The Texas A&M University System

Office of General Counsel

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OPINION COMMITTEE

FILE # ML-43770-04
I.D. # 43770

Mr. Greg Abbott
Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

Subject: Request for Opinion re Standard for Determining "Merit"
Section 21.556, Texas Labor Code

Dear General Abbott:

On behalf of The Texas A&M University System, we are requesting an opinion from your office on the following issues.

Texas A&M University (TAMU) has been notified by the Texas Workforce Commission Civil Rights Division[1] that the university must provide equal employment opportunity training as required by §21.556, Texas Labor Code, because three or more complaints of employment discrimination were filed against TAMU during the 2004 fiscal year.[2] Section 21.556 requires that in calculating the number of complaints that qualify for a finding of mandatory training, those that are without merit are to be excluded. The university asserts that the point at which merit is to be determined is after the complaint has been processed in accordance with Chapter 21, Subchapter E, Texas Labor Code. The commission has stated that all that is required to determine "merit" for purposes of §21.556 is for a complaint to state a prima facie case of discrimination and be within the commission's jurisdiction. We respectfully request an opinion from your office concerning whether the commission's interpretation of the law and its own rule are in compliance with the law.

[1] Throughout this letter the Texas Workforce Commission Civil Rights Division will be referred to as "the commission."

[2] See Exhibit 1, attached

Legal Authorities

Section 21.556, Texas Labor Code states as follows:

§21.556. Required Compliance Training for State Agencies

(a) A state agency that receives three or more complaints of employment discrimination in a fiscal year, other than complaints determined to be without merit, shall provide a comprehensive equal employment opportunity training program to appropriate supervisory and managerial employees.

(b) The training may be provided by the commission or by another entity or person approved by the commission, including a state agency.

(c) The state agency shall provide documentation of the training to the commission if the training is not conducted by the commission. The documentation shall include the dates the training was provided, the names of the persons attending the training, an agenda for the training program, and the name of the entity or person providing the training.

(d) The commission by rule shall adopt minimum standards for a training program described by Subsection (a) and shall approve an entity or person to provide a training program if the program complies with the minimum standards adopted by the commission under this subsection.

(e) An agency required to participate in a program under this section shall pay the cost of attending the program or shall reimburse the commission or state agency providing the program through interagency contract. The cost of providing the program shall be determined and approved by the commission or state agency in cooperation with the state auditor's office. (Emphasis added.)

The commission is the state agency charged with responsibility to "receive, investigate, seek to conciliate, and pass on complaints alleging violations of"[3] Chapter 21 of the Labor Code.[4] Complaints must be in writing and made under oath, and must state (1) that an unlawful employment practice has been committed, (2) the facts on which the complaint is based, and (3) facts sufficient for the commission to identify the respondent.[5] Complaints may be amended to clarify and amplify allegations made in the complaint.[6] Commission staff are required to investigate complaints and "determine if there is reasonable cause to believe that the respondent engaged in an unlawful employment practice as alleged in the complaint."[7] If reasonable cause is not found to exist, the complaint should be

[3] VTCA Labor Code, §21.003(a)(2)
[4] For the sake of convenience, the term "formal process" will be used herein to describe the various processes, including judicial remedies, described in Chapter 21, Labor Code.
[5] VTCA Labor Code, §21.201(b), (c)
[6] VTCA Labor Code, §21.201(e)
[7] VTCA Labor Code, §21.204

dismissed.[8] If after investigation the commission determines that reasonable cause exists to believe that the respondent committed an unlawful employment practice as alleged in the complaint, the finding is referred to a panel of commissioners. If the panel determines that reasonable cause exists, the commission issues a written determination "incorporating the executive director's finding that the evidence supports the complaint" and provides copies to the complainant and respondent.[9] If the commission dismisses the complaint or does not resolve it before the 181st day after the date it was filed, it must inform the complainant of such fact and he or she is entitled to request a written notice of the complainant's right to file a civil action.[10]

The commission has adopted rules for handling complaints of discrimination. Its rule on the determination of merit for purposes of §21.556, Labor Code is 40 TAC §323.8 which states, in relevant part, as follows:

> (a) The Commission will make a determination if a complaint of employment discrimination is with or without merit by analyzing complaints filed by employees of state agencies or applicants for employment with state agencies, with either the Commission or the [EEOC] . . . to ascertain whether the complainant has met his or her burden of providing sufficient factual evidence to establish the elements of a prima facie case of employment discrimination as delineated by the United States Supreme Court . . . <u>If a complaint is determined to have met the elements of a prima facie case, then the complaint will be administratively processed through the Commission's or EEOC's investigation procedures. If the Commission makes a determination that a complaint has met both a Supreme Court test of prima facie (*sic*) and an administrative processing test of merit, a state agency will be determined to have a complaint of merit assessed against them (*sic*).</u>
>
> (b) If a complainant in filing a complaint fails to meet his or her burden of establishing the elements of a prima facie case as outlined by the Supreme Court, is prevented from filing a complaint for jurisdictional reasons, or provides self-defeating evidence on the face of his or her complaint that shows that the complaint is defective, then the complaint <u>will not be administratively processed nor determined to be with merit</u>. . . (Emphasis added.)

The Commission's Application of the Law and Rule

The commission has asserted that its prima facie test is merely a review to determine if the complaint on its face contains allegations that meet the *McDonnell Douglas* test for discrimination complaints in litigation (to be discussed below). The determination of merit is made at the time a complaint is filed and before the agency has had an opportunity to review and respond. As a result, an agency may be required to pay for mandatory training *even if a complaint is ultimately found to be without merit through use of the formal process.* Such an interpretation places the

[8] VTCA Labor Code, §21.205(a)
[9] VTCA Labor Code, §21.206
[10] VTCA Labor Code, §21.252(a)

commission in the position to unilaterally determine that an agency is in need of training. Since the training must be funded by the agency accused of discrimination, the agency has an interest in ensuring that its funds are not used to pay for programs that are not needed to address problems that do not exist. The language of §21.556(a) expresses the legislature's intent that state funds not be expended for training unless it is clear that a record of repeated discriminatory conduct has been established.

"Merit" as Defined by the Commission

In order to carry out the intent of the legislature, some definition of "merit" is needed. The commission's rule describes a process for merit determination: "If the Commission makes a determination that a complaint has met both a Supreme Court test of prima facie (*sic*) and an administrative processing test of merit, a state agency will be determined to have a complaint of merit assessed against them (*sic*)." The rule consists of two parts: a "prima facie" test and a jurisdictional test. The commission applies the prima facie test for cases of employment discrimination as expressed in opinions of the U. S. Supreme Court, the most widely accepted of which is known as the *McDonnell Douglas* test, defined as follows:

> The principle for applying a shifting burden of proof in employment-discrimination cases, essentially requiring the plaintiff to come forward with evidence of discrimination <u>and</u> the defendant to come forward with evidence showing that the employment action complained of was taken for nondiscriminatory reasons. Under this test, the plaintiff is <u>first</u> required to establish a prima facie case of discrimination, as by showing that the plaintiff is a member of a protected group and suffered an adverse employment action. If the plaintiff satisfies that burden, <u>then</u> the defendant must articulate a legitimate, nondiscriminatory reason for the employment action complained of. If the defendant satisfies that burden, then the plaintiff must prove that the defendant's stated reason is just a pretext for discrimination and that discrimination was the real reason for the employment action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).[11] (Emphasis added.)

It is the university's position that the commission's standard for determining merit misapplies the principles of *McDonnell Douglas* and improperly implements the process and remedy devised by the Texas Legislature.

Burden-Shifting is Improperly Omitted

First, the commission applies only one of the three prongs of the *McDonnell Douglas* test by concluding that a prima facie case exists while not allowing the employer to make any response to the bare allegations. While the *McDonnell Douglas* test may be a valid legal benchmark for discrimination cases, the commission has "cherry-picked" the part of the test that it favors and has stopped

[11] Black's Law Dictionary (7th ed. 1999),

short of applying the second part of the test, i.e., the burden-shifting to the employer to articulate a legitimate nondiscriminatory reason for its action. By cutting off an agency's ability to respond on the merits of a complaint, the commission has reduced the subjective question of merit to a ministerial function that looks only at the form of a complaint and ignores its substance. The commission treats a correctly drafted complaint as a type of "self-proving" document, similar to a will offered for probate with a self-proving affidavit. Articulating a prima facie case is made even easier since commission or EEOC employees often assist complainants in drawing up their charges. Once a self-proved will is admitted into evidence, a prima facie case is deemed to have been established, and a rebuttable presumption arises that the will was properly executed.[12] Similarly, the commission's practice means that a properly drafted complaint will automatically establish a prima facie case of discrimination, and create an irrebuttable presumption that the prima facie case has "merit." The presumption is made irrebuttable by the fact that the agency cannot offer its response before merit attaches. Recent experiences with the commission (described below) have led the A&M System to conclude that all complaints filed with the commission and the EEOC are considered to be prima facie cases.

