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LITIGATION

Texas Supreme Court says shame on sham affidavits

by Michael P. Maslanka
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The case was going so well. The employee made crucial admissions in her deposition that she was not the victim of discrimination. Satisfied that she can't prove her claims, you file a request for summary judgment to dismiss the case in your favor before trial. The employee responds by submitting an affidavit (a declaration under oath) that—now that she thinks about it—she was the victim of discrimination. And so, off to trial you go. But no more.

Court steps in

A highlight of 2018 for Texas employers (and all litigants) was the Texas Supreme Court decision banning the use of sham affidavits. The case arose in the context of a commercial lawsuit. A man testified in his deposition that he had conducted business under a certain name. (This fact was material and important.) But when the opposing side used his testimony in seeking dismissal of the lawsuit, he submitted an affidavit that contradicted it.

Rule applies to litigants doing a 180-degree switch

Note that not all inconsistencies are covered by the ruling. If the litigant who testified explains the reason for the switch, such as confusion or misunderstanding of the question, then the trial court—in the exercise of its discretion—may accept the explanation. The court quoted a case from the San Antonio Court of Appeals:

> Most differences between a witness's affidavit and deposition are more a matter of degree and details than direct contradiction. This reflects human nature more than fraud. . . . If the differences fall into the category of variations on a theme, consistent in the major allegations but with some variances of detail, this is grounds for impeachment [pointing out inconsistencies at a trial]. . . . If, on the other hand, the subsequent affidavit clearly contradicts the witness's earlier testimony involving the suit's material points, without explanation [then the sham affidavit rule applies].

The court cited a case from the Eastland Court of Appeals to illustrate its point. In that case, a man sued a convenience store, alleging that it sold him alcohol on the night of a fatal car accident in which he was involved. The store owner asked the court for pretrial dismissal based on the man's testimony that he didn't know whether he had exhibited signs of intoxication on the night in question. The man then submitted an affidavit that—come to think of it—he had exhibited signs of intoxication.

Oops! Affidavit tossed, motion granted, and appeals court agreed. *Lujan v. Navistar, Inc.* (Tex. 2018).

'How con-VEEN-ient!'

That subhead is a quote from The Church Lady character on *Saturday Night Live.* About sums up the case and the ruling. A few thoughts. In taking a deposition, the lawyer must be precise and exacting in both asking the questions and policing the answers.

By way of example, let's say a lawyer asks, "You have no facts to show racial discrimination, do you?" And the answer is, "Yeah." Well, is "yeah" an agreement that the question is being asked, or an acknowledgment that the plaintiff has no facts, or is it just being a wiseacre? If the answer could be either, then an affidavit clarifying the answer is not a sham.

If the question is, "You have no fact to show discrimination, is that correct?" And the witness says, "That's correct," then a subsequent affidavit saying that the witness does have facts is a sham.

A final point. Lawyers (yours truly included) sometimes think, "Wow! I really nailed that witness!" only to discover that—in the heat of the moment—we did not really ask a good question or perhaps heard the answer we hoped for but not the answer that was actually spouted. So, take someone else along with you—another lawyer, HR person, manager—to back you up. A crucial deposition is not the time for "One riot, one ranger."

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SEXUAL HARASSMENT

U visa forms may be discoverable: sexual harassment and immigration

by Jacob M. Monty
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Sexual harassment claims are difficult for any employer, but with the added dimension of immigration status, they can become even more complex to resolve. The Equal Employment Opportunity Commission (EEOC) recently reached a settlement in a long-running case involving allegations by the employer that the employees' sexual harassment claims were falsely motivated by a desire to obtain special immigrant visas, known as U visas.

U visa certification

The U visa category was created with the passage of the Victims of Trafficking and Violence Protection Act (including the Battered Immigrant Women's Protection Act) in October 2000. It provides a temporary visa (up to four years) for undocumented victims of qualifying crimes who suffered substantial mental or physical abuse and fully cooperate in the investigation and/or prosecution of the crime. Its purpose is to strengthen the ability of governmental agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes while also protecting certain undocumented victims.

