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TEXAS COMMISSION ON HUMAN RIGHTS

February 10, 1999 RQ-0022-JC

RECEIVED
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Opinion Committee

Honorable John Cornyn
Attorney General for the State of Texas
P.O. Box 12548
Austin, TX 78711
Attn: Liz Robinson, Chair, Opinions Committee

Re: Request for Reconsideration of Texas Attorney General Opinion No. DM-497 (December 21, 1998) Regarding the Validity of Rider to Appropriations Act Requiring Certain State Agencies to Expend Appropriated Funds for Training Provided by the Texas Commission on Human Rights for Fiscal Years 1997 and 1998 (RQ-1029)

Dear General Cornyn:

On December 21, 1998, former Attorney General Dan Morales issued an opinion in the above-referenced request in which he found that:

> "The rider to the *1997 appropriations act* found at article IX, section 120.5, attempts to amend general law in violation of article III, section 35 of the Texas Constitution and is therefore invalid. Texas Southern University need not comply with its terms in choosing an outside agency to provide training sessions and equal employment opportunities seminars for its employees." (emphasis added).

Tex. Att'y Gen. Op. DM-497 (1998), p. 6.

At its last public meeting, members of the Texas Commission on Human Rights, without dissent, voted to request your administration's review and reconsideration of Tex. Att'y Gen. Op. DM-497 (1998) because the opinion (1) addresses an issue that is moot due to the legislature's adoption of a subsequent appropriations act rider for fiscal years 1998 and 1999; (2) fails to answer the particular question asked by TSU; (3) fails to give adequate weight to the legislature's grant of statutory authority to the Commission; (4) fails to acknowledge the administrative agency's interpretation of the same; and (5) ignores the public policy established by the legislature.

In the 1997 General Appropriations Act, the legislature required state agencies and public institutions of higher education to expend appropriated funds through interagency contracts to receive EEO training provided by or approved by the Commission for its managers and supervisors in order to ensure compliance with laws

prohibiting employment discrimination. *See* TEX. LAB. CODE ANN. § 21.003(5), (8), and (9). According to the rider in Article IX, § 120.5, equal employment opportunity training for state agencies and higher education institutions is triggered by a requirement that there first be at least three meritorious complaints of employment discrimination filed originally with the Commission. *Id.* The Commission considers a complaint to have merit if it sets forth elements of a *prima facie* case. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1993). There is no factual dispute between TSU and the Commission that the public policy set forth by the legislature is that state employees need to receive appropriate training in equal employment opportunities. The only question raised by TSU's original request was whether the Commission or TSU could decide on who would do the training.

The Attorney General's opinion in DM-497 goes far beyond TSU's original inquiry and is in error. The first and most obvious error in DM-497 is found on the first page in which the author of the opinion quotes the language of the fiscal years 1998-1999 appropriations act and not the provisions in effect in 1997. Consequently, the opinion addressees issues not raised in Texas Southern University's (TSU's) original request. Since TSU's original opinion request concerned only the 1997-1998 appropriations act language, any opinion on that matter is moot because the appropriations act at issue in TSU's opinion request involved the FY '97 appropriations act, not the current one.

Second, in its original request for an attorney general opinion, TSU only asked whether the Commission had the authority to approve which entity TSU used to provide EEO training to its employees.[1] The answer was a very clear *yes* because the rider specifically states that the training is "to be provided *by* the Texas Commission on Human Rights or other entities or persons *approved by* the Commission. ..." (emphasis added). In unequivocal language, the legislature gave the Commission the final say on which person or entity would provide EEO training. Notwithstanding the obvious answer, Attorney General Morales decided to opine on an issue never raised by TSU: whether the rider itself was unconstitutional.

Third, with respect to the constitutionality of Section 120.5 of Article IX of the General Appropriations Act (1997), General Morales questioned whether the Texas Commission on Human Rights had sufficient statutory authority to provide training to state agencies and public institutions of higher education, absent Section 120.5 of Article IX of the General Appropriations Act. If the answer was yes, then the rider in Section 120.5 was valid; if no, then Section 120.5 was void. Some of the Commission's purposes are to secure freedom from employment discrimination in order to make available to an employer and an employee "full productive capacities" and to promote an employee's rights and interest.

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[1] The Chairman of the Board of Regents, Mr. Willard L. Jackson, was the person that nominally requested the Office of the Attorney General for the State of Texas to resolve the following:

> "whether a state agency or institution of higher education with three or more complaints of employment discrimination in a year must allow the Texas Commission on Human Rights ("TCHR" or "commission") to conduct a seminar for its employees at the agency's or institution's expense. ...We understand that TSU wishes to provide such training for its employees, but it believes that it may choose the provider."

See Tex. Att'y Gen. Op. DM-497 (1998), p. 1

TEX. LAB. CODE ANN. § 21.001(4), (5), and (8). Providing technical assistance and training to state agencies and institutions of higher education is one method of achieving these goals.

The Legislature specifically authorized the Commission to:

> . . . (5) furnish technical assistance requested by a person subject to this chapter to further compliance with this chapter or with a rule or order issued under this chapter;
> (8) provide educational and outreach activities to those who have been historically victims of employment discrimination; and
> (9) require state agencies and public institutions of higher education to develop and implement personnel policies that comply with this chapter, including personnel procedures that incorporate a work force diversity program.

TEX. LAB. CODE ANN. § 21.003(5), (8), and (9) (formerly TEX. REV. CIV. STAT. ANN. Art. 5221k, § 3.02(8), (11), and (12)).