Intent of the Legislature is Frustrated

Second, the commission has frustrated the intent of the legislature by ensuring that virtually all complaints are considered to have "merit" for purposes of calculating the number to trigger mandatory training. The university does not dispute that it is the commission's responsibility to receive and evaluate complaints in accordance with the governing standards for employment discrimination complaints. The *McDonnell Douglas* test is routinely applied by state and federal agencies in order to evaluate discrimination complaints. However, in requiring that complaints have merit before they may be counted against the minimum number, the legislature was referring to determinations made through the formal process provided by law. By ignoring that prerequisite, the commission has ignored the clear intent of the legislature to limit the designation of "meritorious" to cases that have been shown to be the result of discriminatory practices by a state agency. In such cases, the remedy prescribed by the statute, training of employees, is clearly warranted. The legislature elected to formalize a de minimis standard for the number of meritorious complaints that warrant mandatory training.

The second stage of the process for determining merit is an "administrative processing" test. There is nothing in the commission's rules that defines or delineates what is meant by "administrative processing." According to an attorney for the civil rights division of the commission, it is merely a question of jurisdiction:

> In answer to your question, the administrative processing test is as follows, (*sic*) the Texas Commission on Human Rights asks the question (*sic*) is this

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[12] *Schindler v. Schindler*, 119 S.W.3d 923 (Tex. App.—Dallas, 2003), *petition for review filed 3/1/2004.*

> complaint jurisdictional under the Texas Commission on Human Rights Act. If the answer is yes, then the complaint meets the administrative processing test. If the answer is no (*sic*) then the complaint does not meet the jurisdictional (*sic*) processing test.[13]

In our opinion, this is an incorrect reading of Rule §323.8. Jurisdiction is a necessary prerequisite to any action the commission takes on a complaint, and must be determined before any other action can be taken. If "administrative processing" is the equivalent of "jurisdictional processing," then it is essentially meaningless as applied. If the commission's interpretation is followed, the phrase "administratively processed" is reduced to meaning nothing more than the routine handling of paperwork by referral to the appropriate office. A reading of the rule as a means to implement the intent of the legislature, i.e., balancing the need to conserve scarce agency resources while working to eliminate illegal discrimination, leads to the conclusion that "administrative processing" should refer to the formal process of investigation and determination by the commission or the EEOC. This is borne out by the language of the rule stating, "If a complaint is determined to have met the elements of a prima facie case, then the complaint will be administratively processed through the Commission's or EEOC's investigation procedures." (Emphasis added.) The rule ties the administrative process to the use of investigation procedures. The procedures set forth in the formal process are far more extensive and participatory than simply asking the question, "[I]s this complaint jurisdictional under the Texas Commission on Human Rights Act."

De Facto Dual System Created

Third, by its misapplication of the *McDonnell Douglas* test the commission has exceeded its authority and created a de facto dual system for addressing discrimination complaints. The statute says that the commission must make a determination based on the standard of "reasonable cause" to believe that the agency engaged in an unlawful employment practice as alleged in the complaint.[14] Such a determination may only be made after investigation. But the commission's rule has been interpreted to apply only the prima facie standard. In addition, because the commission considers the mere filing of a properly worded complaint to be the legal equivalent of a finding of reasonable cause, state agencies are subject to having sanctions imposed upon them without any reference to the outcome of the formal process.

[13] Letter of August 20, 2003 from Katherine A. Antwi to W. Jan Faber, attached as Exhibit 2.
[14] VTCA Labor Code, §21.205(a)

If the commission properly applied the law, the process would be as follows:

1. A correctly written complaint that does not on its face defeat the commission's jurisdiction is timely filed.

2. The agency is notified and provided the opportunity to respond to the allegations of the complaint and participate in the formal statutory process of investigation and resolution.

3. The commission (or the EEOC) issues a finding that there is reasonable cause to believe that discrimination has occurred.

