ISSUE
03
MARCH
2018

Civil Rights Reporter

Employment Edition

QUARTERLY JOURNAL OF THE TEXAS WORKFORCE COMMISSION CIVIL RIGHTS DIVISION
Lowell A. Keig – Division Director

In this issue:

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

Andres Alcantar - Chairman
Commissioner Representing the Public

Ruth R. Hughs
Commissioner Representing Employers

Julian Alvarez
Commissioner Representing Labor

Civil Rights Division Spreads the Word about Discrimination

The Texas Workforce Commission Civil Rights Division (CRD) actively pursued person-to-person outreach during January and February 2018. The division's new Trainer and Outreach Coordinator, Edward "Ed" Hill, represented TWC-CRD at several community events, including business conferences in Nacogdoches' and McAllen, the Annual Transportation Works Summit in Waco, and the Special Olympics Texas Winter Games in Austin. During these events, Hill distributed information about the TWC-CRD services and training opportunities available to the public that address employment and housing discrimination.

At the Special Olympics event, Hill had the opportunity to meet special guest J.R. Martinez, an actor, author, motivational speaker, former U.S. Army soldier, and the winner of Season 13 of ABC's *Dancing With the Stars*. During his appearance, Martinez signed copies of his book, *Full of Heart: My Story of Survival, Strength, and Spirit*, and encouraged Olympians with disabilities to triumph over tragedy, rather than set physical and mental limitations on their abilities. At the event, Martinez also took time to talk with Hill about employment and housing difficulties wounded warriors and disabled veterans experience in their post-military lives.

J.R. Martinez (left) with Edward "Ed" Hill (right). Photo courtesy of CRD

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Director's Corner

Now is the Time for Real Change in Preventing Sexual Harassment

By: Lowell A. Keig, Civil Rights Division Director

Louis C.K., Roger Ailes, Charlie Rose, Harvey Weinstein, and others...we have seen many allegations of sexual harassment recently in the news. Sexual harassment may occur in or outside the workplace, and across occupations, professions, educational backgrounds, and income levels.

According to a December 2017 CNBC poll, 27 percent, or one in four women have experienced sexual harassment in the workplace. However, sexual harassment is not just a woman's problem. According to the same poll, one in ten men said that they, too, have experienced sexual harassment.

In Texas during federal fiscal year 2017, we had 910 sexual harassment inquiries statewide. Interestingly, that number had been decreasing each year for the past few years. Probably due to the media attention, preliminary numbers are showing a sharp upswing for the first quarter of this federal fiscal year.

I have been asked what we do differently in the Texas Workforce Commission Civil Rights Division (CRD) with sexual harassment complaints. The reply is simple: we investigate them the same way we do all other complaints. CRD obtains statements from both sides, reviews documentation, interviews witnesses and analyzes the elements of a claim carefully. Then, if we find reasonable cause, the case is presented to the TWC Commissioners for a final decision. In fact, in January, the TWC Commissioners voted unanimously to approve my determination of reasonable cause on a sexual harassment claim (see the summary of the facts *sans names* later is this issue).

After issuing a reasonable cause determination, the statute requires us to engage in informal methods of resolution, such as conciliation discussions—a duty we take seriously. If we cannot conciliate the claim, I will either close the claim as an unsuccessful conciliation and issue a notice of right to sue to the complainant; or I will proceed with steps toward potential litigation. I consult our attorneys about the strength of the claim to prove it by "a preponderance of the evidence" in court (a heavier burden than reasonable cause); and I must receive approval from the TWC Commissioners for the filing of any lawsuit.

Enforcement is just one means of addressing sexual harassment. Prevention is the key to real change and respectful work environments. We have various sexual harassment prevention training options. I want you to know that our instructor-led trainings are not free, but they are at-cost. We annually calculate our training rates based upon such factors as trainer salary, overhead and administrative costs. I encourage you to contact us. Together we can do our part to prevent sexual harassment in the workplace.

Civil Rights Division Makes it Easy for Agencies to Assess Their Workforce Diversity with Simple-to-Use Web Tool

The Texas Workforce Commission Civil Rights Division (CRD) reviews personnel policies and procedures for Texas state agencies and public education institutions (excluding junior colleges) on a six-year schedule to ensure compliance with Texas Labor Code (TLC), Chapter 21, formerly known as Texas Commission on Human Rights Act.

