The Importance of Company Policies

Craig A. Woodcook

General Counsel, Ben E. Keith Company
601 East 7th Street, Fort Worth, TX 76102

David F. Johnson
Managing Shareholder of Winstead PC's Fort Worth Office
300 Throckmorton, Suite 1700, Fort Worth, TX 76102

The Hospitality Law Conference
February 22-24, 2015

CRAIG ANDERSON WOODCOOK
CAWOODCOOK@BENEKEITH.COM
601 E. 7th Street
Fort Worth, Texas 76102
(817) 877-5700

EMPLOYMENT:

*General Counsel, Secretary, & Vice President of Legal Affairs (2015 – current)

-Ben E. Keith Company, a Forbes, Private-200 food/beverage wholesaler with $3b+ revenue and 4,000+ employees. Joined company in 1997 as warehouse worker. Promoted to inventory manger, branch controller, division auditor, company auditor, and company financial analyst before becoming Corporate Counsel (2005) and Ass't. Gen. Counsel (2010).

PRACTICE:

Craig's practice includes both litigation and transaction work in the areas of Employment Law, Food & Beverage Law, Real Estate & Environmental Law, Mergers & Acquisitions, and general business law.

EDUCATION:

Southern Methodist University Dedman School of Law, Dallas, Texas, Masters of Law, 2009

Texas Wesleyan School of Law, Fort Worth, Texas, Juris Doctor, 2005

University of North Texas, Denton, Texas, Master of Science in Economics: Labor Industry Relations, 2001

University of North Texas, Denton, Texas, Bachelors of Arts in Philosophy, 1997

AWARDS AND HONORS:

Named One of Fort Worth Magazine's Top Attorneys – Corporate Finance/Mergers and Acquisitions (2016)

Named Fort Worth Magazine's Top Attorney – Corporate Counsel 2010-2011

Named One of Fort Worth Business Press's "Forty Under Forty" in 2010

PROFESSIONAL AND COMMUNITY INVOLVMENT:

State Fair of Texas, Executive Vice-President (Current), Board of Directors (2011 – Current).

Chairman's Task Force (1996- Current). Founded Big Tex Golf Classic

Corporate Counsel Section of Tarrant County Bar Association, Chair (2007-09).

Harris Methodist Exchange, Member (2008-2010). Executive Committee (2010-2011).

Mahon Inn of Court, Member.

Texas Wesleyan Law School Alumni Association, Director. (year)

Other Memberships: American Bar Association, Dallas Bar Association, State Bar of Texas, Tarrant County Bar Association, Phi Delta Phi.

Performed Pro Bono adoptions for numerous families through National Adoption Day Program.

Speaker at Alcohol Law Symposium (Chicago 2009).

DAVID FOWLER JOHNSON
DFJOHNSON@WINSTEAD.COM
300 Throckmorton, Suite 1700
Fort Worth, Texas 76102
(817) 420-8223

BOARD CERTIFICATIONS:

*Board Certified – Civil Appellate Law, Civil Trial Law, and Personal Injury Trial Law – Texas Board of Legal Specialization

AWARDS AND HONORS:

* Named One of Fort Worth Business Press's "Power Attorneys" in 2014
* Named as a Best Lawyer in America in 2013-2015
* Named by Fort Worth Texas Magazine as One of Tarrant County's Best Lawyers in 2004-2015
* Named by Texas Monthly as a "Super Lawyer" in 2013-2015
* Named by Texas Monthly as a "Texas Rising Star" in 2004, 2006-2012
* Named One of D Magazine's "Best Lawyers Under 40 in Dallas" in 2004, 2006, 2007
* Named One of D Magazine's "Best Lawyers in Dallas" in 2008-2010
* Named One of Fort Worth Business Press's "Forty Under Forty" in 2003

CURRENT LEGAL EMPLOYMENT:

*Managing Shareholder of Winstead PC's Fort Worth Office
-Commercial Litigation and Appellate Practice

EDUCATION:

Baylor University School Of Law, Waco, Texas, Juris Doctor, *Magna Cum Laude*, 1997
Baylor University, Waco, Texas, B.B.A. in Accounting, 1994

ARTICLES AND CLE MATERIALS:

David has published over twenty (20) law review articles on topics including experts, summary judgments, charge practice, preservation of error, voir dire, and other topics. David's articles have been cited as authority by federal courts, the Texas Supreme Court (four occasions), the Texas courts of appeals located in El Paso, Waco, Texarkana, Tyler, Beaumont, and Houston, and cited by McDonald and Carlson in their Texas Civil Practice treatise and William V. Dorsaneo in the Texas Litigation Guide and in the Baylor Law Review, South Texas Law Review, and the Tennessee Law Review. David has presented and/or prepared written materials for over one hundred and thirty (130) continuing legal education courses.

Contents

I. INTRODUCTION AND SCOPE OF ARTICLE.

Company policies have numerous important business and legal functions including: (1) prescribing best practices so as to ensure consistency and fairness and (2) risk mitigation. Correspondingly, an employer's failure to follow its policies can thwart these objectives thus enabling undesirable conduct and increasing risk and liability.

In the hospitality industry, at least two important industry characteristics contribute to failures to follow company policies. First, corporate offices are geographically separated from operating units, thus fostering manager independence and apathy toward company policies. Second, the high intensity nature of the hospitality industry creates camaraderie between managers and employees, thus promoting an atmosphere where managers make exceptions for employees. Consequently, the hospitality industry is ripe for company policy focused litigation.

This presentation is designed to be persuasive and to impress the importance of having and consistently following company policies due to their important role in employment related litigation. In that spirit, it is intended to be a selective survey of relevant case law involving company policies and not a comprehensive, objective, law-review-style article on the status of the law.

II. IMPORTANT REASONS TO IMPLEMENT AND CONSISTENTLY ENFORCE WRITTEN COMPANY POLICIES.

There are many reasons, both legal and non-legal, that an employer should prepare written policies. The authors will only address several of the more important aspects of why an employer should have written policies.

One of the most important reasons to implement company policies is to clarify that employment is "at-will," which gives employers the right to terminate an employee at any time for any non-discriminatory reason. Some states, like Texas, assume that employment is "at-will," but it is always good to clarify that aspect of the employment relationship to confront any subsequent argument that the "at-will" relationship was somehow altered.

Written policies can also protect an employer's intellectual property, confidential information, and trade secrets. Those policies can clarify what the employer considered confidential and trade secrets and what it expects of the employees during, and after, employment regarding that property. Policies can potentially provide easier access to court remedies if an employee decides to inappropriately use confidential information or trade secrets.

Conversely, written policies can explain that an employee has no expectation of privacy regarding the use of employer's computer systems. Such a policy should state that all information, documents, and emails are company property, that personal use of the company system is prohibited, and that all use of the company's computer system or data composed, sent, or retrieved through that system can be monitored, retrieved, read, and used by the company.

From a more basic perspective, company policies are an important way to communicate important facts to employees. This should relieve the employer of answering questions such as when the employer is closed for holidays, sick-leave policies, overtime policies, etc. They are also a great way to provide information that an employer is required by law to give all employees.

Written policies also encourage uniform rules within an organization. Where there are no written policies (or insufficient written policies), different managers may treat different situations differently. Written policies support a uniform treatment of employees so that employees with similar issues are not treated differently. As shown below, this may be an important fact in employment litigation.

