ACCESSIBLE LAW

ISSUE 14 FALL 2023 CIVIL RIGHTS

ARTICLES

THE STATE OF TEXAS, THE STATE OF ABORTION

*Loren Jacobson**

In June 2022, the Supreme Court overturned *Roe v. Wade*,[1] the case that recognized a constitutional right to abortion.[2] This made it possible for states to constitutionally impose limits on abortion, including by banning the procedure. In Texas, there is now a patchwork of laws that prohibit abortion with some exceptions. This article explains the current state of abortion laws in Texas and how they affect the ability to get an abortion in Texas, as well as outside of the state. Specifically, it will examine whether and to what extent an abortion can be provided in Texas, whether a person can self-manage an abortion in Texas without being concerned about legal repercussions, whether a person can travel outside of Texas to obtain an abortion in a state where it is legal, and whether a person in Texas can help another person obtain an abortion in a place where it is legal.

Is providing an abortion illegal in Texas?

It is illegal to *perform* an abortion in Texas, with a few limited exceptions. H.B. 1280, which went into effect on August 25, 2022, prohibits a person from "knowingly perform[ing], induc[ing], or attempt[ing] an abortion."[3] The provision makes the performing of an abortion a crime punishable as either a second or first degree felony (for example, as manslaughter or even murder, if the unborn child dies[4]).[5] It also allows the imposition of a $100,000 civil fine per abortion.[6] The statute defines abortion to mean using any means to cause the death of an "unborn child" and defines "unborn child" to mean "a living homo sapiens from fertilization to birth."[7] This means that no health care provider or any other person can give another person an abortion without facing severe criminal consequences and fines.

---

* Associate Professor of Law at UNT Dallas College of Law

[1] 410 U.S. 113 (1973).

[2] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[3] Human Life Protection Act of 2021, 87th Leg., R.S., ch. 800 (H.B. 1280), § 170A.002(b)(3), 2021 Tex. Sess. Law Serv. (codified at Tex. Health & Safety Code § 170A.002(a)).

[4] *See, e.g.,* Tex. Penal Code §§ 19.02 (murder) & 19.04 (manslaughter) (2003).

[5] Tex. Health & Safety Code §§ 170A.004 & 170A.005. Texas law authorizes up to 99 years in prison for first degree felonies. Tex. Penal Code § 12.32.

[6] Tex. Health & Safety Code § 170A.005.

[7] *Id.* at § 170A.001.

The only exceptions to this general rule are where a licensed physician determines that the person on whom the abortion is performed has a "life threatening physical condition aggravated by, caused by, or arising from the pregnancy" that places the pregnant person "at risk of death or poses a serious risk of substantial impairment of a major bodily function."[8] And even in those cases, the physician must do everything possible to save the life of the fetus unless it will put the pregnant person at greater risk of death or seriously risk the substantial impairment of the pregnant person's major bodily functions.[9] Texas law also does not consider removing an ectopic pregnancy or a "dead, unborn child whose death was caused by spontaneous abortion" an abortion,[10] thus a physician *can* provide an abortion in these circumstances without fear of criminal prosecution or fines. However, there are no exceptions that would allow providing an abortion in the cases of rape or incest, and the law specifically prohibits an abortion where the risk of injury or death comes from the pregnant person herself—for example, where the pregnant person is threatening suicide.[11]

In addition to H.B. 1280, which allows the State of Texas to criminally prosecute and fine health care providers that provide abortions, another law known as S.B. 8 also allows private individuals to sue physicians who "knowingly perform or induce an abortion on a pregnant woman" if the physician detects a fetal heartbeat, which includes fetal cardiac activity.[12] The statute requires a physician to perform a test to detect fetal cardiac activity, so the physician cannot claim ignorance.[13] The law has an exception that does not allow the

---

[8] *Id.* at § 170A.002(b). A recent lawsuit challenged this provision as being vague and violating the Texas Constitution. After a trial, the trial court entered a temporary injunction, requiring Texas to allow physicians to also provide abortions when the pregnant person has "a physical emergent medical condition" meaning "a physical medical condition or complication of pregnancy that poses a risk of infection, or otherwise makes continuing a pregnancy unsafe for the pregnant person; a physical medical condition that is exacerbated by pregnancy, cannot be effectively treated during pregnancy, or requires recurrent invasive intervention; and/or a fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth." Temporary Injunction Order, Zurawski v. Texas, Cause No. D-1-23-00968 (353rd Dist. Ct., Travis County, Tex. Aug. 4, 2023). However, the State of Texas has appealed the ruling, and pursuant to Texas law, pending appeal the injunction is currently suspended.

[9] *Id.*

[10] Tex. Health & Safety Code § 245.002(1) (2017). The statute defines an "ectopic pregnancy" to mean "the implantation of a fertilized egg or embryo outside of the uterus." *Id.* at § 245.002 (4-a).

[11] *Id.* at § 170A.002(c).

[12] Tex. Health & Safety Code § 171.204 (2021). Fetal cardiac activity usually becomes detectable at about six weeks.

[13] *Id.* at § 171.203.

physician to be sued if the physician believes and can document that she provided the abortion because a "medical emergency" necessitated the abortion,[14] but there are no exceptions for rape, sexual assault, incest, fetal abnormalities, or anything else. The law allows any person to bring a lawsuit, and if the lawsuit is successful, it can lead to the imposition of fines on the physician of not less than $10,000 per abortion, and the physician has to pay the attorneys' fees of the person who brought the lawsuit.[15] Notably, the person bringing suit does not have to have any relationship to the physician or the person on whom the abortion is performed; any member of the public can bring suit.[16] However, a person who impregnated the pregnant patient through an act of rape, sexual assault, incest or any other act prohibited by the Texas Penal Code may not bring suit pursuant to S.B. 8.[17]

It does not appear that many lawsuits have been brought pursuant to S.B. 8, likely because performing abortions has since been criminalized in Texas and so physicians are not providing them. One lawsuit that was brought prior to enactment of H.B. 1280 was dismissed by the court because it found that a person who does not have any connection to the abortion does not have standing bring such a suit.[18] Another Texas trial court has held S.B. 8 unconstitutional under both the Texas and U.S. Constitutions because it violates the standing principle, but also because it unconstitutionally delegates state law enforcement authority to private individuals, and violates the due process principles of the Fourteenth Amendment.[19] More recently, a third trial court has also found S.B. 8 to be unconstitutional because of the Texas Constitution's standing requirement, but as of the time of publication of this article, that finding has been suspended

---

[14] *Id.* at § 171.205.
[15] *Id.* at § 171.208(b)(2) & (3).
[16] *Id.* at § 171.208(a) (providing "any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action").
[17] *Id.* at § 171.208(j).
[18] Gomez. v. Braid, No. 2022CI8302 (224th Dist. Ct. Bexar Cty., Tex. Dec. 8, 2022); *see also* Eleanor Klibanoff, *Texas state court throws out lawsuit against doctor who violated abortion law*, THE TEXAS TRIBUNE, Dec. 8, 2022, https://www.texastribune.org/2022/12/08/texas-abortion-provider-lawsuit/. The Texas Supreme Court has read the Texas Constitution to require a person to have "standing," meaning the person has to be able to show injury or harm to herself, in order to bring a lawsuit. *See* Tex. Ass'n of Business v. Tex. Air Control Bd., 852 S.W. 440, 444-46 (Tex. 1993).
[19] Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179, at 2 (98th Dist. Ct., Travis County, Tex. Dec. 9, 2021). The relief the court provided was to grant a declaratory judgment that applied only to the particular parties in the case, and the case is currently on appeal. Tex. Right to Life v. Van Stean, No. 03-21-00650-CV, 2023 WL 3687408 (Tex. App.—Austin May 26, 2023, pet. filed).

pending appeal.[20] Thus, it currently appears that a person with some connection to the abortion could bring a civil suit against a physician for providing an abortion, but at this point, S.B. 8 will rarely, if ever, be used to sue a physician who provides an abortion, since physicians are not generally providing abortions given Texas's criminal prohibition.

Are there legal repercussions for a person obtaining or self-managing a medication abortion in Texas?

For the time being, it seems unlikely that a person who self-manages an abortion in Texas would have exposure to legal repercussions. First, the drugs that are taken to induce a medication abortion, mifepristone and misoprostol, have long been approved by the FDA and thus can be sold legally in the United States. There is a lawsuit that is currently pending that challenges the FDA's approval of one of the medications, mifepristone, but the Supreme Court has allowed the drug to remain on the market pursuant to the FDA's regulations until the Supreme Court has decided the case.[21] Both drugs can only be obtained with a prescription.[22] Because of H.B. 1280, Texas physicians cannot prescribe the drugs.[23] However, they may be available through telemedicine or other providers online.[24]

If a person in Texas self-manages an abortion by use of these medications, that person cannot be criminally prosecuted.[25] H.B. 1280 makes clear that the imposition of civil or criminal penalties cannot

---

[20] *See* Temporary Injunction Order, Zurawski v. Texas, Cause No. D-1-23-00968 (353rd Dist. Ct., Travis County, Tex. Aug. 4, 2023), and *supra* note 8.
[21] Danco Labs v. Alliance for Hippocratic Medicine, 143 S. Ct. 1075 (2023).
[22] FDA, Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation (last updated Mar. 23, 2023).
[23] *See* Tex. Health & Safety Code § 170A.002 (a); *see also* Fund Tex. Choice v. Paxton, No. 1:22-CV-859-RP, 2023 WL 2558143, at *2 (W.D. Tex. Feb. 24, 2023) (quoting Tex. Health & Safety Code § 245.002(1)) ("H.B. 1280 incorporates the definition of abortion from the Texas Abortion Facility Reporting and Licensing Act, which defines abortion as 'the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant.'").
[24] Note that the FDA does not recommend that the drugs be purchased online. *See* FDA, Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation (last updated Mar. 23, 2023).
[25] Tex. Health & Safety Code § 170A.003.

be imposed on a pregnant person "on whom an abortion is performed, induced, or attempted."[26] This language seems to leave open the possibility that a pregnant person who induces or attempts her own abortion may be subject to the statute and its punishments. However, there is a specific provision of Texas's criminal code that prohibits the prosecution of a person who self-induces abortion. That provision states that the death of an unborn child that occurs due to "conduct committed by the mother of the unborn child" is not considered homicide.[27] This provision thus explicitly excepts a person who induces her own abortion from being prosecuted under Texas's felony homicide statutes, which is the punishment imposed by H.B. 1280.[28]

In addition, it is highly unlikely that S.B. 8 could be used against a person who self-manages an abortion. First, S.B. 8 only allows suits against "physicians" who knowingly perform or induce an abortion after a fetal heartbeat has been detected and those who engage in conduct that "aids or abets" the performance or inducement of an abortion.[29] A pregnant person who induces an abortion herself is not a physician and also is not "aiding or abetting" the inducement of an abortion; she is inducing the abortion herself. Moreover, S.B. 8 specifically provides that a person cannot be sued pursuant to S.B. 8 if she is the one receiving the abortion.[30]

Texas did have one other set of statutes that criminalized abortion, including by the pregnant person. These statutes existed prior to *Roe v. Wade*. One of those statutes, Article 1191, authorized two to ten years in prison for anyone who knowingly procured an abortion, meaning that the pregnant person who got the abortion could be prosecuted under the statute.[31] However, after *Roe v. Wade*, the Texas Legislature removed this provision (and another that I will discuss below) from the Penal Code.[32] The law has been absent from Texas's criminal and civil statutes since 1974.[33] Based on this, in 2004 the federal appeals court that oversees federal cases from Texas held that this provision and the others that existed prior to *Roe* had "at least been repealed by implication."[34] A recent federal trial court has

[26] *Id.*
[27] Tex. Penal Code §19.06(1).
[28] Tex. Health & Safety Code §§ 170A.004 & 170A.005.
[29] *Id.* at §§ 171.204(a) & 171.208(a)(2).
[30] *Id.* at § 171.206(b)(1).
[31] Tex. Rev. Civ. Stat. Ann. art. 4512.1 (formerly Tex. Penal Code art. 1191 (1925)).
[32] *See* Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 889 (S.B. 34) (eff. Jan. 1, 1974).
[33] *See* 1973 Tex. Gen. Laws 995 (codified at Tex. Rev. Civ. Stat. art. 4512.1-4512.4, 4512.6 (1974)).
[34] McCorvey v. Hill, 385 F.3d 846, 849 (5th Cir. 2004).

affirmed this ruling, also finding that the criminal abortion provisions that existed prior to *Roe v. Wade*, including Article 1191, have been repealed and thus are no longer good law.[35] Thus, it is highly unlikely that a person who self-manages her own abortion would be prosecuted under this now repealed provision.

Can a pregnant person leave the state to get an abortion in a state where abortion is legal?

Yes, a person can leave the state to have an abortion in another state where abortion is legal. First, under both H.B. 1280 and S.B. 8, a woman seeking abortion cannot be prosecuted or sued. Moreover, a court recently held that H.B. 1280 is "unambiguous—it does not penalize out-of-state abortions."[36]

Nevertheless, very recently, some counties and cities in Texas have been making it illegal to use county roads to travel to get an abortion.[37] The largest of these is Lubbock County. The ban there does not apply to cities within the county, including the city of Lubbock, and only outlaws the transportation of people for abortions in the unincorporated parts of the county. It is only enforceable by private lawsuit, meaning a private individual would have to know that someone was transporting an individual on a road in the unincorporated part of the county to get an abortion out of state—something that is highly unlikely.[38] The Lubbock provision, like the others, also does not allow the person seeking an abortion to be sued.[39] Thus, a person who is pregnant who herself is traveling out of the state to get an abortion cannot be sued.

Again, these provisions allow only private individuals to bring civil lawsuits to sue people who transport others over county roads to get an abortion. This is because the state cannot prohibit an individual from travelling out of state.[40] The Supreme Court has recognized that there is a constitutional right to travel, meaning it is difficult for states

---

[35] Fund Tex. Choice v. Paxton, No. 1:22-CV-859-RP, 2023 WL 2558143, at *25 (W.D. Tex. Feb. 24, 2023).
[36] *Id.* at *15.
[37] Jayme Lozano Carver, *Lubbock County becomes latest to approve "abortion travel ban" while Amarillo City Council balks*, THE TEXAS TRIBUNE (Oct. 24, 2023), https://www.texastribune.org/2023/10/23/abortion-travel-ban-lubbock-county/.
[38] Marin Wolf, *Lubbock becomes largest Texas county to outlaw abortion-related travel*, DALLAS MORNING NEWS (Oct. 23, 2023), https://www.dallasnews.com/news/public-health/2023/10/23/lubbock-becomes-largest-texas-county-to-outlaw-abortion-related-travel/.
[39] *See* Carver, *supra* note 37.
[40] Saenz v. Roe, 526 U.S. 489, 500 (1999).

to impose restrictions on this right.[41] Due to this right, one of the justices who overruled *Roe v. Wade* has made clear that a state cannot prevent a person from traveling out of state for an abortion. Justice Kavanaugh wrote in a concurring opinion in the *Dobbs* case: "may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel."[42] So far, Texas has not passed any laws that would restrict an individual from leaving the state to get an abortion in a state where it is legal.

