

NO. 10-06-00095-CV

**IN THE COURT OF APPEALS
FOR THE TENTH DISTRICT OF TEXAS
AT WACO, TEXAS**

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Appellant,

v.

JERRY RAY EDGIN,
Appellee.

**ON APPEAL FROM THE 12TH JUDICIAL
DISTRICT COURT OF MADISON COUNTY, TEXAS**

APPELLEE JERRY RAY EDGIN'S BRIEF

THOMAS N. THURLOW
440 Louisiana St., Suite 1200
Houston, Texas 77002
713-224-6774
713-237-1408 Fax

Counsel for Appellee

IDENTITY OF PARTIES AND COUNSEL

Parties

Texas Department of Criminal Justice Defendant / Appellant

Jerry Ray Edgin Plaintiff / Appellee

Counsel

Anthony G. Brocato, Jr. Trial and Appellate Counsel for
Assistant Attorney General Appellant Texas Department of
Law Enforcement Defense Division Criminal Justice
Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
512-463-2080

Thomas N. Thurlow Trial and Appellate Counsel for
Law Office of Thurlow & Associates, P.C. Appellee Jerry Ray Edgin
440 Louisiana, Suite 1200
Houston, Texas 77002
713-224-6774

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STATEMENT OF THE CASE

Nature of the Case and Parties: Plaintiff, Jerry Ray Edgin, was demoted and constructively discharged in retaliation for opposing a discriminatory practice by Defendant Texas Department of Criminal Justice. (CR I, 1-4)

Trial Court: The 12th Judicial District Court of Madison County, Texas, the Honorable William L. McAdams presiding.

Trial Court's Disposition: On March 27, 2006:

The trial court denied Defendant's Amended Plea to the Jurisdiction. (CR II, 163-164).

The trial court denied Defendant's Motion for Summary Judgment. (CR II, 165-166).

The trial court overruled by written order Defendant's Amended Objections to Plaintiff's Response to Defendant's Motion for Summary Judgment. (CR II, 167-168).

ISSUES PRESENTED

- Issue One:** Has Plaintiff Jerry Ray Edgin plead facts that show the trial court has subject matter jurisdiction by stating a claim of retaliation within Chapter 21 of the Texas Labor Code?
- Issue Two:** Is Edgin entitled to amend his pleadings?
- Issue Three:** Is there any evidence that a reasonable person could have believed that the alleged comment from Warden Janicek constituted sexual harassment?
- Issue Four:** Is there any evidence that Warden Janicek had knowledge that Edgin was assisting Howe with her EEO complaint?
- Issue Five:** Is there any evidence that “but for” Edgin’s written witness statements reporting the alleged comment by Warden Janicek, the three disciplinary actions taken against Edgin and Edgin’s decision to retire would not have occurred.
- Issue Six:** Is there any evidence that Edgin was constructively discharged?
- Issue Seven:** Did the trial court err in overruling Defendant’s objections to Renee Howe’s affidavit filed by Plaintiff as summary judgment evidence?

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TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Appellant,

v.

JERRY RAY EDGIN,
Appellee.

**ON APPEAL FROM THE 12TH JUDICIAL DISTRICT COURT OF
MADISON COUNTY, TEXAS; CAUSE NO. 04-10356-012-10**

**BRIEF OF APPELLEE
JERRY RAY EDGIN**

TO THE HONORABLE COURT OF APPEALS

NOW COMES Appellee, Jerry Ray Edgin (“Edgin”), and submits this Brief in support of the trial court’s Amended Order which denied the Texas Department of Criminal Justice’s (“TDCJ”) Amended Plea to the Jurisdiction Asserting Sovereign Immunity, and the trial court’s two orders that overruled TDCJ’s objections to Edgin’s summary judgment exhibits.¹

¹ FNX The original Clerk’s Record will be cited as “CR” (with the volume number as a Roman numeral following CR and the page number following the volume number) and the Supplemental Clerk’s Record will be cited as “Supp. CR” (with the volume number as a Roman numeral following CR and the page number following the volume number). Appellee Jerry Ray Edgin will be referred to as “Edgin.” Appellant Texas Department of Criminal Justice will be referred to as “TDCJ”

STATEMENT OF FACTS

I. Jerry Ray Edgin (“Edgin”) was employed continuously with the Texas Department of Criminal Justice (“TDCJ”) from 1983 until June of 2003. (Supp. CR I, 19).

II. On **January 1, 2003**, Edgin as a supervisory employee of the Maintenance Department of the Ferguson Unit was issued a reprimand by the Central Region Maintenance Supervisor out of the Ellis Unit, Eddie Martin. (Supp. CR I, 19).

III. On **January 24, 2003**, in the office of Warden Alfred Janicek, Warden of the Ferguson Unit, Edgin witnessed an offensive utterance by Warden Alfred Janicek when he stated to another TDCJ employee named Renee Howe, “your smiling, I guess you think it’s funny; I’ll write you up for insubordination; I tell you if you can come through them gates or not to go to work, I have the biggest dick on the farm.” That same day, Edgin expressed his complaint concerning the offensive utterance both to Warden Janicek and to other TDCJ administrators. (Supp. CR I, 17-19).

IV. On **January 28, 2003**, Edgin appeared before Warden Janicek for his disciplinary hearing on the reprimand of January 1, 2003. Edgin argued that there was no policy in place for tool inventory to violate therefore the reprimand was baseless. Warden Janicek none the less found Edgin guilty as to the reprimand. Warden Janicek then gave instructions to institute such a policy and made Edgin responsible to develop the procedure. (Supp. CR I, 20).

V. On **February 10, 2003**, Edgin gave a witness statement to Renee Howe to use with her EEO Charge regarding the offensive utterance by Warden Janicek. (Supp. CR I, 27-29).

VI. On **February 12, 2003**, Lt. William Humphrey, an investigator for the in-house TDCJ office of EEO spoke with Edgin and offered that he had seen Edgin's name on the witness statement for Renee Howe. Mr. Humphrey further stated that he had been told by the prison administration not to look into Howe's claim any further. Humphrey told Edgin that he would be sorry he put his name to Mrs. Howe's witness statement; that it was the kind of thing that could end his career there. (Supp. CR I, 21).

