TEXAS

Part of your Texas Employment Law Service *Vol. 29, No. 10*
October 2018

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HOSTILE WORK ENVIRONMENT

HR dilemma: what to do when employee says, 'You can't tell anyone!'

by Michael P. Maslanka
UNT Dallas College of Law

Professor Christine Blasey Ford recently accused Judge Brett Kavanaugh of sexually assaulting her while they were both in high school. An important matter. For Texas Employment Law Letter readers, the event raises this issue: What happens when an employee complains about harassment but asks you to keep the matter confidential? Recall that Ford originally sent a letter detailing her allegations to Senator Diane Feinstein but requested confidentiality. Ultimately, Ford's identity and the allegations came to light. So what should you do when an employee comes to you and complains but wants no disclosure? How should you train your supervisors? Should you revise your antiharassment policy?

Hostile work environment alleged

Surprisingly, there is little case law, but a 1997 ruling did address the issue. In the case, Jenice Torres, an employee of New York University Dental Center, was subjected to vile and disgusting conduct by her supervisor. Another manager, Leonard Pisano, heard there was an issue and spoke with Torres, suggesting she put any concerns in writing. His first request was made in September 1993.

After two more requests, Torres finally replied to Pisano in February 1994, stating, "First of all, I would like to apologize for not writing sooner as we had originally discussed. It has taken me quite a while to gather courage and strength to begin this letter." Her reply went on to provide few details, limiting her comments to her manager's mistreatment of her and other employees. She ended the letter this way:

> There is so much more, but it will take some time. . . . I hope and ask you to please keep this confidential until we both speak about this matter.

Three days later, Pisano insisted that Torres write another letter and lay out the details, and she complied—describing what amounted to 10 episodes of vile, harassing behavior. Finally, in late June 1994, Pisano brought Torres in to meet with his boss. She detailed all the harassment and was moved from her supervisor's oversight to a new department. Her supervisor was fired.

Torres then sued her employer and Pisano under Title VII of the Civil Rights Act of 1964, alleging a hostile work environment. The trial court dismissed her case, and she appealed.

Case dismissed

The appeals court agreed that Torres' claims should be dismissed. Why? Here's what the court said:

AGENCY ACTION

OFCCP releases directives on equal employment and religious freedom. The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) in August issued two new policy directives, one focused on equal employment opportunity and the other addressing religious freedom. The equal employment opportunity directive calls for more comprehensive reviews of contractor compliance with federal antidiscrimination laws. The religious freedom directive is aimed at protecting the rights of religion-exercising organizations. The DOL said it is implementing a comprehensive compliance initiative that will include adding focused reviews to its compliance activities. The religious freedom directive instructs OFCCP staff to take into account recent U.S. Supreme Court decisions and White House Executive Orders that protect religious freedom.

NLRB defends its ALJ appointments. The National Labor Relations Board (NLRB) in August rejected a challenge regarding the appointment of its administrative law judges (ALJs), concluding that all of the Board's ALJs have been validly appointed under the Appointments Clause of the U.S. Constitution. In June, the U.S. Supreme Court issued a decision in *Lucia v. SEC,* finding that ALJs of the Securities and Exchange Commission (SEC) are inferior officers of the United States and thus must be appointed in accordance with the Appointments Clause—i.e., by the president, the courts, or the heads of departments. Unlike the SEC's ALJs, the NLRB's ALJs are appointed by the full Board as the head of department and not by other agency staff members. NLRB Chairman John F. Ring was joined by members Mark Gaston Pearce, Lauren McFerran, Marvin E. Kaplan, and William J. Emanuel in the order.

