

# Civil Rights Reporter

Journal of the Texas Workforce Commission Civil Rights Division

ISSUE  
**03**  
MAY  
2019

## Equal Employment & Fair Housing

### Texas Workforce Commission Commissioners

Ruth R. Hughs - Chair & Commissioner Representing Employers

Julian Alvarez - Commissioner Representing Labor

Robert D. Thomas - Commissioner Representing the Public

## Indefinite Leave is not a Reasonable Accommodation

By: Roberto Gonzalez, Jr., CRD EEO Investigator



On March 16, 2018, Complainant filed a Charge with the Civil Rights Division (CRD) alleging

she was subject to discharge, harassment, and inequitable terms and conditions because of her age (52), disability (torn rotator cuff), color (Brown), national origin (African-American), and race (Black); she also alleged failure to accommodate her disability, and retaliation for requesting a reasonable accommodation. However, Complainant did not

provide evidence of unfavorable treatment based on age, color, national origin or race. Complainant stated the entity she worked for refused to provide sufficient time for recovery following a workplace injury that prevented her from performing her daily duties as a lab assistant. The injury occurred in May 2017, and Complainant exhausted her leave by August 2017.

Complainant submitted Americans with Disabilities Act paperwork requesting continuation of her light duty status for an indefinite period. Respondent did not have a light

duty assignment available and stated an indefinite amount of leave would create an undue hardship. After reviewing the case, CRD made a preliminary determination of no reasonable cause in accordance with *Delaval v. P Tech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 481 (5th Cir. 2016), a Fifth Circuit Court of Appeals decision which states that employers are not required to provide indefinite leave as a reasonable accommodation. To protect the parties' confidentiality as required by Chapter 21 of the Texas Labor Code, the Division is refraining from providing specific details of this complaint.

### Mission Statement

The mission of the Civil Rights Division is to reduce discrimination in employment and housing through education and enforcement.

### Vision

The vision of the Civil Rights Division is to help create an environment in which the people of the State of Texas may pursue and enjoy the benefits of employment and housing that are free from discrimination.



## CRD and the 86th Legislative Session

By: Lowell A. Keig, Civil Rights Division Director



The 86th Legislative Session is in full swing. As a result, the CRD has been busy analyzing over 40 bills involving equal employment or fair housing and spending time at the Capitol to serve as resource witnesses to testify “on” (not for or

against) several bills per the requests of legislators.

Filed equal employment-related bills include the following:

- Sexual harassment protections and training
- Employment protection of emergency evacuees
- Sexual orientation, and gender identity or expression as protected classes
- Discriminatory payment of compensation (like the federal “Lilly Ledbetter Act”)



Photo courtesy of CRD

- Prohibition on collecting wage history
- Prohibition of certain agreements on nondisclosure and arbitration
- Discrimination against a survivor of family violence or assault
- Discrimination based on reproduction decisions
- Removal of age limit for prohibition on training program discrimination
- Pregnancy accommodations

Filed fair housing bills include:

- Fair Housing Act updates (to mirror federal law)
- Sexual orientation, and gender identity or expression as protected classes

At times, things become very “lively” for us during the legislative session when we receive information requests from legislators through our governmental relations office for time-sensitive information that aids in analyzing proposed legislation. We work as quickly as possible to produce such information, most often within the same business day.

Due to strict timelines, the session begins as a brisk walk, then continues to a fast jog in the middle and ends as a sprint. It is an exciting time, and we are all ready to catch our breath after the last day of the regular session, or *sine die*. In case you were wondering about this curious Latin phrase, it translates as “without day,” meaning “without assigning a day for a further meeting.”