Can a person in Texas help a friend get an abortion in a state where abortion is legal?

Yes, a person can help a friend get an abortion in a state where abortion is legal, but there may be some remote risks. First, H.B. 1280 does not prohibit a person from helping another person obtain an abortion in a state where it is legal. H.B. 1280 only criminalizes and allows civil penalties against a person who knowingly performs, induces, or attempts an abortion.[43] There is no aiding and abetting provision in the statute and thus it would not apply to a person living in Texas who helps a pregnant person get an abortion outside of Texas. A recent court decision confirms this, holding that H.B. 1280 does not authorize civil or criminal prosecution for facilitating out-of-state abortions.[44]

One of Texas's pre-*Roe* abortion provisions did criminalize assisting an abortion. Article 1192 provided that "whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice."[45] This language could be interpreted to mean that anyone who helped another person get an abortion, even outside of the state, could be criminally prosecuted as an accomplice. However, as described above, the highest federal appellate court in Texas and a federal trial court judge have held that this early statute has been repealed by subsequent Texas laws and therefore a person cannot be prosecuted under this provision.[46]

---

[41] *Id.*
[42] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).
[43] Tex. Health & Safety Code § 170A.002(a).
[44] Fund Tex. Choice v. Paxton, No. 1:22-CV-859-RP, 2023 WL 2558143, at *14 (W.D. Tex. Feb. 24, 2023).
[45] *See* 1973 Tex. Gen. Laws 995 (codified at Tex. Rev. Civ. Stat. art. 4512.2 (1974)).
[46] *See* Fund Tex. Choice, 2023 WL 2558143, at *14.

As for S.B. 8, it makes clear that while a person who "aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise," can be sued, this is only so if the abortion is performed or induced in violation of Texas law.[47] Thus, someone who helps a pregnant person get an abortion outside of the state cannot be sued under S.B. 8. The provision also makes clear that S.B. 8 cannot be imposed to restrict speech or conduct protected by the First Amendment.[48] Thus, a person cannot be sued for providing information relevant to procuring an abortion outside of the state or for providing funding for an abortion outside of the state.

One lawsuit has been brought in a Texas state court to try to punish individuals who helped a friend get an abortion. In that case, a man has sued the friends of his ex-wife for helping her procure drugs to induce a medical abortion when abortion was still legal in Texas.[49] He sued them pursuant to Texas's civil wrongful death statute and is asking for damages.[50] Texas's wrongful death statute provides that "a person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's . . . wrongful act."[51] The wrongful death statute does define an "individual" to include an "unborn child."[52] However, in order for there to be liability, the individuals who are being sued must engage in a "wrongful act," and it seems unlikely that they were under Texas law.

The wrongful death statute itself makes clear that the provision does *not* apply to a claim for the death of an unborn child that is brought against the mother of the child.[53] Thus, a woman who gets an abortion cannot be sued for wrongful death. In addition, at the time the woman in the case induced her abortion, it was legal, as it would be if a person obtained an abortion in a state where abortion is legal.[54] Thus, if the procurement of the abortion is legal in the state where it is obtained, the person who got the abortion cannot be sued for wrongful death, and as explained above, none of Texas's other statutes prohibit a person from helping another person get an abortion in a state where it is legal, then it seems unlikely that a person

---

[47] Tex. Health & Safety Code § 171.208(a).
[48] *Id.* at § 171.208(g).
[49] Plaintiff's Original Petition at 1, Silva v. Noyola, No. 23-CV-0375 (Tex. 56th Dist. Ct. Galveston Sty., filed Mar. 9, 2023).
[50] *Id.*
[51] Tex. Civ. Prac. & Rem. Code § 71.002(b).
[52] *Id.* at § 71.001(4).
[53] *Id.* at § 71.003(c)(1).
[54] Plaintiff's Original Petition, *supra* note 49.

who helps a friend get a legal abortion is committing a "wrongful act," as required by the statute.

This one case shows that it is *possible* that a person who helps a friend get an abortion in another state could be sued under Texas's civil wrongful death statute, but it is highly unlikely since such conduct is not "wrongful." It is also highly unlikely because the only individuals who can bring suit for "wrongful death" are the parents of the deceased, and thus such a lawsuit could only be brought by the father of the aborted fetus who knows or finds out that the mother's friends helped her get an abortion that he would not have approved of—a highly unusual scenario.

Conclusion

The landscape of statutes that regulate abortion in Texas is complex and seems to be ever-changing, with new cases and theories being tested in courts. At the time of publication of this article, it is clear that providing an abortion is illegal in Texas unless it is performed to save the life or bodily function of a pregnant person with a life-threatening medical condition, to remove an ectopic pregnancy, or to remove a fetus that has already spontaneously died in the womb. However, it is unlikely that a person who self-manages her own abortion in Texas would face legal consequences and individuals can travel out of the state to get abortions in states where it is legal. It also seems that a person can help another person to get a legal abortion out of the state by providing information, funds, or by driving them, although there are some remote risks to doing so.

The following is a supplementary infographic for *The State of Texas, The State of Abortion* created to promote legal comprehension.

Suggested citation:

Loren Jacobson, *The State of Texas, The State of Abortion*, ACCESSIBLE LAW, Fall 2023, at 11 app. illus.

The State of Abortion Law in Texas

It is illegal to perform an abortion in Texas.[1]

Performing an abortion is a crime punishable as a second or first degree felony.[2] A civil fine can also be imposed of $100,000 per abortion.[3]

There are few exceptions to this prohibition.

The abortion prohibition applies unless a licensed physician determines that the person receiving the abortion has a life threatening condition caused or worsened by the pregnancy that puts them at risk of death or serious injury.[4]

Medication abortion drugs continue to be FDA-approved.[5]

Prescription drugs to induce a medication abortion are currently approved by the FDA, and can be legally sold in the United States.[6] However, Texas physicians cannot prescribe such medication.[7] Such drugs may be available online through telemedicine.[8]

A woman who receives an abortion cannot be prosecuted.[9]

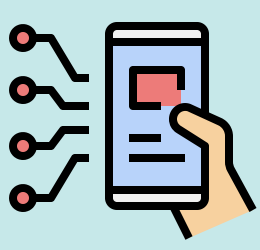
Neither civil nor criminal penalties may be imposed on a pregnant person who obtains an abortion.[10]

A person can leave the state to get an abortion.[11]

The right to travel is a constitutional right that has been recognized by the Supreme Court.[12] However, some counties and cities in Texas prohibit the use of county roads to travel to obtain an abortion.[13]

A person can help someone get an abortion in a state where it is legal.[14]

The laws concerning abortion in Texas do not include aiding and abetting provisions, and a recent decision has confirmed that the law does not authorize legal repercussions for facilitating out-of-state abortions.[15]



Stay informed.

The law concerning abortion in Texas is rapidly evolving and changing. Remember to always stay informed as these laws are in a state of constant flux.

Source *The State Of Texas, The State of Abortion* by Loren Jacobson
Infographic created by Alexis Williams, Staff Editor (2023-2024)

References

1 Human Life Protection Act of 2021, 87th Leg., R.S., ch. 800 (H.B. 1280), § 170A.002(b)(3), 2021 Tex. Sess. Law Serv. (codified at Tex. Health & Safety Code § 170A.002(a)).
2 Tex. Health & Safety Code §§ 170A.004-005.
3 Tex. Health & Safety Code § 170A.005.
4 Tex. Health & Safety Code § 170A.002(b).
5 Danco Labs v. Alliance for Hippocratic Medicine, 143 S. Ct. 1075 (2023); FDA, *Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation (last updated Mar. 23, 2023).
6 FDA, *supra* note 5.
7 Tex. Health & Safety Code § 170A.002(a).
8 FDA, *supra* note 5.
9 Tex. Health & Safety Code § 170A.003.
10 *Id.*
11 Fund Tex. Choice v. Paxton, No. 1:22-CV-859-RP, 2023 WL 2558143, at *15 (W.D. Tex. Feb. 24, 2023).
12 Saenz v. Roe, 526 U.S. 489, 500 (1999).
13 Jayme Lozano Carver, *Lubbock County becomes latest to approve "abortion travel ban" while Amarillo City Council balks*, The Texas Tribune (Oct. 24, 2023), https://www.texastribune.org/2023/10/23/abortion-travel-ban-lubbock-county/.
14 *Fund Tex. Choice*, 2023 WL 2558143, at *14.
15 *Id.*

LAW REVIEW
UNT DALLAS COLLEGE of LAW
ACCESSIBLE LAW

OPERATION LONE STAR'S OVERDETENTIONS CONSTITUTE FALSE IMPRISONMENT

*Shannon W. Conway**

The common law tort claim serves as a viable alternative to detainees' constitutional claims.

In a press release earlier this year, the Office of the Texas Governor, Greg Abbott, bragged that he, the Texas Department of Public Safety (DPS), and the Texas National Guard, as part of their multi-agency "Operation Lone Star" efforts, have effected "over 420,800 illegal immigrant apprehensions."[1] According to Abbott's website, he has also bused over 33,000 migrants to various cities across the United States.[2]

Operation Lone Star was launched by Governor Abbott and the DPS in March 2021 for the stated purpose of combatting "the smuggling of people and drugs into Texas."[3] As described, Operation Lone Star "integrates DPS with the Texas National Guard and deploys air, ground, marine, and tactical border security assets to high threat areas to deny Mexican Cartels and other smugglers the ability to move drugs and people into Texas."[4] And within a year of its inception, Abbott's office reported that Operation Lone Star resulted in the arrests of more than 208,000 migrants and more than 11,800 criminal charges, including 9,300 felony charges.[5]

According to a federal lawsuit filed in the United States District Court for the Western District of Texas, captioned *Robles v. Ramirez*,[6] Governor Abbott's Operation Lone Star—which Abbott has

---

* Assistant Professor of Law at UNT Dallas College of Law

[1] Press Release, Office of the Texas Governor, Operation Lone Star Gains National Support From State Governors (Aug. 25, 2023), https://gov.texas.gov/news/post/operation-lone-star-gains-national-support-from-state-governors.

[2] *Id.* (touting that these migrants have been bused to Washington, D.C., New York City, Chicago, Philadelphia, Denver, and Los Angeles).

[3] Press Release, Office of the Texas Governor, Governor Abbott, DPS Launch "Operation Lone Star" To Address Crisis At Southern Border, (Mar. 6, 2021), https://gov.texas.gov/news/post/governor-abbott-dps-launch-operation-lone-star-to-address-crisis-at-southern-border.

[4] *Id.*

[5] *Id.*; *see also* Emily Hernandez, *What is Operation Lone Star? Gov. Greg Abbott's controversial border mission, explained.,* TEXAS TRIBUNE, (Mar. 30, 2022, 5:00 AM), https://www.texastribune.org/2022/03/30/operation-lone-star-texas-explained/.

[6] Complaint at 1, Robles v. Ramirez, No. 1:23-cv-00981 (W.D. Tex. Aug. 21, 2023).

since also coined as Texas' "catch and jail" policy[7]—the four plaintiffs, who were arrested on allegations of trespassing in the Texas counties of Val Verde and Kinney, were:

> detained, processed, and magistrated in a "temporary" processing center in a tent in a parking lot; transported from there to quickly-converted state prisons over one hundred miles away; subject[sic] to weeks and months of pretrial detention; and, when Texas law commanded their release, they were *overdetained*. Even following days or weeks of overdetention in state prisons, they were released into handcuffs and shackles, transported another one hundred miles, and deprived of their liberty until they were finally presented to federal immigration facilities.[8]

Based on these allegations (and more), the *Robles* plaintiffs asserted causes of action against the defendants—described as "state and county officials tasked with different and overlapping roles in the [Operation Lone Star] criminal legal system [who] designed and administered the catch and jail scheme"—for violation of Due Process; Fourteenth Amendment, 42 U.S.C. § 1983; violation of the Fourth Amendment, 42 U.S.C. § 1983; and Negligence.[9]

Relevant to the claims asserted in the *Robles* Complaint, the Fourteenth Amendment to the U.S. Constitution forbids state actors from, *inter alia*[10], "depriv[ing] any person of life, liberty, or property, without due process of law."[11] The Fourth Amendment protects against unreasonable seizures, which the *Robles* plaintiffs define as a

---

[7] Greg Abbott (@GregAbbott_TX) X (formerly known as Twitter) (Jul. 25, 2021, 10:42pm), https://twitter.com/GregAbbott_TX/status/1419503321811988482?lang=en ("Gov. Abbott: Texas' New Border Plan 'Catch and Jail' We have a new program contrary to the Biden plan to catch & release. The Texas plan is to catch & to jail. The National Guard & the Texas Dept. of Public Safety are deployed for the mission.[sic]).

[8] Complaint, *supra* note 6, ¶ 4.

[9] *Id.* ¶¶ 13-22. The named defendants in *Robles* are: 1) Joe Frank Martinez, sheriff of Val Verde County, Texas; 2) Val Verde County, Texas; 3) Brad Coe, sheriff of Kinney County, Texas; 4) Ricardo "Rick" Alvarado, county clerk of Kinney County, Texas; 5) Kinney County, Texas; 6) Maria Ramirez, former senior warden of the Briscoe Prison; 7) John Cirone, who took over the same duties as the senior warden of the Briscoe Prison upon Ramirez's departure; 8) Felipe Gonzalez, senior warden of the Segovia Prison (with duties similar to those alleged of Ramirez and Cirone); 9) Ronny Taylor, who allegedly helped design, administer, and operate the Val Verde Temporary Processing Center (VVTPC); and 10) Recana Solutions, LLC, which also allegedly operated the VVTPC.