VII. On **February 14, 2003**, Edgin was given a typed paper with a handwritten note from Warden Janicek and told that he needed to make the typed page into a sign and post it in the front area of the office. The sign was to read:

If you work for a man, in heavens name, work for him. Speak well of him and stand by the institution he represents. Remember an ounce of loyalty is worth a pound of cleverness. If you must growl, condemn and eternally find fault, why – resign your position, and when you are on the outside, damn to your heart's content. But as long as you are part of this institution, do not condemn it. If you do, the first high wind that comes along will blow you away, and probably you will never know why.

(Supp. CR I 38-40 [deposition page 33, lines 14-25, page 34, lines 1-10, and Exhibit 2]).

VIII. On **May 5, 2003**, after requesting a transfer to get out of the Ferguson unit and away from Warden Janicek and being turned down, suddenly Edgin was transferred. He went to HROM on the Ellis Unit in Huntsville in the capacity of a Craftsman. This was a reduction in job responsibilities and work status but there was much less tension there and he was under the authority of another Warden. Edgin had been in a supervisory position before and was now just basic personnel. (Supp. CR I, 34, 35).

IX. On **May 23, 2003**, over two weeks after he had transferred away from the Ferguson unit, Edgin was notified by telephone by Major Cook that he was to be charged with two new disciplinary cases from circumstances in his prior unit. In that conversation Major Cook went on to state more than once that he was sorry to do this to Edgin but that even though Warden Merchant had attempted to talk Warden Janicek out of issuing these disciplinary cases Warden Janicek had insisted. (Supp. CR I, 34, 35).

X. On **June 4, 2003**, Edgin was found guilty of the first of the two new disciplinary violations and put on three months probation and docked seven days pay. Also on **June 4, 2003**, Edgin was found guilty of the second of the two new disciplinary actions which imposed six months probation, reduction in pay, and a demotion in job position. The demotion was the result of the unusual practice of considering the two infractions as separate rather than the routine grouping as a single disciplinary of multiple infractions presented at the same time. This approach brought an immediate demotion for Edgin. (Supp. CR I, 21-22).

XI. Around **June 12, 2003**, Edgin received a phone call at his home from Warden Merchant asking if he had ever submitted an IOC about his brother Robert being incarcerated. Edgin met with Warden Merchant at this office and again explained that he had long ago submitted the IOCs as required and asked him why there was a problem. Warden Merchant told Edgin that Warden Janicek had gone through his personnel file and did not see the IOC's on file and told Warden Merchant to call him at home and get the letters. (Supp. CR I, 21-22).

XII. On **June 18, 2003**, as a result of the demotion after the disciplinary actions of June 4, 2006, Edgin was told to report to TDCJ Human Resources Headquarters in Huntsville to complete testing and evaluation for a basic Correctional Officer position. Although Edgin had been a Correctional Officer III for over 16 years of his career, he was required to take the test again for a demoted position. Edgin took the two part test which has a written section then an interview section. He passed the written section but on the subjectively scored interview section he scored 59 points where 60 points was required to pass. (CR I, 185-188)

XIII. On **June 24, 2003**, Edgin went to the office of Human Resources Specialist Shannon Wood to submit his grievances in opposition to the two disciplinary rulings and punishments in hopes of reversing his demotion. Ms. Wood stated that Edgin was about to be administratively separated from TDCJ

and Edgin abruptly left. [Administrative Separation is TDCJ terminology for employment termination.]

Edgin returned to Ms. Wood office on **June 24, 2003**, and asked again his administrative separation. Edgin inquired if he had any way to fight the request for administrative separation. Ms. Wood stated that he didn't have any way to fight it through the TDCJ process. She stated that when you go through administrative separation, you no longer have a job with TDCJ and all your options are gone. Edgin asked about the two grievances he had submitted on June 24, 2003. Edgin told her he thought that if he could get one of the charges over turned he could get his job back. Ms. Wood told him that because of administrative separation, his grievances would no longer be any good. Edgin asked about his medical insurance if he went through administrative separation. Ms. Wood explained that he would have to go on cobra insurance and that it would cost several hundred dollars more and would not be long term. She further explained that if he went through administrative separation his retirement benefits would change and he would not receive all the benefits of a retiree. Edgin asked her if he retired that day would he receive all his benefits as a retiree and she stated that if he retired that day prior to Warden Janicek signing the administrative separation, he would receive all the benefits. Edgin told her he was concerned about the insurance and needed good insurance for his kids. She stated that if he needed the insurance for his kids, he needed to retire that day because his insurance would stay the same. Ms. Wood told him that he would get

the same medical insurance he had then at the same cost and would receive all the benefits of a retiree.

Edgin asked her if she was sure there was nothing he could do to fight the administration separation. Ms. Wood told him there was nothing he could do because he would no longer be an employee with the state. She told him again that she suggested he retire immediately so he could receive all of the benefits of a state retiree. Edgin told her that because of the situation and her advice he would retire that day. She gave him the forms to fill out and he asked her if he filled them out then would they be able to stop his benefits before the paperwork went through. She made a phone call and then told him to do it then and it would be final without any problems. Edgin filled out the retirement request papers and left them with her. (Supp. CR I, 23-24).

SUMMARY OF THE ARGUMENT

Standard Of Review

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject-matter jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex.2004). Whether a court has subject-matter jurisdiction is a question of law. *Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004). Whether a party has alleged facts that affirmatively demonstrate a district court's subject-matter jurisdiction and whether undisputed evidence of jurisdictional facts establishes a district court's jurisdiction are questions of law reviewed *de novo*. *Miranda*, 133 S.W.3d at 226. However, in some cases, disputed evidence of jurisdictional facts that also implicates the merits of the case may require resolution by the finder of fact. *Id.* When a plea to the jurisdiction challenges the pleadings, the review is to determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Id.* The review is to construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Id.* If the pleadings do not contain sufficient facts to affirmatively demonstrate the district court's jurisdiction but likewise do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Id.* at 226-27.

If a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties for the district court to

resolve the jurisdictional issues raised. *Id.* In a case in which the jurisdictional challenge implicates the merits of the plaintiff's cause of action and the plea to the jurisdiction includes evidence, the district court reviews the relevant evidence to determine if a fact issue exists. *Id.* If the evidence creates a fact question regarding the jurisdictional issue, then the district court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact-finder. *Id.* at 227-28. When the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the district court may rule on the plea to the jurisdiction as a matter of law. *Id.* at 228.