4. The complaint is classified as being one with merit and added to the total of meritorious complaints for the purpose of calculating the minimum number of three complaints with merit within a fiscal year.

If three complaints are classified as "with merit" within a fiscal year, the agency must undergo the training required by §21.556. Even if a complaint is later found to be groundless or abandoned by the complainant, the agency is required to pay for training because the commission decided it had sufficient "merit." The question of merit becomes a standard in its own right without any reference to the reasonable cause standard and formal process.

The Commission Equates Filing with Merit

In the experience of several components of The Texas A&M University System, the commission has chosen to classify as meritorious many complaints that were dismissed, allowed by the complainant to lapse, or voluntarily removed to court prior to any determination being made by the commission or the EEOC. The commission's history of handling complaints against components of The Texas A&M University System clearly demonstrates that it considers the mere filing of a correctly worded complaint to be sufficient to classify it as having merit. In one case, a university received a letter dated March 12, 2002 from the TCHR notifying the university that, "at least three (3) complaints alleging employment discrimination" were filed against the university during Fiscal Year 2002. Nothing in the letter addressed how or whether a merit determination had been made in any of the cases.[15] None of the complaints resulted in a finding of discrimination by the university.

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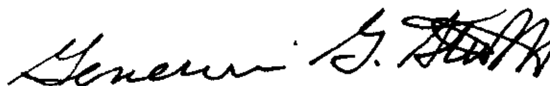
[15] The commission's practice is to announce to an agency that it has met the "3 or more" minimum number of complaints without providing any information concerning the dates, parties, or status of the complaints. In most instances, this means that the agency must review its own records in order to find out whether the commission's figures are accurate, whether the reported dates are within the fiscal year to which they were attributed, and even to identify the types of discriminatory acts of which it was accused. The last factor is crucial because the training received by the agency's employees is supposed to emphasize areas in which it has been found to be deficient.

In June of 2002 another System university received a similar letter dated May 29, 2002. The records of the university indicated that six complaints were filed during the 2002 fiscal year. All were filed by the same attorney on April 17, 2002. None had been resolved as of the writing of the commission's letter. In fact, at the request of the complainants' attorney, the EEOC issued right to sue letters on October 8, 2002 stating that it would not be able to investigate the complaints within 180 days and would not file any lawsuit within that time. No agency determination was ever made regarding the merits of any of the complaints.

On March 19, 2004 Texas A&M University received a letter from the commission stating that three or more complaints had been filed in Fiscal Year 2004 and requiring the university to undergo mandatory training. The letter from the commission did not identify or provide any details concerning the complaints. The Human Resources Office at Texas A&M University has identified three complaints that may be the ones identified in the letter. However, only one of the three was filed against the university. The other two were filed against the Texas Engineering Experiment Station (TEES) and the Texas Veterinary Medical Diagnostic Laboratory (TVMDL) which, along with Texas A&M University, are components of The Texas A&M University System. As of today's date, all three complaints are pending and the formal process has not been concluded.

We respectfully request an opinion from your office regarding the proper interpretation of the law and rules concerning this matter.

Sincerely,



for Delmar L. Cain
General Counsel

Texas Workforce Commission

Member of the Texas Workforce Network

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June 7, 2004

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RE: Section 21.556, Texas Labor Code

Dear Mr. Cain:

This letter is a follow up to our meeting on Friday, May 21, 2004. At that meeting, you shared the intent of the Texas A&M University System to seek an opinion from the Office of the Attorney General (OAG) concerning the interpretation of Section 21.556 of the Texas Labor Code. You indicated that the Texas A&M University System (University System) would be seeking the OAG opinion because it has been informed by the Texas Workforce Commission Civil Rights Division that the University System must provide equal employment opportunity training as required by Section 21.556 of the Texas Labor Code because of three or more complaints of employment discrimination that were filed against the University System during fiscal year 2004.

Under 40 TAC Section 819.18 of the Texas Workforce Commission Rules, a complaint has merit if the complainant has met his or her burden of providing sufficient factual evidence to establish the elements of a prima facie case of employment discrimination as delineated by the United States Supreme Court. If a complaint is determined to have met the elements of a prima facie case, then the complaint will be administratively processed through the Commission on Civil Rights or the Equal Employment Opportunity Commission's investigation procedure. If the Commission of Civil Rights makes a determination that a complaint has met both a Supreme Court test of prima facie and an administrative processing test of merit, a state agency will be determined to have a complaint of merit assessed against it.

