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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.

Texas Workforce Commission Commissioners

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Commissioner Representing the Public

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Governor Greg Abbott Proclaims October *Persons with Disabilities History and Awareness Month*

Throughout our state’s history, Texans with disabilities have played an outsized role in making Texas the greatest state in our nation to live, work and raise a family. Demonstrating the remarkable qualities of the Texas spirit – courage, independence and ingenuity – Texans have filled some of our highest offices, fought in historic battles and contributed to the art and culture of our state.

Each October is designated *Persons with Disabilities History and Awareness Month* in Texas. The state’s observance was enacted by the 82nd Texas Legislature with the passage of House Bill 3616. This law encourages public schools and state agencies to celebrate the accomplishments of people with disabilities. The intent is to increase public awareness of the

many achievements of people with disabilities, to encourage public understanding of the disability rights movement, and to reaffirm the local, state, and federal commitment to providing equality and inclusion for people with disabilities.

Governor Abbott encourages all Texans to learn more about the achievements of Texans

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with disabilities who have contributed so much to our society and about the disability rights movement as it takes its rightful place as part of the story of Texas.

There is no better place to learn about the story of Texas and the role of Texans with disabilities in our state's rich history than the University of Texas at Arlington. In October, UT Arlington exhibited its accessible campus' history collection on the ground floor rotunda of the Capitol Building.

According to Dr. Sarah Rose with UT Arlington's Disability Histories Minor Studies Program, people with disabilities make up about twenty percent of the population of the United States and worldwide: one of the largest minorities. Yet their history—and their fight for full civil rights and equal opportunity—is just beginning to be told.

As is often the case, Texans have played a prominent role, especially in the disability rights movement that led to the passage of the Americans with Disabilities Act of 1990 (ADA). "Godfather of the ADA" Justin W. Dart, Jr. crisscrossed the country during the 1980s, talking with ordinary Americans with disabilities about the barriers they faced. As executive director of the National Council on Disability, "Architect of the ADA" Lex Frieden guided the drafting of the

Americans with Disabilities Act. Bob Kafka of ADAPT of Texas, in turn, organized grassroots protests crucial to raising legislators' awareness about longstanding, systemic barriers.

For those seeking to learn—or teach—more, one could hardly do better than explore the thousands of virtual artifacts and teaching tools available at the online Disability History Museum (www.disabilitymuseum.org).

The Governor's Committee on People with Disabilities Executive Director Ron Lucey remarked, "This year we are proud to partner with the University of Texas at Arlington to support additions to their disability history collection through gathering informational interviews with prominent Texans who shaped the disability rights movement of the 20th and 21st centuries. The next chapter in the story of Texas is still being written. Working at the Office of the Governor I'm reminded by historic images in our building and through our current interactions with leaders in the disability rights movement that Texans with disabilities make meaningful contributions that continue to shape the future direction of our great nation."

*Article Resource: The Governor's
Committee on People with Disabilities*



STATE OF TEXAS OFFICE OF THE GOVERNOR

The often used slogan for the Lone Star State's approach to commerce is that "Texas is wide open for business." This openness and welcoming atmosphere has been a major part of the foundation for our strong economy. Thus, it is crucial that we ensure this welcoming atmosphere applies not only to our business climate but to the hardworking men and women who make up the indomitable Texas workforce.

An important part of this workforce is Texans with disabilities, who make invaluable contributions to Texas employers. In light of this, while we strengthen our state's workforce system to prepare Texans with disabilities for the jobs of the 21st century, we must engage in disability employment awareness to ensure that all Texans have the equal opportunity to contribute to the workforce that is the backbone of our great state's robust economy.

That is why this October is dedicated to Texans with disabilities. During this month, we dedicate ourselves to promoting disability employment awareness, creating more inclusive workplaces and creating more employment opportunities for Texans with disabilities to support an economy that is made ever stronger by the diversity and full participation of workers with disabilities.

