (1) Gobert must prove an objective exposure to a substantial risk of serious harm and (2) he must show that prison officials acted or failed to act with deliberate indifference to that risk.

A prison official acts with deliberate indifference only if (1) he knows that inmates face a substantial risk of serious bodily harm and (2) he disregards that risk by failing to take reasonable measures to abate it.

Unsuccessful medical treatment, acts of negligence or medical malpractice do not constitute deliberate indifference, nor does a prisoner's disagreement with his medical treatment. A showing of deliberate indifference requires the prisoner to submit evidence that prison officials refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in similar conduct that would clearly evince a wanton disregard for any serious medical needs.

***Holding*:** That the district court did err in concluding as a matter of law that officials are not entitled to qualified immunity on that given set of facts.

***Reasoning*:** Gobert's response to Caldwell's statement of undisputed facts accompanying the motion for summary judgment, failed to raise any conflicting facts, but rather recited legal questions.

The court must focus on Caldwell's subjective knowledge and expert testimony cannot create a question of fact as to what Caldwell actually knew. However, based on the medical examination records and Caldwell's deposition, Caldwell was aware of a substantial risk of serious harm to Gobert from the nature of the wound itself. This satisfies the requisite state of mind for the first prong of the deliberate indifference inquiry.

The record does not support a finding of deliberate indifference because although Caldwell didn't prescribe antibiotics for a one week time span, Caldwell explains that no prescriptions for antibiotics were prescribed by the EKL during that same time span, and he was thus relying on their judgment as specialists. Other than this time period, Caldwell continued to examine Gobert and prescribe antibiotics for him.

***Disposition*:** Reversed

G. *Longoria v. Hudson*, 473 F.3d 586 (5th Cir. 2006)

***Facts*:** Longoria was stabbed 28 times by fellow inmates Peralez and White. The three inmates were housed near each other in lockdown because of their suspected involvement in the "TS gang." Longoria was targeted because he had become an informant. He provided gang-related information during meetings with investigators and the internal affairs division.

Prior to the incident Longoria asked to be transferred from lockdown because he was an informant and he feared that his life would be endangered if other inmates were to learn that he was an informant. He even made several written requests to be moved. He also claims that he sent additional letters to officers Hudson, Scott, and Johnson in which he made life-endangerment claims. Hudson attested that these letters were never found in the case file or that any officers had received these letters. On the day of the attack, Longoria approached officer Vann and informed her that the TS were planning to murder him. He requested a life-endangerment investigation and immediate removal from lockdown. Vann phoned officer Johnson who had to contact officer Glass. Officer Glass determined that it was officer Vann's duty so officer Johnson informed Vann of her responsibilities. Vann needed to contact Major Gray but Gray was unable to be reached so Vann contacted Captain Langley who determined that immediate reassignment was not necessary. The next morning the attack occurred.

***Procedural Posture*:** Longoria brought suit against the state and the officers (Hudson, Farr, Glass, Johnson, Peacock, Rogers, Stafford, and Staggs; Peacock was dropped as a defendant because peacock was not on duty at the time of the assault) of failure to protect and state-created danger. The district court denied the defendants' motion for summary judgment based on qualified immunity. The defendants, the officers, appeal.

***Issue*:** Whether, in viewing the facts most favorable to Longoria, each defendant was entitled to qualified immunity?

***Rule*:** Government officials performing discretionary functions are entitled to qualified immunity from civil liability to the extent that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

It is well established that prison officials have a constitutional duty to protect prisoners from violence at the hands of their fellow inmates; and under *Farmer v. Brennan*, an inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm and that prison officials were deliberately indifferent to an inmate's safety.

The official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and must in fact also have drawn the inference. No liability exists if an officer reasonably responded to a known substantial risk, even if the harm was ultimately not averted.

***Holding*:** That in viewing the facts most favorable to Longoria, each defendant was entitled to qualified immunity.

***Reasoning*:** Longoria offered no evidence to suggest that the officers conspired in any way with the TS gang members in planning the stabbing.

No rule of constitutional law requires unarmed officials to endanger their own safety in order to protect a prison inmate threatened with physical violence. The officials, who are unarmed are instructed to first insure their own safety, and then to leave the pod/area and obtain armed reinforcements.

Also, there is no evidence that Farr, Staggs, or Rogers were aware of the activities of Longoria being an informant, that Longoria had previously requested to be removed from lockdown, or that he made a life endangerment claim to officer Vann.

Longoria offers no evidence that Officer Glass had any knowledge of his communications with prison officials or his asserted fears of attack. Glass was not authorized to order an immediate housing reassignment for Longoria and informed Vann that if appropriate, Vann should contact the right person.

The mere fact that Stafford knew Longoria was operating as an informant is insufficient to prove that Stafford had knowledge of a substantial risk to Longoria's safety by the TS.

With respect to Hudson and Johnson, both were aware of Longoria's activities as an informant from the inception of the period pertinent to the lawsuit. However, Johnson claims that Longoria did not request a life-endangerment transfer at any meetings the two had together and neither Hudson nor Johnson could confirm that they received letters in which Longoria requested a life-endangerment transfer. These matters are a question of fact which this court lacks jurisdiction. If these two officers had received warnings then they might have been aware of facts from which inferences suggesting deliberate indifference could be drawn. Consequently, the court has no jurisdiction to address this issue on interlocutory appeal.

***Disposition*:** The court reverses the district court's denial of summary judgment on qualified immunity grounds with respect to officers Farr, Glass, Peacock, Rogers, Stafford and Staggs, and dismisses the appeal with respect to Major Hudson and Officer Johnson for lack of jurisdiction.

***Disposition*:** Affirmed.

V. TITLE VII CASES

A. Employment

1. *Ledbetter v. Goodyear Tire & Rubber Co, Inc.*, 127 S.Ct. 2162, 2007 WL 1528298 (May 29, 2007) (Title VII/EPA/Sex Discrimination)

Ledbetter, a female retiree, sued her former employer, Goodyear Tire & Rubber Co., alleging performance evaluations (which she claims were the result of sex discrimination) that she had received earlier in her employment resulted in significantly lower pay than her male colleagues by the time of her retirement. Goodyear had, at least during part of her employment, a facially neutral merit-base raise system. She asserted claims under both Title VII and the Equal Pay Act.

Ledbetter did not assert that the Goodyear's decision-makers acted with actual discriminatory intent either when they issued her checks during the EEOC charging period or when they denied her a raise in 1998. Rather, she argued that the paychecks were unlawful/discriminatory because they would have been larger if she has been evaluated in a nondiscriminatory manner prior to the EEOC charging period. In essence she suggested that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period

The Court, in a 5-4 decision with Justice Alito writing for the majority, held that discrete discriminatory acts triggering time line for filing the EEOC charge could only be discriminatory pay decisions there by rejecting Ledbetter's "paycheck accrual rule". Justice Ginsburg filed a dissenting opinion joined by Justices Stevens, Souter and Breyer.

Because the later effects of past discrimination do not reset the clock for filing an EEOC charge, Ledbetter's claim was untimely. In addressing the issue of an EEOC charge's timeliness, the Court has stressed the need to identify with care the specific employment practice at issue. Ledbetter's argument – that the paychecks that she received during the charging period and the 1998 raise denial each violated Title VII and triggered a new EEOC charging period – fails because they would required the Court in effect to jettison the defining element of the disparate-treatment claim on which her Title VII recovery was based. A new violation does not occur, and a new charging period does not commence, upon the occurrence of the subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.

This case has been interpreted as setting a six-month statute of limitations. News reports have indicated that Congressional Democrats have vowed to remove what they call an unacceptable obstacle to employee pay discrimination claims caused by a Supreme Court decision which subjected claims to a six-month statute of limitations. Senators Edward Kennedy (D-Mass.), Tom Harkin (D-Iowa), Hillary Rodham Clinton (D-N.Y.) and Barbara Mikulski (D-Md.) said they will introduce legislation next week to clarify federal law to state that the statute of limitations under Title VII.

2. *Turner v. Baylor Richardson Medical Center*,476 F.3d 337 (5th Cir. 2007) (January 19, 2007) (Race Discrimination)

Turner, an African-American female sued Richardson Medical Center Foundation and Richardson Hospital Authority for race discrimination, hostile work environment and retaliation. She was hired as a secretary for RHA but some of her work benefitted RMCF. The plaintiff alleged among other things that the employer had retaliated against her after she asked her supervisor to stop referring to inner-city youth as "ghetto children." Utilized the four-part *Trevino* test to evaluate Title VII employer status, the Court ruled that plaintiff had failed to establish that RMCF and RHA were an integrated-enterprise for purposes of finding that the Foundation was also her employer.

The Fifth Circuit affirmed summary judgment in favor of the employer, because the plaintiff could not reasonably have believed that this comment, standing alone, constituted an unlawful employment practice in violation of Title VII. The Fifth Circuit also affirmed summary judgment against the plaintiff's race discrimination claim based on termination. The plaintiff argued that the reasons for her termination were pretextual, but her only evidence of pretext was the employer's failure to follow its prescribed procedures for disciplinary termination. The Fifth Circuit, in affirming the summary judgment, ruled that a defendant's failure to follow its own procedural rules is not evidence of pretext unless the defendant has treated similarly situated employees differently.

