UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

February 27, 1997

PAUL IWUCHUKWU, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 95B00144
CITY OF GRAND PRAIRIE, Respondent.	)	

ERRATA

The last line on the first page of the Order Finding Jurisdiction dated February 25, 1997, should be deleted.

SO ORDERED:

Dated and entered this 27th day of February, 1997.

MARVIN H. MORSE
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
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CITY OF GRAND PRAIRIE, Respondent.	)	

ORDER FINDING JURISDICTION

I. *Procedural History*

On March 3, 1995, Paul Iwuchukwu (Iwuchukwu or Complainant) filed a charge dated February 27, 1995, in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). The charge alleged that the City of Grand Prairie, Texas (Grand Prairie or Respondent) discriminated against Iwuchukwu by not hiring him for the position of Traffic Engineer even though he met all the required qualifications for the position.

By determination letter dated July 19, 1995, OSC informed Iwuchukwu that it "has determined that there is insufficient evidence of reasonable cause to believe you were discriminated against as prohibited by 8 U.S.C. §1324b." OSC stated that, therefore, it would not file a complaint on Iwuchukwu's behalf, but that he might file a private action within ninety (90) days in the Office of the Chief Administrative Hearing Officer (OCAHO).

On October 16, 1995, Iwuchukwu filed his OCAHO Complaint against Grand Prairie alleging citizenship status and national origin discrimination in violation of §102 of the Immigration Reform and Control Act (IRCA), as amended, 8 U.S.C. §1324b. Specifically,

Complainant alleges that he "met and exceeded all the requirements for the position" listed in Respondent's employment advertisement. Iwuchukwu contends that he "learned that the position was awarded to one of their employees who do [sic] not meet the minimum requirement prescribed in the job announcement."

On December 5, 1995, OCAHO issued a Notice of Hearing (NOH) which transmitted a copy of the Complaint to Respondent. In addition, the NOH advised the parties that all proceedings or appearances would be conducted in accordance with OCAHO rules of practice and procedure, 28 C.F.R. pt. 68, a copy of which was enclosed with each party's copy of the NOH.

On March 7, 1996, Respondent filed as its answer to the Complaint a "Response to Notice of Hearing." Respondent denied that it discriminated against Iwuchukwu. Respondent acknowledged that Complainant was a finalist for the position of Traffic Engineer, but was denied the position because another candidate had more "direct leadership experience within the structure of the City of Grand Prairie, and a factor in his favor was that he was hired from within, and not a new hire." Answer, ¶VIII.

On April 15, 1996, Complainant filed a gratuitous letter/pleading dated April 4, 1996. Complainant detailed alleged "misrepresentations, distortions, and outright lies" in Respondent's filing. Iwuchukwu also related an incident in which he allegedly overheard Russell Fox, a Grand Prairie engineering technician, and another employee talking on the phone "about the possibility of a black man from Africa coming to supervise them." Response of Complainant to Respondent's Response to the Complaint, April 4, 1996, ¶7. Iwuchukwu's national origin is Nigerian. Complainant's March 11, 1995 Letter to OSC; OSC Charge Form, ¶¶2, 3, 4, 5. 6, and 7.

In response, Respondent on May 3, 1996, filed its own gratuitous letter/pleading, denying discrimination and offering to provide information identifying employees who were not born in the United States. Stating an inability to articulate exactly why Complainant was not hired, Respondent suggested that perhaps its interviewers had sensed a side to Iwuchukwu, now revealed in his April 4, 1996 letter, as a basis for not hiring him for the Traffic Engineer position.

On May 24, 1996, Complainant, again gratuitously, responded to Respondent's letter/pleading, reiterating that the basis for his citi-

zenship status discrimination claim related to the conversation among the Grand Prairie employees who discussed the possibility of a black man from Africa in a supervisory position.

