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COUNTY COURTHOUSE
DIMMITT, TEXAS 79027-2689

OUR FILE NUMBER:
HDS-30

CASTRO COUNTY
DIMMITT, TEXAS

July 12, 1991

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Opinion Committee

The Honorable Dan Morales
Office of the Attorney General
Opinion Request Committee
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Dear Mr. Attorney General:

A question has arisen in Castro County regarding the authority of an ex-officio county commissioner to discharge full-time road employees in his precinct and replace the workers with part-time road employees who would not be allowed the same benefits currently afforded road employees of the county in the other three precincts such as membership in the Texas County and District Retirement System and group medical insurance. The same commissioner also proposes a change from the current fixed salary for fixed working hours now in effect in all four precincts of the county to an arrangement in his precinct whereby the fixed salary would cover all time worked by the employees in that precinct.

Several attempts to discharge the employees in the one precinct have been made during the last two and one-half years by the county commissioner. In each instance the employees have been granted an appeal and hearing before the entire commissioners court. During the hearings it was disclosed that the commissioner had no complaint whatsoever about the quality of work performed by the full-time employees. However, the commissioner believes that the precinct can realize large cost savings under his proposal and that Article 6702-1, Section 3.003 (a), V.A.C.S. gives him complete authority to discharge any county employee working in his precinct if the employee is paid from county road and bridge funds.

Each full-time employee in question is either (1) minority or (2) over forty years of age or (3) recently filed a workers compensation claim. Upon advice of counsel the commissioners court rejected the employee terminations by a vote of 4-1. However, during recent weeks, the same commissioner has again given termination notices to the same full-time employees. In support of his position he has delivered on

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July 8, 1991 to the Commissioners Court of Castro County a letter dated March 9, 1991 from the U.S. Department of Labor Employment Standards Administration to U.S. Congressman Larry Combest. (A copy of the letter is attached to this request as an exhibit.) Instead of supporting the county commissioner, the letter warns of further potential discrimination problems in the employment of part-time employees and warns against discrimination against Vietnam era and specially disabled veterans.

Castro County had a population of 10,210 in the 1980 census and apparently has less than 10,000 population according to the 1990 census. It should also be noted that Castro County officially adopted by resolution the optional method of organizing the commissioners court for road construction and maintenance responsibilities as provided in Article 6702-1, Subchapter A (Section 3.101 - 3.107), V.A.C.S. on January 12, 1987 and again on January 9, 1989.

QUESTIONS

1. Can a commissioners court in a county which has ex-officio road commissioners transfer employees from one precinct to another precinct and continue paying those employees with funds which were initially budgeted for the precinct from which the employees were transferred, and over the objection of the ex-officio road commissioner from which the employees were transferred?
2. Can an ex-officio road commissioner terminate full-time employees to achieve cost savings and without existing emergency fiscal conditions under the authority of Article 6702-1, Section 3.003(a), V.A.C.S., without risking federal and state discrimination suits based on race, age, retaliation for workers compensation claims, and/or other protected civil rights?

BRIEF

A. AUTHORITY OF COMMISSIONERS COURT

County commissioners serve as ex-officio road commissioners pursuant to chapter 3, subchapter A of article 6702-a, V.A.C.S. The relevant powers and duties of the commissioners court and ex-officio road commissioners are set forth in the following provisions:

Ex-officio commissioners

Sec. 3.001. (a) in all counties the members of the commissioners court are ex-officio road commissioners of their respective precincts and under the direction of the commissioners court have charge of the teams, tools, and machinery belonging to the county and placed in their hands by the court. They shall superintend the laying out of new roads,

the making or changing of roads, and the building of bridges under rules adopted by the court.

. . . .

Sec. 3.002. (a) The commissioners court shall adopt a system for working, laying out, draining, and repairing the public roads as it considers best, and from time to time the court may change its plan or system of working. The court may purchase teams, tools, and machinery necessary for the working of public roads and may construct, grade, or otherwise improve any road or bridge by contract in the manner provided by Subchapter B of this chapter.

. . . .

Sec. 3.003. (a) Subject to authorization by the commissioners court, each ex-officio road commissioner may employ persons for positions in the commissioner's precinct paid from the county road and bridge funds. Each ex-officio road commissioner may discharge any county employee working in the commissioner's precinct if the employee is paid from county road and bridge funds. Each ex-officio road commissioner also has the duties of a supervisor of public roads as provided by Section 2.009 of this Act.