Not only as the governor of the Lone Star State, but as a Texan with a disability myself, I encourage all Texans to learn more about disability employment and join me in celebrating the varied accomplishments of Texans with disabilities that have contributed to building an even better and brighter future for our great state. Texas employers can find additional resources on how to promote disability employment awareness through the Texas HireAbility Campaign, which raises awareness about the benefits of hiring people with disabilities and highlights the contributions of people with disabilities in the workforce.

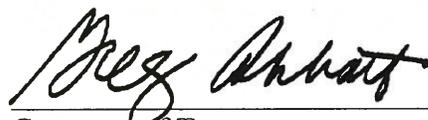
Therefore, I, Greg Abbott, Governor of Texas, do hereby proclaim October 2017 to be

Disability Employment Awareness Month



in Texas, and urge the appropriate recognition whereof.

In official recognition whereof,
I hereby affix my signature this the
28th day of September, 2017.


Governor of Texas

Meet the Blind Month Activity

By: Faith N. Penn

Several commemorative and awareness campaigns share the month of October. These campaigns are designed to bring awareness to the general public regarding topics such as Breast Cancer, Domestic Violence, Information Literacy and Disability Employment. In addition, October has been named “Meet the Blind Month” by the National Federation of the Blind.

“Meet the Blind Month” helps educate the public and create greater awareness of the capabilities of people who are blind. Additionally, October 15th is “White Cane Day,” which recognizes the use of white canes by blind individuals.

Across the country, groups of people who are blind and low vision, along with their friends, families, and co-workers, observe this month by participating in various outreach activities, awareness events and public speaking engagements at venues including schools, civic clubs and church groups. Additional activities include distributing awareness literature, hosting meet and greets, conducting blindness awareness activities and volunteering service within their communities.

During Meet the Blind Month, the Director of Texas Workforce Commission’s Civil Rights Division (CRD) authorized me to offer and conduct 15-minute blindfold/cane travel sessions to interested staff

members. In addition, I e-mailed two blindness/visual impairment-related educational questions daily to the entire CRD staff, giving each member an option to respond with their knowledge or best guess without use of the Internet. The questions were fun, educational and explained different alternative techniques individuals use daily, to ensure nonvisual independence. I provided the correct answers to the entire staff before the end of each work day to increase awareness and attract more participants.

The Blindfold Training Activity presented an educational and slightly challenging exercise in a safe and controlled environment, where participants could enjoy themselves, while relying on their four other senses to navigate, solve problems and complete one or more daily tasks.

As the facilitator, I required participating staff members to choose from a straight cane, a lighter or heavier folding cane or a telescoping cane. After selecting a travel tool, I blindfolded each participant and used sighted/human guide to lead them to a quiet area in the office for instruction. Once there, I explained the importance of walking in step, covering one’s body by swinging the cane slightly

beyond shoulder width, centering the cane and several types of cane techniques such as constant contact and shorelining.

After a bit of practice, I required participants to locate two to three items or places within the CRD office space. I was very impressed with several of my fellow co-workers’ abilities. Additionally, I was fascinated to observe the different strengths and problem solving and cane travel skills demonstrated by each participant. Some participants displayed stronger, better direction-following and mental mapping, while others excelled in using other senses to structurally discover their destination(s).



Lee Pierce (left) with Faith Penn (right). Photo courtesy of Thelma Villanueva

Participation was voluntary, and I am impressed with the overall reception. I had a great time facilitating this event and hope all participants found the activities fun, innovative and informative.

Often, we solicit and receive perspectives from blind and visually impaired persons regarding how they function in the world. Through this activity, I hope to enlighten others by asking the sighted Blindfold Training Activity participants to share their thoughts about the experience.