By Order of Inquiry, 6 OCAHO 869 (1996), 1996 WL 492315 (O.C.A.H.O.), issued June 6, 1996, I asked the parties to comment on two threshold jurisdictional issues. The Order invited the parties to comment on the viability of Complainant's national origin discrimination charge and to discuss state sovereign immunity in light of *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996); *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994), *reh'g denied* (Nov. 21, 1994), and *Kupferberg v. University of Oklahoma Health Services*, 4 OCAHO 709 (1994), 1994 WL 761187 (O.C.A.H.O.), as well as federal and state case law and other sources interpreting the application of the Eleventh Amendment to governmental entities such as Grand Prairie.

The Order of Inquiry directed responses to be filed no later than July 8, 1996. The parties were cautioned that failure to respond might result in a ruling adverse to a nonresponsive party.

On July 3, 1996, Complainant's newly retained counsel requested an extension of time to respond. Complainant filed his Response on July 31, 1996; Respondent filed its Response on August 1, 1996.

On December 2, 1996, I issued an Order of Further Inquiry, dismissing Complainant's national origin discrimination claim on the basis that the number of Grand Prairie employees exceeds the jurisdiction of the Administrative Law Judge (ALJ) under 8 U.S.C. §1324b(a)(2)(C), and inquiring further about the City of Grand Prairie's status as a state arm.

On December 23, 1996, the City of Grand Prairie responded, asking "the Court to apply the argument and logic" of its Answer.

On December 23, 1996, Complainant advised that he elected not to respond to the City of Grand Prairie's Response to Order of Further Inquiry.

II. *Discussion and Findings*

A. *I Find Jurisdiction Over Complainant's Citizenship Discrimination Claim*

Complainant alleges discrimination based on citizenship status. ALJs exercise jurisdiction over citizenship discrimination complaints of "protected" individuals, including citizens or nationals of the United States and aliens lawfully admitted for permanent residence. 8 U.S.C. §1324b(a)(1)(B), §1324b(a)(3). Grand Prairie does not dispute Iwuchukwu's claim that he was admitted for permanent residence on May 14, 1986, applied for naturalization on March 8, 1994, applied for the position of Traffic Engineer on July 19, 1994, was interviewed for the position of Traffic Engineer sometime in September 1994, was rejected on September 29, 1994, and became a naturalized citizen of the United States on September 30, 1994 (the day after Grand Prairie filled the position upon which this dispute is predicated). I find, therefore, that on the date he applied for the job and at all other times relevant, Complainant was within a class of protected individuals. Therefore, Complainant is protected by §1324b, and I have subject matter jurisdiction over the Complaint.

A finding of subject matter jurisdiction, however, does not end the need for a threshold analysis. Title 8 U.S.C. §1324b is silent on the subject of state sovereign immunity. In a recent case, the United States Court of Appeals for the Tenth Circuit held that §1324b does not reach state employees. *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505, 507 (10th Cir. 1994), *reh'g denied*. *Hensel* holds that because §1324b does not waive Eleventh Amendment state immunity, such claims must be dismissed for want of jurisdiction. *Id.* at 508. More recently, in a case unrelated to §1324b jurisdiction, the Supreme Court emphasized that Congress can only abrogate Eleventh Amendment state immunity to suit in federal court "by making its intention unmistakably clear in the language of the statute." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1123 (1996) (quoting *Dellmuth v. Muth,* 109 S.Ct. 2397, 2399-2400 (1989)). No such intention is manifest from the text of §1324b.

Accordingly, it is necessary to determine: (1) whether Grand Prairie, a municipality, is an arm of the state for purposes of Eleventh Amendment state immunity; and (2) whether, on finding that Grand Prairie is an arm of the state under state law, the state has waived its immunity to suit in federal court. To make these determinations, I am guided by Supreme Court and Fifth Circuit[1]

[1] 8 U.S.C. §1324(b)(i)(1) provides that a party may seek review of a §1324b case "in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business." The City of Grand Prairie, Texas, is located within the United States Court of Appeals for the Fifth Circuit.

precedent, as well as by state law. If Grand Prairie is not an arm of the state, I have jurisdiction over the Complaint. To similar effect, if Texas has waived its immunity, I may exercise jurisdiction.

