Hot Topics in Constitutional, Civil Rights, Local Government, and Employment Law

by Thomas P. Brandt
John F. Roehm III
Joshua A. Skinner
Francisco J. Valenzuela
John D. Husted

Hot Topics In Constitutional/Civil Rights Law

I. FIRST AMENDMENT CASES

United States Supreme Court


First Amendment protections extend to corporations. Restrictions on campaign financing amounts to an unconstitutional restraint on free speech.

Doe v. Reed, 130 S. Ct. 2811 (2010)

The disclosure of referendum petitions do not, as a general matter, violate the First Amendment.


A federal statute which makes it a crime to “knowingly provide material support or resources to a foreign terrorist organization” does not violate a person’s First Amendment right to freedom of speech and association and was not impermissibly vague.

Christian Legal Society Chapter of the University of California v. Martinez, 130 S. Ct. 2971 (2010)
Conditioning access to a student-organization forum on compliance with an all-comers policy is reasonable and viewpoint neutral and does not violate the First Amendment.

**Fifth Circuit**

*Service Employers International Union, Local 5 v. City of Houston, 595 F. 3d 588 (5th Cir. 2010)*

Portions of the City of Houston’s sound ordinance, parade ordinance and parks ordinance violated the First Amendment because they were not narrowly tailored and/or were constitutionally vague.

*Fairchild v. Liberty Independent School District, 597 F.3d 747 (5th Cir. 2010)*

School board meetings and comment sessions are limited public forums for the limited time and topic of the meeting and a government may restrict speech in these limited public forums as long as the regulation does not discriminate against speech on the basis of viewpoint and it is reasonable in light of the purpose served by the forum.

*Comer v. Scott, 610 F.3d 929 (5th Cir. 2010)*

The Texas Education Agency’s neutrality policy does not violate the Establishment Clause because it neither endorses nor promotes religion.

*Sonnier v. Crain, 613 F.3d 436 (5th Cir. 2010)*

A University has a significant interest in preserving its property for educational purposes and limiting where outside speakers may assemble or demonstrate but the University’s security fee provision in its speech policy was unconstitutional because the University had the sole discretion in determining the amount of the security fee and the policy did not include any objective factors to use in determining the fee.

*Kleinman v. City of San Marcos, 597 F.3d 323 (5th Cir. 2010)*

When “speech” and “non-speech” elements are united in a course of conduct, a valid governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. When the “expressive” component of an object, considered objectively, in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation.

*Cao v. Federal Election Commission, 2010 U.S. App. Lexis 19056 (5th Cir. 2010)*

The Federal Election Campaign Act’s regulation of political parties’ campaign contributions and coordinated expenditures is constitutionally permissible and does not infringe upon the First Amendment rights of the Plaintiffs to engage in political debate and discussion.
**RTM Media, L.L.C. v. City of Houston, 584 F.3d 220 (5th Cir. 2009)**

A city’s sign code that places a lesser value on “off-premise” than “on-premise” signs, while excluding from regulation all noncommercial signs, is constitutional where it is shown that commercial billboards pose a greater nuisance than noncommercial ones.

**Texas Supreme Court**

*Institutional Division of the Texas Department of Criminal Justice v. Powell, 318 S.W.3d 889 (Tex. 2010)*

To prevail on a claim of retaliation under 42 U.S.C. §1983, one must establish there was a retaliatory adverse action. Acts of retaliation that are *de minimis* do not satisfy the retaliatory adverse act requirement. One must allege adverse acts that would chill or silence a person of ordinary firmness from future First Amendment activities.

**II. FOURTH AMENDMENT CASES**

**United States Supreme Court**

*City of Ontario, Calif. v. Quon, 130 S. Ct. 2619 (2010)*

An employer’s search of an employee’s text messages from an employer-issued pager was reasonable under the circumstances.


Officers do not need iron-clad proof of a likely, serious, life-threatening injury to invoke the emergency aid exception to the Fourth Amendment prohibition of warrantless searches.

**Fifth Circuit**

*Good v. Curtis, 610 F.3d 393 (5th Cir. 2010)*

The initiation of criminal charges without probable cause and the fabrication of evidence violate the Fourth Amendment’s protection against unreasonable seizures and due process rights secured by Fourteenth Amendment.

*Lockett v. New Orleans City, 607 F.3d 992 (5th Cir. 2010)*

If an officer has probable cause to believe that an individual has committed even a minor criminal offense in his presence, the officer may, without violating the Fourth Amendment, arrest the offender. It is not clearly established that multiple searches of a suspect is objectionably unreasonable and thus, unconstitutional.

A temporary emergency custody order to seize a child from his or her parents pursuant to Texas Family Code §262.102 meets the warrant requirement in the context of a search of the child’s home to locate the child. However, the warrantless seizure of that child’s siblings in the absence of any imminent danger is a constitutional violation.

**Peterson v. City of Fort Worth, 588 F.3d 838 (5th Cir. 2009)**

Without proper context, pointing to 27 incidents of excessive force by a police department does not suggest a pattern so common and well-settled as to constitute a custom that fairly represents a municipal policy of condoning excessive force.

**Hill v. Carroll County, 587 F.3d 230 (5th Cir. 2009)**

An officer’s use of four-point restraints (hog tying) on an obese, physically aggressive female arrestee for transport to a jail did not constitute excessive force, even if the cause of the woman’s death during transport was positional asphyxiation from the four-point restraint position.

**Manis v. Lawson, 585 F.3d 839 (5th Cir. 2009)**

Under the circumstances, a police officer could have reasonably believed that a suspect in a car who refused orders to show his hands posed a threat of serious physical harm to himself or to others if the suspect moved his arm out of sight and reasonably appeared to be reaching under his seat for a weapon, such that the officer’s use of deadly force was objectively reasonable.

