Texas
Employment Law Letter

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LITIGATION

True or false: Opposing discrimination gives green light for employee misconduct

by Michael P. Maslanka, UNT-Dallas College of Law

Here's an urban myth: An employee who opposes potential employer discrimination must be treated with kid gloves after complaining. The U.S. 5th Circuit Court of Appeals (whose rulings cover Texas employers) recently stated that this proposition is, indeed, a myth.

Oppose, oppose, oppose

Emilio Lira worked as a financial advisor for Edward Jones. Between November 2014 and November 2016, he complained that while on the job, he was the victim of race and national origin discrimination.

His complaints culminated in a discrimination lawsuit that was filed in 2016. During the legal battle (which lasted almost three years) he remained employed with Edward Jones. After he lost his case in May 2019, however, he was fired.

Why terminate?

Lira claimed he was fired in retaliation for filing a discrimination complaint. In response, the 5th Circuit essentially said, "Well, the complainants were too far removed in time from the termination to possibly have caused it." In other words, since his complaints were about incidents that occurred between 2014 and 2016 and his termination was in 2019, they couldn't be related.

And, oh, are you forgetting something? As a regulated financial institution, Edward Jones was required to collect information on claims filed against it. Lira was charged with reporting the outcome of his lawsuit (his loss) to the company, but he didn't do so in a timely manner.

After the company's second request for Lira to submit the outcome, he obliged. When he finally got around to it, though, he had to have the last word. He let loose with a written comment stating that the company officials were acting like white supremacists.

Five days later, he was terminated for the comment and for the late submission. He sued for retaliation and lost yet another lawsuit. *Lira v. Edward Jones Investments* (5th Cir. 2023)

Lessons learned

Do you see how the desire to have the last word was Lira's undoing? While this can happen with an employee, it could also happen to a supervisor or a company. Look, I know all too well how it feels to want to get in the last word, but as my mother often cautioned me as a child: "A moment's pleasure sometimes leads to a lifetime of regret."

During Lira's case, the 5th Circuit mentioned another case in which the complaints weren't made in a timely manner (similar to Lira's case), the employee filed a lawsuit and lost (also similar to Lira's case), but the supervisor kept

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talking to the employee about the complaints and the lost lawsuit (unlike Lira's case)

When that employee was ultimately fired, the appeals court said that the repeated harping about the complaints was an indication that the employer was possibly mad at the employee for the lawsuit and fired him as a result. According to the 5th Circuit, because Edward Jones kept Lira employed during the lawsuit and didn't continuously bring it up once it was over, his termination wasn't related.

To paraphrase a travel commercial: What happens in the past, should stay in the past. Moreover, engaging in opposition to perceived discrimination and complaining about isn't a "Get Out of Jail" card for an employee.

This case reminds me of a favorite case of mine. An employee claimed that his employer discriminated against him because of his sex. He filed a lawsuit with Equal Employment Opportunity Commission (EEOC), and the employee and the employer agreed to go to a mediation conducted by the EEOC at its offices.

As per mediation protocol, the employee and the employer were placed in separate rooms with the EEOC mediator shuttling back and forth seeking to broker a settlement. Insulted by what he thought was a lowball offer in settlement, the employee left his room, barged into the employer's room, and proclaimed to its representatives: "You can take your proposal and shove it up your ass, fire me, and I'll see you in court."

Well, the company took the employee up on his offer and, indeed, fired him. He sued. Why? Well, the law states that a company can't discipline an employee "because the employee has . . . participated in any in an investigation, proceeding, or hearing" under anti-discrimination laws.

This employee argued that the mediation was a "proceeding" that he participated in, making the termination a violation of the law. The courts didn't agree. Why? The company would be entitled to fire an employee who acted this way at work, and the happenstance of the conduct occurring at the mediation provides no special immunity to the employee. Case closed. *Benes v. A.B. Data Ltd.* (7th Cir. 2013)

A final thought

Think about talking to your lawyer in these situations. Firing an employee who has, in fact, been involved in the EEOC process can be tricky, and it is best to get another pair of eyes and ears on the facts.