Chapter 21 requires each state agency/institution of higher education (collectively, "agency") to develop and implement personnel policies and procedures, including personnel selection procedures that support workforce diversity. In addition, biennially, each agency must analyze its current workforce and compare itself to the statewide civilian workforce to determine percentages of exclusion and/or underutilization in each job category. Based upon the workforce analysis, each agency must then develop and implement a plan to recruit qualified and underutilized individuals in each job category. (TLC §21.501, §21.502)

One method for calculating a potential underutilization involves the "Rule of Thumb" commonly known as the four-fifths or 80 percent rule. CRD applies this analysis to determine whether there is a potential underutilization of African Americans, Hispanics and Females under job categories specified in Chapter 21. If an agency's selection rate for one of these three protected groups in a job category is less than 80 percent of the percentage for that protected group and job category in the statewide civilian workforce, there is an indication of potential underutilization. To assist agencies with the workforce analysis requirement, CRD, in partnership with TWC Operational Insight Division, developed and released the Workforce Utilization Analysis Tool. This tool enables an agency to simply enter their raw employment data and allow the tool to populate relevant fields and complete the computations.

For more information or to download the tool to analyze your workforce, please visit the CRD website: http://www.twc.state.tx.us/partners/civil-rights-discrimination.

For technical assistance please email: CRDReviews@twc.state.tx.us or call toll free (888) 452-4778.

Resources:

Texas Labor Code, Chapter 21

TWCCRD website /Workforce Utilization Analysis Tool

See EEOC Uniform Guidelines on Employee Selection Procedures

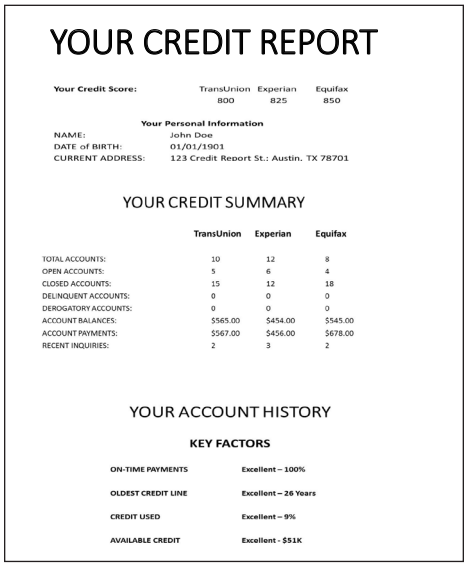
Photo courtesy of Getty Images

Recent Texas Federal Court Decision Allows Credit Check Consent Form with Acknowledgement of 'Legitimate Non-Discriminatory Reasons'

By: Roberta Swan, TWC Office of General Counsel Paralegal, and Corra Dunigan, Assistant General Counsel

Employers use many tools when they screen potential applicants for employment. It is not a new concept for job seekers to sign authorizations to have a background check. Most job seekers may not know that employers also conduct credit checks to screen them for a potential position. An employer can utilize a consumer's credit report to determine the "consumer's eligibility for employment purposes" under 15 U.S.C. § 1681a(d)(b). This provision is further defined by 15 U.S.C. § 1681a(h), stating that, "[t]he term '*employment purposes*' when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."