**III. SIXTH AMENDMENT CASES**

**United States Supreme Court**

**Smith v. Spisak, 130 S. Ct. 676 (2010)**

The inadequacy of a closing argument can violate a person’s Sixth Amendment rights if a reasonable probability exists that adequate representation would have led to a different result.

**Presley v. Georgia, 130 S. Ct. 721 (2010)**

The Sixth Amendments right to a public trial in criminal cases extends to the jury selection phase of trial and in particular, the voir dire of prospective jurors.

**Berghuis v. Smith, 130 S. Ct. 1382 (2010)**

In a fair-cross section of community claim under the Sixth Amendment for jury selection, the petitioner must show that the underrepresentation of a particular group of people is due to systematic exclusion.

The failure of counsel to inform a client that his plea and conviction for drug distribution would subject him to deportation constitutes ineffective assistance of counsel in violation of the Sixth Amendment.

IV. EIGHTH AMENDMENT CASES

United States Supreme Court

Wilkins v. Gaddy, 130 S. Ct. 1175 (2010)

A “significant injury” is not necessary to state an excessive force claim under the Eighth Amendment. The “core judicial inquiry” is not whether a certain quantum of injury was sustained, but rather “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm”.

V. FOURTEENTH AMENDMENT CASES

United States Supreme Court


The Second Amendment right to keep and bear arms is applicable to the States through the Fourteenth Amendment’s Due Process Clause.

Fifth Circuit

Jennings v. Owens, 602 F.3d 652 (5th Cir. 2010)

Designating an individual as a sex offender requires procedural due process, i.e., notice and hearing.

Meza v. Livingston, 602 F.3d 392 (5th Cir. 2010)

A parolee has a liberty interest in being free from sex offender registration and therapy and in order to impose such conditions, the State must provide due process.

Terry v. Hubert, 609 F.3d 757 (5th Cir. 2010)

Right of access to the courts guarantees no particular methodology, but rather the conferral of a capability – the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts. It was not clearly established to a reasonable officer that a defendant who is promptly afforded counsel and a bond hearing but is then held beyond the deadline for
formal indictment suffers a due process violation.

Texas Courts of Appeals


A school district’s zero tolerance policy did not violate a student’s due process rights because the student received a hearing and the school district provided an escape mechanism in lieu of strict application of the zero tolerance policy.


The Texas Legislature has provided an adequate post-deprivation remedy to compensate inmates for property lost or damaged by prison officials and thus, inmates in Texas have no arguable basis in law for asserting a §1983 due process claim for the intentional destruction of their property by a prison officer.


The provisions of the Texas Property Tax Code satisfy the due process requirements under the U.S. Constitution.

VI. OTHER CONSTITUTIONAL/CIVIL RIGHTS CASES

United States Supreme Court


The sufficiency of a *Miranda* warning is not based on the specific words used but rather whether the warning reasonably conveys to a suspect his rights as required by *Miranda*.


A fourteen day break between the time a suspect invokes his *Miranda* rights and the custodial interrogation makes his waiver of his *Miranda* rights voluntary.


In order to invoke one’s *Miranda* right to remain silent during interrogation, one must do so “unambiguously”. Remaining silent during an interrogation is not sufficient to invoke one’s right to remain silent.

Fifth Circuit
Xcaliber International Limited, LLC v. Attorney General State of Louisiana, 612 F.3d 368 (5th Cir. 2010)

A Louisiana statute requiring tobacco manufactures to deposit funds in escrow in order to sell cigarettes in the state does not violate the U.S. Constitution.

Zarnow v. City of Wichita Falls, Texas, 614 F.3d 161 (5th Cir. 2010)

Good faith statements made in defending complaints against municipal employees do not demonstrate ratification by the City of any alleged unconstitutional conduct. Negligent misinformation is insufficient to establish supervisory liability and unintentionally negligent oversight does not satisfy the deliberate indifference standard.

S & M Brands, Inc. v. Caldwell, 614 F.3d 172 (5th Cir. 2010)

Louisiana’s settlement agreement with tobacco manufacturers and the enactment of statutes to implement the terms of the settlement do not violate the U.S. Constitution.

Sanders-Burns v. City of Plano, 594 F.3d 366 (5th Cir. 2010)

A suit under 42 U.S.C. §1983 for failure to train requires evidence of a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation.

Bryant v. Military Department of the State of Mississippi, 597 F.3d 678 (5th Cir. 2010)

A person acts “under color of state law” if he engages in a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. A state officer does not act “under color of state law” if he pursues personal objectives without using or misusing the power granted to him by the state to achieve the personal aims.

Dillon v. Rogers, 596 F.3d 260 (5th Cir. 2010)

Judges may resolve factual disputes concerning exhaustion of remedies without the participation of a jury.

World Wide Street Preachers Fellowship v. Town of Columbia, 2009 U.S. App. LEXIS 27993 (5th Cir. 2009)

Unless a subordinate’s actions are sufficiently extreme—for instance, an obvious violation of clearly established law—a policymaker’s ratification or defense of his subordinate’s actions is insufficient to establish an official policy or custom for municipal liability under §1983.

Hoog-Watson v. Guadalupe County, 2009 U.S. App. LEXIS 27639 (5th Cir. 2009)
For a search and seizure suit, even where a plea agreement was entered on the proceeding that discussed dropping “criminal charges” against the plaintiff, there is a genuine issue of fact as to whether a §1983 claim can be dismissed under the principles of *Heck v. Humphrey* when the proceeding took place before a Justice of the Peace and it followed the procedures of a civil statute.

*Brewster v. Dretke*, 587 F.3d 764 (5th Cir. 2009)

A court need not offer an opportunity for a *pro se* litigant to amend his complaint before it is dismissed when the litigant gives no indication that he did not plead his best case.

