

TENNESSEE

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I. AT-WILL EMPLOYMENT

A. Statute

There is no statute on at-will employment in Tennessee.

B. Case Law

Under long-established Tennessee case law, an employee-at-will can be discharged, without breach of contract, for good cause, bad cause or no cause at all. *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 443 (Tenn. 1984).

There is a presumption in Tennessee that employment is terminable at will. In order to overcome this presumption, the employer must use specific language which guarantees employment for a definite term. *Loeffler v. Kjellgren*, 884 S.W.2d 463,468 (Tenn. Ct. App. 1994).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In *Rose v. Tipton County Public Works Dep't*, 953 S.W.2d 690 (Tenn. Ct. App. 1997), a county public works employee signed a statement acknowledging that his employment was for no definite period and that he could be terminated at any time without notice. Subsequently, the employer promulgated an employee handbook which outlined a progressive system of discipline. The county terminated plaintiff's employment in a manner contrary to the progressive system. In the plaintiff's breach of employment contract action, the trial court granted summary judgment in favor of the defendant and the court of appeals affirmed. *Id.* at 691.

The court began its analysis by reasserting the long-standing rule in Tennessee that servants are presumed to be employees-at-will. In holding that this employee handbook did not change the employee's status, the court noted:

Even in the absence of a definite durational term, an employment contract still may exist with regard to other terms of employment. In this regard, this Court has recognized that an employee handbook can become a part of an employment contract. In order to consider a contract, however, the handbook must contain specific language showing the employer's intent to be bound by the handbook's provisions. Unless an employee handbook contains such guarantees or binding commitments, the handbook will not constitute an employment contract. As stated by one court, in order for an employee handbook to be considered part of an employment contract, "the language used must be phrased in binding terms, interpreted in the context of the entire handbook, and read in conjunction with any other relevant material, such as an employment application.

Rose, 953 S.W.2d at 692, citing *Claiborne v. Frito-Lay Co.*, 718 F. Supp. 1319, 1321 (E.D. Tenn. 1989) (internal citations omitted). The specific language of the employee handbook did not sufficiently evidence intent on the part of the county to bind itself contractually to the handbook's provisions. At most, the county merely intended the handbook to serve as a guide or source of information for the county's employees.

In *Hamby v. Genesco, Inc.*, 627 S.W.2d 373 (Tenn. Ct. App. 1981), several employees filed suit against their employer, alleging that they were entitled to compensation because their employer had not complied with certain procedures concerning job certification, seniority, "roll-down right," and the payment of guaranteed employment hours as set forth in an employees' handbook which they allege was part of their employment contract. The defendant-employer denied the handbook was part of the employment contract. The trial court found that the handbook became a part of the parties' contract when the employees accepted employment under the conditions outlined in the handbook. The Tennessee Court of Appeals affirmed. *Id.* at 376.

Hamby is easily distinguishable from *Rose*, 953 S.W.2d 690. In *Hamby*, the handbook specifically provided that for so long as the employment relationship continued these policies "shall be The Guaranteed Policies, Practices and Procedures" of the employer. 627 S.W.2d at

shall be the Guaranteed Policies, Practices and Procedures of the Employer. 627 S.W.2d at 693. In *Rose* there was no such language in the employment handbook, and it contained no specific language showing the employer's intent to be bound by the handbook's provisions.

However, in *Williams v. Maremont Corp.*, 776 S.W.2d 78 (Tenn. Ct. App. 1988) plaintiffs became employees of the defendant in the late 1970's, at which point all were provided with a copy of the employee handbook. The handbook explicitly stated that all laid-off employees would be rehired in order of seniority. The plaintiffs were laid off but never recalled, while other laid-off employees with less seniority were called back to work. The trial court granted summary judgment in favor of the defendant; however, the court of appeals reversed, holding that an implied contract did exist. *Id.* at 79.

The court determined that the company's promise of seniority-based job recall was supported by the consideration of improved stability in the work force and better cooperation between management and the employees. The company had no obligation to create the seniority plan but did so anyway. As such, both parties had an enforceable contract whose breach could be remedied by damages. *Williams*, 776 S.W.2d at 81.

It is important to note that the *Rose* court distinguished its outcome from this decision in *Williams* in three specific ways. First, *Williams* dealt with a recall provision while *Rose* concerned a termination/discipline procedure. Second, the *Rose* case seemed to lack the element of employee reliance found in *Williams*. Third, the handbook at issue in *Rose* contained language granting the employer the unilateral right to change any handbook provisions, while the *Williams* decision made no mention of any such analogous handbook language. See *Rose*, 953 S.W.2d at 694-95; *Williams*, 766 S.W.2d at 79-81.

In *Robins v. Flagship Airlines, Inc.*, 956 S.W.2d 4 (Tenn. Ct. App. 1997), an employee handbook did not establish an implied contract where one handbook provision specifically reserved to the employer the right to terminate employees at all times without advance notice.

The handbook, at most, merely announced a policy to improve substandard employee performance and not an enforceable contract. *Id.* at 6.

For persuasive authority, consider *Shelby v. Delta Air Lines*, 842 F. Supp. 999 (M.D. Tenn. 1993), *aff'd per curiam* 19 F.3d 1434 (6th Cir. 1994). In *Shelby* the plaintiff made a claim against his employer for breach of his employment contract. The plaintiff was initially hired by the employer as an at-will employee. The plaintiff alleged that an anti-drug memo his employer issued modified his employment contract. The district court reasoned that a memo is much the same as an employee handbook; therefore, a memo like an employee handbook, may become part of the contract of employment between the employee and the employer. The court stated that the determination of whether a memo becomes part of an employment contract depends upon the specific language of the memo. The court found based upon the language of the memo that a reasonable person could conclude that the employer intended the anti-drug memo to become part of the employment contract. *Id.* at 1006-07.

2. Provisions Regarding Fair Treatment

Currently, there is no relevant law on provisions regarding fair treatment in Tennessee. This is not true. I searched Fair Treatment Employees and received over 500 cases. This requires a paragraph or two of explanation. My quick reading is that Equal Protection Laws and discussions of disparate treatment under such laws is the standard and that a Fair Treatment Standard outside of beyond the same does not exist unless under contract or a municipal code. But please supplement this.

3. Disclaimers

“[W]here an employee handbook specifically provides that it is not a contract and reserves to the employer the unilateral right to amend the handbook's provisions, such

handbook does not, as a matter of law, constitute part of the employment contract between the employer and employee.” *Adcox v. SCT Prods.*, 1997 WL 638275, *3 (Tenn. Ct. App., Oct. 7, 1997).

In *Reid v. Express Logistics*, 2001 WL 1516980, at *4 (Tenn. Ct. App., Nov. 26, 2001), the court stated that:

This Court has also recognized that an employer can preclude a handbook or set of guidelines from being considered an employment contract by reserving a ‘unilateral right’ to change or modify the document. *Rose v. Tipton County*, 953 S.W.2d 690, 693-94 (Tenn. Ct. App. 1997) (citing *Claiborne v. Frito-Lay, Inc.*, 718 F. Supp. 1319, 1321 (E.D. Tenn. 1989)). This general rule is inapplicable, however, to cases where the employer also included unequivocal language demonstrating its intent to be bound by the provisions in the guidelines or handbook. See *Reed v. Alamo Rent-A-Car, Inc.*, 4 S.W.3d 677, 688 (Tenn. Ct. App. 1999).

In *Vargo v. Lincoln Brass Works*, 115 S.W.3d 487 (Tenn. Ct. App. 2003), the plaintiff was terminated as a result of a reduction in force by her employer. The plaintiff sued her employer seeking severance pay pursuant to a company “severance policy” that had been previously adopted. The trial court concluded that the employee had a vested right to severance pay under the employer’s severance policy. The court of appeals affirmed, concluding that the employer’s severance policy contained an enforceable contractual obligation to pay severance pay to eligible employees. The court, in reaching its conclusion, recognized that although both the employer’s Policy Manual and Severance Policy did not explicitly state that the employer guaranteed the payment of severance pay, they also did not contain a specific disclaimer that they were not intended to be contracts or that they were subject to unilateral revision by the employer. Based on language in the severance policy that stated, “severance payments will be paid,” the court construed the Severance Policy against the employer and found that it embodied an enforceable obligation to pay severance benefits to “eligible employees.” *Id.* at 492.

4. Implied Covenants of Good Faith and Fair Dealing

In *Hooks v. Gibson*, 842 S.W.2d 625, 628 (Tenn. Ct. App. 1992), the court found that an implied employment contract existed by virtue of an employee handbook. The court then noted that all parties to contracts are held to the duty of good faith and fair dealing, including the parties to employment contracts. See also *Brock v. Provident Life & Accident Ins. Co.*, 1996 WL 134943 (Tenn. Ct. App., Mar. 27, 1996) (holding that defendant employer did not breach its implied duty of good faith and fair dealing with plaintiff employees by terminating their employment where employees were hired for a temporary assignment and signed acknowledgment forms stating that their employment was at-will).

However, in *Randolph v. Dominion Bank*, 826 S.W.2d 477 (Tenn. Ct. App. 1991), an at-will employee alleged that all general at-will employment “contracts” contain an implied covenant of good faith and fair dealing. The court there rejected the argument, citing to *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. Ct. App. 1981). Tennessee courts have consistently refused to adopt such a modification to the at-will doctrine. *Knox v. Textron Aerostructures*, 1992 WL 353266 (Tenn. Ct. App., Dec. 2, 1992); *Shelby v. Delta Air Lines, Inc.*, 842 F. Supp. 999 (M.D. Tenn. 1993), *aff’d per curiam* 19 F.3d 1434 (6th Cir. 1994); *Nordahl v. Studer Revox Am., Inc.*, 78 F.3d 585 (6th Cir. 1996).

B. Public Policy Exceptions

1. General

In *Crews v. Buckman Labs. Int’l*, 78 S.W.3d 852 (Tenn. 2002), the Tennessee Supreme Court stated that the elements necessary for

[A] typical common-law retaliatory discharge claim are as follows: (1) that an employment-at-will relationship existed; (2) that the employee was discharged; (3) that the reason for the discharge was that the employee attempted to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision; and (4) that a substantial factor in the employer's decision to discharge the employee was the employee's exercise of protected rights or compliance with clear public policy.

Crews, 78 S.W.3d at 862.

2. Exercising a Legal Right

In *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984), Clanton worked for Cain-Sloan as an employee-at-will. On April 25, 1980, she was injured during the course of her employment, prompting her to file a workers' compensation claim. The parties negotiated a full settlement, but Clanton was fired the next day. She brought an action against the company for wrongful discharge. The Supreme Court of Tennessee held that firing an employee for seeking workers' compensation benefits circumvents the very purpose of the act and is unlawful.

In our opinion, a cause of action for retaliatory discharge, although not explicitly created by the statute, is necessary to enforce the duty of the employer, to secure the rights of the employee and to carry out the intention of the legislature. A statute need not expressly state what is necessarily implied in order to render it effectual.

Id. at 445.

The court followed the rationale of the Indiana Supreme Court in *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973) in evaluating the purposes of the Workers' Compensation Act. Although the court did not allow Clanton to recover punitive damages in this case, it held that future claimants would be entitled to collect such damages. *Clanton*, 677 S.W.2d at 445.

It should be noted that, in Tennessee, a "common-law retaliatory discharge claim is available only to private-sector employees." *Clark v. Metro. Gov't of Nashville*, 2017 Tenn. App. LEXIS 226, *3 (Tenn. Ct. App. Apr. 3, 2017) (Quoting *Williams v. City of Burns*, 465 S.W.3d 96, 110 (Tenn. 2015)).

The court in *Harney v. Meadowbrook Nursing Ctr.*, 784 S.W.2d 921 (Tenn. 1990) clarified the employment-at-will doctrine within the context of the retaliatory discharge "exception." The court noted:

Clanton did not create a new exception to the foregoing rule. The Court merely recognized that implicit within the provisions of TENN. CODE ANN. § 50-6-114 a cause of action existed to prevent an employer from utilizing retaliatory discharge as a device to defeat the rights of an employee under the Workers' Compensation Law. The decision was not intended as a license for the courts to enlarge on the employee-at-will rule or create other exceptions to public policy or the common-law in the absence of some constitutional or legislative precedent.

Harney, 784 S.W.2d at 922.

Even with additional legislative exceptions, Tennessee courts have continued to resist expanding the holding in *Clanton*. Thus, in *Anderson v. Standard Register Co.*, 857 S.W.2d 555 (Tenn. 1993) overruled on other grounds by *Perkins v. Metro. Gov't of Nashville*, 380 S.W.3d 73, 78 (Tenn. 2012).

79 (Tenn. 2012), the Supreme Court denied the retaliatory discharge claim of an employee who was terminated while recovering from a work-related injury. In this case, the employee was restricted from work by her physician for over a year. The employer had a long-standing policy that required termination of those employees who had an extended absence, regardless of the reason.

Although the employee argued that allowing her termination would have a chilling effect on the assertion of workers' compensation claims by injured employees, the court held that there was no causal connection between the employee's discharge and the fact that she filed for workers' compensation. The court determined that the discharge was in accordance with a policy provision that applied equally to all and not because a workers' compensation claim had been filed. *Anderson*, 857 S.W.2d at 559.

In *Bales v. Dialysis Clinic, Inc.*, 2004 WL 2709211 (Tenn. Ct. App., Nov. 29, 2004), an employee alleged that he injured his shoulder while lifting a patient at work. The employer discharged the employee before he reached maximum medical improvement because there was no light duty work available and the employee was unable to perform his job due to his disability. The employee alleged that he was discharged in retaliation for filing his workers' compensation claim. The trial court granted the employer summary judgment. The court of appeals affirmed, holding that it is well-settled that termination without any evidence of a causal link to the workers' compensation claim is insufficient to prove retaliatory discharge. In so holding, the court refused "to adopt a rule of law that termination of an injured worker prior to his medical treatment being completed and maximum medical improvement being reached is compelling circumstantial evidence of a causal link between the exercise of workers' compensation rights and termination, thus satisfying the 'substantial factor' requirement." *Id.* at *2.

In *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 558 (Tenn. 1993) overruled on other grounds by *Perkins v. Metro. Gov't of Nashville*, 380 S.W.3d 73, 79 (Tenn. 2012), the court stated:

[T]he following elements are found to establish a cause of action for discharge in retaliation for asserting a workers' compensation claim: (1) The plaintiff was an employee of the defendant at the time of the injury; (2) the plaintiff made a claim against the defendant for workers' compensation benefits; (3) the defendant terminated the plaintiff's employment; and (4) the claim for workers' compensation benefits was a substantial factor in the employer's motivation to terminate the employee's employment.

In *Hayes v. Computer Sci. Corp.*, 2003 WL 113457 (Tenn. Ct. App. Jan. 14, 2003), the plaintiff sustained an injury at work. He filed a workers' compensation claim against his employer and its insurance carrier. The plaintiff proceeded to change jobs. The plaintiff's subsequent employer discharged the plaintiff for having filed a workers' compensation claim against his previous employer. The plaintiff filed a claim for retaliatory discharge. The trial court granted the defendant summary judgment. The court of appeals reversed, holding that a cause of action for retaliatory discharge, although not explicitly created by Tenn. Code Ann. § 50-6-114, did exist and such a cause of action was clearly supported by both the Tennessee Workers' Compensation Law, Tenn. Code Ann. § 50-6-101 *et seq.*, and public policy. *Hayes*, 2003 WL 113457 at *4.

3. Refusing to Violate the Law

In *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822 (Tenn. 1994), the court found a new public policy exception to the at-will employment doctrine. A trucking company had fired two team-truck drivers for refusing to violate safety provisions of the Tennessee Motor Carrier's Act. The court believed that the duties imposed by this Act upon owners and operators of trucks directly affected the safety of truckers and other travelers on Tennessee highways. The court

held that firing these truckers for refusing to operate their vehicle without an adequate safety inspection not only violated the Act but also created a cause of action for retaliatory discharge despite the employee's at-will status. *Id.* at 825.

The Tennessee Supreme Court in *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997), refused to recognize a “clearly expressed public policy” exception to the at-will doctrine for employment terminations based upon failed drug tests. The plaintiff had alleged that her termination for failing a drug test violated her right to privacy. The court determined that such an allegation had no basis in any constitutional or statutory right. In discerning public policy exceptions, the court noted that it does not engage in hypothetical guessing, nor does it attempt to draw from the common law. For a plaintiff to sufficiently identify a public policy exception to the at-will doctrine, she “must point to a clear mandate of public policy, evidenced by an unambiguous constitutional, statutory, or regulatory provision.” *Id.* at 717.

In *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992), Hodges filed suit against S.C. Toof & Co., claiming that he was fired in retaliation for serving on jury duty. Hodges was awarded \$200,000.00 in compensatory damages and \$375,000.00 in punitive damages. The court of appeals, while upholding the jury's finding of retaliatory discharge, vacated the award of damages, stating that under Tenn. Code Ann. § 22-4-108, the exclusive remedy for an employee's discharge due to jury service was reinstatement and lost wages.

The Supreme Court of Tennessee disagreed with the appellate court's pronouncement that the statute regarding jury service provided the exclusive remedy.

[W]e are prepared to recognize a right to recovery for retaliatory discharge in cases where an employer violates a clear public policy evidenced by an unambiguous statutory provision. [citation omitted] We therefore reverse the Court of Appeals' judgment insofar as it holds that the statutory remedies provided by Tenn. Code Ann. § 22-4-108 are exclusive and reinstate the jury award of compensatory damages.

Hodges, 833 S.W.2d at 899.

In *Willard v. Golden Gallon-TN, LLC*, 154 S.W.3d 571 (Tenn. Ct. App. 2004) an employee was terminated by his employer because he obeyed a lawful subpoena. The employee brought suit alleging retaliatory discharge. The trial court granted the employer's motion for summary judgment. The court of appeals vacated the trial court's grant of summary judgment and remanded. The court held "that a claim for retaliatory discharge in violation of [Tennessee] public policy lies in cases where a substantial factor in an employer's decision to terminate an employee [was] the fact that the employee honored a lawful subpoena." *Id.* at 577.

4. Exposing Illegal Activity (Whistleblowers)

Under the Tennessee whistleblower statute, no employee may be “discharged or terminated for refusing to participate in, or for refusing to remain silent about, illegal activities.” *Mason v. Seaton*, 942 S.W.2d 470 (Tenn. 1997), quoting Tenn. Code Ann. § 50-1-304(a). The statute further defines “illegal activities” as those “which are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare.” Tenn. Code Ann. § 50-1-304(c). The plaintiff in *Mason* alerted the police and fire departments that the defendant employer was locking certain doors in the workplace, a violation of federal safety regulations. The plaintiff was discharged six days after an inspection.

The court rejected the defendants' argument that there can never be a statutory violation unless the employer initially directs an employee to lie or conceal the truth. Under this logic, an employee could not necessarily refuse to participate or remain silent unless or until the employer has specifically instructed an employee to act in a certain manner. The court held that to require the employer to explicitly instruct the employee as an essential component of a cause of action

the employer to explicitly instruct the employee as an essential component of a cause of action would undermine the purpose of the statute. *Mason*, 942 S.W.2d at 475. “The clear meaning of the statute is that employees have the absolute right to speak out about illegal activities in their workplaces.” *Id.* at 476.

In *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 531 (Tenn. 2002), the Court held that “Tennessee recognizes both a common law tort and a statutory cause of action for retaliatory discharge.” To succeed on a common law retaliatory discharge cause of action, the claimant must demonstrate that his whistle-blowing activity was a substantial factor in his termination. *Id.*

In order to succeed under a statutory cause of action for retaliatory discharge for violation of Tennessee’s whistleblower statute, Tenn. Code Ann. § 50-1-304 (1999), a claimant must prove that he was discharged solely for refusing to participate in, or for refusing to remain silent about, illegal activities. *Id.* at 535.