When there are written policies, it encourages the proper corporate culture and allows the employer to operate more effectively. Written policies reduce employment disputes because employees know what is expected of them, and they also reduce disputes between managers regarding what the policies actually are. Policies may also assist with disputes between employees and how employers expect employees to treat one another. For example, bullying and social media issues may be important aspects of an employer's written policies.

The written nature of the policies also encourages employees and managers to review the employer's policies on a regular basis. If the policies are in writing and provided to all managers and employees, there is a greater chance that they will be reviewed and followed. Easy access is the key. In this regard, the employer should encourage all managers and employees to review written policies on a regular basis.

Written policies also allow employers to document expectations so that employees know what is expected and required of their employment. Written policies also encourage compliance with state and federal laws. Employers expend many resources dealing with non-compliance issues. Written policies show that the employer is dedicated to following the law. As shown below, this can have important ramifications in court proceedings.

Written policies can also contain alternative dispute resolution requirements and procedures. Depending on the jurisdiction, an arbitration clause, forum-selection clause, or jury-waiver clause may be enforceable so as to limit the time, expense, risk, and the public nature associated with normal civil litigation.

Finally, it is very important to have a document signed by each employee stating that he or she has received the employer's policies, has read them, had an opportunity to ask questions about them, understood them, and agree to be bound by them. When an employer amends or changes its policies, it should require employees to sign an acknowledgment that it received the change or amendment, understood it, and agrees to be bound by it. This will confront any argument by an employee that he or she did not know about a particular policy.

III. TITLE VII, RELATED CLAIMS & THE MCDONNEL DOUGLAS BURDEN SHIFTING PARADIGM.

A. *Twymon v. Wells Fargo & Co., 462 F.3d 925, 929-31 (8th Cir. 2006).*

The *Twymon* case, a Title VII race discrimination and retaliation case, involved fairly tabloid allegations including: (1) employee visited hundreds of non-work websites and had pornographic images on her hard drive, and (2) employee was told to be a 'a good black' and to 'to act like an Uncle Tom.'[1] Additionally, the employer replaced the minority (African-American) employee with a majority (white) employee. The employer's policies prohibited excessive personal use of company computers and accessing pornographic materials. The employer's audit revealed the employee visited hundreds of non-work-related internet sites, including multiple pornographic sites and images.[2] The employer terminated the employee for "gross violation of the company's computer policy."[3]

The court analyzed the case under the *McDonnell Douglas* burden shifting paradigm.[4] 'Under this framework, a Title VII plaintiff has the initial burden of establishing a prima facie case of discrimination.'[5] "A plaintiff establishes a prima facie case by showing that: (1) she was a member of a protected class; (2) she was meeting the employer's legitimate job expectations; (3) she suffered an adverse employment action; and (4) similarly situated employees outside the protected class were treated differently."[6] "If a prima facie case is established, a 'burden of production then shifts to the employer to articulate a legitimate, non-discriminatory reason for firing the plaintiff.'"[7] "If the employer makes such a showing, the plaintiff must then demonstrate by a preponderance of the evidence that the stated non-discriminatory rationale was a mere pretext for discrimination."[8]

For a Title VII race discrimination claim, the court stated: "We have consistently held that violating a company **policy** is a legitimate, non-discriminatory rationale for terminating an employee."[9] "A proffered legitimate, nondiscriminatory reason for termination need not, in the end, be correct if the employer honestly believed the asserted grounds at the time of termination."[10] However, following the *McDonnell Douglas* burden shifting paradigm, the court then looked to whether the proffered legitimate, nondiscriminatory reason was pretext. The court noted "'A common way of proving pretext is to show that similarly situated employees were more favorably treated.'"[11] "In this context, similarly situated employees would be those who also violated Wells Fargo's computer policy. The Employee failed to offer any admissible

---

1 *Twymon v. Wells Fargo & Co*, 462 F.3d 925, 929-31 (8th Cir. 2006).
2 *Twymon*, 462 F.3d at 929.
3 *Twymon*, 462 F.3d at 935.
4 This paradigm was established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
5 *Elmahdi v. Marriott Hotel Servs., Inc*., 339 F.3d 645, 656 (8th Cir. 2003).
6 *Philip v. Ford Motor Co*., 413 F.3d 766, 768 (8th Cir. 2005).
7 *Johnson v. Ready Mixed Concrete Co*., 424 F.3d 806, 810 (8th Cir. 2005).
8 *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).
9 *Twymon*, 462 F.3d at 935 (emphasis added).
10 *Twymon*, 462 F.3d at 935.
11 *Twymon*, 462 F.3d at 936.

evidence regarding Wells Fargo's treatment of such employees."[12] Because the employer had a policy, followed it, and assumedly followed it with similarly situated employees [since the employee failed to produce any such evidence[13]], the Court affirmed summary judgment for the employer. Importantly, the Court similarly ruled in favor of the employer on the retaliation claims.

B. *Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712 (7th Cir. 2005).*

In *Rudin*, the employee (majority female) filed Title VII race and gender discrimination claims against her employer. The employee applied for a new professor position, but the position was filled by a minority male.[14] During the hiring process, the employer departed from its hiring policies. Specifically, inter alia, (a) the screening committee failed "'to meet [ ] and thoroughly discuss [ ] the strengths and weaknesses of each candidate,'" (b) the committee chair may have failed to take "'into consideration the input presented by the individual committee members' before identifying his candidate of choice....to his superiors," [15] and (c) the minority male candidate "was allowed to bypass the first elimination"[16] round of the hiring process. The employer's proffered reason for hiring the successful candidate was that he was the most qualified candidate, and most importantly, because he had a second master's degree and was working on his PhD.[17]

The court employed the *McDonnell Douglas* burden shifting paradigm to the employee's race related claim. The court held: "We believe that the fact that LLCC did not follow its own internal procedures [i.e. **policies**] with respect to the hiring process for the position also points to a discriminatory motivation," and "This systematic abandonment of its hiring **policies** is circumstantial evidence of discrimination."[18] Summarily, because the employer failed to follow its policies, the court held there was sufficient evidence of discrimination and therefore a triable issue. [19]

On the gender discrimination claim, the employer conceded the employee "established a prima facie indirect case of sex discrimination."[20] Thus, "a presumption of discrimination arises, and the employer must articulate a legitimate and non-discriminatory reason for the employment action." Subsequently, "If the employer does articulate such a reason, then 'the plaintiff must show by a preponderance of the evidence that the employer's proffered reasons were merely a pretext for discrimination.'"[21] Once the employer has proffered a legitimate, non-discriminatory

---

[12] *Twymon*, 462 F.3d at 936. *See also Baker Hughes Oilfield Operations, Inc. v. Williams*, 360 S.W.3d 15, 24 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (where employee admitted to violating company policy, there was no reasonable factual basis for jury to have found company's stated reason for termination pretextual).

[13] *See Brown v A.J. Gerrard Mfg. Co.*, 643 F.2d 273 (5th Cir. 1981) where the court reversed and remanded for judgment for the plaintiff in Title VII case due to evidence that the employer treated similarly situated employees differently under a company policy.

[14] *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712 (7th Cir. 2005).

[15] *Rudin*, 420 F.3d at 723.

[16] *Rudin*, 420 F.3d at 722.

[17] *Rudin*, 420 F.3d at 724.

[18] *Rudin*, 420 F.3d at 723 (emphasis added).

[19] *Rudin*, 420 F.3d at 724.

[20] *Rudin*, 420 F.3d at 724.