*Reyes v. City of Farmers Branch*, 586 F.3d 1019 (5th Cir. 2009)

Under the Voting Rights Act, only voting-age *citizens* should be considered when determining the population of “voters” who “could form a majority”.

*Villafranca v. United States*, 587 F.3d 257 (5th Cir. 2009)

Federal law enforcement agents can invoke the Texas state law enforcement privilege.

*Fairley v. Hattiesburg*, 584 F.3d 660 (5th Cir. 2009)

A plaintiff’s challenge to the redistricting of a city’s voting wards under the Voting Rights Act fails if the plaintiff supports its challenge with a plan that would exclude *bona fide* city residents from voting. Also, it is not arbitrary or discriminatory for a city to base its redistricting on the voting age population rather than voter registration figures.

*Boyd v. Driver*, 579 F.3d 513 (5th Cir. 2009)

A handwritten *pro se* complaint is read liberally in order to find inexplicit allegations of a constitutional deprivation that would support an inmate’s *Bivens* action.

**Texas Courts of Appeals**


Failure to exhaust administrative remedies deprives the court of subject matter jurisdiction over a school teacher’s breach of contract claim. A 42 U.S.C. §1983 claim has a two year statute of limitations.


An inmate does not have a constitutional right of access to the prison craft shop and §1983 does not impose liability for violations of duties of care arising under tort law.

To prevail on a §1983 claim for failure to train, a plaintiff must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in constitutional violations.


A court has the authority to dismiss an action as frivolous even before service of process or an answer by the defendants, and the Texas Department of Criminal Justice’s policy limiting the wearing of Native American medicine bags by inmates and authorizing their inspection does not violate the Religious Land Use and Institutionalized Persons Act.

Hot Topics In Local Government Law

Texas Supreme Court

Colquitt v. Brazoria County, 2010 Tex. LEXIS 691 (Tex. 2010)

The Texas Tort Claims Act requires that a governmental entity obtain notice of a claim against it within six months of the incident giving rise to the claim. Such notice generally must be a formal, written notice that must reasonably describe the damage or injury claimed, the time and place of the incident and the incident. Actual notice, however, is also sufficient. In Colquitt, the Supreme Court held that service of a lawsuit within the six month period constitutes proper notice under the Act.


A governmental entity does not waive governmental immunity by conduct when it requests attorney’s fees and costs as part of its defense of a lawsuit.

Klein v. Hernandez, 315 S.W.3d 1 (Tex. 2010)

A resident physician working at a public hospital as part of a an agreement with his private medical school, is a governmental employee for purposes of Texas Civil Practice and Remedies Code § 51.014(a)(5) and, consequently, is entitled to an interlocutory appeal from a denial of his assertion of immunity.

City of Dallas v. Abbott, 304 S.W.3d 380 (Tex. 2010)

The timeliness of a request for an attorney general opinion under the Public Information Act is measured from the date a party seeking public information responds to a governmental body’s good-faith request for clarification or narrowing of an unclear or overbroad information request.

City of Waco v. Kirwan, 298 S.W.3d 618 (Tex. 2009)
A landowner, lessee, or occupant, under the Recreational Use Statute, does not generally owe a duty to others to protect or warn against the dangers of natural conditions on the land, and therefore may not ordinarily be held to have been grossly negligent for failing to have done so.

**Texas Courts of Appeals**


An off-duty police officer driving a City police vehicle in furtherance of his employment as a security officer for a private employer is not within the course and scope of his employment for purposes of the waiver of immunity in the Texas Tort Claims Act, despite City policy that states that officers are “on-duty” twenty-four hours a day while within the City.

*City of Richardson v. Gordon*, 316 S.W.3d 758 (Tex. App. – Dallas 2010, no pet.)

A plaintiff is not entitled to recovery of attorney’s fees against a governmental entity in a case seeking declaratory and injunctive relief where the entity amended its charter and mooted the alleged violation of the charter.


Governmental entities are entitled to governmental immunity from condemnation proceedings, unless immunity is otherwise explicitly waived.


A plaintiff cannot circumvent the intentional tort exception to the waiver of immunity in the Texas Tort Claims Act by couching the claim in terms of negligence.

*First-Citizens Bank & Trust Co. v. Greater Austin Area Telecommunications Network*, 318 S.W.3d 560 (Tex. App. – Austin 2010, no pet.)

The waiver of governmental immunity for certain contract claims permits an assignee of rights under a contract to bring suit against the governmental entity in the place of the signatory to the agreement.


Governmental immunity is not waived for the tort of abuse of process because it is an intentional tort.

The provision of medical coverage to employees by an independent school district is a governmental function for which the school district is entitled to governmental immunity, absent a statutory waiver of governmental immunity. The waiver of governmental immunity for breach of contract claims found in Local Government Code § 271.152 applies to claims by third-party beneficiaries. The burden of proving that a party is not a third-party beneficiary rests with the governmental entity in a plea to the jurisdiction.


A commercial lease to a governmental entity does not fall within the limited waiver of governmental immunity for contracts, despite provisions of the lease requiring the landowner to remodel the facility being leased.


A municipality’s act of providing a defense and indemnity to its employees for liability claims through self-insurance is a proprietary function, for which the municipality is not entitled to governmental immunity.


A Rule 11 agreement among the parties restricting the defendants dispositive motions to the issues that had already been asserted barred the defendants from raising the derivative immunity defense in Section 101.106(a) of the Texas Tort Claims Act because it had not been asserted before the agreement. In addition, on-duty police officers engaged in maintenance of the peace are acting in the course and scope of their employment, despite engaging in arguably illegal conduct.

_M.T.D. Envir., LLP v. City of Midland, 315 S.W.3d 606 (Tex. App. – Eastland 2010, pet. filed)_

A provision of a contract between a contractor and a municipality that requires the contractor to release all claims that might arise under the contract is void as to a claim for payment of an invoice for services rendered pursuant to the Payment for Goods and Services Act (Prompt Payment Act).