B. Single File Rule

1. *Price v. Choctaw Glove & Safety Co.*, 459 F.3d 595 (5th Cir. 2006) (August 3, 2006) (Exhaustion of Remedies and Single File Rule Regarding EEOC Charges)

Plaintiff Price filed a sex discrimination claim action complaint after she exhausted her administrative remedies. About sixteen months later, thirty-five other employees filed a separate sex discrimination lawsuit against the defendant based on the same facts as alleged in the Price class action. However, none of these Plaintiffs filed a Charge of Discrimination with the EEOC. After the actions were consolidated with a class action based on the same facts, the district court granted the employer's motion for summary judgment. The employees appealed.

The Fifth Circuit realized the EEOC exhaustion requirement when an individual who has not filed an EEOC charge "piggybacks" his or her action on the claim of a party who has exhausted his or her administrative remedies. However this "single filing rule" only applied with plaintiffs who wished to opt-in, join or intervene in a lawsuit filed by a similarly-situated plaint. However, this "single filing rule" does not apply to a plaintiff who filed their own separate suit. "A non-charging party cannot bring [his] or her own independent lawsuit based upon another party's charge." The Fifth Circuit held that this rule applied even if the two lawsuits are later consolidated. The Fifth Circuit ruled that employees who have failed to exhaust their administrative remedies with the EEOC before bringing a Title VII sex discrimination claim against their employer can not use the "single filing rule" to the "piggyback" on an EEOC charge filed by a plaintiff in a class action with which their case was later consolidated.

C. Retaliation

1. *Burlington Northern & Santa Fe Ry. Co v. White*, 126 S. Ct. 2405, 2006 WL 1698953 (June 22, 2006) (Title VII Retaliation)

White, the only woman in her department, operated a forklift at the Tennessee yard of Burlington Northern. After she complained, her immediate supervisor was disciplined for sexual harassment, but she was removed from forklift duty to standard track labor tasks. She filed an EEOC charge alleging gender discrimination and retaliation. She was later suspended without pay for insubordination. Burlington later found she had not been insubordinate, reinstated her, and awarded her backpay for the 37 days she was suspended. The suspension led to another EEOC retaliation charge. She filed a Title VII retaliation complaint, and the jury awarded her compensatory damages.

The Court held that the anti-retaliation provision of Title VII does not confine the action and harms it forbids to those that are related to employment or occur at the workplace. The terms "hire, "discharge," "compensation," " terms, conditions, or privileges of employment," "employment opportunities" and "status as an employee" explicity limit the substantive provision's scope to action that affect employment or alter workplace conditions. The anti-retaliation provision of Title VII, however, has no such limiting words. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their status, while the anti-retaliation provision seeks to prevent an employer from interfering with an employee's efforts to secure our advance enforcement of the Act's basic provisions. In order to secure the objective of the anti-retaliation provision it must be read as not limiting action to those affecting employment terms and conditions. The anti-retaliation provision covers only those employer's action that would have been materially adverse to a reasonable employee or applicant. The Court agreed with at least two Circuit Courts that the proper formulation requires a retaliation plaintiff to show that the challenge action "well might have dissuaded a reasonable worker for making or supporting a charge of

discrimination." The Court referred to "material" adversity to separate significant from trivial harms. Furthermore. the Court refers to a "reasonable" employee's reaction because the provision's standards for judging harm must be objective, and thus judicially administrable. The standard is phrased in general terms because the significance of any given act of retaliation may depend upon the particular circumstances.

The Court ruled that the determination of whether the reassignment of duties and whether the 37-day suspension constituted materially adverse action were both jury questions. Applying the above-standards to White's retaliation claim, the Court found there was sufficient evidentiary basis to support the jury's verdict on White's retaliation claim.

2. *Muhammad v. Dallas County Corn. Sup. & Corrections Dept.*, 479 F.3d 377, 2007 WL 466246 (5th Cir. 2007) (February 14, 2007) (Race Discrimination/Retaliation)

Muhammad was a probation officer in the Dallas County Community Supervision and Corrections Department (CSCD). He named the CSDC as his employer in his Title VII complaint alleging race discrimination and retaliation in violation of Title VII. CSCD argued it was not his Title VII employer and that the Plaintiff's Title VII employers were the state court judges of the county. In this regard, the CSCD seemed to be supported by federal and state court precedent. In *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), the Fifth Circuit held that probation officers were not employees of the county because they were under the control of the county's district court judges. In *Hardin County Community Supervision and Corrections Dept. v. Sullivan*, 106 S.W.3d 186 (Tex. App.—Austin 2003), Austin Court of Appeals reached the same conclusion.

However, Fifth Circuit held that the earlier courts' determinations that probation officers were not county employees were not rendered as a matter of law. The standards for determining employer-employee status "is necessarily a fact-specific inquiry." Moreover, state court decisions about the employment status of probation officers for purposes of Chapter 21 cases are not binding on federal courts for purposes of determining employment status under Title VII.

The Court reiterated to determine whether an employment relationship exists within the meaning of Title VII a Court utilizes the hybrid economic realities/common law control test (set out in *Deal v. State Farm*) with the most important factor of which right to control the employee's conduct. The Fifth Circuit remanded the case for further proceedings on the issue of the plaintiff's employment status.

D. Reverse Discrimination Cases

1. *Bourdis v. City of New Orleans, et. al.*, 485 F.3d 294, (5th Cir. 2007) (April 20, 2007) (Reverse discrimination and calculation of damages)

The City administers a written test to applicants seeking to become firefighters for the New Orleans Fire Department. The plaintiffs all took this aptitude test in 1991 and their scores were recorded on the 1991 Register. If an applicant received a passing score on the test, he was then required to pass further screening (agility test, drug screening, medical background check, etc.) before being placed on a list of recruits eligible for hire. The City hired seven classes of recruits from the 1991 Register and accompanying eligibility lists over the next few years. Class One was hired March 22, 1992. None of the plaintiffs in this suit were hired in Class One. Each plaintiff was hired at some point between September 8, 1992 (Class Two) and August 21, 1995 (Class Seven).

While NOFD previously hired applicants from the eligibility lists top down from the highest score on the test, the 1991 applicants were subjected to a policy whereby NOFD would hire one African American for every Caucasian. This resulted in African Americans getting hired before Caucasians who had higher test scores.

The City's liability for hiring policy was established through two separate lawsuits instituted in 1996 concerning the same discriminatory practice. In those cases, unlike the plaintiffs here, none of the applicants were hired into any of the seven classes of recruits from the 1991 Register. On May 13, 1998, the former Fire Superintendent testified in the earlier lawsuits that 1991 applicants were hired using a racial quota system. On March 5, 1999, the plaintiffs in the earlier lawsuit won their motion for summary judgment establishing that the hiring policy violated their Fourteenth Amendment right to Equal Protection.

Two months later, on May 10, 1999, plaintiffs brought this reverse discrimination suit to recover back pay and lost benefits attributable to their hiring delays. The district court, after trial, found that the hiring policy did cause delay in most of the plaintiffs' eventual hires and awarded those members back pay, but denied damages for lost pension benefits. The district court entered judgment in favor of some, but not all, of the recruits and refused to award damages for lost pension benefits. Both plaintiffs and defendants appealed.

The Fifth Circuit affirmed the district court's judgment. In doing so, the Court ruled that the district court's finding that the extremely limited knowledge possessed by the plaintiffs of the earlier civil rights action was insufficient to alert them to their own claims, and that the prescriptive period did not begin to run until a date less that one year before they filed their lawsuit (so that their lawsuit was timely under the Louisiana law

doctrine of *contra non valentem*) did not rise to the level of clear error. The plaintiffs against whom judgment was entered failed to show that they suffered any "adverse employment action" as a result of the municipality's racially discriminatory policy. Lastly, the Court held that the district court's decision not to award monetary damages for delay in plaintiffs' accumulation and receipt of pension benefits was not abuse of discretion.

E. Sexual Harassment Cases

1. *EEOC v. Jefferson Dental Clinics*, 478 F.3d 690 (5th Cir. 2007) (February 12, 2007) (Sexual Harassment/Res Judicata)

Four female employees filed EEOC and Chapter 21 administrative charges against their employer, alleging sexual harassment, but they also filed a state court tort lawsuit in which they litigated only common law tort claims and no statutory claims. The EEOC brought an action file in federal court seeking monetary and injunctive relief. Despite a plea in abatement in the state proceeding, the Court set the case for trial. The case was set for mediation which reached an impasse. The EEOC lawyers attended both the mediation and state court trial, and communicated with the lawyers for the charging parties.

