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## Case of the Month

### University staff restructuring did not discriminate against employee based on age in violation of the TCHRA.

Loretta Flores was the director of the president's office at the Texas Tech University Health Sciences Center-El Paso until the president and dean of the university's medical school restructured the office by eliminating the director position and appointing a significantly younger employee to a new assistant position in the office. Flores was reclassified as an executive associate in the provost's office and was the only administrative employee who received a pay cut in the restructuring. Flores sued for age discrimination under the Texas Commission on Human Rights Act (TCHRA), [Texas Labor Code chapter 21](#), and the district court denied the university's plea to the jurisdiction based on sovereign immunity. The university appealed.

The appellate court held that the similarity in job duties of Flores's former director position and the younger employee's new job duties constituted sufficient evidence of a case of age discrimination on the basis that the university truly replaced Flores with someone significantly younger and that Flores raised fact issues regarding the university's stated reason for the restructuring. The appellate court affirmed the district court's decision and the university appealed.

In considering whether Flores had established a case of age discrimination based on true replacement, the Supreme Court of Texas held that, despite some similarities of the job duties of Flores's former director position and the younger employee's new position, the duties were overall too dissimilar for a reasonable juror to conclude that Flores was truly replaced. The court also held that Flores could not establish a case of age discrimination based on disparate treatment because she and the younger employee were not similarly situated at the time of the restructuring, and that stray comments by the president and Flores's subjective beliefs about the president's preferences to work with younger employees were not direct evidence that the restructuring was motivated by discrimination. The Supreme Court of Texas concluded that the district court erred by not granting the university's plea to the jurisdiction and dismissed Flores's claims. [Texas Tech Univ. Health Scis. Ctr.-El Paso v. Flores](#), No. 19-0790, 2020 WL 6811725 (Tex. Nov. 20, 2020).

### Why is This Case Significant?

This case clarifies the determination of when an employee has been truly replaced for purposes of a [TCHRA](#) age discrimination claim, which state courts have historically struggled to determine. Compliance with the TCHRA and the related federal Age Discrimination in Employment Act, [29 U.S.C. § 623](#), presents significant challenges for community colleges. A college should consult local counsel regarding any concerns about particular employment actions.

### Highlights

[Update 40](#) is now available.

Join us at the [TACCA Virtual Conference](#) (Jan. 21-22).

Updated on eLaw:  
[Prohibiting Contracts with Companies Boycotting Israel](#)

### Resources

[Texas Higher Education Coordinating Board](#)  
[Texas Legislature](#)  
[Texas Statutes](#)  
[Texas Attorney General](#)  
[U.S. Department of Education](#)



## From the Courts and the Attorney General

### Business and Finance

University that accepted federal student-loan money was prohibited by [34 C.F.R. § 685.300\(e\)-\(f\)](#) from enforcing a pre-dispute arbitration agreement in a graduate student's admissions application to resolve the student's borrower defense claims of breach-of-contract and misrepresentation by the university. [Young v. Grand Canyon Univ., Inc.](#), No. 19-13639, 2020 WL 6707528 (11th Cir. Nov. 16, 2020).

### Personnel

Former county hospital district employee who sued for violations of the [Americans with Disabilities Act](#) (ADA) failed to provide evidence that he was terminated because of his breathing disorder; however, he presented sufficient evidence to support vacating summary judgment granted to the hospital district on his claim that the hospital district failed to reasonably accommodate his disability by denying him the use of a portable oxygen device while working. [Jones v. Lubbock Cty. Hosp. Dist.](#), No. 19-11364, 2020 WL 6787549 (5th Cir. Nov. 18, 2020).

Former county hospital district employee's lawsuit alleging her termination was discriminatory based on her age in violation of the [Age Discrimination in Employment Act of 1967](#) was dismissed because she did not provide sufficient evidence that the hospital district's stated reasons of termination for poor performance and lack of effort to improve were a pretext for discrimination. [Salazar v. Lubbock Cty. Hosp. Dist.](#), No. 20-10322, 2020 WL 7138646 (5th Cir. Dec. 7, 2020).

Former university professor's race discrimination and retaliation claims under [Title VII of the Civil Rights Act of 1964](#) and [42 U.S.C. § 1981](#) were dismissed because her placement on a performance improvement plan and loss of

course coordinator duties did not constitute an adverse employment action, she failed to demonstrate that the university's decision not to renew her contract was based on her race, and she provided no evidence of retaliation by the university. [Vandenberg v. Univ. of Saint Thomas](#), No. 4:18-CV-379, 2020 WL 6822907 (S.D. Tex. Nov. 20, 2020) (mem. op.).