There is no waiver of governmental immunity as to an alleged breach of a contract for a municipality to provide treated water at a contractually determined rate.


A municipality is entitled to governmental immunity from a conversion claim where it seized and sold gaming machines pursuant to the governmental function of police protection.
Section 101.106(e) of the Texas Tort Claims Act, which permits a governmental entity to move for dismissal of its employees if both the entity and employees are sued in a lawsuit under the Act, does not apply when a plaintiff brings the suit against the employees in their individual and official capacities, but does not name the entity as a defendant.

There was no waiver of governmental immunity as to claim brought by inmate when he severed his thumb and some fingers on a metal cutting machine at the prison, but no government employee was involved and the machine did not lack an integral safety component.

The Texas Tort Claims Act does not waive governmental immunity for discretionary functions. Installation of a safety feature that was not part of the original design of a building is not a maintenance (ministerial) activity; it is a discretionary activity and governmental immunity is not waived.

The Texas Tort Claims Act does not apply to a claim based on an act or a failure to act of an individual who is an officer or employee of a state agency or of a political subdivision other than a county if the act or failure to act is in connection with a community service program or work program. Texas Code of Criminal Procedure article 42.20(b), which provides this exemption from the Tort Claims Act, is not unconstitutional.

Section 101.106(f) of the Texas Tort Claims Act gives a plaintiff who has sued a public official thirty days from the date the official files a motion to dismiss to decide whether to continue with the suit against the official or substitute the official with the public entity employer. Failure to replead in compliance with Section 101.106(f) is not excused by substantial compliance or by the trial court’s failure to rule on whether Section 101.106(f) even applies. A plaintiff must make a decision as to whether to replead within the thirty days and cannot wait for the benefit of a judicial decision on the question of whether the claim could have been brought against the governmental entity.

In determining whether a public official acted in good faith for purposes of official immunity, the court should use an objective standard, asking whether a reasonably prudent official, under the same or similar circumstances, could have believed that his conduct was justified based on the
information he possessed when the conduct occurred.


A plaintiff’s claims against a public official were construed as being made against the public official in his official capacity only because they involved events that occurred while the defendant was acting as a public official.


A plaintiff may bring an employment discrimination suit against an employer if it is filed within sixty (60) days after the date the plaintiff receives notice from the Texas Workforce Commission of his or her right to sue. This timeliness provision, found in Texas Labor Code § 21.254, is not a jurisdictional prerequisite to a suit against a governmental entity.


A doctor working as a governmental employee is entitled to assert official immunity as to the exercise of “governmental discretion,” but not “medical discretion.”


Dismissal of public official defendants based on a motion filed by the governmental entity pursuant to Texas Civil Practice and Remedies Code § 101.106(e) is not subject to an interlocutory appeal by the plaintiff.


An employee cannot establish a Whistleblower Act retaliation claim based on complaints that police officers working for the same employer failed to arrest a suspect. If, how, and when to arrest a suspect is within a police officer’s discretion and failure to do so does not constitute a violation of law for purposes of the Whistleblower Act.

_City of Dallas v. Hillis_, 308 S.W.3d 526 (Tex. App. – Dallas 2010, pet. filed)

Use of a police vehicle in a high speed chase of a suspect is not “operation or use of a motor-driven vehicle” under the Texas Tort Claims Act as to injuries sustained by a suspect who sustained fatal injuries after he lost control of the vehicle he was driving and crashed.


Approval of a building permit based on factually inaccurate statements by the applicant cannot
provide a basis for equitable estoppel when the City notifies the applicant that the structure built will need to be removed.


An allegedly negligent decision to perform a medical procedure does not constitute the use or misuse of tangible personal property under the Texas Tort Claims Act. Consequently, so long as the procedure was performed correctly, there is no waiver of governmental immunity merely because the decision to perform the procedure was negligently made.


Landowners can file a declaratory judgment action to determine whether a local government had or has an easement on the landowner’s property because there is no waiver of governmental immunity as to such a claim.

_City of Arlington v. Randall_, 301 S.W.3d 896 (Tex. App. – Fort Worth 2009, pet. filed)

If a plaintiff brings claims against a governmental entity and its employees for alleged violations of the Texas Constitution and requests damages, the governmental entity may move for automatic dismissal of its employees pursuant to Texas Civil Practice & Remedies Code Section 101.106(e).

_Dallas County v. C. Green Scaping_, 301 S.W.3d 872 (Tex. App. – Dallas 2009 no pet.)

Failure to present a claim to the County Commissioners Court as required by Section 89.004 of the Texas Local Government Code is a jurisdictional defect. Failure to make the required presentation of a claim deprives the courts of jurisdiction because there is no waiver of governmental immunity.


When a contract permits a contractor to rely on a report provided by a governmental entity, or an agent of the governmental entity, governmental immunity is waived for a breach of contract claim based on the negligent preparation of the report.


There is no waiver of governmental immunity when a prison inmate contracts an illness from a contaminated razor provided to him by prison employees.


A city’s misrepresentation of the zoning classification of a piece of real property as inducement to get a purchaser to purchase the property is not a governmental function for which the city is entitled to governmental immunity.
In order to establish a special defect claim for which governmental immunity is waived by the Texas Tort Claims Act, the plaintiff must allege that the dangerous condition poses a threat to users of the roadway.

Placement of a towel inside a patient during surgery and failure to remove that towel prior to the conclusion of the procedure constitutes the use of tangible personal property for which governmental immunity is waived by the Texas Tort Claims Act.

A contract in which a municipality promises to provide water and sewer service in exchange for the conveyance of a piece of real estate to the municipality is not a contract for services to the municipality for which governmental immunity is waived.