OSHA extends certain compliance dates for beryllium standard. The Occupational Safety and Health Administration (OSHA) issued a final rule in August to extend the compliance date for specific ancillary requirements of the general industry beryllium standard to December 12. The extension affects provisions for methods of compliance, beryllium work areas, regulated areas, personal protective clothing and equipment, hygiene facilities and practices, housekeeping, communication of hazards, and record keeping. The extension doesn't affect the compliance dates for other requirements of the general industry beryllium standard. OSHA has determined that the extension will maintain essential safety and health protections for workers while the agency prepares a "Notice of Proposed Rulemaking" to clarify certain provisions of the beryllium standard that would maintain the standard's worker safety and health protections and address employers' compliance burdens. ✤

> There is certainly a point at which harassment becomes so severe that a reasonable employer simply cannot stand by even if requested to do so by a terrified employee. But that was not the case with Torres' claims. There were, for example, no allegations of any serious physical or psychological harm that would have occurred if the employer did not act forthwith. And the law still does not presume in every case that harassed members of Title VII's protected classes do not know what is best for themselves and cannot make reasonable decisions to delay—at least for a time—pursuing harassment claims, perhaps for privacy or emotional reasons, until they are ready to do so.

So, at least for this court, an employer can defend itself against a hostile work environment claim if it honors an employee's request for confidentiality. But note, if the claims are egregious, then there's no flexibility on the employer's part, and action must be taken. *Torres v. Pisano,* 116 F. 3d 625 (2d Cir., 1997).

5 tips for Texas employers

This case will come in handy if you are ever sued in a similar scenario. But the issue we are grappling with is broader. Here are some guidelines.

First, suppose an employee asks a manager, "Can I tell you something in confidence?" Supervisors need to be trained to say something along these lines: "We always want to hear any of your concerns. Still, there are certain things that I may have a duty to tell others in the company."

Second, should your policies address the issue of confidentiality? I could argue it either way, but I come down on the side of yes: "All concerns will be promptly looked into." (Don't use the term "complaint"—it conjures up unfair images of an employee who whines.) Employees sometimes ask that any concern they express be kept confidential. In certain circumstances, however, the company's knowledge of the facts triggering a concern requires action, which may call for the disclosure of the employee's identity.

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JUST ASK JACOB

Pursue theft charge separately (don't dock final paycheck)

by Jacob M. Monty
Monty & Ramirez, LLP

Q *We recently discovered that one of our employees has been ordering supplies for his own personal use through his office account. He has admitted to the theft. We don't want to press charges, but we are going to fire him. Are we allowed to withhold his final two paychecks as repayment for the stolen supplies? He has signed a form authorizing us to do so.*

A Wage deductions inhabit a tricky area of employment law that requires careful navigation to avoid Fair Labor Standards Act (FLSA) violations. Furthermore, the legality of wage deductions will vary depending on your state's payday laws. In Texas, for example, wage deductions are allowed with written authorization from the employee that specifies (1) the deduction's lawful purpose, (2) a reasonable expectation of the amount to be withheld, and (3) a clear indication that the deduction is going to be withheld from his wages. The safest route in many jurisdictions may be to pay the employee according to state law but pursue compensation for the theft through the proper legal channels.

Q *One of the facilities we operate has a formal dining room and bar. One of our directors observed a bartender drinking wine while she was on duty. We have a rule that prohibits employees from drinking on our premises at all times. We would like to fire the bartender for violating that rule. If she tells us she has a drinking problem, would the termination violate her rights under the Americans with Disabilities Act (ADA)?*

A Employees who are qualified alcoholics under the ADA are subject to discipline for violating workplace policies that prohibit alcohol use, even if the violation stems from their alcoholism. You should impose the same discipline other employees have received in similar situations. If the appropriate disciplinary action is termination, the ADA doesn't require further discussion about the potential disability or accommodation request.

