



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.

Texas Commission on Human Rights Commissioners

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TEXAS COMMISSION ON HUMAN RIGHTS HOLDS FINAL MEETING

Governor Greg Abbott Recognizes Commissioners' Service with Proclamations



From Left to Right: Comr. Diggs, Comr. Stidvent, Comr. Thomas, Chairman Anderson (Center), Comr. Michalka, Comr. Glover, and Comr. Osterhout

Wednesday, July 22, 2015 marks the close of a chapter in Texas civil rights enforcement and education. The Texas Commission on Human Rights (TCHR) conducted its final quarterly meeting.

Prior to the recent legislative session, the Sunset Commission reviewed the duties and operations of the Texas Workforce Commission, including the Civil Rights Division (CRD), and recommended

streamlining of CRD's oversight, by discontinuing the seven-member TCHR and transferring its duties to the three-member Texas Workforce Commission. The Legislature adopted these recommendations in Senate Bill 208, which was enacted into law, and made effective on September 1, 2015.

In its last meeting, the TCHR issued a decision to file a civil action in an equal employment opportunity (EEO) sexual harassment matter. It also heard reports on the areas of employment, housing, training and monitoring.

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Immediately following the meeting, attendees adjourned to a farewell reception for the TCHR. CRD Director Lowell Keig reflected on the accomplishments of the TCHR. Keig said that with the direction and input of the TCHR, “We developed a three-year strategic plan to provide us with goals and guidance. Two years into implementation of that plan, we have seen tremendous improvements.”

Keig pointed out that under the TCHR’s oversight, the division has returned to its role as an enforcement body. He highlighted the following actions:

- Two companion EEO matters were presented to a panel in January, 2015. One matter was approved by the panel as reasonable cause and the full TCHR voted to file a civil action if it did not settle, which it did.
- One EEO matter was approved by a panel as reasonable cause in June, 2015.
- One of two EEO matters presented to a panel in July, 2015 was found to be reasonable cause.
- One of two EEO matters presented to the full TCHR in the final meeting was approved for the filing of a civil action.

Although determinations of reasonable cause for housing matters are made by the CRD Director and parties elect whether or not to proceed with judicial determination, Keig pointed out that the TCHR’s governance has resulted in great strides in housing enforcement and that several cases are currently in litigation being handled by the Attorney General’s Office.

Keig went on to state, “Your oversight has helped us reach a state of greater financial stability. With your oversight, we have become more efficient and technologically savvy.” He listed the improvement in training of state employees on EEO and sexual harassment, which has gone from a couple of hundred state employees per year to several thousand per year.

Keig concluded the highlights of the TCHR’s accomplishments by conveying that from 1993 to the present, TCHR has overseen an agency that secured millions of dollars in recoveries through conciliation or settlement for complainants, and made thousands of determinations of no reasonable cause on complaints against employers and housing providers when the evidence was found to be insufficient to support the allegations.

TWC Chair Andres Alcantar, TWC Commissioner Ronald Congleton and TWC Executive Director Larry Temple thanked the TCHR Commissioners for their service, and Luke Bellsnyder with Governor Greg Abbott’s Office presented each of the TCHR Commissioners with a proclamation from the Governor.

In addition, Keig presented framed flags that were flown over the Capitol for each of the TCHR commissioners and delivered a crystal gavel to TCHR Chair Tom Anderson, who had served on the TCHR since 2003.

Following farewell comments from the TCHR commissioners, Keig concluded the ceremony with the words of Barbara Jordan, the late politician and Civil Rights leader who was the first African American elected to the Texas Senate after Reconstruction and the first southern Black female elected to the United States House of Representatives: “More is required of public officials than slogans and handshakes and press releases. More is required. We must hold ourselves strictly accountable.” Keig urged that the TCHR commissioners had “met this challenge over and over” and thanked them for their service. ■

CRD Education, Training & Outreach



Keynote speaker EEOC Chair Yang with TWCCRD Director Lowell Keig at the EEOC Fair Employment Practices Agencies 2015 Annual Training Conference in Atlanta, Georgia on August 4, 2015

Recent Events

Civil Rights Division's Director Lowell A. Keig recently presented to the various Labor & Employment Law attorneys at Bar Associations around the state about current legal issues and pitfalls to avoid in EEO investigations and enforcement.