The U visa certification (Form I-918B) is a form signed by an authorized governmental agency or certifying agency after verifying the applicant's allegations. A certifying or authorized governmental agency—EEOC, Child Protective Services, law enforcement, U.S. Department of Labor (DOL)—is obligated to investigate reported activity.

When an agency executes a certification, it attests the information is true and correct to the best of its knowledge. Without a certification, the applicant will not be eligible for a U visa. The certification in effect affirms to U.S. Citizenship and Immigration Services (USCIS) that the applicant:

- Is a victim of a qualifying crime;
- Has detailed knowledge of the crime; and
- Has been, is being, or is likely to be helpful in the detection, investigation, or prosecution of the crime.

After an agency signs the Form I-918B, the certification is returned to the victim, or his or her attorney, to be submitted with the completed U visa petition and other documentary evidence to USCIS for review. USCIS makes the final determination of whether the applicant is granted or denied immigration benefits.

EEOC reaches settlement

On August 1, 2018, Koch Foods, LLC—entangled in an eight-year discrimination suit—finally agreed to pay a $3.25 million settlement and implement policies and training. This battle began in 2010, when 11 female Hispanic employees filed a complaint with the EEOC and an independent lawsuit against Koch for sexual harassment, assault, and retaliation based on national origin and gender. The EEOC conducted an investigation into the allegations, and after conciliation efforts failed, the agency filed its own discrimination suit against the company for violations of Title VII of the Civil Rights Act of 1964.

Koch argued that the allegations were false and the employees were motivated by hopes of obtaining U visas. The EEOC certified the employees' claims for U visas. Koch argued the information contained in the U visas was relevant and thus should be discoverable (shared pretrial). The case made its way to the U.S. 5th Circuit Court of Appeals (whose rulings apply to all

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JUST ASK JACOB

Provide notice of citizenship requirement to applicants without discriminating

by Jacob M. Monty
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Q *Most of our positions require a U.S. Department of Defense (DOD) security clearance. To get a security clearance, the employee must be a U.S. citizen. Is it legal for us to require applicants to note on our employment application whether they are U.S. citizens?*

A Ordinarily, employers are advised not to ask about citizenship on employment applications because it can lead to possible national origin and citizenship discrimination claims. You may be tempted to ask about an applicant's U.S. citizen status for purposes of the clearance requirement, but doing so jeopardizes you because the inquiry can be taken out of context and perceived as discriminatory. Instead, you should surely let the applicants know that the position requires a security clearance and list reasons why an applicant may not be granted a clearance. Among those reasons, you may list non-U.S. citizen status, thereby providing notice to the applicant.

Q *Our company would like to run background checks on applicants for certain positions. Is that OK, or do we have to run a background check for every job position in the company?*

A Employers should be consistent with their practices. Although background checks can be costly, you should refrain from picking and choosing candidates for background checks. Conducting background checks on a selective basis may lead to discrimination claims. While Texas is among those states that haven't adopted a statewide "Ban the Box" law, cities such as Austin and San Antonio have enacted fair-chance hiring ordinances, "which prohibit covered employers from asking about or considering a job applicant's criminal history until after a conditional offer of employment has been made." It's best practice to comply with "Ban the Box" mandates.

Q *Is there a "statute of limitations" for sexual harassment complaints? For example, if an employee brings forth a complaint from many years ago, are we obligated to investigate?*

A Yes, there is a statute of limitations for sexual harassment complaints of either 180 or 300 days. If the employee files a complaint only with the Texas Commission on Human Rights (TCHR), he must do so within 180 calendar days of the suspected misconduct. If the employee files the charge jointly with the U.S. Equal Employment Opportunity Commission (EEOC), the deadline is extended to 300 calendar days from the suspected misconduct.

Even if an employee were to bring forth a complaint from many years ago, it's best practice to investigate as a preventive measure.