Lowell Keig, Director of CRD said, “Participating in the white cane exercise with a blindfold gives you a keen appreciation of the obstacles encountered daily by someone who is blind. We have a structural pole in a passageway that I knew was there, and caused me to worry about hitting my head on it during the exercise. I can only imagine what it is like for someone who has never seen the layout of a building beforehand. This exercise definitely helped us be better prepared to help people who are blind.”

Carrie Mills, Housing Investigator and Mediator for the Texas Workforce Commission Civil Rights Division said, “The activity was very challenging. Especially when I didn’t know what location I was starting from and I was trying to get to a certain location like the front door. I found it challenging, but in a good way because it helped me learn a lot about how someone who is blind would actually have to find their way if they did not know where they were

starting from. Mills went on to say, “Faith Penn was very helpful as the leader of the training and very patient with me.”

Javier Cano, Employment Investigator for the Texas Workforce Commission Civil Rights Division said, “I found the experience challenging and frightening. At first it was difficult to get my bearings but then an interesting thing happened. I began to get a mental picture of my environment from having a visual foundation. I then turned to my hearing and began to trust my cane just as you had instructed. I could literally see, in my mind, the lay out of the office. It gave me an even greater appreciation and respect for the challenges the visually impaired face on a daily basis. I would recommend the experience to everyone.”

Humans tend to shy away from anything different or that is unfamiliar. Based on statements my co-workers and friends have made, some people are hesitant to ask blind individuals questions regarding blindness for fear of coming across as rude or insensitive. One of my goals for this activity was to try to break down those barriers and help people understand that blind people are not any different than anyone else. I want to help people realize that it is acceptable to ask questions to educate themselves regarding something unfamiliar. I am of the



Liza Ward (left) with Faith Penn (right). Photo courtesy of Thelma Villanueva

opinion that we all have different “characteristics”—that is what makes the world so unique.

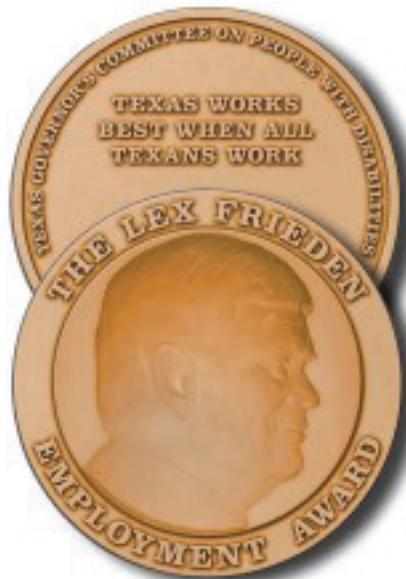
Since I started organizing Meet the Blind Month activities in the CRD offices, I found that people are more willing to broach questions with me regarding blindness; and I love it! I truly hope this activity helps more individuals see people who happen to be different as people, and not persons with conditions.

Lex Frieden Employment Awards

Lex Frieden is The University of Texas Chancellor's Health Fellow on Disability, a professor of biomedical informatics and rehabilitation at UT Health Science Center at Houston and director of the Independent Living Research Utilization Program (ILRU) at TIRR Memorial Hermann Rehabilitation Hospital. Frieden was appointed by President George W. Bush as chair of the National Council on Disability in 2002 and also served an eight-year term on the United Nations Panel of Experts on the Standard Rules for Disability. Frieden is author or co-author of more than sixty articles on independent living, disability rights and rehabilitation. He has received two Presidential Citations for his work in the field of disability, and was awarded an honorary doctorate in law by the national University of Ireland in 2004.

Since 1979, the Governor's Committee on People with Disabilities has worked to highlight the efforts of employers to hire and retain employees with disabilities, and to recognize best practices that positively affect employees with disabilities within the workplace. An employer whose philosophy is to support employment opportunities for all Texans, including people with disabilities, benefits the local community as well as the state. The attitude of working as a partner in the community is encouraged by the presentation of the annual Frieden Employment Awards. The active and enthusiastic promotion of business opportunities for people with disabilities is also an important element in the consideration of the award.