The Civil Rights Division's Training & Outreach Coordinators, Ellena E. Rodriguez and Vickie Covington, recently spoke at the Texas State Independent Living Council (TXSIL)

Texas Transportation Works Summit, August 16-18, 2015, in Lubbock. The Summit comprised of various workshops and panels discussion that are interconnected to the transportation needs in the lives of people with disabilities, such as:

- Employment
- Housing
- Advocacy

TXSIL's Transportation Work statewide initiative is to address the barriers experienced by individuals with disabilities and senior populations that use public transportation in rural and small urban areas of Texas.

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:

- October 25 - 28, 2015 - 74th Annual HRSouthwest Conference (HRSWC) at the Fort Worth Convention Center is the premier regional human resources conference in the United States providing more than 100 educational sessions from thought-leading speakers, an abundance of networking opportunities and an exciting Marketplace of more than 200 HR solutions and services. To register, visit www.hrsouthwest.com
- November 18 - 20, 2015 - 19th Annual Texas Workforce Conference,

co-hosted by the Texas Chapter of the International Association of Workforce Professionals will be held at the Hyatt Regency Hotel, Dallas, TX. TWC has lined up speakers from a variety of disciplines who will share their perspectives on all aspects of education, economic and workforce development with professionals from across the State and around the country. To register, visit www.twc.state.tx.us/events

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 via webinars and in-person sessions throughout the State of Texas.

For more information, availability, and training designed for your needs, contact TWCCRD at

(888) 452-4778, locally (512) 463-2642, or CRDTraining@twc.state.tx.us. ■



CRD Mediator Evelyn Smith Retires



One of CRD's mediators, a long-time employee, Evelyn Smith, retired from the Texas Workforce Commission, as of June 30, 2015.

Smith played a major role in developing the CRD's Alternative Dispute Resolution/Mediation Program into the well-respected program that it is. Employers and complainants have often praised Smith for her concern about finding "win-win" solutions to employment discrimination complaints. Over the course of her career, Evelyn closed 1,432 cases, with settlements totaling \$8,900,744.21.

Smith first began working at the Texas Commission on Human Rights (the predecessor of the Texas Workforce Commission Civil Rights Division) on January 1, 1993 as an investigator. She continued to serve as an investigator as the agency was transitioned into a division of TWC in 2004. The job she most enjoyed was that of mediator, a position she held for the majority of her 22-year career with the organization.

During the last official meeting of the Texas Commission on Human Rights on July 22, 2015, Smith's accomplishments were acknowledged and concluded with a retirement party attended by Smith's closest friends and coworkers. ■

Pregnancy Discrimination Guidance

The U.S. Equal Employment Opportunity Commission (EEOC) issued an update of its Enforcement Guidance on Pregnancy Discrimination and Related Issues (Guidance).

The updates to the Guidance are limited to several pages about the U.S. Supreme Court's recent decision in *Young v. UPS*, issued in March 2015. The updated Guidance reflects the Supreme Court's conclusion that a woman may be able to prove unlawful pregnancy discrimination if the employer did not accommodate a pregnant woman, but accommodated some workers who were not pregnant, but were similar in their ability or inability to work. The Court explained that employer policies that are not intended to discriminate on the basis of pregnancy may still violate the Pregnancy Discrimination Act (PDA) if the policy imposes significant burdens on pregnant employees without a sufficiently strong justification.

The decision in *Young* does not affect most of the July 2014 EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues and the following topics remain the same:

- the PDA's application to current, past, and potential pregnancy;
- termination or refusal to hire someone because she is pregnant and other prohibited employment actions based on pregnancy;
- application of the PDA to lactation and breastfeeding;
- prohibition of forced leave policies;
- the obligation to treat women and men the same with respect to parental leave policies; and
- access to health insurance.

Furthermore, the Court's opinion did not address the effect of the ADA Amendments Act of 2008 on workers with pregnancy-related impairments. Therefore, that discussion in the Guidance also remains the same. The Guidance notes that, "Changes to the definition of the term 'disability'

resulting from enactment of the ADA Amendments Act of 2008 make it much easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA."

Further information about Enforcement Guidance on Pregnancy Discrimination and Related Issues are available at https://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm ■

Avoid ADA mishaps

The Americans with Disabilities Act's interactive process requirement repeatedly is a pitfall for not only supervisors and frontline managers, but also attorneys and HR professionals. Under the ADA, an employer must provide a qualified disabled employee with a "reasonable accommodation" that will allow him to perform the essential functions of his job. The Act doesn't discuss how you should determine whether a reasonable accommodation exists, but the ADA regulations require employers to initiate the "informal, interactive process" to determine whether reasonable accommodations can be found.