Section 101.106(f) of the Texas Civil Practice and Remedies Code permits a public official who is sued to file a motion to dismiss asserting that he was acting in the course and scope of his employment and that the case is one that could have been brought against the official’s governmental entity employer. If the case is one that could have been brought against the employer under the Texas Tort Claims Act, then the plaintiff must either plead the case against the employer and drop the public official or have the entire case dismissed. In order for a case to qualify as one that could have been brought against the employer, however, it must be one for which the Tort Claims Act waives governmental immunity, not merely a tort cause of action.

A plaintiff who pleads only claims that are barred by governmental immunity is not entitled to leave to amend his petition to add claims for which governmental immunity might be waived.

A public official is not entitled to official immunity unless the official considers both the justification for the general course of action taken by the official, as well as the manner in which the official pursues his or her goal. In the context of an emergency police response, the officer must consider other, less dangerous methods of responding to the response.

A bump in a road is not a special defect for which the Texas Tort Claims Act waives governmental immunity.

A curb separating two lanes of traffic was not a special defect for which governmental immunity was waived.

**City of Plano v. Homoky, 294 S.W.3d 809** (Tex. App. – Dallas 2009, no pet.)

The operation of a golf course by the municipality, including the operation of a clubhouse and restaurant on the golf course, is a governmental function and the municipality is entitled to governmental immunity except to the extent it is waived by the Legislature.

### I. TAKINGS, ZONING AND LAND USE CASES

**Fifth Circuit**

**Texas Midstream Gas Services LLC v. City of Grand Prairie, 608 F.3d 200** (5th Circuit 2010)

A governmental entity exercising its powers of eminent domain must still comply with a city’s reasonable, generally applicable zoning requirements.

**Supreme Court of Texas**

**Kirby Lake Development Ltd. V. Clear Lake City Water Authority, 2010 Tex. LEXIS 613** (Tex. 2010)

An inverse condemnation suit is barred when the State withholds property or money from an entity while acting within a color of right under a contract, as opposed to exercising its eminent domain powers.

**State of Texas v. Brownlow, 2010 Tex. LEXIS 615** (Tex. 2010)

The State’s easement to build and maintain a mitigation pond on a landowner’s property does not grant the State a right to remove and use the excavated dirt from the landowner’s property for other purposes, and doing so provides a basis for a constitutional takings claim.

**City of Houston v. Trail Enterprises, Inc., 2009 Tex. LEXIS 872** (Tex. 2009)

For a regulatory takings claim to be ripe, futile variance requests or re-applications are not required; rather, it is ripe upon enactment of an ordinance absolutely prohibiting precisely the use the owners intend to make, subject to potential exceptions.

**Texas Courts of Appeals**

In the context of a recently annexed area’s petition for disannexation, a municipality is not required to provide any new or additional services to the annexed area beyond those required by the Texas Local Government Code, even though the area already received the statutorily required services prior to the annexation.


A landowner may not obtain declaratory relief declaring that a city had abandoned an easement by virtue of the Declaratory Judgments Act’s limited waiver of immunity, where the validity of an ordinance or statute is not challenged and the relief is sought against the city itself as opposed to its officials.


A party cannot voluntarily participate in a government process and then later claim that the process effectuated a government taking.


Emotional-distress damages, and damages for cost of living and schooling elsewhere during a governmental entity’s construction pursuant to a partial-taking of the plaintiff’s property are not special damages for which compensation must be provided.

*City of Carrollton v. HEB Parkway South, Ltd., 2010 Tex. App. LEXIS 4629 (Tex. App. – Fort Worth 2010, no pet.)*

According to federal law, as a prerequisite to the ripeness of an as-applied regulatory takings claim, there must be a final decision regarding the application of the regulation to the property at issue. A court cannot determine whether a regulation goes too far unless it knows how far the regulation goes.


The Declaratory Judgment Act does not waive governmental immunity for claims for injunctive relief, nor does it permit courts to issue advisory opinions.

*AN Collision Ctr. of Addison v. Town of Addison, 2010 Tex. App. LEXIS 2713 (Tex. App. – Dallas 2010, no pet. h.)*

A municipality’s failure to alter municipally-owned property so as to prevent flooding of a neighboring property does not constitute an intentional act for the purposes of a takings claim under
the Texas Constitution. Mere operation and maintenance of the municipally-owned property similarly does not constitute an intentional act unless the operation and maintenance itself causes the flooding.

*Alewine v. City of Houston, 2010 Tex. App. LEXIS 2491 (Tex. App. – Houston 2010, no pet. h.)*

Merely having a house that is somewhat less desirable to live in does not rise to the level of a compensable “taking” under Article I, Section 17 of the Texas Constitution.


An individual lacks standing to bring an unconstitutional takings claim against a city for demolishing a building he owned prior to its foreclosure for delinquent property taxes if the individual did not attempt to pay the lien rendered against the building and did not attempt redemption within six months of the tax sale.

*City of Carrollton v. RIHR, Inc., 2010 Tex. App. LEXIS 1887 (Tex. App. – Dallas 2010, no pet. h.)*

For the purposes of a takings claim under the Texas Constitution, a municipality commits an unconstitutional exaction when it demands payment, not when payment is made.


In the context of eminent domain, “condemned property” only includes real property, as opposed to property interests created under a contract.

*Trudy’s Texas Star, Inc. v. City of Austin, 2010 Tex. App. LEXIS 1760 (Tex. App. – Austin 2010, no pet.)*

A City will not be estopped from enforcing a governmental function, even where a property owner incurred great expenses when relying on an agreement with the City and the City’s assurances.

*2800 La Frontera No. 1A, Ltd. v. City of Round Rock, 2010 Tex. App. LEXIS 243 (Tex. App.—Austin 2010, no pet.)*

Even if a City’s primary motivation for re-zoning was to assist a private developer, if the diminution in value of the plaintiff property owners’ property is especially small, and the degree of interference with the reasonable investment-backed expectations of the property owner is modest, the ordinance does not go “too far” such that fairness and justice require the property owner’s cost to be borne by the public.