Each year during the month of October (National Disability Employment Awareness Month), a local committee in Texas hosts the Annual Employment Awards Ceremony, and the winners in each of several categories are introduced to an appreciative audience. Award categories include large, medium, and small employers, as well as non-profit employers, the Entrepreneurship Award, Martha Arbuckle Award and the Governor's Trophy.



2017 Lex Frieden Employment Award Winners:

The Governor's Trophy – Larry P. Johnson, Author, Disability Advocate, and Motivational Speaker (San Antonio)

Entrepreneurship Award – James Parker, Shredding on the Go (Houston)

Large Employer Award – MAXIMUS (San Antonio)

Medium Employer Award – FCI, Bureau of Prisons (Bastrop)

Small Employer Award – Crepe Crazy (Austin)

Non-Profit Employer – Food Bank of Corpus Christi (Corpus Christi)

Martha Arbuckle Award for a Local Committee Project – Houston Commission on Disabilities

Article Resource: Governor's Committee on People with Disabilities

Civil Rights Division Protects All Texans, including Texas Military

When Hurricane Harvey hit Texas in August, the state experienced catastrophic flooding, structural damage, and unfortunately, loss of life. In response to the devastation, Governor Abbott ordered the entire Texas Military Forces to active status to assist those affected by the storm. As a result, our office received an influx of complaints from service members concerning job security, status and their rights while serving in an active duty status.

So, what laws exist to protect our military service members when called to active duty during these situations? The Civil Rights Division (CRD) enforces Texas Government Code, Chapter 437, which protects a service member's employment status when ordered to training or duty for a state and/or federal assignment.

Per the statute, service members cannot be terminated by their public or private employers when ordered to training or duty. Furthermore, the person may not be subjected to loss of time, efficiency rating, personal time, sick leave, or vacation time. Additionally, service members who are public employees, such as an officer or employee of Texas or a municipality, county, or another

political subdivision of Texas are entitled to not more than 15 workdays of paid leave of absence when ordered to and engaged in training or duty. We would like to highlight two unique cases, in which the service members sought remedy through our office.

In the first case, a Texas National Guardsman, who worked for a county, was authorized to take a leave of absence, in support of Hurricane Harvey, but was charged vacation leave and compensation time to pay for their authorized absences. CRD assisted in both educating the employer on the employee's protected entitlements and helped reinstate their vacation leave and compensation time.

In the second case, a private employer terminated a service member hours after it received notice that the service member had been called to active duty by the Governor to support victims of Hurricane Harvey.

As required by the statute, the service member notified the employer that they were recalled by the Governor and provided written notification to the employer that they would be returning to work and when.

The employer notified the service member that he/she was terminated due to performance issues. The employer was able to show that it had placed the service member on a Performance Improvement Plan (PIP) almost two months earlier. The employer provided written documentation that it had intended to terminate the service member days prior to the activation; however, the service member had not shown up to work until that day. As a result, the complaint was dismissed as no reasonable cause to believe a violation of law occurred.

In one case, the employer either knowingly or unknowingly violated the Texas Military Member's employment rights. When called to duty to support our state and/or nation in a crisis, our service members should be secure in their employment status so they can focus on the mission at hand.

In the second case, the employer was able to show that it did not violate the Texas Military Member's employment rights. When faced with similar situations, our division encourages employees and employers to contact us so we can offer education, guidance, and/or enforcement as needed.