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EMPLOYEE MISCONDUCT

Don't count your chickens before giving warning: an NLRB lesson

by Jacob M. Monty, Monty & Ramirez, LLP

In 1964, the National Labor Relations Board (NLRB) decided the case Johnnie's Poultry Co., which became a monumental judgment that required employers to take specific steps when interviewing employees about misconduct. Last month, the Board reaffirmed the decision and highlighted the importance of a Johnnie's Poultry warning.

Do's and don'ts

A *Johnnie's Poultry* warning is the best way for employers to protect themselves from any possible violation of employee union rights. We can see how popular unions have become in the news with the recent union wins at Starbucks and Amazon. Texas employers in must be aware of the do's and don'ts when it comes to unions and concerted activity.

Essentially, *Johnnie's Poultry* is a free, simple form given to the employee to sign before an investigation. First, the form should be in a language the employee speaks. It should outline what the meeting will be about (specifically that it isn't about the union) and that there will be no discussion about the union or how the business feels about the union. Before you begin questioning the employee, make sure you:

- Communicate the purpose of the questioning;
- Let the employee know there will be no disciplinary action for answering questions;
- Confirm they are answering questions voluntarily;
- Ask questions free from any hostility about union organizing;
- Make certain your questions aren't coercive;
- Assure that your questions don't exceed what is absolutely necessary regarding the misconduct; and
- Do not elicit information concerning employees' subjective state of mind or interfere with any statutory rights of employees.

Bottom line

Ultimately, from an HR perspective, *Johnnie's Poultry* is a way to be proactive when investigating a theft or any misconduct in the workplace. A *Johnnie's Poultry* warning is

essential for any business, but especially when there's an active union. It removes the temptation to enact adverse actions on employees intentionally or unintentionally and covers employers from false violation accusations.

When employers forego using a *Johnnie's Poultry* warning, they leave the opportunity open for any potential coerciveness. Take note that violating an employee's union rights can result in a charge with the NLRB. Contact an employment attorney today to help you draft a warning before your next investigation.

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DISCRIMINATION

Texas Supreme Court to consider protections for obese employees

by Michael P. Maslanka, UNT-Dallas College of Law

The Texas Supreme Court will hear an employer's appeal from the El Paso Court of Appeals that extended the protections of the Texas Commission on Human Rights Act (TCHRA) to obese employees. The El Paso appeals court doesn't have a good track with our high court, and it's likely the court didn't agree to hear the case so it could say, "Good job, El Paso, keep it up." Read on.

A morbidly obese employee . . .

Dr. Lindsey Niehay weighed about 400 pounds during her residency at the Texas Tech University Health Sciences Center in El Paso. Her troubles started when her superior asked her to insert a needle into a joint to remove fluid. It's a fairly common procedure. The superior said that, as she was trying to perform the procedure, Niehay was "sweating profusely . . . and had to take multiple breaks because of her inability to stand and at times bend over to gain the best access."

The more senior doctor attributed the issues to Niehay's weight. A cascade of concerns then arose about her "physical impediments," although the university believes she was capable from a knowledge standpoint. When she allegedly left patients unattended, she was drummed out of the program.

. . . But a legally protected one?

First off, obesity is likely a protected disability under the TCHRA. But for some unknown reason, Niehay didn't make that argument.

Instead, she argued she was legally protected because (borrowing a term used in the TCHRA) she was "regarded as" being disabled—that is, regardless of whether she was actually disabled, her employer perceived her that way and acted on the perception.

The supreme court will now grapple with whether she can claim so. *Texas Tech Health Sciences Center-El Paso v. Niehay* (Tex. App.—El Paso, 2022).

Bottom line

The facts of this case are odd (and confusing) because Niehay could have argued straight up discrimination—"I have a physical impairment: excessive weight"—but did not. The peril for employers dealing with a regarded-as claim is when the employee might be called a "fatty" or mocked because of an extra 100 pounds—that is, they are not morbidly obese (i.e., disabled under the TCHRA) but are treated as if they are. I'll keep you posted on developments later this year, when the court should issue its decision.

