



Contents

[Case of the Month](#)
[From the Courts and the Attorney General](#)
[Recent Regulations and Guidance](#)
[In the News](#)



Case of the Month

Court held community college is not immune from liability for breach of contract.

Lily Tercero, the president of Texas Southmost College was terminated mid-contract by the board of trustees after a hearing. She sued Texas Southmost in federal district court under [42 U.S.C. § 1983](#), alleging that the hearing violated her due process rights under the U.S. Constitution [Fourteenth Amendment](#) to cross-examine witnesses and present evidence. Tercero also brought a breach of contract claim under Texas law. At trial, a jury found for Tercero on both claims and awarded her damages of \$674,878.66 for breach of contract and \$12.5 million on the due process claims. The district court also awarded Tercero \$117,685.67 in attorneys' fees.

After trial, Texas Southmost filed motions to dismiss the breach of contract claims based on governmental immunity and for judgment as a matter of law on the due process claims and damages. The district court dismissed the breach of contract claims for lack of jurisdiction after holding that Texas Southmost was entitled to immunity under the U.S. Constitution [Eleventh Amendment](#) and that Tercero was entitled to only nominal damages for the due process violation because she could not show that the violation caused any injuries. The court also vacated its award of attorneys' fees. Tercero appealed the district court's rulings.

The Fifth Circuit Court of Appeals addressed the breach of contract claims by clarifying the two types of immunities applicable to states and local governments under the U.S. Constitution: state sovereign immunity and governmental immunity. State sovereign immunity under the [Eleventh Amendment](#) protects states, state agencies, and their officers from suit in federal courts. In contrast, governmental immunity applies to a state's political subdivisions, including community colleges, unless waived by the state. The court determined that Texas Southmost was not entitled to governmental immunity from the breach of contract claims since immunity was waived by the state and reversed the dismissal of those claims. However, the court affirmed the district court's judgment that Tercero was entitled to only nominal damages for the due process violation. Therefore, the court reversed the district court's vacatur of the portion of attorneys' fees award based only on the breach of contract claims and remanded to the district court. [Tercero v. Texas Southmost Coll. Dist.](#), 989 F.3d 291 (5th Cir. Feb. 24, 2021).

Why Is This Case Significant?

This case clarifies the longstanding differences between sovereign immunity and government immunity and that community colleges are not immune to suit on an employee's breach of contract claim or the substantial liability that may arise if an employee is terminated mid-contract without good cause.

Highlights

Join us at the TASB/TACCA Post-Legislative Seminar on July 30.

New on eLaw:

[Deadlines for May 1, 2021, Community College Trustee Election](#)

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 provided sufficient evidence to reverse summary judgment dismissing its claim that an online marketplace operator violated federal trademark law, the [Lanham Act](#), by assisting third-party artists in creating and selling goods bearing the university's trademarked images without permission. [Ohio State Univ. v. Redbubble, Inc.](#), 989 F.3d 435 (6th Cir. Feb. 25, 2021).

Personnel

Former employee alleged discrimination and termination by a community college based on her sexual orientation in violation of the [Texas Whistleblower Act](#) (TWA). The court held that the [Texas Commission on Human Rights Act](#) (TCHRA), which was enacted to conform with [Title VII of the Civil Rights Act of 1964](#), prohibits discrimination based on sexual orientation following the U.S. Supreme Court decision in [Bostock v. Clayton Cty., Georgia](#), 140 S. Ct. 1731 (2020), and foreclosed relief under the TWA. The former employee sufficiently pled her claims of retaliation and discrimination under the [Texas Constitution](#). [Tarrant Cty. Coll. Dist. v. Sims](#), No. 05-20-00351-CV, 2021 WL 911928 (Tex. App.—Dallas Mar. 10, 2021, no pet. h.).

The Texas Attorney General concluded that a one-time monetary bonus for county administrative staff would be prohibited by Texas Constitution article III, section 53, which applies to community colleges, if it is a payment of extra compensation for services after they are rendered. However, section 53 would not prohibit a bonus if it is pursuant to an approved bonus plan that ties compensation to performance before the services are rendered. Tex. Att'y Gen. Op. No. [KP-361](#) (Mar. 5, 2021).

Professor failed to provide sufficient evidence that a university created a hostile a work environment or discriminated against him based on his gender in violation of [Title IX of the](#)

[Education Amendments of 1972](#) or [Title VII](#) by investigating his relationship with a university student, providing a written warning regarding the relationship, and changing his teaching schedule. [Throupe v. Univ. of Denver](#), 988 F.3d 1243 (10th Cir. Feb. 26, 2021).