Q *We are moving from a paper to an electronic time card system. Our senior management team wants all exempt personnel to log in and out of the new system. In other words, they want to track their time. Would this eliminate the exemption and open us up to liability for overtime?*

A To be considered an exempt employee under the Fair Labor Standard Act's (FLSA) overtime rules, the employee must meet the salary and duties tests. Tracking the time of an exempt employee will not eliminate the exemption, unless she is no longer able to meet the salary and duties tests.

In fact, there are many reasons why employers would want to track time. For example, it prevents disagreements between employers and employees about whether the applicable exemption requirements were met. Employers may also want to have that data for informational purposes and to monitor attendance. While the FLSA doesn't preclude employers from establishing any type of time-tracking method for exempt employees, they must do so equally among all employees if they choose to implement it.

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Texas employers), which granted Koch access to U visa information, but the employer agreed to settle.

What can employers do about sexual harassment?

No employment sector is impervious, but incidences of sexual harassment occur more in male-dominated industries or those with low-paying jobs. Various preventative strategies have been suggested to control sexual harassment.

You should adopt a sexual harassment policy and training. The policy should entail a set of clear procedures for filing complaints and disciplinary protocols. Provide employees with annual training on prohibited conduct and complaint filing. You should also provide supervisors with training on sexual harassment, other prohibited conduct, and proper management of complaints and documentation methods.

A clear policy can improve the overall work environment and production. An employee is less likely to file a sexual harassment suit if after filing a complaint, her employer takes steps to resolve it and shows compassion. Perhaps the most effective way to curb sexual harassment is to empower employees.

How can a sexual harassment suit lead to a U visa?

A U visa may be available to certain employees who suffer sexual harassment combined with other qualifying conduct. The law is intended to encourage immigrants to report crimes to government agencies and provide protection for those who cooperate.

Sexual harassment by itself may not qualify for a U visa, but if coupled with threats of force or deportation, it can qualify. Workers qualify if they suffer from abusive sexual contact, assault, rape, exploitation, blackmail, or extortion. For example, if a supervisor sexually harasses a female undocumented worker and threatens that he will have her deported if she complains, then this is a qualifying workplace crime.

Other qualifying workplace crimes can include:

- Any attempts to influence, obstruct, or impede a proceeding;
- Witness tampering (attempts to prevent witness participation);
- Trafficking (inducement of a victim to engage in labor); and
- Fraud in foreign labor contracting (knowingly, with fraudulent intent, recruiting or hiring a person outside the United States for employment in the country by means of false or fraudulent representations or promises).

Discovery of U visa information

Generally, U visa applicants cooperate under a belief that information is confidential. Recently, courts have allowed discovery (exchange of evidence). In these suits, employers will argue that the allegations are false and motivated by the possibility of securing a U visa. Discovery of U visa information is a complex issue because it requires courts to balance U visa applicants' rights with employers' rights.

For example, in *Cazorla et. al. v. Koch Foods LLC*, the 5th Circuit permitted discovery of the employees' information contained in their U visa applications. Although the information was sensitive, it was also relevant. Likewise, in *EEOC v. Favorite Farms, Inc.*, a Florida federal judge denied the EEOC's request to keep U visa information sealed for a woman fired after she claimed she was raped by her supervisor. The judge noted that revealing the information wouldn't have a chilling effect nor deter other undocumented immigrants from filing discrimination claims.

Bottom line

A sexual harassment complaint by an undocumented worker may lead to a U visa. For claims filed by undocumented workers against employers, discoverability of U visa information helps employers better assess their prospects of success or risk, which may be handy when determining whether to settle.

Overall, employers may not only improve work production but also reduce liability from such suits by implementing a sound policy for handling cases of sexual harassment and other supervisor/employee misconduct.

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EMPLOYEE THEFT

Quiz: Rules are meant to be (a) broken, (b) ignored, (c) obeyed, or (d) honored

by Michael P. Maslanka
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The answer is at the end of the article. For now, read on about the case of the diabetic cashier, drinking orange juice . . . and getting fired.