As explained below, on the basis of Supreme Court and Fifth Circuit authority, I conclude that Grand Prairie cannot successfully defend on the basis of the Eleventh Amendment. And I conclude that, even were the City of Grand Prairie able to assert a sovereign immunity defense in other kinds of actions, the State of Texas has specifically waived municipalities' immunity from suit in cases alleging employment discrimination. Indeed, the Texas Labor Code imposes an affirmative obligation on governmental agencies and officials "to ensure nondiscrimination in employment as required under . . . [all] state or federal constitutions or laws." TEX. LAB. CODE ANN. §21.005 (West 1997). A "municipality. . . regardless of the number of individuals employed" is among the specific governmental employers Texas renders statutorily amenable to suit for employment discrimination. TEX. LAB. CODE ANN. §21.002 (8)(D). Under Texas law, "an unlawful employment practice is established when the complainant demonstrates that . . . [the protected characteristic] was a motivating factor for an [unlawful] employment practice, even if other factors also motivated the practice." TEX. LAB. CODE ANN. §21.125(a).

1. Supreme Court Precedent

The Eleventh Amendment to the United States Constitution divests federal courts of jurisdiction in suits against states. *Port Auth. Trans- Hudson Corp. v. Feeney*, 110 S.Ct. 1868, 1871 (1990); *Green v. State Bar of Tex.*, 27 F.3d 1083, 1087 (5th Cir. 1994); *Hockaday v. Texas Dept. of Criminal Justice, Pardons and Paroles Division*, 914 F. Supp. 1439, 1444 (S.D.Tex. 1996).

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S.C.A. Const. Amend. XI. While the amendment literally only addresses suits by a citizen of a state other than that against which relief is sought, the Supreme Court has extended this prohibition to suits by all persons against a state in federal court. *Port Auth. Trans-Hudson Corp.,* 110 S.Ct. at 1871; *Pennhurst State School and Hospital v. Halderman*, 104 S.Ct. 900, 907 (1984); *Employees v. Missouri Dept. of Public Health and Welfare*, 93 S.Ct. 1614, 1615 (1973).

There are two judicially recognized exceptions to this jurisdictional bar. First, Congress may abrogate state sovereign immunity. *Port Auth. Trans-Hudson Corp.,* 110 S.Ct. at 1871; *Dellmuth v. Muth*, 109 S.Ct. 2397 (1989). Secondly, states may consent to suit in federal court. *Port Auth. Trans-Hudson Corp.*, 110 S.Ct. at 1871; *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142, 3146 (1985); *Clark v. Barnard*, 2 S.Ct. 878, 882 (1883).

Although it is well-established that state agencies and entities may be understood to act as the state's alter-ego so as to benefit from state sovereign immunity,[2] the Supreme Court has held, in an apparently unbroken chain of cases beginning in 1890, that political subdivisions such as counties and cities do not ordinarily obtain Eleventh Amendment immunity.

For example, in *Lincoln v. Luning*, the Court held Nevada counties liable to suit because "the eleventh amendment limits the jurisdiction [of circuit courts] only as to suits against a state." 133 U.S. 529, 530 (1890). And in *Mt. Healthy City School District Board of Education v. Doyle*, the Court rejected a municipal school board's assertion of Eleventh Amendment immunity, holding that "the bar of the Eleventh Amendment . . . does not extend to counties and similar municipal corporations." 97 S.Ct. 568, 572 (1977). In *Monell v. Dept. of Social Services of New York City,* the Court held municipalities and local governing units liable to suit under 42 U.S.C. §1983 where official municipal policy causes a constitutional tort. 98 S.Ct. 2018, 2035-2036 (1978) (overruling *Monroe v. Pape*, 81 S.Ct. 473 (1961)).

Again, in *City of Lafayette, Louisiana v. Louisiana Power & Light Co.,* declaring that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them," the Court held municipalities to be among those "persons" subject to federal antitrust laws. 98 S.Ct. 1123, 1135 (1978). The Court also observed in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* that it had "consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" 99 S.Ct. 1171, 1177 (1979). "By its terms, the

[2] Frank H. Julian, *The Promise and Perils of Eleventh Amendment Immunity in Suits Against Public Colleges and Universities*, 36 S.TEX.L.R. 85 (1995).

protection afforded by that Amendment is only available to 'one of the United States.'" *Id.* at 1176.

