LITIGATING RETALIATORY TERMINATION AND WRONGFUL DISCHARGE CLAIMS

Robert A. Bragalone
Thomas E. Chandler

Cooper & Scully, P.C.
Founders Square
900 Jackson Street, Suite 100
Dallas, Texas 75202
(214) 712-9500
(214) 712-9540 fax
www.cooperscully.com
bbragalone@cooperscully.com

2006 Employment Law Seminar

BOB BRAGALONE

BIO:

born Bossier City, Louisiana, December 30, 1964; admitted to bar, 1990, Texas and U.S. District Court, Northern District of Texas. *Education*: University of Texas (B.A., *magna cum laude*, 1986, J.D., 1990) and Dallas Theological Seminary (M.A., *summa cum laude*, 1999). Academic honors include Phi Beta Kappa; Phi Kappa Phi; Omicron Delta Kappa; Phi Eta Sigma; Pi Sigma Alpha; Alpha Lambda Delta. National Order of Barristers. Champion and Best Advocate, Mock Trial Competition, 1988. Finalist, Mock Trial Competition, 1989. Regional Champion and National Semi-Finalist, 1990 A.B.A. Moot Court Competition. Member, 1989 National Moot Court Team. Member, Board of Directors, University of Texas Board of Advocates, 1989-1990. Managing Editor, American Journal of Criminal Law, 1988-1989. Assistant Instructor (Teaching Quizmaster), Legal Research, Writing and Appellate Advocacy, University of Texas Law School, 1989-1990. Briefing Attorney to the Honorable David Belew, Jr., United States District Judge, Northern District of Texas, 1990-1991. National Secretary, Board of Governors, National Order of Barristers, 1989-1990. Life Member, *National Registry of Who's Who*. *Member*: Dallas and American Bar Associations; State Bar of Texas; Dallas Association of Young Lawyers.

THOMAS E. CHANDLER

BIO:

born Houston, Texas, April 15, 1976; admitted to bar, 2001, Texas, U.S. District Court, Eastern District of Texas; 2004, U.S. District Court, Northern District of Texas. *Education*: University of Richmond (B.A., 1998), Southern Methodist University Dedman School of Law (J.D. 2001). Member, SMU Law Review Association, 1999 - 2001, *Editor-in-Chief*, SMU Law Review, 2000 - 2001, Jackson Walker Moot Court Board, 2000 - 2001. Law Clerk to the Honorable Richard Schell, United States District Judge, Eastern District of Texas, 2001 - 2002. *Member*: Dallas Bar Association, State Bar of Texas, Dallas Association of Young Lawyers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case **Page(s)**

Statutes, Rules & Constitutions **Page(s)**

I. INTRODUCTION AND OVERVIEW

Employers encounter a wide variety of legal issues in the course of running their businesses. Occasionally, employers must defend themselves in lawsuits brought by former employees. This paper discusses issues that arise in the course of litigating retaliatory termination and wrongful discharge claims from the defense perspective.

This paper focuses on litigating retaliatory termination and wrongful discharge claims from the initial evaluation through trial, beginning with a discussion of the evaluation process. A thorough evaluation of the elements of the claim, as well as an understanding of the plaintiff, former co-workers, management, opposing counsel, and venue greatly benefit defense counsel and aids in the development of a successful trial strategy. The paper also discusses discovery and motion practice, as well as retaining and challenging expert witnesses, and ends with a discussion of trial strategy.

II. EVALUATION AND STRATEGY

A. Possible Claims

Retaliatory termination and wrongful discharge claims can be brought under both state and federal statutes as well as common law. A non-exclusive list of federal statutes under which such a claim may be brought includes the following:

- Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000 et seq. (hereinafter "Title VII");
- Age Discrimination in Employment Act of 1967, 29 U.S.C. §621-634;
- Americans with Disabilities Act of 1990, 42 U.S.C. §§12101, et seq.;
- Fair Labor Standards Act of 1938, 29 U.S.C.§ 201, et seq.;
- National Labor Relations Act, 29 U.S.C. § 151, et seq.; and
- Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678.

Retaliatory discharge and wrongful termination claims under Texas law include Texas Commission on Human Rights Act, Texas Labor Code §21.001, as well as common law claims of defamation, breach of contract, invasion of privacy, and fraud or negligent misrepresentation, among others. To successfully defend a wrongful discharge claim, attorneys must be thoroughly familiar with the particular elements of each cause of action. Attorneys should pay particular attention to the short limitations periods in which the plaintiff must first give notice of a claim found in most Texas statutes.

An analysis of the elements of every conceivable claim for wrongful discharge is beyond the scope of this paper. However, a discussion of Title VII, perhaps the most common claim, including the elements of a claim and burden of proof issues, illustrates the importance of understanding the statute under which a claim is made in order to accurately evaluate the case.

B. Title VII

Title VII prohibits harassment and discrimination based on race, color, religion, national origin and sex. Under Title VII, to establish a *prima facie* case the plaintiff must show the following:

> (1) protected conduct by the employee;
>
> (2) an adverse employment action by the employer directed against the person engaging in the protected conduct; and
>
> (3) a causal connection between the participation in the protected activity and the adverse employment action.

Grizzle v. Travelers Health Network, Inc., 14 F.3d 261, 267 (5th Cir. 1994); Long v. Eastfield Coll., 88 F.3d 300, 304 (5th Cir. 1996).

1. "Protected" Conduct

"Protected" conduct constitutes conduct in opposition to a discriminatory practice or while participating in an investigation or other proceeding. The plaintiff does not need to prove the underlying discrimination occurred to have a valid claim. Instead, the employee must have "a reasonable belief that the employer was engaged in unlawful employment practices." Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1140 (5th Cir. 1981).

