Texas

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Michael P. Maslanka, Editor in Chief • UNT Dallas College of Law
Jacob M. Monty, Coeditor • Monty & Ramirez, LLP
William E. Hammel, Coeditor • Constangy, Brooks, Smith & Prophete, LLP

RACE DISCRIMINATION

'On the one hand this, on the other hand that' test approved by 5th Circuit

by Michael P. Maslanka
UNT Dallas College of Law

What am I talking about? There are two candidates for a position: one black, one white. You pick the white contender, and the black one sues for race discrimination. If they are evenly qualified, who wins? Read on to see how the U.S. 5th Circuit Court of Appeals (whose rulings apply to all Texas employers) recently handled this dilemma.

Robinson-King vs. Patton

Angela Robinson-King is black. Mary Lou Patton is white. Each applied for a promotion to become a district supervisor at a state agency that provided rehabilitation services. Both were qualified for the job. Both held master's degrees in the area of rehabilitation, carried the title of master counselor at the agency, and had supervisory experience.

Robinson-King had greater tenure at the agency, but Patton had risen to become a master counselor sooner. Robinson-King was selected to attend a leadership academy and had 15 extra hours of graduate credit, but Patton held a certification Robinson-King lacked.

Supervisory experience? Robinson-King oversaw 10 employees as a first sergeant in the U.S. Air Force Reserves while Patton supervised only one employee, but that individual worked within the agency. Robinson-King had a somewhat better record of meeting production goals, but neither had met her quotas in the years prior to applying for the position.

Whom to pick? Whom to pick?

How do you prove unlawful discrimination?

The law is an imprecise tool to detect discrimination. So, in these types of scenarios, the courts have developed the "clearly better" test. If the black applicant shows she is clearly better qualified than the white applicant but is passed over for the job, then a jury could conclude that some factor other than merit was at work, and that "something other" could be race discrimination.

For the present case, however, the decision came down to the fact that one applicant had certain qualities while the other candidate possessed certain other qualities. When that is the case, qualifications are irrelevant (unless the position carries a mandatory prerequisite that the black candidate possesses but the white one does not).

All in all, this case provides a good test for employers. Oh, and here is a bonus insight from the court: "An employee's better education, work experience, and longer tenure with the company do not establish that (one

AGENCY ACTION

DOL launches initiative to strengthen H-2B compliance. The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) in September announced a nationwide initiative to strengthen compliance with the labor provisions of the H-2B temporary visa program in the landscaping industry. The initiative includes providing compliance assistance tools and information to employers and stakeholders as well as conducting investigations of employers using the program. The WHD announced that last year, its investigations led to more than $105 million in back wages for more than 97,000 workers in industries with a high prevalence of H-2B workers, including the landscaping industry. A key component of the investigations is ensuring that employers recruit U.S. workers before applying for permission to employ temporary nonimmigrant workers. The H-2B program permits employers to temporarily hire nonimmigrant workers from outside the United States to perform nonagricultural labor or services in the country. The landscaping industry employs more H-2B workers than any other industry.

OFCCP announces new policies aimed at increasing transparency. The DOL's Office of Federal Contract Compliance Programs (OFCCP) in September announced two directives focused on providing more transparency in OFCCP activities. One directive aims to extend the agency's transparency efforts to every stage of a compliance evaluation to facilitate consistency, improve efficiency and collaborative resolution, and support contractors' ability to conduct self-audits. The other directive involves implementation of an ombuds service in the national office to facilitate resolution of specific types of concerns raised by external OFCCP stakeholders in coordination with regional and district offices.

DOL awards grants to prepare workers for high-growth industries. The DOL announced in September nearly $110 million in Trade and Economic Transition Dislocated Worker Grants for state, tribal, and nonprofit entities that are working in collaboration with community partners and local workforce development boards to prepare Americans for professions in high-growth employment sectors. The grants will assist in implementing innovative skills instruction and career services for workers seeking reemployment as a result of changes in workforce needs or from economic changes across multiple sectors. An "economic transition" is defined as a far-reaching economic or workforce trend or event, beyond the operating conditions of one employer, that has caused significant worker dislocations in a stated geographic area. ✤

candidate) is clearly better qualified than the other." *King v. State of Louisiana Workforce Commission* (5th Cir., 2018).