[10] "Among other things", *Inter alia*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[11] U.S. CONST. amend. XIV, § 1.

seizure "not supported by probable cause."[12] According to the plaintiffs, defendants "knew or should have known that continuing to deprive Plaintiffs of their liberty and restrict their movement and activities after their charges had been dismissed or their sentences had been served constituted a seizure."[13]

Potential Impediments to the Constitutional Claims based on Overdetention

In order to succeed on their claims against the individual defendants, all of whom were sued in their individual capacities,[14] the *Robles* plaintiffs will have to establish that these defendants acted, or failed to act, "with deliberate indifference," that is, a "disregard [for] a known or obvious consequence of [their] action[s]."[15] They will also have to establish that these defendants had "actual or constructive notice" that their acts or inactions would result in constitutional violations.[16]

More burdensome are the proof requirements to establish the alleged constitutional violations by the county defendants—namely, proof of both (1) "a predicate constitutional violation" and (2) "that a custom or policy of the [counties] caused the violation."[17] Thus, in order to impose liability on Val Verde and Kinney counties, the *Robles*

---

[12] Complaint, *supra* note 6, ¶ 165; *see also* U.S. CONST. amend. IV.
[13] Complaint, *supra* note 6, ¶ 166; *see also id.* at 32-36 (Counts 1-5). The *Robles* plaintiffs' causes of action against all of the defendants are brought under the Fourth and Fourteenth Amendments, with an additional cause of action for negligence against Recana Solutions.
[14] Individual-capacity suits seek to impose personal liability upon a government official for actions he or she takes under color of state law, while official-capacity suits typically just represent another way of pleading an action against the governmental entity or municipality of which the government official is an agent. Kentucky v. Graham, 473 U.S. 159, 165 (1985). In other words, an official-capacity suit is essentially treated as a suit against the governmental entity or municipality. Where this distinction makes a difference is in the award (or collection) of damages— "[W]hile an award of damages against an official in his or individual capacity can be executed only against the official's personal assets, a plaintiff seeking to recover damages against an official in his or her official capacity must look to the government entity itself." *Id.* at 166.
[15] Crittindon v. LeBlanc, 37 F.4th 177, 186 (5th Cir. 2022), *cert. denied*, No. 22-1171, 2023 WL 6377920 (U.S. Oct. 2, 2023) (quoting Porter v. Epps, 659 F.3d 440, 445 (5th Cir. 2011)).
[16] *Id.* As the *Crittindon* court explained, "This typically requires showing notice of '[a] pattern of similar constitutional violations' due to deficient policies, permitting the inference that Defendants deliberately chose policies causing violations of constitutional rights."
[17] Smith v. D.C., 306 F. Supp. 3d 223, 241 (D.D.C. 2018); *see also* Collins v. City of Harker Heights, 503 U.S.115, 120 (1992).

plaintiffs will have to prove that "action pursuant to official municipal policy" caused their injury.[18]

The *Robles* Complaint sets forth these allegations. The plaintiffs detail their experiences as detainees of the Operation Lone Star initiative and allege, with respect to the individual defendants, that they: (i) "knew or should have known that detention of a person absent pending criminal charges or an operative sentence… violates the Fourteenth Amendment's due process guarantee"; (ii) "had actual knowledge that people in their custody were regularly overdetained for days or weeks after charges had been dismissed or beyond the expiration of their terms of imprisonment"; and (iii) "took no remedial steps to systemically prevent and effectively eliminate overdetention… [which] amounted to deliberate indifference to the constitutional rights of people in their custody."[19] And with respect to the county defendants, the *Robles* plaintiffs allege that: (i) county officials "had actual knowledge that people in their custody were regularly detained without legal authority… [and] in violation of due process"; (ii) that such overdetention "occurred so regularly that it reflected and constituted a widespread practice or custom"; and (iii) county officials failed to implement policies to systemically prevent or eliminate overdetention… [which] amounted to deliberate indifference to the constitutional rights of people in their custody."[20]

The real issue, however, is whether they will be able to sufficiently *prove* these allegations or at least convince the court that there are material issues of fact in dispute on these elements so as to survive a dispositive motion and get these issues before a jury. This is not always easy but certainly has been done in the context of the overdetention of state prisoners, for which the Louisiana Department of Public Safety and Corrections (DPSC) has recently gained much attention.[21]

---

[18] Connick v. Thompson, 563 U.S. 51, 60 (2011). As the D.C. Circuit has explained: "there are a number of ways in which a 'policy' can be set by a municipality to cause it to be liable under § 1983: the explicit setting of a policy by the government that violates the Constitution . . . ; the action of a policy maker within the government . . . ; the adoption through a knowing failure to act by a policy maker of actions by his subordinates that are so consistent that they have become 'custom' . . . ; or the failure of the government to respond to a need (for example, training of employees) in such a manner as to show 'deliberate indifference' to the risk that not addressing the need will result in constitutional violations." Baker v. D.C., 326 F.3d 1302, 1306 (D.C. Cir. 2003) (internal citations omitted).

[19] Complaint, *supra* note 6, ¶¶ 151-153.

[20] *Id.* ¶¶ 160-162.

[21] Glenn Thrush, *Some Prisoners Remain Behind Bars in Louisiana Despite Being Deemed Free*, N.Y. TIMES, (Dec. 11, 2022),

In *Crittendon v. LeBlanc*,[22] the plaintiffs alleged that DPSC officials violated due process by failing to adopt policies ensuring the plaintiffs' timely release and directly participated in conduct that caused their overdetention beyond the expiration of their sentences.[23] Both the district court and the U.S. Court of Appeals for the Fifth Circuit found sufficient fact issues on prisoners' claims that Louisiana prison officials failed to adopt policies to prevent unconstitutional overdetentions so as to preclude the officials' requested summary judgment, but also found that there was *insufficient* evidence, at least with regard to particular individual plaintiff-prisoners, that the officials directly participated in violation of their due process rights.[24] In the even more recent case of *Buchicchio v. LeBlanc*, brought by a former prisoner against the DPSC for due process violations and false imprisonment in connection with a delay of his release from prison 12 weeks after expiration of his sentence, the district court dismissed the plaintiff's claim that the sheriff or his office failed to implement policies to address overdetention, but left the remainder of the claims intact, including those alleging § 1983 due process violations, false imprisonment and negligence.[25]

A Formidable Alternative Theory of Liability

Although not currently asserted in the *Robles* lawsuit, the plaintiffs there have an alternative (or additional) theory of liability available to them in the common law tort of false imprisonment. A false imprisonment claim under Texas law requires that a plaintiff establish: (1) willful detention by the defendant; (2) without plaintiff's consent; and (3) without authority of law.[26] The allegations already

---

https://www.nytimes.com/2022/12/11/us/politics/louisiana-prison-overdetention.html; Glenn Thrush, *Louisiana 'Deliberately Indifferent' to Keeping Inmates Past Release Date, Justice Dept. Says*, N.Y. TIMES, (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/us/politics/justice-department-overdetention.html#; Press Release, U.S. Dept. of Justice, Justice Department Finds Louisiana Department of Public Safety and Corrections Violates the Constitution By Incarcerating People Beyond Their Release Dates (Jan. 25, 2023), https://www.justice.gov/opa/pr/justice-department-finds-louisiana-department-public-safety-and-corrections-violates#.

[22] Crittindon v. LeBlanc, 37 F.4th 177, 186 (5th Cir. 2022), *cert. denied*, No. 22-1171, 2023 WL 6377920 (U.S. Oct. 2, 2023).

[23] *Id.* at 183-85.

[24] *Id.* at 188-190.

[25] Buchicchio v. LeBlanc, No. CV 22-00147-BAJ-EWD, 2023 WL 2027809, at *1 (M.D. La. Feb. 15, 2023).

[26] Thomas v. State, 294 F. Supp. 3d 576, 615 (N.D. Tex. 2018), *report and recommendation adopted*, No. 3:17-CV-0348-N-BH, 2018 WL 1254926 (N.D. Tex. Mar. 12, 2018) (quoting Gordon v. Neugebauer, 57 F. Supp. 3d 766, 780 (N.D. Tex. 2014)); Wal-Mart Stores, Inc. v. Rodriguez, 92 S.W.3d 502, 506 (Tex. 2002).

alleged in the *Robles* Complaint are likely more than sufficient to state a claim for false imprisonment.

First, the *Robles* plaintiffs detailed their willful detention by the defendants with allegations that after their release from state custody, the plaintiffs and other detainees under Operation Loan Star were "not free to leave the prisons where they are held" and instead were "handcuffed, shackled, and aggressively placed in a transport vehicle" and "transported to a federal immigration facility" or otherwise "transported by TDFJ officers with a DPS escort back to [the applicable temporary processing center]."[27] Next, the *Robles* plaintiffs also plead their lack of consent through factual allegations that their court-appointed counsel repeatedly alerted defendants that the plaintiffs were still in custody and inquired as to why and repeatedly requested their release from custody.[28] In addition, the defendants were alleged to have "regularly received complaints about overdetention from people detained under the 'catch and jail' program, both verbally and through the inmate grievance system."[29] Finally, the *Robles* Complaint alleges that these unconsented detentions were committed by the defendants, who had "actual knowledge that people [including plaintiffs] were regularly detained without legal authority," and that the detentions regularly occurred after defendants "had lost any shadow of legal authority" to hold plaintiffs.[30]

One of the seminal cases in Texas involving false imprisonment (and alleged due process violations) was in the context of a prisoner's overdetention, *Whirl v. Kern*.[31] Mr. Whirl was arrested and booked in the Harris County jail where he was deprived of the use of his artificial leg, and where he languished for nearly nine months after all charges against him were dismissed.[32] The elements of Whirl's *prima facie*[33] claim were easily met—the defendant sheriff's actions indisputably constituted the willful detention of Whirl without his consent. At issue in *Whirl* was whether the sheriff was privileged to detain Whirl—or, said differently, whether he had the "legal authority" to detain Whirl for nine extra months.[34] The court

---

[27] Complaint, *supra* note 6, ¶¶ 48, 84, 147, 167, 175.
[28] *Id.* ¶¶ 63, 71, 76, 83.
[29] *See e.g.*, *id.* ¶¶ 55-57.
[30] *Id.* ¶¶ 159, 160, 167, 175.
[31] Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968).
[32] *Id.* at 785.
[33] "At first sight; on first appearance but subject to further evidence or information", *Prima facie*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[34] *Whirl*, 407 F.2d at 792 ("The central issue in this case is one of privilege, not of intent; one of law, not of fact.").

acknowledged that a sheriff's "duty to his prisoner is not breached until the expiration of a reasonable time for the proper ascertainment of the authority upon which his prisoner is detained" but had no problem that Whirl's detainment of nine months was, as a matter of law, an unreasonable time.[35] The *Buchicchio* court held similarly—finding that "12 weeks after expiration of [Buchicchio's] sentence" easily met Louisiana's false imprisonment "essential elements: (1) detention of the person; and (2) the unlawfulness of the detention," leaving only the factual determination of the nature of the official's "specific conduct and authority with regard to Plaintiff's detention."[36]

The overdetention alleged in the *Robles* Complaint—although in a slightly different context under the realm of Operation Lone Star rather than a state prison or county jail—really are not far different than the circumstances in *Whirl*, *Buchicchio*, and *Crittindon* (and the countless other false imprisonment cases around the country grounded on similar factual circumstances). The time periods are not as dramatic—13, 19 and 42 days of alleged overdetention in the *Robles* Complaint versus the 9 months and 12 weeks in *Whirl* and *Buchicchio*, respectively,[37]—but these time periods should suffice so long as they may be deemed "unreasonable," according to the *Whirl* court.[38]

In sum, the existing allegations in the *Robles* Complaint appear facially sufficient to allege an additional cause of action for the common law tort of false imprisonment under Texas law. Doing so provides an alternative theory of recovery on the chance that the constitutional claims do not survive a dispositive motion, or the factfinder is unconvinced that the Operation Lone Star officials acted with "deliberate indifference" or acted "pursuant to official municipal policy" in causing the plaintiffs' overdetention and resulting damages.

---

[35] *Id.*

[36] Buchicchio v. LeBlanc, No. CV 22-00147-BAJ-EWD, 2023 WL 2027809, at *10 (M.D. La. Feb. 15, 2023).

[37] *Whirl*, 407 F.2d at 792 (referencing "Whirl's nine months" of detention); *Buchicchio*, 2023 WL 2027809, at *10 (referencing Buchiccio's overdetention of "twelve weeks").

[38] *Whirl*, 407 F.2d at 792; *see also* Smith v. D.C., 306 F. Supp. 3d 223, 232 (D.D.C. 2018) (23 days sufficient); Tyson v. D.C., No. CV 20-1450 (RC), 2021 WL 860263, at *1 (D.D.C. Oct. 19, 2021) (24 days); McNeal v. La. Dep't. of Pub. Safety & Corr., No. CV 18-736-JWD-EWD, 2020 WL 798321, at *2 (M.D. La. Feb. 18, 2020) (41 days).

The following is a supplementary infographic for *Operation Lone Star's Overdetentions Constitute False Imprisonment* created to promote legal comprehension.

Suggested citation:

Shannon W. Conway, *Operation Lone Star's Overdetentions Constitute False Imprisonment*, ACCESSIBLE LAW, Fall 2023, at 20 app. illus.

Overdetention At Operation Lone Star

Are Operation Lonestar officials committing the tort of false imprisonment?

A Brief History of Operation Lone Star

March 2021 — Operation Lonestar Begins[1]

March 2022 — Significant number of criminal charges filed against immigrants[2]

February 2023 — Seminal lawsuit alleging overdetention is filed[3]

August 2023 — 420,800 immigrants have been apprehended and detained[4]

August 21, 2023 — Robles v. Ramirez suit is filed[5]

Present Day — Are tort claims a solution?

MAR. 2021

OPERATION LONESTAR[6]

- GOVERNOR ABBOTT BEGINS OPERATION LONESTAR TO COMBAT THE GROWING IMMIGRANT POPULATION IN TEXAS

MAR. 2022

CRIME COUNT INCREASES[7]

- 11,800 CRIMINAL CHARGES FILED AGAINST IMMIGRANTS
- 9.300 FELONY CHARGES AGAINST IMMIGRANTS

FEB. 2023

BUCHICCHIO V. LEBLANC[8]

- COMPLAINANT FILED SUIT AGAINST LOUISIANA DEPARTMENT OF CORRECTIONS AFTER BEING DETAINED BEYOND HIS SENTENCE EXPIRATION
- THE TORT CLAIM OF FALSE IMPRISONMENT WAS SHOWN THROUGH INTENTIONAL OVERDETENTION OF BUCHICCHIO
- THE OVERDETENTION LENGTH WAS UNREASONABLE BECAUSE IT LASTED 3 MONTHS LONGER THAN ANTICIPATED

AUG. 2023

DETENTION OF MIGRANTS[9]

- 208,000 MIGRANTS WERE DETAINED IN THE FIRST YEAR
- 33,000 MIGRANTS WERE BUSED TO VARIOUS U.S. CITIES

AUG. 21, 2023

ROBLES v. RAMIREZ ISSUES RAISED[10]

- TEXAS OFFICIALS WERE SUED AFTER FOUR MIGRANTS WERE DETAINED IN TWO TEXAS COUNTIES
- VIOLATIONS OF THE FOURTEENTH AMENDMENT WERE ALLEGED AFTER MIGRANTS WERE DETAINED BETWEEN TWO WEEKS TO OVER A MONTH PAST THEIR RELEASE DATE
- OFFICIALS HAD KNOWLEDGE OF OVERDETENTION & DID NOT ATTEMPT TO REDUCE OR ELIMIATE OVERDETENTION
- OFFICIALS KNEW THE OVERDETENTIONS VIOLATED DUE PROCESS

PRESENT DAY

TORT OF FALSE IMPRISONMENT[11]

DETAINED INDIVIDUALS WILL HAVE TO PROVE...

- OFFICIALS WILLFULLY DETAINED IMMIGRANTS,
- WITHOUT CONSENT, AND
- WITHOUT AUTHORITY OF LAW

FUTURE

WILL TORT CLAIMS BE SUCCESSFUL?