However, the common law cause of action for retaliatory discharge for refusal to participate in or remain silent about illegal activities was abrogated and superseded in 2014 by Tenn. Code Ann. § 50-1-304. “Effective July 1, 2014, the Tennessee Public Protection Act was amended to specifically ‘abrogate and supersede the common law with respect to any claim that could have been brought under this section.’” *Williams v. City of Burns*, 465 S.W.3d 96, 110 (Tenn. 2015) (quoting Tenn. Code Ann. § 50-1-304(g) (2014)). “Accordingly, under the statute as amended, in cases in which the plaintiff alleges retaliatory discharge for refusing to participate in illegal activities or for refusing to remain silent about illegal activities, the TPPA is the exclusive basis for relief.” *Id.*; See also *Strong v. HMA Fentress Cnty. Gen. Hosp., LLC*, 194 F. Supp. 3d 685, 689(M.D. Tenn. July 12, 2016). Therefore, a claimant must prove that he or she was discharged solely for refusing to participate in, or for refusing to remain silent about, illegal activities if his or her § 50-1-304 claim is going to succeed.

In *Moore v. Averitt Express, Inc.*, 2002 WL 31302947 (Tenn. Ct. App. Oct. 11, 2002), the plaintiff made statements during a television interview alleging that his previous employer was involved in illegal conduct. Before the interview was aired, the plaintiff was hired by his new employer. This television interview aired before the plaintiff began work in his new job. The day after the interview aired the plaintiff’s new employer terminated the plaintiff. The plaintiff filed suit against the employer alleging retaliatory discharge and that the employer had terminated him in violation of Tenn. Code Ann. § 50-1-304, Tennessee’s whistleblower statute. The trial court held that the plaintiff had failed to meet the criteria required for either a common law or statutory discharge action and dismissed the case. The court of appeals affirmed. The appellate court initially noted that in order to maintain an action for retaliatory discharge, an employee needed to be an at-will employee faced with the choice of reporting an illegality, thereby running the risk of being discharged as a retaliatory result, or remaining silent, thereby keeping his job at the expense of the public interest. The appellate court held the threat of dismissal had to be contemporaneous with the decision to report the illegal activities. The appellate court concluded that because the statements pre-dated the employee’s hiring, they could not form the basis of a retaliatory discharge claim. *Id.* at *4.

The *Moore* court also stated, “Nowhere in the plain language of the [whistleblower] statute is it specified that the employer must have committed the illegal activities about which the plaintiff reported.” 2002 WL 31302947, at *3.

In *Howard v. Life Care Centers of Am., Inc.*, 2004 WL 1870067 (Tenn. Ct. App. Aug. 20, 2004), a doctor alleged that he was wrongfully discharged for complaining to government officials about alleged Medicare violations at his employer’s hospital. The doctor brought a retaliatory discharge action pursuant to Tenn. Code Ann. § 50-1-304. The trial court granted the employer’s motion for summary judgment. The court of appeals affirmed the judgment of the trial court, finding that although a genuine issue of material fact existed as to whether the doctor was an independent contractor and not an employee, the employer did not discharge the doctor but rather chose not to renew his contract upon its expiration. Accordingly, the court held that the doctor was not entitled to the protection of the Tennessee whistleblower statute, and,

therefore, affirmed the trial court. *Howard*, 2004 WL 1870067 at *5.

In *Gossett v. Tractor Supply Co., Inc.*, 320 S.W.3d 777 (Tenn. 2010), the plaintiff sued for common law retaliatory discharge on the theory that he was fired for failure to participate in an alleged illegal activity. The defendants argued that summary judgment was required because there was no evidence that the plaintiff reported the illegal activity. *Id.* at 787. However, the court held that an employee alleging retaliatory discharge for refusing to participate in an illegal activity is not required to report the illegal activity in order to show that the activity violates a clear public policy. *Id.*

III. CONSTRUCTIVE DISCHARGE

In *Campbell v. Fla. Steel Corp.*, 919 S.W.2d 26 (Tenn. 1996), the Tennessee Supreme Court laid out the appropriate analysis to utilize in determining if a plaintiff employee in an employment discrimination action has successfully proven “constructive discharge.” A minority of jurisdictions have adopted the narrow view that an employee must prove that an employer intended his actions so as to force the employee to quit working. The majority rule states that a plaintiff only need prove that the employer “knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.” The court adopted the majority view:

We agree with the majority rule that requires only a showing that a reasonable employer would have foreseen the employee’s resignation, given the intolerable conditions of employment, and hold that to establish a constructive discharge, an employee need only show that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.

Id. at 34. Additionally, in *Perkins v. Metro. Gov’t of Nashville*, 2011 WL 3793498 at * 6 (Tenn. Ct. App. 2011), rev’g in on different grounds, 380 S.W.3d 73 (Tenn. 2012), the court held that “When, as in the present case, a discharged employee freely agrees to surrender any right to be reinstated in her job and receives in exchange valuable consideration equivalent to back pay for all the months between her termination and the date of the settlement, her termination can no longer be considered adverse.”

In *Jessee v. Am. Gen. Life & Accident Ins. Co.*, 2003 WL 165777 (Tenn. Ct. App. Jan. 24, 2003), the plaintiffs were demoted for their failure to properly supervise employees under their command and to take action required for discovery of problems revealed by the audit. The plaintiffs filed complaints alleging, among other things, constructive discharge. The trial court dismissed the plaintiffs’ cause of action for constructive discharge. The court of appeals affirmed. The court reasoned that since one of the employees was still employed by the employer when the amended complaint alleging constructive discharge was filed, the trial court properly dismissed the complaint as no cause of action for constructive discharge yet existed. *Id.* at *11.

In *Walker v. City of Cookeville*, 2003 WL 21918625 (Tenn. Ct. App. Aug. 12, 2003), the plaintiff was a senior management employee at a hospital. After the hospital’s chief executive officer removed the employee from her position, the employee resigned and filed suit alleging that the hospital had constructively discharged her and breached her employment contract.

Following a bench trial, the court concluded that the hospital’s proposed demotion of the plaintiff amounted to a constructive discharge, and the hospital breached the plaintiff’s employment contract. The court of appeals affirmed, holding that the plaintiff was constructively discharged when she was demoted during the term of her written contract, and the hospital breached the plaintiff’s contract when it declined to pay her the severance benefits required by her employment contract. In reaching its holding the court stated that “[t]he doctrine of constructive discharge recognizes that some resignations are coerced and that employers should not be permitted to escape liability simply because they forced an employee to resign.” *Id.*

Courts today recognize two varieties of constructive dismissal. The first, and currently most frequently encountered variety appears in the context of hostile work environment discrimination claims. In these cases, a constructive discharge arises when an employer permits a hostile working environment to render an employee's working conditions so intolerable that resignation is the employee's only reasonable alternative. The second variety of constructive discharge, and the one implicated in the *Walker* case, involves the demotion of executive employees who have a position-specific contract. "[W]hen an employee with a position-specific employment contract resigns after the employer forces the employee to choose among demotion, termination, or resignation, the employer remains liable for breach of contract unless the facts clearly demonstrate a fairly bargained for release of the employer." *Walker*, 2003 WL 21918625, at *7.

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

An employment contract for an indefinite term is a contract at-will and may be terminated by either party with or without cause. *Bringle v. Methodist Hosp.*, 701 S.W.2d 622, 625 (Tenn. 1985).

It is well established that an employment contract for a definite term may only be terminated prior to its expiration for cause, by mutual agreement of the parties or by terms reserved within the contract. *Nelson Trabue, Inc. v. Prof'l Mgmt.-Auto., Inc.*, 589 S.W.2d 661, 663 (Tenn. 1979).

Whether good cause exists to terminate an employment contract is determined on a case-by-case basis, when termination is "objectively reasonable." A trial court's determination that good cause does or does not exist is fact-intensive and turns on the court's assessments of witness credibility. *Video Catalog Channel, Inc. v. Blackwelder*, 1997 WL 581120, at *3 (Tenn. Ct. App. Sept. 19, 1997).

In *Curtis v. Reeves*, 736 S.W.2d 108 (Tenn. Ct. App. 1987), the plaintiff, who performed custodial services in a building owned by the defendant, her son-in-law, engaged in a conversation with one tenant over the defendant's low moral character. Thereafter, defendant discharged the plaintiff. The court of appeals determined that the defendant had good cause to discharge the plaintiff.

The court noted that employees have a duty "to look to the best interest of the business committed to his care." *Curtis*, 736 S.W.2d at 112. As such, employees should do all that is reasonably possible to advance the interests of that business. Generally speaking, "any act of the servant which injures or has a tendency to injure his master's business, interests, or reputation will justify the dismissal of the servant." *Id.* at 112. If it appears that the employer has been, or likely will be, harmed by the employee's actions, then the employer has cause to terminate the employment contract. *See also Smith v. Signal Mountain Golf & Country Club*, 1994 WL 85949 (Tenn. Ct. App. Mar. 9, 1994) (holding that a supervisor's inappropriate sexual comments made within the presence of female subordinates constituted good cause to terminate plaintiff's employment contract since such conduct was incompatible with the proper performance of his duties).

In *Kayem v. Stewart*, 2003 WL 22309466 (Tenn. Ct. App. Oct. 9, 2003), the court held that a doctor's absence from the office, after a warning from his superior that he had exceeded his allotted leave time and was expected to be in the office, amounted to good cause to terminate the doctor since his absence was a breach of his employment contract. Consequently, the doctor was not entitled to severance pay. *Id.* at *6.

In *Biggs v. Reinsman Equestrian Products, Inc.*, 169 S.W.3d 218 (Tenn. Ct. App. 2004), an employee entered into an employment agreement with an employer. The employee was a skilled leather worker, but the employee was deficient in areas such as of hiring workers, training workers, ordering materials, and keeping production going. The employee was unable to improve in these areas even after training. As a result, the employer discharged the employee. The employee brought a breach of contract action against defendant employer alleging that he had been wrongfully discharged. The trial court found for the employee and awarded him one year's salary. The court of appeals reversed and remanded the case to the trial court, finding that the employee had been discharged for good cause and that the lower court had applied the wrong standard in determining that the employee had not been discharged for good cause by requiring a showing of intent, malice, or malfeasance by the employee. The court of appeals held that the employee's "inability to perform the duties required by his position was conduct adverse to the employer's interest," thus the employer's discharge of the employee was proper. *Id.* at 222.

In *Biggs*, the court of appeals stated that the courts of Tennessee have rejected the argument that the scope of a "for cause" termination of employment should be limited to "acts of serious misconduct, intentional wrongdoing, and other intolerable behaviors." 169 S.W.3d at 222. Instead, they have concluded that an employee has been terminated for cause if the employee's termination stems from a job-related ground. *Id.* A job-related ground includes any act that is inconsistent with the continued existence of the employer-employee relationship. Thus, an employee has been terminated for cause if the termination stems from the employee's failure to follow a supervisor's directions, poor job performance or failure in the exercise of assigned duties. See also *Bolen v. Signage Solutions, LLC*, 2005 WL 166956 (Tenn. Ct. App., Jan. 26, 2005) (holding that an employer who terminated an employee did not breach its employment contract with that employee since the employee's failure to perform his assigned duties gave the employer the right to terminate the employment contract for cause, prior to the expiration of its terms, without incurring liability).

In *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 334 (Tenn. 2005), Teter entered into an employment contract with Republic Parking Systems which provided for a severance package upon termination unless Teter was discharged for "gross misconduct, fraud, embezzlement, theft, or voluntary termination." The employer later attempted to change Teter's contract such that he would receive a higher salary but have no severance package. The employee refused to sign the changed employment contract and was discharged as a result. Following his termination, Republic Parking discovered that Teter had been using his business computer during business hours to view pornographic sites on the internet. Upon discovery of this material, Republic Parking notified that Teter's actions constitute "gross misconduct" in violation of the employment agreement and terminated his severance benefits. Teter sued Republic Parking for breach of the employment contract. The trial court granted the employee's motion for summary judgment, holding that the employee was entitled to \$795,037 under the severance pay provision of his original employment contract. The employer appealed on several issues, including whether the employer should be permitted to rely upon after-acquired evidence of the employee's "gross misconduct" in order to deny severance pay. The court of appeals held that the employer was not entitled to use this after-acquired evidence in its attempt to show that the employee engaged in gross misconduct because the employer could not prove by clear and convincing evidence that the employee would have been discharged solely for viewing pornography on his computer. The Tennessee Supreme Court reversed the court of appeals on the burden of proof issue. The court held that when an employer wishes to use after-acquired evidence to prove grounds for a dismissal, the employer must show, by a preponderance of the evidence, that the wrongdoing was so severe that the employee would have been discharged on that ground alone if it had been known to the employer at the time of termination.

B. Status of Arbitration Clauses

The Uniform Arbitration Act, Tennessee Code Annotated § 29-5-301 (2005) *et seq.*, embodies a legislative policy favoring enforcement of agreements to arbitrate. *Benton v. Vanderbilt Univ.* 137 S W 3d 614 (Tenn. 2004) "A written agreement to submit any existing

controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract. . . .” Tenn. Code Ann. § 29-5-302(a) (2005). *Benton*, 137 S.W.3d at 617.

Arbitration is favored by the legislature and the courts as permitting and encouraging a quick, cost effective, and efficient method of dispute resolution which may, nevertheless, be binding on the parties. *T.R. Mills Contractors, Inc. v. WRH Enter.*, 93 S.W.3d 861 (Tenn. Ct. App. 2002). However, parties cannot be forced into binding arbitration on claims which they did not agree to arbitrate, and Tennessee’s version of the Uniform Arbitration Act contains several provisions designed to “prevent parties from being victimized by the very finality that makes arbitration the procedure of choice for certain types of disputes.” *See* Tenn. Code Ann. § 29-5-303. In Tennessee, an agreement to arbitrate must be in writing.

In *Gunby v. Equitable Life Assurance Soc’y*, 971 S.W.2d 7 (Tenn. Ct. App. 1997), the plaintiffs were employed by the defendant, at which time they were allegedly subjected to sexual discrimination and sexual harassment. After leaving their employment because of the harassment, the plaintiffs filed suit against the defendants under the Tennessee Human Rights Act, Tenn. Code Ann. §§ 4-21-101 to 1004. Both plaintiffs had signed employment contracts when they began employment providing for arbitration of any dispute, claim or controversy between the plaintiffs and their employer which would be required by the National Association of Securities Dealers, Inc. (“NASD”). The NASD’s Code of Arbitration Procedure prescribed binding arbitration for disputes, claims, or controversies between employees and member employers of the NASD. Shortly after the plaintiffs signed these contracts, the NASD amended its Code of Arbitration Procedure to provide for arbitration for claims arising out of employment termination. Consequently, the defendants moved the trial court to compel the plaintiffs to submit their claims to arbitration. The trial court denied the motion, and the defendant appealed.

The court of appeals reversed and remanded with instructions for the trial court to compel arbitration. *Gunby*, 971 S.W.2d at 11.

The *Gunby* court looked to federal authority from the United States Supreme Court and the Sixth Circuit Court of Appeals to determine whether statutory claims under the Tennessee Human Rights Act may be subject to binding arbitration. The court determined that they could and that the arbitration clause at issue in this case proscribed binding arbitration for these sexual discrimination and sexual harassment claims. *Gunby*, 971 S.W.2d at 11.

In *Samson v. Hartsville Hosp., Inc.*, 1997 WL 107167 (Tenn. Ct. App. Mar. 12, 1997), plaintiff doctor and defendant hospital entered into a one-year Physician Agreement, which was later renewed for another year by written approval of both parties, whereby the doctor would establish a practice within the hospital and the hospital would provide advancements up to \$15,000 per month to the doctor. The contract provided that either party could terminate the contract at any time without notice if the termination was for cause. Either party could rescind without cause upon 60 days’ notice. The contract contained a stipulation that allowed either party to request arbitration to resolve a conflict if notice of an intent to terminate the agreement was given.

The hospital owners later sold the hospital. The new owners provided notice of termination and requested reimbursement of advancements, now totaling \$154,614. Plaintiff rejected the request, and the new owners invoked arbitration. The plaintiff filed a declaratory judgment action to determine if he was legally obligated to repay the advancements or to arbitrate the dispute. The trial court enjoined the new owners from pursuing arbitration, and the court of appeals reversed.

The court noted that the dispute over advancements was one which arose under the contract. As such, the arbitration clause controlled in order to resolve “any disagreement.” *Samson*, 1997 WL 107167, at *3. The evidence clearly showed that the parties intended in the contract for advancement repayment disagreements to be resolved via arbitration, should one

party request it. As a side note, the court also determined that it was of no consequence under the Uniform Arbitration Act, Tenn. Code Ann. § 29-5-303, that the one opposed to arbitration was the one who initiated the summary determination of arbitrability. *Id.* at *2.

In *Fontaine v. Weekly Homes, L.P.*, 2003 WL 21946721 (Tenn. Ct. App. Aug. 13, 2003), the plaintiff commenced an action against her employer. The employer contended that a provision contained in its employee handbook constituted a contract between the parties to submit claims of disputes between them to binding arbitration and submitted a motion to compel arbitration to the trial court. The trial court denied the defendant's motion to compel arbitration and ordered the parties to non-binding mediation. The Tennessee Court of Appeals affirmed, holding that the employer "failed to carry its burden of proving that a written, enforceable arbitration agreement existed between it and the employer." *Id.* at *2. The court found that the arbitration provision in the dispute resolution section of the handbook specifically stated that it did "not establish any of the terms of employment." Thus, the court said the language of the handbook was not sufficient to demonstrate the employer's intent to be bound to the arbitration provision. The court stated that "[i]n deciding whether to grant a motion to compel arbitration, the threshold issue for the court is whether the parties have entered into a written agreement to arbitrate." The court said the plaintiff had not entered into a written agreement to arbitrate, therefore the plaintiff could not be forced to arbitrate her claim. *Id.*

In *Erwin v. Moon Products*, 2003 WL 21797584 (Tenn. Ct. App. Aug. 5, 2003), the plaintiff entered into a "Membership Agreement" with his prospective employer. Thereafter, the parties entered into an "Employment Agreement" which provided that the plaintiff was to serve as President and CEO for his employer for five years. The Employment Agreement did not contain an arbitration clause; however, the Membership Agreement did. A year into his employment contract, the plaintiff was notified by his employer that his employment contract was being terminated for cause. The plaintiff filed suit based on the Employment Agreement.

His employer served him with a demand for arbitration based on an arbitration clause in the Membership Agreement. The trial court ruled that the arbitration clause in the Membership Agreement did not apply to the Employment Agreement. The court of appeals affirmed, holding that the Employment Agreement of the plaintiff did not include an arbitration clause and that the Membership Agreement's arbitration clause was not included in the employment agreement when the parties had an opportunity to include the language of the Membership Agreement in the Employment Agreement. The court reasoned that the Membership Agreement was a separate agreement from the Employment Agreement, and the Employment Agreement did not expressly or impliedly incorporate the whole of the Membership Agreement. Therefore, the court said that the plaintiff was not subject to arbitration and upheld the trial court's denial of the motion to compel arbitration. *Id.* at *6.

In *Brown v. Balaton Power, Inc.*, 2003 WL 23099678 (Tenn. Ct. App. Dec. 31, 2003), the plaintiff was hired as the President and CEO of the employer's office in Franklin, Tennessee, and signed an employment contract to that effect. Thereafter, the plaintiff voluntarily stepped down from his position and exercised an option in his employment contract to be appointed Senior Vice-President of Marketing. A year later after an investigation into some allegations against the plaintiff, the employer exercised its right to terminate the plaintiff's employment agreement for just cause. The plaintiff filed suit against his employer for breach of the employment agreement.

The defendant submitted a motion to compel arbitration based on the language found in the employment contract. The trial court rejected the defendant's motion to compel arbitration. The court of appeals affirmed. The court stated that the language of the "governing laws" section in the employment contract was ambiguous and the intent of the parties was not clear from reading the language as written. The first section contemplated a cause of action for breach of the agreement being "commenced and maintained only in a court of appropriate jurisdiction." A second section required arbitration in the same appropriate jurisdiction set out in the first section.