Bottom line

If you can argue either way that one candidate should be picked over the other, then you aren't engaging in discrimination in the eyes of the law. Other lessons for Texas employers:

- Carefully think out the job description and what is truly essential for performing the work.
- Don't create a job description to screen out a minority candidate and include a white candidate.
- Finally, when making a selection, be sure to examine whether you're giving the nod because the person looks like you, believes in what you believe, and will "fit in." If so, implicit bias may be at work.

Michael P. Maslanka is an assistant professor at the UNT Dallas College of Law and an attorney with FisherBroyles, LLP. He can be reached at michael.maslanka@untdallas.edu. ✤

OFF-DUTY ACTIVITY

Privacy on social media? Texas hospital says no after 'anti-vax' nurse leaks measles diagnosis

by Jacob M. Monty
Monty & Ramirez, LLP

With the advent of social media, a significant number of people have lost their jobs. From Roseanne Barr to James Gunn, the list of people with online mishaps runs long and deep. A few weeks ago, a Texas Children's Hospital nurse joined the roster after she allegedly shared a Facebook post about a young patient who may have contracted measles while overseas.

Nurse isn't immune from termination

The self-described "pediatric ICU/ER" nurse uploaded a post onto a Facebook page titled "Proud Parents of Unvaccinated Children—Texas." She shared insights about her "rough" experience seeing the child with measles for the first time and described "how much worse (measles) was than what I expected." Despite that incident, she allegedly added that she planned to continue "my non-vax journey with no regrets." In a subsequent post—which has since been deleted—the nurse sought to retract some of her statements. It came too late to save her job, however, as the hospital promptly fired her, citing breach of private health information.

While the employer clarified that it didn't fire the nurse because of her anti-vaccine stance, her viewpoints directly clashed with those of the hospital and undoubtedly raised concerns about her continued employment at the facility. Measles had not appeared in Houston hospitals since 2013, and most observers

attribute its low prevalence to early childhood vaccinations. It's unclear whether the nurse's termination was triggered by the divulgence of the possible existence of measles or by other protected information related to the patient. What is clear, however, is that despite Facebook's ubiquitousness in our everyday life, social media remain a precarious minefield for many professionals to navigate.

What does this mean for you?

Off-duty social media conduct has always posed a unique and complex challenge for employers and employees. Stationed at the intersections of First Amendment, privacy, and employment laws, social media law can often ambush unwary posters who pass along their outside-of-work personal opinions. Notwithstanding discussion related to the terms and conditions of employment—or "concerted activity" under the National Labor Relations Act (NLRA)—both employers and employees should know that very little speech is categorically protected from the realities of the workplace, even if it occurs outside of work.

Employees should know that while they are free to do as they wish in their own time, they are not immune from the risk of adverse employment consequences if their speech adversely affects coworkers, their employer, or the employer's clients or customers. That is especially true when the speech implicates privacy laws that impose strict limits on disclosure, such as those placed on healthcare providers by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

If you are an employer, social media laws can be on your side. Under Texas law, you generally have the right to take action against an employee for off-duty conduct that damages company business or work relationships. As a practical business matter, however, you also know that canning a valued employee for off-duty conduct can lead to lost productivity. Here are some simple ways to mitigate those kinds of consequences:

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WORKPLACE TRENDS

Survey shows attitudes about talking politics at work. Job search platform Indeed in September reported results of a survey of 2,000 U.S. employees showing that 20% of those workers felt the workplace wasn't politically censored enough. The research also showed that 54% were comfortable with the current amount of sharing of political beliefs at work. Just 10% of respondents said they believed the workplace needed more political talk. The survey found that 23% of the respondents felt certain groups were being silenced at work. Of those, 60% reported that the source of silencing was statements or actions of peers, and 40% said it came from statements or actions from leadership.