A court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex.2000). This review does not look at the merits of the case. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex.2002). The Court is to construe the pleadings liberally in favor of conferring jurisdiction. *Texas Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex.2002).

EXPANDED STANDARD FOR RETALIATION CASES

The U.S. Supreme Court in *Burlington Northern v. White* in resolving the circuit split concerning the second prong of a prima facie case for retaliation under Title VII has broadened the protection of the employee in holding that Title VII's prohibition against retaliation is violated if an employer takes a materially adverse action that might dissuade a reasonable worker from making

or supporting a charge of discrimination, because the worker engaged in protected activity. *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405, 2415 (2006). The Court states that: 1) the retaliatory act must be “materially adverse,” significant as opposed to trivial; and 2) the retaliatory act must be such that it might have “dissuaded a reasonable worker from making or supporting a charge of discrimination” determined from an objective standpoint. The “materially adverse action” is not just confined to action affecting employment or the workplace, but it can be something broader. *Id.* *Burlington* makes it clear that materially adverse actions can constitute unlawful retaliation, even if the more extreme terms and conditions of adverse employment action are not in evidence. *Id.* at 2415-2416.

Prior to *Burlington*, the Fifth Circuit has recognized only action that was considered “ultimate” as unlawful adverse employment action as opposed to the lesser “likely to dissuade the reasonable person” standard now created by *Burlington*. *Hernandez v. Crawford Building Material Co.*, 321 F.3d 528, 531 (5th Cir. 2003).

ARGUMENT AND AUTHORITY

Issue One: Has Plaintiff Jerry Ray Edgin plead facts that show the trial court has subject matter jurisdiction by stating a claim of retaliation within Chapter 21 of the Texas Labor Code?

When a plea to the jurisdiction challenges the pleadings, review determines if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004). Review construes the pleadings liberally in favor of the plaintiff and looks to the pleader's intent. If the pleadings do not contain sufficient facts to affirmatively demonstrate the district court's jurisdiction but likewise do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Id.* at 226-27.

Construing Edgin's pleadings liberally and in his favor, and looking to his intent, as required by *Miranda*, it is clear that Edgin, identified as an employee of the Texas Department of Criminal Department of Criminal Justice, has alleged a claim under Chapter 21 of the Texas Labor Code. (CR I, 1-4). Edgin names his employer as Defendant and alleges in his Original Petition that "his retirement was forced solely and directly due to retaliatory measures for his following policy and submitting witness statements." (CR I, 2). A careful reading of the witness statement provided to Pricilla Daly on March 23, 2003 (CR II, 5) and the witness statement identified by Renee Howe as included in her EEO case (Supp. CR I, 28-

29) makes clear that they are identical and functioned as a single “witness statement” formally utilized in at least two instances.

Edgin included with his Petition a Notice of Suit Rights letter received from the EEOC as identified by the specific Charge No. 330-2003-03951. (CR I, 4). Edgin’s Petition does not affirmatively demonstrate any incurable defects in jurisdiction.

Issue Two: Is Edgin entitled to amend his pleadings?

If the pleadings did not contain sufficient facts to affirmatively demonstrate the district court's jurisdiction but likewise did not affirmatively demonstrate incurable defects in jurisdiction, the issue would be one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend.

Miranda, 133 S.W.3d at 226-227. Edgin has plead the facts necessary on the face of his Original Petition for subject matter jurisdiction in the district court.

Issue Three: Is there any evidence that a reasonable person could have believed that the alleged comment from Warden Janicek constituted sexual harassment?

If a plea to the jurisdiction challenges the existence of jurisdictional facts, a review must consider relevant evidence submitted by the parties for the district court to resolve the jurisdictional issues raised. Miranda, 133 S.W.3d at 226-227.

In a case in which the jurisdictional challenge implicates the merits of the plaintiff's cause of action and the plea to the jurisdiction includes evidence, the district court reviews the relevant evidence to determine if a fact issue exists. *Id.*

If the evidence creates a fact question regarding the jurisdictional issue, then the

district court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact-finder. *Id.* at 227-28. When the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the district court may rule on the plea to the jurisdiction as a matter of law. *Id.* at 228.

Edgin claims that on January 24, 2003, he overheard Warden Janicek in a disciplinary hearing tell one of Edgin's subordinates, Renee Howe, "Your smiling, I guess you think it's funny, I'll write you up for insubordination, I tell you if you can come through them gates or not to go to work, I have the biggest dick on the farm." (CR I, 221 [deposition page 91, lines 12-23, reference to Exhibit #2 at CR I, 96). For the purpose of the Amended Plea to the Jurisdiction, TDCJ accepts this statement by Warden Janicek as truthful. (CR II, 10). The Chapter 21 of the Texas Labor Code protects an employee from retaliation or discrimination by an employer because the employee "opposed a discriminatory practice." Tex.Lab.Code Ann. § 21.055(1) (Vernon 1996). Therefore, opposition to a discriminatory practice is a protected activity under Chapter 21 of the Texas Labor Code. Within the protection of Chapter 21, to establish that the employee opposed a discriminatory practice, the employee must demonstrate a good faith reasonable belief that the underlying discriminatory practice of the employer violated the law. *Cox & Smith, Inc. v. Cook*, 974 S.W.2d 217, 224; *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140-41 (5th Cir.1981). The employee is not required to show that there was actual existence of an

unlawful practice, only that she held a good faith reasonable belief that the employer engaged in activity made unlawful by Chapter 21. *Id.*

Edgin submitted a joint charge with the Texas Commission On Human Rights and the EEOC which he signed on August 26, 2003 in which he stated that “I believe I have been discriminated against because of my participation in a protected activity, in violation of Title VII of the Civil Rights Act of 1964, as amended.” The charge form further indicates by checkmark that the discrimination was based on Retaliation. (CR I, 93-94).

Edgin has on several occasions during his 20 years of employment with TDCJ, viewed as a mandatory requirement for every employee, a video narrated by the Director of TDCJ concerning Sexual Harassment in the workplace. He was last required to view the video in 2002. The video makes it clear that each employee is responsible not only to comply with the law but also to report any non-compliance. (Supp. CR I, 16-17). Edgin at the time he witnessed the offensive utterance by Warden Janicek was employed in a supervisory capacity and must be measured with commensurate sensibilities.