The conflict between the two sections was unavoidable. The court said that except through a strained reading that ignored or avoided words, the two sections could not be reconciled. Due to the unresolvable ambiguity of the language and Tennessee's rule of contract interpretation, the court found that the first section should be given effect and the latter section rejected. As a result, the court of appeals held that the trial court was correct in rejecting the motion to compel

arbitration since there was no contractual agreement between the parties to arbitrate. *Id.* at *6.

“Because the contract in this case is one that involves interstate commerce, the [Federal Arbitration Act] applies to ensure that the arbitration agreement between the parties is enforced according to its terms The purpose of the FAA is ‘to ensure the enforceability, according to their terms, of private agreements to arbitrate.’” *Brown*, 2003 WL 23099678 at *3, citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); and *Volt Info. Science, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1999). However, parties cannot be forced to arbitrate claims that they do not agree to arbitrate. As the United States Supreme Court has stated,

Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Volt Info. Sciences, 489 U.S. at 479 (citations omitted).

V. ORAL AGREEMENTS

A. Promissory Estoppel

In *Campbell v. Precision Rubber Prods. Corp.*, 737 S.W.2d 283 (Tenn. Ct. App. 1987), the plaintiffs were long-time employees of defendant corporation under at-will contracts who had employee retirement pension plans. These plans were outlined and described in a printed booklet, which laid out available options. The booklet also included a provision that the benefits were intended to be permanent but that the employer reserved the right to amend, suspend or terminate the plan. In 1979, plaintiffs were notified that their employment was being terminated.

The Administrator of the Welfare Benefits Plan conferred with each plaintiff individually and informed them about available benefits and options as to the method of payment. Each plaintiff elected to receive a lump sum. Two years later, defendant by letter informed the plaintiffs that their insurance coverage was being switched to a different carrier. Two years after this, the defendant informed each plaintiff by letter that hospital and surgical benefits would also be discontinued. Plaintiffs filed suit, but the trial court dismissed the case under ERISA. The court of appeals affirmed. *Id.* at 286.

Plaintiffs argued that the Administrator’s representations purported to modify the booklet provisions; therefore, the provision allowing modification by the employer was improper. The court rejected this argument. The doctrine of estoppel requires (1) reliance by the plaintiffs on the statement, without opportunity to know the truth, and (2) an action on the part of the plaintiffs based upon that reliance, which results in a detriment to the plaintiffs. *Campbell*, 737 S.W.2d at 286. The plaintiffs here “were charged with the knowledge that the benefit plan could be amended, suspended, or terminated at any time.” *Id.* at 286. Therefore, reliance on the Administrator’s representations to the contrary were unreasonable and misplaced. Also, there was no evidence that the plaintiffs in any way acted to their detriment on these representations.

Promissory estoppel did not apply in this case. See also *Adcox v. SCT Products*, 1997 WL 638275 (Tenn. Ct. App. Oct. 17, 1997) (holding that plaintiff’s promissory estoppel claim failed because of failure to rebut presumption of at-will employment). But see *Richardson v. Goodall Rubber Co.*, 1986 WL 9002 (Tenn. Ct. App. Aug. 19, 1986) (upholding plaintiff’s promissory estoppel claim and awarding damages for the failure of the employer to provide a job after employee quit former job in reliance upon promise of new job from employer).

In *Shedd v. Gaylord Entm’t Co.*, 118 S.W.3d 695 (Tenn. Ct. App. 2003), the court stated, “the Tennessee Supreme Court has taken a more restrictive view, limiting the application of promissory estoppel to ‘exceptional cases where to enforce the statute of frauds would make it an instrument of hardship and oppression, verging on actual fraud.’” *Id.* at 700. See also *Baliles v. Citicorp Sav.*, 578 S.W.2d 621 (Tenn. 1979); *D. & S. Coal Co. v. Int’l UMW Union*, 678 F. Supp.

Cities Serv., 518 S.W.2d 621 (Tenn. 1979); *D & S Coal Co., Inc. v. USA Corp.*, 618 F. Supp. 1318 (E.D. Tenn. 1988); *GRW Enterprises, Inc. v. Davis*, 797 S.W.2d 606 (Tenn. Ct. App. 1990).

The court of appeals held that since there were no allegations of any conduct by the defendant that verged on actual fraud, the case was not one of those “exceptional cases” where promissory estoppel should be applied. *Shedd*, 118 S.W.3d at 700; *see also Glidewell v. Russell*, 2004 WL 2891694 (Tenn. Ct. App. Nov. 17, 2004) (where plaintiff sued to eject a deceased brother’s girlfriend from a house that plaintiff had previously told her she could stay in for the remainder of her life, promissory estoppel did not allow her to stay in the house under the terms of the original promise; court noted that in a claim for promissory estoppel, “the remedy granted for breach may be limited as justice requires,” *Id.* at *7, and ruled that defendant could recover only for expenses made in improving the property after she had been promised that she could remain).

B. Fraud

In *Dobbs v. Guenther*, 846 S.W.2d 270 (Tenn. Ct. App. 1992), the plaintiff was a shareholder-director in the defendant corporation, an automobile dealership, along with the defendants. The corporation, shortly after its incorporation, set up a partnership for the purpose of acquiring a second dealership. Two days later, this partnership acquired eight acres of property. The directors also executed an “Agreement Restricting Transferability of Shares,” which laid out eight occurrences which would require a shareholder to sell his interest in the corporation. One such occurrence listed was termination of employment. The partnership agreement was also subject to this same agreement. Six years later, three of the four directors-shareholders (including the plaintiff) formed a Texas corporation for the purpose of operating another automobile dealership. Shortly thereafter, the first partnership quitclaimed the property to be used for the Lexus dealership to a second partnership formed by these three directors. The three again signed an “Agreement Restricting Transferability of Shares.” The plaintiff then resigned as general manager of the first dealership and became the general manager of the second dealership. The remaining shareholders-directors of the initial corporation asserted that they now had a right to repurchase the plaintiff’s shares in that corporation.

Plaintiff filed an action for fraud, alleging that the other directors had induced him to enter into the transaction acquiring the second dealership after they had already decided to terminate him as an employee as part of a fraudulent scheme to obtain his property at less than fair market value. The trial court dismissed the claim, and the court of appeals affirmed. The court delineated the prima facie case for an action in fraud:

Actions for fraud contain four elements: (1) an intentional misrepresentation of a material fact, (2) knowledge of the representation’s falsity, and (3) an injury caused by reasonable reliance on the representation. The fourth element requires that the misrepresentation involve a past or existing fact or, in the case of promissory fraud, that it involve a promise of future action with no present intent to perform. Nondisclosure will give rise to a claim for fraud when the defendant has a duty to disclose and when the matters not disclosed are material.

Dobbs, 846 S.W.2d at 274. The court determined that the plaintiff had failed to state a claim, primarily because the first partnership acquired the property long before the alleged fraud occurred.

In *Lee v. Hippodrome Oldsmobile, Inc.*, 1997 WL 629951 (Tenn. Ct. App. Oct. 10, 1997), the plaintiff left her place of employment and accepted a position with the defendant company as an at-will employee based upon oral promises of comparable salary, bonuses and “long-term, permanent” employment. Two weeks later, the defendant discharged the plaintiff. Plaintiff filed suit for promissory fraud, implied contract and outrageous conduct; however, the trial court dismissed the action. The court of appeals reversed on the promissory fraud case, holding that plaintiff sufficiently stated a claim under these facts.

The court expressly noted that its decision was not meant to carve out an exception to the employment-at-will doctrine. The plaintiff had no contractual claim based upon the oral promise of long-time employment. Rather, the court recognized plaintiff's claim for promissory fraud, imposing liability when the employer made the offer of long-term, permanent employment with no present intention of keeping that promise. *Lee*, 1997 WL 629951 at *2.

In *Shahrdar v. Global Hous., Inc.*, 983 S.W.2d 230 (Tenn. Ct. App. 1998), the defendant corporation induced the plaintiff to move his family to Tennessee and to manage certain hotel properties. Plaintiff moved to Tennessee and worked for defendants for several months but without pay. Plaintiff quit and filed suit for breach of contract, intentional and negligent misrepresentation, promissory fraud and intentional and negligent infliction of emotional distress. Defendants continually refused to fully comply with discovery orders, and the trial court eventually granted a default judgment. A jury assessed damages for breach of contract, intentional misrepresentation and promissory fraud. The trial court suggested a remittitur which the plaintiff accepted under protest.

The court of appeals affirmed in part and reversed in part. The court determined that the plaintiff could recover for breach of contract; however, the evidence did not support any recovery under intentional misrepresentation or promissory fraud because there was not a sufficient showing of damages beyond the amount recovered under the contract. The standard applied was compensation "for the actual injuries sustained by placing [the plaintiff] in the same position he would have occupied had the wrongdoer performed and the fraud not occurred." *Shahrdar*, 983 S.W.2d at 238. No matter the theory of recovery, the plaintiff may only recover once.

In *Glanton v. Bob Parks Realty*, No. M2003-01144-C0A-R3-CV, 2005 WL 1021559 (Tenn. Ct. App. Apr. 27, 2005), Glanton purchased a home in Nashville that had been marketed by the defendant realtors. Included in the marketing was an assertion that the house had more than 5,800 square feet. After closing on the house, an appraisal report informed the buyer that the house included only 4,600 square feet. The court dismissed the plaintiff's contention that the defendants violated the Consumer Protection Act and then addressed the plaintiff's claim of fraudulent or intentional misrepresentation. The court first noted the elements of an intentional misrepresentation claim:

[T]o prove a claim based on fraudulent or intentional misrepresentation, the plaintiff must show that: (1) the defendant made a misrepresentation of an existing or past fact; (2) the representation was false when made; (3) the representation related to a material fact; (4) the false representation was made either knowingly or without belief in its truth or recklessly; (5) the plaintiff reasonably relied on the misrepresented material facts; and (6) the plaintiff suffered damage as a result of the misrepresentation.

Id. at *7. The court, citing *Shahrdar*, held that to prove a claim of fraudulent or intentional misrepresentation, "[i]n essence, there must be an intentional misrepresentation of an existing material fact, reasonable reliance on which causes damage to the relying party." *Id.* The court then noted that the defendant's misrepresentations of the square footage were based on some actual (though erroneous) calculations of square footage. The court held that although the defendant's actions could constitute negligent misrepresentation, it did not amount to the knowing or reckless standard required for an intentional misrepresentation claim.

C. Statute of Frauds

In *Wilson v. Smythe*, 2004 WL 2853643 (Tenn. Ct. App. Dec. 10, 2004), an employee/president of a closely held corporation sought to enforce a purported oral agreement requiring the employer company to purchase his shares of stock in partial consideration for the employee's continued employment. The owner contended that the purported 1997 agreement was unenforceable under § 47-8-319, which codified the Statute of Frauds in effect in 1997 and

was unenforceable under § 47-8-317, which codified the Statute of Frauds in effect in 1977 and required that agreements pertaining to the sale or purchase of securities be in writing. The appellate court found that the 1997 Statute of Frauds embodied in § 47-8-319 applied and the owner was the party against whom enforcement was sought. The court held that the letter from the employee sent in 2000 satisfied the "writing" component of the Statute of Frauds. However, the letter at issue was not signed by the owner, nor was any other writing sufficient to satisfy § 47-8-319(a) signed by him. Thus, the appellate court held that the employee failed to satisfy an essential component of § 47-8-319(a). The letter to the owner was mailed after the owner had denied the purported agreement and refused to purchase the employee's shares. Thus, because the owner had already nullified the purported agreement prior to the letter being sent, the employee was not afforded the benefit of the written confirmation exception in § 47-8-319(c). The oral agreement was unenforceable because it violated the Statute of Frauds in effect in 1997. *Id.* at *6-7.

In *Johnson v. Allison*, 2004 WL 2266796 (Tenn. Ct. App. Oct. 7, 2004), the plaintiff sued for breach of an option contract to purchase land in Davidson County. The court held that the language in the option contract was not ambiguous and that the buyer had not exercised the option contract before it expired. The buyer argued that there was an oral agreement to extend the option past the written deadline. The buyer further asserted that the oral agreement should not be barred by the Statute of Frauds under the exception of equitable estoppel. The court noted that “[s]ince the application of promissory estoppel in contract cases creates an exception to the Statute of Frauds, it should not be applied too liberally lest the exception swallow the rule.” *Id.* at *8. The court declined to apply the defense of equitable estoppel.

In *Ledbetter v. Ledbetter*, 163 S.W.3d 681 (Tenn. 2005), a couple had entered into an oral marital dissolution agreement (“MDA”), which had been recorded in the course of the mediation. The husband subsequently repudiated his agreement before the MDA was presented to the court. The court held that the oral MDA was not enforceable, stating a valid consent judgment requires the consent of the parties at the time that the agreement is sanctioned by the court. Here, the husband did not consent at the time of the judgment – the mediation process at the time of his consent was not a “sanction of the court” that would bind him to his agreement. *Id.* at 685. Additionally, because the agreement had not been reduced to writing and signed by the parties, it was not an enforceable contract.

In *Shedd v. Gaylord Entm’t Co.*, 118 S.W.3d 695 (Tenn. Ct. App. 2003), the developer of a new record label made oral offers of multi-year employment contracts to the plaintiffs. The plaintiffs accepted the offers, but before work was scheduled to begin, the label’s parent company sent letters to the plaintiffs rescinding the offers. The plaintiffs brought suit against the parent company for breach of contract. The trial court granted the defendant’s motion for summary judgment on the grounds that the oral contracts violated the Statute of Frauds. The court of appeals affirmed the trial court. The court said that the Tennessee Statute of Frauds is a rule of law which forbids a plaintiff from enforcing agreements or contracts which are not to be performed within the space of one year from their making unless a written note or memorandum of the alleged agreement is signed by the parties. The court also stated that “[i]t is also beyond dispute that a promise to reduce to writing a verbal agreement which is unenforceable under the Statute of Frauds does not make the agreement binding.” *Id.* at 698, citing *Patterson v. Davis*, 192 S.W.2d 227 (Tenn. Ct. App. 1945). The court found that in the case at hand no written contracts existed between the plaintiffs and the defendant. The court held that since all of the plaintiffs’ contracts were oral contracts that could not be performed within the space of one year, the oral contracts were unenforceable under the Statute of Frauds. *Shedd*, 118 S.W.3d at 698.

An exception to the Statute of Frauds is the equitable doctrine of partial performance, which in Tennessee can be applied to all types of oral contracts except those for the sale of land. See *Schnider v. Carlisle Corp.*, 65 S.W.3d 619 (Tenn. Ct. App. 2001); *Baliles v. Cities Serv. Co.*, 578 S.W.2d 621 (Tenn. 1979). Tennessee courts have not articulated definite standards for determining the nature or the magnitude of the performance that is necessary to bring an oral contract out of the Statute of Frauds other than to say that it depends upon the particular facts of

each case. *Schnider*, 65 S.W.3d at 622; *Foust v. Carney*, 329 S.W.2d 826, 829 (Tenn. 1959).

Past cases indicate that a plaintiff's partial performance has been deemed sufficient to bring a multi-year employment contract out of the Statute of Frauds only where that performance has been substantial and where it began after the effective date of the contract. *Shedd*, 118 S.W.3d at 698-99. The court in *Shedd* found that the plaintiffs did not substantially perform any part of their oral employment contracts; the defendants did not engage in any conduct that verged on actual fraud; the defendants "simply decided to abandon its plan to launch a new record label before entering into enforceable contracts with the plaintiffs." *Id.* at 700.

VI. DEFAMATION

A. General Rule

In *Spicer v. Thompson*, 2004 WL 1531431 (Tenn. Ct. App. July 7, 2004), a city administrator was held to be liable for the defamation of a plaintiff sheriff. The administrator made statements to the press that the plaintiff had been fired as a result of the plaintiff's refusal to take a polygraph test inquiring about police involvement in "tipping off" drug dealers in the local area. In fact, the administrator knew that the officer had been compliant with any requests that he take a polygraph test. The court provided a detailed opinion about the defamation issue (including a well-placed quote from *Othello*), and held that the administrator knew the accusations he made to the press were false at the time he made them. *Id.* at *21.

In *Byrd v. State*, 150 S.W.3d 414 (Tenn. Ct. App. 2004) the plaintiff-independent-contractors were hired to clean a medical clinic operated by defendant-state. Plaintiffs alleged that they were sexually harassed by one of the clinic's physicians, and upon complaint, were subjected to retaliation and further harassment. Although the court did not require plaintiffs to prove injury to reputation in response to a Rule 12.02(6) motion to dismiss, plaintiffs were required to allege injury to reputation in their complaint. *Id.* at 421.

In *Ferguson v. Union City Daily Messenger*, 845 S.W.2d 162 (Tenn. 1992), a former county employee brought suit against newspaper and its editor asserting, inter alia, defamation. The court held that plaintiff was a public official; therefore, plaintiff was required to prove "malice" in order to sustain his cause of action for defamation. The court concluded that there was no material evidence to support a finding of malice; therefore, the former county employee failed to establish his claim of defamation. *Id.* at 167.

Communications which imply or intimate falsity by their nature and tone can qualify as false statements of fact for the purposes of defamation. *Parks v. Nelson*, 2002 WL 523458 (Tenn. Ct. App. Apr. 9, 2002).

In *Wagner v. Fleming*, 139 S.W.3d 295 (Tenn. Ct. App. 2004), citing Restatement (Second) of Torts § 623A (1974), the court of appeals recognized the tort of injurious falsehood in addition to defamation:

In order to establish a claim for injurious falsehood, a plaintiff must establish the following:

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if

(a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity

Id. at 302.

1. Libel

In *Perry v. Fox*, 1994 WL 715740 (Tenn. Ct. App. Dec. 21, 1994), the plaintiff worked for the defendant when he was discharged for malicious destruction of property, impersonation of another employee, and incorrectly accounting work hours. This information was published via an internal company memorandum. The court of appeals held that this did not sufficiently satisfy the “publication” requirement because the memo was circulated in the ordinary course of business to inform others within the company of the circumstances behind the plaintiff’s discharge. *Id.* at *2.

In *McWhorter v. Barre*, 132 S.W.3d 354 (Tenn. Ct. App. 2003), plaintiff-pilot filed suit against defendant-co-pilot for defamation based upon a letter the co-pilot wrote to the FAA, which alleged that the pilot slept while in flight and was medically unfit. The court addressed defamation by and among co-workers and held that impairment of reputation and standing in the community, which is a compensable damage, may include damage to a plaintiff’s reputation among co-workers, as well as his reputation among prospective employers. *Id.* at 367.

2. Slander

In *Forsman v. Rouse*, 2008 WL 2437644 (M.D. Tenn. Jun 16, 2008), the plaintiff was a securities broker who was involved in an argument with a client. The client called the plaintiff’s supervisors and accused him of acting in a threatening manner and using the “f-word” in an argument. The plaintiff then filed suit against the client for defamation. In denying the client’s motion for summary judgment, the court held that a statement which subjects an individual to disgrace within his professional community is capable of defamatory meaning. *Id.* at *4.

In *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818 (Tenn. 1994), the Tennessee Supreme Court determined that the six-month statute of limitations for slander actions begins to run on the day the “words are uttered” and not when the individual discovers that the words have been uttered. *Id.* at 821.

In *Rose v. Cookeville Reg’l Med. Ctr.*, 2008 WL 2078056 (Tenn. Ct. App. May 14, 2008), a hospital employee brought a claim for defamation against several other employees who allegedly made slanderous remarks about her work performance. The plaintiff alleged that the statements were made over the course of a year until her termination. The court ruled that defamation is not a continuous action, and an allegation of slanderous statements made over the course of a year is not sufficient to defeat the statute of limitations even when part of the time period falls within the six-month limitation. *Id.* at *5.