Q *One of our employees has failed to meet our standards for the past three months. We have spoken with him about his performance several times, but the discussions weren't documented. Is it too late to document his past performance deficiencies before we proceed with termination?*

A Consistent documentation of employees' performance issues and your disciplinary actions (including a date and signature) is a great way to help you manage your workforce and reduce potential liability. It can help you support your decision for a lawful termination if a disgruntled employee files a lawsuit down the road. Retroactively documenting performance deficiencies isn't as strong as creating the records in real time. However, if you document the employee's issues retroactively, be as specific as possible about each issue or incident, including the date, and give him a chance to sign off on the documentation.

Q *A female employee has accused a male subordinate of not respecting her authority because of her gender. The male employee says he has been falsely accused and is very angry. What should we do?*

A When dealing with accusations of workplace discrimination, managers should carefully follow their written internal procedures and leave a detailed paper trail. That will ensure the issues are approached in an objective and practical manner. After an internal investigation, management may need to take action to discipline one or both employees or require further training on communication or discrimination. Business considerations and legal liability may determine if further action will be necessary.

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Staying with the topic of policies, here's a no-no, not a guideline: Do not have a policy that says, "While any concern will be looked into, the company takes very seriously any concern that is baseless. Appropriate action will be taken against the employee asserting a baseless concern." Incredibly, I still see such policies pop up occasionally. They chill an employee's desire to report issues such as harassment. You are always better off knowing what is going on in your organization.

Third, and an implicit issue from the *Torres* case, is the idea of taking action that is in proportion to the expressed concern. Recall that her first letter dealt very little with the sexual harassment of her individually but a great deal with general mistreatment of other employees. In those circumstances, honoring the employee's request for confidentiality was defensible. (I don't think the second letter deserved the same treatment.)

Moreover, on the subject of proportion, not every concern about sexual harassment warrants a full-fledged investigation. Sometimes, a friendly word of advice to an often-clueless employee or supervisor is all it takes to correct an incipient issue. Shakespeare sums it up wonderfully: "Let me speak friendly to your ear."

Fourth, and an offshoot of the friendly advice suggestion, is the development of a "professionalism-at-work" policy. Many harassment issues really stem from a lack of professionalism and then mushroom into something much more serious. Therefore, speak to the better angels of your employees' nature: "You were hired because we believe you are a professional." And insert in your professionalism policy a reminder that courteous conduct, appropriate workplace language, tasteful office decorations, and overall civility are the norms we all strive for in our workplaces. (State it in positive terms of "We all follow," not in negative terms like "Thou shall not.") As Dr. Samuel Johnson said (and I paraphrase), "It is always more effective to remind than to lecture."

Finally, try not to get lost in the weeds on the conduct that is or isn't unlawful sexual harassment. A professionalism policy will help you meet that goal. In your policy, explain why you have an antiharassment policy: "We have this policy not only because the law requires it but also because, more fundamentally, employees who are subjected to harassment are hampered in their efforts to be the very best employee and person they can be. And that hurts us all."

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LOCAL ORDINANCES

Municipal paid sick leave laws hit bump in road, could be short-lived in Texas

by Jacob M. Monty
Monty & Ramirez, LLP

On August 16, 2018, San Antonio became the second Texas city to enact a municipal paid sick leave law. While advocates applauded the city council's decision to pass the law, numerous state lawmakers and the state attorney general (AG) immediately drew their swords against the mandate. But opposition to San Antonio's ordinance came as no surprise. Earlier this year, Austin met similar opposition when it was the first Texas city to pass a paid sick leave ordinance. Now caught in a legal battle that could ultimately render the measure invalid, Austin's ordinance faces an uncertain fate. Legal experts opine that if the court challenge turns out to be successful, San Antonio's ordinance won't be sticking around very long either.

Austin on defense

After Austin approved its paid sick leave ordinance in February, various representatives from the state legislature spoke up to express their disapproval. Opponents said the ordinance would negatively affect small business owners by placing them at a competitive disadvantage. Nearly two months after the ordinance passed, the Texas Public Policy Foundation (TPPF) filed suit against Austin and its mayor and city manager.