For an employer to perform a credit check on a prospective employee, they must obtain written permission and notify the employee that they will be using the credit report as a basis for hiring for a potential position. In 15 U.S.C. §1681b(b)(2)(A), it states that a prospective employer may not procure a consumer report for employment purposes unless "(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes" and "(ii) the consumer has authorized the report in writing." However, when a potential applicant reviews the authorization to obtain a credit report they need to be aware that the acknowledgment may have additional information which could potentially waive a discriminatory basis for the failure to hire. In the case of *Lewis v. Southwest Airlines Co.*, No. 3:16-CV-01538-M, 2018 U.S. Dist. LEXIS 5576 (N.D. Tex. 2018), the Court "determine(d) that the inclusion of the Acknowledgment and other extraneous information in the Consent Form violates the FCRA's stand-alone requirement" (Fair Credit Reporting Act). Lewis' assertion was that the consent he signed to permit the employer to obtain his credit report contained additional information that essentially caused him to waive any future remedies he may have against the employer. Lewis also asserted that the employer is obligated under FCRA's stand-alone requirements to provide him a notice of his rights in a separate format from the Acknowledgement and the Consent Form that he signed. The combined format of the Consent Form and the Acknowledgement contained a lot of extraneous language, but one crucial element was that the applicant "fully understand[s] that all employment related decisions are based on legitimate non-discriminatory reasons." The Court determined that the inclusion of the extraneous information "was not a willful" violation by the potential employer. The Court further held that "to constitute a willful violation, the company's interpretation of the FCRA must have been 'objectively unreasonable.'" Applicants may unknowingly waive their recourse for filing a discrimination complaint when signing an authorization like the one in this case.



YOUR CREDIT REPORT

Your Credit Score: TransUnion 800 Experian 825 Equifax 850

Your Personal Information
NAME: John Doe
DATE of BIRTH: 01/01/1901
CURRENT ADDRESS: 123 Credit Report St.: Austin, TX 78701

YOUR CREDIT SUMMARY

	TransUnion	Experian	Equifax
TOTAL ACCOUNTS:	10	12	8
OPEN ACCOUNTS:	5	6	4
CLOSED ACCOUNTS:	15	12	18
DELINQUENT ACCOUNTS:	0	0	0
DEROGATORY ACCOUNTS:	0	0	0
ACCOUNT BALANCES:	$565.00	$454.00	$545.00
ACCOUNT PAYMENTS:	$567.00	$456.00	$678.00
RECENT INQUIRIES:	2	3	2

YOUR ACCOUNT HISTORY

KEY FACTORS

ON-TIME PAYMENTS	Excellent – 100%
OLDEST CREDIT LINE	Excellent – 26 Years
CREDIT USED	Excellent – 9%
AVAILABLE CREDIT	Excellent - $51K

Photo courtesy of CRD

Job seekers should make sure they are aware of what is in their credit reports. In some cases, credit reports can be unreliable and even have errors. Prior to applying for employment, a potential candidate should be prepared to answer questions regarding their credit reports, and be educated on associated remedies for disputes.

TWC Commissioners Approve Two Determinations of Reasonable Cause

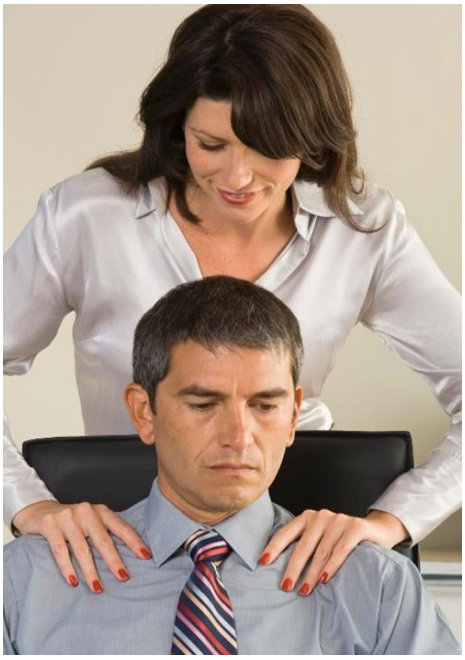


Photo courtesy of Getty Images

Sexual Harassment Case

On Jan. 17, 2018, the commissioners of the Texas Workforce Commission unanimously determined there was reasonable cause in a case of sexual harassment, retaliation and constructive discharge. The female complainant alleged that the male owner of the bar where she worked touched her buttocks and genitals in an unwanted manner, and asked her to engage in sexual acts with him. The complainant alleged the owner retaliated against her after she complained about sexual harassment by assigning her fewer and less favorable shifts, causing her a decrease in wages.

The complainant presented multiple witnesses who supported her allegations of sexual harassment. She also contended it was reasonable for her to quit her job because the owner failed to address her sexual harassment complaints, and treated her less favorably than other employees after she complained.

Finally, the complainant asserted that the respondent retaliated against her after she quit by informing her she was banned from multiple bars in the area, while she was searching for work.

