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## **State Employment Law Update: Texas And Beyond**

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## STATE EMPLOYMENT LAW UPDATE: TEXAS AND BEYOND

### I. INTRODUCTION

This article reviews recent and significant employment law cases in Texas over the last year. Employment issues are considered and decided by courts every day, and consequently, the area of employment law is frequently changing and evolving. The goal of this paper is to inform the reader of important developments, changes, and rulings in the area of employment law in order to be better prepared to handle employment issues as they arise.

### II. Chapter 21 of the Texas Labor Code

#### A. Sexual Harassment

##### 1. Jurisdictional issues—*Reid v. SSB Holdings, Inc.*, 506 S.W.3d 140 (Tex.App.-Texarkana 2016, pet. filed).

Employee filed a complaint of sexual harassment under Chapter 21 with the Texas Workforce Commission-Civil Rights Division (TWCCRD), but the complaint was never verified under oath as required by the Texas Labor Code Section 21.201(b). This section states that a complaint must be made under oath; this provision is mandatory under the Texas Government Code Section 311.016(3). The employer filed a plea to the jurisdiction claiming that the failure to verify the complaint prevented the court from having jurisdiction under *Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 488 (Tex. 1991). The district court granted the plea to the jurisdiction and dismissed the case. The employee appealed. The court of appeals held that there is no language that indicates that the verification requirement is jurisdictional or provides that failure to verify the complaint should result in dismissal.

Since the language of the statute does not clearly express a legislative intent that the failure to verify a complaint filed with the TWCCRD deprives the trial court of subject-matter jurisdiction, the purpose of the statute is not impaired by interpreting the verification requirement as non-jurisdictional. Given this, Employee's failure to verify the complaint she filed with the Commission did not deprive the trial court of subject-matter jurisdiction, and the trial court erred in granting appellee's plea to the jurisdiction.

**2. Same-sex sexual harassment in Texas: *Alamo Heights Indep. Sch. Dist. v. Clark*, 04-14-00746-CV, 2015 WL 6163252 (Tex. App.—San Antonio Oct. 21, 2015, review granted).**

The Texas Supreme Court granted petition to review this case of same-sex sexual discrimination. In this case, Plaintiff-Appellee Clark was hired as a physical education teacher for Alamo Heights Independent School District (AHISD); right after she was hired, Clark was harassed by a female co-worker (Monterrubio). Monterrubio would make comments on Clark's breasts and buttocks, and from time to time, Monterrubio would bump Clark and block her exit. In February of 2009, Clark submitted a formal grievance against Monterrubio, asking that either Clark or Monterrubio be removed from the workplace; Clark was transferred to another campus. In May 2009, Clark was placed on administrative leave, and in August 2009, she was terminated. Clark then brought a sexual harassment and retaliation claim against AHISD based on Chapter 21. AHISD made a plea to the jurisdiction, the trial court denied the plea. The trial court's decision to deny the plea to the jurisdiction was affirmed by the court of appeals, and AHISD appealed to the Texas Supreme Court.

AHISD presents the following issues on appeal: 1) Whether the second and third step of the *McDonnell Douglas* burden-shifting framework are part of the jurisdictional analysis under *Mission Consolidated* for purposes of sovereign immunity under Chapter 21, and 2) whether same-sex hostile work environment claims are sufficient to constitute gender discrimination under Chapter 21.

**3. Assault claims not preempted by Chapter 21: *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017)**

A former employee [B.C.] made common law assault claim and other tort claims against her former employer Steak N Shake, claiming her supervisor had sexually assaulted her on company property. According to the employee, during the night shift, the supervisor attacked her in the restroom, attempting to pull down her pants, exposing himself, and putting his hand up her shirt. The supervisor had not made any previous sexual approaches, or done anything of a sexual nature. The trial court granted summary judgment in favor of Steak N' Shake. The court of appeals affirmed the decision, reasoning that the assault claim was preempted by Chapter 21, so that the claim had to be brought under Chapter 21 framework. The former employee appealed the decision.

The Texas Supreme Court reversed this decision, holding that the gravamen of the former employee's assault claim was assault and not sexual harassment; as such, the claim was not preempted by Chapter 21. The Texas Supreme Court held that courts must analyze the gravamen of a plaintiff's assault claims, and if the gravamen is not sexual harassment, Chapter 21 does not preempt the claims. In this case, the former employee's supervisor had not previously made sexual advances to the employee or engaged in other conduct of a sexual nature, as usually occurs in sexual harassment claims. Given this, the Supreme Court reasoned that the gravamen of the former employee's claim was assault, which was not preempted by Chapter 21.

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