The TPPF argued that Austin's ordinance is invalid and has no force or effect because it conflicts with Texas state law. The organization sought injunctive relief to prevent the measure from going into effect. And although the ordinance was supposed to take effect on October 1, 2018, it was put on hold in August by an appellate court based in Austin. The court temporarily blocked the ordinance from going into effect until the merits of the case can be fully litigated. According to various news reports, the city has pledged to take the issue all the way to the Texas Supreme Court.

At this juncture of the proceedings, it's difficult to determine how the appellate court will rule on the

ordinance. Even if Austin wins the legal battle, many observers believe the ordinance will be short-lived. State lawmakers have echoed that sentiment, promising to introduce legislation prohibiting municipalities from passing similar paid sick leave ordinances. Moreover, the challenge to Austin's ordinance has drawn support from the state AG.

San Antonio ordinance is similar

San Antonio's paid sick leave ordinance somewhat mirrors the Austin legislation. Under San Antonio's mandate, large and medium employers (those with 15 or more employees) must allow them to accrue up to 64 hours of paid sick leave per year. Small employers (with 15 or fewer employees) must allow them to accrue at least 48 hours of leave per year.

Employees may accrue one hour of paid sick time for every 30 hours they work. Additionally, an employee requesting earned paid sick time would be able to use it when:

- A personal or close family member has an illness or injury;
- The employee or a family member is a victim of stalking, domestic abuse, or sexual assault, and the employee is consequently required to participate in a legal or court-ordered action; or
- The employee requires other medical, mental, or preventive care.

San Antonio's ordinance is set to take effect on January 1, 2019.

AG warns San Antonio against circumventing Texas law

About a month before the San Antonio paid sick leave measure passed, the Texas AG sent a letter to the mayor and city council asking them to reject what was then only a proposed ordinance. In the letter, the AG gave an in-depth explanation about why the proposed ordinance was in conflict with state law. But the city ignored the warning and passed the ordinance anyway.

IMMIGRATION INTEL

DACA alive for now, but no permanent solution yet

by Jacob M. Monty
Monty & Ramirez, LLP

Despite a federal judge's ruling to keep the Deferred Action for Childhood Arrivals (DACA) program alive while the trial and appellate processes play out, beneficiaries and proponents should recognize that no permanent solution is in place yet. The program offers work authorization and a level of deportation protection to eligible undocumented immigrants who came to the United States as children.

The federal judge hearing the DACA case, Judge Andrew Hanen of the U.S. District Court for the Southern District of Texas, has made it clear that he intends to strike the program down because he believes the Obama administration didn't have the proper authority to enact it. According to Judge Hanen, such a program should have been created through Congress.

It will be months until there is even a trial and a ruling, not to mention any appeals following Judge Hanen's decision. Given how long it will take the case to go through the legal process, the hundreds of thousands of DACA recipients and their beneficiaries will have more time to weigh their next steps. They face a lot of uncertainty, but so do the employers that depend on them.

Employers are in a bind. They want to know if they can invest resources in training DACA employees and what their tax liabilities and budgets will be. Employers with DACA employees should stay on top of the latest developments so their employees can make the best decisions about renewing their DACA status. Most important, employers should remain aware that firing someone because of her immigration status would be against the antidiscrimination laws.

Judge Hanen's ruling didn't touch on the issue of advance parole for DACA recipients, which would allow them to travel outside the United States temporarily. Under the immigration laws, that could allow eligible DACA recipients to obtain permanent residency status if they had a sponsor. DACA recipients who hoped to use the strategy for a more permanent immigration status are now, unfortunately, stuck in a state of uncertainty.