Section 21.003(5) permits the TCHR to furnish technical assistance to those persons subject to the Labor Code in order to further compliance with the code. While the language states that such assistance should be provided upon request, the legislature, in Section 120.5, basically has deemed that the fact that at least three complaints have been filed against a state agency or public institution of higher education constitutes a "constructive" request that the Commission provide it with EEO training. Likewise, Section 21.003(8) empowers the Commission to "provide educational and outreach" programs to the victims of employment discrimination. A victim, however, is not necessarily assisted by educational activities unless the perpetrators of the employment discrimination are also extended training, technical assistance, and educational opportunities. Indeed, this section would be nearly meaningless if training, technical assistance, and outreach activities are confined to the historical victims of discrimination, but not the historical perpetrators of the same. Consequently, state agencies and public institutions of higher education who are alleged to have perpetrated discrimination should be subject to the training, technical assistance, and outreach requirements of the law.

In addition, Section 21.003(9) authorizes the TCHR to "require state agencies and public institutions of higher education to develop and implement personnel policies that comply with this chapter, including personnel selection procedures that incorporate a work force diversity program." This section provides the strongest basis for holding that the legislature intended state agencies and public institutions of higher education to receive EEO training. In order for the Commission to implement this provision of its organic statute, Commission staff are required to review agencies' and institutions' personnel policies. If a particular agency's policies do not conform to the TCHRA, then the Commission will assist the agency in drafting an appropriate plan and will then train agency personnel on how to implement the plan. Without the ability to train properly the employees of these agencies

and institutions, there would be no way for the Commission to ensure that their personnel policies are non-discriminatory on their face as well as in practice.

In the case of *Brown, et al. v. Morales, et al.*, Cause No. 98-00745; in the 353rd Judicial District Court of Travis County (1998); Opinion on Summary Judgment, p. 6,. Judge F. Scott McCown set forth a test to determine whether an appropriations rider violates the "one-subject" rule of the Texas Constitution.

> (1) Does the rider relate to an appropriation? If it does not, the rider is a general law and violates the one-subject rule. If it does, next question. 2) If the rider is related to an appropriation, assume the governor line-item vetoed the appropriation to which the rider relates, would the rider still have legal effect? If it would, then the rider is a general law because it survives the appropriation and violates the one-subject rule. If it would not, next question. 3) If the rider relates to an appropriation that the governor could line-item veto, assume the governor does not, would the rider conflict with a general law already on the books? If it would, then the rider amends general law and violates the one-subject rule. If it would not, then the rider is an appropriate explanation of how money is to be spent within the one-subject rule.

In analyzing Section 120.5 of Article IX of the current General Appropriations Act under this standard, it seems clear that the "training" rider is constitutional. First, the rider relates to the use of appropriated funds by state agencies and public institutions of higher education. Second, if the Governor were to line-item veto the individual budgets of all state agencies and public institutions of higher education, then the rider would have no legal effect because there would be no "appropriated" funds to expend. Third, the rider conflicts with no general law, but is merely an appropriate limitation on the expenditure of funds under the one-subject rule.

Finally, so long as the TCHR's interpretation of the 1997 Appropriations Act, Article IX rider is reasonable, it should be given great deference in the area of providing training to eliminate employment discrimination. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *Dodd*, 870 S.W.2d at 7 (*citing Tarrant County Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993)); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1240-41 (11th Cir. 1989). If the Commission's interpretation of its own statute is reasonable, the Commission's position should be upheld against any challenges. One amendment to the TCHRA requiring joinder of the Commission in civil actions challenging the validity of the statute or agency regulations is an *indicia* of the legislature's intent to defer to the Commission on matters of employment discrimination. TEX. LAB. CODE ANN. § 21.009 (Vernon Supp. 1996) (formerly TEX. REV. CIV. STAT. ANN. art. 5221k, § 10.08, as amended by Tex. H.B. 860). Moreover, there is no dispute that the legislature has established as public policy the training of state employees in EEO matters in order to reduce the number of employment discrimination claims filed against the State and its agencies.

CONCLUSION

The Texas legislature specifically authorized the Texas Commission on Human Rights to provide technical assistance, education, and outreach programs to state agencies and public institutions of higher education. *See* Texas Labor Code, §§ 21.003(5), (8) and (9). Indeed, these agencies and institutions of higher education are specifically required by statute to have personnel policies and procedures that comply with the TCHRA to ensure that they do not have discriminatory employment practices. *Id.* Without the Commission being able to train and monitor these agencies and institutions, there is virtually no way the Commission could assure their compliance with the TCHRA as required by § 21.003(9) of the Texas Labor Code. As a general rule, the Commission's own interpretations of the TCHRA should be determinative of the legislature's intent. Because the legislature put this requirement in the Labor Code and because it has repeatedly inserted riders similar to Article IX, § 120.5 since the 70th Legislature R.S., it appears clear that the legislature wants to have all state agencies and institutions of higher education be trained in EEO laws in order to reduce the number of employment discrimination complaints and lawsuits filed against state agencies and institutions of higher education. Under such circumstances, great deference should be given to the Commission's interpretation of its legislative mandate.

Article IX, § 120.5 of the General Appropriations Act does not violate the Texas Constitution because it does not attempt to add or amend substantive state law. Rather, Article IX, § 120.5 only requires an expenditure of state funds for EEO training after three employment discrimination cases are filed against a state agency or institution of higher education with the Texas Commission on Human Rights.

Therefore, the Commission respectfully requests your reconsideration of DM-497 because: (1) the issue on which TSU requested is moot due to subsequent legislation passed in for fiscal years 1999 and 2000; (2) the opinion answers a question not asked by TSU; (3) the opinion mischaracterizes and minimizes the statutory authority of the Commission; (4) the opinion fails to give adequate deference to the Commission's interpretation of its own legislative mandate; and (5) the opinion ignores the public policy set forth by the legislation requiring state agencies and institutions of higher education to train their employees about equal employment opportunities.

Sincerely,

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