The employer prevailed in the state court lawsuit, and then the charging parties moved to intervene in the EEOC's federal case. The employer moved to dismiss on grounds of res judicata, but the district court denied the motion. In this interlocutory appeal, the Fifth Circuit held that the EEOC serves a public interest independent of the charging parties' interest when the EEOC seeks injunctive and equitable relief. On the other hand, when the EEOC seeks damages or other make-whole relief on behalf of the individual claimants, the EEOC's interests are not sufficiently independent to avoid the bar created by the individual claimants' earlier litigation. The Fifth Circuit reversed in part and remanded in part.

VI. SECTION 1981 RACE DISCRIMINATION CASES

A. *Jenkins v. Methodist Hospitals of Dallas, Inc.*, 478 F.3d 255 (5th Cir. 2007) (January 31, 2007) (Section 1981 race discrimination)

Dr. Jenkins is a cardiologist who joined the NTCA. He then applied for medical-staff privileges at the hospital shortly after. The chief of medicine, Dr. Barnett, initially opposed the application, but his colleagues did not. He therefore gave the application his support and Jenkins was granted staff privileges. Employees in the cath-lab department where Jenkins was working began to complain of a hostile work environment. A committee comprised of the chief, the cardiology administrator, and Dr. Edmonson, the director of cardiology, found that the work environment complained about was hostile and potentially injurious to the patient care. The committee recommended termination of Jenkins' medical-staff membership and privileges and the Board suspended his privileges pending further review. After further review the Board recommended that Jenkins retain his staff privileges under certain conditions. Jenkins then requested a further review by a fair-hearing committee of the medical staff. This committee disagreed with the suspension of privileges. Therefore, the suspension lasted only 7 months.

Jenkins filed an action presenting numerous federal and state-law claims against the hospital. Only one claim is on appeal: that for racial discrimination impairing his ability to make or enforce contracts under Section 1981. The district court granted summary judgment for the hospital because the court held that there was no contract in the record to form the basis of the claim. Jenkins' attorney was also sanctioned with a public reprimand *sua sponte* by the Court for a misstatement in quoting a comment in an affidavit. Plaintiffs appealed both the ruling and the sanction.

The issues on appeal was whether Dr. Jenkins failed to establish intentional discrimination on the basis of race interfered with his ability to make or enforce contracts. Section 1981 utilizes the same burden-shifting as Title VII jurisprudence. Throughout the burden-shifting, Jenkins had the ultimate burden of showing a genuine issue of material fact on whether the hospital intentionally discriminated against him on the basis of race. In order for comments in the workplace to provide sufficient evidence of discrimination, they must be: (1) related to the protected class of persons of which the plaintiff is a member; (2) proximate in time to the complained of adverse employment decision; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue. The Firth Circuit held that Dr. Jenkins failed to establish intentional discrimination on the basis of race interfered with his ability to make or enforce contracts.

In reaching its ruling, the Fifth Circuit reasoned that Dr. Barnett's remarks reflect mistrust in the plaintiff and his professional capabilities but none show the requisite racial animus towards Jenkins. Also, the other alleged remarks were either not made in reference to blacks and/or occurred many years prior to Jenkins' suspension. One witness made a singular remark off hospital grounds, but this remark is insufficient to show that the committee's actions were motivated by this one comment. Jenkins provided no evidence that the witness to the committee either yielded power over the members or provided inaccurate information the committee relied upon without conducting an independent investigation.

Sanctions were also imposed against Jenkins' attorney because even though his client's affidavit states that "he [Dr. Barrett] would not let me [Dr. Jenkins treat his dog." the Plaintiff's attorney response brief inserted the racially charged word, "boy" in reference to his client's affidavit statement. This factual misrepresentation, although isolated, could have changed the outcome of the case. In upholding the sanction – at least partially because the Plaintiff's attorney failed to correct it for nearly two months after it was brought to his attention – the Fifth Circuit reiterated that "a lawyer is required to stop-and-think before . . . making legal or factual contentions." The court concluded that this conduct was unacceptable because it changed a sentence that had nothing to do with race to one that did. The judgment and sanctions were affirmed.

VII. FMLA CASES

A. *Lubke v. City of Arlington*, 455 F.3d 489 (5th Cir. 2006) (June 30, 2006) (FMLA)

Lubke was a Battalion Chief in the City of Arlington's Fire Department in charge of eight fire stations and forty to fifty employees. The City had a Y2K plan in place which requested critical departments, including the Fire Department, to have full staffing during the New Years weekend. Lubke was scheduled to work but because of his wife's severe bronchitis he did not report to work and did not follow the revised guidelines. Ultimately Lubke was discharged for dereliction of duty, unauthorized absence, and insubordination. He later submitted documentation from his wife's doctor regarding why it was necessary for him to stay with her. He appealed his discharge, which was upheld, primarily because the documentation was untimely provided.

The trial court (Judge Terry Means) entered judgment on the jury verdict in the firefighter's favor and the City of Arlington appealed. The Fifth Circuit affirmed liability but reversed and remanded the damage award for further proceedings.

Since both the FMLA and the Age Discrimination in Employment Act ("ADEA") track the remedial provisions of the FLSA, the Fifth Circuit ruled that the calculation of damages and remedies under both statutes should be consistent. Relying on ADEA caselaw and jurisprudence, the Court Circuit held that the proper measure of damages for lost insurance benefits in FMLA cases is either the actual replacement cost for the insurance, or the expenses the plaintiff actually incurred that would have been covered under the employer's insurance plan. The Court also held that a back-pay award should be offset by the employer's portion of an employee's retirement plan paid out at the time of termination.

B. *Modica v. Taylor*, 465 F.3d 174 (5th Cir. 2006) (September 13, 2006) (FMLA/Qualified Immunity)

Modica was an inspector for the Texas Cosmetology Commission ("TCC"). In 2000, she wrote a letter to the chairman of TCC expressing concerns about the demotion of her supervisor. She also attended a TCC meeting during which she addressed the TCC regarding her supervisor's demotion, her discovery of a file containing pornography on an employee's government-issued computer, and her concerns that the Executive Director had instructed inspectors to report their numbers wrong. She claims she was retaliated against in her merit raises and not being promoted. In November, 2000 she filed a charge of gender discrimination with the EEOC. In December, 2000 she was involved in an on-duty incident with the owner of a beauty school she was inspecting which ultimately resulted in a conviction against her for simple assault. In September, 2001, she was again denied a merit raise. In May, 2002 she sent a letter to a state representative accusing TCC and its Director of various "offenses" or offensive conduct. In June, 2002, she applied for the Executive Director position when it became available after the Director's death. While considered, she did not get the directorship. The new Director met with the state representative regarding Modica's complaints. Modica contends that after the meeting the Director began micro-managing her schedule. In November, 2002 she filed a First Amendment retaliation case.

In April, 2003, Modica injured her knee in a work-related incident and filed a claim for worker's compensation. In July Modica sent an email inquiring as the FMLA leave, and forms for short and long-term disability. She claims never to have received any of the forms. On August 1, 2003 she notified TCC that she was still on medical leave. The Director indicated that the position in San Antonio needed to be filled immediately, but she offered Modica a position in El Paso which was to be held open until August, the expiration of Modica's medical leave. Modica accepted but warned she was not sure when she would be able to return to work. Modica subsequently extended her leave until November 12, 2003 and failed to report to work on September 2 as expected. On September 15th, the TCC terminated Modica's employment. Modica amended her pleading to allege wrongful termination in retaliation of Title VII and the First Amendment, as well as for taking FMLA leave. While the lower court dismissed TCC and individual commissioners for various reasons, and also dismissed Modica's Title VII claims as untimely. It nevertheless concluded that there were genuine issues of material fact regarding the Director discharged her for requesting FMLA leave or writing the letter to the state representative. The district court also ruled that the

Director was not entitled to qualified immunity on of the claims. The Director filed an interlocutory appeal on qualified immunity grounds.

The Fifth Circuit affirmed the denial of summary judgment with regard to the First Amendment case, however, reversed with regard to the FMLA claim. In a matter of first impression, the Fifth Circuit ruled that an employee within a public agency could be held individually liable under the FMLA. However, the Executive Director, sued in her individual capacity was entitled to qualified immunity in the FMLA claim because although the FMLA was clearly established and applicable to the agency employer, it was not clearly established at the time of discharge that a supervisory employee was subject to individual liability under the FMLA (as evidenced by the split in district court and court of appeals decisions).

VIII. IDEA CASES

A. *Winkelman v. Parma City School District*, 127 S.Ct. 1994, 2007 WL 1461151 (May 21, 2007) (IDEA/IEP and parental rights)

The School District received federal funds under the Individual with Disabilities Education Act (IDEA) so it must provide qualified students, such as the Winkelmans' son, a "free appropriate public education" in accordance with an individualized education program (IEP) that the parents, school officials and others develop as members of the student's IEP team. Regarding their son's IEP as deficient, the Winkelman's unsuccessfully appealed through the IDEA's administrative review process. Proceeding without counsel, they then filed a federal court complaint on their own behalf and on their son's behalf. The District Court granted the District's judgment on the pleadings. The Sixth Circuit entered an order dismissing the Winkelman's subsequent appeal unless they obtained an attorney. The Court based its order on Circuit precedent holding that because the right to a free appropriate public education belongs only to the child, and the IDEA does not abrogate the common-law rule prohibiting non-lawyers from representing minor children, the IDEA does not allow non-lawyer parents to proceed pro se in federal court.