[21] *Rudin*, 420 F.3d at 724.

reason, then if "the employee has cast doubt upon the employer's proffered reasons for termination, the issue of whether the employer discriminated against the plaintiff is to be determined by the jury-not the court."[22] The court, pointing to the same failure to follow the same policies mentioned above, held: "This court has held in the past that an employer's failure to follow its own internal employment procedures [i.e **policies**] can constitute evidence of pretext."[23] Thus, the employer's failure to follow its policies constituted evidence against its proffered legitimate, non-discriminatory reason for termination.

Significantly, the employer's failure to follow its policies constituted evidence: (1) showing the employer's discrimination and (2) showing the employer's proffered legitimate, nondiscriminatory reason was pretext. Thus, the Court overturned the district courts granting of summary judgments and remanded for trial.

C. *Quezada v. Earnhardt El Paso Motors, LP, 592 F. Supp. 2d 915, 923 (W.D. Tex. 2009)*.

In *Quezeda*, an Age Discrimination in Employment Act ("ADEA") claim analyzed under the *McDonnell Douglas* burden shifting paradigm, the employee claimed he was not counseled by the employer about his poor performance prior to his termination, as was recommended by the employer's policies. [24]The court held: "an inference of pretext arises when an employer fails to follow its own internal **policies**"[25] and this inference is sufficient to raise a material fact as to whether the employer's proffered legitimate, nondiscriminatory reason for terminating the employee is merely pretext.[26] Thus, the court denied the employer's motion for summary judgment.[27] In the Fifth Circuit, an employer's failure to follow its own policies can raise an inference of pretext that is sufficient to defeat an employer's motion for summary judgment.

Similarly, in *Bowditch v. Mettler Toledo International, Inc.*, an employer terminated an employee in his fifties because he was using a company computer to view and transmit pornographic materials to coworkers and people outside the company in violation of the company's policies.[28]After the employee sued for age discrimination, the trial court granted summary judgment for the employer. The court of appeals reversed the judgment and found that the employee provided sufficient evidence of pretext by showing that a similarly situated employee who had engaged in similar, if not identical, misconduct had not been terminated. The court held: "Because … appellant raised a genuine issue of material fact as to whether a substantially younger, similarly-situated co-worker was treated more favorably despite engaging in substantially similar conduct, appellant has demonstrated appellees' reason was insufficient."[29]

---

[22] *Rudin*, 420 F.3d at 726.
[23] *Rudin*, 420 F.3d at 727 (emphasis added).
[24] *Quezada v. Earnhardt El Paso Motors, LP*, 592 F. Supp. 2d 915, 923 (W.D. Tex. 2009) (citing *Machinchick v PB Power, Inc*., 398 F. 3d 345, 355 (5th Cir. 2005)).
[25] *Quezada*, 592 F. Supp. 2d at 923 (emphasis added).
[26] *Quezada*, 592 F. Supp. 2d at 924.
[27] *Quezada*, 592 F. Supp. 2d at 924.
[28] No. 12AP-776, 2013 Ohio App. 4380 (Ohio App September 26, 2013).
[29] *Id*. at *P36.

IV. TITLE VII, RELATED CLAIMS & THE FARAGHER-ELLERTH DEFENSE.[30]

A. *Burlington Indus., Inc v. Ellerth, 524 U.S. 742 (1998)*.[31]

In *Ellerth,* the U.S. Supreme Court adopted an affirmative defense for Title VII sexual harassment-hostile work environment claims. The Court held:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. *See* Fed. R. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment **policy** with complaint procedure is not necessary in every instance as a matter of law, the need for a stated **policy** suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[32]

Although the Court declared there are two elements to the *Fargher-Ellerth* defense, the first element is readily dissected into two prongs with the first prong focusing on preventative measures installed by the employer prior to the complaint and the second prong focusing on corrective measures, including any internal investigations, initiated by the employer after the complaint.

B. *Leopold v. Baccarat, Inc. No. 95-CV-6475JSM, 2000 WL 174923.*

---

[30] http://us.practicallaw.com/4-502-6644 - "The Faragher-Ellerth defense is primarily used to defend against claims of hostile work environment sexual harassment, but has been applied to defend against claims of hostile work environment harassment on the basis of other protected classes as well. The Faragher-Ellerth defense is recognized as a defense against harassment claims under Title VII of the Civil Rights Act of 1964 (Title VII) and by the equivalent law of many states, but has been rejected by at least one jurisdiction, New York City (see *Zakrzewska v. The New Sch*., 598 F. Supp. 2d 426 (S.D.N.Y. 2009) rejecting Faragher-Ellerth for purposes of sexual harassment claims under the New York City Human Rights Law)."

[31] *See* companion case: *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

[32] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998) (citing *Faragher v. Boca Raton*, 524 U.S. 775 (1998)) (emphasis added).

In *Leopold*, the employee alleged a Title VII hostile work environment claim and that the employer's "anti-harassment policy and complaint procedure" were insufficient to satisfy the employer's *Faragher-Ellerth* defense.[33] The employer moved for summary judgment on its *Faragher-Ellerth* defense. In addressing the sufficiency of the employer's anti-harassment policy, the court held:

> One way that an employer can prove reasonable steps is by producing a detailed, written anti-harassment **policy** and complaint procedure that include a by-pass provision, an assurance that there will be no repercussions for complaints, a promise of severe punishment for harassers and incentives to encourage employees to report harassment. But such a **policy** is not necessary in every case. In a very small company, for example, an oral statement that harassment will not be tolerated and an open door **policy** on the part of management may be sufficient. The law is very clear that any reasonable **policy** will do.[34]

The court noted that a "laudable" anti-harassment policy may include provisions addressing the following: (1) complaints are confidential, (2) ability to bypass a supervisor, if the supervisor is the harasser, (3) no retaliation, (4) harassment definition, (5) consequences to harasser, and (6) incentive to report harassment.[35]

Because the employer's anti-harassment policy defined harassment, stated the consequence for harassment, and allowed the employee to bypass the harassing supervisor, the court held the employer's anti-harassment policy satisfied the first element of the *Faragher-Ellerth* defense.[36] Because the employee failed to take advantage of the complaint procedures, the court also held that second element of the *Faragher-Ellerth* defense was satisfied and therefore granted summary judgment in favor of the employer.[37]

In short, a written anti-harassment policy, even if not robust, is critically important to an employer's ability to successfully utilize the *Faragher-Ellerth* defense.

C. *Upjohn Co. v. U.S., 449 US 383 (1981).*

Although the *Upjohn* case does not involve the *Faragher-Ellerth* defense, it is a seminal case on the attorney-client privilege and the work-product exemption in the internal investigation context and is thus integral to any *Faragher-Ellerth* discussion. Obviously, *Upjohn* is the genesis of "Upjohn warnings."