- IF ALL ELEMENTS ARE SUCCESSFULLY PROVEN, THEN COURTS ARE UNLIKELY TO DISMISS THE CLAIMS
- OPERATION LONE STAR OFFICIALS ARE LIKELY COMMITTING FALSE IMPRISONMENT THROUGH OVERDETENTIONS

OVERDETENTION CLAIMS

PREVIOUS LAWSUITS

PRIOR LAWSUITS HAVE BEEN SOMEWHAT SUCCESSFUL ON FALSE IMPRISONMENT ALLEGATIONS[15]

TORT CLAIMS

ALL OF THESE CASES HAVE A VALID TORT CLAIM TO PRESENT THAT MAY BE SUCCESSFUL

ROBLES & FUTURE LAWSUITS

ROBLES AND SIMILAR SUITS SEEM TO PRESENT THE BASIC CASE OF FALSE IMPRISONMENT[16]

Source• Operation Lone Star's Overdetentions Constitute False Imprisonment by Shannon W. Conway. Infographic created by Jamaria Rongey, Staff Editor (2023).

References

1 Press Release, Office of the Texas Governor, Governor Abbott, Operation Lone Star Gains National Support From State Governors (Aug. 25, 2023), https://gov.texas.gov/news/post/operation-lone-star-gains-national-support-from-state-governors.

2 Press Release, Office of the Texas Governor, Governor Abbott, DPS Launch "Operation Lone Star" To Address Crisis At Southern Border (Mar. 6, 2021), https://gov.texas.gov/news/post/governor-abbott-dps-launch-operation-lone-star-to-address-crisis-at-southern-border; *see also*Emily Hernandez, *What is Operation Lone Star? Gov. Greg Abbott's controversial border mission, explained.*,Texas Tribune (Mar. 30, 2022, 5:00 AM), https://www.texastribune.org/2022/03/30/operation-lone-star-texas-explained/.

3 Buchicchio v. LeBlanc, No. CV 22-00147-BAJ-EWD, 2023 WL 2027809, at *1 (M.D. La. Feb. 15, 2023).

4 Office of the Texas Governor, *supra* note 1.

5 Complaint at 1, Robles v. Ramirez, No. 1:23-cv-00981 (W.D. Tex. Aug. 21, 2023).

6 Office of the Texas Governor, *supra* note 1.

7 Office of the Texas Governor, *supra* note 2.

8 *Buchicchio*, 2023 WL 2027809, at *1.

9 Office of the Texas Governor, *supra* note 1.

10 Complaint, *supra* note 5, ¶ 151.

11 Thomas v. State, 294 F. Supp. 3d 576, 615 (N.D. Tex. 2018), report and recommendation adopted, No. 3:17-CV-0348-N-BH, 2018 WL 1254926 (N.D. Tex. Mar. 12, 2018), (quoting Gordon v. Neugebauer, 57 F. Supp. 3d 766, 780 (N.D. Tex. 2014)); Wal-Mart Stores, Inc. v. Rodriguez, 92 S.W.3d 502, 506 (Tex. 2002).

12 *Buchicchio*, 2023 WL 2027809, at *1.

13 Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968).

14 Complaint, *supra* note 5.

15 *Buchicchio*, 2023 WL 2027809, at *1.

16 Complaint, *supra* note 5, ¶¶ 159-160, 167, 175.

LAW REVIEW
UNT DALLAS COLLEGE of LAW
ACCESSIBLE LAW

WHEN AND WHERE DOES SCHOOL DISCIPLINE BEGIN AND END?

*Amanda Bigbee**

When a parent sends their child to school, there is an expectation that the child will be educated and kept safe. Part of maintaining an environment for safe learning is discipline when students make poor decisions. But where does the school's power to discipline begin and end? Does a school have the authority to punish behavior that occurs in the evening in the child's home? What about a profanity-laced Snap from the corner convenience store on the weekend? Drawing that line is tricky business in today's media-saturated world.

I. The U.S. Constitution and Parent Expectations

It is important to first understand that public schools and private schools are not cut from the same constitutional cloth. Public schools, including traditional school districts and charter schools, are governmental entities and, as such, must comply with constitutional provisions like the First Amendment right to free speech and the right to freely exercise one's religion.[1] Private schools, on the other hand, are not governmental entities and may function outside of those constitutional restrictions.[2] A private Catholic school, for example, may require students to attend a daily mass but a public school could not.

When student activities are viewed through the lens of the U.S. Constitution, there can be a significant difference between speech and behavior. A student's Instagram post will likely see constitutional protection[3], but drinking in a cheerleading uniform may not.[4] A student handing out flyers for a political action rally during lunch is an activity the Constitution likely protects, but pulling the fire alarm as a prank during that same lunch period is not.[5] That distinction is

* Division Director, Policy Services, Texas Association of School Boards

[1] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.").

[2] Private schools are not government-run, and, thus, are not subject to the First Amendment's demands. U.S. CONST. art. 1; *see* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2050 (2021) (Alito, J., concurring) (noting that had a student been at a private school, there would be no legal basis to punish the student's speech).

[3] *See generally Mahanoy*, 141 S. Ct. at 2038.

[4] *See generally* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

[5] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

important when analyzing discipline for both on-campus and off-campus student conduct.

Schools function *in loco parentis*, which means "in the place of the parent," in Latin.[6] Most parents would agree that a child who cusses at them should have consequences for that behavior at home. Likewise, when a student uses profanity with a teacher, the school will issue discipline for that behavior. There is not generally an expectation that the student's parents consent to that discipline or even be informed before the school issues the consequence. When the school acts in place of the parent, it must take reasonable steps to maintain a safe school environment conducive to learning. The real crux of the issues is when and where does that discipline line begin and end?

II. Behavior

Texas law mandates that some student behaviors that occur on or within 300 feet of the campus or at an off-campus school activity or event are subject to discipline.[7] Under Texas Education Code section 37.006(a), conduct punishable as a felony, possessing a vape, and selling a dangerous drug or alcohol are examples of behaviors that require removal from class and placement in a disciplinary alternative education program.[8] 300 feet from the campus is "measured from any point on the school's real property boundary line."[9]

Other student behaviors that occur on campus or at school related events or activities require the school to expel the student. Under Texas Education Code section 37.007, if a student engages in conduct that contains the elements of crimes like murder, aggravated assault, arson, or indecency with a child, that student must be expelled from school.[10]

Things get a little trickier at the bus stop. School bus stops are generally out in neighborhoods and not at or within 300 feet of a school campus. Is standing at the school bus stop a school-related activity? Does the school's reach go all the way to a neighborhood corner? Schools will not generally discipline behavior that occurs

---

[6] *See, e.g.*, *Vernonia*, 515 U.S. at 654 ("When parents place minor children in . . . schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them.").
[7] *See generally* Tex. Educ. Code Ann. § 37.
[8] *See* Tex. Educ. Code Ann. § 37.006(a).
[9] *See id.* at § 37.006(a)(2).
[10] *See id.* at § 37.007.

before a student steps on the school bus unless the behavior causes a disruption to the school environment.[11] The school's responsibility to provide a safe learning environment typically begins when a student is within its control or when the behavior disrupts school.[12] A fight *on* the bus will land a student in the principal's office[13], but a fight at the bus stop may mean a call to the police, a parent, or no consequence at all aside from the bloody lip or hurt pride.

Parents of students in athletics or fine arts activities are accustomed to receiving an additional code of conduct that outlines behaviors a specific program, like cheerleading, finds unacceptable. It is very common for those extracurricular codes of conduct to warn students against things like drinking, smoking, or engaging in criminal behavior even when the student is not at school or a school related activity.[14] Extracurricular activities are by their very nature "extra" and can have extra rules that don't apply to the rest of the student population.[15] Recently the United States Supreme Court grappled with whether or not those extra rules can also apply to off-campus speech, but we'll get to that in a moment.

When analyzing student behavior, it's important to consider not only what the behavior is but where it occurred. Behavior on district property or at a school-sponsored event are squarely within the school's responsibility to manage and discipline.[16] In some instances, the responsibility to discipline extends out beyond the school fence up to 300 feet.[17] Once a student's behavior takes place outside of that 300-foot perimeter, it is usually up to parents and police to handle unless the student is also managed by an extracurricular code of conduct or that behavior has a close nexus to the school community.[18]

---

[11] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that school regulations may violate students' constitutional rights unless "justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.").
[12] *Id.*
[13] Tex. Educ. Code Ann. § 37.0022.
[14] It should be noted, however, that some courts are reining in the extent to which schools can police behavior that is not school-related. *See, e.g.*, G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist., 427 N.J. Super. 246 (App. Div. 2012).
[15] *See, e.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 838 (2002) (holding that schools may require students involved in extracurricular activities to submit to drug-testing).
[16] *See generally* Tex. Educ. Code Ann. § 37.
[17] *Id.*
[18] *See, e.g.*, *Earls*, 536 U.S. at 838; Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 395 (5th Cir. 2015).

III. Speech

Tinker

In the modern digital era, student misbehavior is often in the form of text messages and memes rather than fist fights and smoking in the bathroom. To understand student free speech rights, we have to venture back to 1965. President Johnson had started a long and difficult bombing campaign in North Vietnam and quickly pushed more American soldiers into South Vietnam.[19] By April of that year, Students for a Democratic Society organized a march in Washington, D.C. that saw around 15,000 to 25,000 people protest, many of whom were college students.[20] By December 1965 the protest energy had reached middle and high schools. A group of students in Des Moines, Iowa met and decided to wear black armbands from December 16 to New Year's in silent protest of the Vietnam War.[21] Each student who wore the armband and refused to remove it was suspended from school.[22] The lawsuit that followed set the framework for student rights and remains important to this day.

The school argued that wearing armbands to school could be disruptive to learning, and the school had an important responsibility to maintain order in that learning environment.[23] While lower courts agreed with that reasoning, the U.S. Supreme Court carved a new path.[24] The *Tinker* case famously held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[25] The wearing of armbands was considered speech, not behavior, because the students were clearly relaying a message relating to the Vietnam War.[26] Because this protest was "pure speech" the Court held that a student's speech must "materially and substantially interfere" with school operations before the school could discipline the students for the speech.[27] The Court reasoned that in this case the school merely anticipated and feared a disruption, but

---

[19] *Resistance and Revolution: The Anti-Vietnam War Movement At The University of Michigan, 1965–1972*, UNIVERSITY OF MICHIGAN, https://michiganintheworld.history.lsa.umich.edu/antivietnamwar/exhibits/show/exhibit/the_teach_ins/national_teach_in_1965 (last visited Oct. 3, 2023).
[20] *Id.*
[21] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).
[22] *Id.*
[23] *Id.* at 505.
[24] *Id.*
[25] *Id.* at 506.
[26] *Id.* at 505–06.
[27] *Id.* at 505.

there was no actual interference with the school's ability to maintain order and operate.[28] When analyzing student behavior and speech, schools today still take into account whether or not the speech caused a serious disruption to the functioning of the campus before determining whether or not to assign consequences.

Fraser

Let's leap forward to 1986 when the United States Supreme Court considered a speech given during a high school assembly when a young man stood before his peers to nominate a fellow student for a class elected position.[29] These words led the administration to suspend the student for two days:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between us and the best our school can be.[30]

The Court in *Fraser* considered whether or not to apply the *Tinker* disruption test discussed above, but ultimately decided that schools have a compelling reason to prohibit vulgar and lewd speech because there are "fundamental values of public school education" that should be maintained even if there is no substantial disruption.[31] The question schools now must grapple with is what is considered "vulgar and lewd" in today's communities. If the school determines that a student's on-campus speech is vulgar or lewd, it may discipline the student even if there is no substantial disruption to the learning environment.

Bong Hits 4 Jesus

We take another roughly 20-year jump to 2007 for the Supreme Court's next venture into student speech and discipline. This time we visit the Last Frontier of Alaska for *Morse v. Frederick,* which

---

[28] *Id.* at 514.
[29] *See generally* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[30] *Id.* at 687 (Brennan, J., concurring).
[31] *Id.* at 685.

is amusingly often referred to as the "Bong Hits 4 Jesus" case.[32] A high school student in Alaska, at a school event, displayed a banner reading "BONG HITS 4 JESUS."[33] No disruption to the school environment occurred, but the principal was less than pleased and suspended the student for ten days for promoting illegal drug use.[34]

In a 5-4 decision, the Supreme Court opined that the banner could reasonably be construed as encouraging illegal drug use even if it was admittedly a cryptic message.[35] The Supreme Court concluded that preventing the use of drugs by school children is an important, "indeed, perhaps compelling," interest.[36] The student's discipline was upheld, and schools now know that they can discipline behavior that could be considered encouraging of drug use.[37]

Ponce

The Fifth Circuit Court of Appeals, which covers Texas, Louisiana, and Mississippi, waded into the arena of violence in schools later that same year when it decided *Ponce v. Socorro Independent School District.*[38] A student in Texas kept a diary at home and wrote stories of neo-Nazi groups across the school district committing acts of violence against homosexual and racial minority students as well as mass shootings the student described as "Columbine shootings."[39] The student mentioned the diary to a friend who reported it to a teacher who in turn reported it to an assistant principal.[40] When questioned about it the student claimed that the writing was a work of fiction.[41] After carefully reviewing the diary, the assistant principal was concerned for the safety of the students and staff and decided to suspend the student and recommend he attend school at an alternative disciplinary placement.[42]

The student sued and claimed that his fictional writing was protected by the First Amendment and could not be the basis of disciplinary action by the school.[43] The Fifth Circuit Court analyzed

---

[32] *See generally* Morse v. Frederick, 551 U.S. 393 (2007).
[33] *Id.* at 397.
[34] *Id.* at 397–98.
[35] *Id.* at 401.
[36] *Id.* at 407.
[37] *Id.* at 410.
[38] Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765 (5th Cir. 2007).
[39] *Id.* at 766.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 767.
[43] *Id.*

the very recent "Bong Hits 4 Jesus" case when coming to the decision that speech is not protected by the First Amendment if it "poses a direct threat to the physical safety of the school population."[44] The Court recognized that school administrators have to take threats seriously to ensure they do not miss warning signs that could result in tragic loss of lives.[45] Campus administration must be allowed "to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance."[46]

Bell

Teenagers in today's world have the ability to create content and post it on the internet with their phones anywhere in the world. When those postings happen outside of school, but are about school, does the school have the responsibility or even authority to discipline the behavior? This was the question the Fifth Circuit tackled in 2015 when a high school student from Mississippi recorded a rap song and posted it to Facebook and YouTube from home.[47] The song was about the alleged sexually inappropriate behavior of two staff coaches with students at the school.[48] Some of the lyrics include:

> Looking down girls' shirts / drool running down your mouth / messing with the wrong one / going to get a pistol down your mouth.[49]

The song's refrain tells students they should extend their "middle fingers up if you hate that nigga / middle fingers up if you can't stand that nigga / middle fingers up if you want to cap that nigga."[50]

In *Bell v. Itawamba County School Board*, the Court ultimately decided that the song Bell posted was "threatening, intimidating, and harassing" and, as such, was the basis of a reasonable anticipation of a substantial disruption under *Tinker*. It was relevant in the Court's reasoning that Bell intended for his song to be heard by the school community.[51] While his speech did not take place originally within the