However, not all conduct by the employee is protected. This is true even if the employer is engaged in unlawful employment practices. The Fifth Circuit often

uses a "balancing test" to determine if the conduct is protected. Courts are sensitive to an employer's "right to run his business" as long as the employer can articulate a legitimate reason for the adverse employment action. Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1035 (5th Cir. 1980)(copying and disseminating confidential personnel information of company in opposition to alleged discriminatory hiring practice was not a protected activity). However, employers must be careful to articulate a legitimate reason for the adverse employment action at trial. Waiting until appeal to assert a legitimate reason for the adverse employment action may be insufficient. Payne, 654 F.2d at 1142-43 (5th Cir. 1981)(employer asserted on appeal for the first time that the conduct was not protected and the appellate court determined the employer failed to carry its burden on this issue).

Protected individuals include employees and former employees, as well as third parties. Robinson v. Shell Oil Co., 519 U.S. 337, 337 (1997). Third parties are protected for opposing discrimination against a co-employee or participating in a proceeding relating to a co-employee's claim. EEOC v. Cosmair, Inc., 821 F.2d 1085, 1088-89 (5th Cir. 1987)(ADEA case).

In evaluating plaintiff's claims under Title VII, it is important to focus on legitimate reasons for the adverse employment action. The employer must be able to articulate how the alleged "protected" activity was disruptive to the employer's business. The employer should be able to discuss both the effect on the business in general, as well as how the conduct interfered with the performance of the employee's job. Of course, the greater degree of specificity the employer can bring to the explanation the better.

2. "Adverse Employment Action"

The focus of this paper is on claims brought by a former employee after termination from employment. However, determining whether the action in question constitutes an "adverse employment action" is often the subject of intense dispute. Therefore, the scope of "adverse employment action" under Title VII warrants discussion.

The Fifth Circuit is often regarded as employer-friendly in its view of what constitutes an "adverse employment action." The Fifth Circuit has held that the purpose of Title VII is to address "ultimate employment decisions," not every decision by employers that might have a negative effect on an employee. Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995). "Ultimate employment decisions" include the following: hiring, firing, promoting, compensating, and granting leave, among others. Dollis, 77 F.3d at 782; Burger v. Central Apartment Management, Inc., 168 F.3d 875, 878 (5th Cir. 1999). However, on June 22, 2006, the U.S. Supreme Court found that the retaliatory action need not rise to the level of a "tangible employment action" such as a demotion or discharge. Burlington Northern & Santa Fe Ry. Co. v. White, - - S.Ct. - - , 2006 WL 1698953 at *1 (U.S.). Instead, to be retaliatory, the employer's actions "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Id. at *2. The White case involved a 37-day indefinite suspension of an employee without pay. Id. at *3-4. After the employee filed a grievance, the employer reinstated the employee and paid her backpay. Id. Nevertheless, the Court had no difficulty with the jury finding that the employer's actions were materially adverse. Id. at *11. Therefore, it is at this point unclear whether the Fifth Circuit will be forced to expand its definition of "adverse employment action."

Although the scope of this section is limited to elements of a Title VII claim, it should be noted that in the Fifth Circuit the definition of "adverse employment action" may be different in Title VII cases than in cases under §1983. Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999). In Sharp, a §1983 case, the court found that adverse employment actions can include a transfer, stating "it can be a demotion if the new position proves objectively worse - such as being less prestigious or less interesting or providing less room for advancement." Sharp, 164 F.3d at 933.

Additionally, it is important to note that "adverse employment actions" do not necessarily have to take place in the workplace. White, 2006 WL 1698953. The White decision constitutes a blow to employers' rights in the area of workplace retaliation. Because the Court handed down its decision just weeks ago, the extent to which employers in Texas are negatively effected remains to be seen.

3. Causal Connection

To fulfill the third prong of the *prima facie* case, the evidence must establish a causal link between the protected conduct and the adverse employment action. Sherrod v. Am. Airlines, Inc., 132 F.3d 1112, 1121-22 (5th Cir. 1998). The *prima facie* claim can be made merely by establishing that a complaint was filed, the supervisor knew of the complaint, and the supervisor

subsequently recommended adverse employment action. Long, 88 F.3d at 306.

Once a *prima facie* case has been established, the defendant must come forward with a legitimate, non-discriminatory reason for the adverse action. The plaintiff must then demonstrate that the employer's reason is merely a pretext. In order to demonstrate pretext, the plaintiff must show that "but for" the protected activity, the adverse employment action would not have occurred. Seaman v. CSPH, Inc., 179 F.3d 297, 301 (5th Cir. 1999). This "but for" causation element is more difficult that the initial *prima facie* causation standard. In fact, it is often the most difficult aspect of a plaintiff's claim. As the Fifth Circuit has noted, "[e]mployers rarely leave concrete evidence of their retaliatory purposes and motives." Nowlin v. Resolution Trust Corp., 33 F.3d 498, 508 (5th Cir. 1994). Therefore, plaintiffs often must resort to circumstantial evidence to establish "but for" causation.

Because "but for" causation is so critical, defense counsel must evaluate the case mindful of four key factual issues: (1) timing, (2) performance, (3) comparative treatment, and (4) decision making.

a. Timing

Although not determinative, the timing of an adverse employment action can play a vital role in determining "but for" causation. Employers must know whether an employee considered for an adverse employment action has recently made an allegation of discrimination or harassment. The shorter the time period between the alleged protected conduct and the adverse employment action, the more likely that "but for" causation will be established. Similarly, the longer the time period between the alleged protected conduct and the adverse employment action, the less likely a court or jury will find "but for" causation.

b. Performance

Employers often assert job performance as the reason for an adverse employment action. In such cases, the employee's performance evaluations must support the employer's position. Once employee evaluations have been completed and performance reviews have been given, employers cannot go back in time and change the results. Therefore, employers should establish performance review policies in case retaliatory termination or wrongful discharge claims arise. A performance review policy should include regular evaluations and an open, honest and thorough evaluation of the employee's performance. Additionally, all employee evaluations should be documented in writing.