Here are some of the top mistakes employers make when they are required to engage in the interactive process; be aware of them so you don't make them, too:

- 1. Failing to recognize an accommodation request.** The interactive process should begin when an employee requests an accommodation. The employee does not need to use any specific words or fill out a certain form to start the process. The request for an accommodation need not even be in writing.

Guidance from the Equal Employment Opportunity Commission (EEOC) requires only that an employee use "plain English" to request an accommodation, and

it does not have to reference the ADA. Training frontline supervisors and managers to recognize when the company must engage in the interactive process is key.

- 2. Failing to engage in an interactive dialogue.** Once an employee requests an accommodation, you *must* engage in a dialogue to determine whether any reasonable accommodations are possible. The dialogue may be informal, but you should identify any work restrictions associated with the employee's medical condition and explore all options that will allow him/her to perform the essential functions of the job.

Generally, courts require that an employee propose a reasonable accommodation; it's a good employer practice to suggest other possible accommodations. By offering an alternative, you may discover accommodations that are more efficient than the one proposed by the employee.

- 3. Not recognizing that the ADA may warrant additional leave.** Some employers err when they deny employees leave under the ADA. It's common for an employer to automatically deny additional leave after an employee uses all of his/her leave entitlement under the Family and Medical

Leave Act (FMLA) even though the employee may qualify for a leave extension under the ADA. Put simply, exhausting FMLA leave does not automatically disqualify an employee from taking more leave as an accommodation under the ADA.

- 4. Not documenting the interactive process.** Good documentation helps you follow the proper steps in the interactive process. It also helps you recreate those steps if an employee ever challenges your willingness to offer a reasonable accommodation—whether that challenge arises in a severance or termination discussion, a civil rights charge, or a lawsuit. Good documentation charts the map of your efforts along the way. It is also best practice to keep documentation, even after the employee has left the organization in accordance with your agency's retention cycle.

- 5. Not identifying the essential job functions.** Job duties and roles change—by virtue of the economy or work cycles or for other reasons. Given the 2008 amendments to the ADA, which emphasize reasonable accommodations and also broadened its definitions, it's essential that you articulate the essential functions of all jobs, and keep your job descriptions up to date. ■

SELECTED TEXAS CASE SUMMARIES

Madden v. El Paso Independent School District

2015 Tex. App. LEXIS 7586 (El Paso, July 22, 2015)



Vashti Madden was employed as a teacher with the El Paso Independent School District (the "District"). Per her contract, the District was allowed to reassign her to other positions or change her duties at any time during the contract period. The District reassigned her from teaching all Mathematics to a combination of Mathematics and mostly Spanish. Madden alleged that after filing a grievance, she experienced five walk-throughs in one month, and a few months later another walk-through, which she characterized as negative. Madden filed an EEOC claim, alleging that she was discriminated against based upon her sex and due to her Mexican origin, and that she was retaliated against for opposing discriminatory treatment. The trial court granted summary judgment for the District.

The Court of Appeals assumed that Madden met the prima facie elements of a discrimination claim. The Court then analyzed whether the District articulated a legitimate non-discriminatory reason for the employment action, and whether there was evidence that the reason was pretext.

With regard to Madden's national origin discrimination claim, the Court stated that she was certified to teach Spanish; her contract allowed reassignment; two Spanish teachers had left the high school; and that she was the only math teacher certified in Spanish. The Court concluded that the District's reasons were credible and that Madden's bare assertion that she was discriminated against because she was Hispanic by assigning her to teach mostly Spanish classes was mere conjecture.

With regard to Madden's sex discrimination claim, the Court stated that Madden's assertion that three new, unlicensed male math teachers were hired and given advanced math courses was not supported by the record, since her own summary judgment evidence showed licensing information for three unidentified male teachers. Furthermore, the District provided a credible explanation for the decision to have Madden teach mainly Spanish courses and one Mathematics course, as noted above.

On her retaliation claim, the Court stated that it was undisputed that Madden engaged in protected activity by filing an EEOC claim, but the only negative employment actions that Madden alleged occurred after the filing of her claim were two walk-throughs conducted in the subsequent three months. The Court pointed out that an adverse action short of discharge must be materially adverse. In this instance, since walk-throughs were required

under state law, and two other foreign language teachers also were subject to two walk-throughs in one month, the walk-throughs Madden experienced were not materially adverse.