B. References

Any employer that, upon request by a prospective employer or a current or former employee, provides truthful, fair and unbiased information about a current or former employee’s job performance is presumed to be acting in good faith and is granted qualified immunity for the disclosure and consequences of the disclosure. The presumption of good faith is rebuttable upon a showing by a preponderance of the evidence that the information disclosed was:

- (1) Knowingly false;
- (2) Deliberately misleading;
- (3) Disclosed for a malicious purpose;
- (4) Disclosed in reckless disregard for its falsity or defamatory nature; or
- (5) Violative of the current or former employee’s civil rights pursuant to current employment discrimination laws.

Tenn. Code Ann. § 50-1-105. In *Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 575 (Tenn. 1999) (citations omitted), the court held that under Tenn. Code Ann. § 50-1-105:

[M]ere negligence is not enough to rebut the presumption in favor of the employer's good faith. In contrast, defamation may be proven by establishing that a party published a false and defaming statement with reckless disregard for the truth or with negligence in failing to ascertain the truth. Thus . . . an employer could not be held liable for disclosing allegedly defamatory information about which it was only negligent in ascertaining the truth. It follows, therefore, that an employer should not be held liable for disclosure of this same information when it is self-published by a former employee.

C. Privileges

Tennessee courts have held that a “qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty to a person having a corresponding interest or duty[.]” *S. Ice Co. v. Black*, 136 Tenn. 391, 189 S.W. 861, 863 (1916); *Pate v. Serv. Merch. Co.*, 959 S.W.2d 569, 576 (Tenn. Ct. App. 1996). Under these circumstances, a plaintiff must prove that defamation was made with actual malice.

The question occasionally arises as to how much an employer can tell its employees regarding the termination of a fellow employee. As a practical matter, the employer’s qualified privilege in the event of an employee termination is limited to stating to its employees that a discharge has taken place and the grounds therefor, stated in general terms. See *Dickson v. Nissan Motor Mfg. Corp., U.S.A.*, 1988 WL 9805 at *8 (Tenn. Ct. App. Feb. 10, 1989).

In *Maynard v. Vanderbilt Univ.*, 1993 WL 156156 (Tenn. Ct. App. May 14, 1993), a former employee brought a defamation action based upon statements made by a university official in two letters responding to prior letters sent from non-university personnel criticizing the plaintiff’s discharge. Plaintiff alleged that these communications were not privileged since they were sent to individuals not part of the university community. The court of appeals determined that these two letter-writers were acting as agents of the plaintiff in the first place. As such, they were treated as communications to the plaintiff. There was no publication. Also, these statements were subject to the qualified privilege. *Id.* at *7-8.

Tennessee courts recognize conditional or qualified privileges over matters which are of a common interest and a public interest, meaning that the privilege may be lost if the defendant does not act in good faith or acts with actual malice. *Pate v. Serv. Merch. Co.*, 959 S.W.2d 569, 575-76 (Tenn. Ct. App. 1996).

In *Whitehurst v. Martin Med. Ctr., P.C.*, 2003 WL 22071467 (Tenn. Ct. App. Aug. 28, 2003), a pharmacist spread a rumor among his coworkers, which he believed to be true but was actually false, that a local doctor had contracted HIV. The doctor sued under a theory of defamation, and the pharmacist asserted a qualified privilege. The court held that the pharmacist was not protected by a qualified privilege because he did not have a recognizable interest or duty which corresponded to the information. Nonetheless, the court admitted evidence which suggested that the pharmacist had believed the rumor to be true, under the rationale that defamation is not a strict liability tort. Such evidence can disprove requisite intent. *Id.* at *6.

Reporting a co-worker’s suspected misconduct to a regulatory agency may be protected by a qualified privilege if the information is of public interest and the person or agency to which the information is communicated is authorized to take action if the information is true. However, for the qualified privilege to apply, the reporting person must reasonably believe that the information is true. Thus, a co-pilot was not protected by qualified privilege for reporting a pilot’s alleged misconduct to the FAA, even though such misconduct is obviously of public

interest, and the FAA had authority to act on the information. The co-pilot was not protected by the qualified privilege because the co-pilot could not reasonably believe that the information was true. *McWhorter v. Barre*, 132 S.W.3d 354 (Tenn. Ct. App. 2003).

D. Other Defenses

1. Truth

“Truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true.” *Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978).

2. No Publication

In *Pate v. Serv. Merch. Co.*, 959 S.W.2d 569 (Tenn. Ct. App. 1996), the plaintiff-employee brought a defamation action against her former employer, who fired her for allegedly stealing a co-worker’s credit cards. The court noted that the plaintiff to defamation action must prove that a false and defamatory statement was published concerning the plaintiff and that injury flowed from the publication of the defamatory statement. *Id.* at 573. Tennessee no longer makes a distinction between “libel per se” and “libel per quod.” Presumed damages are no longer permissible in Tennessee defamation actions. *Id.* at 573-74 (citing *Nichols*, 569 S.W.2d at 420).

3. Self-Publication

In *Sullivan v. Baptist Mem’l Hosp.*, 995 S.W.2d 569 (Tenn. 1999), the Tennessee Supreme Court overturned the court of appeals’ holding that, in an employment context, a compulsory self-publication by the defendant could constitute publication for the purpose of defamation. Thus, an employee’s responses to questions regarding former employment, even if required by the prospective employer, do not satisfy the publication element of defamation. In so holding, the Tennessee Supreme Court aligned Tennessee with the majority of jurisdictions, and further based its decision on the notion that recognizing even compulsory self-publication would have a chilling effect on speech. *Id.* at 574.

4. Invited Libel

There are no Tennessee statutes with regard to invited libel. The Supreme Court of Tennessee has held that “the publication of a libel or slander invited or procured by plaintiff is not sufficient to support an action for defamation . . .” *Freeman v. Dayton Scale Co.*, 19 S.W.2d 255, 257 (Tenn. 1928).

5. Opinion

In *Raiteri v. RKO Gen., Inc.*, 1989 WL 146743 (Tenn. Ct. App., Dec. 6, 1989), a television reporter sued his former employer after being discharged for “biased and unbalanced reporting,” an opinion based upon the uncontroverted facts surrounding a reporting project. *Id.* at *1. The court of appeals rejected plaintiff’s defamation claim, noting that mere opinions of otherwise true facts cannot be a basis for a defamation action.

E. Job References and Blacklisting Statutes

There are no Tennessee statutes that deal specifically with “blacklisting” of employees. *But see Bonham v. Copper Cellar Corp.*, 476 F. Supp. 98 (E.D. Tenn. 1979). The plaintiff in *Bonham* alleged that defendant Chase attempted to interfere with her employment at the Smuggler’s Inn restaurant following her discharge from the Copper Cellar by making certain comments to the landlord at the Smuggler’s Inn. The court found that defendant did not suggest that the landlord pass this information on to plaintiff’s new employer. Nevertheless, the landlord did contact the manager of Smuggler’s Inn and it was reasonably foreseeable that he would do so

and contact the manager of Smuggler's Inn and it was reasonably foreseeable that he would do so. No action was ever taken against plaintiff by Smuggler's Inn because of this phone call. The court stated that under the law, former employers are not permitted to punish former employees by seeking to have them "black-listed" by potential employers. The court found that in this case the plaintiff had failed to sustain her burden of proof with regard to the alleged "blacklisting" by her former employer. *Id.* at 103.

F. Non-Disparagement Clauses

In *Green v. Moore*, 2004 WL 1745443 (Tenn. Ct. App. Aug. 3, 2004), the appellant former employee filed suit against defendant, her former employer, to recover damages resulting from an insulting remark allegedly made in violation of a prior settlement agreement that contained a non-disparagement provision. In pertinent part the settlement provided: "The parties agree that each shall refrain from engaging in any conduct or making any statements, oral or written, which would disparage, harm, or otherwise adversely or negatively impact or affect the reputation or employment prospects of the other, and in the case of ShoLodge, its affiliates, subsidiaries, officers, directors, employees, shareholders or attorneys, regardless of whether any such statements or conduct are in fact true, except to the extent that any such statements are made as required by law pursuant to testimony given under a validly issued subpoena or in a court of law." *Id.* at *1.

The trial court granted the employer's motion for summary judgment. The plaintiff claimed that Leon Moore came to the AmeriSuites in Franklin where she was working and called her an expletive. Other Prime Hospitality employees heard the statement. The plaintiff maintained that Moore's statement violated the settlement agreement and that it damaged her employment with Prime Hospitality. The employee argued, *inter alia*, that the trial court erred by granting the employer's motion for summary judgment because, but for the disparaging comment, she would have served as director of sales for that motel which would have made her eligible to participate in the sales incentive plan. The appellate court affirmed the finding that there were no disputed facts that the comments prevented the plaintiff from participating in the sales incentive plan. *Id.* at *5.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

"Intentional infliction of emotional distress" and "outrageous conduct" are two different names for the same cause of action. *Moorhead v. J.C. Penney Co., Inc.*, 555 S.W.2d 713, 717 (Tenn. 1977). In order to make out a prima facie case, the plaintiff must show (1) that the conduct complained of was intentional or reckless, (2) that the conduct was so outrageous as not to be tolerable by civilized society and (3) that the conduct complained of resulted in serious mental injury. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997) (citing *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270, 274 (1966)).

In *Bringle v. Methodist Hosp.*, 701 S.W.2d 622 (Tenn. Ct. App. 1985), the defendant employer provided the at-will employee plaintiff the option of resigning or being terminated. In return for the resignation, the defendant allegedly allowed the plaintiff to apply for a position in another department. Later, the defendant refused to rehire the plaintiff. The court determined "outrageous conduct" was not committed on this at-will employee. *Id.* at 625. *See also Newsom v. Textron Aerostructures, Inc.*, 924 S.W.2d 87 (Tenn. Ct. App. 1995) (employer did not commit outrageous conduct by forcing a terminated at-will employee with 35 years of service to gather his belongings into a garbage bag and escorting him out of the building in front of co-workers).

In *Suttle v. Dominion Bank of Middle Tenn.*, 1993 WL 415691 (Tenn. Ct. App. Oct. 13, 1993), the defendant employer's investigation of the employee for theft was not sufficient to support a claim for intentional infliction of emotional distress because any possible injury sustained could only be remedied under the workers' compensation statute. The employee could

not overcome the exclusivity provision because she could not show that the defendant intentionally injured her. *Id.* at *6-7.

In *Briordy v. Chloe Foods Corp.*, 2008 WL 587503 (M.D. Tenn. Feb 29, 2008), the plaintiff claimed her former employer was vicariously liable for intentional infliction of emotional distress/outrageous conduct because of her supervisor's alleged behavior. She claimed that her supervisor invited her to his home, suggested they stop at an adult store while on a business trip, kissed her against her will, and repeatedly made sexually suggestive remarks. The court dismissed the plaintiff's claim, noting that the facts alleged do not constitute extreme, outrageous conduct which would be beyond the pale of decency. *Id.* at *10

In *Johnson v. S. Cent. Human Res. Agency*, 926 S.W.2d 951 (Tenn. Ct. App. 1996), the defendant human resource agency was a "governmental entity" for purposes of the Governmental Tort Liability Act (Tenn. Code Ann. § 29-20-101 *et seq.*), and as such had immunity from suit for plaintiff's outrageous conduct action.

Unlike claims of libel, the discovery rule applies to false oral statements pertaining to a claim of intentional infliction of emotional distress. Thus, the statute of limitations on such an intentional infliction claim does not commence until the plaintiff is put on actual or reasonable notice of the oral statement. See *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818 (Tenn. 1994).

B. Negligent Infliction of Emotional Distress

In *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996), the Tennessee Supreme Court rejected the "physical manifestation" or "injury" rule and decided that general negligence principles should be used for negligent infliction of emotional distress actions. Plaintiff must prove duty, breach of duty, injury or loss, causation in fact and proximate cause, as well as serious emotional injury. The court noted that serious emotional injury has occurred "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* at 446. Also, plaintiffs must prove injury with expert medical or scientific proof. *Id.*

In *Lourcey v. Estate of Scarlett*, 146 S.W.3d 48 (Tenn. 2004), a postal worker on her delivery route encountered a husband and wife standing in the middle of the road. After pulling over to give assistance, the postal carrier watched as the husband shot the wife in the head and then turned to face the plaintiff and shot himself in the head. The plaintiff sued the estate for both intentional infliction of emotional distress and for negligent infliction of emotional distress.

The circuit court dismissed the intentional claim because the husband's conduct was not outrageous and dismissed the negligent claim because the plaintiff was not closely related to either of the deceased.

The Tennessee Supreme Court affirmed a reversal of the circuit court, holding that the actions of the husband were sufficiently outrageous to support a claim of intentional infliction of emotional distress. The court also held that the plaintiff had stated a valid claim for negligent infliction of emotional distress, noting that the plaintiff is not required to establish a close relationship to the injured party to support such a claim. The court did note, however, that the closeness of the relationship "is relevant to the duty and causation elements of a negligent infliction of emotional distress claim, as well as to the question of damages, but is not dispositive of such a claim." *Id.* at 54.

In *Riley v. Whybrew*, 185 S.W.3d 393 (Tenn. Ct. App. 2005), a homeowner family sued the landlord of their neighboring house for emotional distress, alleging that the landlord had allowed his tenants to engage in acts that constituted nuisance and emotional distress. The trial court granted summary judgment in favor of the landlord, stating that the plaintiffs had failed to prove the requisite "serious emotional injury by medical or scientific proof unless there is also an accompanying physical injury" as required by *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996).

accompanying physical injury, as required by *Camper v. Minor*, 715 S.W.2d 457 (Tenn. 1996). *Id.* at 400.

The court of appeals, however, noted that the medical or scientific proof required under *Camper* is only necessary for a "stand alone" claim for negligent infliction of emotional distress. The court went on to hold that the plaintiffs' claim for mental anguish due to the tenants' activities constituted a nuisance and that the landlord maintained a nuisance by negligently allowing the tenants' behavior to continue. The court held that the claim of negligent infliction of emotional distress against the landlord was related to the claim of negligence for his failure to abate the nuisance caused by the tenants. As such, the plaintiffs' claim for damages for emotional distress was not a standalone claim and the *Camper* requirement of expert medical or scientific proof was not applicable. *Id.* at 400-01. *See also Amos v. Vanderbilt Univ.*, 62 S.W.3d 133, 134-37 (Tenn. 2001).

The Tennessee Supreme Court has addressed the issue of whether governmental immunity under Tenn. Code Ann. § 29-20-205(2) extends to a claim for negligent infliction of emotional distress. The court noted that the statute specifically preserves immunity from claims arising out of intentional torts. The court held that it would read the term 'infliction of mental anguish,' which is included in the list of intentional torts, as applying only to intentional infliction of emotional distress. Therefore, governmental immunity is not available for a claim of negligent infliction of emotional distress. *See Sallee v. Barrett*, 171 S.W.3d 822 (Tenn. 2005); *Brown v. City of Springhill*, 2008 WL 974729 (M.D. Tenn. Apr. 8, 2008).

In *Eskin v. Bartee*, 2006 WL 3787823 (Tenn. Ct. App. Dec 27, 2006), the Tennessee Court of Appeals rejected the "zone of danger" rule and provided that liability under the theory of negligent infliction of emotional distress would be determined under general negligence principles. *Id.* at *4. *See also Ramsey v. Beavers*, 931 S.W.2d 527 (Tenn. 1996). The *Eskin* court held that:

[T]o recover for emotional injuries sustained as a result of death or injury of a third person, plaintiff must establish that defendant's negligence was the cause in fact of the third person's death or injury as well as plaintiff's emotional injury. Secondly, plaintiff must establish that the third person's death or injury and plaintiff's emotional injury were proximate and foreseeable results of defendant's negligence.

Id. at *4. In light of its holding that sensory observance of the injury producing event is not an absolute essential element, it also adopted the holding of the Supreme Court of Washington in *Hegel v. McMahon*, which states that "a family member may recover for emotional distress caused by observing an injured relative at the scene of an accident after its occurrence and before there is substantial change in the relative's condition or location." *Id.* at *6, (quoting *Hegel v. McMahon*, 960 P.2d 424, 428 (Wash. 1998)).

In *Doe v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22 (Tenn. 2005), the Tennessee Supreme Court held that to be actionable, an intentional or reckless infliction of emotional distress need not be directed at a particular individual or group of individuals or be conducted while in the presence of the plaintiff. This opinion specifically reversed court of appeals' opinions that required this "directed at" element for all claims of outrageous conduct.

In *Doe*, the plaintiffs sued the Catholic Diocese of Nashville, claiming that the Diocese had removed the priest from his post with the Diocese as a result of several prior reports of sexual molestation by the priest. The plaintiffs asserted that the Diocese did not properly warn the priest's new parish about the previous molestations, and additionally did not restrict the priest's interactions with minors at the new parish. The plaintiffs sued the Diocese, claiming that its reckless acts and omissions resulted in the reckless infliction of emotional distress.

The court reversed the summary judgment granted by the court of appeals, and noted

that:

[I]n addressing the unique nature of recklessness and the directed-at issue, we are confronted with three options. First, we could simply eliminate recklessness as a means for satisfying the state-of-mind element of outrageous conduct. Second, we could require that claims for reckless infliction of emotional distress must be based upon conduct that had been directed at a specific individual or that occurred in the presence of the plaintiff, thereby effectively collapsing recklessness into intent. Third, we could reaffirm our recognition of infliction of emotional distress predicated upon recklessness and expressly reject the directed-at requirement. We choose the third option. Therefore, we hold that a claim of reckless infliction of emotional distress need not be based upon conduct that was directed at a specific person or that occurred in the presence of the plaintiff.

Id. at 38-39 (citations omitted).

VIII. PRIVACY RIGHTS

A. Generally

Tennessee recognizes a common law action for invasion of privacy if the defendant should have realized the invasion was offensive and if the intrusion goes “beyond the limits of decency that liability accrues.” *Swallows v. W. Elec. Co.*, 543 S.W.2d 581, 583 (Tenn. 1976) (citation omitted); *see also Alley v. Cleveland*, 1996 WL 605157 (Tenn. Ct. App. 1996) (noting that Tennessee recognizes the common law tort action for invasion of privacy).

But see Raines v. Shoney’s Inc., 909 F. Supp. 1070 (E.D. Tenn. 1995). In *Raines*, the court determined that neither the Tennessee Constitution nor the United States Constitution create an independent cause of action for invasion of privacy; therefore, plaintiff employee could not recover under this theory against an employer who forced her to undergo a strip search after a sum of \$600 was discovered missing.

In *Scarborough v. Brown Group, Inc.*, 972 F. Supp. 1112 (W.D. Tenn. 1997), an employee’s Title VII claim for sexual harassment, in and of itself, did not support an additional common law cause of action for invasion of privacy.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

The Tennessee Lawful Employment Act (TLEA) requires employers to obtain lawful resident/employment verification information. Tenn. Code Ann. § 50-1-703. Under the TLEA, effective January 1, 2017, private employers with 50 or more employees under the same FEIN are required to use the federal E-Verify employment verification process. Private employers with fewer than 50 employees may choose to either (a) use E-Verify for newly hired employees, or (b) request and maintain one or more of the following documents providing identity and work eligibility:

- A valid Tennessee driver license or photo identification license issued by the Department of Safety;
- A valid driver license or photo identification license issued by another state where the issuance requirements are at least as strict as those in this state, as determined by the department.
- An official birth certificate issued by a U.S. state, jurisdiction or territory;
- A U.S. government-issued certified birth certificate;
- A valid unexpired U.S. passport;

A valid, unexpired U.S. passport,

- A U.S. certificate of birth abroad (forms DS-1350 or FS-545);
- A report of birth abroad of a citizen of the U.S. (form FS-240);
- A certificate of citizenship (forms N560 or N561);
- A certificate of naturalization (forms N550, N570 or N578);
- A U.S. citizen identification card (forms I-197 or I-179); or
- Valid alien registration documentation or other proof of current immigration registration recognized by the U.S. Department of Homeland Security that contains the individual's complete legal name and current alien admission number or alien file number.