In *Owen v. City of Independence, Missouri*, 100 S.Ct. 1398, 1407, 1413- 415 (1980), *reh'g denied*,[3] the Court denied a municipality immunity from 42 U.S.C. §1983 liability for due process violations. Because §1983 failed to specify any privileges, immunities, or defenses, the Court found cities to be within the statute's reach. *Id*. at 1407. The Court also held that public policy dictates that municipalities be included among those "persons" liable for civil rights violations. "[T]he threat that damages might be levied against the city may encourage those in a policy making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." *Id.* at 1415. And the Court found defenses to a federal right of action, including a city's claim of sovereign immunity, to be controlled by federal law. *Id*. at 1413-14.

The Supreme Court in *Owen* undertook a textual analysis. By the Court's methodology, broad statutory language—coupled with silence on the subject of privileges, immunities, and defenses—means that municipalities are liable in federal court for civil rights violations. *Owen*, 100 S.Ct. at 1407.

> Its [the statute's] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act [§1983] imposes liability upon "every person" who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities of the Constitution and laws." And *Monell [supra]* held that these words were intended to encompass municipal corporations as well as natural "persons."

Id.

> [T]he municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. . . . By including municipalities with the class of "persons" subject to violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed.

[3] Limiting the reach of §1983, the Supreme Court in 1989 held that §1983 did not abrogate state immunity, but refused to extend such immunity to cities. *Will v. Michigan Dept. of State Police*, 109 S.Ct. at 2304—2305 (1989).

Id. at 1413-14 (footnote omitted).

Title 42 U.S.C. §1983 provides:

> Every *person* [emphasis added] who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 8 U.S.C. §1324b provides:

> It is an unfair immigration-related employment practice for a person *or other entity* [emphasis added] to discriminate against any individual . . . with respect to the hiring, or recruitment . . . of the individual for employment . . . because of such individual's citizenship status.

8 U.S.C. §1324b(a)(1)(B).

The language of 8 U.S.C. §1324b, like that of §1983, is both "absolute" and "unqualified." Like §1983, §1324b does not specify privileges or immunities, although a limited number of defenses are specified. Moreover, on its face, §1324b, but not §1983, includes "other entit[ies]" among those subject to its mandate. Therefore, §1324b may be understood to be even more sweeping in application than is §1983. It would be consistent with the Supreme Court's rejection in *Owen*, *supra*, and *Monell, supra*, of immunity for municipalities in §1983 cases to conclude that silence on the subject of privileges and immunities, coupled with inclusion of the term "other entity," is sufficiently clear to confirm §1324b municipal liability.

In *Hess v. Port Authority Trans-Hudson Corp.*,115 S.Ct. 394 (1994), a suit under the Federal Employers' Liability Act (FELA) by injured workers, the Court held a bistate employer railway created pursuant to the Interstate Commerce Clause subject to suit in federal court. Commenting that historically municipalities are not exempt under the Eleventh Amendment from federal suit, the Court nevertheless endorsed the "treasury test" to determine whether an entity is an arm of the state. *Id.* at 403-404. Because the purpose of the Eleventh Amendment is "prevention of federal court judgments that must be paid out of a State's treasury," the factor to be analyzed in order to determine state agency liability or immunity is who will pay a judgment against the entity being sued. *Id*. at 403.

Texas confers upon home-rule municipalities, such as the City of Grand Prairie, an affirmative obligation to ensure nondiscrimination in hiring. TEX. LAB. CODE ANN. §21.002(8)(D). If successfully sued, the city is ***itself*** "liable for costs, including attorney's fees, to the same extent as a private person." TEX. LAB. CODE ANN. §21.002(8)(D). Under *Hess*, therefore, the City of Grand Prairie, which must by statute ensure employment non-discrimination and pay its own judgments when successfully sued, cannot successfully defend itself on grounds of state sovereign immunity.