The Supreme Court held that the IDEA grants parents independent, enforceable rights, which are not limited to procedural and reimbursement-related matters, but rather encompass the entitlement to a free appropriate public education for their child. The Court also held that the Sixth Circuit erred in dismissing the Winkelmans' appeal for lack of counsel. Because parents enjoy rights under the IDEA, they are entitled to prosecute IDEA claims on their own behalf. The Court reversed and remanded.

IX. COMMERCE CLAUSE CASES

A. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority* ,127 S. Ct. 1786 (April 30, 2007) (Commerce Clause)

Solids waste management companies and an association representing their interests brought a § 1983 action against counties in New York and their solid waste a management authority, alleging that the counties' flow ordinance regulating the collection, processing, transfer, and disposal of all solid waste within the counties violated the Commerce Clause. The district court granted the defendants' motion for summary judgment and the Court of Appeals affirmed. The Supreme Court also affirmed.

In affirming the lower courts' rulings, the Supreme Court held that county flow control ordinances that favored state-created public benefit corporation (by requiring businesses hauling waste in counties to bring the waste to facilities owned and operated by the public benefit corporation) but that treated every private business, whether in-state or out-of-state, in exactly the same way, did not discriminate against interstate commerce in violation of the "dormant" aspect of the Commerce Clause. The Supreme Court further ruled that any incidental burden on interstate commerce that resulted from the application of county flow control ordinances was not clearly excessive in relation to public benefits provided in the form of increased recycling.

X. SECTION 1983 RELIGIOUS DISCRIMINATION CASES

A. *Barrow v. Greenville Independent School District*, 480 F.3d 377, (5th Cir. 2007) (February 26, 2007) (Section 1983 / Religious Discrimination/ Public School Patronage Rules)

Barrow, a public school teacher, applied for promotion to assistant principal. The district superintendent denied the promotion after Barrow refused to move her children from a private religious school to the public school system. Barrow sued the superintendent and the District under Title VII for religious discrimination and Section 1983 for alleged violation of her First Amendment rights. The district court dismissed the Title VII claim, and a jury rendered a verdict in favor of the district but against the superintendent on the First Amendment claim. Barrow appealed, and the Fifth Circuit affirmed.

First, with regard to the First Amendment claim against the School District, the Fifth Circuit held that the Board of Trustees, and not the superintendent, had policy-making authority for hiring the principal. The superintendent's actions could not be imputed to the

district, because under Texas law "school boards make policy and superintendents administer." Second, with respect to the religious discrimination claim under Title VII, the court found no evidence that the superintendent's "patronage" requirement was applied differently against religious private schools as compared with secular private schools as required to support the teacher's claim that the District's alleged patronage policy had a disparate impact in violation of Title VII.

XI. ADA CASES

A. *Black v. North Panola School District,* 461 F.3d 584 (5th Cir. 2006) (August 18, 2006) (Res Judicata/ADA/Section 1983/Title VII)

Black, the mother of a mentally disabled girl, claimed that her daughter was sexually assaulted at school. She filed a state law Petition alleging negligence claims under the Mississippi Tort Claims act. After a bench trial, Black was awarded $20,197.03 for past and future medical bills and therapy. The state court dismissed the individuals because they could not be individually liable under the state statute. The Mississippi Court of Appeals affirmed. While her state court appeal was pending, Black filed suite about NPSD and the individuals in federal court on nearly identical claims. In the federal claim, Black asserted recovery based on Section 1983, Title I of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and Title VII (42 U.S.C. 2000d). NPSD moved to dismiss Black's claims on the grounds that the federal action was barred by res judicata. The District Court dismissed her claim on res judicata grounds.

The Fifth Circuit affirmed the dismissal and held that the criteria for the application of res judicata were satisfied. In reaching its decision the Court held that the Eleventh Amendment would not have barred assertion of the Section 1983 claims and Title VII claims in the previous state-court action, so long as the school district was not an arm of the state. It further determined that the school district was not an arm of the state for Eleventh Amendment purposes.

B. *EEOC v. E.I. DuPont de Nemours & Co.,* 480 F.3d 724 (March 1, 2007) (5th Cir. 2007) (Americans with Disabilities Act / "Regarded As" Disabled /Punitive Damages)

Barrios began working in 1981 as a lab operator in DuPont's LaPlace Louisiana chemical plant. In 1986 she was diagnosed with a number of various medical conditions that impaired her ability to walk. She was later transferred to a lab clerk job, a sedentary job that involved copying and filing. DuPont physicians concluded that she should be medically restricted from walking anywhere in the plant. DuPont believe this restriction left her unable to evacuate in case of emergency and placed her on disability leave and then total and permanent disability afterward.

The Fifth Circuit affirmed a jury verdict for the plaintiff. First, the fact that the employer "regarded" the plaintiff as disabled was sufficiently evidenced by the company's decision, based on the recommendation of its own doctors, that the plaintiff should not be permitted to walk anywhere in the plant because of her medical condition. In other words, the company regarded the plaintiff as so limited in her ability to work that she was disqualified from working not only in a particular job or narrow range of jobs, but in any job in the plant. Second, the court upheld an award of punitive damages of $1,000,000.

The Fifth Circuit joined other circuits in concluding that "equitable" relief, in the form of back pay or front pay, is a sufficient basis for an award of punitive damages even in the absence of "compensatory" damages. The court also found the evidence sufficient to prove malice or reckless indifference by the company. Among other things, the company placed the plaintiff's printer 100 feet from her desk, although other employees had their printers adjacent to their desks; the company refused to permit the plaintiff to demonstrate her ability to evacuate the plant in case of an emergency, although the company maintained that her inability to evacuate was a reason for termination; and "the crowning evidentiary blow" was that after plaintiff tried to go back to work a supervisor allegedly stated that he no longer wanted to see the plaintiff's "crippled crooked self, going down the hall hugging the walls."

C. *Jenkins v. Cleco Power LLC,* — F.3d —, 2007 WL 1454363 (5th Cir. 2007) (May 18, 2007) (Americans with Disabilities Act)

Jenkins worked for Cleco as a senior line mechanic. A utility pole which he was climbing broke causing him to fall and fracture his left femur. This fracture required extensive surgery, which resulted in some permanent deformity to the leg and limited his physical capacity to perform several of the job-related tasked including the ability to sit for extended periods of time. When he returned from disability leave, he returned to his previous position with the restriction that he not climb. Because he was not fully performing his duties, Cleco transferred him to the position of customer service specialist. Jenkins' doctor informed Cleco that Jenkins would not be able to perform these duties as well either. Jenkins then began training for the position of Customer Service Specialist. Jenkins was offered a call center job, which entitled substantial sitting. Jenkins declined stating he could not meet the physical job requirements because of the sitting. Cleco then let Jenkins go.

Jenkins filed a charge of disability discrimination with the EEOC. Jenkins brought suit against Cleco under the Americans with Disabilities Act, as well as ERISA and other claims. The court concluded that Jenkins failed to establish that he was disabled as defined by the ADA and was unable to prove that Cleco failed to reasonably accommodate him. Jenkins appealed the summary judgment ruling and the involuntary dismissal of his claims.

On appeal the issue was whether Cleco failed to reasonably accommodate Jenkins because of his disability. The plaintiff bears the burden of proving that an available position exists that he was qualified for and could perform, either with or without reasonable accommodation. A disabled employee has no right to a promotion, to choose his job assignment, or to receive the same compensation as he received previously.

The Fifth Circuit held that while Jenkins was "disabled" as defined by the ADA, Cleco reasonably accommodated his disability. Furthermore, the Court held that his termination was not done in retaliation for Jenkins' request for reasonable accommodation. Jenkins does not make any argument regarding Cleco's proffered reason or point to any evidence demonstrating that Cleco's proffered reason was pretextual. The Court found no evidence of retaliation.

Dr. Waldman's recommendations to Cleco never changed. Jenkins gave the job descriptions to the doctor without having seen the actual job description, without discussing with Cleco the specific job duties, and without discussing with Cleco whether he could perform the job with alternate sitting and standing or other accommodation. Therefore, there wasn't an unwillingness to negotiate in good faith attempt at finding reasonable accommodations.

Cleco had placed Jenkins in several different positions as an effort to find the most optimal accommodation and the record does not indicate that Cleco failed to engage Jenkins in an interactive process or that it is responsible for Jenkins' rejections of the call center specialist position. The decision of the district court was affirmed.

XII. EMPLOYMENT AT WILL CASES

A. *Bolton v. City of Dallas*. 472 F.3d 261 (5th Cir. 2006) (December 7, 2006) (Employment at Will/Property Interest/Due Process)

Bolton served as an executive-ranked officer of the Dallas Police Department for fifteen years. In 1999 he was promoted from the assistant chief to the Chief of Police with the DPD. In 2003 Bolton was discharged on grounds the City of Dallas admitted did not constitute "cause." Bolton brought a Section 1983 Due Process claim against the City and the city manager in his official and individual capacity. The District Judge granted the City's Motion for Summary Judgment and Bolton appealed.