The federal E-verify program requires employers to verify the information provided by newly hired employees during the I-9 process against information contained in federal databases maintained by the Department of Homeland Security and the Social Security Administration.

The TLEA requires documentation for "non-employees," such as independent contractors. Employers must request and retain one of the documents listed above for any non-employee with whom the employer contracts for labor. The TLEA also requires employers to keep and maintain copies of the required work eligibility documents for three years after the date of hire, or one year after the date of termination, whichever is longer.

Penalties for violation of the Act follow a schedule:

- First offense: a \$500 civil penalty, plus \$500 for each worker not properly verified
- Second Offense: a \$1,000 civil penalty, plus \$1,000 for each worker not properly verified
- Third or Subsequent Offense: a \$2,500 civil penalty, plus \$2,500 for each worker not properly verified

Sanctions may also be imposed for employers that knowingly misclassify workers in an attempt to avoid the requirements of the law, and employers must submit evidence of compliance within 60 days after being found in violation of the law.

2. Background Checks

Beginning January 1, 2013, employers must use new Fair Credit Reporting Act ("FCRA") forms as part of their background check process. 15 U.S.C. § 1681 *et seq.* Several of the forms required by the FCRA have recently been revised, including the following:

- A Summary of Your Rights Under the Fair Credit Reporting Act (Appendix K of Title 12 Code of Federal Regulations, Part 1022)
- Notice to Furnishers of Information: Obligations of Furnishers Under the FCRA (Appendix M of Title 12 Code of Federal Regulations, Part 1022)
- Notice to Users of Consumer Reports: Obligations of Users Under the FCRA (Appendix N of Title 12 Code of Federal Regulations, Part 1022)

Nevertheless, the requirements imposed by the FCRA on employers obtaining a consumer report on a current or potential employee or independent contractor did not change.

On June 11, 2013, the EEOC filed a lawsuit against a Tennessee company for the use of pre-employment criminal background checks. The EEOC filed suit against Nashville based Dollar General Corporation alleging that the company subjected a class of black job applicants to discrimination by way of criminal background checks during the hiring process. The EEOC asserts that the use of criminal background checks is in violation of Title VII of the Civil Rights Act of 1964, and the EEOC is pursuing injunctive relief and monetary damages for those job applicants allegedly affected by this practice.

The outcome of this suit will have significant implications regarding the continued use of

background check policies. While it is doubtful that the end result would require employers to hire criminals or completely abolish background checks; however, it may begin to carve out a place in the hiring process for convicted felons by eliminating this factor as an automatic disqualifier in hiring.

C. Other Specific Issues

1. Workplace Searches

In *Butler v. Bd of Comm'rs*, 1988 WL 55735 (Tenn. Ct. App. June 2, 1988), a fireman worked for the city and was required along with all other firemen to undergo a three-step physical. The third step consisted of blood and urine tests. The fireman tested positive twice for marijuana and was terminated. The fireman applied to the board for reinstatement, and the application was denied after an extensive evidentiary hearing. The fireman appealed to the chancery court, which affirmed the board. The fireman appealed, and the court affirmed. The court rejected the fireman's assertion that his Fourth Amendment rights were violated when he was required to take the urine test because all firemen were required to take the test for public safety reasons and the tests were not a subterfuge to conduct an unreasonable search. There was no evidence that the scope or purpose of the drug-testing program was unreasonable. Quoting the United States Supreme Court's decision in *O'Connor v. Ortega*, 480 U.S. 709 (1987), which drew a distinction between job-related search and seizure and those in criminal cases, the court stated that the "operational realities of the workplace" make some employees' expectations of privacy unreasonable when an intrusion is made by a supervisor rather than a law enforcement official. "The employee's expectation of privacy must be assessed in the context of the employment relation." "Given the great variety of work environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Butler* at *3. In the case of searches conducted by a public employer, the court must balance the invasion of the employee's legitimate expectations of privacy against the government's need for supervision and control, and the efficient operation of the workplace. The court recognized that "there is a plethora of contexts in which employers will have occasion to intrude to some extent upon employees' expectation of privacy." *Id.* at *3.

In *State v. Francisco*, 790 S.W.2d 543 (Tenn. Crim. App. 1989), the defendant was a narcotics detective, and cocaine was seized from his police car. The lower court refused to grant defendant's motion to suppress on the grounds that defendant agreed contractually to the searches, the searches were legally authorized by department regulations, and defendant had no expectation of privacy in the property searched. The appellate court affirmed holding that searches and seizures by government employers or supervisors of the private property of their employees are subject to the restraints of the Fourth Amendment. An appellant can claim Fourth Amendment protection only if he held a reasonable expectation of privacy in the objects of the search. A constitutionally justified expectation of privacy has two requirements: first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable. In this case the court found that the search was incident to the investigation of work-related misconduct; thus, the defendant had no expectation of privacy in the property searched. *Id.* at 545.

Tenn. Code Ann. § 41-1-102 requires the department of correction to perform periodic routine searches for contraband of all employees of the department prior to their entrance inside the confines of a state correctional facility. If contraband is found on an employee pursuant to a search, the employee may be required to submit to an official polygraph examination. The statute authorizes the department to utilize one drug detecting dog and one polygraph for each grand division to carry out the searches and examinations.

2. Electronic Monitoring

Under Tenn. Code Ann. § 10-7-512, a state employee's electronic mail may be subject to

public inspection.

Tenn. Code Ann. § 39-13-601 governs wiretapping and electronic surveillance:

(a)(1) Except as otherwise specifically provided in §§ 39-13-601 -- 39-13-603 and title 40, chapter 6, part 3, a person commits an offense who:

(A) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(B) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

(i) The device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) The device transmits communications by radio, or interferes with the transmission of such communication;

(C) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection (a); or

(D) Intentionally uses, or endeavors to use, the contents of any wire, oral or electronic communication, knowing or having reason to know, that the information was obtained through the interception of a wire, oral or electronic communication in violation of this subsection (a).

(E) Notwithstanding any provision of this party to the contrary, this section shall not apply to a person who installs software on a computer the person owns if such software is intended solely to monitor and record the use of the Internet by a minor child of whom such person is a parent or legal guardian.

(a)(2) A violation of subdivision (a)(1) shall be punished as provided in § 39-13-602 and shall be subject to suit as provided in § 39-13-603.

(b)(1) It is lawful under §§ 39-13-601--39-13-603 and title 40, chapter 6, part 3 for an officer, employee, or agent of a provider of wire or electronic communications service, or a telecommunications company, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of employment while engaged in any activity which is necessary to the rendition of service or to the protection of the rights or property of the provider of that service. Nothing in §§ 39-13-601 -- 39-13-603 and title 40, chapter 6, part 3 shall be construed to prohibit a telecommunications or other company from engaging in service observing for the purpose of maintaining service quality standards for the benefit of consumers.

(2) Notwithstanding any other law, providers of wire or electronic communications service, their officers, employees, or agents, landlords, custodians, or other persons are authorized to provide information, facilities, or

technical assistance to persons authorized by law to intercept wire, oral, or electronic communications if such provider, its officers, employees, or agents, landlord, custodian or other specified person has been provided with a court order signed by the authorizing judge of competent jurisdiction which:

- (A) Directs such assistance;
- (B) Sets forth a period of time during which the provision of the information, facilities, or technical assistance is authorized; and
- (C) Specifies the information, facilities, or technical assistance required.

(3) No provider of wire or electronic communications service, officer, employee, or agent thereof, or landlord, custodian or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order, except as may otherwise be required by legal process and then only after prior notification to the attorney general and reporter or to the district attorney general or any political subdivision of a district, as may be appropriate. Any such disclosure shall render such person liable for the civil damages provided for in § 39-13-603. No cause of action shall lie in any court against any provider of wire or electronic communications service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order under §§ 39-13-601 -- 39-13-603 and title 40, chapter 6, part 3.

(4) It is lawful under §§ 39-13-601 -- 39-13-603 and title 40, chapter 6, part 3 for a person acting under the color of law to intercept a wire, oral or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(5) It is lawful under §§ 39-13-601 -- 39-13-603 and title 40, chapter 6, part 3 for a person not acting under color of law to intercept a wire, oral, or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the state of Tennessee.

(6) It is unlawful to intercept any wire, oral, or electronic communication for the purpose of committing a criminal act.

(7) It is lawful, unless otherwise prohibited by state or federal law, for any person:

- (A) To intercept or access an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public;

- (B) To intercept any radio communication which is transmitted by:

- (i) Any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

- (ii) Any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(iii) Any station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(iv) Any marine or aeronautical communications system;

(C) To intercept any wire or electronic communication, the transmission of which is causing harmful interference with any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(D) For other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(c)(1) Except as provided in subdivision (c)(2), a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(2) A person or entity providing electronic communication service to the public may divulge the contents of any such communication:

(A) As otherwise authorized in subdivisions (b)(1)-(3) or § 40-6-306;

(B) With the lawful consent of the originator or any addressee or intended recipient of such communication;

(C) To a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(D) Which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

3. Social Media

The Employee Online Privacy Act of 2014 (the "EOPA") (Tenn. Code Ann. § 50-1-1001 *et seq.*) went into effect on January 1, 2015. Under Tenn. Code Ann. § 50-1-1003(a):

(a) An employer shall not:

(1) Request or require an employee or an applicant to disclose a password that allows access to the employee's or applicant's personal Internet account;

(2) Compel an employee or an applicant to add the employer or an employment agency to the employee's or applicant's list of contacts associated with a personal Internet account;

(3) Compel an employee or an applicant to access a personal Internet account in the presence of the employer in a manner that enables the employer to observe the contents of the employee's or applicant's personal Internet account; or

(4) Take adverse action, fail to hire, or otherwise penalize an employee or

(4) take adverse action, fail to hire, or otherwise penalize an employee or applicant because of a failure to disclose information or take an action specified in subdivisions (a)(1)-(3).

However, under Tenn. Code Ann. § 50-1-1003(b):

(b) Unless otherwise provided by law, an employer is not prohibited from:

(1) Requesting or requiring an employee to disclose a username or password required only to gain access to:

(A) An electronic communications device supplied by or paid for wholly or in part by the employer; or

(B) An account or service provided by the employer that is obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes;

(2) Disciplining or discharging an employee for transferring the employer's proprietary or confidential information or financial data to an employee's personal Internet account without the employer's authorization;

(3) Conducting an investigation or requiring an employee to cooperate in an investigation if:

(A) There is specific information on the employee's personal Internet account regarding compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct; or

(B) The employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information, or financial data to an employee's personal Internet account;

(4) Restricting or prohibiting an employee's access to certain web sites while using an electronic communications device supplied by or paid for wholly or in part by the employer or while using an employer's network or resources, in accordance with state and federal law;

(5) Monitoring, reviewing, accessing, or blocking electronic data stored on an electronic communications device supplied by or paid for wholly or in part by the employer, or stored on an employer's network, in accordance with state and federal law;

(6) Complying with a duty to screen employees or applicants before hiring or to monitor or retain employee communications:

(A) That is established under federal law or by a "self-regulatory organization", as defined in the Securities and Exchange Act of 1934, 15 U.S.C. § 78c(a);

(B) For purposes of law enforcement employment; or

(C) For purposes of an investigation into law enforcement officer conduct performed by a law enforcement agency; or

(7) Viewing, accessing, or using information about an employee or applicant that

can be obtained without violating subsection (a) or information that is available in the public domain.

The statutes definition of “personal internet account” includes social media accounts “used by an employee or applicant for personal communications unrelated to any business purpose of the employer.” Tenn. Code Ann. § 50-1-1002.

4. Taping of Employees

In *Gentry v. E. I. Du Pont de Nemours & Co.*, 1987 WL 15854 (Tenn. Ct. App. 1987), an employer was not liable for outrageous conduct or invasion of privacy when it accidentally taped the phone conversation of an employee. The employer ordered that the tape be erased and ordered employees not to repeat the conversation.

5. Release of Personal Information on Employees

Tenn. Code Ann. § 50-1-105 addresses an employer’s liability incurred from communicating information about an employee. This section provides that:

[a]ny employer that, upon request by a prospective employer or a current or former employee, provides truthful, fair and unbiased information about a current or former employee's job performance is presumed to be acting in good faith and is granted a qualified immunity for the disclosure and the consequences of the disclosure. The presumption of good faith is rebuttable upon a showing by a preponderance of the evidence that the information disclosed was:

- (1) Knowingly false;
- (2) Deliberately misleading;
- (3) Disclosed for a malicious purpose;
- (4) Disclosed in reckless disregard for its falsity or defamatory nature; or
- (5) Violative of the current or former employee's civil rights pursuant to current employment discrimination laws.

“Under this statute, mere negligence is not enough to rebut the presumption in favor of the employer's good faith.” *Sullivan v. Baptist Memorial Hosp.*, 995 S.W.2d 569, 575 (Tenn. 1999).

6. Medical Information

In *Johnson v. Nissan N. Am.*, 146 S.W.3d 600 (Tenn. Ct. App. 2004), *aff'd*, 2007 WL 551181 (Tenn. Ct. App. Feb. 22, 2007), the Tennessee Court of Appeals held that an employee’s interrogatory requesting an employer to provide information about every employee terminated by the employer over a 16-month period was overbroad. Generally stated, discovery of personnel and medical records requires a compelling showing of relevance because of the privacy interests involved. “[T]he proper balance, between the privacy interests of non-party third persons, and the discovery interests of a party litigant, is to assure that those portions of the pertinent personnel files, which are clearly relevant to the parties’ claims, are open to disclosure and, then, subject to an appropriate Confidentiality Order as the circumstance requires.” *Id.* at 607.

The following statutes govern the privacy of medical information:

a. Tenn. Code Ann. § 10-7-504 (regulating access to state agency records, including

a. Tenn. Code Ann. § 10-7-204 (regulating access to state agency records, including records from state hospitals, fire and police departments, educational institutions, attorney generals' offices, departments of correction and family services, and department of transportation).

b. Tenn. Code Ann. § 50-9-109 (outlining privacy requirements for workplace drug test results).

c. Tenn. Code Ann. § 63-22-114 (providing confidentiality to client-therapist communications).

d. Tenn. Code Ann. § 68-5-506 (providing criminal liability for unauthorized negligent or intentional disclosure of information contained in the Tennessee birth defects registry).

e. Tenn. Code Ann. § 68-5-703 (making confidential the results of HIV tests performed on pregnant women).

Present law requires health care service providers who assume responsibility for the prenatal care of pregnant women during gestation to counsel pregnant women regarding HIV infections and, except in cases where women refuse testing, to test the women for HIV and to provide counseling for those women who test positive. The law also requires health care providers to provide referral into appropriate medical and social services for women who test positive.

Health care providers are to arrange for pregnant women to be tested for HIV twice - once as early as possible in the course of the pregnancy and once during the third trimester, unless the patient refused testing in writing and the refusal is placed in the patient's chart.

The health care provider is to impart the information to an HIV positive patient. In the past, the law required the presence of a counselor.

Finally, present law no longer requires that health care providers report statistical information to the department of health each month regarding the number of pregnant women who were tested for HIV and the number who tested positive.

7. Restrictions on Requesting Salary History

At present, Tennessee has no restrictions on employers requesting salary history.

IX. WORKPLACE SAFETY

A. Negligent Hiring

Tennessee courts recognize the negligence of an employer in the selection and retention of employees and independent contractors. "A plaintiff in Tennessee may recover for negligent hiring, supervision or retention of an employee if he establishes, in addition to the elements of a negligence claim, that the employer had knowledge of the employee's unfitness for the job." *Doe v. Catholic Bishop for Diocese of Memphis*, 306 S.W.3d 712, 717 (Tenn. Ct. App. 2008) (internal citations omitted).

In order to succeed in a negligent hiring, supervision, or retention claim, a plaintiff must prove the following elements of a common law negligence claim: (1) the duty of care owed by the Defendants; (2) breach of this duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. *See Turner v. Jordan*, 957 S.W.2d 815, 818 (Tenn. 1997).

In *Gates v. McQuiddy Office Products*, 1995 WL 650128 (Tenn. Ct. App. Nov. 2, 1995) (perm. app. denied April 8, 1996), the Court of Appeals of Tennessee held that evidence of past criminal conduct of an employee, by itself, was not enough to support a claim for negligent

hiring. *Id.* at *2. The *Gates* Court, citing a decision from the New Mexico Court of Appeals, listed the following elements a plaintiff must prove to be successful on a claim for negligent hiring: (1) evidence of unfitness for the particular job; (2) evidence that the applicant for employment, if hired, would pose an unreasonable risk to others; and (3) evidence that the prospective employee knew or should have known that the historical criminality of the applicant would likely be repetitive. *Id.*

The statute of limitations for tort actions is one year. Tenn. Code Ann. § 28-3-104.

B. Negligent Supervision/Retention

Claims of negligent supervision and/or retention are examined under the same analysis as negligent hiring under Tennessee law.

C. Interplay with Worker's Comp. Bar

In Tennessee an employee's exclusive remedy against an employer is governed by Tennessee's Workers' Compensation laws found at Tenn. Code Ann. § 50-6-101 *et seq.* Tenn. Code Ann. § 50-6-108(a). An employer subject to Tennessee's Workers' Compensation Laws consists of those employers employing 5 or more persons. Tenn. Code Ann. § 50-6-102.

D. Firearms in the Workplace

Effective May 1, 2014, Tenn. Code Ann. § 39-17-1313 makes it legal for individuals with valid handgun carry permits to store firearms and ammunition in their own privately owned motor vehicle so long as it is parked in a location "where it is permitted to be," and it applies to all private and public parking lots, with the exception of parking lots at or near schools, public parks or playgrounds, or other public buildings or facilities.

Recognizing the potential impact on employers, the law specifically exempts business entities, public or private employers, or owners, managers or possessors of property from liability in a civil action for damages such as injuries or death resulting from or arising out of another's actions involving a firearm or ammunition transported or stored under the law. An exception is if the business or employer commits an offense involving the firearm or ammunition or intentionally solicits the conduct resulting in the damage, injury or death. A business or employer also may not be held responsible for the theft of a firearm or ammunition stored in the permit holder's private vehicle.

E. Use of Mobile Devices

Tennessee law prohibits texting while driving. Tenn. Code Ann. § 55-8-199. No Tennessee case has referenced or cited this statutory provision. However, employers should include clear policies in employee handbooks regarding the use of mobile devices while driving, including explicitly prohibiting texting while driving.

X. TORT LIABILITY

A. Respondeat Superior Liability

In *Gates v. McQuiddy Office Products*, 1995 WL 650128 (Tenn. Ct. App. Nov. 2, 1995), the plaintiffs sued after being robbed and shot by an employee of the defendant. The plaintiffs asserted that the employer was negligent in hiring the employee, particularly because of his past criminal conviction in Michigan. The court first noted that the tort of negligent hiring was first recognized in Tennessee in the case of *Wishone v. Yellow Cab Co.*, 97 S.W.2d 452 (Tenn. Ct. App. 1936) (distinguished on other grounds), where an employer was held liable for injuries sustained by a fare-paying passenger when the driver had an epileptic seizure.

The court then discussed the requirements of a negligent hiring claim: "We think an

The court then discussed the requirements of a negligent hiring claim: we think an action for negligent hiring requires something more than a showing of past criminal conduct. There must be (1) evidence of unfitness for the particular job, (2) evidence that the applicant for employment, if hired, would pose an unreasonable risk to others, (3) evidence that the prospective employee knew or should have known that the historical criminality of the applicant would likely be repetitive.” *Gates*, 1995 WL 650128 at *2. The court also noted that it was significant that the employee had worked at McQuiddy for a year before the incident, because it “tends to insulate the employer or to vindicate the employment.” *Id.* See also *McLeay v. Huddleston*, 2006 WL 2855164 (Tenn. Ct. App. Oct. 6, 2006).