Recent Equal Employment Case Law Summaries

***EEOC v. Accentcare Inc.,
Civil Action No. 3:15-CV-3157-D,
2017 U.S. Dist.
LEXIS 95922 (N.D. Tex. 2017)***

By: Corra Dunigan
TWC Assistant General Counsel

On or about April 24, 2013, Defendant, AccentCare, hired Alisia Beasley as an analyst to work at their IT help desk. The first 90 days would be a probationary period for Beasley's employment. Beginning in June 2013, Beasley was absent from work for two full days due to illness and left early three times for various reasons. Thereafter, Beasley's supervisor counseled Beasley about her absenteeism. Beasley began to suffer increased panic attacks due to her Bipolar Disorder. On July 8, 2013, Beasley e-mailed Defendant that she would be out for the day because she needed to see her psychiatrist to obtain medication for her adult ADHD disorder. She stated that she had been out of medication for two weeks and was not able to manage without the medication. On July 9, 2013, Beasley e-mailed Defendant stating that her doctor had taken her out of work due to her medical condition and she would be out for an extended period. Beasley further stated that she did not have an exact date that she would be returning to work. The Defendant contacted Beasley to follow up on when she planned to return to work and concluded after the telephone call with Beasley that she would be out indefinitely. Defendant informed Beasley that they could not provide her an extended period of time off and would be terminating her employment.

Beasley filed a charge of discrimination with the EEOC alleging that Defendant, AccentCare, had denied her a reasonable accommodation for her disability and had discriminated against

her by terminating her because of her disability, and then filed the instant lawsuit. The defendant filed a motion for summary judgment. The Court first considered Beasley's allegation that Defendant denied her a reasonable accommodation for her disability. Beasley e-mailed her request for leave to the Defendant and thereafter Beasley contacted Kimberly Nelson from Defendant's HR department, to clarify her request for leave. The Court included in its analysis an excerpt from a recorded telephone call between Beasley and Defendant. The transcript from that call reads in part:
Nelson: So I consider that to be indefinitely.
Beasley: Well no, I go back to the doctor on Friday, and when I go back to the doctor on Friday he can either release me or he can extend it. But one way or the other, regardless if I'm within 90 days or if I'm there a year, you all have the right to let me go whenever because we are . . . in an at-will state. But I'm not . . .
Nelson: Uh-huh
Beasley: . . . but I'm not letting you all know that I'm—that I'm not going to come back at all. All I'm saying is, as of today, my doctor has me off, I go back to work on Monday. I'm sorry, I mean I go back to the doctor on Friday because he put me on medication to see if the medication has helped stabilize me. And if . . .
Nelson: Ok
Beasley: . . . it has, then I will be released to return to work.
Nelson: Ok, So, um, you [inaudible] you go to the doctor on Friday . . .
Beasley: Uh-huh
Nelson: . . . and then when would you be able to get back to us?
Beasley: if he releases me on Friday, then I'll be back in the office on Monday. Um, you know, just as I . . .
Nelson: I mean, what time . . . [inaudible]

you know what time you could give us a call . . . would you expect to hear back from you on Friday?
Beasley: Oh, yes. Oh my appointment on Friday is, is at 11 a.m.
Nelson: Okay.
Beasley: And so right after I leave my doctor's Um . . .
Nelson: Okay

Initially, Nelson gave Beasley until Friday to call her back and let her know if and when Beasley would be returning to work. Nelson informed Beasley later that same day that her employment was terminated. To demonstrate an ADA failure-to-accommodate claim, a plaintiff must show that: "(1) the plaintiff is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered employer; and (3) the employer failed to make reasonable accommodations for such known limitations." The Defendant asserted that Beasley did not meet the criteria because she was not a "qualified individual with a disability." A qualified individual is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Defendant stated that an essential function of the job was regular attendance and because Beasley needed an indefinite leave of absence, Beasley was not a qualified individual with a disability. Beasley asserted that she did not request an indefinite leave of absence, and instead she only requested a few additional days to obtain medication and to ensure that the medication was working properly. Beasley further asserted that she had informed Defendant that she had a disability and needed an accommodation to obtain medication for her disability. The Court noted that the EEOC had presented evidence

Beasley was actually requesting a few days of leave rather than indefinite leave and that AccentCare terminated her employment before acting on her leave request. The Court quoted the Fifth Circuit as saying, “An employer may not stymie the interactive process of identifying a reasonable accommodation for an employee’s disability by preemptively terminating the employee before an accommodation can be considered or recommended.” The Court thus found that there was sufficient evidence to create genuine issues of material fact on the reasonable accommodation claim and denied the motion for summary judgment.