Pursuant to Chapter 21 of the Texas Labor Code, after a determination of reasonable cause is issued, the commission must endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. The Texas Workforce Commission Civil Rights Division (CRD) is not able to provide specific details of the investigation or conciliation discussions due to confidentiality provisions under the statute.

Reasonable Accommodation Case

On Jan. 17, 2018, a majority of the commissioners also approved a determination of reasonable cause on a claim of failure to make a reasonable accommodation involving a complainant who has a physical disability. Although he suggested five options for an accommodation, the employer failed or refused to do so. The employer merely offered the complainant short term disability leave and a 90-day window to search for employment within its internal seniority based system (but he had no seniority, so everyone else would have preference over him). When the complainant's short-term disability leave was over and he could not find other employment within the company, he was discharged.

A key issue in the case was a job duty analysis that determined whether the subject job duty was an essential or marginal function. Marginal job functions can be reallocated or reassigned without even a need for a reasonable accommodation. After applying a seven-factor test promulgated in EEOC regulations and cited in a Fifth Circuit Court of Appeals decision, the division concluded that in this instance, the particular function was a marginal function that could have been reallocated; and further, even if it were considered an essential function, the employer could have accommodated the complainant. CRD additionally analyzed the evidence to determine whether an undue hardship existed and whether the options provided by the complainant were, in fact, reasonable. The division found that at least two of complainant's options were reasonable and did not constitute an undue hardship.

The complainant also alleged a retaliation claim, but the division determined there was not sufficient evidence to support a finding of reasonable cause; therefore, the retaliation claim was not presented to the commissioners.

As with the sexual harassment case above, CRD is not able to provide more specific details due to confidentiality under the statute.

Recent Equal Employment Case Law Summaries

Texas State University v. Quinn
2017 Tex. App. LEXIS 11025 (Austin)

By: Corra Dunigan
TWC Assistant General Counsel

This appeal resulted from the district court's denial of Texas State's plea to the jurisdiction regarding Quinn's discrimination and retaliation claims. In 2011, Texas State was in the process of developing a Doctoral Nursing program. Quinn was offered two one-year contracts as an "emergency hire" to teach as a clinical associate professor. In addition to teaching, Quinn was given significant program writing tasks. When this position became permanent, Quinn applied for it, but was denied.

Quinn was 68 years old, and had severe nerve damage to her hands and feet, so much so that walking was very difficult. She made a request for an accommodation, but nothing was done. In her claim, she stated that she was subject to harassment and derogatory comments based on her age and disability. She complained to her supervisor, but no action resulted from those complaints.

In addition to being denied the clinical associate professor position, Texas State did not renew her contract. She filed the current lawsuit based on disability and age discrimination, as well as retaliation for her previous complaints. In its plea to the jurisdiction, Texas State contended sovereign immunity barred her claims, arguing that she failed to plead a claim of discrimination and retaliation, and that there was insufficient evidence to support those claims. To invoke a waiver of sovereign immunity, Quinn had to "...allege facts that affirmatively demonstrated the court's jurisdiction and marshal some evidence in support of the contested elements of her discrimination and retaliation claims...."

The elements of claims for disability discrimination and age discrimination are: (1) the plaintiff has a disability and is over the age of forty; (2) she was qualified for the job she had or sought; (3) she suffered an adverse action; and (4) she was replaced by a younger, non-disabled person, or was treated less favorably than a younger, non-disabled person, or was otherwise discriminated against because of her age or disability. The elements of a retaliation claim are: (1) the plaintiff engaged in a protected activity; (2) an adverse employment action occurred; and (3) a causal link exists between the two.

In response to Texas State's plea to the jurisdiction, Quinn outlined in extensive detail the facts supporting her discrimination claims. She provided details regarding her qualifications for the job; her supervisor did not dispute those qualifications, stating that she "did not hire unqualified people." She also provided details of the nerve damage to her feet and hands and explained the difficulty in walking. She further produced voluminous medical records to validate her disabilities. The appellate court considered and rejected the university's argument that because she was on a contract, the university's non-renewal could not constitute evidence of an "adverse action." Finally, she presented evidence that the person who was offered the permanent position was non-disabled and younger.