Most recently, the Supreme Court addressed state sovereign immunity from suit in federal court in *Seminole Tribe of Florida*, 116 S.Ct. 1114 (1996). In a suit against the State of Florida to compel negotiations under the Indian Gaming Regulatory Act, the Court dismissed for want of jurisdiction, holding that although Congress made unmistakably clear its intent to abrogate state sovereign immunity, it lacked authority to do so under the Indian Commerce Clause. *Id*. at 1131.

Taken as a whole, these cases do not support the conclusion that a city is immune from suit under federal statutes, however silent. Significantly, Grand Prairie's Response to Order of Inquiry concedes that it can find no case authority for the proposition "that a city can be considered a state and claim the umbrella of immunity granted by the 11th Amendment." Response to Order of Inquiry ¶IV. Rather, Supreme Court precedent clearly establishes that municipalities are amenable to civil rights suits in federal court. *Owen*, 100 S.Ct. at 1407; *Monell,* 98 S.Ct. at 2035-2036; *Mt. Healthy*, 97 S.Ct. at 572. *See also Howlett v. Rose,* 110 S.Ct. 2430, 2444 (1990) (holding that "Federal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations," but acknowledging that the state and its arms are immune from the reach of §1983).

2. Fifth Circuit Precedent

In accord, a recent decision of the Fifth Circuit is controlling. In *Flores v. Cameron County,* a §1983 civil rights case in which it was alleged that a juvenile's death in a county detention center was the result of excessive force, the court refused to accord a county juvenile probation board Eleventh Amendment immunity from suit. 92 F.3d 258, 263 (5th Cir. 1996), *reh'g denied*. To determine whether a

governmental body is a state or local entity, the Fifth Circuit applied a six-part test:

> (1) whether state law views the entity as an arm of the state;
>
> (2) the source of the entity's funding;
>
> (3) the degree of local autonomy retained;
>
> (4) whether the entity is concerned primarily with local, as opposed to statewide, problems;
>
> (5) whether the entity has the authority to sue and be sued in its own name;
>
> and
>
> (6) whether the entity retains the right to hold and use property.

Flores, 92 F.3d at 264-265 (citing *Stem v. Ahearn*, 908 F.2d 1, 4 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 788 (1991); *Clark v. Tarrant County*, 798 F.2d 736, 744-745 (5th Cir. 1986), *reh'g denied*).

To determine whether Texas law views a county juvenile probation board as an arm of the state, the Fifth Circuit considered sources such as the Texas Human Resources Code section creating a related state agency, the Texas Juvenile Probation Commission, and found in the Commission's mandate to assist "local authorities," including counties, a clear inference that county juvenile probation boards are not arms of the state. *Flores,* 92 F.3d at 265. The Fifth Circuit also consulted opinions of the Texas Attorney General on the status of juvenile probation personnel for purposes of the wage and hours requirements of the Fair Labor Standards Act. *Id*. Weighing those factors and relying on *Monell, supra*, the court held that "it is well settled that a local governmental body such as Cameron County is liable for damages . . . for constitutional violations resulting from official county policy or custom." *Flores,* 92 F.3d at 263. At the same time, however, the Fifth Circuit refused to hold a local government liable on the theory of *respondeat superior* "for the unconstitutional acts of its non-policy making employees." *Id.*

Applying the Fifth Circuit's *Flores* analysis to the present case, considering the City of Grand Prairie's funding, degree of local autonomy, breadth of concern, amenability to sue in its own name, and right to hold and use property, I find that Grand Prairie cannot

shield itself from suit by a claim of state sovereign immunity. In reaching this conclusion, I have considered:

a. *State Law*

Under Texas law, the City of Grand Prairie is not understood to be an "arm of the state." The Texas Constitution confers enormous independence upon home-rule municipalities such as the City of Grand Prairie, including independence from the Texas legislature. According to the Texas Code, "The municipality has full power of local self-government." Tex. Loc. Gov. Code §51.072(a) (West 1997). Texas courts have held the home-rule municipality empowered to do whatever the legislature could have authorized it to do, bounded only by constitutional limitation. *Burch v. City of San Antonio*, 518 S.W.2d 540, 543 (Tex. 1975) (home rule city need not look to Texas legislature for grant of power to act); *City of Beaumont v. Bond*, 546 S.W.2d 407, 409 (Tex. Civ. App. 1977), *error refused nre* (home rule city's legislative power is analogous to that of state legislature); *Tuck v. Tex. Power and Light Co., Inc.,* 543 S.W.2d 214 (Tex. Civ. App. 1976), *error refused nre* (home rule city empowered to do anything Texas legislature could have authorized it to do). This is so because the home-rule municipality is created by Art. 11, §5 of the Texas Constitution, not by act of legislature; grants of power from the legislature are therefore unnecessary. *City of Houston v. Reyes*, 527 S.W.2d 489, 494 (Tex. Civ. App. 1975), *error refused nre; Zachry v. City of San Antonio*, 296 S.W.2d 299, 301 (Tex. Civ. App. 1957, *aff'd,* 305 S.W.2d 558 (Tex. 1957); *City of El Paso v. State ex rel. Town of Ascarte*, 209 S.W.2d 989, 994-995 (Tex. Civ. App. 1948).

Among the functions which a home-rule municipality may discharge is the creation, adoption, and abolition of personnel positions; this ability to hire and fire is a municipal, not a state function. *Jones v. City of Houston*, 907 S.W.2d 871, 876 (Tex. App. 1995), *error denied* (1995), *reh'g over'd* (1995), *reh'g of writ of error over'd* (1995); *Int'l Ass'n of Fire Fighters, Loc. 1173 v. City of Baytown*, 837 S.W.2d 783, 788 (Tex. App. 1992), *reh'g denied* (1992), *error denied* (1993), *reh'g of writ of error over'd* (1993).

b. *Sources of Funding*

In its Response to Order of Further Inquiry, the City of Grand Prairie acknowledges that it "has the right to assess and receive ad valorem and sales taxes . . . fees for services . . . court costs and

fines . . . grant money . . . [and] bonds." Respondent's Response to Order of Further Inquiry, §II, ¶2.

c. *Degree of Autonomy*

Respondent also acknowledges that it has the "ability and obligation to represent itself . . . sometimes in opposition to the state, or without the state being involved at all." *Id.* at §II, ¶3.

d. *Breadth of Concern*

Grand Prairie within its boundaries enforces "ordinances necessary to protect health, life, and property and to preserve the good government . . . of the municipality and its inhabitants." TEX. LOC. GOV. CODE ANN. §54.004.

e. *Authority To Sue and Be Sued*

As a home-rule municipality, the City of Grand Prairie "may plead and be impleaded in ***any*** court." TX. LOC. GOV. CODE ANN. §51.075 (emphasis added).

f. *Right to Hold and Use Property*

Grand Prairie "may hold property . . . not subject to execution." TEX. LOC. GOV. CODE ANN. §51.076.

3. Texas Statutory Authority

Texas consents to suit when federal laws governing employment discrimination are invoked. Applicable to complaints filed on or after September 1, 1993, the Texas Labor Code executes the policies of Title VII of the Civil Rights Act of 1964, as amended, and includes specifically the guarantee "for persons in this state . . . [of] freedom from discrimination in certain employment transactions, in order to protect their personal dignity." TEX. LAB. CODE ANN. §21.001 (West 1996). Employment transactions in which freedom from discrimination is statutorily guaranteed include failure or refusal to hire. TEX. LAB. CODE ANN. §21.051(1).

Section 21 explicitly forbids an employer to fail or refuse to hire "because of race, color, disability, religion, national origin, or age," but

> [D]oes not relieve a government agency or official of the responsibility to ensure nondiscrimination in employment as required under another provision of the state ***or federal constitutions or laws*** (emphasis supplied).

Id. at §§21.051, 21.005 ("Effect on Other State or Federal Laws"). 8 U.S.C.A. §1324b is such a federal law. Among the governmental employers the Texas Labor Code explicitly makes liable for employment discrimination is the "municipality . . . regardless of the number of individuals employed." TEX. LAB. CODE ANN. §21.002(8)(D). Absent any reason to conclude otherwise, it appears certain that Texas governmental agencies are explicitly and implicitly liable in their official capacity for discriminatory employment practices forbidden by federal and state law. Of course, federal law forbids discriminatory refusal to hire on the basis of citizenship status. 8 U.S.C. §1324b(a)(1)(B). If successfully sued, "the state, a state agency, or a political subdivision is liable for costs, including attorney's fees, to the same extent as a private person." TEX LAB. CODE ANN. §21.259(b).