In *Upjohn*, Upjohn's general counsel conducted an internal investigation into potentially illegal payments to foreign governments to secure business.[38] The IRS sought discovery of various investigation related documents and argued the attorney-client privilege belonged to the client-

---

[33] *Leopold*, 2000 WL 174923 at *3.
[34] *Leopold*, 2000 WL 174923 at *3 (emphasis added).
[35] *Leopold*, 2000 WL 174923 at *3-4.
[36] *Leopold*, 2000 WL 174923 at *4.
[37] *Leopold*, 2000 WL 174923 at *5.
[38] *Upjohn*, 449 U.S. at 386.

corporation and only officers and employees capable of directing Upjohn's actions constituted the "client."[39] Thus, the IRS contended Upjohn waived the attorney-client privilege in regards to the general counsel's employee questionnaires and interview notes in regard to low-level employees.[40] The US Supreme Court rejected the IRS's contention and noted the attorney-client "privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice" and to hold otherwise would often prevent a lawyer from gathering necessary information from the employees that actually possess the information.[41]

In upholding the attorney-client privilege, the US Supreme Court noted the general counsel's comments and instructions to employees included: (1) the general counsel's role as attorney for the employer,[42] and (2) that the interviews and questionnaires were garnered for the employer to obtain legal advice.[43]

The Court also concluded that many of the same investigation-related documents were protected under the work-product exemption. The Court held: "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes ... ("what he saw fit to write down regarding witnesses' remarks"); ... ("the statement would be his [the attorney's] language, permeated with his inferences")."[44]

In short, many documents prepared by or under the direction of an attorney in the context of an internal investigation are protected by the attorney-client privilege if the documents were prepared in the furtherance of providing legal advice. Furthermore, these same documents are also likely subject to the work product exemption if prepared in anticipation of litigation.

D. *Koumoulis v. Indep. Fin. Mktg. Group, Inc., 29 F. Supp. 3d 142 (E.D.N.Y. 2014)*.

The *Koumoulis* Court addressed both the attorney-client privilege and the work-product exemption in the context of internal investigations and the *Faragher-Ellerth* defense. The court compelled numerous attorney-client communications to be produced because the outside attorney "was not a consultant on legal issues, but instead she helped supervise the internal investigation primarily as an adjunct member of Defendants' human resource team."[45] The court held the following topics were not subject to the attorney-client privilege: (1) instructions on what actions and disciplinary actions were warranted, (2) when to take certain actions, (3) who should take certain actions, (4) what and how things should be documented, (5) communications

---

[39] *Upjohn*, 449 U.S. at 388. This standard is commonly referred to as the "Control Group" standard.

[40] *Upjohn*, 449 U.S. at 388.

[41] *Upjohn*, 449 U.S. at 390-391.

[42] *Upjohn*, 449 U.S. at 387.

[43] *Upjohn* at 394. A general survey of the legal landscape reveals a robust Upjohn Warning will also include statements that: (a) the attorney does not represent the employee, (b) the attorney-client privilege belongs to the company (c) the company may elect to waive the attorney-client privilege, and (d) the importance of confidentiality. Upjohn Warnings are often accompanied by other statements that address business, human resource, and other legal matters such as confidentiality, retaliation, duty to cooperate with investigation, right to obtain personal attorney, rights and obligations to cooperate with investigating government agencies.

[44] *Upjohn*, 449 U.S. at 399-400 (internal citations omitted) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947) at 513 and 516-17).

[45] *Koumoulis*, 29 F. Supp 3d at 147.

to be sent to the employee, (6) scripts of conversations to be had with the employee, and (7) instructions on how to conduct an internal investigation.[46]

The court then held the work-product exemption also failed to protect many of the same topics. The court noted the internal investigation and responses to the employee's complaints "would have been provided even absent the specter of litigation, and therefore do not constitute litigation related work product."[47] The court further explained "Legal advice given for the purpose of *preventing* litigation is different than advice given in *anticipation* of litigation."[48]

After holding a vast amount of material was not subject to the attorney-client privilege or the work-product exemption, the court then covered its bases and held that by asserting the *Faragher-Ellerth* defense, "Defendants waive any otherwise applicable privilege with respect to all documents relating to the reasonableness of their efforts to correct the allegedly discriminatory behavior and the reasonableness of their investigatory policies and procedures."[49]

In short, an attorney's advice that is predominantly non-legal, including advice on an internal investigation, will likely not be protected by the attorney-client privilege. If an employer likely would have conducted an internal investigation or obtained advice from counsel for reasons other than the anticipation of litigation (e.g. human resource or safety reasons), the internal investigation and advice from counsel will likely not be protected by the work-product exemption.

E. *Koss v. Palmer Water Dep't. 977 F. Supp. 2d 28 (2012).*

In *Koss*, a Title VII sexual harassment discrimination case, the court held:

> when a Title VII defendant affirmatively invokes a *Faragher-Ellerth* defense that is premised ... on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation.[50]

The rationale for this position is:

> Defendants deliberately placed the internal investigation of Plaintiff's complaints at issue in this lawsuit ... Defendants cannot rely on the thoroughness and competency of its investigation and corrective actions and then try and shield discovery of documents underlying the investigation by asserting the attorney-client privilege or work product protections.[51]

---

[46] *Koumoulis*, 29 F. Supp 3d at 147
[47] *Koumoulis*, 29 F. Supp 3d at 149.
[48] *Koumoulis*, 29 F. Supp 3d at 150.
[49] *Koumoulis*, 29 F. Supp 3d at 150 (citing *Angelone v. Xerox Corp*., No 09-CV-6019, 2011 WL 4473534, at *3 (W.D.N.Y. Sept. 26, 2011)).
[50] *Koss*, 977 F. Supp. 2d at 29 (citing *Angelone*, 2011 WL 4473534 at *2).
[51] *Koss*, 977 F. Supp. 2d at 29 (internal quotations omitted) (citing *Angelone*, 2011 WL 4473534, at *3).

In short, the attorney-client privilege and the work-product exemption are waived for all documents prepared by or under the direction of an attorney in the context of an internal investigation and utilized as part of the *Faragher-Ellerth* defense.

F. *McKenna v. Nestle Purina PetCare Co., 2:05-cv-0976, 2007 WL 433291 (S.D. Ohio Feb. 5, 2007)*.

In *McKenna*, the court held "the waiver [of privilege due to the *Faragher-Ellerth* defense] extends only to documents which constitute evidence of the investigation of the claim of harassment or discrimination."[52] The court further explained that if an attorney had been consulted about an investigation but did not himself or herself conduct interviews, make disciplinary decisions, or otherwise participate in the investigation itself, the contents of the attorney's advice to the client about the investigative process and the decisions made by the employer remain privileged.[53]

G. *Waugh v Pathmark Stores, Inc., 191 F.R.D. 427 (2000).*[54]

In *Waugh*, the US District Court denied an employee's motion to compel (i) the deposition of the employer's in-house counsel and (ii) the production of in-house counsel's created documents. The court repeatedly stressed the employer's in-house counsel's role was only that of "legal advisor" and not that of "participant and decision maker" because he did not conduct the internal investigation or render disciplinary decisions."[55]

V. THE FAIR LABOR STANDARDS ACT ("FLSA") AND WAGE AND HOUR CLAIMS.

A. *Richardson v. Wells Fargo Bank, N.A., 4:11-CV-00738, 2012 WL 334038 (S.D. Tex. Feb. 2, 2012).*

In *Richardson*, employees alleged they were not compensated for work performed off the clock (e.g. before work, after work, during lunch breaks, etc.) and filed a motion to certify a nationwide class under the Fair Labor Standards Act ("FLSA").[56] The employer maintained the following policies: (a) all employees were required to accurately report all hours worked, (b) all employees were entitled to pay for all actual hours worked, even those ... that were not authorized, and (c) managers were prohibited from allowing off the clock work.[57]
The court held the key determination for class certification is whether the potential members "were together the victims of a single decision, **policy**, or plan," thus making them "similarly situated."[58] The court noted "Although written **policies** are not dispositive ... written **policies** are