A regulatory takings claim is ripe where the claimant alleges a concrete plan to sell property to a builder and has taken steps to sell the property, but was prevented due to the City’s ordinance.


For actions seeking declaratory judgment and injunction regarding the rezoning of neighboring property, a plaintiff does not have standing unless the rezoning affects the plaintiff differently than other members of the general public. A property owner has standing to challenge an ordinance rezoning neighboring property where rezoning would inflict on that owner a special and peculiar injury.

II. SCHOOL LAW CASES

United States Supreme Court


A law school’s policy requiring student groups to allow any student to participate, regardless of her status or beliefs, in order to obtain a school-approved status and access to the benefits of that status is a reasonable, viewpoint-neutral condition and does not transgress First Amendment limitations under the limited-public-forum analysis.

Fifth Circuit


A school district violated the Texas Religious Freedom Restoration Act by requiring a Native American student to wear his long hair in a bun on top of his head or in a braid tucked into his shirt, thereby offending a sincere religious belief.

_Morgan v. Swanson_, 2010 U.S. App. LEXIS 21452 (5th Cir. 2010)

Elementary school students have First Amendment rights. The First Amendment protects elementary school students from religious-viewpoint discrimination while at school.

_R.H. v. Plano ISD_, 607 F.3d 1003 (5th Cir. 2010)

When determining a student’s eligibility for tuition reimbursement for private pre-schooling under the Individuals with Disabilities Education Act (“IDEA”), removal to a private school is the exception, not the default.

_US v. Texas_, 601 F.3d 354 (5th Cir. 2010)

Absent problems existing on a statewide basis, Equal Education Opportunities Act (EEOA) claims must be asserted against the particular local school district(s) at issue.
Texas Supreme Court


When a school district brings suit to review the Commissioner of Education’s decision to require the reinstatement of a teacher, the school district and the teacher, not the Commissioner, are the adverse parties for the purposes of determining venue.


Whether the reporting of a violation of the University Interscholastic League’s (UIL) rules to UIL officials constitutes “a good-faith report of a violation of law to an appropriate law-enforcement authority” under the Texas Whistleblower Act is a jurisdictional question.

Texas Courts of Appeals


A school district does not waive governmental immunity by providing health insurance to school district employees, because doing so is not a proprietary function.


When a school principal decided to not recommend that the plaintiff intern receive teacher certification pursuant to the Teach for Texas Pilot Program, and the intern appealed that decision to the Commissioner of Education, both the School District and the Commissioner enjoy immunity.


When a special needs student apparently died by choking on school-prepared food, Tex. Civ. Prac. Rem. Code §101.021 did not waive governmental immunity for personal injury or death caused by a condition or use of tangible personal property, even though school personnel prepared, served, and even helped the student get the large food pieces on his spoon, because it was the student that put the food to its intended use, and the food did not completely lack an integral safety component.

Hot Topics in Employment Law

I. TITLE VII/TEXAS COMMISSION ON HUMAN RIGHTS ACT CASES

United States Supreme Court

A plaintiff can assert a disparate impact claim under Title VII by filing a charge of discrimination within the appropriate time-period after an application, as opposed to adoption, of the challenged practice.

**Fifth Circuit**

*Floyd v. Amite County School District, 581 F.3d 244 (5th Cir. 2009)*

In order for an employee to successfully assert a Title VII claim of discrimination based on a personal relationship between the employee and a person of a different race, the employee-plaintiff must present evidence of racial animus against the employee because of the employee’s race.

*Depree v. Saunders, 588 F.3d 282 (5th Cir. 2009)*

Saunders, the decision-maker who removed Depree from his teaching duties and evicted him from his office, was entitled to qualified immunity because her conduct did not violate a clearly established constitutional right.

*Alaniz v. Zamora-Quezada, 2009 U.S. App. LEXIS 28052 (5th Cir. 2009)*

In a case involving numerous claims of sexual harassment and retaliation, a trial court did not err by allowing the jury to consider questions concerning the quid pro quo and retaliation claims because “but for” causation, required to establish a retaliation claim, is not the same as sole causation, alleged by the defendant as required to establish the plaintiff’s quid pro quo claims.

*Jackson v. Watkins, 2010 U.S. App. LEXIS 19075 (5th Cir. 2010)*

A plaintiff asserting a Title VII claim must rebut each of a defendant employer’s legitimate, non-discriminatory reason to survive summary judgment, and statistical evidence is not sufficient to raise a genuine issue of material fact in the absence of evidence tailored to rebut the specific legitimate, non-discriminatory reasons proffered by the defendant.

**Texas Supreme Court**

*In re: United Services Automobile Association, 2010 Tex. LEXIS 282 (Tex. 2010)*

Labor Code filing deadlines, against non-governmental entities, are mandatory but not jurisdictional. Additionally, the tolling statute, Tex. Civ. Prac. & Rem. Code § 16.064, applies to TCHRA claims.

*Waffle House, Inc. v. Williams, 2010 Tex. LEXIS 416 (Tex. 2010)*

A plaintiff may not recover negligence damages against her employer for harassment covered by the TCHRA because the TCHRA is a specific, tailored anti-harassment remedy that preempts a
negligence claim when the alleged negligence is entwined with the alleged harassment.

**Texas Courts of Appeals**


If a timely charge of discrimination is filed as to one act of discrimination, the continuing violation doctrine, which applies when unlawful employment acts manifest themselves over time as opposed to discrete acts, serves to expand the scope of the events that can be challenged, if one of the events took place within the 180 day statutory time frame under the TCHRA.


