



### Mission Statement

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

### 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.

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## Background Checks: Arrest & Convictions

An employer's use of criminal history information of job applicants and employees has taken the national stage more than two years after the Equal Employment Opportunity Commission (EEOC) issued consolidated and updated enforcement guidance on criminal background checks in April 2012.

According to EEOC, Title VII of the 1964 Civil Rights Act doesn't bar the use of background screening for arrest and conviction records, but employers still may violate would-be and existing workers' workplace rights if they intentionally discriminate among individuals with similar criminal histories, or if their employment policies have an adverse impact

based on race, national origin or another protected class and cannot be defended as a "business necessity."

This issue took the spotlight when the State of Texas sued EEOC in federal district court on Nov. 4, 2013, seeking an order invalidating the April 2012 enforcement guidance and barring the commission from using the guidance to challenge the state's policy of not hiring convicted felons from many state jobs. According to the Office of the Attorney General of Texas, the state has "the sovereign right to impose categorical bans on the hiring of criminals, and the EEOC has no authority to say otherwise."

On Aug. 21, 2014, Judge Sam R. Cummings of the U.S. District Court for the

Northern District of Texas issued an order granting the EEOC's motion to dismiss the State of Texas' lawsuit because generally the issue was not ripe for adjudication. The judge concluded that the court lacked subject matter jurisdiction over Texas' request for declaratory and injunctive relief against the EEOC's policy because the state can't prove "an actual case or controversy" involving the guidance exists at this time. The case is now on appeal before the fifth circuit.

To address these issues, Congress recently proposed legislation to protect employers who comply with the laws that regulate their industries. The proposed legislation, aptly named the

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Background check fingerprints. Photo courtesy of Thinkstock

“Certainty in Enforcement Act of 2014,” would amend Title VII of the Civil Rights Act of 1964, by adding the following language:

(o) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer, labor organization, or employment agency, or for a joint labor

management committee controlling apprenticeships or other training or retraining opportunities, to engage in an employment practice that is required by Federal, State, or local law, in an area such as, but not limited to, health care, childcare, in-home services, policing, security, education, finance,

employee benefits, and fiduciary duties.

For now, the proposed legislation has been sent to committee for further discussion and potential revision. As this issue continues to develop, the Civil Rights Division will keep you abreast of any progress or further developments. ■

## TWC 18th annual Texas Workforce Conference

*Preparing Today's Workforce for Tomorrow's Texas*

Texas workforce stakeholders gathered in Grapevine in November for the 18th annual Texas Workforce Conference. It was a great opportunity to engage in information-sharing and obtain valuable customer and administrative resources.

This year's conference, co-hosted with the Texas chapter of the International

Association of Workforce Professionals, enhanced the idea exchange between Local Workforce Development Board professionals, economic development entities, labor leaders and educators to meet the demands of Texas employers and job seekers.

The dynamic speakers and workshops at this year's

conference focused on important topics that offer solutions to augment our workforce, training, and economic development goals, and to address our current and future challenges.

Save the date for next year's conference, to be held at the Hyatt Regency Dallas in Dallas, Nov. 18-20, 2015. ■

# Disabilities: Greatest Barrier to Employment

## Myths and Facts

While the treatment of mental illness has advanced, unfortunately much of society's thinking about mental, emotional or behavioral disabilities has not. Stigmatization has excluded individuals from key spheres of society, including, and perhaps especially, the workplace. Many myths about the impact of mental illness endure despite clear facts refuting them.

### Five Myths About Mental Illness

#### **Myth #1: Mental illness is the same as developmental disability.**

Fact: Mental illness and developmental disability are entirely different. Developmental disability is primarily characterized by limitations in intellectual functioning, while intellectual functioning varies among persons with persistent mental illness just as it does across the general population.

#### **Myth #2: Recovery from mental illness is impossible.**

Fact: While mental illness may be persistent, research has shown that with treatment, the majority

of people show genuine improvement in symptoms over time and lead stable, productive lives. As the treatment of mental illness has advanced, the focus of treatment has shifted from simply minimizing symptoms to true recovery—that is, reintegration into mainstream society, including (and perhaps most importantly) the world of employment.