Former employee's lawsuit for wrongful termination under the [ADA](#) was dismissed because she was terminated for reasons other than her diabetes, including hostile behavior after counseling, progressive discipline, and a final warning. [Katz v. Univ. of Pittsburgh Med. Ctr.](#), No. 19-3938, 2020 WL 6746987 (3d Cir. Nov. 17, 2020).

### Students and Instruction

Student's claim that his two-year suspension by a university after finding him responsible for a sexual assault constituted sex discrimination in violation of [Title IX of the Education Amendments of 1972](#) was dismissed because he failed to provide evidence of gender bias and only made general allegations about the university administration's perceived anti-male culture. [Johnson v. Marian Univ.](#), No. 20-1165, 2020 WL 6821714 (7th Cir. Nov. 20, 2020).

### Open Records Letter Rulings

This month, the attorney general issued Open Records Letter Rulings<sup>1</sup> based on requests from Texas community colleges related to:

- Information related to a specified request for proposals. Tex. Att'y Gen. [OR2020-29078](#) (Nov. 19, 2020), [OR2020-29213](#) (Nov. 20, 2020);

<sup>1</sup> Open record letter rulings are limited to the particular records at issue and the facts as presented to the attorney general. These rulings must not be relied upon as a previous determination regarding any other records or any other circumstances.

- Information related to safety and security audits. Tex. Att’y Gen. [OR2020-29216](#) (Nov. 20, 2020); and
- Information related to personnel and medical files. Tex. Att’y Gen. [OR2020-29486](#) (Nov. 25, 2020).



## Recent Regulations and Guidance

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The Texas Higher Education Coordinating Board (THECB) amended [regulations](#) addressing college readiness benchmarks and implementation of the Texas Success Initiative.

THECB amended a [regulation](#) clarifying that, beginning on January 1, 2021, an institution denied membership in the State Authorization Reciprocity Agreement (SARA) may appeal to Texas’s SARA signatory before appealing to the Southern Regional Education Board.

THECB amended a [regulation](#) addressing the transfer of funds between the Texas College Work-Study and Work-Study Student Mentorship Programs.

THECB amended a [regulation](#) concerning the Tuition Equalization Grant Program and deleting a provision that prorated the amount of an award to a student enrolled less than three-quarter-time in a semester.

THECB amended a [regulation](#) addressing the Texas Educational Opportunity Grant Program by deleting provisions related to the calculation of grant awards.

THECB amended [regulations](#) addressing the Texas B-On-Time Loan Program by amending certain definitions and eliminating institutional holds on student records and registration for individuals who are delinquent on a Texas B-On-Time loan.

THECB repealed [regulations](#) addressing the board’s authority to award a Texas B-On-Time loan, which is no longer authorized after the summer 2020 semester.

THECB amended [regulations](#) addressing the Peace Officer Loan Repayment Assistance Program by allowing peace officers to receive loan repayment based on the initial year of

service as a peace officer after September 1, 2019, rather than requiring applicants to wait another year to qualify for an initial award.

THECB adopted a [regulation](#) extending the existence of the Workforce Education Course Manual Advisory Committee until January 31, 2025.

The U.S. Department of Education [announced](#) joint final [regulations](#) addressing the participation of religious organizations in federal programs and activities.

The Texas Commission of Licensing and Regulation (TDLR) [adopted](#) amendments to the [TDLR Criminal Conviction Guidelines](#) that describe the process by which TDLR determines whether a criminal conviction will result in the denial, revocation, or suspension of a person’s license.

The Texas Ethics Commission made [revisions](#) to regulations adjusting disclosure thresholds for campaign finance reports, lobby registrations and activities reports, and personal financial statements.

The Texas Health and Human Services Commission adopted a [regulation](#) addressing the approval, posting, and updating of a list of human trafficking prevention training courses for certain health care practitioners.

The Texas Commission on Fire Protection adopted [regulations](#) that offer a new voluntary incident commander certification.

The Texas Commission on Environmental Quality amended [regulations](#) addressing the consequences of criminal conviction on licensure of certain occupations, such as landscape irrigator.

*Legal Update* is a publication of TASB Community College Services



## In the News

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The Texas Governor [renewed](#) the disaster proclamation issued for all counties in Texas due to the COVID-19 pandemic.

DOE [issued](#) updated waivers and modifications under authority of the Higher Education Relief Opportunities for Students (HEROES) Act of 2003, as codified at [20 U.S.C. § 1098bb\(a\)\(2\)](#),

of certain federal financial aid regulations due to the COVID-19 pandemic.

The DOE [extended](#) Federal Student Loan relief through January 31, 2021.