To stay on top of the latest DACA developments or receive guidance on the program's immigration and employment implications, contact Jacob Monty at jmonty@montyramirezlaw.com. ✤

UNION ACTIVITY

AFL-CIO leader hails defeat of right-to-work law. AFL-CIO President Richard Trumka has spoken out to praise the August referendum in Missouri that struck down the state's right-to-work law. "Missouri is the latest sign of a true groundswell, and working people are just getting started," Trumka said after the vote. Calling the right-to-work law "poisonous anti-worker legislation," he said the law's defeat represents a victory for workers across the country. "The message sent by every single person who worked to defeat Prop. A is clear: When we see an opportunity to use our political voice to give workers a more level playing field, we will seize it with overwhelming passion and determination." A day after the election, the AFL-CIO announced an advertising campaign aimed at drawing attention to the "wave of collective action happening across the country and showing that anyone can join the momentum working people are generating."

UAW announces petition for postdoctoral researcher union. The United Auto Workers (UAW) announced in August that postdoctoral researchers at Columbia University had filed a petition with the National Labor Relations Board (NLRB) to initiate the certification process for a union. If a majority votes yes for Columbia Postdoctoral Workers-UAW as their union in an NLRB election, organizers believe the union would become the first certified union of postdocs at a private university in the United States. Postdocs are researchers who have earned a doctoral degree and work under the supervision of a faculty member on research projects. A statement from the UAW said the union now represents roughly 75,000 academic workers across the United States. The UAW also represents support staff at Columbia and graduate student workers who voted in favor of unionization in 2016. The union says the administration has refused to bargain with the graduate worker union based on the claim that student employees don't have union rights.

CWA criticizes AT&T's use of tax cut. The Communications Workers of America (CWA) announced over the summer a multistate political effort focused on the Midwest with radio ads spotlighting what the union calls AT&T's cuts to U.S. jobs in the wake of the new tax cut law. The union claims that AT&T has eliminated over 7,000 jobs since the tax cuts took effect in January despite seeing $20 billion in tax savings. The union says AT&T plegeded before the tax plan passed to use tax savings to create jobs. The CWA says it has has been leading the charge "to hold AT&T and other corporations accountable to their tax bill promises by publicly challenging them to reveal their spending plans for the tax windfall." ✤

Now San Antonio's ordinance is looking to undergo the same scrutiny as Austin's ordinance.

Bottom line

Austin's and San Antonio's paid sick leave laws face an uncertain future, but employers shouldn't be alarmed because many legal experts have suggested the ordinances may be short-lived. Furthermore, state lawmakers have promised to file a bill overturning the municipal laws if Texas' highest civil court doesn't invalidate them.

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INDEPENDENT CONTRACTORS

Don't forget to properly classify independent contractors

You likely recall a time not so long ago when the improper classification of employees as independent contractors was the hot topic for the IRS and the U.S. Department of Labor (DOL). In 2011, the agencies entered into a "Memorandum of Understanding" in which they agreed to share information about potential misclassifications in an effort to crack down on the common practice. The DOL also entered into similar agreements with roughly 30 state departments of labor.

If you haven't heard much about independent contractors lately, you're not alone. Nevertheless, we consider this an important issue that presents serious risks to employers that get it wrong. So in case it has fallen off your radar, consider this your refresher course.

General principles

Employers are prohibited from classifying a worker as an "independent contractor" if the nature of the working relationship is, for all intents and purposes, that of "employer-employee." If certain factors are met, you cannot classify employees as independent contractors even if, for example, they

are begging you to do so or they sign an apparently ironclad contract in which they specifically acknowledge being independent contractors.

The IRS is concerned about misclassification because employers that misclassify employees as independent contractors don't pay employment taxes or withhold them on the employees' behalf. The DOL's concern lies primarily in the fact that employees who are misclassified as independent contractors are deprived of key benefits and legal protections under such laws as the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Employee Retirement Income Security Act (ERISA).