Edgin when asked in his deposition whether Warden Janicek’s statement about “the big dick or the big -- biggest dick, is a violation of the TDCJ Rule No. 14 against the “Use of Profane / Abusive Language answers “No, sir”. The follow-up asks what it would most appropriately fit under and Edgin responds, “Page 3, Rule No. 7, Substandard Duty Performance, Violation Level 4.” Edgin goes on to explain that section states “Employees must perform their duties in a manner

that meets or exceeds the minimum standards established for their position. He finishes by stating “What he – what he had said to Ms. Howe was – was not – was not of professional standards.” (CR I, 222-224 [Deposition page 106 line 1 to page 108 line 5]). Most importantly, Edgin at no time stated that he did not believe the alleged comment by Warden Janicek violated a rule against sexual harassment. TDCJ misstates this allegation in their brief on page 27 with no reference to the source of that statement because there is none.

TDCJ states in its Appellant Brief on page 22, “This case [as appealed] is controlled by the decision on the United States Supreme Court in *Clark County School District v. Breeden*, 532 U.S. 268 (2001). Although *Breeden* is not on point and TDCJ misapplies it to the present argument, Edgin will apply it correctly for useful contrast. *Breeden* is a Title VII case filed by a Plaintiff alleging direct sexual harassment. The unique facts of this case isolate it from the present argument by way of several issues. Firstly, the offensive utterance alleged by Plaintiff Breeden although dramatic in its tone, was not directed toward her. It was instead the indirect exposure of the utterance which was contained in clinical data that she was reviewing along with male colleagues, to which Breeden complained. The comment read aloud from the data stated, “I hear making love to you is like making love to the Grand Canyon.” *Id* at 271. The Court found that “The ordinary terms and conditions of respondent’s job required her to review the sexually explicit statement in the course of screening job applicants.” *Id* at 274.

In the present argument, the facts Edgin allege state that an offensive utterance was made intentionally and directly by Employer Warden Janicek to his employee Renee Howe in the course of what should have been a routine hearing. *Breeden*, in relying on *Faragher v. Boca Raton*, 524 U.S. 775 (1998) for a legal standard for sexual harassment does however provide important authority in the present argument. *Breeden* at 270. *Faragher*, in its analysis of vicarious liability by the employer or supervisor for sexual harassment in their work environment presents an excellent perspective for the “good faith reasonable belief” of a third party witness to hostile environment sexual harassment. *Faragher* warns that “[e]veryone knows by now that sexual harassment is a common problem in the American workplace. An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace...” *Faragher* at 796. *Faragher* does offer a baseline legal standard in stating that “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.” *Faragher* at 788.

For a detailed and current analysis, the 5th Circuit has provided significant guidance. In *Harvill v. Westward Communications, L.L.C.*, 433 F.3d 428 (5th Cir. 2005), the court begins with the *Meritor* standard that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

Harvill then looks further as to “whether the complained of conduct undermines the plaintiff’s workplace confidence.” *Harvill* at 434. To be actionable, the challenged conduct must be both objectively offensive, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so.” *Id.* The “severity” that TDCJ would so eagerly promote from the backdrop of the sexual statement in *Breeden* provides little or no context for the subjective factors in this or most cases. Renee Howe and her immediate circumstances are thereby of legal significance to this standard. The community of Huntsville and its surrounding population also creates a subjective factor in this matter that must somehow be considered in the measure of “severity.”

Edgin states that after Warden Janicek directed his offensive utterance to Renee Howe, she exited the office, appeared to be upset and immediately left the building. (Supp. CR I 17). Edgin followed Mrs. Howe outside to see how she was doing and found her in the parking lot appearing “pretty” upset. As her immediate supervisor, she asked Edgin if she could have the day off and he told her yes. (Supp. CR I 18).

Issue Four: Is there any evidence that Warden Janicek had knowledge that Edgin was assisting Howe with her EEO complaint?

TDCJ makes no explicit denial that Warden Janicek knew prior to the series of adverse employment actions that Edgin was assisting Howe with her EEO complaint. It is undisputed that the alleged offensive utterance by Warden

Janicek occurred on January 24, 2003. Immediately after the occurrence, Edgin met informally with several other administrative staff and discussed the Warden's behavior. Edgin made the public statement in that setting that what the Warden said to Mrs. Howe was wrong. During the discussion Edgin turned and realized that the Warden was standing next to the door of the office they were in. The Warden entered the office and Edgin exited and returned to the maintenance shop. (Supp. CR I, 18) Fifteen minutes later, the Warden called the maintenance shop and spoke to Edgin. He asked Edgin what was wrong with Mrs. Howe. Edgin told him that "she probably didn't appreciate the way you talked to her in your office." Warden Janicek stated "she shouldn't have smiled..." Edgin finished by tell the Warden that Mrs. Howe had taken the rest of the day off to which the Warden replied, "good" and hung up the phone. (Supp. CR I, 19).

On February 10, 2003, Edgin provided a witness statement to Renee Howe recounting the incident with Warden Janicek and supporting her complaint to the EEO in Huntsville. Within four days, two significant things occurred. On February 14, 2003, Edgin was given a typed paper with a handwritten note from Warden Janicek and told to make the typed page into a sign and post it in the front office area of Edgin's building. It is undisputed that Warden Janicek provided the wording that the sign was to read, (Supp. CR I, 20)

"If you work for a man, in heavens name, work for him. Speak well of him and stand by the institution he represents. Remember an ounce of loyalty is worth a pound of cleverness. If you must growl, condemn and eternally

find fault, why – resign your position, and when you are on the outside, damn to your heart’s content.

But as long as you are part of this institution, do not condemn it. If you do, the first high wind that comes along will blow you away, and probably you will never know why.” (Supp. CR I 38-40 [deposition page 33, lines 14-25, page 34, lines 1-10, and Exhibit 2]).

Soon after the sign incident, Edgin made a visit to the TDCJ internal EEO office in Huntsville. Edgin spoke with Lt. William Humphrey there, a man Edgin had worked for previously in another unit of TDCJ. In the course of their conversation, Mr. Humphrey offered that he had seen Edgin’s name on the witness statement for Renee Howe. When asked by Edgin if he was working on her complaint Humphrey stated that they were told by the prison administration not to look into it any further. Humphrey told Edgin that he would be sorry he put his name to Mrs. Howe’s witness statement; that it was the kind of thing that could end his career there. (Supp. CR I, 21). Edgin testified in his deposition that he understood that his subordinate in the maintenance department, Howe, had filed an EEO complaint with TDCJ. When asked if it was his understanding that it was investigated, Edgin answered, “[f]rom the conversation I had with Mr. Humphreys and – and either Evelyn or Marilyn, the lady, it was looked into.”