(b) Each county commissioner, when acting as a road commissioner, shall inform himself of the condition of the public roads in his precinct, shall determine what character of work is to be done on the roads, and shall direct the manner of the grading, draining, or otherwise improving the roads, which directions shall be followed and obeyed by all road overseers of his precinct.

The county commissioners serving as ex-officio road commissioners may employ personnel for their precinct subject to commissioner court approval. Tex.Rev.Civ. Stat. Ann. art. 6702-1, § 3.003 (Vernon Supp. 1989). All road contracts, purchases of road equipment and materials, and employment of personnel are consummated by actions of the commissioners court as a body. While individual commissioners have substantial influence over these matters, they do not have any authority to legally bind the county for the most part, 36 Brooks, County and Special District Law § 40.7 (Texas Practice, 1989). A county can act only through its commissioners court, and the individual commissioners have not authority to bind the county by their separate actions or agreements. Wilson vs. County of Calhoun, 489 S.W. 2d 393, 397 (Tex.Civ.App.-Corpus Christi 1972, writ ref'd n.r.e.). In short, even though each county commissioner is responsible for supervising road work in his precinct and keeping himself informed as to road conditions, he generally has little further authority. The County Road and Bridge Act (Article 6702-1, supra.) essentially means that county roads are opened, constructed and maintained by the commissioners court as a whole and not by individual county commissioners. Brooks, Supra.

The statutes governing ex-officio road commissioners have provided since their enactment that ex-officio road commissioners act "under the direction of the commissioners court." Acts 1901, 27th Leg., ch. 114, at 277. Op.Tex.Att'y.Gen. No. JM-801(1987).

B. "AT-WILL" EMPLOYMENT

The traditional employment relationship sometimes called "at will" means that either the employer or the employee may terminate the relationship at anytime without further liability. Spurgin, The At Will Employment Doctrine and Employee Handbooks, 53 Tex. B.J. 27 (1990). Spurgin discusses exceptions to the "At Will" Doctrine as follows:

"In addition to various federal statutes regulating employment practices, there are several exceptions under Texas law to the general rule of employment at will. The Legislature has created exceptions prohibiting discharge of an employee for prohibited discrimination or retaliation, because the worker has filed a worker's compensation claim, because of union membership or non-membership, because of active duty in the state militia, because of jury duty, because a worker failed to purchase goods from a particular store or merchant, because of a child support or child custody order or writ, and, in the case of public employees, because of reporting, in good faith, a violation of law to an appropriate law enforcement agency. In addition, the Texas Supreme Court has created a prohibition against discharging an employee for refusing to commit an illegal act, and has recently recognized a public policy exception when the plaintiff proves that the reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund. Finally, public employees may not be discharged for exercising their free speech rights under the Texas or United States Constitutions."

C. EMPLOYMENT DISCRIMINATION---AGE

The federal Age Discrimination in Employment Act prohibits covered employers (generally, those with twenty or more employees) from discriminating in employment on the basis of age against individuals who are at least age forty. 29 U.S.C. §§ 623(a), and 631. Such discrimination is likewise prohibited by the Texas Commission on Human Rights Act, art. 5221k. §§1.04 and 5.01 (Vernon's Supp. 1990). Note that the Texas statute has a lower threshold for coverage---fifteen rather than twenty employees. Art. 5221k, § 7(A).

Thamer, Something Old and Something New: A Review of the Texas Employment - at-Will Doctrine and the Federal Americans with Disabilities Act of 1990 in Texas Tech Stay Abreast of Law Seminar, A-4 (1990).

A basic case of age discrimination is established if the following is proved: the plaintiff is over 40 at the time of termination, he was qualified for that position, he was dismissed despite those qualifications, and he was replaced, at least in some part, by a younger employee. Champion, Management's Red Herrings: Attempts to Circumvent the Age Discrimination in Employment Act 50 Tex. B.J. 506 (1987). Champion says that courts usually side with management if there are legitimate reasons such as reduction of force problems or employee incompetence.

Under both federal and state laws a public employer may not discriminate against its employees on the basis of race, sex, religion, or national origin. Under state law a violation is punishable by a \$1,000 fine and one year in jail. Nor may age be a factor of discrimination. The Commission on Human Rights and the authorized local human rights commissions are organized to prevent employment discrimination. Discriminatory employment practices may also be attacked under the Federal Equal Employment Opportunities laws. 35 Brooks, County and Special District Law § 8.13 (Texas Practice, 1989)

D. EMPLOYMENT DISCRIMINATION---CIVIL RIGHTS (RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN)

Under Title VII of the Civil Rights Act of 1964, covered employers (generally, those with fifteen or more employees) are prohibited from discriminating in employment against any individual on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e(b) and 2000e-2(a). Such discrimination is likewise prohibited by the Texas Commission on Human Rights Act, art. 5521k, § 5.01 (Vernon's Supp. 1990). (The Texas law also covers employers with fifteen or more employees; see art. 5221k, § 2.01(7). Both the federal and state laws prohibit employer retaliation against those who oppose unlawful practices, file charges of discrimination, or participate in investigations. 42 U.S.C. § 2000e-3(a); art. 5221k, § 5.05(a) (Vernon 1987). Also, sexual harassment is recognized as a form of unlawful sex discrimination under both the state and federal employment discrimination laws. Thamer, supra.