Plaintiffs often compare employee evaluations prior to the protected activity and after the protected activity to establish "but for" causation. Generally positive reviews prior to the protected activity followed by significantly more negative reviews after the protected activity raise suspicion. Additionally, non-specific, infrequent and irregular reviews prior to the protected activity followed by detailed and frequent reviews after the protected activity give the appearance of "padding the file." On the other hand, a documented history of poor performance, both before and after the protected activity, supports the employer's assertion of performance as a reason for adverse employment action. Long, 88 F.3d at 308.

c. Comparative Treatment

A plaintiff in a retaliatory termination or wrongful discharge case may often compare his treatment to that of other employees to establish "but for" causation. Issues raised in this context include whether other employees have been treated differently when they did the "same thing" wrong, as well as how close to "the same thing" must the act be to show "but for" causation.

Recently, the Fifth Circuit concluded that for employees to be similarly situated to support a disparate treatment claim, the employee's misconduct must have been nearly identical to that engaged in by the plaintiff. Perez v. Texas Dept. of Criminal Justice, 395 F.3d 206, 213 (5th Cir. 2004). Although many wrongful discharge claims do not involve incidents of misconduct, the "nearly identical" standard articulated in Perez nonetheless represents a higher burden for plaintiffs than the formerly used "comparable seriousness" standard. Therefore, if a plaintiff tries to allege dissimilar treatment, defense counsel should emphasize the differences between the plaintiff's situation and that of the individual to which plaintiff compares himself.

d. Decision Making

The matter of *who* actually makes the decision to follow through on the adverse employment action is an important factor in determining "but for" causation. Courts will likely regard any decisions to terminate made by a supervisor solely on recommendation from the alleged discriminating person as a "rubber stamp." However, if the supervisor bases his decision on his own independent investigation, "but for" causation will not likely be found. Therefore, it is helpful for the employer to have an established process for independent review by at least two members of management for final decision making prior to any adverse employment action.

C. Parties/Fact Witnesses/Venue

In addition to an understanding of the claims brought against an employer, defense counsel must thoroughly investigate the parties, fact witnesses, venue and opposing counsel of the particular case to develop the most effective strategy.

1. Plaintiff

A plaintiff/former-employee's character can play a major role in the jury's perception of a case. Defense counsel should analyze the plaintiff's performance reviews and investigate his work history. Additionally, interviews with former co-workers and management assist defense counsel in constructing a full picture of plaintiff as an employee and co-worker. The plaintiff will present himself to the jury in a light most favorable to his case. Therefore, defense counsel must be able to show a plaintiff's true colors as an employee and co-worker.

2. Co-workers

Defense counsel should interview the plaintiff's former co-workers and obtain signed witness statements as soon after the lawsuit is filed as possible. Recollection of important events and relevant personality traits may fade with time. It is also important to remember that the business world is dynamic, regardless of whether a lawsuit has been filed. People move, quit jobs, or get terminated every day.

In addition to gaining information about the plaintiff and the alleged protected activity, defense counsel should use the interviews to evaluate plaintiff's former co-workers. Does the co-worker make a strong witness? How credible would the co-worker's testimony be? An accurate evaluation of the case depends upon answering these questions, among others.

3. Management

As discussed in the previous section, understanding the performance review and termination processes is vital to the successful defense of a retaliatory termination or wrongful discharge case. Interview management to determine their roles in carrying out these functions. Additionally, defense counsel should discover any "stray comments" or statements by management regarding the plaintiff, whether made in connection with adverse employment action or not, that could be prejudicial to the defense. Although companies typically exhibit the utmost amount of professionalism, decency and respect when dealing with employees, a single lost temper or moment of bad judgment could greatly harm an employer's defense to wrongful discharge. It is much better to know of any potentially damaging statements early than to be surprised at trial.

4. Venue

The location of the case and identity of the judge are two important factors to consider in evaluating a case. Is the jury pool generally regarded as more conservative or more liberal? If the venue is plaintiff-friendly, explore venue transfer possibilities. Additionally, defense counsel should know the judge's reputation. For example, some judges rarely grant motions for summary judgment, while others are more receptive. Knowing the courtroom preferences of the presiding judge can help ensure a smooth trial.

5. Opposing Counsel

The opposing counsel's strengths and weaknesses often determine the litigation strategy. Is opposing counsel a specialist in litigating wrongful termination claims? Does opposing counsel have significant experience as a trial lawyer? What discovery and pre-trial tactics does opposing counsel typically utilize? A thorough evaluation of opposing counsel helps defense counsel to anticipate a plaintiff's litigation tactics and prepare appropriate defenses accordingly.

D. Strategy

A defense counsel's litigation strategy can run the gamut from "scorched earth" to "bare minimum." Factors to consider when determining a strategy include the complexity of the case, experience of opposing counsel, the extent to which plaintiff arouses sympathy

and defense counsel's resources (i.e. time, money and manpower) versus plaintiff counsel's resources. Of course, any attempt to capitalize on opposing counsel's relative lack of resources by employing a "scorched earth" strategy is limited by prohibitions on filing frivolous pleadings.

Defense counsel should consider not only the effect of a litigation strategy on the opposition, but also the potential effect on the jury. In wrongful termination and retaliatory discharge cases, employers often must combat a "David versus Goliath" narrative of plaintiff. While you may gain some short-term advantages by utilizing "scorched earth" tactics against small firms, defense counsel should be mindful of the potential to look like a "bully" in the eyes of the jury.