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LITIGATION

How the law works: Court lets race discrimination promotion case go to jury

by Michael P. Maslanka, UNT-Dallas College of Law

Here's a very recent case from the 5th Circuit, the federal appeals court covering Texas. It explains how a court goes about deciding whether to dismiss a lawsuit filed by a very qualified Black woman—who claimed race discrimination when she was denied a position—or instead allow its merits to be decided by a jury. Lots of lessons.

Ominous start for employer

The 5th Circuit said she gets to a jury. The first line of the opinion starts off, "For approximately half a century, Esther Watson worked in education, including as a teacher for over twenty years, an assistant principal for almost a decade, a principal for around seven years." So when she was denied the position of principal of an elementary school, which went to a white man with a mere eight years of teaching experience, there was—as the expression goes—"some explaining to do." Let's drill down.

Watson had actually been in retirement for only one month. But when the position of principal of the school where she had been the assistant principal opened up, she wanted to get back into the game and applied. Interviews were conducted.

In addition to her experience, Watson had also earned 10 teaching certifications, including many dealing with being a school administrator. All this information was before the interview committee, which rated her slightly higher than other applicants including the white male who received the job.

Why did he get selected? The school district believed Watson would be a short timer because of her age (there was no age claim, but there could have been one) and she didn't live close to the school. The lawsuit was quick in coming.

School district gets schooled

The trial court dismissed Watson's lawsuit, but the appeals court disagreed. The school district argued it had the right to decide whom to hire. After all, the 5th Circuit had held in a promotion case several years ago that the employee doesn't win merely because of her "better education, work experience, and longer tenure" and the employer is "free to weigh the qualifications of prospective employees." That's called management prerogative, or so the argument went, and warranted dismissal. But the dismissal bell was rung too early according to the appeals court, which sliced the analysis in a much more granular fashion.

In sending the lawsuit to the jury to decide if race discrimination occurred, the 5th Circuit found Watson "presented evidence as to her substantial amount of relevant work experience, above all almost a decade as [the school's] assistant principal and several years as a principal" at another school.

The cherries on top were all Watson's management certifications and the interview results. In comparison, the selected candidate fell far short on the pertinent criteria. The court cut to the heart of the matter, saying a "jury could—not necessarily will—find that no reasonable person could have selected [the white candidate] over her in the absence of racial discrimination." My advice to the school district: Hoist the flag of surrender and settle. *Watson v. School Board of Franklin Parish et al* (5th Cir., February 16, 2023).

Bottom line

Watson had a powerful narrative working in her favor. One can imagine these facts as a movie. The script—the facts—mattered, and they mattered a lot. Now, with this case, the law is aligned with the reality of how our court system works.

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EMPLOYER LIABILITY

Texas employer dodges wrongful death lawsuit

by Michael P. Maslanka, UNT-Dallas College of Law

Companies can only make money through employees. So far, so good. But when is a company on the hook for harm to others caused by the actions of its employees? The Texas Supreme Court recently chimed in on this issue in a lawsuit involving a tragic car accident in West Texas.

Company mission or personal errand?

John Mueller was a truck driver for Cameron International Company, which drilled for oil in remote West Texas. Mueller lived in a trailer at the work site, and he collided with another vehicle while coming back from a trip to a grocery store. The occupants were either killed or injured, and a wrongful death and person injury lawsuit followed.

Cameron (the deep financial pocket) asked the court to dismiss the lawsuit, but the El Paso Court of Appeals refused. It reasoned that Mueller was acting in the interests of Cameron at the time of the accident—that is, buying supplies so he could feed and hydrate himself to be ready for the next day's work.

According to the court's reasoning, the company benefited from the grocery store trip, so it could therefore be on the hook for any harm or mishaps that occurred during it.

Texas Supreme Court: personal errand

Yes, the Texas Supreme Court agreed that the employer benefits from a well-fed and hydrated employee but, in an exasperated tone, stated: "Workers often travel for personal necessities during the workday or leave for a meal before returning to work, but these activities do not arise from the business of the employer. Rather, they are daily tasks in which workers and nonworkers alike engage, carrying the same attendant risks."