B. Tortious Interference with Business/Contractual Relations

In *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691 (Tenn. 2002) (distinguished on other grounds), the Tennessee Supreme Court adopted the tort of intentional interference with a business relationship. In *Trau-Med*, the court put an end to the distinction between the claims of tortious interference with prospective and existing relationships. For several years, Tennessee courts had been allowing a claim for interference with existing relationships, while not allowing claims for prospective relationships to continue. The court expressly adopted both claims into a single tort. *Id.* at 701. Liability should be imposed on the interfering party if the plaintiff can demonstrate the following: (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means; and (5) damages resulting from the tortious interference. *Id.*

In *Ellipsis, Inc. v. Colorworks, Inc.*, the court addressed the considerations in finding “improper motive” to support a claim of intentional interference with business relationships. 2006 WL 1207589 (W.D. Tenn. May 4, 2006). The court concluded that a finding of “improper motive” is premised upon the “. . . particular facts and circumstances of a given case.” *Id.* at *13, quoting *Trau-Med*, 71 S.W.3d at 701 n. 5. The court could not grant summary judgment to the defendant, as there was a strong link between alleged defamatory statements by a competitor and a dramatic decrease in production of the in-question product. *Id.* at *13. See also *Watson's Carpet & Floor Covering, Inc., v. McCormick*, 247 S.W.3d 169 (Tenn. Ct. App. 2007) (holding that not electing to do business with another party does not equal interference with a business relationship) (distinguished on other grounds).

Tennessee recognizes both a common law and statutory action for inducement to breach a contract. Tenn. Code Ann. § 47-50-109 is declaratory of the common law. The elements of a cause of action for procurement of the breach of a contract are: (1) there must be a legal contract; (2) the wrongdoer must have knowledge of the existence of the contract; (3) there must be an intention to induce its breach; (4) the wrongdoer must have acted maliciously; (5) there must be a breach of the contract; (6) the act complained of must be the proximate cause of the breach of the contract; and, (7) there must have been damages resulting from the breach of the contract. *Myers v. Pickering Firm*, 959 S.W.2d 152, 158 (Tenn. Ct. App. 1997). Malice is a necessary element to an action for common law and statutory inducement to breach. *Testerman v. Tragesser*, 789 S.W.2d 553, 557 (Tenn. Ct. App. 1989).

The Tennessee Supreme Court recognized the tort of intentional interference with at-will employment in *Forrester v. Stockstill*, 869 S.W.2d 328 (Tenn. 1994). In *Forrester*, two members of the Board of Directors of a not-for-profit corporation allegedly conspired to defame the employee and thereby procure his discharge from employment. The employee was the Executive Director of the corporation. He sued the Directors for inducing the breach of his employment contract, intentionally interfering with his business relationship, defamation, and conspiracy. The court noted that generally, the discharge from employment of an at-will employee is not actionable. *Id.* at 331. However, the court stated that the plaintiff's wrongful interference with at-will employment by third persons suit would be actionable if the proof

established that the directors stood as third parties to the employment relationship. *Id.*

In *Frankenbach v. Rose*, 2004 WL 221319 (Tenn. Ct. App. Feb. 3, 2004), the court reiterated that improper motive, an element of the tort of interference with contractual relations, requires intent. Defendant's intent to interfere could not be inferred from the fact that defendant contracted to a party in privity with plaintiff. The court found that such agreement could exist in harmony and not interfere with plaintiff's agreement. *Id.* at *19.

In *Satterfield v. Bluhm*, 2004 WL 833291 (Tenn. Ct. App. Apr. 16, 2004), the court held that the "plaintiff must show an intentional inducement by [defendant] akin to malice, before he can recover," under either interference with business relationship or interference with contractual relations. *Id.* at *5.

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Generally, although disfavored by law, agreements in restraint of trade, such as covenants not to compete are valid and will be enforced if they are deemed reasonable under the particular circumstances. *Money & Tax Help, Inc. v. Moody*, 180 S.W.3d 561, 565 (Tenn. Ct. App. 2005) (citing *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361, 363 (Tenn.1966)). The Tennessee Court of appeals stated, "[t]he inquiry as to reasonableness under the circumstances is a fact-specific one, and there is no inflexible formula for determining reasonableness." *Id.* The Tennessee Supreme Court noted that "it is generally agreed that, before a noncompetitive covenant will be upheld as reasonable and therefore enforceable, the time and territorial limits involved must be no greater than is necessary to protect the business interests of the employer." *Allright Auto Parks, Inc.*, 409 S.W.2d at 363.

Outfitters Satellite, Inc. v. CIMA, Inc., 2005 WL 309370 (Tenn. Ct. App. Feb. 8, 2005), illustrates when a non-compete agreement is reasonable. In *Outfitters Satellite, Inc.*, the appellant former employee challenged a decision of the Chancery Court for Davidson County, which ruled in favor of respondents, a former employer and related company. The trial court found that the employee breached a non-compete agreement and enjoined the employee from competing with the employer for one year in North America. The employer had claimed that the employee was interfering with the employer's business relations with customers and suppliers. Except for one modification, the Tennessee Court of Appeals affirmed the trial court's decision. The court reasoned that the agreement was made at a time when the employee had already been working for the employer for a few months; the employer clearly had a legitimate interest in restricting the employee's contacts with the employer's customers and vendors on the event of the employee's departure because these sources would likely have associated the employer's business primarily with the employee; there was consideration for the agreement because the employee was paid by the employer to promote its products and was provided with leads and product information; and enforcement of the agreement was in the public interest because it protected businesses from being damaged by unfair competition. Thus, the trial court properly enforced the agreement. As for the geographical boundary imposed, the court of appeals modified it to apply only to the United States because the employer only asked the trial court to enforce the agreement within the United States, where the company was primarily located. The court modified the judgment to reflect the geographical boundary as the United States. *Id.* at *4.

In regard to non-compete clauses in the medical field, Tenn. Code Ann. § 63-1-148 provides:

A restriction on the right of an employed or contracted healthcare provider to practice the healthcare provider's profession upon termination or conclusion of the employment or contractual relationship shall be deemed reasonable if:

- (1) The restriction is set forth in an employment agreement or other

(1) The restriction is set forth in an employment agreement or other written document signed by the healthcare provider and the employing or contracting entity; and

(2) The duration of the restriction is two (2) years or less and either:

(A) The maximum allowable geographic restriction is the greater of:

(i) A ten-mile radius from the primary practice site of the healthcare provider while employed or contracted; or

(ii) The county in which the primary practice of the healthcare provider while employed or contracted is located; or

(B) There is no geographic restriction, but the healthcare provider is restricted from practicing the healthcare provider's profession at any facility at which the employing or contracting entity provided services while the healthcare provider was employed or contracted with the employing or contracting entity.

Tenn. Code Ann. § 63-1-148 does not apply to physicians who specialize in the practice of emergency medicine.

Additionally, an agreement entered into in conjunction with the purchase or sale of a healthcare provider's practice, or all or substantially all of the assets of the healthcare provider's practice, may restrict the healthcare provider's right to practice the healthcare provider's profession; provided, that the duration of the restriction and the allowable area of the restriction are reasonable under the circumstances. Tenn. Code Ann. § 63-1-148 (b). There shall be a rebuttable presumption that the duration and area of restriction agreed upon by the parties in such an agreement are reasonable. *Id.*

In regard to non-compete clauses signed in a corporate capacity, consider the case of *Money & Tax Help, Inc. v. Moody*, 180 S.W.3d 561 (Tenn. Ct. App. 2005). The appellee company filed a suit against appellant employee alleging that he and his new company breached a non-compete agreement by taking a substantial number of clients when he left the company. The Chancery Court for Knox County ruled that the employee had breached the agreement and was liable for damages but offset the \$77,796 award to the company by \$1,056, which it found duly owing to the employee. The employee appealed. The employee claimed that the trial court erred in holding him personally liable for breach of an agreement signed by him in his corporate capacity and that the damages were too speculative. The court held that the trial court erred by holding the employee personally liable for breach of the agreement. The agreement essentially precluded the employee, who was not a certified public accountant, from practicing his profession at all for three years within 50 miles of Knoxville. It should have been construed as prohibiting the employee and his company from performing, for three years, the financial and accounting services described in the contract for those clients who were on the company's client list when the employee left the company. Thus, as written the agreement was too broad, and therefore unreasonable, with respect to the employee's personal liability. All of the evidence pertaining to damages involved individuals or entities who were clients of the company and who responded to the employee's solicitation and transferred their business to his new company. The damages awarded by the trial court were thus not overbroad and were in keeping with the court's interpretation of the agreement under the reasonableness rule. The judgment of the trial court holding the employee personally liable for breach of the agreement signed in his corporate capacity was reversed. The remainder of the trial court's judgment was affirmed, and the case was remanded for a determination of the amount of damages for which the employee was personally liable under his individual employee agreement. Costs on appeal were assessed to the employee and his company. *Id.* at 569.

In *Intermodal Cartage Co. v. Cherry*, 227 S.W.3d 580 (Tenn. Ct. App. 2007), the

appellant trucking company sought to overturn the trial court's grant of summary judgment for the trucking company's former employees who had left to work for a competitor despite signing a non-compete agreement. *Id.* at 581. The trucking company argued that the named employee, Cherry, was the "face" of Intermodal to its customers. Appellant further averred that its non-competition agreement, which appellee signed, was reasonable owing to that employee's particular knowledge of clients and the relationships that he had with those clients. The Tennessee Court of Appeals held that summary judgment was inappropriate owing to the disputed issues of material fact. In doing so, the court highlighted the extensive relationships that appellee maintained with appellant's customers, stating that "[t]hese relationships were maintained for the benefit and at the expense of Appellant." *Id.* at 592. The court pointedly held that "the relationships between Cherry and Appellant's customers do not belong to Cherry; he was merely the device used by Appellant to establish good will with its customers." *Id.*

In *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984), an employee signed a covenant not to compete that provided that the employee could not compete with the employer for two years after his employment in any location in the United States, could not divulge any confidential information, and could not contact any of employer's past or present customers. The employee incorporated his own business before leaving his employment with the employer. Then, he began competing in the same type of business and soliciting customers.

The court applied the long-standing rule in Tennessee of reasonableness and determined that this far-reaching covenant was unreasonable in terms of geographic area and customer solicitation. The court then refused to follow the "all or nothing" rule and nullify the covenant. It discussed the two leading trends followed in other jurisdictions of "blue penciling," where the court merely strikes out the offending provisions of the covenant, if possible, and the "rule of reasonableness, there the court enforces the covenant to the extent reasonably necessary, unless this would be unduly burdensome on the employee. The court then rejected "all or nothing" and "blue penciling" in favor of the "rule of reasonableness." In so doing, the court expressly noted that it did not "intend a retreat from the general rule precluding courts from creating new contracts for parties." *Cent. Adjustment Bureau*, 678 S.W.2d at 37. The court also recognized that covenants which are deliberately unreasonable and oppressive will not be valid. The court then affirmed the chancellor's determination that a one-year limitation on specific customers was more reasonable.

In *Total Car Franchising Corp. v. L&S Paint Works*, 981 F. Supp. 1079, 1082 (M.D. Tenn. 1997), the district court observed that Tennessee courts are more receptive toward non-compete agreements governing the following employees: Employees who are "'privity to . . . trade or business secrets or confidential information' [employees] who had 'received . . . training' from the former employer," and employees who "had repeated, close contact with the former employer's customers and became associated with the employer's business, and who could attempt to influence former customers to use his new employer's services rather than those of his former employer." *Id.*

B. Blue Penciling

In *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984), the Tennessee Supreme Court rejected the "blue pencil" rule in favor of a rule of reasonableness. *See* cases cited and discussion in Section XI.A. on the "rule of reasonableness."

C. Confidentiality Agreements

Under existing case law in Tennessee, confidentiality agreements are akin to non-compete agreements and are discussed almost always in the same context. The case cited most often by the Tennessee courts with regard to non-compete clauses and confidentiality agreements is *Hasty v. Rent-a-Driver, Inc.*, 671 S.W.2d 471 (Tenn. 1984). In *Hasty*, the defendant leased the services of truck drivers to other businesses. It employed the plaintiff as a truck driver under an employment contract containing a non-competition covenant. The plaintiff accepted new

employment contract containing a non-competition covenant. The plaintiff accepted new employment with another leasing company, which assigned him to the same account he worked while working for the defendant. The company severed its relationship with defendant and established an account with plaintiff's new firm. Plaintiff brought an action and the defendant brought a counterclaim for breach of the non-compete agreement. The court held that the defendant could not justify the enforcement of the non-compete agreement and affirmed the dismissal of the counterclaim. The court reasoned that in order for an employer to be entitled to protection under a non-compete agreement, there must be special facts present over and above ordinary competition. These special facts must be such that without the covenant not to compete the employee would gain an unfair advantage in future competition with the employer.

Legitimate business interests that would create an unfair advantage for a former employee include knowledge of trade or business secrets or other confidential information. The *Hasty* court found that the employee was not privy to any of the former employer's trade secrets or confidential information. *Id.* at 473.

D. Trade Secrets Statute

Tennessee has adopted the Uniform Trade Secrets Act, Tenn. Code Ann. §§ 47-25-1701 to 1709. The Act provides for tort liability for persons who breach a duty of confidentiality and disclose trade secrets. Potential defendants may breach such a duty by acquiring knowledge of the secret by improper means, Tenn. Code Ann. § 47-25-1702(1), (2)(A), or through disclosure by a third party who gained the knowledge by reasonably apparent improper means or reasonably apparent mistake. Tenn. Code Ann. § 47-25-1702(2)(B)(ii).

The Act provides a broad definition of trade secret, which includes almost any piece of intellectual property that has actual or potential economic value by way of its secrecy and is subject to reasonable means to preserve such secrecy. Tenn. Code Ann. § 47-25-1702(4).

Furthermore, the Act provides for injunctive relief, Tenn. Code Ann. § 47-25-1703, monetary damages, Tenn. Code Ann. § 47-25-1704, and, in some instances, attorney's fees, Tenn. Code Ann. § 47-25-1705.

Tenn. Code Ann. § 47-25-1702 provides:

As used in this part, unless the context requires otherwise:

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy or limit use, or espionage through electronic or other means;

(2) "Misappropriation" means:

(A) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) Used improper means to acquire knowledge of the trade secret; or

(ii) At the time of disclosure or use, knew or had reason to know that that person's knowledge of the trade secret was:

(a) Derived from or through a person who

had utilized improper means to acquire it;

(b) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(c) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake;

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity;

(4) "Trade secret" means information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that:

(A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In *B & L Corp. v. Thomas & Thorngren, Inc.*, the Tennessee Court of Appeals listed several factors to be considered in determining whether certain information constitutes a business's trade secret: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of money or effort expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. 162 S.W.3d 189, 211 (Tenn. Ct. App. 2005).

The Tennessee Code provides both criminal and civil tort liability for misappropriation of trade secrets. Tenn. Code Ann. § 39-14-138(b) provides that:

A person is guilty of theft and shall be punished pursuant to § 39-14-105 who, with intent to deprive or withhold from its owner the control of the trade secret, or with intent to appropriate a trade secret to the person's own use or to the use of another:

(1) Steals or embezzles an article representing a trade secret; or

(2) Without authority makes or causes to be made a copy of an article representing a trade secret.

E. Fiduciary Duty and Other Considerations: Inducement to Breach of Contract Statute Applied to Breach of Non-Compete Agreement

The employee in *Hanger Prosthetics & Orthodontics East, Inc. v. Kitchens*, 280 S.W.3d

192 (Tenn. Ct. App. 2008), became a certified orthodontist after entering into the covenant with his employer. After the employee quit his job and began providing orthotic services for a competitor, the employer filed suit. In addition to upholding the trial court's determination that the covenant not to compete was enforceable and that the employee had breached the covenant, the Court of Appeals of Tennessee also determined that the employee's new employer induced the employee to breach the contract in violation of Tenn. Code Ann. § 47-50-109 and that an award of treble damages was appropriate. The court rejected Defendant's argument that Tennessee public policy prohibits application of the treble damages provision in Tenn. Code Ann. §47-50-109 from being applied in an employment setting involving a covenant not to compete.

XII. DRUG TESTING LAWS

A. Public Employers

Tenn. Code Ann. § 50-9-104 governs testing for drugs and alcohol in Tennessee and applies to both public and private employers. The statute provides in part:

(a) A covered employer may test a job applicant for alcohol or for any drug described in § 50-9-103; provided, that for public employees such testing shall be limited to the extent permitted by the Tennessee and federal constitutions. A covered employer may test an employee for any drug defined in § 50-9-103(6), and at any time set out in § 50-9-106. An employee who is not in a "safety-sensitive position," as defined in § 50-9-103(16), may be tested for alcohol only when the test is based upon "reasonable suspicion," as defined in § 50-9-103(15). An employee in a safety-sensitive position may be tested for alcohol use at any occasion described in § 50-9-106(a)(2)-(5), inclusive. In order to qualify as having established a drug-free workplace program that affords a covered employer the ability to qualify for the discounts provided under § 50-6-418 and deny workers' compensation medical and indemnity benefits and shift the burden of proof under § 50-6-110(c), all drug or alcohol testing conducted by covered employers shall be in conformity with the standards and procedures established in this chapter and all applicable rules adopted pursuant to this chapter. If a covered employer fails to maintain a drug-free workplace program in accordance with the standards and procedures established in this section and in applicable rules, the covered employer shall not be eligible for:

(1) Discounts under § 50-6-418;

(2) A shift in the burden of proof pursuant to § 50-6-110(c); or

(3) Denial of workers' compensation medical and indemnity benefits pursuant to this chapter. All covered employers qualifying for and receiving discounts provided under § 50-6-418 must be reported annually by the insurer to the division.

(b) The commissioner of labor and workforce development shall adopt a form pursuant to the commissioner's rulemaking authority, which form shall be used by the employer to certify compliance with the provisions of this chapter. Substantial compliance in completing and filing the form with the commissioner shall create a rebuttable presumption that the employer has established a drug-free workplace program and is entitled to the protection and benefit of this chapter. Prior to granting any premium credit to an employer pursuant to § 50-6-418, all insurers and self-insured pools under chapter 6, part 4 of this title, shall obtain such form from the employer. No less frequently than monthly, insurers and self-insured pools shall submit such forms to the department of labor and workforce development. Any other employer desiring to establish a drug-free workplace

development. Any other employer desiring to establish a drug-free workplace shall file such form with the department.

(c) It is intended that any employer required to test its employees pursuant to the requirements of any federal statute or regulation shall be deemed to be in conformity with this section as to the employees it is required to test by those standards and procedures designated in that federal statute or regulation. All other employees of such employer shall be subject to testing as provided in this chapter in order for such employer to qualify as having a drug-free workplace program.

B. Private Employers

See discussion of Tenn. Code Ann. § 50-9-104 under “Public Employers” above.

In *Hackney v. DRD Mgmt. Inc.*, 1999 WL 1577977 (Tenn. Ct. App. 1999), the appellant was employed as a medical assistant, an employee-at-will, by appellee, a drug rehabilitation center. When appellant's random drug screen test returned positive for methadone, her employment was terminated. Appellant sued, arguing that her test results were incorrect due to appellee's failure to maintain a proper chain of custody over the samples. The trial court granted appellee's motion for summary judgment. On appeal, appellant asked the court to find a clear public policy requiring private employers to use chain of custody procedures in drug testing its at-will employees, relying on the Drug-Free Workplace Programs Act, Tenn. Code Ann. § 50-9-101. The court held that the statute only applied to employers who implemented a drug-free workplace pursuant to it, which appellee had not. The court refused to extend public policy to require that all private employers who performed drug testing on at-will employees to comply with chain of custody procedures. *Id.* at *6.