III. DISCOVERY

A. Written Discovery

1. Requests for Disclosure

Defense counsel should usually serve requests for disclosure, interrogatories and requests for production early in the litigation. Discovery of persons with knowledge of the case pursuant to TEXAS RULE OF CIVIL PROCEDURE 194.2(e) is particularly helpful in wrongful discharge cases as a tool to determine potential fact witnesses in the case.

2. Interrogatories

Interrogatories must cover all elements of plaintiff's allegations, damages claimed, experts (including consulting experts on whose work testifying experts rely), and plaintiff's employment history. In Texas state court, a Level 2 scheduling order allows for 25 written interrogatories. TEXAS RULE OF CIVIL PROCEDURE 190.3. Under a Level 3 scheduling order, the parties may negotiate the maximum number of interrogatories allowed. Therefore, if you anticipate more than 25 interrogatories are necessary, you may consider approaching opposing counsel about entering into a Level 3 scheduling order or filing a motion for scheduling order with the court pursuant to TEXAS RULE OF CIVIL PROCEDURE 166.

3. Requests for Production

Requests for production should be specific enough to be immune from objection and numerous enough to encompass all relevant documents. Requests should include any documents belonging to the employer yet still in the employee's possession.

4. Requests for Admission

Requests for admission may be beneficial under certain circumstances, such as to obtain judicial admission of negative performance reviews prior to the protected activity in a Title VII case, for example. Requests for admission are typically utilized after other written discovery has been conducted.

B. Fact Witness Depositions

1. Plaintiff

Defense counsel should take the plaintiff's deposition fairly early in the case, but only after an evaluation of plaintiff's character and employment history has been conducted. Any insight into the plaintiff's deportment and level of sophistication obtained from the initial case evaluation greatly helps in preparing for the deposition. Defense counsel must determine whether more favorable testimony can be obtained by aggressive, forceful questions or by open-ended questions. Also, it is often beneficial to videotape depositions. Remember, non-lawyers are not accustomed to the process of giving sworn testimony. Although the plaintiff will very likely be present to testify at trial, the presence of a video camera at deposition often adds to witnesses' discomfort. An otherwise strong plaintiff witness may appear evasive and unsure on video.

2. Management

It is impossible to overestimate the importance of extensive witness preparation for a deposition. Although members of an employer's management team are typically sophisticated and business savvy executives, most are unfamiliar with the discovery process. Giving a deposition may be as foreign to them as to the plaintiff. Therefore, defense counsel should be prepared to spend as much time as necessary to prepare their clients to testify. It is important that the employer's decision makers present themselves as straight-forward, articulate and credible. A discussion of the attorney/client privilege is beyond the scope of this paper. However, when speaking with management, as well as former co-

workers, consult with in-house counsel regarding any attorney/client privilege issues.

3. Co-workers

Defense counsel should begin preparing the plaintiff's former co-workers to testify during the initial interviews. Assess each co-worker's strength and credibility as a witness. After opposing counsel notices a deposition, meet with that particular co-worker again for an extended period of time. It is also important to meet with plaintiff's former co-workers who no longer work for your client. However, be mindful of the fact that attorney-client privilege will likely not apply. Under such circumstances, limiting the meeting to a general overview of the scope and purpose of the deposition would be prudent.

IV. MOTION PRACTICE

Motion practice is typically one of the most important aspects of defending a wrongful termination or retaliatory discharge claim. Motions for summary judgment and motions to dismiss may provide defense counsel with multiple benefits. First, of course, a successful dispositive motion eliminates claims against the employer. However, even if the dispositive motion is unsuccessful, litigating the motion often forces the plaintiff to reveal strategy. Through a plaintiff's response to the motion and argument at the hearing, defense counsel may gain insight into what a plaintiff considers to be the strengths and weaknesses of his case.

Additionally, the time and money required to defend against potentially case-ending dispositive motions may drain plaintiff's counsel's resources and put added pressure on plaintiff to settle. The most common dispositive motions filed in federal court in wrongful discharge cases are motions to dismiss and motions for summary judgment. The most common dispositive motion filed in Texas courts in wrongful discharge cases is a motion for summary judgment.

A. Federal Court

1. Motions to Dismiss

Motions to dismiss in federal court are governed by FEDERAL RULE OF CIVIL PROCEDURE 12b. Pursuant to Rule 12b(1), a party may file a motion to dismiss based on lack of subject matter jurisdiction. Motions to dismiss based on failure to state a claim upon which relief may be grated are made pursuant to Rule 12b(6). A Rule 12b(6) motion to dismiss is used to attack a plaintiff's pleadings as insufficient.

2. Motions for Summary Judgment

Motions for summary judgment in federal court are governed by Rule 56. Traditionally, the Fifth Circuit has required the plaintiff to show more than a mere scintilla of evidence to survive summary judgment. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996). In order to rebut the defendant's evidence in support of summary judgment, the plaintiff has been required to show a conflict in *substantial* evidence that would create a jury issue. Id. (emphasis added). The Rhodes court defined "substantial evidence" as "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." Id.

In 2000, the Rhodes case was abrogated by the United States Supreme Court in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). In Reeves, a discharged employee sued his former employer, alleging age discrimination under the ADEA. Id. at 133. The Court held that a *prima facie* case and sufficient evidence of pretext may permit the trier of fact to find unlawful discrimination without additional, independent evidence of discrimination. Id. at 148. However, the Supreme Court did note that sufficient evidence of pretext, without any other evidence, will not *always* be sufficient to sustain a jury's finding of liability. Id.