Employer's rule

Dollar General Stores gives a handbook to its employees. One policy (also known as the "grazing" policy) is as follows:

> **Personal Appearance**
>
> [Employees] should not chew gum or eat/drink, except during breaks (which should not be taken on the sales floor, at registers etc.). . . . Religious and/or disability-related exceptions may be permitted depending on the circumstances.

Atkins, meet the policy

Linda Atkins was the lead sales associate at a Dollar General Store. She was a loyal, hard worker and a good supervisor, according to the store manager. But when Atkins asked to be able to drink orange juice at her register to manage her diabetes, the request was flatly denied by the manager.

On two occasions, while working alone at the front of the store, Atkins felt dizzy and faint. She couldn't get to the break room to retrieve her orange juice. But she did make it to the store cooler and drank a small bottle. She paid for the juice ($1.69) at once and told the store manager she had done so.

AGENCY ACTION

NLRB launches ADR pilot program. The National Labor Relations Board (NLRB) announced in July that it is launching a new pilot program to enhance the use of its alternative dispute resolution (ADR) program. The pilot program is intended to increase participation opportunities for parties in the ADR program and help facilitate mutually satisfactory settlements. Under the new program, the NLRB's Office of the Executive Secretary will proactively engage parties with cases pending before the Board to determine whether their cases are appropriate for inclusion in the ADR program. Parties also may contact the Office of the Executive Secretary and request that their case be placed in the ADR program. There are no fees or expenses for using the program.

Acosta praises action to create workforce advisory board. U.S. Secretary of Labor Alexander Acosta spoke in support of President Donald Trump's July 19 Executive Order establishing the National Council for the American Worker and the American Workforce Policy Advisory Board. "President Trump's Executive Order represents a national commitment to helping Americans upskill and reskill to embrace rapidly changing job demands," Acosta said. "A blend of traditional and workplace lifelong learning is required for a nimble workforce ready to succeed in overcoming any challenge." The council is made up of senior administration officials and is charged with developing a strategy for training and retraining workers needed for high-demand industries.

DOL cites court ruling in rescinding Persuader Rule. The U.S. Department of Labor (DOL) in July rescinded the 2016 Persuader Rule, which the department said exceeded the authority of the Labor-Management Reporting and Disclosure Act. The DOL said the rule impinged on attorney-client privilege by requiring confidential information to be part of disclosures. Also, the DOL noted that a federal court had decided the rule was incompatible with the law and client confidentiality.

DOL announces training grants to help homeless veterans reenter workforce. The DOL in July announced the award of 163 Homeless Veterans' Reintegration Program grants totaling $47.6 million. This funding will provide workforce reintegration services to more than 18,000 homeless veterans. Funds are awarded on a competitive basis to state and local workforce investment boards, local public agencies, nonprofit organizations, tribal governments, and faith-based and community organizations. Homeless veterans may receive occupational skills training, apprenticeship opportunities, and on-the-job training as well as job search and placement assistance. ✤

WORKPLACE TRENDS

Survey finds more than half of workers open to new job opportunities. Recruitment firms Accounting Principals and Ajilon released results of a new survey in July exploring job search trends among more than 1,000 U.S. full-time workers in sales, office, and management/professional occupations. The survey found that 25.7% of respondents are actively seeking new job opportunities and that 55.5% are passively open to new job opportunities. The survey found that salary is the most important factor respondents consider when deciding to accept a job offer. The survey also found that 43.2% of respondents would be enticed to leave their company if another one offered a better salary or pay. That rate is highest among respondents ages 18 to 25, while respondents age 55 and older are least likely to leave for better pay.

Research finds counteroffers often ineffective. Research from staffing firm Robert Half suggests that offering higher salaries to workers who announce they're planning to quit for a better job may not be effective in the effort to hold on to top talent. Instead, counteroffers may serve only as a stopgap retention strategy since employees who accept a counteroffer typically end up leaving the company in less than two years. The primary reasons leaders said they extend counteroffers are to prevent the loss of an employee's institutional knowledge and to avoid spending time or money hiring a replacement. "Counteroffers are typically a knee-jerk reaction to broader staffing issues," said Paul McDonald, senior executive director for Robert Half. "While they may seem like a quick fix for employers, the solution is often temporary."