In order to succeed on a due process claim in the context of public employment, an employee must show that (1) he had a property interest or right in his employment, and (2) that his termination was arbitrary or capricious. A public employee proves a property interest in his employment if he or she establishes his or her employer has abrogated the right to terminate an employee without cause. This proof can take the form of a contract, or it might take the form of a statute, ordinance or public charter. In this case, Bolton sought reinstatement to the position he held before being appointed to Chief relying on the following provision in the city's charter: If the Police Chief "is removed from the position on account of unfitness for the discharge of the duties of the position, and not for any cause justifying dismissal from the service, the chief . . . shall be restored to the rank and grade held prior to appointment to the position." The Fifth Circuit held that this language was sufficient to create a property interest in Bolton's pre-appointment position with the police department.

The Fifth Circuit ruled that the City Manager, in his individual capacity, was entitled to qualified immunity. The Court reversed and remanded in part. As the Labor & Employment Law Section newsletter stated "At a time when the employment at will doctrine is newly ascendent, it is always noteworthy when an employee overcomes the doctrine as a matter of contract or "property interest.""

XIII. FIRST AMENDMENT CASES

A. *Communications Workers of America v. Ector County*, 467 F.3d 427 (5th Cir. 2006) (October 5, 2006) (First Amendment / Anti-adornment Rule)

A County hospital employee, disciplined for wearing a "Union Yes" lapel button on his hospital carpenter uniform in violation of the hospital's dress code, brough a § 1983 action alleging denial of his First Amendment right. The disciplinary action was pursuant to a workplace adornment policy prohibiting the wearing of pins, except non-controversial pins such as those showing professional accreditation, anti-smoking messages, or blood donation messages. The district court granted judgment for the plaintiffs, and a panel of the Fifth Circuit affirmed. In this rehearing en banc, however, a majority of the court found that the hospital's enforcement of its policy did not violate the First Amendment.

Under the Supreme Court's *Pickering* analysis for workplace speech cases, a court must first decide whether a public employee spoke as a citizen on a matter of "public concern." Second, the court must decide whether

the employer had an adequate justification for restricting employee speech when restricting the same speech by the general public would be impermissible. However, the less the employee's speech involves a public concern or the less the employer's restriction affects the employee's right to speak, the less the employer's burden of justification. In this case, for example, the rule in question applied only to buttons or pins and did not result in a substantial limitation of the employee's right of expression. Employees were free to express their support for the union in other ways. The majority also believed that the "Union Yes" message involved public concern "only insubstantially and in a weak and attenuated sense." The majority concluded that wearing such a button communicates nothing more than that "the employee is a union member and believes working conditions and/or compensation would be better ... if more Hospital employees were union members."

In some contexts, support for a union might relate substantially to public concerns where public employees have a right to seek collective bargaining. In Texas, however, public employees such as the plaintiffs are barred from engaging in collective bargaining. In comparison with the relatively slight relationship with public concerns and the limited impact on freedom of expression, the employer's justification for its rule was substantial, in the majority's view. A uniform requirement "fosters discipline, promotes uniformity, encourages esprit de corps, and increases readiness." Furthermore, a rule requiring "standardized uniforms"encourages the subordination of personal preferences; and identities in favor of the overall group mission." Uniforms also "allow patients and visitors to identify the employees as being such," and this purpose is important even for a maintenance worker if the worker may have access to a patient's room. Finally, if union buttons were allowed, the employer would be required to allow buttons commenting on other matters of public concern, such as abortion, gay marriage or illegal immigration. Thus, neither the rule nor the hospital's enforcement of its rule violated the First Amendment. Judges Wiener, DeMoss, Stewart and Dennis dissented.

B. *Gelin v. Housing Authority of New Orleans,* 456 F.3d 525 (5th Cir. 2006) (July 18, 2006) (First Amendment)

Gelin, an attorney, served in various positions in the Housing Authority of New Orleans (HANO) office of the general counsel. HANO is a Louisiana state agency charged with providing safe, affordable housing to economically disadvantaged citizens in Orleans Parish. Immediately prior to his dismissal, Gelin served as general counsel – an unclassified, exempt, at-will position. HANO entered into a settlement agreement with the Desire Area Resident County that provided employment to the council's president at an annual salary of $27,000. Gelin testified that he was concerned that this was a "bribe" and told his supervisor that "if you guys proceed and do this, you leave me no choice but to go to the FBI." Gelin contends that his relationship with his supervisor became strained and in February 2004, while he was on approved sick leave, he was discharged by his supervisor.

He filed suit under Section 1983 (and FMLA) asserting that he was discharged for speaking out on a matter of public concern in violation of the First Amendment. Gelin abandoned his FMLA claim. The District Court dismissed his First Amendment claim finding no evidence that his supervisor was a final policy maker for employment matters at HANO and that there was no evidence of a casual connection between his discharge and his alleged protected activity. Gelin appealed.

The Fifth Circuit affirmed the dismissal finding that Geline failed to establish that his supervisor that made the decision to discharge him had final policy-making authority for personnel matters which precluded Section 1983 liability on the theory that her termination decision constituted official policy of HANO. The evidence established that HANO had various officials that could have overruled his supervisor's decision to discharge him, HANO also had a three-phase grievance procedure which allowed Gelin to request and obtain a hearing before the executive director or a three-person committee. Because the Court found that the supervisor was not the final policy maker, it declined to address whether the discharge was casually related to Gelin's alleged protected activity.

C. *Knowles v. City of Waco, Texas,* 462 F.3d 430 (5th Cir. 2006) (August 24, 2006) (First Amendment)

Plaintiffs, a group of demonstrators, pray, display anti-abortion signs, distribute literature, and counsel clinic clients on the public sidewalk outside an abortion clinic in Waco. The clinic is located in a school zone so therefore it is subject to two ordinances. The first ordinance is the school zone ordinance and the second ordinance is the parade ordinance. These ordinances prohibit street activity and parades within school zones when the warning lights are flashing. The appellant contends that these ordinances violate his First Amendment rights.

After the demonstrators filed suit, the City amended the ordinances to their present form and then moved for summary judgment. Demonstrators proceeded to challenge the constitutionality of the amendments and the ordinances. The district court denied the demonstrators' motion for summary judgment and they appealed.

The issue addressed by the Fifth Circuit was whether the school zone and parade ordinances were

unconstitutional because they placed restrictions prohibited by the First Amendment in respect to time, place, and manner regulations. The Court also addressed whether the ordinances were narrowly tailored and whether they failed to leave open ample alternative channels for communication.

Even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. A regulation is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy.

In analyzing the issues, the Fifth Circuit held that the school zone and parade ordinances were unconstitutional because they do place restrictions prohibited by the First Amendment in respect to time, place, and manner regulations. It reversed and remanded the case. In reaching the ruling, the Fifth Circuit found that the school zone ordinance was not narrowly tailored because the ordinance swept far more broadly than was necessary to further the city's legitimate concern of enhancing the safety and welfare of school children because the ordinance prohibited any public assemblage which was undefined in the ordinance. This could mean only two people or it could mean more than two people. Also the definition of parade in the ordinance was open-ended. It again meant that two people could form a parade, or a man walking two dogs. Furthermore, the Court questioned what were the normal and usual traffic regulations and controls. The parade ordinance left as much open as the school zone ordinance. It could be interpreted to require only two people together to have a permit. Furthermore, since the ordinance has three exceptions the City is willing to disregard the traffic problems that could be caused by school children and government agencies engaging in a parade so it could not accept the contention that traffic control was a substantial interest.

XIV. FIRST AMENDMENT RETALIATION CASES

A. *Connelly v. Texas Dept. of Criminal Justice*, 484 F.3d 343 (5th Cir. 2007) (April 10, 2007) (First Amendment Retaliation, Sex Discrimination, Qualified Immunity)

Connelly was an attorney for the TDCJ from November, 1998 until his discharge in January, 2002. During the summer of 1999 she reported to a supervisor that Fant, the director of State Counsel for Offenders Division ("SCFO"), was engaging in the unauthorized practice of law. Over the next two years she repeated these allegations, but no action was taken. Connelly notified the State Bar of Texas and she obtained documents demonstrating that Fant's license was inactive. In April 2001 she reported the wrongdoings to the general counsel of TDCJ. She was then instructed to hand over the case files of her clients in preparation for a transfer. She refused and instead filed grievances against Fant and several other SCFO and TDCJ officials. In the summer of 2001, Florence, Connelly's supervisor, filed disciplinary charges against her. These charges accused her of falsifying travel records, being insubordinate, and failing to obey an order. She was found guilty, and later terminated. Connelly filed suit alleging retaliatory termination based on speech protected by the First Amendment against TDCJ and Fant. Fant moved for summary judgment in the district court, asserting the defense of qualified immunity.