---

[52] *Koss*, 977 F. Supp. 2d at 30 (emphasis in original) (citing *McKenna*, 2007 WL 433291 at *4).
[53] *Koss*, 977 F. Supp. 2d at 30 (emphasis in original) (citing *McKenna*, 2007 WL 433291 at *4).
[54] Although the *Waugh* Court relies heaving on New Jersey Supreme Court decisions, the court repeatedly relies on the US Supreme Court's *Faragher* decision as the substance issues are substantially similar.
[55] *Waugh*, 191 F.R.D. at 429.
[56] *Richardson*, 2012 WL 334038.
[57] *Richardson*, 2012 WL 334038.
[58] *Richardson*, 2012 WL 334038 (citing *McKnight v D. Houston, Inc.*, 756 F. Supp. 2d 794, 801 (quotations and citations omitted)) (emphasis added).

relevant considerations when assessing workers' arguments about the existence of a company-wide **policy**."[59] "Where the 'inappropriate behavior rested on the interpretation and implementation of regional managers and 'there is no evidence that managers, nationwide, failed to follow [written overtime] **policies**,' nationwide certification is inappropriate."[60]

In essence, the employer's policies prohibiting unpaid off-the-clock work, in the absence of countervailing evidence, were sufficient evidence to defeat class certification. Importantly, the court distinguished the existence of a company-wide policy and the regional implementation or interpretation of such policy.

B. *Burch v. Qwest Commc'n Intern., Inc., 500 F. Supp. 2d 1181 (D. Minn. 2007)*.

In *Burch*, employees brought various FLSA and wage and hour claims. The employer maintained a policy, as part of its collective bargaining agreement, that all employees would be paid one and a half times for hours worked in excess of forty hours and that all work would be included.[61] Call center employees' hours worked were tracked by use of their phones; however, these employees were required to work on their computer while not on the phone and this time was not tracked or paid.[62]

The court held: "the existence of a written **policy** dictating overtime pay is one factor weighing against conditional certification.[63] However, at this early stage of litigation, the mere fact that Quest has written **policy** does not defeat Plaintiffs' motion in light of the Plaintiffs' countervailing evidence of a centralized **policy** to not pay overtime."[64] Thus, the court permitted first-stage class certification.

Not only should an employer have company policies prohibiting unpaid off-the clock work, those company policies should also be consistent with the employer's other policies and practices.

VI. OTHER MISCELLANEOUS EMPLOYMENT CLAIMS.

A. *Green v. Ransor Inc., 175 S.W. 3d 513 (Tex. App.--Fort Worth 2005, no pet.).*

In *Green*, an employee, while on an overnight business trip for the employer, drove a company vehicle to a bar, became intoxicated, and caused an accident thus injuring the plaintiff. The employee was charged with driving while intoxicated and failing to render aid. The employer maintained the following company policies: (1) "operating company vehicles after the consumption of alcoholic beverages is strictly prohibited," and (2) "a company vehicle may be used for certain limited personal purposes after working hours, such as driving to a restaurant for

---

[59] *Richardson*, 2012 WL 334038 (emphasis added).
[60] *Richardson*, 2012 WL 334038 (emphasis added).
[61] *Burch*, 500 F. Supp. 2d at 1184
[62] *Burch*, 500 F. Supp. 2d at 1183
[63] *Burch*, 500 F. Supp. 2d at 1188 (citing *West v. Border Foods, Inc.*, 2006 WL 1892527 at *9 (D. Minn. July 10, 2006)) (emphasis added).
[64] *Burch*, 500 F. Supp. 2d at 1188, (emphasis added).

meals or driving to a movie, but emphasizes that this limited permission is given only '*so long as it [the activity] does not involve the consumption of alcoholic beverages.*'"[65]

The plaintiff alleged that the employer was vicariously liable for its employee's negligence under respondeat superior and correctly noted that "a presumption arose that ... [the employee] was acting within the course and scope of his employment because ... [he] was an employee driving a company vehicle at the time of the accident."[66] "Under the doctrine of respondeat superior, an employer is responsible for the negligence of an employee acting within the course and scope of his employment, even though the employer has not personally committed a wrong."[67] "To prove that an employee acted within the course and scope of employment, a plaintiff must show that the act was (1) within the general authority given to the employee, (2) in furtherance of the employer's business, and (3) for the accomplishment of the object for which the employee was employed."[68]

Although the plaintiff argued "that evidence of intoxication and violation of a company policy, standing alone, do not establish that an employee acted outside the course and scope of employment,"[69] the court granted summary judgment for the employer. The court of appeals affirmed and noted:

> the summary judgment evidence was sufficient to overcome the presumption that ... [the employee] was acting within the course and scope of his employment at the time of the accident and to meet appellee's summary judgment burden of proving as a matter of law that ... [The employee] was not acting within the course and scope of his employment with appellee when the accident occurred. Appellee's uncontroverted evidence shows that not only did ... [the employee] violate company **policy** by driving the company truck while intoxicated, he also did not have the general authority—or permission from his employer—to drive the truck to or from a bar as he was at the time of the accident.[70]

---

[65] *Green v. Ransor Inc.*, 175 S.W.3d 513, 517 (Tex. App.—Fort Worth 2005, no pet.).

[66] *Green*,175 S.W.3d at 516 (citing *Salmon v. Hinojosa*, 538 S.W.2d 22, 23 (Tex. Civ. App.—San Antonio 1976, no writ)).

[67] *Green*,175 S.W.3d at 516 (citing *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex.1998)); *Arbelaez v. Just Brakes Corp*., 149 S.W.3d 717, 720 (Tex. App.—Austin 2004, no pet.).

[68] *Green*, 175 S.W.3d at 516 (citing *Arbelaez*, 149 S.W.3d at 720).

[69] *Green*, 175 S.W.3d at 516 (citing *Hooper v. Pitney Bowes, Inc*., 895 S.W.2d 773, 777 (Tex. App.— Texarkana 1995, writ denied) ("The fact that an employee does an act that is unauthorized or that would not be approved by his employer does not mean that the employee was outside the scope of his employment. The employer is liable for the act of his employee, even if the specific act is unauthorized or contrary to express orders, so long as the act is done while the employee is acting within his general authority and for the benefit of the employer."); *G. & H. Equip. Co. v. Alexander*, 533 S.W.2d 872, 876–77 (Tex. Civ. App.—Fort Worth 1976, no writ) (quoting 57 C.J.S. Master and Servant § 570 for the proposition that " '[w]here an act inflicting an injury on a third person is committed by a servant acting within the scope of his authority, the fact that the servant ... was intoxicated at the time of inflicting the injury complained of does not exonerate the master from liability.' ")).

[70] *Green*, 175 S.W. 3d at 517; *Andrews v. Houston Lighting & Power*, 820 S.W.2d 411, 413 (Tex. App.—Houston [14th Dist.] 1991, writ denied) ("[A]n employer is not liable for actions that an employee takes in his own interest and not to further the purpose of carrying out the master's business.").

Thus, when an employee is acting for his own interest (e.g. getting intoxicated after work), an employer's policies that both (1) prohibit certain conduct and (2) deny authority/permission for certain conduct may be sufficient to overcome adverse presumptions and prevent vicarious liability at summary judgment.