When would a company be on the hook? The Court noted two scenarios:

- An employee traveling to an employer-mandated seminar; and
- An employee required to pick up and drop off workers at their homes.

In these examples, there's a direct order by the company, one seeking to accomplish a particular mission the company believes will inure to its benefit. These aren't general and generic activities performed by all. So, the El Paso Court of Appeals got shot down. *Cameron International Corp. v. Martinez at al.*

Bottom line

Once again, the high court saved an employer from a potentially large lawsuit. Stay tuned for other pro-employer rulings.

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EMPLOYEE BENEFITS

401(k) matching for student loan payments finally arrives

by Lake Moore, McAfee & Taft

In this economic environment, employers are doing almost anything to attract and retain a quality workforce. Improving the suite of employee benefit offerings, sometimes without incurring major new expenditures, is top of mind for many.

Enter SECURE 2.0, which includes a long-awaited 401(k) feature that has sparked employer interest for years.

What is it?

The new legislation lets employers treat an employee's payments toward student loan debt as if they were 401(k) contributions.

Employers are permitted to make "matching contributions" into the employee's plan account even though the employee didn't contribute anything to the plan. This is a discretionary feature and isn't required.

Why add this feature to your plan?

This could be a win-win for employees and employers. Employees are incentivized to pay down a potentially large student loan debt burden while simultaneously saving for retirement. Employees wouldn't have to choose between paying down student loans and making 401(k) deferrals to receive the match.

For employers, although it might mean making a matching contribution when it otherwise wouldn't (for example, if an employee chose to make loan payments rather than elective deferrals), it would almost certainly be a unique benefit offering, and the matching contributions are deductible in the same manner as a traditional match.

Only 'qualified student loan payments' count

Matching contributions may only be made on account of a qualified student loan payment. This is defined as a payment made by an employee in repayment of a qualified education loan incurred by the employee to pay qualified higher education expenses.

The amount of student loan payments that can be matched can't be greater than the normal Code § 402(g) limit for the year (for 2023, that's $22,500) or reduced by any regular elective deferrals the employee makes during that plan year.

A qualified student loan payment generally must meet the requirements of Code § 221(d)(1). The loan must be obtained solely to pay qualified higher education expenses:

- Which are taken on behalf of the taxpayer, or his spouse or dependent, as of the time the debt was incurred;
- Which are paid or incurred within a reasonable period before or after the debt was taken on; and
- Which are attributable to education during a period when the recipient was an eligible student (which is a defined term).

It also includes loans to refinance loans that meet the above requirements. It does not include a loan from a relative or a loan from a retirement plan.

For verification, employers must have the employee certify, at least annually, that his loan payments were made to a qualifying loan.

What are 'qualified higher education expenses?'

These are generally expenses related to enrollment or attendance at an eligible post-secondary school. Very generally, it includes (1) tuition and fees; (2) books, supplies, and equipment; and (3) room and board. Other related items can potentially be included as well, like computers and internet service, but the expenses are only qualified higher education expenses if the student is enrolled at least part-time.

Although the rules for determining "qualified student loan payments" and "qualified higher education expenses" seem complex, employers are permitted to rely on the employee certification that the loan meets these requirements.

Employers would be wise to distribute information on these rules with the certification so employees can make an informed decision, but the requirements should be familiar since they are similar to those for the student loan interest deduction on employees' personal tax returns.

As of right now, it appears that the employee certification is sufficient to protect the plan's qualified status, but guidance from the IRS confirming that piece would be welcome.

Would this hurt the plan's nondiscrimination testing?

No. Congress included special nondiscrimination testing rules to ensure student loan matches wouldn't hurt testing.

Plans are permitted to test separately the employees who receive a regular match from those who receive a student loan match. More guidance from the IRS on this piece would also be welcome.

Are there any other important things to know?

Here are a few:

- The matching contribution for student loan payments must be the same as for elective deferrals;
- Employees receiving the student loan match must otherwise be eligible to participate in the plan and receive a regular match;
- All employees eligible to receive a regular match must also be eligible to receive a student loan match;
- The student loan match must vest in the same manner as a regular match; and
- After the effective date, this feature can be implemented into 401(k), 403(b), SIMPLE IRA, and 457(b) plans (including plans sponsored by governmental employers). However, existing plans will almost certainly need to be amended before implementation.