The Fifth Circuit ruled that it lacked jurisdiction over the interlocutory appeal and the appeal was dismissed. To determine whether an official is entitled to qualified immunity, the court asks (1) whether the plaintiff has alleged a violation of a constitutional right, and (2) whether the defendant's conduct was objectively reasonable in light of the clearly established law at the time of the incident. Any arguments not addressed to these questions may not be considered on interlocutory appeal, and an appeal relying on these improperly raised arguments should be dismissed.

Fant's first assertion, in which he stated he discharged Connelly based on her conduct and not her speech, was an attack on the merits of Connelly's claim. Connelly must therefore show that the exercise of her speech was a substantial or motivating factor in the decision to terminate. However, Fant never raised the argument that Connelly produced insufficient evidence of motivation for termination. Therefore, it may not be considered for the purpose of the interlocutory appeal.

B. *Oscar Renda Contracting, Inc. v. The City of Lubbock, Texas,* 463 F.3d 378 (5th Cir. 2006) (August 31, 2006) (First Amendment Retaliation)

Plaintiff, a construction company that specializes in public works projects, filed suit against the City of Lubbock under § 1983 alleging that the City had retaliated against it for its exercise of its freedom of speech, that is, because of its prior lawsuit against a different governmental entitled. The City requested bids for construction of improvements to the storm drainage system. Under Texas law, the City is required to award the contract to the lowest responsible bidder. Renda was the lowest bidder but the City awarded the contract to UCA. Renda had recently been involved in a lawsuit against the El Paso Water District. The City Council believed that Renda might still be lawsuit happy but did

not award it the contract based on its business practices. Plaintiff alleged that the City's real reason of not awarding the contract to it was because of the lawsuit. The district court granted the City's 12(b)(6) motion to dismiss and Plaintiff appealed.

The issue on appeal was whether the First Amendment protects a contractor whose bid has been rejected by a city in retaliation for the contractor's exercise of freedom of speech where the contractor had no pre-existing relationship with that city. To state a First Amendment retaliation claim, an employee suing his employer must establish four elements: (1) the employee must suffer an adverse employment decision; (2) the employee's speech must involve a matter of public concern; (3) the employee's interest in commenting on matters of public concern must outweigh the defendant's interest in promoting efficiency; and (4) the employee's speech must have motivated the employer's adverse action. No prior relationship is required before an employee is permitted to assert a claim for First Amendment retaliation. And the court in *Rutan* held that a government entity's refusal to hire an employee for engaging in protected activity supports a claim for First Amendment retaliation.

The Fifth Circuit held that the absence of a prior relationship would not preclude the contractor's claim. It reversed and remanded the case. In reaching its decision, the Court reasoned that the claim Renda had against El Paso Water District was a subject of legitimate news interest and it is a public concern so therefore the district court erred in concluding that Renda's complaint failed to allege that the water district suit was a matter of public concern in the community because the lawsuit occurred in El Paso and not in Lubbock. Renda alleged that its suit involved a First Amendment claim which the allegations are sufficient under 12(b)(6) to put the City on notice that the El Paso suit involved more than Renda's personal interests and implicated matters of public concern. The Fifth Circuit agreed – the contractor, like the individual job applicant, is protected by the First Amendment if its bid is rejected in retaliation of its exercise of protected speech. Since First Amendment rights have been afforded to individuals applying for employment with the government, no different result should be afforded to bidders applying for employment with the government under a bidding arrangement. The Fifth Circuit vacated and remanded.

XV. FIRST AMENDMENT SOB'S CASES

A. *Fantasy Ranch Inc. v. City of Arlington,* 459 F.3d 546 (5th Cir. 2006) (August 2, 2006) (First Amendment/SOBs)

Fantasy Ranch, along with a number of other sexually-oriented businesses (SOBs) in Arlington, Texas brought suit against the City of Arlington and its police chief challenging several provisions of the City's sexually-oriented business ordinance as an unconstitutional restriction of their expressive liberties. Both sides filed motions for summary judgment. Judge Buchmeyer granted the Defendants motion and denied the Plaintiffs' motion.

The Court of Appeals held that an ordinance regulating SOBs is content-neutral, and will be subjected to intermediate rather than strict scrutiny so long as its predominant concern is for secondary effect. In the case at bar, the Fifth Circuit ruled that the ordinance's proximity provisions including the six-foot buffer zone, 18-inch stage height, and the six-foot tipping requirements, targeted secondary effects and so were entitled to intermediate scrutiny. Furthermore, the Court ruled that the ordinance's proximity provisions, satisfied the *O'Brien* test for content-neutral restriction on symbolic speech because they were aimed at protecting the health and safety of the citizens. It also ruled that the ordinance's license-revocation provision did not impose an unconstitutional prior restraint on speech.

The Fifth Circuit affirmed Judge Buchmeyer's dismissal (way to go Tom Brandt).

B. *H & A Land Corp. v. City of Kennedale, Texas,* 480 F.3d 336 (5th Cir. 2007) (February 22, 2007) (SOBs and First Amendment)

The City annexed land that included multiple sexually oriented businesses, thus making those businesses subject to the City's ordinances. The ordinances prohibit the sexually-oriented businesses within 800 feet of churches, schools, residences, day cares, parks, and other sexually oriented businesses. They also require the businesses to have a license to operate. Reliable, an intervening Plaintiff, is an "off-site" store. This means that they only sell printed materials that cannot be viewed at the store and they do not have any live entertainment. Suit was brought challenging the ordinance regulating the SOBs.

The district court found that the ordinances were content neutral and that the City's evidence of secondary effects failed to show that the ordinances were narrowly tailored to further a substantial government interest. The City appealed the district court's permanent injunction order.

On appeal the issue was whether the evidence offered by the City of Kennedale sufficiently supported its ordinance regulating sexually-oriented businesses. Zoning regulations restricting the location of adult entertainment businesses are considered time, place, and manner restrictions if they do not ban businesses throughout the whole of a jurisdiction and are designed to combat the undesirable secondary effects of such businesses rather than to restrict the content of their

speech per se. Time, place, and manner restrictions on speech violate the First Amendment unless they are content-neutral, are designed to serve a substantial governmental interest, do not unreasonably limit alternative avenues of communication, and are narrowly tailored. To show that an ordinance advances its goals, a city may rely on any evidence that is reasonably believed to be relevant.

The Fifth Circuit found that the City produced sufficient evidence that it could have relied on in establishing that the ordinances were narrowly tailored to advance a substantial governmental interest. The district court never reached the final element of the time, place, and manner analysis: whether the ordinances unreasonably limit alternative avenues of communication. The secondary effect studies must differentiate between on-site and off-site sexually-oriented businesses because off-site stores are less likely to produce harmful secondary effects.

The Fifth Circuit remanded the case to the district court to make the necessary findings.

C. *Illusions – Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007)

***Facts*:** The clubs are located in Dallas and are within dry counties. These clubs feature sexually oriented dancing and are regulated as sexually oriented businesses ("SOBs"). Since the political subdivisions are dry the clubs cannot sell alcoholic beverages unless they obtain a Private Club Registration Permit in accordance with the TABC.

***Procedural Posture*:** The clubs sued the TABC and the complaint sought declarations that the law was unconstitutional under the 1st, 5th, and 14th amendments. They asserted that the law violated the clubs right to free expression under the 1st, their rights to equal protection and due process under the 14th, and their right to be free from taking of private property without just compensation under the 5th and 14th amendments. The district court granted summary judgment in favor of the state on the 1st, 5th and 14th amendment claims. The clubs appealed the 1st amendment claim and abandoned the 5th and 14th amendment claims.

***Issue*:** Whether the legislative statute violates the clubs' right to free expression under the 1st amendment?

Whether the statute targets secondary effects or protected speech and whether the statute is designed to serve a substantial governmental interest as is narrowly tailored?

***Rule*:** Section 32.03(k) of the Texas Alcoholic Beverage Code prohibits the issuance of club permits to SOBs operated in dry political subdivisions and prohibits the renewal of existing club permits. This section this denies the clubs, as SOBs operating in dry political subdivisions, the ability to sere alcohol.

Two tests to determine if a statute violates the 1st amendment.

The *Alameda Books* test: courts consider whether the ordinance (1) bans SOBs altogether; (2) is content-neutral or content-based; and (3) if content-neutral, serves a substantial governmental interest and leaves available "reasonable alternative avenues of communication.

The *O'Brian* test: requires courts to determine if (1) the regulation is within the constitutional power of the government (2) it furthers an important governmental interest that is (3) unrelated to the suppression of speech and (4) the incidental restrictions on speech are no greater than is essential to further the interest.

The district court adopted a hybrid of the two.

***Holding*:** Holding that the legislative statute does violate the clubs' right to free expression under the 1st amendment.

That the statute does not target protected speech, instead its predominate purpose is to regulate alcohol service and is unrelated to the suppression of speech and that the State has not justified a substantial governmental interest.

***Reasoning*:** The State is required to justify a substantial governmental interest and it is divided into two parts: first one must actually exist and secondly, the statute must further that interest.