Study finds organizations confident but unprepared for crises. Many organizations overestimate their ability to deal with a crisis despite their awareness of the increasing threat of emergencies, according to Deloitte Global's 2018 crisis management survey. The survey, "Stronger, fitter, better: Crisis management for the resilient enterprise," found that nearly 60% of respondents believe organizations face more crises today than they did 10 years ago, yet many overestimate their ability to respond. The study's researchers surveyed over 500 senior crisis management, business continuity, and risk executives about crisis management and preparedness. The research found that 80% of organizations worldwide have had to mobilize their crisis management teams at least once in the past two years. Cyber and safety incidents in particular have topped companies' crises (46% and 45%, respectively). The study says that being ready significantly reduces the negative impact of a crisis, particularly if senior management and board members have been involved in creating a crisis plan. ✤

Atkins, meet district manager and regional loss prevention manager

Two company leaders came to the store to conduct an audit designed to address employee theft and other merchandise "shrinkage" issues. They interviewed Atkins and said they had heard she was eating Little Debbie cakes behind the counter. She denied the accusation but mentioned she had twice taken orange juice from the cooler during a medical emergency and paid each time.

Believing Atkins' conduct had violated the company's grazing rule, the two leaders fired her on the spot.

EEOC sues and wins

The Equal Employment Opportunity Commission (EEOC) won at trial with the jury awarding Atkins $27,565 in back pay and $250,000 in compensatory damages. Her personal lawyer received an additional $445,322 in fees.

Dollar General appealed. Here are the company's arguments presented in the fashion of the popular TV game show "Let's Make A Deal!"

Door number 1: Glucose is glucose

Atkins needed glucose, which can be found in all sorts of places such as glucose pills, honey, or candy. She should have used one of those alternatives, or so the company's argument went. The court made short work of that position:

The store manager categorically denied Atkins' request, failed to explore any alternatives, and never relayed the matter to a superior. "That was Dollar General's problem, not Atkins'"—or at least a reasonable jury could so conclude.

The court went on to note that even if Dollar General's policy permitted alternative glucose sources, Atkins presented evidence suggesting that the options—though medically equivalent in the abstract—"were not practically equivalent in the concrete." Based on Atkins' testimony, the court listed all the reasons why the alternatives would not have worked. In short, when an employee seeks an accommodation, the employer's obligation to engage in an interactive process is triggered. Dollar General failed to do so, in the jury's estimation.

Door number 2: She violated grazing policy

So, the company had a policy, she violated it, and thus we win because we had a legitimate reason for her termination. This sounds like the bad joke about a child who shoots her parent and then asks for mercy because she is an orphan. Here is the court's take:

> A company may not illegitimately deny an employee a reasonable accommodation to a general policy and use that same policy as a neutral basis for firing him. Imagine a school that lacked an elevator to accommodate a teacher with mobility problems. It could not refuse to assign him to classrooms on the first floor, then

turn around and fire him for being late to class after he took too long to climb the stairs between periods. In the same way, Atkins would never have had a reason to buy the store's orange juice during a medical emergency if Dollar General had allowed her to keep her own orange juice at the register or worked with her to find another solution.

Door number 3: We have no disability bias

At trial, a lawyer for Atkins said in closing arguments: "We're not claiming that Dollar General dislikes people with diabetes or that it fired her to get rid of people with diabetes." So, the employer then countered that the former employee's failure to offer evidence of bias doomed her claim. It did not. As the court points out:

> An employer violates the [Americans with Disabilities Act (ADA)] whenever it discharges an employee "on the basis of disability" (a necessary requirement for liability), not only when it harbors ill will (a sufficient way of establishing liability). . . . Imagine a company that fired a visually impaired employee to save itself the minimal expense of buying special software for her. Without more, that would constitute termination "on the basis of disability," even if all of the evidence showed that cost-savings, not animus towards the [visually impaired], motivated the company.