E. EMPLOYMENT DISCRIMINATION---DISABILITY AND HANDICAP

The Texas Commission on Human Rights Act prohibits discrimination in employment on the basis of "disability." Art. 5221k, § 5.01(1) (Vernon's Supp. 1990). The statute defines "disability" as a mental or physical impairment that substantially limits at least one major life activity or a record of such a mental or physical impairment." Art. 5221k, § 2.01(4). Excluded from "disability" are: (1) addiction to alcohol, drugs, and controlled substances; and (2) a currently communicable disease or infection (including AIDS or infection with the HIV virus) that constitutes a direct threat to the health or safety of others or that renders the affected person unable to perform his employment duties. Art. 5221k, § 2.01(4)(A) and (B).

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The federal Americans with Disabilities Act, enacted on July 26, 1990, prohibits employment discrimination against qualified workers with disabilities. The Act contains a broad definition of "disability" (see § 3(2) of Act); it will include AIDS victims and drug users who have successfully completed drug treatment programs. Employers with twenty-five or more employees are subject to the Act on July 26, 1992; those with fifteen or more employees will be covered effective July 26, 1994. Thamer, supra.

F. FACIAL DISTINCTIONS

Another danger area in Title VII of the Civil Rights Act which should be avoided is in the area of "facial distinctions." An employer may not establish compensation systems that utilize proscribed classifications. Player, Employment Discrimination Law, § 5.50(1988). The author gives the example of a black employee paid \$500.00 per week for 50 hours of work as being a victim of discrimination if a white employee, similarly situated, earns \$500.00 per week for 40 hours of work. The rate of compensation is discriminatory in that the white employee is earning \$12.50 per hour while the black employee is earning \$10.00 per hour. This could become a problem area in Castro County if the commissioners court were to allow one commissioner to set a different hourly rate for work performed in his precinct from the rate paid for essentially the same work in any of the other precincts.

It has been suggested to the ex-officio county commissioner by the county attorney that intense analysis by a highly qualified labor attorney should be obtained before the county commissioners establish a different compensation arrangement in one precinct form that utilized in the other three precincts in order to avoid unintentional discrimination. Additionally, the Fair Labor Standards Act does not apparently allow a change from payment of a fixed salary for fixed working hours to an arrangement whereby the same fixed salary covers all time worked by the employee, unless the employee agrees to the change. 1989 Guidebook to Federal Wage Hour Laws, § 803.1 (Commerce Clearing House, Inc., 1989)

G. CONSTRUCTIVE DISCHARGE

A constructive discharge occurs when a worker resigns in order to escape illegal and intolerable employment practices or conditions. 1989 Guidebook to Fair Employment Practices, § 710 (Commerce Clearing House, Inc. 1989)

H. TANSFER OF EMPLOYEES TO ANOTHER PRECINCT WITH PAYMENT MADE FROM FUNDS INITIALLY BUDGETED TO OTHER PRECINCT

One Attorney General's Opinion indicates that a commissioners court may authorize repair of the roads in one precinct by an adjacent commissioners precinct and charge the expense against the former's road and bridge allotment. Op.Tex.Att'y. Gen. No. V-1424 (1952)

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Another Attorney General's Opinion indicates authority for a commissioners' court to re-allocate from one precinct to another money from the county and road bridge fund appropriated for county road and bridge purposes, but unexpended. The requirement of Section 3.101(c) of Article 6702-1, V.A.C.S. [County Road and Bridge Act] that the road and bridge fund be judiciously and equitably expended and in proportion to the amount (tax) collected in the precinct as nearly as conditions will permit is not applicable except where road commissioners are employed under Chapter 3, Subchapter B of the Act. (Road commissioners have never been employed in Castro County. Road commissioners and ex-officio road commissioners are two different optional methods of organizing the commissioners court for road construction and maintenance responsibilities.) Op.Tex.Att'y.Gen. No. JM-784 (1987).