Factors to consider

So how can you be sure your independent contractors are properly classified? The easier question is, how can you tell they aren't? Here are some of the biggest red flags that employees have been misclassified as independent contractors:

- You require them to follow instructions on when, where, and how the work is to be done. This is the single most important factor.
- You provide training for them (which can be as informal as requiring them to shadow more experienced employees).
- The nature of the relationship precludes them from making a profit or suffering a loss. (In other words, employees get paid no matter what, while independent contractors have a financial stake in their enterprise.)
- You pay them on an hourly, weekly, or monthly basis (as opposed to a per-project fee).
- They provide services that are integral to the success of your business. (In other words, they do what your business was formed to do.)
- They perform services for you on an ongoing (not necessarily continuous) basis.
- You require them to perform the work personally.

WORKPLACE TRENDS

Salary increases expected to remain flat. Research from workforce consulting firm Mercer shows salary increase budgets for U.S. employees are at 2.8% in 2018—no change from 2017. Salary increase budgets for 2019 are projected to be just 2.9%, despite factors like the tightening labor market and a high rate of workers voluntarily quitting their jobs. The information comes from Mercer's "2018/2019 US Compensation Planning Survey." Mercer's research shows that even newly available investment dollars from the new Tax Cuts and Jobs Act aren't enhancing the compensation budgets for most companies. Mercer says just 4% of organizations have redirected some of their anticipated tax savings to their salary increase budgets.

Study shows fewer workers relocating for jobs. Data from global outplacement consultancy Challenger, Gray & Christmas, Inc., shows the percentage of jobseekers relocating for new employment has fallen dramatically since the late 1980s, when over one-third of jobseekers were willing to move for a new position. Just 11% of jobseekers relocated for work over the last decade, compared to nearly 19% of workers who relocated for new positions in the previous decade. Just over 10% of jobseekers relocated for work in the first six months of 2018, virtually unchanged from the relocation rate in the first two quarters of 2017. The relocation rate in the third quarter of 2017 was 16.5%, the highest quarterly relocation rate since the second quarter of 2009, when 18.2% of jobseekers moved for work. But by the fourth quarter of 2017, just 7.5% of jobseekers relocated. The data is based on a survey of approximately 1,000 jobseekers who successfully found employment each quarter.

Report shows how employers are taking advantage of the gig economy. A new report from Deloitte details how midmarket and private enterprises are taking advantage of the gig economy. Sixty-two percent of respondents to a survey of 500 executives in the midmarket and private company segment say the rise of the gig economy has allowed their companies to become even more agile in product and service development, while half of companies surveyed are leveraging gig workers to develop entire new lines of business. In addition to greater utilization of the gig economy, the Deloitte report, "Technology in the mid-market: Embracing technology," says that employers are placing a premium on talent as being a critical factor in technology deployment. The Deloitte researchers found that 46% of the executives surveyed plan to hire more people than before emerging technologies came on the scene. Only 26% saw digital disruption as shrinking the workforce. ✤

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On the other hand, there are certain factors that may weigh in favor of concluding the workers are properly classified as independent contractors:

- You have a written agreement with them reflecting that (1) they are independent contractors who will be paid by the job or project, (2) they will provide all necessary tools or equipment for the performance of the work, and (3) there is a defined duration for the contract/project and a set project fee.
- They are incorporated or have their own employees.

Just keep in mind that you can't be certain either of those "green flags" will protect you if other factors weigh in favor of classifying the workers as employees.

Final thoughts

While the federal agencies may be taking a less aggressive (and less collaborative) enforcement approach, remember that the underlying legal requirements have not changed. If someone you have classified as an independent contractor files a complaint with the DOL (or a state agency), there's a good chance you will receive a call or visit from an agency official who will want to take a close look at your independent contractors. Once the DOL is involved, there is a chance the IRS will come knocking as well.

More important, if one of your contractors consults an attorney, you could quickly find yourself on the receiving end of a lawsuit. If you happen to have a number of independent contractors performing similar services, that lawsuit could turn into a costly and time-consuming class action. ✤

TEXAS EMPLOYMENT LAW LETTER (ISSN 1046-9214) is published monthly for $447 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

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