As a result, the Court of Appeals affirmed the judgment of the trial court in favor of the district.

Mayfield v. Tarrant Regional Water District

2015 Tex. App. LEXIS 5851 (El Paso, June 10, 2015)



Jacklyn Worfel Mayfield and her mother-in-law, Lori Beth Mayfield, were employed by the Tarrant Regional Water District (the "District"). Jacklyn Mayfield worked for two different departments. She alleged that three of her supervisors (one male and two females) in one department showed her a picture on the male supervisor's cell phone of male genitalia. She reported it to a supervisor in another department and her mother-in-law, Lori Mayfield, another of her supervisors, who recommended that she not report the incident further and hope it would blow over with time.

Subsequently, Jacklyn Mayfield alleged that her medical leave was overly scrutinized and questioned. She was terminated after exhausting her leave and for failing to make prior arrangements with her supervisor. Lori Mayfield told her own supervisor that she had personally supervised Jacklyn Mayfield's leave and that the District had "broken her heart and

that her heart would never be with this company again.” Lori Mayfield was then terminated without a reason given.

Jacklyn Mayfield and Lori Mayfield filed charges of discrimination and retaliation and then filed a lawsuit. The trial court granted a plea to the jurisdiction in favor of the District.

The Court of Appeals held that sexual harassment was not sufficiently pleaded because there was no *quid pro quo* without sexual advances and because showing one vulgar picture in mixed company in the workplace was not sufficiently abusive to create a hostile work environment, nor was a series of alleged work requirements that she felt were contradictory and oppressive, since they did not implicate sex and did not permeate the workplace with severe and pervasive discriminatory intimidation, ridicule and insult so as to alter the conditions of her employment.

As for the retaliation claims, the Court held that Lori Mayfield did not engage in any protected activity or oppose a discriminatory practice. Likewise, the Court ruled that Jacklyn Mayfield did not oppose a discriminatory practice or make or file a claim. She elected not to make a complaint on the advice of her mother-in-law.

The Court of Appeals further concluded that allowing plaintiffs to amend to attempt to state facts to establish jurisdiction would serve no purpose as they had already marshaled their facts. The Court therefore affirmed

the trial court’s order granting the plea to the jurisdiction.

River Oaks L-M, Inc. d/b/a West Point Lincoln Mercury v. Veronica Vinton-Duarte

2015 Tex. App. LEXIS 5385 (Houston [14th Dist.], May 28, 2015)

Veronica Vinton-Duarte worked at West Point Lincoln Mercury (West Point) as the aftermarket sales manager. Vinton-Duarte alleged that she was subjected to a litany of sexual comments and inappropriate touching on an almost daily basis by management and co-workers for a few years.

The trial court entered judgment on the jury’s portion of the verdict that awarded actual damages plus pre-judgment interest of \$739,623.88, including offsets for how the trial court believed the statutory cap was to be applied and for West Point’s counterclaims for theft and similar theories. The trial court also awarded Vinton-Duarte attorney’s fees of \$146,350.00, offset by the fees awarded to West Point on a statutory theft claim.

The Court of Appeals held that there was sufficient evidence to support a jury finding that West Point retaliated against Vinton-Duarte when she was fired for theft three months after she made a sexual harassment complaint, because other employees were not discharged for similar thefts and West Point was aware of the sexual harassment allegations.

The Court also concluded that sufficient evidence also supported the jury finding that West Point knew or should have known of the sexual harassment against Vinton-Duarte, but failed to take prompt remedial action to eliminate the harassment. West Point did not begin investigating Vinton-Duarte’s complaint until a couple of months after she reported it. The investigation was started after Vinton-Duarte checked on the status with the human resources manager and informed her that the touching and comments had continued.

Finally, the Court held that the trial court erred in applying the Texas Labor Code damages cap on a “per claim” rather than a “per claimant” basis. The cap applies to each complainant, not to each claim. As a result, the Court of Appeals affirmed the judgment, but modified Vinton-Duarte’s total damages award to the amount of \$625,197.87, including front and back pay of \$364,000, sexual harassment/retaliation compensatory damages of \$200,000 (capped for an employer with fewer than 201 employees), prejudgment interest, and an offset for West Point’s counterclaims. ■