An employee asserting a retaliation claim against her employer may establish a causal link (the third part of a plaintiff’s prima facie case) between engaging in a protected activity and an adverse employment action (using circumstantial evidence) by showing an employer’s failure to follow its normal policies or procedures, discriminatory treatment in comparison to similarly situated employees, knowledge of the employee’s protected activity by those carrying out the adverse employment action, evidence that the reasons for the adverse employment action were false, and through temporal proximity between the protected activity and the adverse employment action.


The statutory limitations period for filing a discrimination complaint began to run when the employer announced the names of the persons being promoted, not when the announced individuals were actually promoted.


Section 21.202 of the Texas Labor Code’s requirement of the filing of an administrative complaint is mandatory; failure to abide by that requirement prevents a plaintiff from bringing suit in court for alleged employment discrimination.


An employee had sixty days from the date of her first complaint with the Texas Workforce Commission alleging harassment and retaliation to file suit and failure to do so prevents the employee from filing suit.

*Santi v. The University of Texas Health Science Center at Houston, 2009 Tex. App. LEXIS 8957* (Tex. App. – Houston [1st Dist.] 2009, no pet.)
First, a charge of discrimination adequately notifies an employer of the existence of a sex discrimination claim by asserting facts indicating such discrimination, notwithstanding that the box for sex discrimination was not checked-off. Second, an untimely filed complaint with the EEOC alleging two discrete acts, one of which was beyond the statutory limitations period, does not give the court jurisdiction over the first discrete act. Third, post-termination actions in connection with a former-employee’s compensation can be the subject of a retaliation claim.


A female plaintiff who served letters to superiors complaining about the conduct of a co-worker and used the term “hostile work environment” but did not provide any information that she was being discriminated against on the basis of her gender, did not engage in a protected activity that could serve as the basis of a retaliation claim.


An oral agreement to delay service of process “is insufficient as a matter of law to show diligence of any kind in seeking or accomplishing timely service.”


In order for a plaintiff to properly invoke the TCHRA’s limited waiver of governmental immunity, a plaintiff must have shown a prima facie case of discrimination or retaliation under the Texas Labor Code, and a court’s subject matter jurisdiction will be defeated if the defendant can “conclusively negate” any element of the plaintiff’s prima facie case of discrimination under the TCHRA.


A court lacks subject matter jurisdiction over claims under the Texas Commission on Human Rights Act when a plaintiff failed to file a charge of discrimination with the Texas Workforce Commission within 180 days of the allegedly discriminatory act.

**II. AGE DISCRIMINATION IN EMPLOYMENT ACT CASES**

**Fifth Circuit**

*Jackson v. Cal-Western Packaging Corp., 602 F.3d 374 (5th Cir. 2010)*

In cases where a defendant-employer terminates a plaintiff-employee based on the complaints of other employees and the employee brings a claim under the Age Discrimination in Employment Act (“ADEA”), the issue in considering whether the employer’s stated reason is merely a pretext for discrimination is not the truth of the allegation against the employee, but whether the employer
“reasonably believed the employee’s allegation and acted on it in good faith.” Moreover, an employer’s stray remarks are insufficient to defeat summary judgment.

**Texas Courts of Appeals**


A plaintiff who was terminated and replaced by another individual and who brings a claim of age discrimination under the Age Discrimination in Employment Act (“ADEA”), cannot establish a prima facie case of discrimination by showing that she was “otherwise discharged because of her age.”

**III. TEXAS WHISTLEBLOWER ACT CASES**

**Texas Supreme Court**


The elements of a claim under the Texas Whistleblower Act can be considered to determine jurisdiction and liability.

*City of Elsa, Texas v. Gonzalez, 2010 Tex. LEXIS 693 (Tex. 2010)*

At the direction of a council member, the city administrator distributed the city attorney’s letter containing the attorney’s opinion that the mayor had ipso facto resigned from being mayor upon the assumption of a position with a county urban program and discussing the mooting of any potential conflicts of interest, to the county judge, the director of the urban county program, the district attorney, and a local newspaper. The city administrator also reported to each of listed persons that the city council had accepted the resignation. These reports did not constitute a good faith violation of law under the Texas Whistleblower Act. Moreover, informing the city council that its meeting violated the Texas Open Meetings Act did not satisfy the TWA’s requirement to report a violation of law to an appropriate law enforcement authority.

**Texas Courts of Appeals**

*Bates v. Randall County, 297 S.W.3d 828 (Tex. App. – Amarillo 2009, pet. filed)*

Employees who verbally tried to initiate the County’s grievance process but who were thwarted from doing so may be able to establish that their efforts were sufficient to toll the 90-day limitations period to file litigation under the Texas Whistleblower Act.

*Flores v. City of Liberty, Texas, 318 S.W.3d 551 (Tex. App. – Beaumont 2010, no pet. h.)*

A police officer who reported the killing of a cat by a fellow police officer did not have a reasonable
good faith belief that the killing was a violation of law, based on his training, experience, and responsibilities, sufficient to satisfy the requirements of the Texas Whistleblower Act.

IV. DUE PROCESS CASES

Texas Courts of Appeals


The preparation and service of a letter to TALX Employer Services and an F-5 Report required by the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”), neither of which was shown to have impacted Roccaforte’s ability to obtain another law enforcement job, do not constitute publication for the purpose of a claim asserting deprivation of a liberty interest under the due process clause. Moreover, statements by a supervising officer that he would not terminate a subordinate employee without good cause were not sufficiently specific to modify the subordinate’s status as an at-will employee.

V. FAIR LABOR STANDARDS ACT CASES


As part of the recent federal health care legislation, the Fair Labor Standards Act was amended to include subsection (r). Subsection (r) requires employers to provide a “reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.” Moreover, covered employers must also provide a place (not a bathroom) “that is shielded from view and free from intrusion from coworkers and the public” to express the milk. An employer is not required to pay an employee for such break time. Employers with fewer than 50 employees are not subject to subsection (r) “if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.”

