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Case of the Month

University's termination of employee within three months of becoming disabled was presumptively disability-based discrimination under TCHRA.

David Deville was employed by the University of Texas M.D. Anderson Cancer Center (M.D. Anderson) in December 2015 and suffered a hemorrhagic stroke two weeks later, requiring him to take disability leave for three months. Upon returning to work, Deville allegedly could perform the essential functions of his job, but experienced less favorable treatment, including departmental changes without notice, exclusion from meetings, and warnings regarding work performance without specific examples. In May 2016, Deville took two weeks of medical leave due to stroke-related symptoms, returned to work on June 1, 2016, and was terminated two days later. Deville sued M.D. Anderson for disability discrimination under the Texas Commission on Human Rights Act (TCHRA), [Texas Labor Code chapter 21](#). M.D. Anderson argued that it was immune from suit because Deville had not identified another employee who was non-disabled and who was treated more favorably and that the court therefore did not have jurisdiction. The district court agreed with M.D. Anderson and dismissed the claims, which Deville appealed.

The issue for the appellate court was whether Deville had alleged basic facts showing that M.D. Anderson's treatment after his stroke was disability discrimination in violation of the TCHRA, which could support a finding of liability if non-rebutted and would mean that immunity was waived. Applying a standard test, the court concluded that Deville had established a prima facie case of disability discrimination by alleging, without identifying another employee, that he was treated less favorably after he became disabled. The court characterized the written threat of termination made less than a week after Deville's first return to work and the termination that occurred two days after his second return to work as "suspicious timing" and held that the allegations supported an inference of disability discrimination. The case was remanded to district court. [Deville v. Univ. of Tex. M.D. Anderson Cancer Ctr.](#), No. 01-19-00830-CV, 2021 WL 3775590 (Tex. App.—Houston [1st Dist.] Aug. 26, 2021).

Why Is This Case Significant?

Although the court in this case did not make a factual finding of disability discrimination, it exemplifies how less favorable treatment of an employee after the employee becomes disabled might constitute disability discrimination. Colleges should consider both the TCHRA and the [Americans with Disabilities Act](#) when taking any adverse action against an employee who is or is regarded as disabled.

Highlights

Join us at the UNT 2021 Texas Higher Education Law Conference on Nov. 1-3, 2021. Register [here!](#)

HR Services is conducting the [annual salary survey](#).

New on eLaw:
[Dual Office Holding Issues](#)
[Use of Public Funds](#)

Updated on eLaw:
[Closed Meeting Topics](#)

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

Governance

The Texas Attorney General concluded that the Texas Governor's Executive Order GA-38, which prohibits a governmental official, including a community college official, from requiring or mandating that any person wear a face covering, protects individuals in Texas from enforcement of a face covering mandate. The attorney general also concluded that a court could find that a governmental official would violate Texas Penal Code section 39.03 by intentionally denying that immunity to an individual by enforcing an unlawful face covering mandate. Tex. Att'y Gen. Op. No. [KP-386](#) (Sept. 17, 2021).

Business

The Texas Ethics Commission concluded that Texas Election Code section 255.003, which prohibits an officer or employee of a political subdivision, including a community college, from spending public funds for political advertising, would generally not prohibit the use of city funds for certain communications to promote a specified city event. The commission also concluded that the statute prohibits an officer or employee of a political subdivision from using public funds to produce an event at which elected officials are invited to disseminate their political advertising. [Op. Tex. Ethics Comm'n No. 563](#) (Sept. 1, 2021).

The Texas Ethics Commission concluded that a specified cover letter to be distributed by a town secretary that contained factual information about a measure regarding adoption of a home rule charter to appear on the ballot in an election was not political advertising and that Texas Election Code section 255.003 would not prohibit the use of public funds to create and distribute the letter. [Op. Tex. Ethics Comm'n No. 564](#) (Sept. 1, 2021).

The Texas Ethics Commission concluded that specified communications to be distributed by a special purpose district that contained factual information about a measure regarding the incorporation of the district to appear on the ballot in an election was not political advertising and that Texas Election Code section 255.003 would not prohibit the use of public funds to create and distribute the communications. [Op. Tex. Ethics Comm'n No. 565](#) (Sept. 1, 2021).

Personnel

Former university basketball coach sufficiently pled that the university discriminated against her based on her sex by paying her a lower salary and treating her worse than male coaches and terminating her employment contract because of her sex in violation of [Title VII of the Civil Rights Act of 1964](#). The former coach also sufficiently pled that the termination was in retaliation for reporting sexual-harassment allegations to the university in violation of [Title IX of the Education Amendments of 1972](#). [Stollings v. Tex. Tech Univ.](#), No. 5:20-CV-250-H, 2021 WL 3748964 (N.D. Tex. Aug. 25, 2021) (mem. op.).