At first glance, the Reeves decision appears to eliminate the standard to survive summary judgment articulated in Rhodes. However, the Fifth Circuit has interpreted Reeves to be consistent with its holding in Rhodes. Vadie v. Mississippi State University, et al, 218 F.3d 365 (5th Cir. 2000). In Vadie, a professor whose department had been closed by MSU brought a Title VII action against the university, alleging retaliation and intentional discrimination based on race and/or national origin after his application to another department was rejected twice. Vadie, 218 F.3d at 368-69. The district court entered judgment upon verdict for the professor. Id. at 365. On appeal, the Fifth Circuit noted that the only evidence which the professor offered to support his claim was by establishing his Iranian ancestry, which he did when putting forth a *prima facie* case. Id. The court held that there was no probative evidence in the record of national origin discrimination. Id. at 373. Accordingly, the 5th Circuit vacated the judgment of the district court with respect to the claim of national origin

discrimination, and remanded with instructions to enter judgment on favor of MSU on that claim. Id. at 374.

Considering the application of the Supreme Court's decision in Reeves, the Fifth Circuit noted that both Reeves and Rhodes state that the fact finder may rely on all evidence in the record to infer discrimination. Id. at 374 (FN 23). Additionally, both cases observed that in some circumstances no rational trier of fact could find discrimination, even when plaintiff established a *prima facie* case. Id. The Fifth Circuit stated "[w]e hold therefore that Rhodes is consistent with Reeves and continues to be the governing standard in this circuit." Id. In light of the Fifth Circuit's reasoning in Vadie, defense counsel should maintain that the Rhodes standard of "substantial evidence" governs motions for summary judgment.

B. Texas State Court

1. Motion for Summary Judgment

In Texas state court, the movant must prove that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." TEXAS RULE OF CIVIL PROCEDURE 166a(c). Summary judgment in state court is generally more difficult to obtain than in federal court. In state court, the party responding to the motion for summary judgment is merely required to introduce some evidence on a material issue of fact to defeat the motion.

Defense counsel should also consider filing a "no evidence" motion for summary judgment pursuant to TEXAS RULE OF CIVIL PROCEDURE 166a(i). Under Rule 166a(i), "a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." Rule 166a(i). The effect of filing a "no evidence" motion for summary judgment is to force opposing counsel to produce some evidence of a claim. Whether no evidence or traditional, motions for summary judgment often put opposing counsel on the defensive and place added pressure to settle the case at mediation.

V. EXPERTS

One of the most important aspects of defending a wrongful termination or retaliatory discharge case pertains to expert witnesses. Defense counsel must retain expert witnesses who are qualified and competent. Additionally, effective challenges to plaintiff's expert witnesses may result in early settlement, dismissal of claims or a defense verdict at trial. Typically, there are four types of experts used in wrongful discharge cases: (1) economic; (2) psychological; (3) statisticians; and (4) attorneys' fees experts. Regardless of the particular specialty of the expert, any effective challenge to plaintiff's experts will be based on thorough preparation and an understanding of the law.

A. Depositions

One of the most important events in the course of litigation is the expert deposition. The outcome of the plaintiff's claims may hinge on how the testifying expert does in deposition. Naturally, careful preparation and evaluation of the issues involved in the case improves the likelihood of a successful deposition of the plaintiff's expert.

1. Preparation

The value of preparation cannot be overestimated. Knowledge of all relevant literature is critical to raising and sustaining any Daubert challenges against that particular expert. It is also helpful to consult with your client and your own consulting experts in preparation for taking the opposing expert's deposition.

In addition to understanding the opposing expert's field of study, defense counsel should know the opposing expert's testifying history. Databases such as IDEX provide information on the particular cases in which an expert has testified. Internet search engines like Google may indicate whether the expert has advertized his services. A study of past depositions may provide helpful information for impeachment purposes as well as insight into any verbal tics or presentation deficiencies of the opposing expert.

2. Discover *All* of the Opinions of the Adverse Expert

Trial is the most important cross-examination, and it is better to know all the answers at trial than to be surprised at trial when you get the answer to the question that you were afraid to ask in deposition.

3. The Expert's Qualifications

Defense counsel should exploit any weaknesses of the plaintiff's expert's qualifications. If your experts have better credentials, be sure to point out the differences to the jury through the *opposing* expert witness, so as to refrain from making your experts appear pompous.

4. Bias Shown By History of Testimony

Of course, it generally pays to know the testimonial history of the expert you are opposing. Does the witness testify only for plaintiffs? Does the witness testify for plaintiffs the vast majority of the time? Has the expert made sworn statements in other cases that are inconsistent with the expert's positions in the case at hand? Exposing an opposing expert's bias may result in significant harm to such expert's credibility as well as the opposing party's overall case.

5. Obtain Testimony Favorable To Your Case

During cross-examinations, it is possible to obtain testimony from an opposing expert that supports -- at least in a small way -- your theory of the case. There are some commonly acknowledged principles that can serve as small admissions of the validity of your case. An adverse expert may be willing to agree with several of your premises while disagreeing with your conclusion.

In the same fashion, it may be possible to have the adverse witness accredit your expert witness by having the adverse witness acknowledge the reliability of your witness' data and assumptions, and the legitimacy of his credentials. In some cases, you may even be able to get the adverse expert to admit that your expert is better qualified in a specific area.

B. Case Law and Rules of Evidence

An understanding of the applicability of Daubert is crucial to an effective challenge to the theories of an expert. The United States Supreme Court changed the landscape of pretrial and trial challenges to expert witnesses when it handed down its decision in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). The Daubert decision reigned in trial courts' unwarranted tolerance of what the high Court called "junk science." Masquerading as "scientific theories," many novel, unproven and unreliable techniques and theories had invaded federal courts. Trial courts had taken too passive an approach to gatekeeping and too often had permitted unreliable testimony to reach the jury, cloaked in the aura of the special expertise brought by the expert witness.