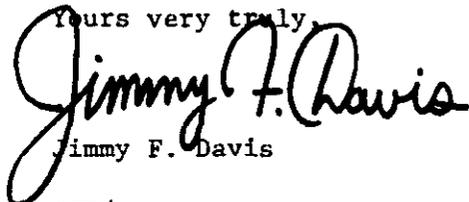
Opinion No. JM-784 explains the four (4) different ways of organizing the commissioners court for road construction and maintenance responsibilities. It also addresses the necessity of an emergency before the county budget is amended. It discusses the fact that a governing body of a political subdivision has the right to alter or amend any act that it adopts, including acts appropriating money, unless that right is restrained by the state constitution or statutes or United States Constitutional provisions.

CONCLUSION

In order to avoid federal and state civil rights law suits for discrimination based on race, age, retaliation for workers compensation claims and/or other protected civil rights, a county utilizing the optional ex-officio road commissioner form of organizing the commissioners court for road construction and maintenance responsibilities may declare an emergency to amend the budget, transfer discharged road employees from one precinct to road employment in other precincts using funds initially budgeted for the precinct from which the employees are being transferred and over the objection of that same ex-officio road commissioner.

The opinion of the Attorney General's office will be helpful in the proper operation of the commissioners court. No litigation has been filed or is contemplated to my knowledge. I will be looking forward to hearing from you.

Yours very truly,


Jimmy F. Davis

JFD/gw

xc: Mrs. M. L. Simpson, Jr.
County Judge
Castro County Courthouse
Dimmitt, Texas 79027

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xc: (continued)

Mr. Harold Smith, Commissioner
Precinct No. 1
P.O. Box 467
Hart, Texas 79043

Mr. Dale Winders, Commissioner
Precinct No. 2
HCR 4
Dimmitt, Texas 79027

Mr. Jeff Robertson
Commissioner, Precinct No. 3
615 N.W. 7th
Dimmitt, Texas 79027

Mr. Vincent Guggemos, Commissioner
Precinct No. 4
HCR 1, Box 78
Nazareth, Texas 79063

U.S. Department of Labor

Employment Standards Administration
Office of Federal Contract
Compliance Programs
Washington, D.C. 20210



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The Honorable Larry Combest
House of Representatives
Washington, D.C. 20515

**CASTRO COUNTY
DISTRICT ATTORNEYS OFFICE**

Dear Congressman Combest:

This is in response to your February 20 correspondence to Ms. Kathleen M. Harrington, Assistant Secretary, Congressional and Intergovernmental Affairs, U.S. Department of Labor, on behalf of your constituent, Mr. Harold D. Smith. Mr. Smith in his letter to your office dated February 8 was questioning whether or not if he terminated full-time employees for more economical part-time employees would he be depriving the full-time employees of their equal opportunity employment or their civil rights. Your letter was referred to the Office of Federal Contract Compliance Programs (OFCCP) for response.

OFCCP administers three equal employment opportunity programs; Executive Order 11246, as amended, (race, color, religion, sex, national origin); Section 503 of the Rehabilitation Act of 1973, as amended, (individuals with handicaps); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 2012 (Vietnam Era and special disabled veterans). These programs require nondiscrimination and affirmative action in employment by covered Federal contractors and subcontractors.

It would not be a violation of any of the programs that OFCCP administers if Mr. Smith decided that it would be more economical to use part-time rather than full-time employees. However, the criteria to be applied is that he cannot utilize a discriminatory personnel practice against any of the groups indicated above in determining who should be terminated or otherwise affected. In addition, the selection of part-time employees must, of course, also adhere to equal opportunity and affirmative action guidelines.

EXHIBIT A PAGE 1

If Mr. Smith wishes further information or guidance on the application of equal opportunity requirements, he should contact the office listed below.

Mr. Robert J Gnidziejko
District Director
for OFCCP/ESA
U.S. Department of Labor
Rosenwald Bldg., Suite 14
320 Central Avenue, S.W.
Albuquerque, New Mexico 87103

In addition, Mr. Smith should be advised to contact the local Equal Employment Opportunity Commission Office, as well as the Texas Employment Commission to ascertain if there are other applicable laws that would be controlling in this situation.

If I can be of further assistance, please contact me.

Sincerely,

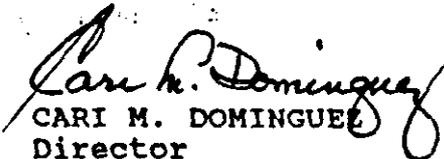

CARI M. DOMINGUEZ
Director

EXHIBIT A PAGE 2