Lack of information on compensation big frustration for jobseekers. A survey from job and recruiting site Glassdoor says that a lack of information about a job's total compensation package is among the biggest frustrations for U.S. workers and jobseekers during the interview process. The survey found that 50% of U.S. workers/jobseekers surveyed called lack of information on compensation one of their biggest frustrations, with an equal number saying potential employers canceling or postponing interviews is their biggest frustration. Forty-seven percent named potential employers not responding in a timely manner.

"Lunch hour" found to be less than 30 minutes for most. Research from staffing firm OfficeTeam shows that 56% of workers surveyed said their typical lunch break lasts 30 minutes or less. Among professionals in the 28 U.S. cities surveyed, those in San Francisco, Los Angeles, and Miami take the longest lunches. Employees in Salt Lake City, Des Moines, and Cincinnati have the shortest breaks. The survey also addressed what workers do during lunch besides eating. Respondents said they most frequently surf the Internet or social media (52%), followed by catching up on personal calls or e-mails (51%). Twenty-nine percent of professionals said they work during lunch.

Research finds nearly a fourth of workers have left a job over a bad commute. Research from staffing firm Robert Half has found that 23% of employees have left a job because of a bad commute. Among workers in the 28 U.S. cities surveyed, respondents in Chicago, Miami, New York, and San Francisco have most often resigned because of their commute. While 39% of professionals reported their travel to and from the office has improved over the past five years, 22% said the trip has gotten worse. Of those who noted a negative change in their commute, 60% said their company hasn't taken steps to reduce the burden on employees. ✤

JUST ASK JACOB

Who pays doctor when flu disrupts employee's overseas trip?

by Jacob M. Monty
Monty & Ramirez, LLP

Q *We had an employee travel to Mexico for business. She ended up getting the flu and had a doctor come see her at the hotel. Unfortunately, the employee's health insurance doesn't cover treatment in Mexico. Since the illness occurred during business travel, do we need to cover the cost of the doctor?*

A Probably not. There is generally no duty for employers to provide international health insurance to employees who attend brief overseas business trips. While many other countries such as Australia and the United Kingdom have recognized a legal requirement for employers to ensure traveling employees' safety and welfare, the same duty has not been well-developed in the United States.

Nevertheless, employees of U.S.-based organizations may receive coverage through a company-provided international health plan or an emergency, out-of-network provision in their standard benefits plan. Employees also should be encouraged to consult their credit card company or travel booking agency for possible international emergency medical coverage.

Q *An employee resigned about six months ago. Almost as soon as he started his new job, he changed his mind and wanted us to rehire him. We have no plans to rehire him, but he continues to send long, personal e-mails directly to HR and other managers asking to be rehired. How can we get him to stop sending these disruptive and persistent e-mails?*

A When you're interacting with persistent applicants, there can be a fine line between assertive and annoying. Except for circumstances not indicated here, you have no duty to rehire someone who voluntarily left his position. In fact, rehires often lead to increased exposure, and many employers have adopted a no-rehire policy.

It can sometimes be tempting to ignore a pushy candidate in the hopes that he will go away, but that usually won't put an end to the anxious inquiries. If you're sure the applicant doesn't fit into your immediate plans, it's best to decline him quickly and directly. You may choose to give feedback if you wish, but be sure to tread lightly when offering specific reasons. If a candidate refuses to accept your reasons or continues to call/e-mail even after he has been declined, it may be in your best interest to seek legal counsel, who may be able to proceed with a cease-and-desist letter on your behalf.

Q *One of our employees was approved for Family and Medical Leave Act (FMLA) leave for the birth of his child. The mother is suffering from postpartum depression, and he has requested FMLA leave to care for her. Is this leave covered under the certification for the child's birth, or should we request a new certification?*

A It depends on the type and duration of the leave requested. In most circumstances, certification isn't needed to take parental leave to bond with a newborn child. If the initial certification was instead for the serious health condition of a family member, recertification may be permitted after a certain period of time. If the initial medical certification indicates that the minimum duration would last more than 30 days, you must wait until that minimum length of time expires before requesting a new certification. In all cases, you may request recertification every six months in connection with an absence.