The Daubert Court reminded trial courts that "[t]he Rules–especially Rule 702–place appropriate limits on the admissibility of purportedly scientific evidence by assigning the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Id. The Court enunciated a list of six factors for trial courts to consider when ruling on the admissibility of expert testimony. Id. The end result was that Rule 702 now has specific parameters for use in evaluating whether a proffered expert's testimony should be permitted to be heard by the jury. Id. Before turning to the six Daubert factors however, we will examine Rules 702 and 703 to understand the existing framework at the time that Daubert was handed down.

1. The Rules of Evidence

a. Rule 702

Many states have enacted rules of evidence that mirror the federal rules. Texas Rule of Evidence 702, like its federal counterpart, permits opinion testimony by a witness qualified as an expert by knowledge, skill, experience, training, or education.

Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

b. Rule 703

In addition to challenging the qualification of experts to render expert testimony under Rule 702, the foundation of the expert's opinions may also be challenged pursuant to Rule 703:

Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming

opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Together, these rules of evidence provide powerful ammunition to the defense for challenging the qualifications of the expert to render opinion testimony, and for challenging the opinion itself as unreliable. As outlined above, Daubert was the first United States Supreme Court case to dispense with the "general acceptance test" and set forth the requirements for qualification of expert testimony under Federal Rule of Evidence 702.

Later in Texas, E.I. duPont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995) incorporated the holding of Daubert and applied it to consideration of expert opinions pursuant to the substantially similar Texas Rule of Evidence 702.

2. The Simple Three-Step Approach

The basic three-step approach for expert testimony under Daubert and Robinson is as follows:

1. The expert must be qualified;

2. The testimony must be relevant; and

3. The opinion must be reliable.

As a practical matter, the expert must be qualified according to education, training and experience. The testimony must also be relevant. Should the court determine that the expert testimony meets the relevance test, the plaintiff must still demonstrate that the expert's opinions are reliable.

3. The Burden of Proof

Once an objection to the expert has been made, the Daubert and Robinson cases shift the burden of demonstrating the admissibility of expert opinion to the proponent of the expert's opinion. These cases require that an objection be made to the expert's qualification or reliability of the specific opinion, and the proponent must then bear the burden of proving the qualifications of the witness to testify or the reliability of the specific opinion.

To meet his burden, the proponent of the testimony must prove both the qualifications of the witness and the reliability of the testimony on the premise that expert evidence that is not grounded "in methods and procedures of science" is no more than "subjective belief or unsupported speculation." Robinson, 923 S.W.2d at 557.

4. The Daubert/Robinson Factors

The factors to be evaluated by the trial court when considering the admissibility of expert opinion include, but are not limited to, the following factors:

1. the extent to which the theory has been or can be tested;

2. the extent to which the technique relies upon the subjective interpretation of the expert;

3. whether the theory has been subjected to peer review and/or publication;

4. the technique's potential rate of error;

5. whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

6. the non-judicial uses which have been made of the theory or technique.

Robinson, 923 S.W.2d at 557. However, as recent Texas case law described below illustrates, appellate courts may affirm the trial court's decision to allow expert testimony even if the trial court does not apply the Robinson factors, as long as the decision was based on the challenged expert's knowledge, training and experience. Therefore, motions to strike expert testimony should include an analysis of the Robinson factors as well as the Texas Rules of Evidence.

5. Key Texas Cases After Robinson

A number of Texas cases have been decided after Robinson that expand on the factors adopted and enunciated by the Robinson court as well as shed light on the application of Daubert/Robinson to a variety of claims.

a. Merrell Dow Pharm., Inc. v. Havner

In Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997), the Texas Supreme Court analyzed the reliability of epidemiological studies relating to proximate causation. The opinion sets forth several requirements for the admissibility of expert opinions based upon epidemiological studies. In addition to satisfying the Daubert/Robinson factors, the plaintiff must show that the epidemiological studies themselves are reliable. The Texas Supreme Court set forth guidelines relating to the statistical reliability of such epidemiological studies to support an opinion on proximate causation.

The language contained in the Havner opinion may offer support to defense counsel in efforts to exclude experts or strike opinions as unreliable. Some of the more interesting comments include the following:

1. "An expert's bare opinion will not suffice." (Plaintiff. 711).

2. ". . . it is not so simply because 'an expert says it is so.'" (Plaintiff. 712).

3. ". . . even an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the earth is the center of the solar system." (Plaintiff. 712).

4. An expert's bald assurance of validity is not enough. (Plaintiff. 712).

5. "A flaw in the expert's reasoning from the data or in the data itself may render a reliance on a study unreasonable and render the inferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence." (Plaintiff. 714).

6. ". . . courts must be 'especially skeptical' of scientific evidence that has not been published or subjected to peer review." (Plaintiff. 727).

b. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998)

The Daubert/Robinson factors are not limited to novel or unconventional science, but rather extended to all scientific evidence proffered under Rule 702. There are some experts who "are more than willing to proffer opinions of dubious value for the proper fee." All expert testimony should be shown to be reliable before it is admitted. Experience alone may provide a sufficient basis for an expert's testimony in some cases, but it cannot do so in every case. A more experienced expert may offer unreliable opinions, and a lesser experienced expert's opinions may have solid footing.

c. Sears, Roebuck & Co. v. Kunze, 996 S.W.2d 416 (Tex. App. – Beaumont 1999, pet. denied)