As we discussed, it is the position of the University System that the point at which merit is to be determined should be after the complaint has been processed in accordance with Chapter 21, Subchapter E, Texas Labor Code, which would mean that there must be a determination of cause after a review by a panel of Human Rights Commissioners.

As I indicated in our conversation, I understand your argument, and from my past experience with other state agencies, I have attempted to deal with the very issue that we discussed. I indicated to you in our conversation that I would review your concerns. I also informed you that the Texas Workforce Commission will be reviewing all of the rules of the Texas Workforce Commission Civil Rights Division in the near future to determine if changes should be made. I indicated to you that your agency's input in that process would be welcome.

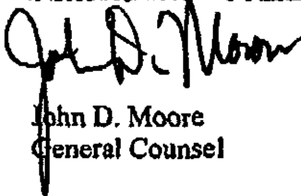
A review of the legislation, HB 2933, 78th Texas Legislature, Regular Session (HB 2933), which made the former Texas Commission on Human Rights (TCHR) a division of the Texas Workforce Commission (TWC), indicates that all TCHR rules in existence at the time of abolition of TCHR and the transfer of its powers and duties to the TWC Civil Rights Division would become the rules of the division and would remain in effect until changed by the TWC. (See Section 5 of HB 2933) There have been no substantive changes in those rules since they became the rules of the Civil Rights Division. Therefore, the long-standing interpretation of Section 21.556 of the Texas Labor Code as reflected in 40 TAC Section 819.18 must remain in effect at this time.

I would appreciate it if you would inform Dr. Joni Baker, the EEO Officer for the University System, that it is the intent of the Civil Rights Division that she should schedule the required training at this time. Unless and until there is a change to the current interpretation of Section 21.556 of the Texas Labor Code, the Civil Rights Division will proceed with its duties under the law. Please have Dr. Baker contact Glenn Skiles with the Civil Rights Division to schedule the required training at this time.

I would suggest that you proceed with your opinion request to the OAG. This agency will respond to the request when asked to do so by the OAG. Even if you do request the opinion, the Civil Rights Division will provide the required training.

Thank you for your time and consideration in this matter.

Sincerely,



John D. Moore
General Counsel

cc: Gene Crump, Deputy Executive Director, TWC
Vickie Covington, Interim Director, Civil Rights Division, TWC
Glenn Skiles, Training and Monitoring Manager, Civil Rights Division, TWC
Tina Coronado, Legal Counsel, TWC

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TEXAS COMMISSION ON HUMAN RIGHTS

August 20, 2003

Mr. W. Jan Faber
Assistant General Counsel
The Texas A&M University System
Office of General Counsel
John B. Connally Building, 6th Floor
301 Tarrow
College Station, Texas 77840-7896

Re: Prairie View A&M University – Complaints of Discrimination

Dear Mr. Faber:

I am in receipt of your letter dated August 13, 2003. In your letter you request clarification on what the administrative processing test of merit is as determined by the Texas Commission on Human Rights. In answer to your question, the administrative processing test is as follows, the Texas Commission on Human Rights asks the question is this complaint jurisdictional under the Texas Commission on Human Rights Act. If the answer is yes, then the complaint meets the administrative processing test. If the answer is no then the complaint does not meet the jurisdictional processing test. In sum, under the Texas Labor Code § 21.556 and the Texas Administrative Code § 323.8 a complaint of discrimination is deemed to be a complaint with merit if it meets prima facie as outlined by the U.S. Supreme Court and is jurisdictional as delineated in the Texas Commission on Human Rights Act. I hope that this response provides you and your organization with clarity on the issue.

Your organization has been identified as having three or more complaints of discrimination that have been determined to be with merit. As such, please contact our office to schedule dates and times for training sessions. If you decide not to schedule the required training please contact our office to inform us of the same. Please be advised that this concludes the Texas Commission on Human Rights' discussion of the matter.

Sincerely,

Katherine A. Antwi
General Counsel

xc: Mr. Glenn Skiles, Training and Monitoring Manager
Ms. Susan Irza, Director of Human Resources

"Texas Commission on Human Rights is an Equal Opportunity Employer"