B. *Cont'l Coffee Prod. Co v. Cazarez, 937 S.W.2d 444 (Tex. 1996).*

In *Continental Coffee*, the employee alleged retaliation under Texas workers compensation laws.[71] Although the facts are tedious, suffice it to say, the employer terminated the employee for violation of its absence control policy or three-day rule after the employee had filed a Worker's Compensation claim and while the employee claims she was still on her permitted leave.[72]

The Texas Supreme Court held that in order to establish a workers' compensation retaliation claim, an employee must show a (1)"'causal connection' between (2) her discharge and (3) the filing of a workers' compensation claim."[73] The Court then held:

> Circumstantial evidence sufficient to establish a causal link between termination and filing a compensation claim includes: (1) knowledge of the compensation claim by those making the decision on termination; (2) expression of a negative attitude toward the employee's injured condition; (3) failure to adhere to established company **policies**; (4) discriminatory treatment in comparison to similarly situated employees; and (5) evidence that the stated reason for the discharge was false.[74]

"Once the link is established, it is the employer's burden to rebut the alleged discrimination by showing there was a legitimate reason behind the discharge."[75]

The court found there was some evidence that the employer failed to follow its three-day policy, which was the employer's only proffered explanation for termination. Thus, the court held there was some evidence of causation and upheld the trial court's award of actual damages (but reversed on other grounds for punitive damages).[76]

C. *La Tier v. Compaq Computer Corp., 123 S.W.3d 557 (Tex. App.—San Antonio 2003, no pet.)*.

In *La Tier*, an employee sued her former employer for retaliation for filing a Texas workers compensation claim.[77] The employer asserted that it terminated the employee for taking food

---

[71] *Con'tl Coffee Prod. Co*., 937 S.W.2d at 445.

[72] *Con'tl Coffee Prod. Co*., 937 S.W.2d at 451.

[73] *Con'tl Coffee Prod. Co*., 937 S.W.2d at 450 (internal numbering added) (citing *Investment Properties Management, Inc. v. Montes*, 821 S.W.2d 691, 694 (Tex. App.—El Paso 1991, no writ)).

[74] *Con'tl Coffee Prod. Co*., 937 S.W.2d at 451

[75] *Con'tl Coffee Prod. Co*., 937 S.W.2d at 451 (citing *Hughes Tool Co. v. Richards*, 624 S.W.2d 598, 599 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.)).

[76] *Con'tl Coffee Prod. Co*., 937 S.W.2d at 455 (the Texas Supreme Court did reverse the award of punitive damages) (emphasis added); *American West Airlines v. Tope*, 935 S.W.2d 908 (Tex. App.—El Paso 1996, no pet.).

[77] *La Tier v. Compaq Computer Corp*., 123 S.W.3d 557 (Tex. App.—San Antonio 2003, no pet.).

home and violating company policy prohibiting dishonesty, theft, and misuse of company assets. The employee sued, and the trial court granted summary judgment for the employer. The court of appeals reversed. It noted the employer admitted there was no company policy prohibiting food from being taken or requiring permission before taking food. The court held that the employer's knowledge of the claim and its negative attitude toward the employee's injured condition, and "the conflicting evidence regarding whether La Tier was treated differently than others in response to taking left over food was sufficient to raise a genuine issue of material fact with regard to whether a causal link existed between La Tier's termination and her filing of a workers' compensation claim."[78]

D. *Texas Division-Tranter, Inc. v. Carrozza, 876 S.W.2d 312 (Tex. 1994).*

In *Texas Division-Tranter, Inc.*, the employee filed a retaliatory-discharge claim under the workers' compensation law.[79] The employer presented evidence that the employee violated the employer's "three-day rule" by not obtaining permission or giving notice of absence for three consecutive days. The employer argued that the termination for violation of a company policy constituted a legitimate, non-discriminatory reason for termination. The employee offered little controverting evidence.

The Texas Supreme Court held: "Uniform enforcement of a reasonable absence-control provision, like the three-day rule in this case, does not constitute retaliatory discharge."[80] Thus, the Court upheld the summary judgment for the employer because the employer followed its company policy (i.e. "three-day rule") thus establishing a legitimate, non-discriminatory reason for termination and the employee failed to offer any countervailing evidence of pretext.[81]

Following a company policy can constitute a legitimate, non-discriminatory reason for termination, allowing the employer to win via a summary judgment.

E. *Paskuaskiene v. Tex. Workforce Com'n & Microconsult, Inc., No. 02-12000358-CV, 2013 Tex. App. LEXIS 9900 (Tex. App.—Fort Worth August 8, 2013, pet. denied)*.

In *Paskuaskiene*, an employee filed for unemployment benefits, her former-employer contested her right to receive benefits, and a Texas Workforce Commission hearing officer determined that she was ineligible to receive benefits because she was terminated for misconduct related to her work.[82] A person is "disqualified for benefits if [she] was discharged for misconduct connected with [her] last work."[83] Texas Labor Code section 201.012(a) defines "misconduct" as "mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law,

---

[78] *Id*. at 564.

[79] *Texas Division-Tranter*, 876 S.W.2d at 313.

[80] *Texas Division-Tranter*, 876 S.W.2d at 313.

[81] *Texas Division-Tranter*, 876 S.W.2d at 314. *Also see Nat'l Labor Relations Bd. v. Alamo Express Inc.*, 420 F.2d 1216 (5th Cir. 1969) where the Employer consistently followed a clear policy and was therefore not found to be discriminatory.

[82] *Paskuaskiene v. Tex. Workforce Com'n & Microconsult, Inc.*, No. 02-12000358-CV, 2013 Tex. App. LEXIS 9900 (Tex. App.—Fort Worth August 8, 2013, pet. denied).

[83] Tex. Lab. Code Ann. § 207.044(a).

or violation of a policy or rule adopted to ensure the orderly work and the safety of employees."[84] The court of appeals held that the denial of the employee's application for unemployment benefits was proper under Texas Labor Code Sections 207.044(a) and 201.012(a) because the employer's company policy provided for termination upon dishonesty or falsification of records and the employee admitted that she signed at least one such report without reviewing the entire document. Therefore, company policies can support a decision to terminate an employee and contest a claim for unemployment benefits.

VII. ACCESS TO EMPLOYEE'S CONFIDENTIAL OR PRIVILEGED COMMUNICATIONS.

Often when an employee starts having issues and disputes with his or her employer, he or she will communicate with a personal attorney. These communications may be via work email. These communications may provide a clearer version of the facts, and support an employer's defenses, than what is being stated at the time of litigation. Does the employer have a right to review and use those communications in subsequent litigation? They key issue is whether the employee had a reasonable expectation of privacy when using the employer's computer systems.

If there is no company policy addressing the use of the employer's computers and email systems, then courts have been willing to find that the emails with the employee's attorney were protected by the attorney-client privilege because there was an expectation of privacy.[85]In one of the early decisions to consider the issue, one court started from the proposition that an employee can have a reasonable expectation of privacy in a work email account.[86] The court explained that under United States Supreme Court precedent, an employee can have reasonable expectation of privacy in areas such as the employee's office, desk, and files, but that the "employee's expectation of privacy . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation."[87] "Although e-mail communication, like any other form of communication, carries the risk of unauthorized disclosure, the prevailing view is that lawyers and clients may communicate confidential information through unencrypted e-mail with a reasonable expectation of confidentiality."[88] In the ordinary course of business, employees who send communications within the company over the employer's email system can reasonably expect that outsiders will not be able to access the system.[89] Consequently, "[a]ssuming a communication is otherwise privileged, the use of the company's e-mail system does not, without more, destroy the privilege."[90]

---

[84] *Id*. § 201.012(a).