Well, three doors and not a winning argument behind any of them. *EEOC et al. v. Dolgencorp, LLC* (6th Cir., August 7, 2018).

Bottom line

By the way, the court also ordered an injunction against the company to last three years, prohibiting it from violating the ADA and requiring it to provide disability discrimination training in the region where Atkins' store was located. That covers 195 stores with 1,547 employees. The court also said corporate office employees will need training, which adds another 1,018 employees. All over a plastic bottle of orange juice costing $1.69.

Look, supervisors have choices. In Atkins' case, they had a choice to engage in a reasonable accommodation dialogue but did not. They had a choice to ask themselves whether summary termination was warranted. They had a choice to pick up a phone and call HR for advice. Like the saying goes, "ready, aim, fire" is a better approach than "ready, fire, aim."

Finally, some of us love rules. That isn't a bad thing. In Atkins' case, there was an OK rule providing for a disability exception, but it wasn't followed. Juries do not mind rules, but they hate rules that are promulgated and then not followed. I know some of you love rules. That's fine. But realize, as I tell students, that you must know not just the rule but also the *reason* for it.

Which leads me to the correct answer, (d). Rules' rationales are meant to "be honored," not blindly followed.

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TEXT MESSAGING

Allowing employees to use cell phones while driving leads to $45.3 million verdict

by Jacob M. Monty
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In 2017, the Texas Legislature passed a statewide ban on sending electronic communications such as texts or e-mails while driving. Yet, the National Highway Traffic Safety Administration (NHTSA) reports that at any given daylight moment, more than 660,000 drivers are attempting to use electronic devices while on the road. During long commutes, drivers may feel the urge to check their work e-mails or make quick phone calls. Texas employers should know, however, that employees' distracted driving may lead to multimillion-dollar lawsuits. One employer recently learned that lesson the hard way.

San Antonio jury dials up victory for crash victim

Jennes Haynes claims her car was rear-ended by an SUV driven by an employee of JC Fodale Energy Services, LLC, a privately held oilfield services company. The employee was apparently distracted by his phone during stop-and-go traffic. The employer and the employee denied responsibility for the crash.

A unanimous San Antonio jury nevertheless sided with Haynes and awarded her a $45.3 million verdict.

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10-17 ACA Forms 1094-B, 1095-B, 1094-C, and 1095-C and Employer Shared Responsibility Reporting Requirements—Lessons Learned and What to Expect for the 2019 Filing Season

The jury heard testimony that JC Fodale permitted executive employees to use their cell phones to conduct company business while driving. The lack of oversight was underscored by the fact that the company maintained at least four different conflicting policies regarding cell phone use by its executive and nonexecutive employees.

The jury also heard arguments that JC Fodale executives were aware of studies showing that cell phone use while driving was equivalent to driving while intoxicated. The company, however, still allowed executive employees to make heavy use of their devices while on the road.

What the ruling means for you

While the large damages award may ultimately be appealed, the whopping sum and the unanimity of the verdict should serve as a cautionary tale if you find yourself exchanging correspondence with employees (or tolerating colleagues who do so) while in traffic. As Haynes' lawsuit shows, you may be liable if your distracted employee causes an accident during the scope of his employment. Furthermore, the lawsuit makes clear that companies may be on the hook if they're aware of the dangers of cell phone use while driving without taking steps to inform or discourage employees from engaging in the behavior.

Here are four cautionary steps you can take to minimize your exposure to liability:

- Consider adopting clear and consistent policies to discourage all cell phone use—even hands-free devices—by employees tempted to conduct official business while commuting.
- Discourage managers and supervisors from sending e-mails or placing calls to an employee who they know is on the road.
- Make clear to employees that they aren't considered to be "on the job" while in traffic.
- Fully and promptly address all concerns regarding employees' cell phone usage while driving.

While employees' negligence can never be fully avoided, taking the above steps will decrease the likelihood that their distracted driving will be imputed to you and your business. For other best practices, be sure to consult with your attorneys.

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