As part of the Workers' Compensation Reform Act of 1996, Tennessee employers can now implement a drug-free workplace pursuant to Tenn. Code Ann. §§ 50-9-101 to 115. If an employer implements this plan pursuant to the regulations promulgated by the State Department of Labor, it receives two primary benefits.

First, the employer receives a reduction in workers' compensation insurance premiums. Tenn. Code Ann. § 50-9-104(a)(1). Second, the employer is entitled to a presumption that when an employee is injured and tests positive for drugs or alcohol after the accident, it will be presumed that the injury was the result of the drugs or alcohol. Essentially the burden is shifted to favor an employer who implements a drug-free workplace. Rather than the employer having to prove drugs or alcohol caused the accident, the employee will have to prove that it did not. Tenn. Code Ann. § 50-9-104(a)(2).

Tenn. Code Ann. § 50-9-101 was amended in 2016 to allow employers who have obtained a certification as a drug-free workplace to be able to renew the certification on an annual basis without requiring repeated annual training of employees who received training during the time that the employer received the certification. However, the employer still must certify that all existing employees have undergone the required training at least once and that the drug-free workplace policy still exists.

“Tennessee has not enacted a comprehensive statutory scheme to govern random drug testing by private employers.” *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 718 (Tenn. 1997). Nevertheless, the General Assembly has approved of workplace drug testing in certain areas. Tenn. Code Ann. § 50-7-303(a)(2) provides that private sector employees who refuse a drug test or who test positive in such a test can be denied unemployment compensation. The legislature has also specifically authorized drug testing of security personnel employed by the Department of Corrections and Youth Development. Tenn. Code Ann. § 41-1-121.

In *Stein*, the employer instituted a new drug and alcohol testing program which included “pre-employment testing, reasonable suspicion testing, after accident testing, and random drug

testing.” 945 S.W.2d at 715. At the time all employees were asked to sign a consent and release form. The employee was selected for a random drug screen and tested positive, and, as a result, was discharged. She filed suit claiming, *inter alia*, invasion of privacy, specifically the separate torts of public disclosure of private fact and intrusion into seclusion.

In its review, the Supreme Court of Tennessee upheld the dismissal of the employee, finding no violation of public policy for dismissal of an at-will employee. *Stein*, 945 S.W.2d at 718. Specifically, the court stated, “[c]ontrary to Stein’s claim, therefore, the state constitutional guarantee of privacy is not a source of public policy which restricts the right of private employers to discharge terminable-at-will employees who test positive on random drug tests.” *Id.*

Continuing, the court held, “[t]here is certainly no statutory provision expressly prohibiting an employer from discharging an employee who has tested positive on a random drug test.” *Id.*

XIII. STATE ANTI-DISCRIMINATION STATUTES

A. Employers/Employees Covered

The Tennessee Human Rights Act (“THRA”) defines an “employer” for purposes of the Act as “the state, or any political or civil subdivision thereof, and persons employing eight (8) or more persons within the state, or any person acting as an agent of an employer, directly or indirectly.” Tenn. Code Ann. § 4-21-102(5). The act defines “person” as “one (1) or more individuals, governments, governmental agencies, public authorities, labor organizations, corporations, legal representatives, partnerships, associations, trustees, trustees in bankruptcy, receivers, mutual companies, joint stock companies, trusts, unincorporated organizations or other organized groups of persons.” Tenn. Code Ann. § 4-21-102(14). A state university may be a “person” under the Act. *Roberson v. Univ. of Tenn.*, 912 S.W.2d 746 (Tenn. Ct. App. 1995).

In *Byrd v. State*, 150 S.W.3d 414 (Tenn. Ct. App. 2004), the court held that the Tennessee Claims Commission has jurisdiction to hear a plaintiff-independent contractor’s claim against a defendant-university for violation of the THRA, Tenn. Code Ann. §§ 4-21-101 to 1004, because such a violation was a deprivation of a statutory right.

See also Tenn. Code Ann. § 50-2-202 (prohibiting wage discrimination based on sex).

B. Types of Conduct Prohibited

1. Tennessee Human Rights Act

Section 4-21-101(a)(1) of the THRA states that one of the primary purposes of the THRA is to “[p]rovide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968 and 1972, the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967.” “Accordingly, an analysis of claims under the THRA is the same as under Title VII of the Federal Civil Rights Act.” *Lynch v. City of Jellico*, 205 S.W.3d 384, 399 (Tenn. 2006).

The THRA contains its own internal statute of limitations of one year for private actions and/or 180 days to file a complaint with the Tennessee Human Rights Commission Tenn. Code Ann. § 4-21-302(c). However, Tennessee’s saving statutes apply to claims brought under the THRA. *See Rector v. DACCO, Inc.*, 2006 WL 1749525 (Tenn. Ct. App. 2006).

Tenn. Code Ann. § 4-21-401 provides:

(a) It is a discriminatory practice for an employer to:

(1) Fail or refuse to hire or discharge any person or otherwise to

(1) Fail or refuse to hire or discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin; or

(2) Limit, segregate or classify an employee or applicants for employment in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, because of national origin.

Tenn. Code Ann. § 4-21-301 provides that:

It is a discriminatory practice for a person or two (2) or more persons to:

(1) Retaliate or discriminate in any manner against a person because such person has opposed a practice declared discriminatory by this chapter or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing under this chapter;

(2) Aid, abet, incite, compel or command a person to engage in any of the acts or practices declared discriminatory by this chapter;

(3) Willfully interfere with the performance of a duty or the exercise of a power by the [Tennessee Human Rights Commission] or one (1) of its members or representatives;

(4) Willfully obstruct or prevent a person from complying with the provisions of this chapter or an order issued thereunder; or

(5) Violate the terms of a conciliation agreement made pursuant to this chapter.

The Act further defines a “discriminatory practice” as “any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons because of race, creed, color, religion, sex, age or national origin.” Tenn. Code Ann. § 4-21-102(4). “Discriminatory practice” does not include alleged political motives. *Batts v. Lack*, 1986 WL 13040 (Tenn. Ct. App. 1986).

In *Parker v. Warren County Utilities Dist.*, 2 S.W.3d 170 (Tenn. 1999), *rev'g in part Carr v. United Parcel Service.*, 955 S.W.2d 832 (Tenn. 1997), the court held that:

[U]nder the THRA, an employer is subject to vicarious liability to a victimized employee for actionable hostile work environment sexual harassment by a supervisor with immediate (or successively higher) authority over the employee. The defending employer may raise an affirmative defense to liability or damages when no tangible employment action has been taken. The affirmative defense is comprised of two necessary elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or that the employee unreasonably failed to otherwise avoid the harm. The affirmative defense shall not be available to the employer when the supervisor's sexual harassment has culminated in a tangible employment action.

With respect to age discrimination, the THRA provides:

(a) It is not unlawful for an employer, employment agency or labor organization to:

(1) Discriminate in employment on the basis of age where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; or

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension or insurance plan, that is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by § 4-21-101(b) because of the age of such individual, unless otherwise provided by law.

(b) The prohibitions imposed by this chapter relating to age discrimination in employment shall be limited to individuals who are at least forty (40) years of age.

(c) Notwithstanding any other provisions of this chapter relating to age discrimination in employment, it is not unlawful for an employer, employment agency or labor organization subject to the other provisions of this chapter to observe the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension or insurance plan, that is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual covered by this chapter because of the age of such individual.

(d) Nothing in this chapter relating to age discrimination shall be construed to prohibit compulsory retirement of any employee who has attained sixty-five (65) years of age and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, of the employer of such employee, that equals, in the aggregate, at least forty-four thousand dollars (\$ 44,000).

(e)(1) It is not unlawful for an employer subject to the provisions of this chapter to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken:

(A) With respect to the employment of an individual as a firefighter or a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable state or local law on March 3, 1983; and

(B) Pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(2) For the purposes of this part, unless the context otherwise requires:

(A) "Firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment

primarily to persons not directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position; and

(B) "Law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension or detention of individuals suspected or convicted of offenses against state criminal laws, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purposes of this subdivision (e)(2)(B), "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(3) The provisions of this subsection (e) shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of 1967 as in effect before January 1, 1987.

Tenn. Code Ann. § 4-21-407.

a. Retaliation Claims Under THRA

In order to establish a prima facie case of retaliatory discharge under the THRA a plaintiff must prove the following: (1) the plaintiff engaged in a protected activity; (2) the exercise of the plaintiff's protected civil rights was known to the defendant; (3) the defendant thereafter took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 29 (Tenn. 2011).

2. Pay Discrimination Based on Sex

Tenn. Code Ann. § 50-2-202 provides:

(a) No employer shall discriminate between employees in the same establishment on the basis of sex by paying any employee salary or wage rates less than the rates such employer pays to any employee of the opposite sex for comparable work on jobs the performance of which require comparable skill, effort and responsibility, and which are performed under similar working conditions. However, nothing in this part shall prohibit wage differentials based on a seniority system, a merit system, a system that measures earnings by quality or quantity of production, or any other reasonable differential that is based on a factor other than sex.

(b) An employer who is paying a wage differential in violation of this part shall not, in order to comply with this part, reduce the wage rate of any employee.

(c) No employer may discharge or discriminate against any employee by reason of any action taken by such employee to invoke or assist in any manner the enforcement of this part.

3. Disability Determination

Tenn. Code Ann. § 8-50-103(b) provides:

There shall be no discrimination in the hiring, firing and other terms and conditions of employment of the state of Tennessee or any department, agency, institution or political subdivision of the state, or of any private employer, against any applicant for employment based solely upon any physical, mental or visual

disability of the applicant, unless such disability to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved. Furthermore, no blind person shall be discriminated against in any such employment practices because such person uses a guide dog. A violation of this subsection (b) is a Class C misdemeanor.

It is important to note that handicap discrimination actions are handled through the same administrative procedures as all actions brought pursuant to the Tennessee Human Rights Act. Tenn. Code Ann. § 8-50-103(c).

4. Preferential Treatment for Veterans

Under the Veterans' Preference statute enacted in 2017, private employers may adopt employment policies giving preference in hiring to honorably discharged veterans, spouses of veterans with a service-connected disability, and unremarried widows and widowers of veterans that died either of a service-connected disability, or in the line of duty. Tenn. Code Ann. § 50-1-107 (a). This preference in hiring is not a requirement. Tenn. Code Ann. § 50-1-107(e). If the employer chooses to implement the policy however, it must be in writing and applied uniformly to employment decisions regarding hiring and promotion. Tenn. Code Ann. § 50-1-107(b), (c).

C. Administrative Requirements

Unlike Title VII litigants, plaintiffs bringing actions under the THRA have the option of either filing a complaint with the Human Rights Commission under Tenn. Code Ann. § 4-21-302 or commencing a civil action in chancery or circuit court, pursuant to Tenn. Code Ann. § 4-21-311. Litigants who choose the administrative route must file a complaint with the Commission within 180 days of the alleged discriminatory practice. Tenn. Code Ann. § 4-21-302(c). If the commission staff determines there not to be reasonable cause that a discriminatory practice occurred, then the commission will notify the complainant in writing of this determination. Tenn. Code Ann. § 4-21-302(d). The complainant may file an application for reconsideration within 30 days of receiving the commission's decision. Tenn. Code Ann. § 4-21-302(e). If the application is denied, the commission will dismiss the complaint, after which the complainant may seek judicial review via filing an action in chancery or circuit court. Tenn. Code Ann. § 4-21-307.

If the commission determines that reasonable cause exists that a discriminatory practice occurred, then the commission will seek to eliminate the practice through "conference, conciliation and persuasion," if such conciliatory agreement is possible. § 4-21-303(a). If necessary for temporary relief, the commission may petition chancery or circuit court to issue appropriate temporary relief while the administrative procedures are pending. Tenn. Code Ann. § 4-21-303(g).

Within 90 days of the reasonable cause determination, the commission will notify the parties of the time, date and place of a hearing. Tenn. Code Ann. § 4-21-304(a). After a hearing officer(s) conducts a hearing and examines all the evidence presented, the commission will issue a written opinion with a statement of facts and conclusions of law. Tenn. Code Ann. § 4-21-305.

If the commission determines that no discriminatory practice occurred, then it will dismiss the complaint, at which point the claimant may seek judicial review. *Id.* If the commission determines that a discriminatory practice did in fact occur, then the commission may issue a "cease and desist" order or "take such affirmative action as in the judgment of the commission will carry out the purposes of this chapter." *Id.*

It is also important to note that the civil actions which completely avoid the administrative hurdles are subject to a one-year statute of limitations. Also, the commencement of a civil action effectively dismisses any complaint pending before the Human Rights Commission. Tenn. Code Ann. § 4-21-311(d).

D. Remedies Available

1. Tennessee Human Rights Act

The remedies available to plaintiffs under the THRA who take either the administrative or civil action tracts are enumerated in Tenn. Code Ann. § 4-21-306. They include back-pay, rehiring, posting of notices, damages, costs, attorneys' fees and "such other remedies as shall be necessary and proper to eliminate all the discrimination identified." This catch-all provision does not allow punitive damages in employment discrimination cases. Had the General Assembly intended to authorize punitive damages as an available remedy, it could have and would have done so explicitly within the statute. *Carver v. Citizens Util. Co.*, 954 S.W.2d 34 (Tenn. 1997). Punitive damages are available under the THRA only for claims involving discriminatory housing practices and malicious harassment. Tenn. Code Ann. § 4-21-311; Tenn. Code Ann. § 4-21-701.

2. Pay Discrimination Based on Sex

Tenn. Code Ann. § 50-2-204 provides that:

(a) (1) Any employer who violates § 50-2-202 shall be liable to the employee or employees affected in the amount of their unpaid wages, and in instances of an employer knowingly violating § 50-2-202 in employee suits under subsection (b), up to an additional equal amount of unpaid wages as liquidated damages.

(2) For the second established violation of this part in a separate judicial proceeding distinct from the first, any employer who violates § 50-2-202 shall be liable to the employee or employees affected in the amount of their unpaid wages, and instances of an employer knowingly violating § 50-2-202 in employee suits under subsection (b), up to an additional two (2) times the amount of unpaid wages as liquidated damages.

(3) For the third established violation of this part in a separate judicial proceeding distinct from the first and second, any employer who violates § 50-2-202 shall be liable to the employee or employees affected in the amount of their unpaid wages, and instances of an employer knowingly violating § 50-2-202 in employee suits under subsection (b), up to an additional three (3) times the amount of unpaid wages as liquidated damages.

(b) Action to recover such wages may be maintained in any court of competent jurisdiction by any one (1) or more employees. The court shall, in cases of violation, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee and cost of the action to be paid by the defendant.

(c) No agreement by any such employee to work for less than the wages to which the employee is entitled under this part shall be a bar to any such action, or to a voluntary wage restitution of the full amount due under this part.

(d) At the written request of any employee claiming to have been paid less than the wage to which the employee is entitled under this part, the commissioner may bring any legal action necessary in behalf of the employee to collect such claim for unpaid wages. The commissioner shall not be required to pay any filing fee, or other cost in connection with such action. The commissioner shall have the power to join various claims against the employer in one (1) cause of action.

The Tennessee Supreme Court held in *Booker v. Boeing Co.*, 188 S.W.3d 639 (Tenn. 2006), that discriminatory pay is a continuing violation under the THRA and that an employee may seek back pay for the duration of the practice.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

Under Tenn. Code Ann. § 22-4-106(a), an employee must be excused from work if he or she shows the employer the summons to report for jury duty. Additionally, the employee is entitled to his or her usual compensation. Tenn. Code Ann. § 22-4-106(b). However, the employer has the discretion to deduct the amount of the fee or compensation the employee receives for serving as a juror. *Id.* The employer is not required to compensate the juror during the period of jury service if the employer employs less than five employees or if the juror has been employed by the employer on temporary basis for less than six months. *Id.*

Furthermore, it is unlawful for employers to discharge or discriminate against an employee for serving on jury duty if the employee gives proper notice pursuant to subsection (a). Tenn. Code Ann. § 22-4-106(d). Any employee who is discharged, demoted or suspended because the employee has taken time off to serve on jury duty is entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer. *Id.*

B. Voting

Under Tenn. Code Ann. § 2-1-106 employers are required to provide employees with a reasonable amount of paid time off to vote, not to exceed three (3) hours. An employee is eligible as long as they: (1) do not have three (3) or more hours prior to the beginning of their shift or following the end of their shift in which to vote while polls are open; and (2) requests paid voting leave by twelve o'clock noon (12:00 p.m.) the day before the election. An employer can specify the hours during which the employee may be absent.

C. Family/Medical Leave

Tenn. Code Ann. § 4-21-408 provides that:

(a) Employees who have been employed by the same employer for at least twelve (12) consecutive months as full-time employees, as determined by the employer at the job site or location, may be absent from such employment for a period not to exceed four (4) months for adoption, pregnancy, childbirth and nursing an infant, where applicable, referred to as "leave" in this section. With regard to adoption, the four-month period shall begin at the time an employee receives custody of the child.

(b)(1) Employees who give at least three (3) months' advance notice to their employer of their anticipated date of departure for such leave, their length of leave, and their intention to return to full-time employment after leave, shall be restored to their previous or similar positions with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of their leave.

(2) Employees who are prevented from giving three (3) months' advance notice because of a medical emergency that necessitates that leave begin earlier than originally anticipated shall not forfeit their rights and benefits under this section solely because of their failure to give three (3) months' advance notice.

(3) Employees who are prevented from giving three (3) months' advance notice because the notice of adoption was received less than three (3) months in advance shall not forfeit their rights and benefits under this section solely because of their failure to give three (3) month(s) advance notice.

(c)(1) Leave may be with or without pay at the discretion of the employer. Such leave shall not affect the employees' right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which the employees were eligible at the date of their leave, and any other benefits or rights of their employment incident to the employees' employment position; provided, that the employer need not provide for the cost of any benefits, plans or programs during the period of such leave, unless such employer so provides for all employees on leaves of absence.

(2) If an employee's job position is so unique that the employer cannot, after reasonable efforts, fill that position temporarily, then the employer shall not be liable under this section for failure to reinstate the employee at the end of the leave period.

(3) The purpose of this section is to provide leave time to employees for adoption, pregnancy, childbirth and nursing the infant, where applicable; therefore, if an employer finds that the employee has utilized the period of leave to actively pursue other employment opportunities or if the employer finds that the employee has worked part time or full time for another employer during the period of leave, then the employer shall not be liable under this section for failure to reinstate the employee at the end of the leave.

(4) Whenever the employer shall determine that the employee will not be reinstated at the end of the leave because the employee's position cannot be filled temporarily or because the employee has used the leave to pursue employment opportunities or to work for another employer, the employer shall so notify the employee.

(d) Nothing contained within the provisions of this section shall be construed to:

(1) Affect any bargaining agreement or company policy that provides for greater or additional benefits than those required under this section;

(2) Apply to any employer who employs fewer than one hundred (100) full-time employees on a permanent basis at the job site or location; or

(3) Diminish or restrict the rights of teachers to leave pursuant to title 49, chapter 5, part 7, or to return or to be reinstated after leave.

(e) This section shall be included in the next employee handbook published by the employer after May 27, 2005

D. Pregnancy/Maternity/Paternity Leave

Tennessee employers must follow the federal Family and Medical Leave Act (FMLA), which allows eligible employees to take unpaid leave for certain reasons. Once an employee's FMLA leave is over, the employee has the right to be reinstated to his or her position. Tennessee law also gives employees the right to take parental leave, and employees are entitled to the protections of all applicable law (e.g. if more than one law applies, the employee may use the most beneficial provisions).

The Tennessee Maternity Leave Act ("TMLA") allows employees, male or female, working in Tennessee to take up to 16 weeks of leave for childbirth, pregnancy, nursing of an infant or adoption. Tenn. Code Ann. § 4-21-408. The TMLA does not require employers to pay employees while taking leave. The TMLA applies to those employers with at least 100 employees at a single job location. To qualify for leave under TMLA, an employee must work

employees at a single job location. To qualify for leave under FMLA, an employee must work full-time for the employer for at least one year prior to the leave. Employees must provide a minimum of three months' notice before taking FMLA leave, except when the need for time off stems from a medical emergency. The employer is not liable for failing to reinstate the employee at the end of the leave if the employee's position is so unique that the employer, after reasonable efforts, cannot temporarily replace the employee or if the employer learns that the employee, during the period of leave, is actively pursuing or actively engaged in other employment.