When can this be implemented?

This new feature can be effective for plan years beginning after December 31, 2024. For plans with a calendar year plan year, that means no sooner than January 1, 2025.

The IRS will most likely implement regulations to tighten up these rules closer to the effective date (and hopefully before).

What you can do now

If 2025 is too long to wait, employers could consider implementing a student loan reimbursement program. Buried in the CARES Act from 2020, Congress expanded the rules for qualified education assistance programs.

Those programs typically reimburse employees for these same types of education-related expenses, but Congress expanded the program to also permit reimbursements for student loan payments made before January 1, 2026. An employer's reimbursement of student loan payments can be made to the employee on a tax-free basis up to $5,250 per year.

There are various requirements under Code § 127 that must be met, however, before implementing a student loan reimbursement program. For example, employers should have a program document in place, and the design can be affected for employers that already have a qualified education assistance program in place. ■

WORKPLACE ISSUES

Think you know your employees? Find out if they're 'splitters' or 'blenders'

by Tammy Binford

HR thinkers have had much to stew over in the last few years as the pandemic triggered major change in how work gets done. Almost overnight, workers learned how to be productive in nontraditional environments. And that experience is causing researchers to take a close look at how organizations—and the people who drive them—can best thrive.

Recent research from Gallup identified two types of workers—"splitters," who want to split work from the rest of their life, and "blenders," who want to blend work and life. The key for employers is knowing who's who.

Who are splitters and blenders?

Gallup reported its research shows "there is a dead-even, 50-50 split" between the two preferences. That means as organizations decide when and where people should work, they need to know which employees prefer which work style.

"Splitters might work best at home or in the office but want to maintain a strict schedule of hours in each location," Gallup's report on the research says. "Blenders might get work done on a weekend or evening, or early in the morning before the office opens."

The research found splitters are more common in production jobs, with 59% preferring to split work from the rest of their life and 41% preferring a blend. But other categories—white collar, healthcare/social assistance, administrative/clerical, managerial, and "other"—prefer to blend.

"Predictably, on-site workers are more likely to be splitters at 61%, but 39% of those workers still have a blender's mentality," the Gallup report says.

Age plays a role, according to the research. Baby boomers, those born from 1946-1964, were more often splitters (55% to 45%). Gen X, those born from 1965-1979, also were more often splitters (52% to 47%).

Older millennials, those born from 1980-1988, preferred to blend work and the rest of their life (44% splitters and 56% blenders). Young millennials and Gen Z, those born in 1989 or after, also preferred blending (51% to 49%).

Engagement and retention

Gallup also looked at the outcomes of splitters and blenders and found "the percentage of engaged employees was essentially equal—as was their overall level of thriving," showing that both preferences can be productive and fulfilling.

But which type of employee represents a flight risk? The research says blenders are a bit more likely than splitters to be looking for another job. Blenders also were more likely than splitters to report burnout.

Asking employees what "their best life imaginable looks like" can help managers understand their employees. For example, managers can ask questions to find out if employees mind getting emails on weekends or during off hours or if they instead thrive on being constantly in the loop. Managers also may find it helpful to ask if employees feel it's intrusive when their home life is disrupted by the office or if they instead see work and life as seamless?

Trends shaping the workplace

No matter what work style people prefer, employers need to be aware of the pressure to retain talent. ManpowerGroup in January released its 2023 trends report "The New Human Age," which finds that although technology may be the great enabler, "humans are still the catalyst to the future."