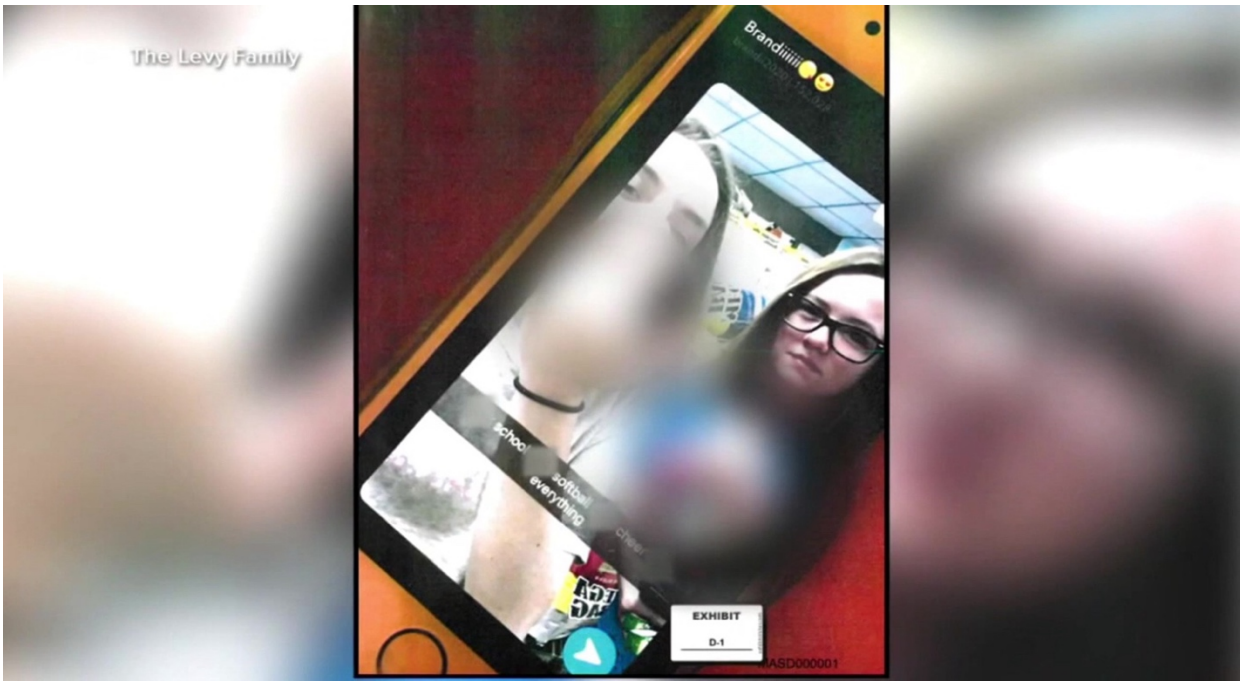
---

[44] *Id.* at 770–71.
[45] *Id.*
[46] *Id.* at 772.
[47] *See generally* Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015).
[48] *Id.* at 384.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 396.

school setting, the speech was directed at the school.[52] That nexus was relevant in the opinion that the school was within its constitutional rights to punish the off-campus speech.[53]

Mahanoy

B.L. was a student at Mahanoy Area High School when she tried out for varsity cheerleading.[54] She did not make varsity but was placed on the junior varsity team.[55] The next weekend, B.L. was at a local convenience store with a friend and took to Snapchat to express her displeasure at this turn of events, as teenagers tend to do.[56] B.L. took the Snap of her and her friend with middle fingers raised and captioned the photo with "Fuck school fuck softball fuck cheer fuck everything."[57] The Snap was seen by about 250 people, including many students from the school and several other cheerleaders. Students reported the Snap to the cheerleading coaches, who believed the expression to be a violation of the team and school rules.[58] The consequence for the off-school speech was a one-year suspension from the junior varsity cheerleading team.[59]



[52] *Id.*
[53] *Id.* at 397–98.
[54] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2043 (2021).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*

The Supreme Court dug into the analysis of when off-campus speech can be disciplined by a school system, and landed on three features of speech that must be considered when determining whether the First Amendment protects the speech:

1. Off-campus speech is generally for parents to discipline, not schools;
2. If schools have the power to control speech off campus and on campus, students effectively have no venue in which they can engage in free expression; and
3. Schools have an interest in allowing students to express themselves somewhere since a free society where ideas can be shared is a basic tenet of our democracy.[60]

In *Mahanoy Area School District v. B.L*, the Court decided that the convenience store Snap was not for the school to manage but was, instead, for the parents to control.[61] Even with additional extracurricular expectations, the student was entitled to some space to express her displeasure with her cheerleading fate.[62] The Court did leave space for schools to regulate off-campus speech when that speech constitutes serious bullying or harassment targeted to individuals in the school community, threats to students or staff, when there is a breach to a school security device, and when the speech is directly related to a school lesson or device.[63]

Mahanoy is important case law for the school community because it is the first time since *Tinker* that the Court expanded rather than constricted student speech rights. The Court has told schools across the nation that its reach to discipline student expression is not indefinite, even when the student is talking about the school in vulgar terms that administration and cheerleading coaches find distasteful.

IV. Where is the Line?

After the legislature has made its rules, and the courts have given their opinions, where is this discipline line between home and school? If the student is on school grounds or at a school event, the ability to discipline lands squarely on the school's shoulder.[64] Some

---

[60] *Id.* at 2046.
[61] *Id.* at 2047.
[62] *Id.*
[63] *Id.* at 2045.
[64] It should be noted, though, that when I was in grade school and got in trouble at school, I was also in trouble at home. The law does not protect children from

behaviors that occur off school property but still within 300 feet of the property are also still within the purview of the school and can be punished.[65] Off-campus behavior is generally not punishable by a school unless the behavior has a close nexus to the school.[66] Once that nexus is established the school must determine if the behavior constitutes constitutionally protected speech before it can determine if it can discipline the student.[67]

At the end of the day, it takes a village to raise a child. Students are best served when the school and parents work together to help students learn acceptable behavior and lessons that are needed to be productive members of society. If you have questions about the discipline processes at your own child's school, refer to the Student Code of Conduct and contact the campus administration with any questions.

"double jeopardy," so a consequence at school in no way limits a parent's ability to dish out consequences at home as well.

[65] *See generally* Tex. Educ. Code Ann. § 37.

[66] *See, e.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 838 (2002); Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 395 (5th Cir. 2015).

[67] *See Mahanoy*, 141 S. Ct. at 2046.

The following is a supplementary infographic for *When and Where Does School Discipline Begin and End?* created to promote legal comprehension.

Suggested citation:

Amanda Bigbee, *When and Where Does School Discipline Begin and End?*, ACCESSIBLE LAW, Fall 2023, at 32 app. illus.

When and Where Does School Discipline Begin and End?

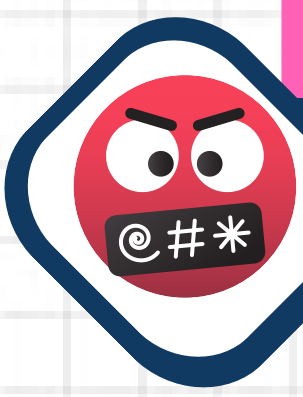
Can my child's school discipline my child at school?

Yes! (up to 300 feet from the school property line)[1]

What if the behavior happens at the bus stop?

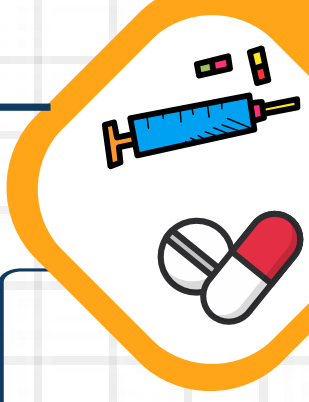
Probably Not. The Supreme Court requires that students engage in conduct that substantially disrupts or materially interferes with the learning environment to warrant a school's discipline. [2]

Can the school discipline my child for using vulgarity at school?



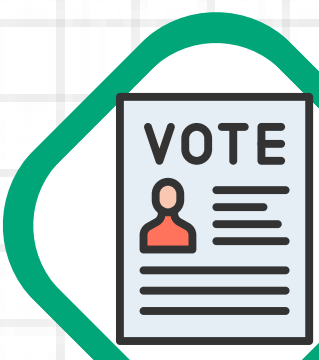
YES! [3]

Can it discipline my child for supporting drug use?



Yes! The Supreme has held that a school's need to prevent illegal drug use by students is an important interest. As such, students cannot claim First Amendment protection for speech that might promote drug use.[4]

What about for handing out political fliers in the lunchroom?

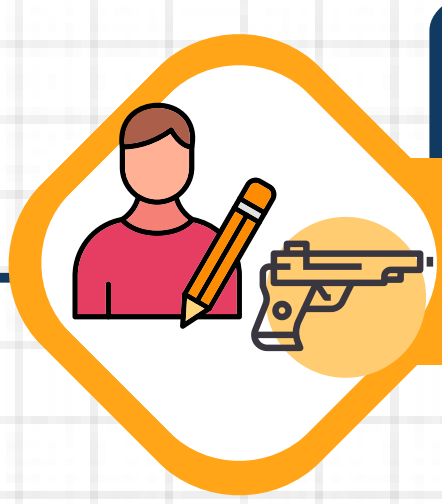


No, not unless that activity "materially and substantially interferes" with the learning environment. Political speech is protected by the First Amendment. [5]

What about for criticizing school officials on social media?

It depends. If the student expresses violent actions in the post, then yes. If they only vent frustrations, even if using course language, then no.[6]

What if my child writes a novel where the hero shoots up everyone at the school?



Yes - your child can be suspended and sent to alternative school, even if the writing is fictitious.[7]

Source: When and Where Does School Discipline Begin and End? By Amanda Bigbee, Division Director, Policy Services, Texas Association of School Boards. Infographic by Josh Blann, Director of Acquisitions, Accessible Law (2023-2024).

References

[1] *See e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995) ("When parents place minor children in... schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them."); *see also* Tex. Educ. Code Ann. § 37.
[2] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that school regulations may violate students' constitutional rights unless "justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.").
[3] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
[4] Morse v. Frederick, 551 U.S. 393, 407 (2007).
[5] *Tinker*, 393 U.S., at 505.
[6] *See* Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2047 (2021); *See also* Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015).
[7] Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 770-71 (5th Cir. 2007).

LAW REVIEW
UNT DALLAS COLLEGE of LAW
ACCESSIBLE LAW

NAVIGATING WRONGFUL DEATH CLAIMS AND SURVIVAL ACTION CLAIMS IN TEXAS

*Alexandra W. Payne**

Losing a loved one is never easy. Sometimes that process is complicated by the circumstances of the person's death. When someone dies because of the negligence or wrongdoing of another, the family's grieving process unfortunately often intersects with—and is prolonged by—the legal system.

Two of the most common claims that family members file regarding the death of their loved ones are called wrongful death claims and survival action claims. Both claims are brought after someone has died if the death is caused by the wrongful conduct of another.

These claims can arise from many different circumstances, including automobile and workplace accidents, as a result of medical malpractice, and from incidents that occur while a person is in law enforcement custody such as suicides and medical neglect. While these claims share some similarities and are often filed together in the same lawsuit, they are different claims that have different statutory requirements, including who can file them.

Understanding the difference between wrongful death claims and survival action claims may help surviving family members contextualize their rights and legal options, know if and when to contact an attorney, and understand a lawsuit filed on their behalf.

I. When is filing a wrongful death or survival claim appropriate?

Each state has its own wrongful death statutes, which govern claims that can be filed on behalf of the person who has died. In the law, the deceased person is referred to as the "decedent."[1] A wrongful death action or survival action can be brought where a decedent's death was caused by another person's or entity's wrongful conduct.[2] Wrongful conduct has a specific meaning in the law and does not include all situations in which a person dies, even if that death is traumatic or seemingly someone else's fault. There are different

* The Law Offices of Dean Malone, P.C.

[1] *Decedent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[2] Tex. Civ. Prac. & Rem. Code Ann. § 71.002(b).

standards for establishing that the person's conduct was "wrongful" depending on the facts and circumstances of the decedent's death. For example, the standard for holding someone liable for a death caused in an automobile accident is different than the standard for holding someone liable for a death caused by a doctor in an emergency room.[3] Both of those are different than the standard for holding law enforcement accountable for deaths that occur while the decedent was in custody.[4]

In short, this means that conduct that may be considered "wrongful" in one situation may not be considered "wrongful" in another setting for purposes of asserting wrongful death or survival action claims. A lawyer who is familiar with the situation can best advise as to the standard in a given circumstance.

II. What do I get from filing a wrongful death or survival action claim?

Whether any lawsuit is successful depends on numerous case-specific factors, and there is never any guarantee that filing a lawsuit will result in a monetary award. While both wrongful death claims and survival actions claims will attempt to convert a loss into a dollar amount, monetary damages are handled differently with each claim. Calculating the value of a case is complex and depends on an endless number of factors. Nothing can ever replace the life lost, but money is unfortunately the primary remedy available in the civil judicial system.

III. Wrongful Death Claims

The purpose of the Texas Wrongful Death Act is to try to compensate certain surviving people for the loss of their relationship to the decedent.[5]

---

[3] *Compare* Davis v. Bills, 444 S.W.3d 752, 757 (Tex. App.—El Paso 2014, no pet.) (Wrongful Death Act governs wrongful death claims arising from car accidents), *with* Bangert v. Baylor Coll. of Med., 881 S.W.2d 564, 566 (Tex. App.—Houston [1st Dist.] 1994, no writ) (Medical Liability Act governs wrongful death claims arising from medical malpractice).

[4] *See* City of Houston v. Nicolai, No. 01-20-00327-CV, 2023 WL 2799067, at *4 (Tex. App.—Houston [1st Dist] Apr. 6, 2023, no pet.) (discussing "official immunity" for government employees).

[5] *Davis*, 444 S.W.3d at 757 (citing Tex. Civ. Prac. & Rem. Code Ann. § 71.004; Russell v. Ingersoll–Rand Co., 795 S.W.2d 243, 247 (Tex. App.—Houston [1st Dist.] 1990), *aff'd*, 841 S.W.2d 343 (Tex. 1992)).

A. Who can bring a wrongful death claim in Texas?

Many states, including Texas, limit who can file a wrongful death lawsuit on behalf of the person who died.[6] People who can file a wrongful death lawsuit are called "wrongful death beneficiaries."[7] Wrongful death beneficiaries in Texas are the decedent's surviving spouse, children, and parents, meaning only those who are the decedent's surviving spouse, child, or parent can file a wrongful death claim.[8] People who shared other types of relationships with the decedent, such as siblings, grandparents, or friends, cannot file this type of claim.

i. What if we weren't legally married?

In most states, the surviving spouse of a person generally must be the legal spouse, meaning the person must have been legally married to the decedent before their death.[9] Texas is one of the few states that also recognizes what are referred to as "common-law spouses."[10] Common-law spouses are couples who were never legally married but who meet certain other requirements, which show that the couple were in a long-term committed relationship akin to a legal marriage.[11]

Determining whether someone is a common-law spouse is a fact-intensive process and often requires witnesses and evidence be presented to establish each of the requirements. The person who wants to prove the existence of a common-law marriage—in this case, the person who wants to bring a wrongful death claim as a "surviving spouse"—has the burden, or responsibility, of producing sufficient evidence to convince a court that there was a common-law marriage.[12] This can sometimes be challenging to do after one of the people in the relationship has died.