E. Day of Rest Statutes

Title 15 of the Tennessee Code lists all recognized Holidays and Special Days of Observance. The statute does not state any restrictions upon employers regarding days that employees cannot work. The following general guideline is provided: "all public offices of this state may be closed and business of every character, at the option of the parties in interest of the same, may be suspended." Tenn. Code Ann. § 15-1-101.

F. Military Leave

Tenn. Code Ann. § 8-33-102 provides that:

Any public employee who leaves a position or who left such position not earlier than June 27, 1950, whether voluntarily or involuntarily, in order to perform military duty, or who was performing military duty on June 27, 1950, and who is relieved or discharged from such duty under conditions other than dishonorable, and makes application for reemployment within ninety (90) days after such employee is relieved from military duty or from hospitalization continuing after discharge for a period of not more than one (1) year shall:

(1) If still physically qualified to perform the duties of such position, be restored to such position if it exists and is not held by a person with greater seniority, otherwise to a position of like seniority, status and pay; or

(2) If not qualified to perform the duties of such position by reason of disability sustained during such service, such public employee shall be placed in such other position, the duties of which such employee is qualified to perform as will provide the employee like seniority, status and pay, or the nearest approximation thereof consistent with the circumstances of the case.

G. Sick Leave

Sick leave is considered a fringe benefit and there is no Tennessee law that regulates fringe benefits. Company policy is the determining factor. These and similar matters are also determined by agreement between the employees and their employer or their authorized representatives. *See* Tenn. Code Ann. § 50-3-103. However, an employer in Tennessee may be required to provide an employee unpaid sick leave in accordance with the FMLA or other federal laws.

H. Domestic Violence Leave

Currently, Tennessee does not require employers to provide a leave of absence for this purpose. Tennessee Senate Bill 1769, which would have established employment protections for people who are victims of domestic abuse or sexual assault to attend court, meet with law enforcement, attend counseling, or find new housing, failed on February 13, 2018, in the Senate Judiciary Committee.

I. Other Leave Laws

Other than those discussed above, Tennessee does not have any other employment leave laws.

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

Tennessee has not established a minimum wage rate. The federal minimum wage rate applies. Currently, the federal minimum wage rate is \$7.25 as of July 24, 2009.

B. Deductions from Pay

Under Tennessee law, deductions can only be taken out of pay if the employee has authorized it by a written statement. Tenn. Code Ann. § 50-2-110. An employee's pay can be cut with or without his approval as long as the employer tells the employee before any work is done. The employee cannot work without first knowing the amount of wages to be paid. Tenn. Code Ann. § 50-2-101(b).

Under Tennessee Wage Regulation Act, an employer is prohibited from penalizing an employee or deducting any sum of money as a penalty or fine from the employee's wages. Tenn. Code Ann. § 50-2-101 to 113.

The Tennessee Wage Regulation Act also requires employers of private employments of 5 or more employees to establish and maintain regular pay periods at least twice monthly. Tenn. Code Ann. § 50-2-103. Penalties may be assessed for violation of this section against those employers for missing a regularly scheduled payroll date and in paying their employees late.

C. Overtime rules

Tennessee does not have laws governing the payment of overtime. Federal overtime laws apply under the Fair Labor Standards Act.

D. Time for payment upon termination

Tennessee employers whose employees are laid off, fired, or quit must pay their employee's wages in full at the next regular payday, not to exceed 21 days from the date of their discharge or termination. Tenn. Code Ann. § 50-2-103(g). Claims against an employer for late payment are filed with the Labor Standards Division, and the Tennessee Department of Labor and Workforce Development has the authority to enforce this law. Tenn. Code Ann. § 50-2-103(j).

1.. Prospective Employee to be Informed as to Wages – Exceptions

Tenn. Code Ann. § 50-2-101 makes it a Class C Misdemeanor for any proprietor, foreman, owner or other person to employ, permit or suffer to work for hire, in, about, or in connection with any workshop or factory, as defined in subsection (a), any person whatsoever without first informing such employee of the amount of wages to be paid for such labor.

2.. Redemption of Coupons or Scrip

Tenn. Code Ann. § 50-2-102 controls the use of coupons, scrip, punchouts, store orders or other evidences of indebtedness by employers to pay their laborers and employees.

3.. Payment of Employees in Private Employment

Tenn. Code Ann. § 50-2-103 sets forth the appropriate timeline for wage payments for private employees.

4.. Misrepresenting Wages in New Employment

Tenn. Code Ann. § 50-2-104 makes it a Class C Misdemeanor to misrepresent the amount of wages an employee is to receive upon entering into a new contract.

5.. Restrictions on Assignment of Income -- Court Orders

Tenn. Code Ann. § 50-2-105 establishes that no assignments may be brought on an employer for unearned wages of an employee, unless the assignment has been assented to in writing by the employer.

6.. Company Stores

Tenn. Code Ann. § 50-2-106 makes it a Class C Misdemeanor for an employer to restrict its employees from trading with stores as specified by the employer.

7.. Distribution of Service Charges or Gratuities

Tenn. Code Ann. § 50-2-107 establishes the method by which employees are to receive tips, gratuities, etc. Any such tip or gratuity must be paid to or distributed among employees who have rendered that service. The payment must be made at the close of business on the day the amount is received or at the time the employee is regularly paid.

8. Collection of Claims and Judgments for Wages

Tenn. Code Ann. § 50-2-108 establishes the additional powers and duties of the Commissioner of Labor and Workforce Development.

9. Assessment of Penalties

Tenn. Code Ann. § 50-2-109 concerns penalties for violations of the preceding sections.

In summary, Tenn. Code Ann. § 50-2-101 *et seq.* provides as follows:

When to pay. Private employers of at least five employees must pay wages earned during the first 16 days of a month by the fifth of the following month. Wages earned during the second half of the month must be paid by the 20th of the following month. Wages may be paid more frequently than required. Employees absent at the time of payment must be paid within a reasonable time after demand.

Special rules. If private clubs, bars, or restaurants include an automatic percentage or dollar amount on a customer's bill as a tip, that amount must be paid at the close of the business day to the employees who served the customer. If the customer pays by credit card, employees must be paid on the day the employer collects from the credit card company or by the first regular payday after collection. The law does not apply to bills for food or beverages served at a banquet or meeting facility segregated from the public-at-large, unless the facilities are on the premises of a private club.

Terminated employees. Any employee who leaves or is discharged must be paid in full all wages or salary earned by the later of the next regular pay day or 21 days following the date of discharge or voluntary leaving.

How to pay. Employees must be paid in cash or by negotiable checks or drafts payable on presentation at a bank or other established place of business without discount. Scrip or other evidence of indebtedness must be redeemable in lawful money, at face value, on demand or within 30 days of issuance.

Direct deposit. Direct deposit is permissible and may be mandated if the employee has a choice

of depository institution. Direct deposit is mandatory for state employees.

Final wages and vacation pay. Although employers are not obligated to provide vacations, any vacation pay or "comp" time owed to the employee under a collective bargaining agreement or company policy must be included with the final wages of a terminated employee.

Tennessee does not permit deductions (other than those legally required) from final paychecks. However, if an employee has an outstanding loan balance, the department of labor suggests that an amicable agreement of repayment be established. If unacceptable to the employee, then the company should treat the loan balance as it would any other outstanding loan balance.

Final wages must include any vacation or other compensatory time that is owed to the employee by virtue of company policy or labor agreement. However, employers are not required to provide vacation or establish written vacation pay policies.

Deductions from pay. Unauthorized deductions are not allowed. Deductions for cash shortages are permitted with the employee's written consent. Payment of tips may not be docked or reduced for any actions of employees in connection with their employment.

Notices; posting; recordkeeping. A notice of regular paydays must be posted. Employees in workshops and factories must be informed of the amount of wages before being hired. The Department of Labor and Workforce Development inspectors are entitled to view wage and payroll records relating to complaints filed by employees.

Penalties. A violation of the law's wage payment provisions is a Class B misdemeanor subject only to a fine of \$100 to \$500. Misrepresenting the amount of wages an employee is to receive on entering into a new contract of employment is a Class C misdemeanor (subject to a fine not to exceed \$50 or imprisonment for up to 30 days, or both). A violation of the provisions on distributions of tips is a Class C misdemeanor, and each failure to pay an employee is a separate offense.

In addition, Tenn. Code Ann. § 55-20-204, the Passenger Contract Carrier Safety Act, provides:

(a) A passenger contract carrier shall not permit, or require, any driver to remain on duty, and the driver shall not drive:

(1) More than twelve (12) hours following eight (8) consecutive hours off;

(2) If the driver's combined on-duty and drive time hours equal fifteen (15) hours since last obtaining eight (8) consecutive hours off-duty time; or

(3) If the total number of hours of on-duty time and drive time exceed seventy (70) hours in any period of eight (8) consecutive days. However, in the event of an emergency or unforeseeable delay, a driver may drive for up to two (2) additional hours to complete an assignment or to deliver passengers to a safe location.

(b) Each driver shall maintain, and keep current, a daily log book detailing the hours worked. The log book for the past thirty (30) working days must be in the driver's possession at all times when on duty. The log book shall be made available for inspection upon the request of any law enforcement officer or passenger.

(c) For purposes of this section:

(1) Time spent driving a transport vehicle is considered time on duty even if no passengers are aboard the vehicle.

(2) Time spent performing any other service for the passenger contract carrier, or an associated business, during a twenty-four (24) hour period in which the transport vehicle driver is engaged in, or connected with, the movement of a transport vehicle is considered time on-duty.

(d) The passenger contract carrier shall maintain, and retain, for a period of six (6) months, accurate time records showing:

(1) The time the driver reports for duty each day;

(2) The total number of hours the driver is on-duty each day; and

(3) The time the driver is released from duty each day.

E. Breaks and Meal Periods

Under Tenn. Code Ann. § 50-2-103(h)(1)(A), employees are entitled to a 30-minute unpaid meal break if the employee is scheduled to work six hours consecutively. Additionally, the meal break cannot be scheduled during or before the first hour of the scheduled work activity. However, an employee is not entitled to a 30-minute unpaid meal break if the employee's workplace environment, by their nature of business, provides for ample opportunity to rest or take an appropriate break.

Tenn. Code Ann. § 50-2-103(h)(1)(B) further provides that at the discretion of the employer, employees who are principally employed in the food and beverage industry and receive tips may waive his or her right to a 30-minute unpaid meal break. An employee's waiver of the 30-minute unpaid meal break is effective only if the employee submits the waiver knowingly and voluntarily, and the employer and employee both must consent to the waiver. Under Tenn. Code Ann. § 50-2-103(h)(1)(C), an employer who intends to enter into waiver agreements with employees must establish a reasonable policy that permits employees to waive the unpaid meal break. Any such policy must be in writing and posted in at least one conspicuous location in the workplace. The policy must include the following elements: (1) A waiver form that contains a statement that the employee acknowledges the employee's right, under state law, to receive an unpaid meal break of not less than 30 minutes during a six-hour work period and that the employee is knowingly and voluntarily waiving this right; (2) The length of time the waiver will be in effect; and (3) Procedures for rescission of the waiver agreement by the employee or employer. Either the employer or employee may rescind a waiver agreement after providing notice to the other party. Such notice must be provided at least seven days prior to the date that the waiver will no longer be in effect.

The requirements under Tenn. Code Ann. § 50-2-103(h) apply to employers who have at least five employees. Tenn. Code Ann. § 50-2-103 makes no provision for private enforcement, but instead provides for enforcement by the department of labor and workforce development. *See* Tenn. Code Ann. § 50-2-103(j).

F. Employee Scheduling Laws

Tennessee does not have minimum wage or overtime laws. Accordingly, Tennessee has not adopted a definition of hours worked for purposes of compensation calculations, established what constitutes a workweek, waiting time, when on-call time must be counted for purposes of compensation calculations, when sleeping time must be counted for purposes of compensation calculations, or when travel time must be counted for purposes of compensation calculations. However, the standards for each of the calculations set forth in 29 U.S.C. 201, *et seq.*, the Fair

Labor Standards Act, typically apply because most employers and employees are subject to the FLSA.

Tennessee has not enacted any laws regarding advanced notice of an employee's work schedule.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

On June 11, 2007 then-Tennessee Governor Bredesen signed the Non-Smokers Protection (NSPA) codified at Tenn. Code Ann. § 39-17-1801 *et seq.* which took effect on October 1, 2007. The NSPA prohibits smoking in all enclosed public places. § 1803. However, under the NSPA smoking is permitted in the following places:

- (1) Age-restricted venues;
- (2) Hotel and motel rooms that are rented to guests and are designated as smoking rooms; provided, that no more than twenty-five percent (25%) of rooms rented to guests in a hotel or motel may be so designated. All smoking rooms on the same floor shall be contiguous and smoke from these rooms shall not infiltrate into areas where smoking is prohibited pursuant to this part;
- (3) All premises of any manufacturer, importer, or wholesaler of tobacco products, all premises of any tobacco leaf dealer or processor, and all tobacco storage facilities;
- (4)(A) Non-enclosed areas of public places, including:
 - (i) Open air patios, porches or decks;
 - (ii) Any area enclosed by garage type doors on one (1) or more sides when all those doors are completely open; and
 - (iii) Any area enclosed by tents or awnings with removable sides or vents when all those sides or vents are completely removed or open;
- (B) Smoke from those non-enclosed areas shall not infiltrate into areas where smoking is prohibited pursuant to this part;
- (5) Nursing homes and long-term care facilities licensed pursuant to title 68, chapter 11; provided, that this exemption shall only apply to residents of those facilities and that resident smoking practices shall be governed by the policies and procedures established by those facilities. Smoke from such areas shall not infiltrate into areas where smoking is prohibited pursuant to this part;
- (6) Private businesses with three (3) or fewer employees where, in the discretion of the business owner, smoking may be allowed in an enclosed room not accessible to the general public. Smoke from that room shall not infiltrate into areas where smoking is prohibited pursuant to this part;
- (7) Private clubs; provided, that this exemption shall not apply to any entity that is established solely for the purpose of avoiding compliance with this part;
- (8) Private homes, private residences and private motor vehicles, unless those homes, residences and motor vehicles are being used for child care or day care or unless the private vehicle is being used for the public transportation of children or as part of health care or day care transportation;
- (9) Retail tobacco stores that prohibit minors on their premises; and
- (10) Commercial vehicles when the vehicle is occupied solely by the operator.

§ 1804. Pursuant to the NSPA, "No Smoking" signs or the international "No Smoking" symbol, consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it must clearly and conspicuously be posted at every entrance to every public place and place of employment where smoking is prohibited. § 1805.

The NSPA is enforced by the Department of Health and the Department of Labor and Workforce Development. § 1806. Individuals found in violation of the NSPA are subject to a \$50.00 civil penalty. Owners, managers and those in control of public places found in violation of the NSPA are subject to the following civil penalties:

- (1) For a first violation in any twelve-month period, a written warning from the department of health or department of labor and workforce development, as appropriate;
- (2) For a second violation in any twelve-month period, a civil penalty of one hundred dollars (\$100); and
- (3) For a third or subsequent violation in any twelve-month period, a civil penalty of five hundred dollars (\$500).

§ 1807. Furthermore, each day on which a knowing violation of this part occurs shall be considered a separate and distinct violation. § 1807. The Department of Health and the Department of Labor and Workforce are authorized by the NSPA to promulgate their own rules. § 1811. Furthermore, “[t]he commissioner of health and the commissioner of labor and workforce development shall annually request other governmental and educational agencies to establish local operating procedures in cooperation and compliance with this part.” § 1809. In Tennessee these local operation procedures are codified at Tenn. Comp. R. & Regs. 800-06-01-.01 through .08.

Tennessee also prohibits terminating an employee for the use of agricultural products i.e. tobacco product. Tenn. Code Ann. § 50-1-304(e).

B. Health Benefit Mandates for Employers

Tennessee law does not require that employers provide employees disability or medical insurance benefits, however, if such benefits are provided then the employer may be subject to the provisions of ERISA, COBRA and HIPAA.

C. Immigration Laws

Regarding immigration laws, the TLEA provides as follows:

Nothing in this part shall be construed to abrogate any obligations by an employer to comply with federal immigration law, including, but not limited to, the proper completing and maintaining of federal employment eligibility verification forms or documents.

This part shall be interpreted so as to be fully consistent with all federal laws, including, but not limited to, federal laws regulating immigration and labor.

Tenn. Code Ann. § 50-1-711 & 712.

D. Right to Work laws

In Tennessee it is unlawful to deny employment or terminate an employee for joining or affiliating with any labor union or employee organization. Tenn. Code Ann. § 50-1-201.

E. Lawful Off-duty Conduct (including lawful marijuana use)

On April 29, 2014, then-Tennessee Governor Bill Haslam signed a password protection law, known as the Employee Online Privacy Act of 2014 (S.B. 1808), which went into effect on January 1, 2015. The law prohibits an employer from requesting or requiring that applicants or employees disclose their passwords for personal internet accounts. The law also prohibits employers from requiring applicants or employees to (a) add the employer to the employee's or applicant's list of contacts associated with the personal internet account; or (b) permit the employer to observe their restricted online content after they have accessed an online account.

The law broadly prohibits employers from taking any adverse action against employees, failing to hire applicants, or otherwise penalizing an employee or applicant for not permitting access to their personal online account in a manner prohibited by the statute. While this law places far-reaching restrictions on employers' access to applicant or employees' personal internet accounts, it does not provide for a private cause of action for wronged employees or applicants, nor does it provide any mechanism for administrative enforcement. In short, it is unclear how this law is to be enforced.

There is no exception in Tennessee law for use of marijuana, for medicinal use or otherwise. If an employer implements a certified drug-free workplace pursuant to Chapter 0800-02-12 of Tennessee's workers' compensation laws, they will get a rebuttable presumption that an employee who tested positive for marijuana (or other scheduled drugs) on or about the time of injury was injured due to intoxication, which does not arise in the course and scope of employment.

F. Gender/Transgender Expressions

In *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, (6th Cir. 2018), the 6th Circuit held that the firing of an employee because of the expression of their gender necessarily violates Title VII. In this case, Aimee Stephens (formerly known as Anthony Stephens) was born biologically male. While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. ("the Funeral Home"), a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. *Id.* at 566. After her employment was terminated, Stephens filed a sex-discrimination charge with the EEOC, alleging that "[t]he only explanation" she received from "management" for her termination was that "the public would [not] be accepting of [her] transition." R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). *Id.* at 569.

The Court held, "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female." *Id.* at 571. Based on *Price Waterhouse*, we determined that "discrimination based on a failure to conform to stereotypical gender norms" was no less prohibited under Title VII than discrimination based on "the biological differences between men and women." *Id.* at 574. Citing *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). "We also hold that discrimination on the basis of transgender and transitioning status violates Title VII." *Id.* First, it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex. *Id.* at 575. Second, discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping. *Id.* at 576. Because an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be. 884 F.3d at 578.

G. Other Key State Statutes

Title 50 of the Tennessee Code covers additional matters relating to employment:

CHAPTER 1. EMPLOYMENT RELATIONSHIP AND PRACTICES
CHAPTER 3. OCCUPATIONAL SAFETY AND HEALTH
CHAPTER 5. CHILD LABOR
CHAPTER 6. WORKERS' COMPENSATION
CHAPTER 7. EMPLOYMENT SECURITY LAW
CHAPTER 9. DRUG FREE WORKPLACE PROGRAMS

See also Tenn. Code Ann. §§ 62-27-124 and 125 (making polygraph results confidential and providing certain rights to examinees).

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