In Kunze, a product liability action, the court applied Robinson to exclude an out of court test offered by the defendants. The trial court excluded the test because the expert's theory and technique had not been tested in the past, because it relied on a subjective determination, because it had not been subjected to peer review, because it had no established rate of error, because the underlying theory or technique had not been tested in the past, and because there were no non-judicial uses of the technique. 996 S.W.2d at 424. Applying an abuse of discretion standard of review, the court of appeals affirmed, holding that the trial court "appear[ed] to have properly applied the factors set out in Robinson." Id.

d. Taylor v. Am. Fabritech, Inc.
132 S.W.3d 613 (Tex. App. – Houston [14th Dist.] 2004, rehearing overruled)

In Taylor, a personal injury action relating to injuries suffered by a construction worker from falling through a skylight at a construction sight, the trial court entered judgment on the jury's verdict for the Plaintiff. On appeal, the employer attacked the reliability of Plaintiff's expert witnesses, including a builder testifying on safety issues, an economist testifying to lost earning capacity, a life care planner and a psychologist testifying on the worker's injuries.

The appellate court affirmed the trial court's decision to admit the testimony of the various experts, finding that the experts "were not offering testimony of a scientific nature." 132 S.W.3d at 619. The court found that in forming their opinions, the experts relied on their experience, education and knowledge, and thus the trial court "was required to consider whether the testimony was based on a reliable foundation and whether it was relevant to the issues in the case" but was not required "to analyze all of the specific factors noted in Robinson." Id.

e. Volkswagen of America, Inc. v. Ramirez, 159 S.W.3d 897 (Tex. 2004)

In Ramirez, a negligence action brought against a motor vehicle manufacturer, the court of appeals affirmed the trial court's ruling admitting the testimony of Plaintiff's expert witness on accident reconstruction. On appeal to the Texas Supreme Court, the appellants argued the testimony of the accident reconstruction expert was unreliable since it was not supported by scientific evidence (i.e. tests, studies, calculations, etc.). The Texas Supreme Court reversed the appellate court, holding that plaintiff's expert failed to explain how any of the general "laws of physics" relied on by the expert supported his theory. The Supreme Court noted that while the Robinson factors are not applicable to every type of expert testimony, expert theories must always be supported by a reliable foundation.

f. **United Services Auto. Ass'n v. Croft**, 175 S.W.3d 457 (Tex. App. – Dallas 2005, no pet.)

Insureds brought action against homeowners insurer pertaining to their refusal to pay for foundation and cosmetic repairs necessitated by a plumbing leak and heaved foundation. The trial court entered judgment on jury verdict for insureds.

On appeal, the insurer argued that the testimony of various expert witnesses, including a structural engineer, a foundation repairman and the owner of a home remodeling business, were conclusory. The appellate court affirmed the trial court's ruling allowing the testimony, holding that the experts' opinions were based on knowledge, training and experience as well as underlying factual support and data.

6. Key Federal Cases After Daubert

a. **Kumho Tire Co., Ltd. v. Carmichael**, 526 U.S. 137; 119 SCT 1167; 143 L.ED. 238; (1999)

In one of the more important decisions since Daubert, the United States Supreme Court held that the reliability factors may apply to the testimony of all experts, not just "scientific" experts. It further held that the gatekeeping function applies to all expert testimony and is not limited to novel science or scientific testimony.

b. **Moore v. Ashland Chemical Inc.**, 151 F.3d 269 (5th Cir.1999)

The 5th Circuit held in a toxic tort case that the underlying analytical data relied upon by the plaintiffs' expert had gaps that were too wide to support his causation opinion. Thus the 5th Circuit held that the trial court properly excluded his causation testimony on the grounds that the foundation was unreliable as a matter of law.

c. **Tanner v. Westbrook**, 174 F.3d 542 (5th Cir. 1999)

The trial court abused its discretion in admitting a physician's medical causation testimony in an alleged perinatal injury case where the expert did not have the training or background in cerebral palsy and the studies relied upon did not address the alleged cause in question.

d. **Mays v. State Farm Lloyds**, 98 F. Supp.2d 785 (N.D. Tex. 2000)

Insureds sued their homeowners' insurer, alleging that the insurer wrongfully denied their claim for structural damage to their home resulting from foundation movement. In support of their position, the insureds offered expert testimony that the damage was caused by a sewer leak rather than tree roots. On insurer's motion for summary judgment, the court held that insureds' expert's testimony was unreliable and inadmissible. The court found that insureds' expert formed his opinion after a single visual inspection of the property, and he failed to provide a basis for his conclusion. Thus the expert's testimony amounted to nothing more than speculation.

e. **Mathis v. Exxon Corp.,** 302 F.3d 448 (5th Cir. 2002)

In Mathis, gasoline station franchisees sued a gasoline company for breach of contact, arguing that the company set prices in order to drive the franchisees out of the business and replace them with corporation-operated stations. Following a jury trial, the trial court entered judgment for the franchisees. On appeal, the company argued that the testimony of franchisees' expert witness economist was unreliable because it did not include a "competitive impact analysis" for each station. The appellate court found that such a study was not necessary to determine whether the corporation had set a commercially reasonable price. Upholding the trial court's decision to allow the testimony, the appellate

court stated, "we must bear in mind the purpose of [the expert's] testimony when addressing its reliability." Mathis, 302 F.3d at 461.

C. The Trial Court Must Determine Whether the Expert is Qualified

Naturally, the decision on an expert witness' qualification rests with the trial court. Broders v. Heise, 924 S.W.2d 148 (Tex. 1996). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. Robinson, 923 S.W.2d at 558. The proponent of the testimony must prove that the witness is qualified under Texas Rule of Evidence 702, which permits testimony by a witness "qualified as an expert by knowledge, skill, experience, training, or education." In addition, the testimony must "assist the trier of fact."