For an absence of less than 30 days, however, you may request recertification if (1) the employee requests a leave extension, (2) circumstances described by the previous certification have changed significantly, or (3) you receive information that casts doubt on the employee's stated reason for the absence or the continuing validity of the existing medical certification. While each circumstance should be evaluated thoroughly, a different qualifying event for a different family member would likely qualify as a significant change in circumstances. Because the recertification process involves notification and other requirements, it's best to consult with your attorney before proceeding.

Q *One of our employees has been on short-term disability (STD) leave for the past few months. During that time, we have decided to lay off multiple employees with her same job title because of lack of work. Are we OK with proceeding, or do we need to find a way to return this employee to work?*

A STD leave may be offered as part of an STD plan or FMLA leave or as a reasonable accommodation under the Americans with Disabilities Act (ADA). Each federal law has different standards for reinstatement.

Under the ADA, you must reinstate an employee on leave unless you can show undue hardship or that the employee is no longer qualified for her original position with or without a reasonable accommodation. Under the FMLA, you must reinstate an employee on leave unless you can show she would not otherwise have been employed at the time of reinstatement, regardless of whether she took the leave.

Because of strict federal laws against discrimination and retaliation, terminating an employee immediately after taking leave can be fraught with pitfalls and potential liabilities. You are urged to proceed very cautiously and get legal advice before taking any adverse employment actions.

Jacob M. Monty of Monty & Ramirez, LLP, practices at the intersection of immigration and labor law. He is the managing partner of the Houston firm and may be contacted at jmonty@montyramirezlaw.com. ✤

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- Adopt clear, written handbook policies on computer and Internet usage, especially regarding employees' social media use during and outside of work hours.
- Require all employees to sign copies of the policies and, if possible, be trained on your guidelines for appropriate conduct and confidentiality.
- Remind employees that Internet postings are often cached and can be retrieved as evidence even after they're deleted.
- Let employees know they should be extra cautious when disclosing sensitive information such as internal company procedures, processes, or personnel information.

While the line between civility and criticism often seems fine, having a strong social media policy will protect you and your employees alike from inadvertent disclosures or mishaps. As always, for best practices in drafting a robust social media policy, please consult with your attorneys.

Jacob M. Monty is the managing partner of Monty & Ramirez LLP in Houston and coeditor or Texas Employment Law Letter. He can be reached at jmonty@montyramirezlaw.com. ✤

ELECTRONIC WORKPLACE

Can employer snoop through employee's electronic devices? Lessons from a real-life case

by Jacob M. Monty
Monty & Ramirez, LLP

With the rapid advancement of consumer devices, it seems like a computer, phone, or laptop becomes outdated almost as soon as you buy it. It's no surprise then that some employers allow employees to bring their own devices to work. Workers may simply be more efficient and comfortable using their own up-to-date devices. Employers also may save money by avoiding the regular updating of company work devices. Despite the obvious advantages, however, allowing employees to use their own devices for work can have significant drawbacks, as one New York employer is learning.

O, what a tangled Web we weave . . .

Paul Iacovacci was terminated in October 2016. In a September 2018 lawsuit, he alleged that his former employer accessed his home computer to read his personal e-mails and steal data from his personal hard drives. The company, in turn, accused Iacovacci of stealing confidential material. Also, company leaders argued that the computer was their property because they had purchased it.

Iacovacci's case highlights the problems that can arise when devices are intermingled between home and work. Further, it raises questions about what a work device really is. Is a personal hard drive attached to a work computer fair game for an employer to access? What about the personal e-mails employees access on a work computer? This is a tangled area of employment law that will likely take years to unpack.

In most cases, however, employers will have the right to access any "artifacts" that are left behind on work computers. Texts downloaded onto a work computer through iTunes, for example, can be accessed. You

UNION ACTIVITY

Union files claims with EEOC against targeted Facebook ads. The Communications Workers of America (CWA), along with the American Civil Liberties Union (ACLU), announced in September that it has filed charges with the Equal Employment Opportunity Commission (EEOC) against Facebook and 10 other employers claiming unlawful discrimination on the basis of gender by targeting their job ads on Facebook to male Facebook users, excluding all women and nonbinary users from receiving the ads. The CWA alleges most of the employers' male-targeted ads highlighted jobs in male-dominated fields. It also claims that Facebook delivers job ads selectively based on age and sex categories that employers choose and that it earns revenue from placing job ads that exclude women and older workers from receiving them.