University's termination of a tenured professor and department chair following an investigation, suspension, and hearing regarding allegations that the professor without authorization signed a lease on behalf of the department and met with firms to discuss selling the department's clinical practice provided him with due process and did not deprive him of a liberty interest in his reputation or career in violation of the U.S. Constitution [Fourteenth Amendment](#) or of his academic freedom in violation of the U.S. Constitution [First Amendment](#). [Kaplan v. Univ. of Louisville](#), 10 F.4th 569 (6th Cir. Aug. 18, 2021).

Former university professor who informed the university that she planned to transition from male to female and then presented as a woman provided sufficient evidence that the university's subsequent denial of tenure and of an opportunity to reapply for tenure was transgender discrimination and was therefore discrimination because of her sex in violation of Title VII and that the denial to reapply for tenure was in retaliation for filing Title VII complaints in violation of Title VII. The court also held that she was entitled to reinstatement with tenure and that damages under Title VII was correctly capped at \$300,000, affirmed the calculated amount of backpay at \$60,040.77, and remanded the terms of reinstatement and calculation of front pay to the district court. [Tudor v. Se. Okla. State Univ.](#), No. 18-6102, 2021 WL 4166701 (10th Cir. Sept. 13, 2021).

Open Records Letter Rulings

This month, the attorney general issued Open Records Letter Rulings¹ based on requests from Texas community colleges related to:

- An award for a specified bid. Tex. Att'y Gen. [OR2021-19776](#) (July 27, 2021);
- Copies of specified contracts. Tex. Att'y Gen. [OR2021-19897](#) (July 28, 2021);
- A specified request for proposals. Tex. Att'y Gen. [OR2021-22441](#) (Aug. 18, 2021);
- A specified proposal and related orders and contracts during a certain date range. Tex. Att'y Gen. [OR2021-22870](#) (Aug. 23, 2021);
- A specified request for proposals and a specified current agreement. Tex. Att'y Gen. [OR2021-22947](#) (Aug. 23, 2021);
- Scoring information and proposals submitted in response to a specified request for proposals. Tex. Att'y Gen. [OR2021-23264](#) (Aug. 25, 2021);
- Three specified responses to a request for proposals. Tex. Att'y Gen. [OR2021-23745](#) (Aug. 31, 2021); and
- Proposals, amendments, and evaluation documents pertaining to a specified request for proposals. Tex. Att'y Gen. [OR2021-24809](#) (Sept. 9, 2021).



Recent Regulations and Guidance

The Texas Alcoholic Beverage Commission amended [regulations](#) concerning alcoholic beverage licenses and permits, fees, bonds, and advertising and repealed regulations for which legislative authority had been eliminated.

The Texas State Library and Archives Commission amended [regulations](#) to reflect best practices and standards of records management, to improve readability and clarity, and to fulfill minimum requirements for management of electronic records.

The Texas Commission of Licensing and Regulation adopted and amended [regulations](#)

concerning motor vehicle and motorcycle driver education and safety programs.

The Texas Department of Agriculture amended [regulations](#) concerning licensing of persons to purchase and use certain pesticides for mosquito control in counties along the international border with Mexico.

The U.S. Department of Education (DOE) amended [regulations](#) concerning institutional eligibility under the Higher Education Act of 1965 related to distance education and innovation to restore certain paragraphs that were inadvertently deleted.

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.

The U.S. Department of Labor amended [regulations](#) concerning annual reporting

requirements under the Employee Retirement Income Security Act of 1974 (ERISA).



In the News

The Texas Higher Education Coordinating Board (THECB) issued new [guidance](#) regarding the impact on public institutions of higher education by Executive Order [GA-38](#), which contains prohibitions in relation to a COVID-19 vaccine administered under an emergency use authorization and face covering mandates.

The Texas Governor [called](#) a third special session of the 87th Texas Legislature beginning on September 20, 2021.

The second special session of the 87th Texas Legislature ended on September 2, 2021.

The Department of Information Resources updated its videoconferencing [standards](#) for board meetings under the Open Meetings Act.

The U.S. Department of Education [announced](#) the expansion of, and [invited](#) applications to participate in, the Second Chance Pell experiment for the 2022-2023 award year, which would expand the number of colleges and universities that may offer prison education programs with support from the Pell Grant program.

The U.S. Department of Labor (DOL) [delayed](#) the [recession](#) of its final rule concerning joint employer status under the Fair Labor Standards Act until October 5, 2021.

The DOL [issued](#) a memorandum with updated guidance regarding the status of student athletes as employees under the federal National Labor Relations Act.