[85] *See Leventhal v. Knapek*, 266 F.3d 64, 74 (2d Cir. 2001) (finding reasonable expectation of privacy when there was no clear policy or practice regarding email monitoring or use; "the anti-theft policy [merely] prohibited 'using' state equipment 'for personal business' without defining further these terms"); *DeGeer v. Gillis*, 2010 U.S. Dist. LEXIS 97457, 2010 WL 3732132, at *9 (N.D. Ill. Sept. 17, 2010) (declining to order production where there was no evidence of a company policy).

[86] *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 256 (Bankr. S.D.N.Y. 2005).

[87] *Id*. at 257 (quoting *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)) (internal quotation marks omitted).

[88] *Id*. (collecting authorities).

[89] *Id*.

[90] *Id*. at 251.

However, courts have held that where the company has a written policy that clearly states that the employee has no right to privacy in using the company's computer system, the company may review and use the employee's confidential emails.[91] An employer's policies and procedures regarding work email can alter the employee's reasonable expectation of privacy.[92] "In light of the variety of work environments, whether the employee has a reasonable expectation of privacy must be decided on a case-by-case basis."[93]

To guide the case-by-case analysis, the court identified four factors: (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?[94] No one factor is dispositive.[95] The question of privilege comes down to "whether the [employee's] intent to communicate in confidence was objectively reasonable."[96]

Such a policy should state, at a minimum, that all emails are company property, that personal use of the company system is prohibited, and that all use of the company's computer system or data composed, sent, or retrieved through that system can be monitored, retrieved, read, and used by the company.

---

[91] *See, e.g., In re Mgmt. Servs., Inc. Derivative Litig.*, 81 A.3d 278 (Del. Ct. 2013) (emails with private attorney were discoverable); *Miller v. Blattner*, 676 F. Supp. 2d 485, 497 (E.D. La. 2009) (holding that when "an employer has a rule prohibiting personal computer use and a published policy that emails on [the employer's] computers were the property of [the employer], an employee cannot reasonably expect privacy in their prohibited communications"); *Sims v. Lakeside School*, 2007 U.S. Dist. LEXIS 69568, 2007 WL 2745367, at *1 (W.D. Wash. Sept. 20, 2007) ("[W]here an employer indicates that it can inspect laptops that it furnished for use of its employees, the employee does not have a reasonable expectation of privacy over the employer-furnished laptop."); *Thygeson v. U.S. Bancorp*, 2004 U.S. Dist. LEXIS 18863, 2004 WL 2066746, at *21 (D. Or. Sept. 15, 2004) ("[W]hen, as here, an employer accesses its own computer network and has an explicit policy banning personal use of office computers and permitting monitoring, an employee has no reasonable expectation of privacy."); *Kelleher v. City of Reading*, 2002 U.S. Dist. LEXIS 9408, 2002 WL 1067442, at *8 (E.D. Pa. May 29, 2002) (finding employee had no reasonable expectation of privacy in workplace email where the employer's guidelines "explicitly informed employees that there was no such expectation of privacy"); *Garrity v. John Hancock Mut. Life Ins. Co*., 2002 U.S. Dist. LEXIS 8343, 2002 WL 974676, at *1-2 (D. Mass. May 7, 2002) (finding no reasonable expectation of privacy where company reserved the right to monitor employee use of work email); *see also Muick v. Glenayre Elecs*., 280 F.3d 741, 743 (7th Cir. 2002) (Posner, J.) ("But Glenayre had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy that Muick might have had and so scotches his claim."); *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) ("Therefore, regardless of whether Simons subjectively believed that the files he transferred from the Internet were private, such a belief was not objectively reasonable after [his employer] notified him that it would be overseeing his internet use."); *Banks v. Mario Indus. of Va., Inc*., 274 Va. 438, 650 S.E.2d. 687, 695-96 (Va. 2007) (holding that existence of policy advising employee that there was no right of privacy when using employer-furnished computer eliminated reasonable expectation of confidentiality and permitted employer to recover and use employee's letter to attorney that was drafted on employer-furnished computer, then sent through regular mail).

[92] *Id*.

[93] *Id*. at 257 (citing *Ortega*, 480 U.S. at 718).

[94] *Id*.

[95] *Id*. at 258-59.

[96] *Id*. at 258.

VIII. NEGLIGENCE AND STANDARD OF CARE ISSUES.

Plaintiffs often seek discovery on a defendants' policies and procedures with an eye to using that evidence against the defendant. If an employee did not live up to the company's policies and procedures, a plaintiff may argue that the employee (and his or her employer) did not live up to its duty or the appropriate standard of care.

From a policy standpoint, this is a bad approach. Policies and procedures benefit the employer, the employee, the plaintiff, and society in general. If companies are reluctant to implement policies because they fear them being used against them, everyone will lose. Without policies to encourage employees to do better, there may be worse customer service and worse company performance.

Moreover, a fact finder should not judge a company's performance by their policies. Companies may want to not only comply with the law but exceed it. So, a company's policies and legal requirements are not necessarily the same, and one does not necessarily evidence the other.[97] The Texas Supreme Court held that internal policies and procedures do not set the standard of care:

> [Defendant's] self-imposed policy with regard to inspection of its trailers, taken alone, does not establish the standard of care that a reasonably prudent operator would follow. As a Texas court of appeals explained, a company's internal policies "alone do not determine the governing standard of care." *Fence v. Hospice in the Pines,* 4 S.W.3d 476, 481 (Tex. App.—Beaumont 1999, pet. denied). A federal court of appeals has also held that a defendant's internal policies do not, taken alone, establish the applicable standard of care. In *Titchnell v. United States*, 681 F.2d 165, 173 (3d Cir.1982), the court stated:
>
> > [I]f a health care facility, in striving to provide optimum care, promulgates guidelines for its own operations which exceed the prevailing standard, it is possible that care rendered at that facility by an individual practitioner on a given occasion may deviate from and fall below the facility's own standard yet exceed the recognized standard of care of the medical profession at the time. A facility's efforts to provide the best care possible should not result in liability because the care provided a patient falls below the facility's usual degree of care, if the care provided nonetheless exceeds the standard of care required of the medical profession at the time. Such a result would unfairly penalize health care providers who strive for excellence in the delivery of health care and benefit those who choose to set their own standard of care no higher than that found as a norm in the same or similar localities at the time.[98]

---

[97] *See Grassie v. Roswell Hosp. Corp*., 150 N.M. 283 (N.M. Ct. App. 2010) ("The Agreement is evidence of a standard the Hospital set for itself. But a failure to follow it may or may not be negligent when viewed in the context of the entire screening process actually undertaken.").

[98] *FFE Transportation Services, Inc. v. Fulgham,* 154 S.W.3d 84 (Tex. 2006).