“Employment discrimination and retaliation cases often reveal no direct evidence of wrongdoing, culpability frequently must be inferred from circumstantial evidence.” *Lubbock County v. Strube*, 953 S.W.2d 847, 854 (Tex.App.-Austin 1997, pet. denied). The Fifth Circuit noted in *Thornbrough* in the context of an age discrimination claim, “Unless the employer is a latter-day

George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree. Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age,' or to inform a dismissed employee candidly that he is too old for the job." *Thornbrough v. Columbus & Greenville RR. Co.*, 760 F.2d 633, 638 (5th Cir.1985).

"Indeed, a series of acts by an employer can sufficiently raise inferences to overcome legal and factual sufficiency challenges." *Strube*, 953 S.W.2d at 854.

"The causal connection component of the prima facie case also can be established by showing the employer had knowledge of the employee's protected activity and the adverse personnel action took place shortly thereafter." *Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C.Cir.1985); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 43-44 (5th Cir.1992) (noting proximity in time between adverse employment action and protected activity is factor to consider in determining causation). "Because of the proximity in time, some evidence of a causal link exists." *Fields v.*

Teamsters Local Union 988, 23 S.W.3d 517, 529 (Tex.App.-Houston [1st Dist.] 2000, pet. denied) (proximity of time may be considered if not too distant);

Webb v. Cardiothoracic Surgery Assoc. of N. Tex., P.A., 139 F.3d 532, 540 (5th Cir.1998); (court should consider whether disparate treatment began shortly after protected activity occurred).

Issue Five: Is there any evidence that "but for" Edgin's written witness statements reporting the alleged comment by Warden Janicek, the three disciplinary actions taken against Edgin and Edgin's decision to retire would not have occurred.

The detailed chronology of events in this case sworn to by Edgin and supported by the sworn statements of others, provides the strongest evidence supporting Edgin's allegations of adverse employment action and the causal connection to the protected activity which finally resulted in his constructive discharge. The chronology begins with the one action that is free from any suspicion in this case. On **January 1, 2003**, the Central Region Maintenance Supervisor out of the Ellis Unit, Eddie Martin, evaluated the Ferguson Unit and issued a number of reprimands to avoid any criticism from the new Warden of Fergusson, Alfred Janicek. One of Martin's reprimands was against Edgin stating that there was no ongoing daily documentation of tool inventory in the maintenance shop. Edgin states that there was no policy requiring a daily inventory log although it was obviously a good idea. (Supp. CR I, 20). The otherwise routine hearing before Warden Janicek to address this reprimand was to set the stage for a downward spiral of a loyal employee's career of twenty years. (Supp. CR I, 19).

On **January 24, 2003**, Edgin had the misfortune to be waiting for this routine disciplinary hearing before a person he was first to witness and later act against as to an unlawful act. Edgin's self preservation could have lead him to retreat in this situation but his supervisory experience and his institutional training put him at odds with the number one authority figure in his immediate workplace. (Supp. CR I, 16,). After almost twenty years of ladder climbing with

the Texas Department of Criminal Justice, Edgin was well aware of the risk in supporting such serious action against a Warden. (Supp. CR I, 19). Edgin now claims that his decision to back a sexual harassment claim against Warden Janicek, in the end cost him his job.

On **January 24, 2003**, Edgin arrived at Warden Janicek's secretary's office at approximately 9:15 am for his scheduled hearing and sat in a chair next to Mrs. Stanley's desk waiting for my appointment with the Warden to address the reprimand. Warden's secretary Mrs. Mary Belcher Walker was present at her desk closest to Warden Janicek's door. Warden Janicek's door was closed. Robin Duke walked into the office and began to talk to him. Shannon Wood came out of Warden Janicek's office and closed the door behind her. It was apparent that an employee disciplinary hearing was being conducted concerning Mrs. Renee Howe, a woman who Edgin supervised in the Maintenance Department of the Ferguson Unit. Suddenly, Edgin could hear Warden Janicek become loud and state "your smiling, I guess you think it's funny; I'll write you up for insubordination; I tell you if you can come through them gates or not to go to work, I have the biggest dick on the farm." Edgin looked at Mrs. Duke and Mrs. Wood and stated "did you hear what he just said?" Mrs. Duke stated "did he say what I think he said?" Mrs. Wood stated "I cannot believe he just said that." Shannon Wood appeared to have a surprised look on her face. As he sat there, Edgin documented the incident with date and time on an envelope, which was in his hand. Mrs. Duke stated "don't write it on that, he will see it when you go in

there.” Edgin stated that he didn’t care, it’s not right for him to talk to Mrs. Howe in that manner. Mrs. Duke spoke up saying, “man, Warden Merchant and Major Cook just burned out of his office.” Edgin then asked Shannon Wood “what would happen if he opened the door and told Mrs. Howe that she didn’t have to tolerate being talked to like that?” Shannon Wood replied “he’ll probably write you a disciplinary case.” Mrs. Duke stated “you go out into the hall and get a drink and cool off.” Edgin departed the secretary’s office, got a drink of water and returned back to my seat. Mrs. Howe exited Warden Janicek’s office a few moments later. Mrs. Howe appeared to be upset and left the office headed outside. (Supp. CR I, 17).