---

[6] Tex. Civ. Prac. & Rem. Code Ann. § 71.004.

[7] White v. Davenport, 398 S.W.3d 802, 806 (Tex. App.—Beaumont 2012), *rev'd on other grounds*, No. 13-0090, 2013 WL 12501850 (Tex. 2013) ("The damages recoverable are those suffered by the wrongful death beneficiaries."); *Beneficiary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[8] Tex. Civ. Prac. & Rem. Code Ann. § 71.004(a).

[9] 22A AM. JUR. 2d *Death* § 78 (2023).

[10] Tex. Fam. Code Ann. § 1.91(a)(2) (establishing that the elements to establish a common-law marriage in Texas are: (1) that the couple agreed to be married; (2) after their agreement, the couple lived together in Texas as husband and wife; and (3) the couple represented to others that they were married.).

[11] *Id.*

[12] White v. State Farm Mut. Auto. Ins. Co., 907 F. Supp. 1012, 1016 (E.D. Tex. 1995) ("The existence of a common-law marriage is a question of fact, with the burden of proof being on the party seeking to establish the marriage.") (citing Weaver v. State, 855 S.W.2d 116 (Tex. App.—Houston [14th Dist.] 1993, no pet.)).

For example, Ashley marries Bradley in January of 2021. Bradly dies a few months later while undergoing surgery. Ashley, as Bradley's "surviving spouse," could file a wrongful death claim regarding Bradley's death.

Instead, consider that Ashley and Bradley lived together for twenty years, have referred to each other as husband and wife, and have three children together. Ashley and Bradley shared all of their finances and all of their friends and family considered them to be married, even though Ashley and Bradly never legally married.

Ashley may be considered a "surviving spouse," but she would have to prove that to a court, such as by showing the judge bank statements of their joint accounts and bringing friends and family to testify on her behalf. Only if a judge decides that Ashley established the requirements of a "common-law marriage" could Ashley be considered a "surviving spouse" who could then file a wrongful death claim regarding Bradley's death.

ii. What if I am adopted or a step-child?

A "child" must generally be the person's legal and biological child.[13] The definition of "children" does not include step-children, meaning step-children of the decedent cannot file this type of claim.[14] The definition of "child" does, however, include children whom the decedent formally adopted prior to death.[15] Formal adoption is a legal process that ultimately results in a court order, which will establish that the adoptive parent is the legal parent of the adoptive child.[16] The formal adoption process must have been completed, meaning the court must have issued an order finalizing the adoption, before the child's eighteenth birthday for the child to be considered a "child" under the Texas Wrongful Death Statute.[17]

---

[13] *See* Pluet v. Frasier, 355 F.3d 381, 384 (5th Cir. 2004) ("To recover under the TWDS, an illegitimate child must establish biological paternity by clear and convincing evidence."); Brown v. Edwards Transfer Co., 764 S.W.2d 220, 223 (Tex. 1988) (finding that there was "some evidence to support the jury's finding that the children were the biological children of [decedent]" and allowing those children to assert wrongful death claims).

[14] Miles v. Ford Motor Co., 922 S.W.2d 572, 590 (Tex. App.—Texarkana 1996), *aff'd in part*, 967 S.W.2d 377 (Tex. 1998).

[15] *See* Transp. Ins. Co. v. Faircloth, 898 S.W.2d 269, 275 (Tex. 1995) ("[O]nly biological or legally-adopted children of the decedent have standing" under the Act.).

[16] *See* Tex. Fam. Code Ann. §§ 162.001–162.026.

[17] Clayton v. U.S. Xpress, Inc., 538 F. Supp. 3d 707, 711 (N.D. Tex. 2021) (distinguishing adoption as a minor and adoption as an adult, holding that adoption

For example, when Emily is fifteen-years-old, her step-father, Wesley, formally adopts her. Five years later, Wesley dies in a workplace accident. In Texas, because Emily was formally adopted by Wesley before her eighteenth birthday, she is a "child" under the Wrongful Death Statute and can, therefore, bring a wrongful death claim for Wesley's death.

Instead, consider that Emily was adopted by Wesley when she was nineteen-years-old. Even if Wesley raised her and was the primary father figure in Emily's life for her childhood, Emily still could not file a wrongful death claim because she was not formally adopted by Wesley prior to her eighteenth birthday. In this situation, Emily would not be a "child" under the Wrongful Death Statute and could not file a wrongful death claim.

B. What can I get from filing a wrongful death claim?

Wrongful death claims attempt to compensate wrongful death beneficiaries for the loss of their relationship with the decedent through monetary damages.[18] In other words, the value of the wrongful death beneficiary's relationship with the decedent will be converted into a dollar amount.

Assuming there is money awarded, such as through a jury verdict or a settlement agreement, the money is split between all the wrongful death beneficiaries of the decedent.[19] If there is a jury verdict, the jury decides how the money will be split.[20]

For example, if Sally dies, leaving behind her dad, John, and her spouse, Jill, both John, as her parent, and Jill, as her surviving spouse, are considered wrongful death beneficiaries in Texas. If John and Jill decide to file a wrongful death lawsuit regarding Susie's death, and a jury awards them $100,000, the jury can decide to split that $100,000 in different shares. The jury could award John $60,000 and Jill $40,000.

---

as an adult did not make a person an heir of the decedent because there was never any termination of the biological parent's rights under Texas Family Code).

[18] Davis v. Bills, 444 S.W.3d 752, 757 (Tex. App.—El Paso 2014, no pet.) (citing Tex. Civ. Prac. & Rem. Code Ann. § 71.004; Russell v. Ingersoll–Rand Co., 795 S.W.2d 243, 247 (Tex. App.—Houston [1st Dist.] 1990), *aff'd*, 841 S.W.2d 343 (Tex. 1992)).

[19] Tex. Civ. Prac. & Rem. Code Ann. § 71.010(b).

[20] *Id.*

C. When do I have to file a wrongful death claim?

The right to sue does not last forever. A statute of limitations is a legally determined period of time within which a person must bring certain kinds of legal action.[21] For wrongful death claims, the statute of limitations is two-years, which typically begins at the death of the decedent.[22]

If a lawsuit is not brought within the statute of limitations, the right to bring that lawsuit expires forever.[23] In other words, a wrongful death beneficiary must bring a wrongful death action within two years of the decedent's death, or they will forever forfeit the right to file that claim about that person's death.

For example, if Jackson's child, Jordan, dies in an automobile accident on January 3, 2020, Jackson has until January 3, 2022, to file a wrongful death lawsuit regarding Jordan's death. If Jackson attempts to file his lawsuit on January 4, 2022, his claims would be rightfully dismissed.

IV. Survival Action Claims

Each state also has its own survival action statutes. The purpose of the Texas Survival Act Statute is to try to compensate the heirs of a decedent for losses that occurred prior to the decedent's death.[24]
This can include conscious pain and suffering, medical bills, lost wages, and property damages of the decedent.[25] One way to think about survival action claims is to think about what claims the decedent could have asserted themself had they survived.

A. Who can bring a survival action claim in Texas?

Survival action claims can be filed by the decedent's heirs, legal representatives, and estate.[26] An "heir" is a person who is entitled to

---

[21] *Statute of Limitations*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[22] Tex. Civ. Prac. & Rem. Code Ann. § 16.003(b); Trapnell v. Sysco Food Servs., Inc., 850 S.W.2d 529, 550 (Tex. App.—Corpus Christi–Edinburg 1992), *aff'd*, 890 S.W.2d 796 (Tex. 1994) ("Thus, the rule now is that a wrongful death or survival claim accrues, at the latest, at the time of death."); Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 352 (Tex. 1990) (holding that the cause of action for injuries resulting in wrongful death accrues upon death, not upon discovery of the death).
[23] Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a).
[24] *See* Tex. Civ. Prac. & Rem. Code Ann. § 71.021.
[25] Cunningham v. Haroona, 382 S.W.3d 492, 507 (Tex. App.—Fort Worth 2012, no pet.); *see also* 1 Tex. Jur. 3d *Actions* § 222 (2023).
[26] Tex. Civ. Prac. & Rem. Code Ann. § 71.021(b).

inherit some part of the decedent's estate when the decedent dies without a will.[27] Dying without a will is called dying "intestate" in the law.[28] A person's surviving spouse, including common-law spouse, is included as an heir.[29] Claims filed by the estate are typically filed by an estate administrator.

i. How are heirs determined?

Heirs are determined by a court through a process called an heirship determination.[30] A lawyer is required to complete this process.[31] Determining heirship involves filing an application with the proper court for determination of heirship, conducting an heirship investigation, and ultimately having a hearing to provide the court with evidence on who the decedent's heirs are.[32]

In general, the court will start with the closest relationships and move outward, following statutory guidelines from the State called laws of intestate succession.[33] Under the laws of intestate succession, people who will commonly be considered heirs of a decedent are the decedent's spouse, children, parents, and siblings.[34] Individuals with other familial relationships may also be considered heirs in some situations depending on what other surviving family members are living at the time.[35]

ii. How long does heirship determination take?

The amount of time it takes to complete the heirship determination process depends on several factors, including the number and complexity of the familial relationships to the decedent and which court determines heirship. Some counties in Texas have dockets that are fuller than other counties, which can make it difficult to get hearing settings or get issues timely heard.

The application for proceeding to declare heirship requires certain information be included in the application, such as a list of all

---

[27] Tex. Est. Code Ann. § 22.015.
[28] *Intestate*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[29] Tex. Est. Code Ann. § 22.015.
[30] Tex. Est. Code Ann. § 31.001(3).
[31] Under Texas law, only a licensed attorney can represent the interests of a third-party, including in probate matters. *See, e.g.*, *In re* Guetersloh, 326 S.W.3d 737, 739 (Tex. App.—Amarillo 2010, no pet.) (citing Steele v. McDonald, 202 S.W.3d 926, 928–29 (Tex. App.—Waco 2006, no pet.)); *see also* Tex. Gov't Code Ann. § 81.102.
[32] Tex. Est. Code Ann. §§ 202.001–202.009.
[33] Tex. Est. Code Ann. § 201.001.
[34] *Id.*
[35] Tex. Est. Code Ann. § 201.101.

children born to or adopted by the decedent.[36] If a decedent had, for example, several children by several different partners, it could take additional time to gather this information.

Sometimes there are complicated relationships between the decedent and the surviving family that can make gathering this information difficult. For example, if the decedent potentially parented one or more children, but he was not listed on the birth certificate as the father, additional steps can be required to prove parentage, such as paternity testing.[37]

In short, it is difficult to say how long an heirship determination will take because there are case-specific variables that greatly influence the amount of time. On average, heirship determinations with little to no complications take a few months to complete.

iii. What is an estate administrator?

Probate is a legal process through which a court legally recognizes a person's death.[38] During this process, the court will authorize the management and distribution of the decedent's estate.[39] The management and distribution of a decedent's estate is called "administration," and the court will appoint an "administrator" to oversee that process.[40]

The administrator, once qualified, is an authorized representative of the estate and the decedent's heirs.[41] As an authorized representative, the administrator has what is called a "fiduciary duty" to the estate and to the decedent's heirs.[42] This means that the administrator must act in the best interest of the estate, not themself.[43] The administrator has several tasks that they must complete on behalf

---

[36] Tex. Est. Code Ann. § 202.005(4).
[37] Tex. Est. Code Ann. § 204.051(a).
[38] *See* Tex. Est. Code Ann. § 31.001; CRAIG HOPPER ET. AL., O'CONNOR'S TEX. PROBATE LAW HANDBOOK, at Ch. 1-A § 2 (2024 ed.).
[39] *See* Tex. Est. Code Ann. § 301.051.
[40] Tex. Est. Code Ann. §§ 301.051, 304.001(a).
[41] Tex. Est. Code Ann. § 305.002.
[42] Tex. Est. Code Ann. §§ 351.001, 351.101; Ali v. Smith, 554 S.W.3d 755, 762 (Tex. App. 2018) ("The fiduciary duty that an executor or administrator owes to the estate is derived from the statutes and common law."); *see* Humane Soc'y of Austin & Travis Cnty. v. Austin Nat'l Bank, 531 S.W.2d 574, 577 (Tex. 1975) ("As trustee of the property of the estate, the executor is subject to the high fiduciary standards applicable to all trustees.").
[43] *Id.*

of the estate, such as paying estate debts and distributing assets according to court orders.[44]

Family members most often serve as administrators, but it is not necessary for the administrator to have a familial relationship to the decedent.[45] To be appointed as an administrator in Texas, the person cannot have any felony convictions or otherwise be found unsuitable by the court.[46]

Courts will often also look at whether a person has other types of convictions for what are called crimes of "moral turpitude," meaning crimes that may reflect poorly on the person's truthfulness or character.[47] Some examples of crimes of "moral turpitude" are crimes of violence, stealing, embezzlement, and fraud.[48] If these convictions occurred a significant period of time before the person seeks to be appointed as administrator, a judge could still choose to approve the person to serve as administrator, but this is usually highly discretionary.

For example, Lisa seeks to be appointed as estate administrator for her mother, Pamela's estate. However, four years ago, Lisa was caught embezzling funds from an account at work and was convicted. Lisa would likely not be qualified to serve as administrator because of this conviction for a crime that involved "moral turpitude." Lisa's brother, Ethan, however, has never been convicted of any crime. Assuming Ethan meets other qualification requirements, Ethan could be appointed to serve as administrator for their mother's estate.

B. What can I get from filing a survival action claim?

Again, whether any lawsuit is successful depends on numerous case-specific factors, and there is never any guarantee that filing a lawsuit will result in a monetary award. Survival action claims attempt to compensate heirs and the estate of the decedent for losses the decedent suffered prior to their death.[49] The value of those losses will be converted into a dollar amount.

---

[44] *See, e.g.*, Tex. Est. Code Ann. § 351.051.
[45] *See* Tex. Est. Code Ann. § 301.051.
[46] Tex. Est. Code Ann. § 304.003(a)(2), (5).
[47] Duncan v. Board of Disciplinary Appeals, 898 S.W.2d 759, 761 (Tex. 1995) (defining crimes of moral turpitude as "those that involve dishonesty, fraud, deceit, misrepresentation…").
[48] *Id.*
[49] *See* Tex. Civ. Prac. & Rem. Code Ann. § 71.021.

Assuming there is money awarded, such as through a jury verdict or a settlement agreement, the money goes to the estate of the decedent and is split according to how the court has previously determined in the heirship determination proceeding.[50] In other words, the heirs do not determine how the money is split, and the money goes to the estate first to be distributed to the heirs.[51]

For example, Bryan and Melissa are the surviving children of Lois. Lois's husband, Marlin, is also still alive. The court issues its final heirship determination order and determines that Marlin is entitled to 50% of Lois's estate, and Bryan and Melissa are each entitled to 25% of Lois's estate. If a jury later awards Bryan, Melissa, and Marlin $100,000 in their survival action claim, $100,000 will go to Lois's estate to be paid out as follows: $50,000 to Marlin, $25,000 to Bryan, and $25,000 to Melissa.