## Recent Employment Case Law Summary

By: Corra Dunigan, TWC Assistant General Counsel



**Wittmer v. Phillips 66 Co.**  
2019 U.S. App. LEXIS 3731  
(5th Cir. February 6, 2019)

This case came before the Fifth Circuit on appeal by Plaintiff Wittmer after the district court granted summary judgment to Phillips 66 on her claims of discrimination based upon her transgender status. Wittmer, a transgender woman, applied for a position with Phillips 66 in 2015. During the interview process, she was asked about her current position with Agrium. She indicated that there were projects with Agrium that would require significant future travel, which was why she was looking for a new job. Phillips 66 offered her the job, contingent upon a background check; the background check revealed that Wittmer was in fact terminated by Agrium, and that termination occurred before she explained her reasons for searching for a new job in her interview. Based on what they believed was a serious misrepresentation, Phillips 66 made the decision to rescind her offer on September 8. Two days later, Wittmer sent an e-mail to Phillips 66's human resources manager and another employee, accusing them of transgender discrimination. Phillips 66 responded to her that they were unaware of her status as a transgender woman, and that would not have any effect on their decision. On September 14, Phillips 66 formally rescinded the offer of employment due to the

discrepancies in Wittmer's background check.

A year later, Wittmer filed a charge of discrimination and received a notice of right to sue from the Equal Employment Opportunity Commission (EEOC). Wittmer filed suit alleging discrimination based on transgender status. Phillips 66 did not argue whether Title VII prohibits transgender discrimination but moved for summary judgment claiming Wittmer "failed to state a prima facie case of discrimination based on transgender status," and that she "failed to present a genuine issue of material fact that the non-discriminatory reason offered by Phillips 66 was pretextual." The district court ultimately found in favor of Phillips 66 on these two summary judgment issues. In that ruling, however, the district court found that Title VII did prohibit transgender discrimination, relying on rulings from the Second, Sixth, and Seventh Circuits as persuasive authority.

In this appeal, the Fifth Circuit court upheld the district court's judgment granting of Phillips 66's motion for summary judgement. The appellate court goes on to address whether Title VII prohibits discrimination based on transgender status by noting that "[t]his appeal nevertheless attracted substantial amicus attention on the question of whether Title VII prohibits transgender discrimination." The EEOC filed an amicus brief asking the Fifth Circuit to hold that Title VII does indeed prohibit discrimination based on transgender status. There were



Photos courtesy of Getty Images

other organizations which also filed amicus briefs arguing that Title VII prohibits transgender discrimination; none of these organizations, including the EEOC, took a position on the lower court's ruling on the motion for summary judgement.

In this opinion, Judge Ho appears to presume that the district court was unaware that this issue had been addressed by the Fifth Circuit years prior in the case *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Circuit 1979). In *Blum*, "...we expressly held that Title VII does not prohibit discrimination on the basis of sexual orientation. *Blum* remains binding precedent in this circuit to this day. Our sister circuits—including those favorably quoted in the district court's published opinion—recognize *Blum* as our precedent."

It should be noted that on April 22, 2019, the Supreme Court of the United States granted certiorari on three cases (arising out of the 2nd, 6th, and 11th circuits) in which the Court will decide whether Title VII of 1964 prohibits discrimination on the basis of sexual orientation or an individual's status as transgender.

## Recent Housing Case Law Summary

By: Roberta Swan, TWC Legal Assistant



**Walsh v. Friendship Village of South County**, No. 4:18CV1222 JCH, 2019 U.S. Dist. LEXIS 7630 (E.D. Mo. 2019)

This case comes on a Motion for Summary Judgment when Plaintiffs sued Defendant alleging a violation of 42 U.S.C. § 3601 of the Fair Housing Act (FHA). Plaintiffs, Mary Walsh and Beverly Nance have been in a committed relationship for four decades and were married in Massachusetts on July 30, 2009. Plaintiffs wanted to move out of their single-family residence and into a senior living community. They visited Friendship Village (FV), a senior living community. The Plaintiffs visited the center multiple times, discussed pricing and floor plans with the living center, put a deposit down for a unit, and joined a waiting list. Thereafter, FV contacted the Plaintiffs and asked them the nature of their relationship; Ms. Walsh stated that they were legally married. On July 29, 2016 the Plaintiffs received a letter from FV stating that “(y)our request to share a single unit does not fall within the categories permitted by the long-standing policy of Friendship Village Sunset Hills, a copy of which is enclosed.” FV’s policy stated: “It

is the policy of Friendship Village Sunset Hills, consistent with its longstanding practice of operating its facilities in accordance with biblical principles and sincerely-held religious standards, that it will permit the cohabitation of residents within a single unit only if those residents, while residing in said unit, are related as spouses by marriage, as parent and child or as siblings. The term ‘marriage’ as used in this policy means the union of one man and one woman, as marriage is understood in the Bible....This policy, which has applied to all new residents for many years, will continue to apply to all new residents.”