Edgin was still sitting there when Warden Janicek came out of his office and asked him if he was going to be able to run his disciplinary hearing on Edgin. Edgin went into his office and told him that he did not understand the question. Warden Janicek asked if Edgin was guilty or not guilty. Edgin responded not guilty. Warden Janicek instructed the human resource representative to reschedule the hearing for technical support and threw the documentation on the floor. (Supp. CR I, 18). Edgin then walked out of the Warden’s office and headed for the parking lot to see how Mrs. Howe was doing. On the way to the parking lot at the gatehouse Edgin saw Warden Merchant who had dashed out of the office when Warden Janicek had made his statements to Mrs. Howe. Warden Merchant was standing by the gatehouse and Edgin asked him to talk to him for a minute Warden Merchant replied yes and Edgin I stated the way Warden

Janicek verbally abused Mrs. Howe was uncalled for and out of line and inappropriate. I couldn't believe the statement that Warden Janicek was yelling at Mrs. Howe. Warden Merchant looked down towards the ground and shook his head. Edgin stated that he can't talk to her like that, it's not right, even if she was in there for a disciplinary case, he still can't talk to her like that and you know it. Warden Merchant stated yea, that was wrong. Edgin departed to check to see how Mrs. Howe was doing. When Edgin found Mrs. Howe she was still in the parking lot and she said she was pretty upset. She asked Edgin as her supervisor if she could have the rest of the day off and he told her yes. She got in her truck and left for the day. (Supp. CR I, 18)

Edgin then went back into the building and in to Shannon Wood's office where Robin Duke the Commissary Manager was talking to Shannon Wood. Mary Belcher-Walker, Warden Janicek's secretary came in to the office and they all were discussing the remark made by the Warden to Mrs. Howe. Edgin said that it was wrong what the Warden had said and he is not permitted to talk to Mrs. Howe with those words. Everyone but Mary Belcher-Walker agreed and she stated that she did not hear the specific word "dick". During this discussion Edgin turned and realized that Warden was standing next to the door of the office. When Edgin looked at him he asked what the group was talking about and everyone was suddenly silent. Warden Janicek walked in and Edgin walked out and returned to the maintenance shop. (Supp. CR I, 18)

Fifteen minutes later, Warden Janicek called the maintenance shop and Edgin answered and Warden immediately asked him “where is Matchett”. Edgin told him Mr. Matchett went to the doctor yesterday and is not at work today.” He then said “I want to let you know there has been a Warden change, that Warden Merchant was over the Ferguson maintenance unit now. Then he asked what is wrong with Mrs. Howe?”

Edgin told him he didn’t want to get into all of that. Warden Janicek repeated his question about Mrs. Howe. Edgin then replied “she probably didn’t appreciate the way you talked to her in your office.” Warden Janicek responded “she shouldn’t have smiled, per PD 22 insubordination through words or actions.” He then asked “where is Mrs. Howe now?” Edgin told him that Mrs. Howe had taken the rest of the day off. Warden Janicek said “good” and hung up the phone. (Supp. CR I, 19).

Edgin first experienced adverse employment action when he returned to the Warden several days after the incident between the Warden and Mrs. Howe to complete his own hearing. He was to have what he thought would be a routine disciplinary hearing by a fairly new to the Unit Warden who wanted to make clear his authority. The head of Maintenance had issued a number of reprimands for what would typically be considered minor issues and Warden Janicek was hearing the cases. Edgin had been charged with substandard duty performance for failing to maintain a daily recorded inventory of the tool room. He fully expected to explain to Warden Janicek that there was no policy requiring that

particular process and the issue would be resolved. Instead he was found guilty in his hearing on January 28, 2003 and received a verbal reprimand. It was not long after that Edgin was absolved informally on this issue but by then things were steadily worsening for Edgin.

On **January 28, 2003**, Edgin returned to Warden Janicek for his rescheduled disciplinary hearing on the initial reprimand. Edgin argued that there was no policy in place for tool inventory to violate therefore the reprimand was baseless. Warden Janicek none the less found Edgin guilty as to the reprimand. To add insult to injury, Warden Janicek then instructed Eddie Martin to institute such a policy and make Edgin responsible to develop the procedure. (Supp. CR I, 20).

On **February 10, 2003**, Edgin gave a witness statement to Renee Howe to use with her EEO Charge. (Supp. CR I, 27-29).

On **February 12, 2003**, Edgin made a visit to the TDCJ internal EEO office in Huntsville. This is an EEO office staffed and maintained by the TDCJ. Edgin spoke with Lt. William Humphrey there, a man Edgin had worked for previously in another unit of TDCJ. In the course of their conversation, Mr. Humphrey offered that he had seen Edgin's name on the witness statement for Renee Howe. When asked by Edgin if he was working on her complaint Humphrey stated that they were told by the prison administration not to look into it any further. Humphrey told Edgin that he would be sorry he put his name

to Mrs. Howe's witness statement; that it was the kind of thing that could end his career there. (Supp. CR I, 21).

On **February 14, 2003**, Edgin was given a typed paper with a handwritten note from Warden Janicek and told that he needed to make the typed page into a sign and post it over the officer's clothing door in the front office area of the main office building. The statement read:

"If you work for a man, in heavens name, work for him. Speak well of him and stand by the institution he represents. Remember an ounce of loyalty is worth a pound of cleverness. If you must growl, condemn and eternally find fault, why – resign your position, and when you are on the outside, damn to your heart's content.

But as long as you are part of this institution, do not condemn it. If you do, the first high wind that comes along will blow you away, and probably you will never know why." (Supp. CR I 38-40 [deposition page 33, lines 14-25, page 34, lines 1-10, and Exhibit 2]).

On **May 5, 2003**, after requesting a transfer to get out of the Ferguson unit and away from Warden Janicek and being turned down, suddenly Edgin was transferred. He went to HROM on the Ellis Unit in Huntsville in the capacity of a Craftsman. This was a reduction in job responsibilities and work status but there was much less tension there and he was under the authority of another Warden. Edgin had been in a supervisory position before and was now just basic personnel.

Then, on **May 23, 2003**, over two weeks after he had transferred away from the Ferguson unit, Edgin was notified by telephone by Major Cook that he was to be charged with two new disciplinary cases. In that conversation Major Cook went on to state more than once that he was sorry to do this to Edgin but

that even though Warden Merchant had attempted to talk Warden Janicek out of issuing these disciplinary cases Warden Janicek had insisted. Edgin didn't understand this because he had been off the Ferguson Unit for over two weeks and wasn't even supervised by the Ferguson administration any longer. One of these two new disciplinary charges was based upon a lack of ongoing daily inventories which Edgin had set up in a green three ring notebook. Edgin was informed that the inventory notebook was not there and that he was to blame weeks after he had left the Unit. The second disciplinary was about maintaining the air-conditioner and heater in the maintenance department and although William Machette the head maintenance supervisor was also disciplined for this same item, Edgin was included without having been there since early May and was fined seven days pay as well. (Supp. CR I, 21). Arthur E. Coburn was an Assistant Regional Maintenance Supervisor who had been sent by the Regional Maintenance Supervisor to oversee the operation at Ferguson for a while. Arthur was on the Ferguson Unit from January 15, 2003 to April 16, 2003. Arthur supports Edgin's contention that the inventory system was in operation and states that he had witnessed it being there. (Supp. CR I, 34, 35).