C. When do I have to file a survival action claim?

Like with wrongful death claims, the right to bring a survival action claim does not last forever—the right to file that claim will be forfeited if it is not filed within the statute of limitations.[52] The statute of limitations for survival action claims is also two years in Texas, which typically begins at the death of the decedent.[53]

There is one exception to this rule with survival action claims. The statute of limitations for survival action claims can be suspended for up to one year after the decedent's death.[54] In effect, this can create up to three years after the decedent's death where a survival claim may be filed. The clock starts on the additional one year at the decedent's death and ends once the administrator is appointed.[55] Once the administrator is appointed, the two-year statute of limitations begins to run.[56]

---

[50] Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345 (Tex. 1992).
[51] *Id.*
[52] Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a).
[53] Tex. Civ. Prac. & Rem. Code Ann. § 16.003(b); Trapnell v. Sysco Food Servs., Inc., 850 S.W.2d 529, 550 (Tex. App.—Corpus Christi–Edinburg 1992), *aff'd*, 890 S.W.2d 796 (Tex. 1994) ("Thus, the rule now is that a wrongful death or survival claim accrues, at the latest, at the time of death."); Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 352 (Tex. 1990) (holding that the cause of action for injuries resulting in wrongful death accrues upon death, not upon discovery of the death).
[54] Tex. Civ. Prac. & Rem. Code Ann. § 16.062(a).
[55] Tex. Civ. Prac. & Rem. Code Ann. § 16.062(b).
[56] *Id.*

For example, if Delores died on May 5, 2021, the one-year clock would begin on that date. If Anne was appointed as the administrator of Delores's estate on January 18, 2022, then the two-year statute of limitations would begin to run on that date. Under the typical two-year statute limitations, a claim would need to be filed no later than May 5, 2023, but because the statute of limitations was suspended, the claim could be filed any time before January 18, 2024.

V. What does this mean for me?

Navigating grief and seeking out legal representation can be difficult to do simultaneously, but to ensure the best chance of success, it is important to contact an attorney as soon as possible.
Every death will not be a valid basis for a lawsuit. Sometimes knowing whether or not a lawsuit may be warranted can provide necessary closure for grieving families. Grief can become more complicated when a person dies because of the wrongful conduct of another, *i.e.*, where a family may have valid wrongful death or survival action claims. Mental health and community resources are vital for navigating grief, but the legal process can also often provide necessary closure for families in complicated grief situations.

This information is intended for educational purposes only and does not constitute legal advice. Always consult an experienced attorney for particularized information and advice.

The following is a supplementary infographic for *Navigating Wrongful Death Claims and Survival Action Claims in Texas* created to promote legal comprehension.

Suggested citation:

Alexandra W. Payne, *Navigating Wrongful Death Claims and Survival Action Claims in Texas,* ACCESSIBLE LAW, Fall 2023, at 45 app. illus.

What to Know about Wrongful Death and Survival Action Lawsuits

Not every death will be a valid basis for a lawsuit. Sometimes knowing whether a lawsuit may be warranted can provide necessary closure for grieving families. Two of the most common claims that family members file regarding the death of their loved ones are called wrongful-death claims and survival-action claims. Both claims are brought after someone has died if the death is caused by the wrongful conduct of another.

Talk to an Attorney

Lawsuits are complicated, and bringing wrongful-death claims and surival-action claims requires expertise. An attorney can help you navigate these complex waters.

Don't Wait

It is important not to wait. In Texas, the surviving family members have two years to file a lawsuit for wrongful death or survival action claims; after two years pass, a claim can no longer be brought.[1]

Should I file a claim?

A wrongful-death claim or survival-action claim can be brought where a decedent's death was caused by another person's or entity's wrongful conduct.[2] Wrongful conduct has a specific meaning in the law and does not include all situations in which a person dies, even if that death is traumatic or seemingly someone else's fault.[3]

Conduct that may be considered "wrongful" in one situation may not be considered "wrongful" in another setting.[4] Attorneys familiar with the law of the state in which you are located are best equipped to evaluate specific circumstances.

What do I get if I win the lawsuit?

Wrongful-death and surivial-action claims, if successful, result in a monetary award.[5]

Who can file a lawsuit?

Wrongful-Death Claim[6]

- Spouses
- Children
- Parents

Survival-Action Claim[7]

- Heirs
- Legal Representatives
- Estate

How are heirs determined?[8]

1. **Apply**
   Determining heirship involves filing an application with the proper court for determination of heirship proceedings.
2. **Investigate**
   An heirship investigation involves identifying relatives, evaluating the status of the decedent's property, and collecting additional evidence.
3. **Have a Hearing**
   Ultimately, the court will have a hearing where evidence of the decedent's heirs will be presented.

Source: *Navigating Wrongful-Death and Survival-Action Claims in Texas* by Alexandra Payne, Staff Attorney, The Law Offices of Dean Malone, P.C. Infographic by Garrett Littlejohn, Staff Reporter, Accessible Law (2023).

References

1 Tex. Civ. Prac. & Rem. Code Ann. § 16.003(b).

2 *Id*. § 71.002(b).

3 *Compare* Davis v. Bills, 444 S.W.3d 752, 757 (Tex. App.—El Paso 2014, no pet.) (the Wrongful Death Act governs wrongful-death claims arising from car accidents), *with* Bangert v. Baylor Coll. of Med., 881 S.W.2d 564, 566 (Tex. App.—Houston [1st Dist.] 1994, no writ) (The Medical Liability Act governs wrongful-death claims arising from medical malpractice).

4 *Id*.

5 *Davis*, 444 S.W.3d at 757 (first citing Tex. Civ. Prac. & Rem. Code Ann. § 71.004; and then Russell v. Ingersoll–Rand Co., 795 S.W.2d 243, 247 (Tex. App.—Houston [1st Dist.] 1990), *aff'd*, 841 S.W.2d 343 (Tex. 1992)); *See* Tex. Civ. Prac. & Rem. Code Ann. § 71.021.

6 Tex. Civ. Prac. & Rem. Code Ann. § 71.004.

7 *Id*. § 71.021(b).

8 Tex. Est. Code Ann. §§ 202.001–.009; Christy Bieber, *Wrongful Death Lawsuit Guide 2023*, Forbes Advisor (Mar. 7, 2023, 1:39 PM), www.forbes.com/advisor/legal/personal-injury/wrongful-death-lawsuit/.

LAW REVIEW
UNT DALLAS COLLEGE of LAW
ACCESSIBLE LAW

WHAT TO EXPECT WHEN YOU'RE AN EMPLOYEE EXPECTING: HOW THE NEW PREGNANCY WORKERS' FAIRNESS ACT STRENGTHENS WORKPLACE PROTECTIONS

Shannon Black & Brooke López*

Growing a human is hard work, and for many pregnant people, their pregnancy impacts all aspects of their lives. Doctors' appointments, nausea, and difficulty walking long distances, among other things, are not side effects of pregnancy limited to a pregnant person's time at home. Inevitably, many pregnant people require accommodations in the workplace to keep themselves and their babies healthy. Accommodations are modifications to the way an employee normally conducts their work, such as longer breaks, flexible hours, or exemptions from lifting heavy objects.[1] Unfortunately, many employers have been historically averse to granting pregnant workers the accommodations they need. Because of this, important anti-discrimination laws provide protections for pregnant people in the workplace. No pregnant person should be terminated, retaliated against, or otherwise discriminated against for requesting reasonable accommodation for their pregnancy. But what steps should a pregnant person take if this does happen? This article aims to inform you of your rights as a pregnant person in the workplace. Spoiler alert: these protections just got MUCH stronger.

Unfortunately, discrimination against pregnant workers is more common than we might hope. The Equal Employment Opportunity Commission ("EEOC"), the federal agency enforcing several anti-discrimination statutes, received 2,261 pregnancy discrimination charges during the 2021 fiscal year.[2] These charges include claims that employers failed to accommodate their pregnant employees. Yet it is likely there are far more instances of discrimination against pregnant workers than is reported to the EEOC. If you applied to work, currently work, or recently worked for an employer with fifteen or more employees in a calendar year, you may be entitled to an accommodation pursuant to federal anti-

* Trial Attorneys, U.S. Equal Employment Opportunity Commission.
Research assistance was provided by Alyssa Rodriguez, a law student at the University of North Texas at Dallas College of Law.
[1] *See e.g.*, H.R. Rep. No. 117-27, pt. 1, at 29 (2022).
[2] U.S. Equal Emp. Opportunity Comm'n, *Pregnancy Discrimination Charges FY 2010 - 2022*, https://www.eeoc.gov/data/pregnancy-discrimination-charges-fy-2010-fy-2022 (last visited Oct. 17, 2023).

discrimination statutes.[3] Below provides some guidance on these laws as applied in Texas, Mississippi, and Louisiana.

If I am a pregnant employee, what laws protect me from discrimination?

There are three laws that are designed to protect a pregnant person from discrimination: the Pregnancy Discrimination Act of Title VII ("PDA"), the Americans with Disabilities Act ("ADA"), and the Pregnant Workers Fairness Act ("PWFA"). Each law provides different types of rules for who qualifies for an accommodation and what type of accommodations you can seek. But don't worry, we're going to break down each law and the protections it provides in the coming paragraphs to make sure you're aware of your rights and the steps you need to take to enforce them.

Pregnancy Discrimination Act: Accommodations received by non-pregnant employees

Although other anti-discrimination laws existed prior to 1978, pregnant workers were largely unprotected in the workplace when it came to pregnancy-related accommodations they may require. In 1978, Congress made its first attempt to support pregnant workers by passing the Pregnancy Discrimination Act.[4] The PDA provides the narrowest protections out of the three statutes listed above. Under the PDA, an employee has access to accommodations granted to other non-pregnant employees in their workplace.[5] Essentially, the PDA attempts to level the playing field, giving pregnant workers access to the same accommodations their colleagues may receive for other disabilities. Generally, this means an employee seeking an accommodation under the PDA would need to show another non-

---

[3] *See* U.S. Equal Emp. Opportunity Comm'n, *What You Should Know About the Pregnant Workers Fairness Act*, https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act (last visited Nov. 12, 2023) ("The PWFA protects employees and applicants of 'covered employers' who have known limitations related to pregnancy, childbirth, or related medical conditions. 'Covered employers' include private and public sector employers with at least 15 employees, Congress, Federal agencies, employment agencies, and labor organizations.).

[4] *See* H.R. Rep. No. 117-27, pt. 1, at 5 (2022).

[5] 42 U.S.C.A. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."); *see also*, 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes.").

pregnant employee, or employee without a pregnancy-related condition, was already receiving the requested accommodation in nearly identical circumstances. Under the PDA, courts only consider whether someone else is receiving the same accommodation under similar circumstances.[6] While well-intentioned, the PDA, in practice, does not provide strong protection for pregnant workers seeking accommodations.

The main obstacle when asking for a PDA accommodation is providing evidence of non-pregnant individuals receiving the *same* accommodation.[7] The courts interpret these criteria very narrowly[8]. For example, in *Stout v. Baxter Healthcare Corp.*, an employee who was absent for roughly two and a half weeks while recovering from a miscarriage was not entitled to a short-term leave accommodation under the PDA because other non-pregnant employees were not permitted to take similar short-term leave.[9] Simply put, if a non-pregnant employee could not receive the accommodation, the PDA does not provide the same protection for a pregnant employee.

In another recent PDA case, *Carmona v. Dejoy,* a pregnant USPS rural mail carrier was unable to show other rural mail carriers received the same type of accommodation she requested.[10] The pregnant mail carrier requested two accommodations: that she not lift packages heavier than ten pounds and that she receive a break during any of her shifts lasting longer than eight hours.[11] USPS denied both accommodations.[12] The court held USPS did not have to accommodate her because she did not provide evidence of non-pregnant employees receiving the same accommodations under "nearly identical circumstances."[13] Specifically, the court said the pregnant mail carrier was only able to show that several of her coworkers received "package assistance" with large packages, not that they received an accommodation on all packages greater than ten pounds nor that they received a break during an eight-hour shift.[14] Because the accommodations received by non-pregnant employees were not

---

[6] *See e.g.*, Stout v. Baxter Healthcare Corp., 282 F.3d 856, 860 (5th Cir. 2002) (holding a pregnant employee terminated for absenteeism was not treated differently because she was pregnant).
[7] Id.
[8] *See id.* at 861.
[9] *Id.* at 860.
[10] Carmona v. Dejoy, No. 22-20064, 2022 U.S. App. LEXIS 31086, at *1-2, 5-6 (5th Cir. Nov. 9, 2022).
[11] *Id.* at *1-2.
[12] *Id.* at *2.
[13] *Id.* at *6.
[14] *Id.* at *5.

similar enough, the pregnant employee was not entitled to an accommodation.[15] You can see the courts follow a very strict standard when enforcing the PDA.

These real-life examples demonstrate how the PDA alone isn't strong enough to protect pregnant employees from discrimination or accommodation denial. Don't be discouraged. Luckily, we have additional protections in place to support pregnant workers in America.

Americans with Disabilities Act: Accommodations for disabilities stemming from pregnancy

Under the ADA, an employee is entitled to an accommodation for pregnancy-related conditions that are considered qualifying disabilities.[16] A qualifying disability is defined as a physical or mental impairment that substantially limits one or more major life activities.[17] Yet "absent unusual circumstances pregnancy and related medical conditions do not constitute a physical impairment" under the ADA.[18] EEOC's *Enforcement Guidance on Pregnancy Discrimination and Related Issues* notes pregnancy itself is not a qualifying disability.[19] Rather, courts have typically only found pregnancy-related conditions that don't fall within "normal" or non-high-risk pregnancies to be qualifying disabilities.

Showing a pregnancy-related condition constitutes a qualifying disability can be a challenging obstacle in seeking an ADA accommodation. Because the ADA requires "unusual circumstances" outside of a "normal" pregnancy to be present to support an accommodation, the protections for pregnant workers under the ADA are limited. This means that many beneficial accommodations for pregnant workers are not protected under the ADA in a large percentage of circumstances.

---

[15] *Id.*
[16] *See* 42 U.S.C. § 12112 (b)(5)(A) (defining discrimination as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability") *and* § 12102 (2)(B) (defining disability as one of many "major life activities" including "reproductive functions").
[17] *Id.* § 12102(2).
[18] Tomiwa v. PharMEDium Servs., LLC, No. 4:16-CV-3229, 2018 WL 1898458, at *10 (S.D. Tex. Apr. 20, 2018).
[19] U.S. Equal Emp. Opportunity Comm'n, 915.003, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015).