Further, in Texas, a company's internal policies or procedures will not create a negligence duty where none otherwise exists.[99] For example, in *Cox v. City of Fort Worth*, the plaintiff alleged that the defendant hospital breached a duty by failing to follow its own internal policies.[100]Plaintiffs specifically claimed that the defendant allegedly failed to exercise reasonable care in implementing and enforcing its policy concerning limitations on the number of visitors each emergency-room patient was allowed, and that it particularly failed to exercise reasonable care in communicating that information to plaintiffs prior to the decedent's arrival at the hospital. The court rejected this claim, holding: "Plaintiffs' negligence claim, grounded on Texas Health's alleged negligent implementation of its internal policies, thus cannot pass the first hurdle: it fails to allege a legal duty. Having alleged no duty outside of the implementation of Texas Health's own internal policies, plaintiffs' negligence claim fails."[101]

At least one Texas court has held that even if internal policies and procedures do not create the standard of care and do not create a negligence duty, they may still be admissible and may be considered by an expert who may opine on the standard of care and causation.[102] That court held:

> Dana argues that Microtherm's causation case cannot rest on Dana's own reports and internal evaluations and policies to substitute for the needed expert testimony. However, the cases relied upon by Dana, *FFE Transportation Services, Inc. v. Fulgham* and *Fence v. Hospice in the Pines*, do not support this proposition. They provide only that a company's self-imposed policies do not establish the standard of care and cannot be substituted as the industry's standard of care in determining a breach. In this case, Trillo did not use Dana's self-imposed policies, reports, and internal evaluations to establish the standard of care. She did not substitute Dana's quality control reports for the industry's standard. Trillo provided expert testimony on causation. She reviewed Dana's own reports on quality control and its internal evaluations and used information from the reports to provide support for her opinion on causation. Neither case relied upon by Dana addresses the application of internal reports, evaluations, and policies to a determination of causation. Neither case supports a conclusion that Microtherm's expert cannot consider Dana's 8-D correction report or the April quality control report in

[99] *Owens v. Comerica Bank*, 229 S.W.3d 544, 547 (Tex. App.—Dallas 2007, no pet.) ("The Texas Supreme Court has refused to create a standard of care or duty based upon internal policies, and the failure to follow such policies does not give rise to a cause of action in favor of customers or others."); *Entex, A Div. of Noram Energy Corp. v. Gonzalez*, 94 S.W.3d 1, 10 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Fence v. Hospice in the Pines*, 4 S.W.3d 476, 481 (Tex. App.—Beaumont 1999, pet. denied); *Jacobs-Cathey Co. v. Cockrum*, 947 S.W.2d 288, 291-92 (Tex. App.—Waco 1997, writ denied) (holding that company's internal policy of removing debris left at its work sites by other parties did not impose upon the company a legal duty to parties injured by unremoved debris); *Estate of Catlin v. Gen. Motors Corp.*, 936 S.W.2d 447, 451 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that company's safety policies restricting consumption of alcohol on its premises did not create legal duty that would subject the company to liability for failing to comply with those policies); *Williford Energy Co. v. Submergible Cable Servs., Inc*., 895 S.W.2d 379, 386-87 (Tex. App.—Amarillo 1994, no writ); *See also Salazar v. S. Cal. Gas Co.*, 54 Cal. App. 4th 1370, 63 Cal. Rptr. 2d 522, 525-32 (1997, review denied) (holding internal company policy of warning customers that elevating water heaters to at least eighteen inches would reduce the risk of flammable vapors being ignited did not create any duty).

[100] 762 F.Supp.2d 926 (N.D. Tex. 2010).

[101] *Id.* at 941.

[102] *See Dana Corp. v. Microtherm, Inc.*, No. 13-05000281-CV, 2010 Tex. App. LEXIS 408 (Tex. App.—Corpus Christi January 21, 2010, pet. granted, vacated in part by agr.).

> arriving at an opinion on causation. Whether or not corrective actions were taken at Dana's assembly plant pursuant to a company policy which did or did not exceed the existing standard of care, the evidence established there was contamination in the assembly of the thermistors, which according to Trillo, was a producing cause of the failure of the thermistor.[103]

Therefore, company policies may be discoverable in litigation, and depending on the jurisdiction and the issue, may be admissible into evidence.

IX. GROSS NEGLIGENCE AND KNOWLEDGE ISSUES

A. *Dalworth Trucking v. Bulen, 924 S.W. 2d 728 (Tex. App.--Texarkana 1996, no writ).*

In *Dalworth Trucking*, the evidence showed the employee had (i) fifty five violations of the employer's speed policy, (ii) six violations of the employer's over-hour policy, and (iii) one missing log violation within the week preceding the accident.[104] Furthermore, the employer "had a 'three strikes and you're out' policy with its drivers, which provided that after a driver accumulated three safety violations, the Employer would fire him."[105] However, despite the employee's violations of the safety policies, the employer failed to follow its "three strikes and you're out" policy and terminate the employee. In fact, the employee "was not disciplined, or admonished, despite his safety violations. The ...[employer] did not even send cautionary letters to [the employee] concerning his violations."[106]

In this matter, the court upheld one million three hundred thousand dollars in compensatory damages and one million in punitive damages because "Dalworth's managers could reasonably foresee a similar consequence from their failure to suspend or discipline [i.e. failure to follow company policies]" the driver.[107] Importantly, the jury only found the employer (via its manager's failure to follow company policies) grossly negligent and did not similarly so find for the employee.[108] . This decision can be read as implying that company policies may constitute evidence of an employer's knowledge.

X. CONCLUSION.

An employer's policies and practices revolving around those policies play vital and varied roles in employee-related litigation.

In many instances, the mere existence of a company policy is essential to an employer's success in litigation. In FLSA and other wage and hour claims, the mere existence of a "full pay" company policy is some evidence against class certification as it may show employees are not

---

[103] *Id*. at *35-36. *See also Flowers v. Torrence Memorial Hosp. Med. Ctr.*, (1994) 8 Cal.4th 992, 45; *Jutzi v. County of Los Angeles*, (1988) 196 Cal.App.3d 637

[104] *Dalworth Trucking v. Bulen*, 924 S.W. 2d 728, 732 (Tex. App.—Texarkana 1996, no writ).

[105] *Id*.

[106] *Dalworth*, 924 S.W. 2d at 732.

[107] *Dalworth*, 924 S.W. 2d at 734 (emphasis added).

[108] *Dalworth*, 924 S.W. 2d at 731. The jury found the employee forty percent negligent but not grossly negligent. The jury found the employer sixty percent negligent and grossly negligent.

similarly situated. Furthermore, in hostile-work environment-discrimination claims, the mere existence of a reasonably robust "anti-harassment" company policy is necessary, or at least sufficient, to establish the first element of the of the *Faragher-Ellerth* defense to an employer's vicarious liability. And again in tort claims, the mere existence of company policy prohibiting alcoholic beverage consumption and denying authority to drive a company vehicle after alcoholic beverage consumption can be vital to preventing an employer's vicarious liability as it shows an employee acted outside the scope of his employment.

On the other hand, an employer's failure to consistently follow company policies can increase an employer's risk and liability in litigation. Under the *McDonnell Douglas* burden shifting paradigm, an employer's failure to follow its own policies can constitute evidence of (1) the employer's discrimination and (2) that the employer's legitimate, non-discriminatory reason for termination was mere pretext. Similarly, in the workers' compensation retaliation context, an employer's failure to follow it policy regarding termination can show causation. In tort claims, an employer's failure to enforce and follow safety policies (and safety related termination policies) can be used to substantiate gross negligence and subject an employer to punitive damages.

Importantly, an employer's consistent enforcement of company policies when terminating an employee can help shield an employer from liability. For instance, an employer's consistent enforcement of an "absence control" (e.g. three-day policy), "no pornography" policy, or other policy when terminating an employee can constitute a legitimate, non-discriminatory reason for termination thus helping shield an employer from liability.

Finally, employment-related litigation often begins or includes an internal investigation performed or directed by counsel. Because the pitfalls surrounding the loss and/or waiver of the attorney-client privilege and work-product exemption in internal investigations are numerous and precarious, special attention and precautions by counsel are required.