On **June 4, 2003**, Edgin was found guilty of the first of the two new disciplinary violations and put on three months probation and docked seven days pay. Also on **June 4, 2003**, Edgin was found guilty of the second of the two new disciplinary action which imposed six months probation, reduction in pay, and a demotion in job position. The demotion was the result of considering the

two infractions as separate rather than the routine grouping as a single disciplinary of multiple infractions presented at the same time. This approach brought an immediate demotion for Edgin.

Around **June 12, 2003**, Edgin received a phone call at his home from Warden Merchant asking if he had ever submitted an IOC about his brother Robert being incarcerated. Edgin told him that he had submitted an IOC about him on several occasions in the past. Edgin told him that he would come to his office and straighten it out. Edgin met with Warden Merchant at this office and again explained that he had submitted the IOCs as required and asked him why there was a problem. Warden Merchant told Edgin that Warden Janicek had gone through his personnel file and did not see the IOC's on file and told Warden Merchant to call him at home and get the letters. (Supp. CR I, 21-22).

On **June 18, 2003**, as a result of the demotion in the third disciplinary action, Edgin was told to report to TDCJ Human Resources Headquarters in Huntsville to complete testing and evaluation for a Correctional Officer position. Although Edgin had been a Correctional Officer III for over 16 years of his career, he was required to take the test again. Edgin took the two part test which has a written section then an interview section. He passed the written section but on the subjectively scored interview section he scored 59 points where 60 points was required to pass. (CR I, 185-188) Joe Waddell stated in his affidavit signed on December 19, 2005 and belatedly added to the court's file, that the official who conducted the interview informed him that Edgin had cursed at "him" and in

general had a less than acceptable attitude. (CR II, 49-50). The fact is, the two people who tested Edgin for the written and interview parts of the test were both female and Mr. Waddell refers to the interviewer as “him”. Secondly, Edgin states he in no way used other than courteous language in speaking with her. Mr. Waddell has bad information and apparently did not even see fit to name the person (him or her) who accused Edgin. (Supp. CR I, 22).

The final bizarre chapter in the failed test story comes from Carol Blair Johnston. Ms. Johnston states in her affidavit signed October 31, 2005 that as Director of the Human Resources Division of TDCJ, “I used my discretion to reevaluate the rating score and interview information [from Edgin’s original test].” Based on my review and in light of Mr. Edgin’s circumstances at the time, his evaluation information was rescored and the result was that he had a passing overall evaluation score.” She states that her office “authorized the Ferguson Unit to offer Mr. Edgin the Correctional Officer III position; However, I do not recall when the offer was made.” The affidavit goes on to memorialize a variety of dates well after the fact that involve Edgin’s request for retirement. Ms. Johnston has the unique distinction of being the only management level person in this case who under oath states in her last page that “I had no knowledge that Mr. Edgin had written any statements that were critical of Warden Janicek or that he had submitted any kind of witness statements.” (CR I, 185-188).

On **June 24, 2003**, Edgin went to the office of Shannon Wood to submit his grievances in opposition to the two disciplinary rulings and punishments. In

the office were Warden Staples, Shannon Wood and Mrs. Thomas from the ACA office. Edgin was talking to Warden Staples when Kim the Human Resources Clerk came into the office and handed Shannon Wood a fax. Edgin looked over at her and Shannon looked shocked and her face was white. She began discussing the fax with Kim and they mentioned Edgin's name so he knew it had something to do with him. Shannon Wood made a phone call inquiring more about the fax and when she hung up the phone Edgin asked her if he could see the fax because it was obviously about him. She told Edgin to "hold on for a minute" and got up from her desk and approached Warden Staples motioning for him to walk out the door into the hallway with her. They left the office and walked out into the hallway and Edgin could hear them discussing the fax and Shannon Wood read from it stating that it was a request for administrative separation. They continued down the hall to Warden Staple's office. Mrs. Thomas asked Edgin if he knew what is all that about and he told her they are not going to except his application for security so he can't go through the academy and they are going to fire him. In a little while Shannon and Warden Staples came back to the office and Edgin asked them what was going on? Shannon stated outright that Edgin was going to be administratively separated from TDCJ. Edgin didn't know what to say and left pretty much in shock.

The next afternoon on **June 24, 2003**, Edgin called and came from Ellis to meet with Shannon Wood in her office at about 2:30pm. Edgin went into her office and asked again about the fax from the day before concerning the request

for his administrative separation. Edgin inquired if he had any way to fight the request for administrative separation. Shannon stated that he didn't have any way to fight it through the TDCJ process. She stated that when you go through administrative separation, you no longer have a job with TDCJ and all your options are gone. Edgin asked about the two grievances he had submitted on June 24, 2003. Edgin told her he thought that if he could get one of the charges over turned he could get his job back. Ms. Wood told him that because of administrative separation, his grievances would no longer be any good. Edgin asked about his medical insurance if he went through administrative separation. Shannon explained that he would have to go on cobra insurance and that it would cost several hundred dollars more and would not be long term. She further explained that if he went through administrative separation his retirement benefits would change and he would not receive all the benefits of a retiree. Edgin asked her if he retired today would he receive all his benefits as a retiree and she stated that if he retired today prior to Warden Janicek signing the administrative separation, he would receive all the benefits. Edgin told her he was concerned about the insurance and needed good insurance for his kids. She stated that if he needed the insurance for his kids, he needed to retire that day because his insurance would stay the same. Ms. Wood told him that he would get the same medical insurance he had then at the same cost and would receive all the benefits of a retiree. Edgin asked her if she was sure there was nothing he could do to fight the administration separation. Ms. Wood told him there was

nothing he could do because he would no longer be an employee with the state. Edgin asked her again about the benefits and if he retired now because of the administration separation would it be better for his kids. She told him she suggested that he retire now so he could receive all of the benefits of a state retiree. Edgin told her that because of the situation and her advice he would retire that day. She gave him the forms to fill out and he asked her if he filled them out then would they be able to stop his benefits before the paperwork went through. She made a phone call and then told him to do then and it would be final without any problems. Edgin filled out the papers and left them with her. Edgin left her office and went home completely in shock wondering what he would do next to pay his bills and take care of his kids. For just about the whole next week he sat at home, not doing much, just trying to understand what had happened. Edgin always thought he would work the rest of his life with TDCJ and retire with a 30 year pension like some of older guys had bragged about when he was just starting there as a young man. (Supp. CR I, 23-24).