UMWA delivers letters to congressional pension committee. The United Mine Workers of America (UMWA) announced in September that it delivered 1,756 letters written by UMWA retirees, their families, and their widows to the congressional Joint Select Committee on the Solvency of Multiemployer Pension Funds, asking the panel to take action to preserve their pensions. The committee is supposed to make recommendations to the rest of Congress by November 30 on how to prevent pension funds like the UMWA 1974 Plan from failing. The letter writers' pensions "are at risk through no fault of their own, and Congress is the only body that can save them," UMWA International President Cecil E. Roberts said. "They have no more time to wait. It is time for this committee to do what it is supposed to do and preserve their pensions."

Judge orders back pay for workers who backed union. The United Farm Workers (UFW) union announced in September that a California administrative law judge (ALJ) ordered Gerawan Farming Inc. to pay back pay to four workers the tree fruit producer refused to recall to work beginning in 2013 because they were "outspoken" in supporting the UFW. The workers also claimed the employer retaliated against them for testifying before or attending Agricultural Labor Relations Board hearings. The ALJ recommended two of the workers receive nearly seven months of back pay and one be awarded back pay from April 2015 until the employer offers him reinstatement to his job. The union said the workers wore union T-shirts to work, passed out UFW fliers, and spoke with coworkers about the union during work breaks. In addition, the workers attended union negotiating and mediation sessions and joined other workers at Gerawan's offices to urge the owners to sign a union contract. ✤

can't penetrate an employee's personal e-mail account on a work device, but you can get a lot of information through whatever digital trail is left behind. You also will more than likely have the right to control what happens to work documents on an employee's personal device.

Employers' best practices

Your best practice is to have clear language in your policies about the use of work and personal devices, addressing the concerns of both your organization and the employees. The policy can outline your right to access, monitor, and even delete an employee's device. It also can specify the steps you will take to protect employee privacy. You also may consider using software to create a virtual partition that separates work data from personal data.

At the end of the day, however, each workplace is different. Work closely with your attorneys and HR professionals to tailor an IT and device policy that makes sense and fits your needs.

Jacob M. Monty is the managing partner of Monty & Ramirez, LLP, and coeditor of Texas Employment Law Letter. If your workplace is in need of an updated device policy, he can be reached at jmonty@montyramirezlaw.com. ✤

FAMILY AND MEDICAL LEAVE

How to claim paid family and medical leave tax credit

The tax reform law passed late last year contained a little-noticed tax credit for employers that provide employees paid "family and medical" leave and meet certain other requirements. While the IRS hasn't finalized regulations pinning down the specifics of the new credit, it recently issued some helpful guidance. Let's take a look.

Core requirements

In general, the law offers employers a tax credit of up to 25% of the amount of compensation paid to "qualifying employees" under a written paid family and medical leave policy. The credit is available only to employers that (1) provide at least two weeks of paid leave annually for all employees and (2) pay at least 50% of an employee's normal wage during the leave. In addition, employers don't have to be covered by the Family and Medical Leave Act (FMLA) to claim the credit.

The credit starts at 12.5% of employee wages paid and increases by 0.25% for each percentage point by which they exceed 50% of the employee's normal wage. The maximum allowable credit is 25% of compensation paid to qualifying employees.

While the law doesn't require employers to provide paid leave, it does place substantial restrictions on the circumstances in which the credit may be claimed by those that do. The main restrictions to keep in mind include:

- The maximum period of paid leave for which the credit may be claimed is 12 weeks.

- In general, the credit can't be claimed for compensation paid to employees who made more than $72,000 in the year before the leave was taken.
- The employer must have a written policy under which paid leave is available for one or more FMLA-qualifying reasons. If employees could use the leave for non-FMLA purposes (such as paid time off or paid sick leave), the credit doesn't apply.
- The policy must grant paid leave to any employee who has worked for the employer for at least 12 months, including part-time employees on a prorated basis.
- Leave benefits that are paid for or mandated by a state or local government don't qualify for the credit.
- At this time, the credit is available only for paid leave taken during the 2018 and 2019 taxable years. Like many other tax provisions, however, it could be extended in the future.