When a pregnant worker contends to have a "physical impairment that significantly limits her reproductive ability to carry a normal pregnancy," such as having an incompetent cervix half the typical size, the Fifth Circuit Court of Appeals affirmed that the ailment may qualify as a disability under the ADA.[20] Hyperemesis gravidarum, a diagnosis of severe morning sickness characterized by dehydration, weight loss, and frequent dizziness[21], may also qualify a pregnant person as disabled and eligible for reasonable accommodation under the ADA.[22] While high-risk pregnancy symptoms or complications may be considered a disability, complications such as "normal" morning sickness, leave for routine doctors' visits, and other requests do not fall under the protection of the ADA.[23]

Yet there are also many cases where courts found severe, life-threatening complications did not rise to the disability standard required under the ADA. For example, when a pregnant woman experienced painful cramping, bleeding, and a miscarriage, a court held that she "was not disabled for purposes of the ADA because there [was] no evidence her cramps limited her ability to work or other major life activities."[24] In 2020, one court held that a woman with preeclampsia, one of three leading causes of maternal mortality, did not have an ADA-qualifying disability because she failed to sufficiently demonstrate how the complication limited her major life activities.[25]

By 2021, it was clear that federal law was failing to provide adequate protections to pregnant workers. When pregnant workers are not provided reasonable accommodations they require, they are often forced to choose between the impossible: financial stability for their family, and the health and safety of their pregnancy. Clearly, something had to change.

---

[20] Appel v. Inspire Pharms., Inc., 712 F. Supp. 2d 538, 546 (N.D. Tex. 2010), *aff'd*, 428 F. App'x 279 (5th Cir. 2011).
[21] Cleveland Clinic, Hyperemesis Gravidarum: Causes, Symptoms & Treatment, https://my.clevelandclinic.org/health/diseases/12232-hyperemesis-gravidarum (last modified February 21, 2023).
[22] Hernandez v. Clearwater Transp., Ltd., 550 F.Supp.3d 405 (W.D. Tex 2021).
[23] *See* Jessie v. Carter Health Care Ctr., Inc., 926 F.Supp. 613 at *616 (E.D.Ky. 1996) (employee's pregnancy with no unusual circumstances was not a disability under the ADA.).
[24] Adireje v. ResCare, Inc., No. 1:18-CV-01429-TWP-DLP, 2019 U.S. Dist. LEXIS 170125, at * 16 (S.D. Ind. 2019).
[25] H.R. Rep. No. 117-27, pt. 1, at 21 (2022).

Pregnant Workers Fairness Act: Accommodations for "normal" or non-high-risk pregnancies

Luckily, Congress also recognized the shortcomings of federal law to protect pregnant workers and passed the Pregnant Workers Fairness Act. Committee notes go so far as to address this exact need for more protections, stating, "When Congress passed the [PDA] . . . its objective was to eradicate pregnancy discrimination in the workplace. Yet nearly forty-three years after its passage, federal law still falls short of guaranteeing that all pregnant workers have reasonable workplace accommodations."[26]

The PWFA has the most expansive definition of who qualifies for accommodations and what type of conditions are protected. Under the PWFA, a qualified employee is entitled to an accommodation for known limitations stemming from pregnancy, childbirth, or related medical conditions absent undue hardship.[27] Let's break that down.

You can only receive an accommodation under the PWFA if you are a qualified employee. The term "qualified employee" is an employee or applicant that can perform the essential functions of their job with or without a reasonable accommodation *or* individuals that are (1) unable to perform an essential function for a temporary period, (2) the essential function can be performed in the near future, and (3) the inability to perform the function can be reasonably accommodated.[28] Pursuant to the PWFA, individuals seeking an accommodation are still qualified if they are unable to engage in essential functions of their job for only a short period of time knowing they will eventually be able to engage in those functions again upon their recovery.[29] Hypothetically, a pregnant employee that normally takes patient x-rays as part of her job, can still be a qualified employee even if she requests an accommodation to forgo taking x-rays for the remainder of her pregnancy. That is because she will likely be able to take x-rays again after she gives birth, making her accommodation temporary.

You can seek an accommodation under the PWFA for any known limitations stemming from pregnancy, childbirth, or related medical conditions. The term, "known limitation" is a physical or mental condition related to, affected by, or arising out of pregnancy,

---

[26] *Id.* at 5.
[27] 42 U.S.C. § 2000gg-1.
[28] *Id.* § 2000gg(6).
[29] *Id.*

childbirth, or a related medical condition that an employee has communicated to the employer.[30] The PWFA covers a broader set of limitations than the other rules discussed above.

Hypothetically, the PWFA's expanded definition would include limitations that fall within a "normal" or non-high-risk pregnancy such as morning sickness, vaginal bleeding, increased risk of falls, or general inability to lift items unrelated to a separate severe complication. Some "normal" pregnancy accommodations considered when PWFA was debated in congressional committee included use of a stool to sit on; additional breaktime to use the bathroom, eat, and rest; appropriately sized uniforms and safety apparel; and excusing workers from activities that involve exposure to unsafe compounds or materials.[31]

What conditions are covered outside of pregnancy and childbirth?

Good news! Accommodations are not exclusively limited to currently-pregnant individuals. You may be entitled to an accommodation if you have another condition related to pregnancy or childbirth. Each of the three laws above have similar definitions of what conditions are considered related to pregnancy and childbirth. Here are some of the most common conditions considered.

Breastfeeding & lactation

Breastfeeding and lactation are considered conditions related to pregnancy. This is because "lactation is a normal aspect of female physiology that is initiated by pregnancy and concludes sometime thereafter."[32] Accommodations for breastfeeding typically include break time or special facilities to pump, or express milk.[33]

However, each of the three rules above treat breastfeeding accommodations differently. Under the PDA, breastfeeding accommodations are seldom granted because courts have held that without a proper comparator, breastfeeding and lactation do not impose a requirement for a special accommodation.[34] Under the ADA,

---

[30] *Id.* § 2000gg(4).
[31] H.R. Rep. No. 117-27, pt. 1, at 22 (2022).
[32] EEOC v. Hous. Funding II, Ltd., 717 F.3d 425, 429 (5th Cir. 2013).
[33] 29 U.S.C.A. § 218d(a)(1) (West).
[34] *See Hous. Funding II, Ltd.*, 717 F.3d at 430 (E. Jones concurring) ("…PDA does not mandate special accommodations to women because of pregnancy or related conditions."). *See also* Bye v. MGM Resorts Int'l., Inc., No. 1:20cv3-HSO-RHWR, 2021 U.S. Dist. LEXIS 240265, at *20-21 (S.D. Miss. Dec. 16, 2021) (finding a

an individual would have to show that she suffers from a disability associated with breastfeeding or lactation that substantially limits a major life activity. Normally, lactation itself is not considered a disability.[35] The most liberal rule would be the PWFA. Lactation falls within related medical conditions stemming from "known limitations of pregnancy."[36] Under the PWFA, an individual does not need to show someone else has a similar accommodation, nor that they have a disability to receive breastfeeding accommodations.[37]

Menstruation

Menstruation is considered a condition related to pregnancy as well. This is because menstruation "is a normal aspect of female physiology, which is interrupted during pregnancy, but resumes shortly after the pregnancy concludes."[38] Menorrhagia, is a form of severe menstrual bleeding that is heavy and long-lasting can complicate pregnancy by ectopic pregnancy or miscarriage.[39] Endometriosis, a condition where uterine tissue grows in locations other than the uterus, can result in infertility, extreme pain, and severe menstrual bleeding.[40] Under the ADA alone, individuals with endometriosis regularly failed to succeed in court defining endometriosis as a disability.[41] Both menorrhagia and endometriosis are intertwined with pregnancy and reproduction, and it is likely the PWFA will provide support to those seeking care.

---

breastfeeding employee was not entitled to a break time accommodation because she could not find similar comparators).

[35] Mayer v. Prof'l Ambulance, LLC, 211 F. Supp. 3d 408, 420 (D.R.I. 2016) (holding lactation itself falls within the "normal" aspects of pregnancy and does not qualify as a disability); Tsepenyuk v. Fred Alger & Co., 2022 U.S. Dist. LEXIS 57526, at *24 (S.D.N.Y. Mar. 29, 2022) ("To the extent Plaintiff is arguing that her breast pumping and lactation constitutes a disability under the ADA, she cites no caselaw, nor is the Court aware of any precedent supporting this assertion.")

[36] *See,* Delanoy v. Twp. of Ocean, 245 N.J. 384, 396 A.3d 188 (2021).

[37] *Id.*

[38] *Hous. Funding II, Ltd.*, 717 F.3d at 429.

[39]Cleveland Clinic, Heavy Menstrual Bleeding (Menorrhagia): Causes & Treatment, https://my.clevelandclinic.org/health/diseases/17734-menorrhagia-heavy-menstrual-bleeding (last modified Nov. 11, 2021).

[40] Mayo Clinic, *Endometriosis*, https://www.mayoclinic.org/diseases-conditions/endometriosis/symptoms-causes/syc-20354656 (last modified Oct. 12, 2023).

[41] Kampmier v. Emeritus Corp., 472 F.3d 930, 938 (7th Cir. 2007); Aleman v. Sharp, No. 97-6186, 1998 U.S. App. LEXIS 18289, *11 (10th Cir. Aug. 7, 1998); Tarpley v. City Colls. of Chi., 752 F. App'x 336, 350 (7th Cir. 2018).

IVF

In vitro fertilization, or IVF, is a fertility treatment considered to be a medical condition related to pregnancy. Some women receive in vitro fertilization because of tubal obstruction, severe endometriosis, ovulatory dysfunction, or infertility of unexplained causes.[42] The use of IVF can be considered a medical condition related to pregnancy because seeking fertility treatments is done pre-pregnancy and can result in pregnancy-related complications. Although under the PDA, some courts found that in order for infertility to fall within the PDA's inclusion of "pregnancy. . . and related medical conditions" the condition must be unique to women.[43] The PWFA is meant to protect related conditions, and should include the use of in vitro fertilization.[44] Globally, approximately one in six people have experienced infertility at some stage in their lives.[45] Yet many U.S. employers do not have policies in place to accommodate employees and allow time off for fertility treatments, pregnancy loss, and other medical conditions.

While infertility and related conditions can be protected under the ADA, the PWFA requires covered employers to make accommodations to the "known limitations" related to pregnancy, childbirth, or related medical conditions thereby allowing women to be reasonably accommodated to attend appointments and undergo treatments.[46] Just as the Legislature enacted the PDA to give women the right to be financially and legally protected before, during, and after pregnancy, the new PWFA does as well. Under the PWFA, an employee could request leave for IVF treatment in order to get pregnant. Ways in which an employer can reasonably accommodate women undergoing IVF treatments could be through schedule changes, time off, or allowing telework for an employee who is feeling fatigued from IVF.[47]

---

[42] Anis Fadhlaoui, et al., *Endometriosis and Infertility: How and When to Treat?*, Frontiers in Surgery, 1 (July 2, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4286960/pdf/fsurg-01-00024.pdf.

[43] Saks v. Franklin Covey Co., 316 F.3d 337, 346 (2d Cir. 2003).

[44] *Id.*

[45] World Health Organization, *Infertility Prevalence Estimates, 1990-2021*, 25 (Apr. 3, 2023), https://www.who.int/publications/i/item/978920068315.

[46] H.R. Rep. No. 117-27, pt. 1, at 26 (2022).

[47] Regulations To Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54730 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

What should I do if I request an accommodation for pregnancy but don't receive it?

So far, this article has described the rights you have as a pregnant worker. But what practical steps should you take if your rights are violated? Well, you may be able to file a charge of discrimination under the PWFA with the EEOC if you meet the following criteria:[48]

1. The discriminatory incident occurred on or after June 27, 2023[49] and, typically, 180 calendar days have not passed since the incident[50].
2. You work for a qualified employer. Ordinarily, this means your employer has more than fifteen employees.[51]
3. You requested a reasonable accommodation under the PWFA
4. Your employer responded to your accommodation request by
    a. Requiring you to accept an accommodation without a discussion about the accommodation between the you and your employer;
    b. Denying a job or other employment opportunity to you because of your request for accommodation;
    c. Requiring you to take leave instead of another reasonable accommodation that would have let you keep working;
    d. Retaliate against you for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
    e. Interfering with any worker's rights under the PWFA.

---

[48] U.S. Equal Emp. Opportunity Comm'n, *What You Should Know About the Pregnant Workers Fairness Act*, https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act (last visited Oct. 17, 2023).

[49] However, just because the discriminatory incident happened before the PWFA came into effect, does not mean you may not still be protected under another federal law! The EEOC can also refer you to other agencies that may be able to support you. U.S. Equal Emp. Opportunity Comm'n, *EEOC Public Portal,* https://www.eeoc.gov/eeoc-public-portal (last visited Oct. 17, 2023).

[50] In many circumstances, a charging party may be able to file within 300 days of the discriminatory incident. The 180-calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. U.S. Equal Emp. Opportunity Comm'n, *Time Limits For Filing A Charge,* https://www.eeoc.gov/time-limits-filing-charge (last visited Oct. 17, 2023).

[51] U.S. Equal Emp. Opportunity Comm'n, *Overview*, https://www.eeoc.gov/overview (last visited Oct. 17, 2023).

Filing a charge with the EEOC can be done independently online through the EEOC Public Portal.[52] When you open the Portal, select "Filing with EEOC ." A lawyer is not required to file a charge. However, some charging parties prefer to contact a lawyer before filing a charge to receive advice during the process.

[52] U.S. Equal Emp. Opportunity Comm'n, *EEOC Public Portal,* https://www.eeoc.gov/eeoc-public-portal (last visited Oct. 17, 2023).

The following is a supplementary infographic for *What to Expect When You're an Employee Expecting: How the New Pregnancy Workers' Fairness Act Strengthens Workplace Protections* created to promote legal comprehension.

Suggested citation:

Shannon Black & Brooke López, *What to Expect When You're an Employee Expecting: How the New Pregnancy Workers' Fairness Act Strengthens Workplace Protections*, ACCESSIBLE LAW, Fall 2023, at 58 app. illus.

PREGNANCY IN THE WORKPLACE

I requested an accommodation for pregnancy but didn't receive it. Can I file for discrimination?

If you meet the four criteria below, you may be eligible to file a charge of discrimination with the EEOC:[1]

1. The discriminatory incident occurred on or after June 27, 2023[2], and is typically less than 180 calendar days since the incident[3].

2. Your employer has more than 15 employees.

3. You made a reasonable accommodation request.

(Requests that do not cause your employer a large expense, such as additional bathroom breaks, or a chair to avoid long periods of standing.[4])

4. When you made your request, your employer responded by any of the following:

- You were assigned an accommodation without an opportunity to discuss your needs.
- You were denied a job or employment opportunity because of the request.
- You were forced to take a leave of absence.
- You experienced retaliation from your employer.

Source What to Expect when You're an Employee Expecting: How the New Pregnancy Workers' Fairness Act Strengthens Workplace Protections by Shannon Black & Brooke López. Infographic created by Kate Johnson, Staff Editor (2023-2024).

References

1 U.S. Equal Emp. Opportunity Comm'n, *What You Should Know About the Pregnant Workers Fairness Act*, https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act (last visited Oct. 17, 2023).

2 U.S. Equal Emp. Opportunity Comm'n, *EEOC Public Portal*, https://www.eeoc.gov/eeoc-public-portal (last visited Oct. 17, 2023).

3 U.S. Equal Emp. Opportunity Comm'n, *Time Limits for Filing a Charge*, https://www.eeoc.gov/time-limits-filing-charge (last visited Oct. 17, 2023).

4 H.R. Rep. No. 117-27, pt. 1, at 22 (2022).

LAW REVIEW
UNT DALLAS COLLEGE of LAW
ACCESSIBLE LAW