Fifth Circuit

Allen v. McWane Inc., 2010 U.S. App. LEXIS 487 (5th Cir. 2010)

A collective bargaining negotiation between an employer and employee representatives is not necessary to find that a “custom or practice” existed under § 203 of the Fair Labor Standards Act.

Gagnon v. United Technisource Inc., 2010 U.S. App. LEXIS 10880 (5th Cir. 2010)

The Fair Labor Standards Act requires that non-exempt employees working more than forty hours per week receive overtime payment of one and a half times their regular rate of pay, which includes “all payments which the parties have agreed shall be received regularly during the workweek,” unaffected by any contractual designation as to how certain pay shall be called. When a per diem
varies with the number of hours worked, the per diem payments are part of the regular rate of pay.

*Songer v. Dillon Resources, Inc., 2010 U.S. App. LEXIS 18642 (5th Cir. 2010)*

A staffing leasing company that provides employees for a motor carrier and operates as a joint employer with that carrier is subject to the jurisdiction of the Secretary of Transportation. Truck drivers are employed in positions affecting the operational safety of motor vehicles. The plaintiff truck drivers could have reasonably been expected to drive interstate routes consistent with their job duties. For all of these reasons, the plaintiffs’ fall under the Motor Carrier Act exemption to the Fair Labor Standards Act, which does not entitle the plaintiffs to overtime under the FLSA.

VI. FIRE FIGHTERS AND POLICE OFFICERS CIVIL SERVICE ACT CASES

**Texas Supreme Court**

*City of Pasadena v. Smith, 292 F.3d 14 (Tex. 2009)*

A hearing examiner exceeds his jurisdiction under the Fire Fighters and Police Officers Civil Service Act when his acts are not authorized by the Act or are contrary to it, or when his acts invade the policy-setting realm protected by the non-delegation doctrine.

**Texas Courts of Appeals**

*City of Houston v. Tones, 2009 Tex. App. LEXIS 7840 (Tex. App. – Houston [14th Dist.] 2009, no pet.)*

Under the Fire Fighters’ and Police Officers’ Civil Service Act, unfounded allegations that a hearing examiner misapplied the law do not amount to the examiner’s exceeding his jurisdiction under *City of Pasadena v. Smith, 292 F.3d 14 (Tex. August 28, 2009)*. For this reason, the district court did not have jurisdiction to hear the City’s appeal.

VI. GOVERNMENT CODE § 617.005 CASES

**Texas Courts of Appeals**


A public employer satisfies § 617.005 of the Government Code’s requirement to give employees an opportunity to present their grievance if it allows its employees to access persons in positions of authority who have the authority to actually correct the alleged wrong.

VII. ARTICLE III, SECTION 52e CASES

**Texas Courts of Appeals**

Article III, section 52e of the Texas Constitution does not bar a deputy sheriff from recovering salary continuation benefits during a 2001 term of office for an incapacity resulting from an on-the-job injury that occurred during his prior term of office.

VIII. ERISA CASES

United States Supreme Court


A single, honest mistake by an ERISA plan administrator with discretionary authority to interpret a plan does not justify stripping him of the deference granted to him for subsequent related interpretations of the plan.


In an ERISA case, a court, in its discretion, may award fees and costs to either party if the fee claimant has achieved “‘some degree of success on the merits.’”

Fifth Circuit


When reviewing the combination of factors a court must study to determine whether an ERISA plan administrator decision was an abuse of discretion, a court may give more weight to a conflict of interest where the circumstances surrounding the administrator’s decision suggest “procedural unreasonableness”.

IX. EMPLOYMENT CONTRACT CASES

Fifth Circuit


A contract stated for a longer term that one year “is not taken out of the statute of frauds when there is a mere possibility of termination within one year due to contingent events set forth in the contract, including termination by a party.”

X. ARBITRATION CASES

United States Supreme Court

A court may decide whether an arbitration clause is unconscionable even if the arbitration agreement expressly assigns that decision to an arbitrator.

XI. NATIONAL LABOR RELATIONS BOARD CASES

United States Supreme Court


The National Labor Relations Board lacked the statutory authority to issue approximately 600 decisions during a 27-month period because the Board did not have a quorum.

XII. COLLECTIVE BARGAINING AGREEMENT CASES

United States Supreme Court


A question as to the formation date of a collective bargaining agreement requires judicial resolution, and not arbitration, when the answer to this question determines whether the parties consented to arbitrate issues that may arise.

XIII. OSHA CASES

Fifth Circuit

StarTran, Inc. v. Occupational Safety and Health Review Commission, 2010 U.S. App. LEXIS 11652 (5th Cir. 2010)

An entity whose board members are appointed and removable by a public official, whose principal executives are at will employees hired, removed, or transferred by the same public official, that possesses no assets save its employees, that has no substantial existence apart from the public entity that created it, and that has no relationship with any other parties except for the public entity that created it and a labor union is a “political subdivision” under the Occupational Safety and Health Act and its regulations and is, therefore, exempt from the Act.

XIV. FAMILY MEDICAL LEAVE ACT CASES

Texas Supreme Court

Univ. of Tex. at El Paso v. Herrera, 2010 Tex. LEXIS 479 (Tex. 2010)

The U.S. Congress invalidly abrogated Texas’ sovereign immunity under the FMLA’s self care
provision and, therefore, no private causes of action may be asserted against Texas under the FMLA’s self care provision. Moreover, language in UTEP’s policy handbook did not constitute a waiver of sovereign immunity.

XV. TEXAS WORKERS’ COMPENSATION ACT CASES

Fifth Circuit


An insurance policy’s exclusion of coverage for obligations incurred under workers compensation laws does not apply to claims arising out of the nonsubscribing employer’s own negligence.