Modifying and adopting a policy

What if you want to claim the credit for paid leave taken by employees in 2018 but don't yet have a policy? You may need to move fast, especially if you use the calendar year as your taxable year. The guidance says a written policy must be in place by the end of the 2018 taxable year. To accomplish that, you need to (1) make the policy retroactive to the first day of your 2018 taxable year (usually January 1, 2018) and (2) make sure all employees who took qualifying leave during the year were actually paid for it (even if that means paying them after the fact). Another option would be to implement a policy only for 2019.

IMMIGRATION INTEL

When it comes to trial, workers' comp, don't tell immigration status

by Jacob M. Monty
Monty & Ramirez, LLP

Here are two areas of the law where a Texas employee's immigration status should never come into consideration.

Improper references during trials

During a trial involving an 18-wheeler accident, defense counsel questioned the injured plaintiff's medical expert about future damages. During cross-examination, the attorney asked the physician if his opinion assumed that the victim "would continue living in the United States." The jury sided with the defense.

On appeal, the Thirteenth Court of Appeals found that the attorney's veiled reference to the victim's immigration status was "incurably prejudicial" (or harmful). The court stated that reversible error occurs "whenever any attorney suggests, either openly or with subtlety and finesse, that a jury feel solidarity with or animus toward a litigant or a witness because of race or ethnicity." Furthermore, the court reinforced that even a single racially or ethnically prejudicial remark can give rise to incurable error.

In August 2018, the Texas Supreme Court called off a retrial in the case because the parties reached a settlement.

Texas case law makes it clear: Trial attorneys should be fully aware of the harmful effect that comes with referencing an individual's immigration status. Legal counsel choosing to ignore Texas courts and incense juries with their prejudicial remarks risk handing their clients a costly mistrial, settlement, or courtroom defeat.

Contesting workers' comp benefits

Another area of the law where a person's immigration status should not come into play—at least in Texas—involves workers' compensation. In our state, a worker's undocumented status doesn't bar him from collecting workers' comp benefits. In fact, the Texas Labor Code specifically mentions undocumented workers for workers' comp eligibility.

Undocumented workers in other states, however, should approach workers' comp claims very carefully. Some states, such as Florida, make it a crime to file a workers' comp claim using false identification, e.g., a fake Social Security number. With many undocumented workers living off of false or fabricated identification, filing a workers' comp claim can make them a target of an insurance fraud investigation, which can lead to jail time followed by deportation.

Jacob M. Monty of Monty & Ramirez, LLP, practices at the intersection of immigration and labor law. He is the managing partner of the Houston firm and may be contacted at jmonty@montyramirezlaw.com. ✤

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Finally, while the policy must contain specific provisions, the IRS guidance (oddly) says there is no requirement to provide employees any notice of the policy. This gives rise to the possibility that you could have a "published" policy explaining your leave benefits to employees and a separate internal policy that governs your use of the tax credit.

Next steps

Here are some steps you should consider taking:

(1) Identify any paid leave you already offer to determine whether it could qualify for (or be modified to qualify for) the credit. The guidance says the credit may be available for short-term disability benefits, so take a close look at those as well.

(2) Assess whether it's worthwhile to modify your existing policy retroactively (for example, by offering paid leave to part-time employees and retroactively paying them the appropriate prorated benefits).

(3) Consider whether to adopt an entirely new paid leave policy that would qualify for the credit. While this is less likely to be practical for the January 2018 taxable year (because you would have to retroactively compensate all qualifying employees who took the leave in 2018), it may still be worthwhile for 2019.

(4) Consult IRS Notice 2018-71 and your attorney for additional information and guidance. ✤

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Editorial inquiries should be directed to Michael P. Maslanka at FisherBroyles, LLP, 100 Highland Park Village, Suite 200, Dallas, TX 75205, 214-559-7210, michael.maslanka@fisherbroyles.com.

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