Thereafter Plaintiffs filed a housing complaint against FV alleging discrimination based on sex in violation of the FHA. Each Plaintiff alleged that FV denied them access to housing “...because of her own sex (female) and because of the sex of her spouse (female), since if either Plaintiff had been a man married to a woman, they would not have been denied housing. Furthermore, Defendants denied Plaintiffs housing because they do not conform to traditional sex stereotypes[; namely] that a married woman should be in a different-sex relationship[,] that a married woman’s spouse should be a man[,] and that women should be attracted

to and form relationships with men, not women.”

The Court first reviewed Plaintiffs’ initial assertion that “had Ms. Walsh been a man married to Ms. Nance (or vice versa), she would not have been denied housing at Friendship Village.” The Court rejected the Plaintiffs’ assertion of discrimination based on sex, and instead found that “sexual orientation rather than sex lies at the heart of Plaintiffs’ claims.” The Court found that the Plaintiffs sexual orientation was lesbian wherein “they are women whose primary emotional, romantic, and sexual attractions are to other women.” “The Eighth Circuit has squarely held that Title VII does not prohibit discrimination against homosexuals.” The Court noted that many other Courts have followed this line of reasoning regarding Title VII. The Court dismissed this part of Plaintiffs’ claim because of previous standing by the Eighth Circuit.

The second issue reviewed by the Court is whether the Plaintiffs were “treated less favorably because of their association with person of a particular sex, i.e. their same-sex spouse.” Plaintiffs stated that if Ms. Walsh have been a man with Ms. Nance or vice versa then neither of the Plaintiffs would have been denied access to housing at FV. The Court denied this portion of

the Plaintiffs' claim because the Plaintiffs did not provide evidence to show that there is a statutory basis for their claims because Title VII does not prohibit housing discrimination based on sexual orientation.

Lastly, the Plaintiffs assert that "they were treated less favorably on the basis of their nonconformity with sex stereotypes[; specifically,] that a married woman should be in a different-sex relationship[,] that a married woman's spouse should be a man[,] and that women should be attracted to and form relationships with men, not women." When determining whether there is actionable discrimination regarding this allegation, the Court must proceed by distinguishing

"between discrimination based on stereotypical notions of femininity and masculinity and that based on sexual orientation, determining the former is actionable under Title VII while the latter is not." The Court found in this case the allegations that were asserted by the Plaintiffs were based solely on their sexual orientation and not on sexual-stereotyping. The Court further stated that "sexual orientation alone cannot be the alleged gender non-conforming behavior that gives rise to an actionable Title VII claim under a sex-stereotyping theory, as to hold otherwise would be contrary to well-settled law that Title VII does not prohibit discrimination on the basis of sexual orientation. A gender stereotyping claim should

not be used to bootstrap protection for sexual orientation into Title VII."

Although this housing discrimination case is not from the 5th Circuit, the 5th Circuit has held that Title VII does not prohibit discrimination against an individual based on their sexual orientation. In fact, this issue was recently addressed in the case of *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019). In *Wittmer*, the 5th Circuit, held that sexual orientation in employment cases is not covered under Title VII, based on a previous holding by this court in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), and which "remains binding precedent in this circuit to this day."



Photos courtesy of Friendship Village

## Workforce Utilization Analysis Tool

By: Ellena Rodriguez, TWC EEO Compliance Monitor



Employers, it is time to conduct your biennial workforce analysis and update your recruitment plan. For best results, use the recently revised Texas Workforce Commission (TWC) Microsoft Excel [Workforce Utilization Analysis Tool](#) posted under the Learn about the Personnel Policies and

Procedures Reviews section of the Texas Workforce Commission (TWC) website at <https://twc.texas.gov/partners/civil-rights-discrimination>.

For each state fiscal biennium, every state entity (including a state institution of higher education, but not a junior college) is required to analyze its workforce by comparing the number of African Americans, Hispanic Americans and females in every agency and in each job category to the available African Americans, Hispanic Americans and females in the statewide civilian workforce to determine the percentage of exclusion or underutilization in each job category (Tex. Lab. Code §21.501).