#### **Myth #3: Mentally ill and mentally restored employees (that is, those in whom mental illness is effectively treated) tend to be second-rate workers.**

Fact: Far from being inferior workers, individuals with mental illnesses may in fact be superior in many ways to their co-workers without mental illness. Employers who have hired persons with mental disabilities have reported that their attendance and punctuality exceed the norm, and that their motivation, work quality, and job tenure is as good as, or better than, that of other employees. Research has shown that there is no difference between the productivity of workers with and without mental illness.

#### **Myth #4: People with psychiatric disabilities cannot tolerate stress on the job.**

Fact: The responses to job-related stress, and precisely which factors will be perceived as stressful, vary among individuals with psychiatric disabilities just as they do among people without such disabilities. For all workers, with or without psychiatric disabilities, productivity is optimized when there is a close match between the employee's needs and his or her working conditions.

#### **Myth #5: Mentally ill and mentally restored individuals are unpredictable, potentially violent and dangerous.**

Fact: This myth is reinforced by media portrayals of people with mental illnesses as frequently and randomly violent. However, a research literature review conducted at Cornell University found absolutely no evidence to support such portrayals. The fact is that the vast majority of individuals with psychiatric disabilities are neither dangerous nor violent.

**It's More Than Just the "Right Thing" – It's the Law.** The workforce includes many individuals with mental, emotional or behavioral disabilities who face employment discrimination because their disabilities are stigmatized and misunderstood. Congress intended Title I of the Americans with Disabilities Act to combat such employment discrimination as well as the myths, fears, and stereotypes upon which it is based. Under substantially equivalent state law, Chapter 21 of the Texas Labor Code (TLC) likewise prohibits employment discrimination based upon a mental disability. In TLC Section 21.105, the prohibition of discrimination on the basis of a mental (or physical) disability applies only to discrimination because of or on the basis of a mental (or physical) condition that does not impair an individual's ability to *reasonably perform a job*.

Together employees with mental illnesses and their employers can dispel myths and contribute to a productive and fulfilling workplace. ■

# Recent State Employment Case Summaries

## **City of Sugar Land v. Kaplan**

2014 Tex. App. LEXIS 11455  
(Houston, 14th Dist. – Dec. 16, 2014)

Leon Kaplan, filed a charge of age discrimination against the City of Sugar Land, his former employer, with the Equal Employment Opportunity Commission (EEOC), and subsequently filed a court case. During the trial court case, Kaplan filed an amended charge of discrimination with the EEOC, alleging that the City had discriminated against him on the basis of both age and disability. The charge was filed 698 days after the date of Kaplan's termination. The City of Sugar Land argued that the amended charge was non-jurisdictional under the Texas Commission on Human Rights Act because it was not filed within 180 days of his termination. Kaplan argued that his initial EEOC intake questionnaire described information regarding his disability, and therefore, his amended charge related back to the initial charge of discrimination, which was filed within the mandatory 180-day maximum time frame. The trial court rejected the city's plea to the jurisdiction.

The Court of Appeals of Texas reversed the trial court's order denying the plea to the jurisdiction and dismissed Kaplan's disability claim. Amendments that raise a new legal theory of discrimination cannot relate back to the initial charge of discrimination, unless the facts supporting both the amendment and the initial charge are essentially the same. According to the Court of Appeals, Kaplan failed to demonstrate that his untimely disability claim related back to his timely filed claim of age discrimination.

## **Bill Miller Bar-B-Q Enterprises v. Gonzales**

2014 Tex. App. LEXIS 11796  
(San Antonio – Oct. 29, 2014)

A jury found that Bill Miller B-B-Q Enterprises retaliated by terminating Gonzales because of her opposition to and complaints of discrimination and awarded her back pay and compensatory damages of \$30,000. The trial court judge granted attorney's fees to Gonzales of \$60,975 through trial and conditional fees for post-judgment motions and appeals. Bill Miller challenged the attorney's fees award on appeal on several grounds.

The Fourth Court of Appeals in San Antonio held that Section 21.259(a) of the Texas Labor Code entitles the parties to have a jury determine the reasonableness of the amount of attorney's fees for the following reasons: 1) Section 21.259(a) is silent on who determines the reasonableness of the amount; 2) the amount of "costs" is fixed by statute; however, the reasonableness of the amount of attorney's fees to award is not fixed, but is a fact issue; and 3) interpretation of Section 21.259(a) as requiring a jury to determine the attorney's fees avoids any constitutional issue involving a party's entitlement to a jury trial on all contested issues of fact.