The research features responses from 13,000 decision-makers and 8,000 workers from eight countries and regions. The key findings include the following:

- Purpose and balance are important. Gen Z workers are far more likely to say the pandemic has affected what they want from their job than workers 55 and older (88% to 65%).
- Talent shortages are afflicting most employers, leading them to reduce or eliminate college degree requirements and instead focus on skills acquired through work and life experience.
- Employers should—but largely don't—consider older workers. Just 19% of hiring managers are actively looking to hire returning retirees.
- Remote and hybrid work can promote balance but also can hinder career progression, with women bearing the brunt of the problem. More women say when working remote, they are less likely to get access to time with senior leaders, learn from others, be considered for promotion, brainstorm, and collaborate with others.
- Employers should upskill workers, or they will upskill themselves, meaning they're more likely to leave. The Manpower research found 57% of employees were pursuing training outside of work because company training programs weren't teaching them relevant skills and didn't advance their career development or help them stay competitive.
- A lack of flexibility is another threat to retention. Manpower found that 64% of the workforce would consider looking for a new job if they were required to return to the office full time, and one in three would take another role in the next month if it offered a better blend of work and lifestyle. ■

RETENTION

Career flexibility: It's more than just choosing a time and place to work

by Tammy Binford

It's still early in the new year, a time when leaders often consider what the future holds for their organizations. And new research is giving leaders a lot to think about as they examine their talent needs. Workers' desire—and demand—for flexibility has gotten a lot of attention, but the definition of flexibility is now expanding.

A new study shows that people don't just want flexibility in when and where they work—they also crave flexibility in their career paths within their organizations. Other research shows the importance of an organization's culture and its ability to include flexibility in its talent strategy.

Rethinking flexibility

Human resources software provider Ceridian recently released a report titled "2023 Pulse of Talent: The rise of the flexible career experience," which is the result of a survey of more than 8,800 workers from around the world. Flexibility and work-life balance were cited by 49% of respondents as among the most valued attributes in a job.

Flexibility was shown to be especially important to respondents aged 18 to 24, since 44% rated flexibility as the job attribute they most value. Just 41% rated compensation as the top attribute.

The survey showed that workers want more than just the traditional meaning of flexibility. They also want the ability to forge new paths. The Ceridian research found that 90% of survey respondents said they have felt stuck in their role over the past year, and one-third said they feel stuck often or always.

The research found that nearly half of employees surveyed were open to new opportunities, and 21% were actively looking. But many of those employees can still be retained.

What's the lesson for employers? "The linear career path is now largely a relic," the report says. "Workers today don't just want flexible jobs—they want flexible careers."

The survey asked employees what their employers could do to make them consider staying. Responses show workers want employers to provide personalized

growth plans and training opportunities. They also want the chance to change career paths within the company, work on new projects or with different teams, and the opportunity to transition to new roles.

The report urges employers to embrace internal mobility, since many employees want to contribute skills to new projects and move into new roles.

Control over career paths

The Ceridian research found barriers to the kind of career flexibility workers want. Less than half of respondents said they see clear career paths with their employers, and just 10% said they have a high degree of control over their career path.

The report also notes that a lack of internal hiring is another barrier to career flexibility. Just 31% of respondents said employees often or very often move into roles on other teams, and 47% said it was difficult to find open roles in their organization that might suit them.

Management also is a factor. Just over half of the survey respondents said their manager would support them moving to a new internal role. The report urges organizations to coach managers on the importance of flexibility.

Equitable training

The importance of training was also noted in the report. "Sixty percent of respondents strongly or somewhat agreed that their employer has a good understanding of the skills they have," the report says. "But only 49% said they strongly or somewhat agree that their employers have a good understanding of the skills they would like to have."

Age also was found to be a problem for employees wanting more training. Fifty-four percent of survey respondents at least 65 years old said they didn't receive any learning and development opportunities over the past year. Despite that, flight risk decreases as age increases.

"Organizations are prioritizing investments in younger employees and leaving out those who are likely to be more loyal," the report says.

Advice for organizations

As employers plan how to offer the kind of flexibility employees want, the Institute for Corporate Productivity (i4cp) offers some food for thought. Its report, "2023 Priorities & Predictions," says financial performance and culture are linked, and no matter what happens with the economy, organizations that prioritize developing and maintaining a healthy culture will see more productivity and better financial performance.

Also, successful leaders are the ones who guard against proximity bias as they manage hybrid teams. In addition, i4cp says HR departments can benefit from bringing in people who have experience working outside of the HR function.

The i4cp report also says companies need to pay attention to data showing the importance of flexibility, stressing that flexibility should be a strategy, not a concession. ■

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