Professor provided sufficient evidence to reverse summary judgment dismissing her claims that a university paid her a salary that was less than the salaries of comparable male employees in violation of the [U.S. Equal Pay Act of 1963](#) and that the university's practices of awarding retention raises without increasing salaries of comparable professors had a discriminatory impact in violation of [Title VII](#). However, the professor did not provide sufficient evidence that the university's practices of granting equity and retention raises were made with discriminatory intent in violation of Title VII or [Title IX](#). [Freyd v. Univ. of Oregon](#), No. 19-35428, 2021 WL 958217 (9th Cir. Mar. 15, 2021).

Students and Instruction

Students who alleged a public college violated their rights under the U.S. Constitution [First Amendment](#) by prohibiting them from publicly speaking on campus regarding their religion satisfied the redressability requirement for standing in federal district court by seeking nominal damages for their injuries. [Uzuegbunam v. Preczewski](#), 141 S. Ct. 792 (Mar. 8, 2021).

Student who was denied by a university the opportunity to continue participating in an athletic program without competing failed to provide sufficient evidence that the university retaliated against her for participating in a sexual harassment investigation and discriminated against her based on her sex in violation of [Title IX](#). [Du Bois v. Bd. of Regents](#)

[of Univ. of Minn.](#), 987 F.3d 1199 (8th Cir. Feb. 16, 2021)

Student who was expelled by a university for sexually assaulting other students failed to show that the university denied him due process in violation of the U.S. Constitution [Fourteenth Amendment](#) during an in-person, three-day hearing by permitting the claimants to not answer an unspecified number of questions during cross-examination. [Doe v. Michigan](#)

[State Univ.](#), 989 F.3d 418 (6th Cir. Feb. 25, 2021).

Open Records Letter Rulings

This month, the attorney general issued an Open Records Letter Ruling¹ based on a request from a Texas community college related to certain lease and service contracts. Tex. Att'y Gen. [OR2021-03642](#) (Feb. 9, 2021).



Recent Regulations and Guidance

The Texas Department of Public Safety amended a [regulation](#) clarifying that a driver license holder, including a learner license holder or a commercial driver license holder, may use alternative methods to renew the license.

The Texas State Library and Archives Commission adopted a [regulation](#) addressing the waiver of library accreditation criteria for

good cause, including a pandemic or other public health emergency.

The Texas Health and Human Services Commission amended regulations related to the standards of care for before- and after-school care and school-age program [services](#) and [child-care centers](#), including standards for physical activity, screen time, and nutrition.



In the News

The Texas Governor issued [Executive Order GA-34](#) relating to the removal of operating limits resulting from the COVID-19 pandemic and encouraging institutions of higher education to establish operating standards similar to [protocols](#) issued by the Texas Education Agency.

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

The Texas Governor [renewed](#) the disaster proclamation issued for all counties in Texas due to severe winter weather.

The Texas Higher Education Coordinating Board (THECB) [updated](#) its guidance regarding the COVID-19 pandemic to Texas institutions of higher education, including the impact of the governor's Executive Order GA-34 on campus operations.

The Department of Education (DOE) [issued](#) a request for institutions of higher education and other education providers to voluntarily submit information to assist in developing best practices for operating safely during the COVID-19 pandemic.

The Texas Department of State Health Services [issued](#) guidance regarding the availability of

¹ 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.

COVID-19 vaccines for individuals who teach high school students in dual-credit courses in person and [expanded](#) COVID-19 vaccine eligibility all persons age 16 and older.

The Centers for Disease Control and Prevention (CDC) [updated](#) guidance on testing for COVID-19.

CDC [issued](#) guidance on workplace vaccination programs and [maintains](#) separate guidance on operations during COVID-19 for institutions of higher education.

THECB [published](#) presentations made by Commissioner Harrison Keller to the Texas House Higher Education Committee and the Texas House Appropriations Subcommittee.

The final day for introducing new bills during the 87th Texas regular legislative was March 12, 2021. Follow the latest developments on the [Texas Legislature Online](#) website, including the latest news, [committee meetings](#), and [calendars](#).

THECB [announced](#) \$9.3 million in grants awarded to Texas institutions of higher education under the Texas Reskilling Support Fund Grant Program.

DOE [issued](#) priorities for discretionary grant programs for use in fiscal year 2020.

DOE [issued](#) new and updated guidance regarding the use of grants issued to institutions of higher education from the Higher Education Emergency Relief Fund (HEERF) for COVID-19 relief.

DOE [announced](#) the availability of grants from the Supplemental Assistance to Institutions of Higher Education (SAIHE) program for institutions of higher education with unmet needs related to COVID-19. The deadline for applications is April 28, 2021.

The federal [American Rescue Plan Act of 2021](#) appropriated \$39.5 billion in grant funds to the DOE for providing relief to institutions of higher education, which the American Council on Education has [estimated](#) includes \$2.9 billion in grants for non-profit institutions of higher education in Texas. The Association of Community College Trustees [issued](#) a summary of the law's provisions related to institutions of higher education.

The Department of Labor [announced](#) \$31 million in grants available for the Registered Apprenticeship program, including [grant opportunities](#) for eligible institutions of higher education.