The Broders Court ruled that the trial court properly excluded the testimony of an emergency room physician that proper treatment by the defendants, also emergency room physicians, would have prevented the death of a patient suffering from a head injury. Broders, 924, S.W.2d 152. Rejecting the plaintiff's argument that the expert was qualified simply because he was a medical doctor, the Court noted that "given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question." Id.

The Broders court also rejected the argument that the expert's testimony was admissible because he possessed knowledge and skill not possessed by people generally. *Id.* Rather, the Court declared that the focus should be on the fit between the subject matter at issue and the expert's familiarity with it. Id. at 153, quoting with approval Nunley v. Kloehn, 888 F. Supp. 1483, 1488 (E.D.Wis.1995). The Court reasoned that the expert's undoubtedly greater knowledge did not establish that his expertise on the issue of cause in fact met the requisites of Rule 702. Id. For example, while the expert knew that neurosurgeons should be called to treat head injuries and what treatments they could provide, he never testified that he knew, from either experience or study, the effectiveness of those treatments in general or in this case. Id. The court concluded that the witness had not been shown to be qualified to testify about the cause in fact of death from an injury to the brain. Therefore, the Court held that the trial court did not abuse its discretion in excluding the expert's testimony. Id.

D. Daubert/Robinson Questions

When preparing to depose plaintiff's expert witness, defense counsel should always prepare a series of questions based on the Daubert/Robinson criteria. Some examples of topic areas for questions to challenge an expert under Daubert/Robinson include:

- What theory / technique / methodology did you use?
- Is this the same theory / technique / methodology that you use outside the courtroom?
- Is this theory / technique / methodology used in other areas?
- How long have you used this theory / technique / methodology (before hired in case)?
- Did you test your theory / technique / methodology? How often?
- Did you keep records of your tests?
- Describe tests.
- Did you use the same method for testing each time tested?
- Is there a way to check your tests? If so, was it done?
- Does your theory-technique-methodology require subjective interpretation of data?
- Have you published theory-technique-methodology?
- Has anyone else?
- Peer reviewed journal?
- Has your theory-technique-methodology been criticized in the community?
- Does your theory-technique- methodology have a rate of error?
- How was it determined?
- Is your theory-technique-methodology generally accepted by the scientific community?

- By majority? By consensus?
- What groups and organizations?
- By any particular individuals recognized as authoritative in field?
- For how long accepted?

Whether plaintiff's expert is a economist retained to discuss lost income, a psychologist retained to emotional anguish, or a statistician retained to provide a disparate impact analysis, defense counsel must be prepare to capitalize on any flaw in the expert's opinion. Originally many thought these battles would be waged almost exclusively by defense attorneys challenging the plaintiff's experts. Experience has shown, however, that cross-motions by plaintiffs frequently are filed in response to motions by defendants and that many plaintiffs' lawyers are raising the issue even without a defense objection. Therefore, it is also important to ensure your experts are not vulnerable to challenges under the Texas Rules of Evidence and Daubert/Robinson.

VI. TRIAL

Although many retaliatory termination and wrongful discharge claims are either dismissed or settled long before trial, developing a trial strategy is important in every case. The strategy should emphasize those areas of the case in which you have gained a strategic advantage over the course of the litigation. Two key aspects of any trial strategy are developing a defense theme and tailoring that theme to the jury. In addition to posturing the case more favorably for settlement, developing a theme from the initial evaluation onward helps provide a consistent, coherent story for the jury.

A. The Theme

Every case tells a story. Defense counsel's theme for the case should tell a story that provides the employer with a strong defense. In retaliatory discharge and wrongful termination cases, a defense theme should at least include the following items: (1) employer is a good place to work; (2) the plaintiff received due process; and (3) management are people too.

1. Good Place to Work

Defense counsel should take every opportunity to remind the jury that the employer provides a good work environment. This task can be accomplished by asking management about the efforts taken to ensure the company is a good place to work, as well as asking plaintiff's former co-workers their thoughts on the company's work environment. Of course, any literature (i.e. industry newsletters, trade publications) lauding the company as a good place to work is also beneficial. The more effective defense counsel conveys the company's efforts to provide a good work environment, the more likely the jury will conclude the company probably treated the plaintiff fairly.

2. Due Process

In addition to effectively communicating that the employer offers a good place to work generally, it is very important that the jury understand that this particular plaintiff received due process in connection with the adverse employment action. Defense counsel should explain the employer's performance review process and the decision to engage in an adverse employment action, emphasizing the reasoning behind the employer's decisions and the fairness that was shown to the plaintiff throughout the process.

3. Management

It is important to humanize the employer by reminding the jury that the company's decision-makers are people too, working hard to provide for their families just like the plaintiff. Often, this goal can best be accomplished by thoroughly preparing the employer's decision-makers for testifying at trial. Members of the company's management must present themselves as honest, fair and compassionate.

B. The Jury

As important as developing a story is to defending the case, defense counsel should also remember to whom they are telling the story. This is especially true with regard to jury selection. Obviously, persons in management positions, small business owners, and individuals associated with these persons are typically good jurors for employers. Union members and people who have suffered an adverse employment action either personally or within their family are typically bad jurors for employers. However, it may not be possible to exclude every potentially harmful juror. Therefore, it is

doubly important that the jury to see the employer in the best possible light.

The key question that employers must ask themselves when developing procedures relating to adverse employment actions as well as preparing to defend a lawsuit is: "how would this look to a jury?" Jurors look to identify with the parties to a lawsuit. Plaintiffs in retaliatory termination or wrongful discharge cases naturally evoke sympathy from a jury. However, if defense counsel's theme includes the items described above, the jury will likely be more open to the employer's point of view.