The Fourth Court noted that it was

diverging from the opinions of the Eighth and Thirteenth Courts of Appeals in El Paso and Corpus Christi, respectively, which both have held that the amount of attorney's fees is to be determined by the trial court, because Section 21.259 authorizes the recovery of attorney's fees "as part of the costs." In conclusion, the Fourth Court reversed the portion of the trial court's judgment awarding attorney's fees and sent the case back for a new trial solely on the attorney's fees issue.

## **Webb v. Round Rock ISD**

2014 U.S. App. LEXIS 23291  
(Fifth Cir. Dec. 11, 2014)

Note: This opinion was not published and is not precedent except under limited circumstances set forth in 5th Circuit Rule 47.5.4.

Crystal Webb, an African-American woman employed as a night-shift custodian for Round Rock Independent School District, alleged retaliation after she filed an EEOC complaint of



Custodian cleaning. Photo courtesy of Thinkstock

racial discrimination based upon an involuntary transfer to another school within the district, which required her to walk sixteen miles to work. The district court rejected her claim on the grounds that a lateral transfer does not qualify as an adverse employment action.

On appeal, the Fifth Circuit cited the U.S. Supreme Court's decision in *Burlington Northern & Santa Fe Ry. v. White*. The Supreme Court found that the lateral transfer in the *Burlington* case was sufficient to support the jury

verdict of retaliation. In that case, the complainant was moved within the same job title from a position as a forklift operator to a position in which she removed and replaced railroad track components, among other things. The forklift operator position required more qualifications, and also the new position was more strenuous. The U.S. Supreme Court concluded that "[c]ontext matters."

In the instant case, the Fifth Circuit stated that there was a lack of context

facts to evaluate whether the transfer was truly adverse. Although the timeline of events arguably supported Webb's allegation of causation, the Court asserted there was insufficient evidence as to why the school district transferred Webb and whether it transferred her because of her protected activity in filing the EEOC complaint. The Fifth Circuit concluded that Webb sufficiently pled a claim for retaliation, and that the case should be allowed to proceed at least to the summary judgment stage. ■

## TWC Civil Rights Bill Watch: The 84th Texas Legislative Session

The TWC Civil Rights Division will monitor selected bills related to civil rights and Texas Labor Code Chapter 21 during the 84th session of the Texas Legislature that started Jan. 13, 2015. The list of relevant employment bills include:

- House Bill 58 by Martinez, Armando (D) – Relating to an unlawful employment practice by an employer whose leave policy does not permit an employee to use leave to care for the employee's foster child.
- House Bill 187 by Thompson,

Senfronia (D) – Relating to unlawful employment practices regarding discrimination in payment compensation. Companion Senate Bill 65, Ellis, Rodney (D) was filed on Nov. 10, 2014 and is identical.

- House Bill 476 by Dutton, Harold (D) – Relating to the consequences of successfully completing a period of deferred adjudication community supervision.
- House Bill 577 by Flynn, Dan (R)–Relating to pay, benefits and

requirements for state active duty service members.

- House Bill 627 by Johnson, Eric (D)–Relating to the prohibition of employment discrimination on the basis of sexual orientation or gender identity or expression.

You may access bill text and other information for these bills by accessing the following website: <http://www.capitol.state.tx.us/>. Type the bill number into the search field for full text and additional details. ■

## Civil Rights Division Staff Celebrates State Service Anniversaries

Congratulations! This year marks a significant milestone in Ellena E. Rodriguez's service to the State of Texas. Ms. Rodriguez is a Program Specialist in CRD who conducts training and technical assistance. The Texas

Workforce Commission recognizes her 15 years of time, thought and energy contributed to the State. We would like to convey our sincerest appreciation for her dedicated work for the people of Texas. ■



Ellena E. Rodriguez receives Service Recognition Award from Lowell Keig, Director of Civil Rights Division. Photo courtesy of CRD

# Mental and Behavioral Health Training

## A Call for Help

The Civil Rights Division often interacts with people whose lives have been disrupted by the unexpected loss of employment or housing. Psychologists point out serious mental health consequences of job loss or losing one's home can be devastating. Individuals can be burdened with thoughts and feelings of hopelessness, including thoughts so severe as suicide.