The court then turned to Beasley’s assertion that Defendant discriminated against her by terminating her because of her disability. Defendant’s evidence showed that they terminated Beasley because of excessive absenteeism during her 90-day probationary period. The requirement of her employment was to be present at her job. Prior to her termination on July 9, 2013, Beasley was absent from work for two days due to illness and left early three times without providing proper notice. The court found that Defendant had met its burden to show that the termination of Beasley was a “legitimate, non-pretextual reason for terminating Beasley’s employment.” Then, the EEOC responded to Defendant’s assertions by arguing that the Defendant exaggerated the time off Beasley requested and that Defendant rushed to terminate Beasley, which the EEOC asserted showed the Defendant’s reason for termination was pretextual. The Court disagreed. The Court stated that even though Beasley, on a Tuesday, asserted she hoped to return to work after her Friday doctor appointment, she had just added two full days’ absences with little to no notice, along with her numerous previous absences; and a forthcoming doctor’s appointment, without

certainty of returning to work, would not be sufficient to show one expects to return to work. The Court further concluded that temporal proximity of Defendant’s knowledge of Beasley’s mental impairment and her termination, standing alone, would not constitute pretext. As a result, the Court granted summary judgment on the disability discrimination claim.

Note that this case resulted in a mixed finding by the Court, concluding that while the Defendant had a legitimate, non-discriminatory reason for terminating Beasley, the Defendant may have failed to make a reasonable accommodation. The Court explained that the rulings were not irreconcilable, since there are differences in the burdens of proof that apply to each.

Kyle Berghorn v. Texas Workforce Commission and Xerox Corporation, Civil Action No. 3:17-CV-01345-L, Pacer, Document 16, PageID 223 (N.D. Tex. 11/15/17)

By: Lowell Keig
TWC Civil Rights Director

Kyle Berghorn originally filed a state lawsuit against TWC and Xerox, seeking judicial review of his unemployment compensation benefits denial. He amended his pleadings to allege that Xerox violated Title VII of the Civil Rights Act of 1964 by terminating him because he is gay and failed to conform to Xerox’s gender stereotypes. The case was removed to federal court by Xerox, and the Court split off the unemployment compensation claim and sent it back to state court.

In asserting a motion to dismiss, Xerox argued that sexual orientation is not a protected class, so Berghorn’s claim based on sexual orientation would fail as a matter of law. Berghorn, in response,

contended that the Fifth Circuit Court of Appeals cases relied upon by Xerox to say sexual orientation is not a protected class were “outdated” and that the Seventh Circuit Court of Appeals had recently held sexual orientation discrimination is indistinguishable from sex discrimination.

The Court ruled that it is bound by Fifth Circuit precedent, not Seventh Circuit precedent, and that unless the Fifth Circuit or the Supreme Court, or Congress, extends protection to sexual orientation, the Court could not disregard Fifth Circuit precedent, regardless of the age of the case.

Xerox, in its motion to dismiss, also contended that Berghorn had not alleged sufficient facts in his pleadings to support a claim based on gender stereotyping. Xerox asserted that Berghorn’s allegations in his pleadings were grounded in perceptions of his sexual orientation, not gender stereotypes. Berghorn replied by arguing in his brief that the employees at issue were discriminating against him because of their stereotypes that men should have appropriate boundaries, should not have sex with each other, and should have children.

The Court disagreed that Berghorn’s pleadings contained sufficient factual allegations to draw an inference of gender stereotyping, but rather focused on his sexual orientation. However, instead of dismissing the claim, and the Court gave Berghorn one month in which to amend his pleadings on the sex/gender stereotyping claim, or face dismissal.