TWC has attempted to make your workforce analysis as simple and straightforward as possible. To begin,

simply enter your workforce data under the 'Data Inputs' tab of the spreadsheet and then click on the 'Final Results' tab, which shows whether you have any job categories with a potential underutilization of African Americans, Hispanic Americans or females.

Each state entity must use its workforce availability analysis to create (or update) and implement a recruitment plan for any job category in which an exclusion or underutilization of African Americans, Hispanic Americans or females exists. TWC is responsible for monitoring state entities for compliance (Tex. Lab. Code §21.502). TWC reviews recruitment plans to ensure that entities have a current plan that specifies steps the entity will take to address a potential underutilization. For example, if a potential underutilization of African Americans as Officials/Administrators exists, an entity may state that it will network and post those positions with historically black colleges and universities and African American chambers of commerce.

If you have questions, please feel free to contact the Compliance Monitoring Program by email: [CRDReviews@twc.state.tx.us](mailto:CRDReviews@twc.state.tx.us) or (512) 463-4650.



Photos courtesy of Getty Images

## Civil Rights Division Education, Training & Outreach

The Texas Workforce Commission Civil Rights Division (CRD) is committed to providing training and outreach to housing providers, housing consumers, and other stakeholders. We believe that discrimination can be averted if everyone knows their rights and responsibilities.

### Recent CRD Outreach and Education Programs and Activities

Each year, Ed Hill, CRD's Trainer and Outreach Coordinator, participates in numerous business conferences, training sessions, and outreach/networking events throughout the state. Since distribution of the last issue of the Civil Rights Reporter, Hill conducted several instructor-led, Equal Employment Opportunity (EEO) and Fair Housing training sessions and supported more than 900 participants at a business conference in Houston. Additionally, Hill partnered with Kelly Robinson, a Dallas-area Equal Employment Opportunity Commission (EEOC) Investigator, to support 1100 personnel at a business conference in Dallas and delivered a "Service and Assistance Animals" presentation at the Texas Realtors Annual Winter Meeting.

During the first week of February 2019, Hill partnered with Maria Morrow, a TWC Vocational Rehabilitation Services Counselor at the Special Olympics Texas (SOTX) Winter Games. During this event, the duo provided information about equal employment, fair housing rights, and rehabilitative services for participants with disabilities who are



Edward Hill, CRD (l) and Maria Morrow, TWC Vocational Rehabilitation Services (r). Photos courtesy of CRD

transitioning to adulthood and their families. The shared information is critical for assisting persons with disabilities in overcoming substantial employment and housing barriers as well as obtaining, retaining, and advancing in employment.

For more information about inviting the CRD to an upcoming event, please contact CRD at (888) 452-4778 or by email at [CRDTraining@twc.state.tx.us](mailto:CRDTraining@twc.state.tx.us).

### Meet Us at Upcoming Texas Business Conferences

TWC's [Chair and Commissioner Representing Employers](#) sponsors the Texas Business Conferences (TBCs), a series of employer seminars held each year throughout the state. Employers who attend the seminars learn about state and federal employment laws and the unemployment claim and appeal process. TWC Chair Ruth Hughs and her staff assemble excellent speakers to guide you through ongoing matters of concern to Texas employers and to answer any questions you have regarding your business. Each conference is geared toward

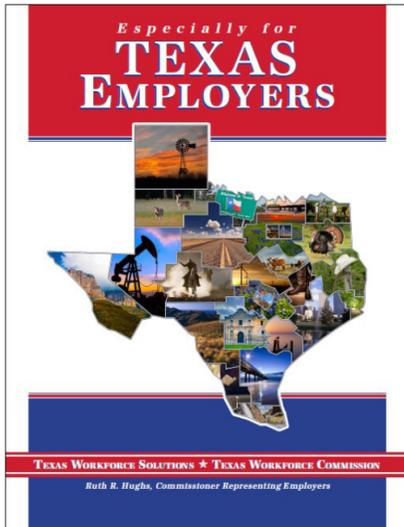
small business owners, HR managers and assistants, payroll managers, and anyone responsible for the hiring and managing of employees. CRD outreach personnel regularly participate in these events by staffing an information booth to provide details about the state's EEO and Fair Housing programs and provide technical assistance to conference participants. Please see the listing of upcoming TBCs and dates below:

- Eagle Pass, TX:** May 9, 2019 - Eagle Pass International Center for Trade (ITC)
- San Antonio, TX:** June 7, 2019 – Hyatt Regency San Antonio
- Texarkana, TX:** June 21, 2019 – Texarkana Convention Center
- Horseshoe Bay, TX:** July 11-12, 2019 – Horseshoe Bay Resort
- Midlothian, TX:** August 30, 2019 – Midlothian Conference Center
- Wichita Falls, TX:** September 13, 2019 – Wellington Banquet & Conference Center
- Longview, TX:** September 20, 2019 – Maude Cobb Convention Center & Activity Complex

For more information and registration,

# CRD Training

go to <http://www.twc.state.tx.us/texas-business-conferences>.



Photos courtesy of TWC Design Services

## Fair Housing Computer Based Training

CRD offers a free Fair Housing Overview Computer-Based Training (CBT) module for housing providers, consumers, realtors, and lenders. This CBT enables participants to learn about fair housing at their own pace and location, using personal computers. For registration information, send an e-mail to [crdtraining@twc.state.tx.us](mailto:crdtraining@twc.state.tx.us).

## Fair Housing Instructor-Led Training

CRD representatives are available on a limited basis at low to no cost to deliver fair housing presentations and participate

in meetings with consumers, providers, organizations and other members of the public. For more information about inviting CRD to an upcoming event, please contact CRD at (888) 452-4778 or by email at [CRDTraining@twc.state.tx.us](mailto:CRDTraining@twc.state.tx.us).

## EEO Instructor-Led Training

CRD representatives are available on a limited basis at low cost for EEO training and no cost for brief remarks to state entities, municipalities, private businesses, and community groups/ organizations. For more information about inviting CRD to an upcoming event, please contact CRD at (888) 452-4778 or by email at [CRDTraining@twc.state.tx.us](mailto:CRDTraining@twc.state.tx.us).

## CRD Professional Development

So that CRD representatives can maintain subject matter expertise on fair housing and equal employment requirements and hot topics, not only do we conduct external training and outreach, but our staff also stays up-to-date by obtaining education from others. CRD's Housing Section hosted a three-day joint training with its federal partner, the U.S. Department of Housing and Urban Development (HUD) from April 15-17, 2019. During the event, HUD personnel presented training regarding current issues affecting fair housing practices and enforcement. Topics of discussion included, but were not limited to, reasonable accommodation requests,

gathering appropriate comparative data when analyzing terms and conditions and effective public relief in conciliation agreements.

On July 11, 2019, CRD's Employment and Training and Monitoring Sections will participate in a one-day seminar in San Antonio, provided by its federal partner, the U.S. Equal Employment Opportunity Commission (EEOC). The seminar will provide updates on EEO laws and best practices relating to hiring practices, religion and the workplace, the EEO process, and ADA Reasonable Accommodations.



HUD Regional Director Garry Sweeney (l.) and TWCCRD Housing Manager Betty Stanton (r.) who spoke at the Southwestern Affordable Housing Management Association Annual Conference in April. Photo courtesy of CRD

## Texas Workforce Commission Civil Rights Division

**Mailing Address:**  
Texas Workforce Commission  
101 E. 15th Street  
Guadalupe CRD  
Austin, Texas 78778-0001

**Physical Address:**  
1215 Guadalupe  
Austin, Texas 78701-1829

**Phone:**  
512-463-2642 or  
888-452-4778  
**Fax:**  
512-463-2643

**Relay Texas:**  
800-735-2989 (TTY)  
and 711 (Voice)

[www.texasworkforce.org](http://www.texasworkforce.org)

Copies of this publication (05/2019) have been distributed in compliance with the State Depository Law, and are available for public use through the Texas State Publication Depository Program at the Texas State Library and other state depository libraries.

For more information or to subscribe to this newsletter, please visit: [civilrightsreporter@twc.state.tx.us](mailto:civilrightsreporter@twc.state.tx.us)  
Equal Opportunity Employer/ Program Auxiliary aids and services are available upon request to individuals with disabilities.