The only evidence the State offered was in the form of land-use studies by other cities on the negative secondary effects caused by SOBs. However, these studies were excluded and therefore there is no evidence.

***Disposition*:** The court affirms the district court's judgment insofar as it dismissed the clubs' due process claim; reverses the judgment insofar as it dismissed the club's first amendment claim and remand for further proceedings consistent with the opinion.

D. *Fantasy Ranch v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006)

***Facts*:** The plaintiff, Fantasy Ranch, is a sexually oriented business, an SOB. According to the Arlington SOB ordinance, if a topless bar violates the no touching statue between a dancer and a patron 5 or more times then the city can suspend the license of the SOB for three days. The chief of police notified the plaintiff that they would be suspended for three days.

***Procedural Posture*:** The club filed suit before the suspension alleging that the license suspension and revocation scheme created by the pre-amendment licensing provisions violated the 1st amendment by operating as a prior restraint and failing to satisfy the requirements for content-neutral speech-inhibiting regulations set for in *O'Brian*; and that they violated the procedural component of the due process clause. Before the district ruled on the suit the city amended the SOB

ordinance. The parties then amended their complaints and answers. The SOB still argued that the statue post amendments still violated the due process clause and the 1st amendment. Both parties moved for summary judgment and the court granted summary judgment to the city holding that the proximity provisions to be constitutional. Later the court held the statutory provisions to be constitutional and the plaintiff's claims moot.

***Issue*:** Whether the statutory provisions do not satisfy the 4 part *O'Brian* test and therefore violate the 1st amendment?

What level of scrutiny applies? Whether the suppression is content-neutral or content based?

Whether the Ordinance's license revocation provision does not impose an unconstitutional prior restraint on speech?

***Rule*:** The *O'Brian* test: an ordinance is upheld if (1) it is within the constitutional power of the government (2) it furthers an important or substantial government interest (3) the governmental interest is unrelated to the suppression of free expression and (4) the incidental restriction on first amendment freedoms is no greater than is essential to the furtherance of that interest.

***Holding*:** That the ordinance targets only negative secondary effects of speech, not content and therefore that the ordinance is content neutral. The court will apply intermediate scrutiny.

That the City of Arlington's ordinance is constitutional because it passes the 4 part *O'Brian* test.

That the Ordinance's license revocation provision does not impose an unconstitutional prior restraint on speech.

***Reasoning*:** The ordinance targets only negative secondary effects of speech because the ordinance does not prohibit the speech itself. The ordinance is not aimed at prohibiting the expression of the erotic message by nude dancing.

The ordinance satisfies the first prong because ordinances that are aimed at protecting the health and safety of citizens are within the City's police powers.

The ordinance satisfies the second prong because a city may rely on any evidence that is reasonably believed to be relevant. The city does not have to conduct new studies. The city's expert Dr. Goldsteen conducted a test that related dancer patron touch to dangerous secondary effects. The City also bases its support off of a LAPD study.

The ordinance satisfies the third prong because the City's interest is unrelated to the suppression of free expression.

The ordinance satisfies the fourth prong because the restriction on expressive conduct is no greater than is essential to the furtherance of the City's interest. The City has only muted that portion of the expression that occurs when the 6-foot line is crossed, while leaving the erotic message intact.

The ordinance's license revocation provision does not impose an unconstitutional prior restraint on speech because it contains all three safeguards: (1) providing for a stay of suspension pending the appeals process (2) providing a hearing before an administrative law judge with an appeal to a Texas district court and (3) placing the burden of proof on the City.

***Disposition*:** The judgment of the district court is affirmed.

XVI. FIRST AMENDMENT ESTABLISHMENT CLAUSE CASES

A. *Staley v. Harris County, Texas* , 461 F.3d 504 (5th Cir. 2006) (August 15, 2006) (1st Amendment Establishment Clause)

The Star of Hope Mission is a local Christian charity that provides food and shelter to indigents. They decided to build a memorial to Mosher for his long time active support of the Star of Hope. They secured a position in front of the court house and the monument contained a glass-topped display case with an open Bible in it. The Star of Hope maintains that the Bible was placed there to signify that Mosher was a "godly man" and it was also intended to represent his Christianity. Other monuments, markers, and plaques are present in and near other county buildings, but none of them contain a religious message. The monument was vandalized several times with the Bible being stolen each time. John Devine was later elected as a state district judge and he raised private funds to refurbish the monument. He put a Bible back in the case and added neon lights. Although Harris County does not maintain the monument, they retain the authority to move or alter it and the county pays for the electricity bill for the neon lights surrounding the Bible.

Staley filed suit in August, 2003 requesting a temporary restraining order, preliminary injunction, and permanent injunction against the county to remove the Bible from the display case. In August, 2004 the district court entered a final judgment in favor of Staley, ordering the Bible to be removed. Harris County then appealed.

The issue on appeal was whether a monument that is dedicated to a local citizen, and located on the grounds of the Harris County Courthouse, and contains an open Bible violates the Establishment Clause. The Fifth Court ruled that a monument attacked under the Establishment Clause will not pass constitutional scrutiny if the objective observer concludes that the purpose or the effect of the monument advances a religious message demonstrating sectarian preferences. Referencing *McCreary County*, the court noted that although a legislature's stated reasons will generally get deference,

the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective. In referencing *Van Orden*, the Court noted that in examining the context of display to determine the predominant message it conveyed, the court looks to several different factors, including the circumstances surrounding the display's placement on the grounds, the display's physical setting, and the amount of time the display stood without challenge.

Utilizing that analysis the Fifth Circuit ruled that the monument's recent history would force an objective observer to conclude that it is a religious symbol of a particular faith, located on public grounds-public grounds that may not reflect preference in matters of religion under the Establishment Clause of the First Amendment. Reaching its finding the Court reasoned that an original religious purpose may not be concealed by later acts, nor may a newfound religious purpose be shielded by reference to an original purpose. Before the renovations of the monument the primary purpose of the monument was to honor the life of Mosher and the monument even stood for 32 years before it was complained about. Now, however, after the renovations there is a religious purpose. Judge Devine ran on a political campaign of putting Christianity back in government and he wasn't even connected to Mosher. Furthermore, he renovated the monument, and not a museum of the Mission and the renovations included a red neon light that lit up the Bible. Also, the rededication ceremony featured several Christian ministers who led in prayers. Furthermore, the time period between the renovations and the complaint is short.

The Fifth Circuit affirmed the district court, and a rehearing en banc was sought and granted (see below).

B. *Staley v. Harris County, Texas,* 485 F.3d 305 (5th Cir. 2007) (April 24, 2007) (en banc) (Establishment Clause/Mootness/Vacatur)

The Monument had been removed due to renovations at the courthouse and on the courthouse grounds. Therefore, the case of whether the monument violates the establishment clause was moot because the monument is no longer on the grounds. Due to the circumstances and the court not knowing what the monument will look like when it comes out of storage, the facts are not available for the court to make a decision on the question of the violation of the establishment clause. Therefore, the case was moot. The decision was then whether to vacate the district court's judgment.

The Fifth Circuit noted that vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court. Furthermore, in response to an argument that both parties agreed to the settlement and therefore both parties were jointly responsible, the burden is on the party seeking relief from the status quo of the lower court judgment to demonstrate equitable entitlement to the extraordinary remedy of vacatur.

The issue on appeal was whether Harris County has met its burden of demonstrating an equitable entitlement to the extraordinary remedy of vacatur. The Fifth Circuit held that Harris County did not carry its burden of demonstrating an equitable entitlement to the extraordinary remedy of vacatur so therefore, the district court's injunction and judgment will be left in place. In reaching it holding the Court reasoned that the County did not show that the public interest weighed in its favor. Preservation of the district court judgment serves an interest to the community by discouraging relitigation of the identical issues. The County's voluntary actions caused the case to become moot and the County has pledged to display the monument after the courthouse grounds renovations.

XVII. FIRST AMENDMENT SPEECH CASES

A. *Williams v. Dallas ISD,* 480 F.3d 689 (5th Cir. 2007) (First Amendment / Speech in the Course of Job)

Williams was the athletic director and head football coach at a public high school. In this First Amendment-based Section 1983 action, he alleged that the principal at his school had dismissed him from his position at the school because of a memorandum he wrote questioning the handling of receipts from sporting events. The Fifth Circuit affirmed summary judgment for the defendant school district, citing the U.S. Supreme Court's recent (May 31, 2006) decision *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). In *Garcetti*, the Court held that the First Amendment does not protect "expressions made pursuant to their official duties." In *Garcetti*, the alleged free speech was required of the employee by virtue of his employment.

In contrast, in this case the athletic director's duties did not require that he write the memorandum that allegedly led to his discharge. Nevertheless, the Fifth Circuit held that the First Amendment did not offer protection with respect to the athletic director's memorandum. Citing other Supreme Court cases preceding *Garcetti*, the Fifth Circuit concluded: "Activities undertaken in the course of performing one's job are activities pursuant to official duties." The Fifth Circuit held that the coach's speech was made in the course of performing his employment rather than as a citizen and thus was not protected by the First Amendment. The district court's ruling was affirmed.