On **July 1, 2003**, Edgin received a phone call at home from Shannon Wood telling him that Jimmy Alford had told her to call him and tell him to report to the Training Academy to return as a Correctional Officer COIII. Edgin thought it was a joke. He called her later and talked more about it but told her that because he had processed his retirement and it was final, he would leave it that way. Edgin did not trust that the people who had acted against him before would not do the same again and the next time he would be put out with even

less. It was a difficult decision after such a long career. He thanked her and said no. (Supp. CR I, 22)

Issue Six: Is there any evidence that Edgin was constructively discharged?

“When an employee submits a letter of resignation, he may still satisfy the adverse employment action element by proving that he was constructively discharged. A constructive discharge occurs when an employer makes conditions so intolerable that an employee reasonably feels compelled to resign.” Factors that may be considered singly or in combination in making its determination include: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work (5) badgering, harassment, or humiliation by the employer calculated to encourage the employee’s resignation. *Craig Winters v. Chubb & Son, Inc.* 132 S.W.3d 568, 575 (Tex.App. - - Houston [14th Dist.]

By late June of 2003, Edgin had been demoted, transferred and retested. His suspicious failed test performance had narrowed his options to near nothing. He was working on grievances that could present all the evidence and overturn his reprimands so as to regain his position in the maintenance department as it was before his demotion. On June 24, 2003 as part of his final push, he had gone to the office of Shannon Wood to submit his grievances. It was there at the doorstep of Warden Janicek’s office that Edgin came across a form called Administrative Separation which is the TDCJ equivalent of employment

termination. After a discussion with the Human Resources Specialist Shannon Wood and her counsel that Edgin would need to retire immediately to protect his benefits, Edgin submitted his resignation and applied for early retirement.

(Supp. CR I, 22-24)

A constructive discharge occurs when an employer makes conditions so intolerable that an employee reasonably feels compelled to resign. *Wal-Mart Stores, Inc. v. Bertrand*, 37 S.W.3d 1, 8 (Tex.App.-Tyler 2000, pet. denied). To find a constructive discharge, the fact finder must determine whether or not a reasonable person in the employee's position would have felt compelled to resign. *Green v. Industrial Specialty Contractors, Inc.*, 1 S.W.3d 126, 134 (Tex.App.-Houston [1st Dist.] 1999, no pet.). It is necessary to examine the conditions imposed, not the employer's state of mind. *Hammond v. Katy ISD*, 821 S.W.2d 174, 177 (Tex.App.-Houston [14 Dist.] 1991, no writ). Therefore, an employee does not need to prove that an employer subjectively intended to force the employee to resign. *Id.*

Issue Seven: Did the trial court err in overruling Defendant's objections to Renee Howe's affidavit filed by Plaintiff as summary judgment evidence?

TDCJ relies on two cases in support of this issue neither of which apply to the affidavit of key witness Renee Howe. The first is *McIntyre v. Ramirez*, 109 S.W.3d 741, 749-50 (Tex.2003). In *Ramirez*, a witness Dr. Edelberg purported to have personal knowledge of the facts recited in his affidavit, but his statement

regarding Dr. McIntyre's entitlement to bill is a legal conclusion with no supporting facts or rationale. “A conclusory statement of an expert witness is insufficient to create a question of fact to defeat summary judgment. The relevant standard for an expert's affidavit opposing a motion for summary judgment is whether it presents some probative evidence of the facts at issue.” *Id* at 750. TDCJ’s second flawed authority for this argument is *Brownlee v. Brownlee*, 665 S.W.2d 111 (Tex.1984). *Brownlee* states that “[a]ffidavits consisting only of conclusions are insufficient to raise an issue of fact. By stating that his contractual obligation had been modified, Michael asserted nothing more than a legal conclusion. His affidavit did not set forth such facts as would be admissible in evidence, as required by Rule 166-A(e), TEX.R.CIV.P.” *Id* at 112.

The Affidavit of Renee Howe sets out in proper form certain facts that are within her personal knowledge. (Supp. CR I, 27-29). Howe states that “I received this signed, printed statement from Mr. Edgin on February 10, 2003 as a witness statement supporting my complaint of an unlawful employment practice against Warden Janicek.” (Supp. CR I, 27).

The Texas Supreme Court has set out its standard of review in *Owens Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex.1998). “Evidentiary rulings are ‘committed to the trial court's sound discretion.’ *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex.1995). A trial court abuses its discretion when it rules ‘without regard for any guiding rules or principles.’ *Alvarado*, 897 S.W.2d at 754. Trial courts may exclude relevant evidence if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Tex.R. Evid. 403; *State v. Malone Serv. Co.*, 829 S.W.2d 763, 767 (Tex.1992). An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *State Bar of Texas v. Evans*, 774 S.W.2d 656, 658 n. 5 (Tex.1989). Moreover, we will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. Tex.R.App. P. 44.1; *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex.1989).” *Malone*, 972 S.W.2d at 42.

PRAYER

For all of these reasons, Appellee, Jerry Ray Edgin, prays that the rulings of the trial court be affirmed and that he be awarded any further relief at Law and Equity he is entitled to; and that he be awarded his costs of appeal.

RESPECTFULLY SUBMITTED,

Thomas N. Thurlow
Texas Bar No. 20003000
Law Offices of Thomas N.
Thurlow & Assoc., P.C.
440 Louisiana, Suite 1200
Houston, Texas 77002
Telephone (713) 224-6774
Facsimile (713) 237-1408

Attorney for Appellee
Jerry Ray Edgin

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of this Brief on all counsel of record, the names of whom are listed below, (via First Class U.S. Mail, Certified, Return Receipt Requested) on September 7, 2006.

Thomas N. Thurlow

Anthony G. Brocato, Jr.
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
512-463-2080
512-495-9139 Fax
Attorney for Defendant-Appellant