To better serve the people of Texas, the Civil Rights Division (CRD) recently requested mental and behavioral health training that was provided by Austin Clubhouse, Mental Health America of Texas and the SIMS Foundation. Through this training CRD staff gained a higher understanding of people affected, how to identify warning signs, available resources and how to best handle such situations. Knowing how to recognize these signs is the first step in taking action that could save someone's life. In fact, CRD staff members, Maria Cervantes, Marcia Anavitate-Jordan, and Julie Smith had just such an incident and utilized this training.

Recently, an individual called the Civil Rights Division very upset with her current situation and circumstances and stated she, "...wanted to kill herself" to Mrs. Cervantes.

A true professional, Ms. Cervantes stayed calm with the caller and kept her talking to retrieve valuable information all the while notifying and obtaining assistance from fellow co-workers Ms. Anavitate-Jordan and Ms. Smith. Ms. Cervantes successfully calmed the caller enough to obtain the caller's permission to include Ms. Anavitate-Jordan on the call. While Ms. Anavitate-Jordan spoke with the caller, she was able to obtain the caller's full name, address, and

contact information of an immediate family member(s) in the caller's area. A call was made to the caller's husband to inform him of his wife's immediate need for help.

Ms. Anavitate-Jordan then passed the caller's information to Ms. Smith who, on a separate phone line, dialed 911. The 911 dispatcher then transferred Ms. Smith to the city where the caller resides to request a wellness check from the city's local law enforcement. At that point, the 911 dispatcher confirmed to Ms. Smith that two police officers had been sent to the caller's home address.

Minutes later, the caller informed Ms. Anavitate-Jordan that the police had arrived, but she was worried that the police were going to "take her away." Ms. Anavitate-Jordan calmly assured the caller that she may need the help to get through this time in her life. When Ms. Anavitate-Jordan confirmed the caller was safe and talking with police officers, she and the caller disconnected the call.

However, that wasn't the end of the story...Ms. Anavitate-Jordan and Ms. Smith later phoned the caller's husband to follow up and to be of

any further assistance to him and his family. Together, the CRD staff formed a professional triage team of support and protection for the caller and swiftly went into action with the tools needed to save her life, utilizing the training and resources they recently received.

Should you find yourself in a similar situation or know someone who needs help, get in touch with your local crisis line for resources and immediate assistance. Nationally, Call 1-800-273-TALK (8255) to be connected to the nearest crisis center or go to the Texas Department of State Health Services Web page at <http://www.dshs.state.tx.us/mhservices/default.shtm> to search by county to find the crisis center in your area or to the Texas Council of Community Mental Health Centers web site at <http://www.txcouncil.com> to find the crisis number for your area.

### **Save a Number / Save a Life.**

Enter the Lifeline phone number in your cell phone, since it might be hard to remember a phone number in a crisis: 1-800-273-TALK (8255).

Everyone in Texas can be a "gatekeeper" and help save a life by talking about suicide prevention. ■



Tom Keller with Mental Health America of Texas. Photo courtesy of David Halpern



Civil Rights Division information booth at the Texas Workforce Conference November 2014. Photo courtesy of CRD

## Civil Rights Division: Education Training & Outreach

### Upcoming Schedule of Events

The Texas Workforce Commission Civil Rights Division (TWCCRD) is committed to providing training and technical assistance, outreach and education programs to assist employers, employees and other stakeholders in understanding and preventing discrimination. We believe that discrimination can be averted if everyone knows their rights and responsibilities.

Please come and visit with us at the following upcoming scheduled events:

- February 6, 2015, Texas Business Conference, Horseshoe Bay Resort, Horseshoe Bay, TX.

- February 12, 2015, Victoria Apartment Association, Victoria, TX.
- February 27, 2015, Texas Business Conference, Holiday Inn, Beaumont, TX.
- March 11, 2015, Builders Association of San Angelo, San Angelo, TX.
- March 13, 2015, Texas Business Conference, Holiday Inn-South Broadway, Tyler, TX.

**No-cost Outreach and Education Programs:** TWCCRD representatives are available on a limited basis at no cost to make presentations and

participate in meetings with employees and employers, and their representative groups, as well as community organizations and other members of the general public.

**TWCCRD Education Training & Technical Assistance:** TWCCRD provides low-cost, fee-based trainings and technical assistance programs throughout the State of Texas. For more information, availability, and training designed for your needs, contact TWCCRD at (888) 452-4778, (512) 463-2642, or CRDTraining@twc.state.tx.us. ■