XVIII. DUE PROCESS CASES

A. *Hudson v. Texas Racing Commission*, 455 F.3d (5th Cir. 2006) (July 20, 2006)

***Facts*:** James Hudson is licensed to be a trainer and owner of race horses. He owns and trains the horse St. Martin's Cloak, which finished first at Lone Star Park. After the race the horse tested positive for a prohibited drug. Hudson was suspended and the winnings were redistributed.

***Procedural Posture*:** Hudson appealed the ruling to the Commission, and a hearing was conducted before an administrative law judge. The ALJ determined that it was irrelevant that there was no evidence of Hudson's intent or overt act in administering the drug. They upheld the previous decision. Hudson then filed a petition in the Texas state district court. The case was removed to federal district court and the court granted summary judgment in favor of the Commission.

***Issue*:** Whether the Texas absolute insurer rule violates the due process clause?

***Rule*:** To establish a due process violation under 42 USC 1983, one must first show that he was denied a constitutionally-protected property right.

***Holding*:** That the Texas absolute insurer rule does not violate the due process clause.

***Reasoning*:** The Texas Administrative Code provides that a license issued by the Commission may be denied, suspended, or revoked after notice and a hearing. Therefore Hudson has a protected property interest in his racing license.

But, the absolute insurer rule makes a trainer of a horse that is entered in a race the absolute insurer that the horse is free from all prohibited substances. This rule does not assign fault, but instead, requires the trainer to bear the responsibility of the horse's condition, as a contingency to being licensed as a trainer by the state.

Also, it has long been held that due process does not require proof of guilty knowledge before punishment may be imposed. Horse racing requires strong police regulation to protect the public interest.

Also, because horse racing for money can be prohibited all together in Texas, the legislature may condition a license to engage in legalized racing upon compliance with any regulation that is reasonably appropriate to the accomplishment of the Act.

***Disposition*:** Affirmed.

B. *Meadows v. Odom*

***Facts*:** The State of Louisiana requires that at least one licensed retail florist at any florist business establishment. To obtain a license one must pass an exam which consists of a written section and a practical section. The appellants brought suit challenging this requirement. They argue that the examination violates the substantive due process, equal protection, and privileges or immunities clauses of the 14th amendment.

***Procedural Posture*:** The appellees filed a motion to dismiss the equal protection and privileges or immunities claims. Both parties filed motions for summary judgment. The district court granted the motion to dismiss on the immunities claim, granted the appellees summary judgment claim, denied the appellant's summary judgment claim, and dismissed the action.

***Issue*:** Whether the parties continue to have a justifiable claim and that the case is moot?

Whether the appellant's claim falls within the exception: the "capable of repetition, yet evading review" exception?

***Rule*:** Mootness is the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of litigation must continue throughout its existence. This doctrine ensures that the litigant's interest in the outcome continues to exist throughout the lifetime of the suit.

There are two situations where the exception is met: (1) the challenges action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

***Holding*:** That the parties do not continue to have a justifiable claim and that the case is no longer moot.

That the appellant's claim does not fall within the mootness exception.

***Reasoning*:** The appellants, because of the natural disaster, have no intentions of returning to the state to be a florist. Also, one of the other parties, although now in a different part of the state, is retired.

Also, there is no underlying event or condition that will cease before there can be judicial intervention.

The appellants do not have a continuing interest in the litigation.

***Disposition*:** Because this case is moot, the court vacates the district court's ruling and directs the district court to dismiss the action.

XIX. SCHOOL DESEGREGATION CASES

A. *United States v. State of Texas v. Mumford ISD*, 457 F.3d 472 (5th Cir. 2006)

***Facts*:** Texas has a liberal transfer policy wherein funding from TEA follows the student across district lines. Hearne is trying to prevent flight from its schools, and retain funding in its district. Hearne argues that the transfer of whites out of their district has reduced desegregation in its schools.

***Procedural Posture*:** The City of Hearne sued TEA (Texas Education Agency) and Mumford ISD. The U.S. joined as plaintiffs. The district court ruled in favor of the plaintiffs, enjoining Mumford from accepting any more white transfers and prohibiting TEA from funding Mumford for those transfers.

***Issue*:** Whether TEA's funding to Mumford of white transfer students from Hearne violated Order 5281 because such transfers' cumulative effect reduced or impeded desegregation in Hearne? (district court)

Whether after a qualitative and quantitative analysis there was a violation of a desegregation decree?

Whether the court's injunction is among those federal-court decrees that exceed appropriate limits if they are aimed at eliminating a condition that does not violate the constitution or does not flow from such a violation?

***Rule*:** Order 5281 prohibits the State from permitting or supporting in any way student transfers, between school districts, when the cumulative effect, in either the sending or receiving school or school district, will be to reduce or impede desegregation. TEA shall not approve transfers whose effect will change the majority or minority percentage of the school population by more than one percent in either the home or the receiving school.

Small changes in the racial composition of a district through transfers cannot justify mandatory interdistrict desegregation remedies.

The remedial powers of the federal courts could be exercised only on the basis of a violation of law and could not extend no farther than required by the nature and extent of the violation.

***Holding*:** That the district court's quantitative and qualitative findings were clearly erroneous, and the district court abused its discretion in fashioning such a broad remedy.

***Reasoning*:** Contrary to the district court's finding, the numbers in this case do not prove that the transfers from Hearne to Mumford reduced desegregation or caused Hearne to transform into a one-race school

The district court also erred because it examined only the impact of the transfers on the percentage of black and white students in Hearne, while ignoring the growing portion of Hispanic students.

The record does not support that there is a resegregative effect in Hearne because at no point in the relevant time period have black students comprised more than 56% of the student population.

All TEA did was continue to fund transfer students already attending the receiving district after it learned that the one percent guideline had been violated. These conditions may have justified a remedial order that would have deferred to TEA's solomonic solution, however, the district court's order threatened to inflict a harsh and immediate funding reduction on Mumford and to penalize many innocent students.

There is no direct evidence condemning Mumford. Its violation of the one percent guideline is not indicative of intentional discrimination. The 5th Circuit has rejected bare numerical requirements in the context of transfers. Therefore since there was no intent, the district court had no legal or factual basis to enjoin Mumford from accepting white transfer students.

***Disposition*:** The court therefore reverses the judgment of the district court and vacates its injunction against Mumford and TEA.

XX. TAKING CLAUSE CASES

A. *Western Seafood v. United States*, 2006 WL 2920809 (5th Cir. 2006) (October 22, 2006)

***Facts*:** The City of Freeport, in an effort to foster economic development, seized a portion of Western Seafood's property along the river. They intended to transfer this property to Freeport Waterfront Properties, who is a private entity, for the purpose of building a private marina. The City planned to finance the project through low interest loans of public money from the City through the FEDC. The City Council then passed a resolution and the FEDC passed a resolution adopting the project.

***Procedural Posture*:** The plaintiff filed a complaint for injunctive relief, seeking to prevent the U.S. and the City from building the marina. They also filed a motion for preliminary injunction to prevent the City from commencing a condemnation suit in state court. The district court granted summary judgment to defendants and held that the City's proposed condemnation of the property fell within the scope of the taking clause. Western Seafood appeals seeking (1) reversal and remand on both federal and state constitutional questions; or (2) reversal and remand on the federal constitutional question, in light of *Kelo*, and certification to the Texas Supreme Court of constitutionality of the City's taking under the State constitution and its legality under newly enacted state legislation placing limits on the governments eminent domain powers.

***Issue*:** Whether the taking of the property owned by Western Seafood is valid under the constitution of the U.S. and the Taking Clause?

***Rule*:** The state constitution reads: no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money.

The Taking Clause: nor shall private property be taken for public use, without just compensation.

The Texas Constitution and the Texas Government Code §2206.001: The Limitations on Use of Eminent Domain Act, which states: (b) a governmental or private entity may not take private property through the use of eminent domain if the taking: (1) confers a private benefit on a particular private party through the use of property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party, or (3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.

***Holding*:** That the court remands the claim under the Texas Constitution to the district court for reconsideration of in light of the Act.

***Reasoning*:** The court in *Kelo* held that public purpose had been broadly defined, reasoning that promoting economic development is a traditional and long accepted function of government and that there is no way of distinguishing economic development form the other public purposes that we have recognized. Economic development qualifies as a legitimate public use under the US constitution.

As in *Kelo* the City developed and carefully formulated an economic development plan.

The transfer of the property to a private party did not invalidate the taking.

A taking under a right of eminent domain was for the public use, will be given deference by the courts until it is shown to involve an impossibility.

The act places new limitations on the use of eminent domain for economic development purposes, or where the taking confers a benefit on a particular private party. This Act was passed in response to *Kelo*.

A Texas court interpreting the constitutional provision might look to the Act as recent legislative declaration regarding the scope of the public use provision.

***Disposition*:** Accordingly, the court affirms on federal constitutional and vacates and remands on state constitutional grounds.