As to her retaliation claim, Quinn offered some evidence that she suffered an adverse action after engaging in a protected activity. Specifically, the decision not to renew her contract, and the decision not to hire her for the permanent position occurred after she made complaints to her supervisor about disability discrimination. The appellate court found that her response contained enough evidence to support a causal connection between her protected activity and the adverse action.

Patton v. Jacobs Eng'g Grp., Inc.
874 F.3d 437 *; 2017 U.S. App. LEXIS 21028 (5th Cir.)

In this case, the plaintiff appealed a district court decision ruling against him on failure to accommodate and hostile work environment claims. The plaintiff had been placed for employment with defendant, Jacobs Engineering Group, Inc., through defendant Talascend, L.L.C., a staffing agency. When the plaintiff interviewed with the staffing agency, he stated that he "told Emily Wimbley, a Talascend recruiter, about his stuttering and

anxiety problems, which he said, 'all go[] together.'" From the onset of the plaintiff's employment at Jacobs, he stated that co-workers harassed and ridiculed him for his stuttering. He claimed his co-workers would call him names like "lawnmower and bush hog (a type of lawnmower)." The plaintiff also stated that he made several complaints to his supervisors about the noise and horseplay which aggravated his anxiety and made his stuttering worse. The plaintiff said he requested to be moved to a quieter work station so the noise did not affect his stuttering. He also stated that he contacted the placement agency, which offered to move him to another assignment, but the plaintiff continued to work with the defendant and performed his job well. The plaintiff stated that the excessive ridicule of his stuttering caused him to experience "severe anxiety." As a result of the stressful environment, the plaintiff "suffered a panic attack" and was involved in a car accident on Feb. 28, 2014.

The Court initially addressed an issue of exhaustion of administrative remedies, because the failure to accommodate claim was not specifically listed in the charge of discrimination. The plaintiff indicated in his intake form, however, that he requested changes or assistance because of his disability. The Court found that the plaintiff's intake questionnaire should be construed as part of the Equal Employment Opportunity Commission's charge.

Then, the Court turned to analyze the claim of failure to accommodate, stating that one must show: "(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 plaintiff asserted that he was disabled due to a "childhood onset fluency disorder" and that a noisy environment caused him to suffer panic attacks and worsened his stuttering. The defendants did not contest that the plaintiff is a qualified individual with a disability; however, the defendants stated that the plaintiff failed to establish the other two elements.

The Court found that the plaintiff's statement to Wimbley at Talascend about his stuttering and anxiety problems being related, along with a statement he made to her about a previous job where he was sensitive to noise, were too vague to show that his noise sensitivity was a limitation resulting from a disability. As for knowledge on the part of Jacobs, the plaintiff claimed, "he asked Jacobs 'to move him to a quiet area so that [his] stuttering—[his] nerves would decrease…'." Yet, he did not tell his employer that his disability caused his noise sensitivity, nor was the nexus obvious. Consequently, the Fifth Circuit affirmed the lower court's summary judgment finding in favor of the defendants on the failure to accommodate the claim.

Next, the court reviewed the plaintiff's assertion that he suffered a hostile work environment. To establish that a plaintiff suffered a hostile work environment one must show: "(1) that (s)he belongs to a protected group; (2) that (s) he was subjected to unwelcome harassment; (3) that the harassment complained of was based on [his/] her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action." The Court found the harassment suffered by the plaintiff was "sufficiently severe or pervasive" to change the terms and conditions of the employment. The constant name calling and ridicule of the plaintiff by his co-workers created a hostile work environment for the plaintiff. In fact, his supervisor was one who ridiculed plaintiff in a department meeting. These actions contributed to the plaintiff's anxiety, which changed the terms and conditions of his employment. Yet, the Fifth Circuit stated that the plaintiff failed to "challenge on appeal the district court's determination that he 'unreasonably failed to avail himself of the procedures set forth in the anti-harassment policies maintained by both defendants.'" The plaintiff, therefore, forfeited any objection to that determination. The Court thus affirmed the district court's ruling that the plaintiff failed to show the defendants knew or should have known of the harassment and failed to take prompt, remedial action; and it upheld the district court's granting of summary judgment on the hostile work environment claim.