This conclusion is consistent with *Flores*, where the court rejected a county claim of sovereign immunity to §1983 suit. Although the Texas Labor Code was silent as to specific liability under §1983, the Fifth Circuit found §1983 jurisdiction. To the same effect, the Code's silence as to liability under §1324b is not necessarily a bar to §1324b jurisdiction.

4. Texas Case Law

In 1996 the Texas Court of Appeals held the purpose of the Texas Commission on Human Rights Act (TCHRA), later repealed and recodified in the Texas Labor Code, to be the promotion of federal civil rights policy. *Holt v. Lone Star Gas Co.*, 921 S.W.2d 301, 304 (Tex. App. 1996), *reh'g overruled* (1996). The purpose underlying Texas antidiscrimination employment law is that employers not discriminate " for reasons other than . . . ability to perform the job." *McIntyre v. Kroger Co.,* 863 F.Supp. 355, 358 (N.D.Tex. 1994). Because the purpose of Texas employment discrimination law is to "correlate state law with federal law," Texas employment discrimination law is construed in a manner consistent with federal precedent. *Thompson v. City of Arlington, Tex.,* 838 F.Supp. 1137, 1153 (N.D.Tex. 1993) (citing *Elstner v. Southwestern Bell Tel. Co.,* 659 F.Supp. 1328, 1345 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988)). "[B]ecause Texas has little case law interpreting the Act [TCHRA and its successor Tex. Lab. Code]," courts "can look to analogous federal precedent when appropriate." *Holt* at 304. Given the purpose of the Texas employment discrimination law, as understood in

the context of §21.001 of the Texas Labor Code, i.e., universal compliance with federal civil rights policy, and the inclusion in §21.002 of municipalities among those employers prohibited from failing to hire an individual because of a protected characteristic, it would be incongruous for Texas to have intended to preserve municipal immunity from liability in employment discrimination actions.

Indeed, the Fifth Circuit has held that where federal and state laws conflict, federal labor law governs. *See Thomas v. LTV Corp.,* 39 F.3d 611 (5th Cir. 1994) (wrongful discharge claim under Texas Labor Code held preempted by the Labor Management Relations Act). The court relied on *Allis-Chalmers Corp. v. Lueck*, 105 S.Ct. 1904, 1915 (1985), which held in pertinent part: "[T]he application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute." In accord, *see* the subsequent Supreme Court holding that where state sovereign immunity law "reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law." *Howlett v. Rose*, 110 S.Ct. 2430, 2443.

Texas common law, therefore, interprets Texas employment discrimination statutes to embrace federal discrimination law.

5. Texas Attorney General Opinions

Flores instructs that opinions of the Texas Attorney General are fertile sources for the interpretation of state discrimination law. In Opinion No. H-1186, the Texas Attorney General found no conflict between Art. 3, §44 of the Texas Constitution, which prohibited state agencies from entering into conciliation agreements providing back wages to complainants, and Title VII back pay remedies. Tex. Atty. Gen. Op. H-1186, 1978 WL 24441 (Tex.A.G. 1978) ("We believe the provisions of Title VII constitute terms and conditions of state employment"). Issued well before the enactment of IRCA in 1986, the Texas Attorney General's 1978 opinion nevertheless indicates that Texas law will be interpreted in a manner consistent with federal discrimination law.

III. *Conclusion and Order*

On the basis of Supreme Court, Fifth Circuit, and Texas statutory and common law authority, I conclude that the City of Grand Prairie

is not entitled to a defense of sovereign immunity. I therefore have jurisdiction over this Complaint of employment discrimination.

Accordingly, my office will arrange a telephonic prehearing conference in accord with 28 C.F.R. §68.13. Meanwhile, the parties are encouraged to achieve an agreed disposition. Within a week or so, you may expect a telephone inquiry as to a mutually convenient date and time for the conference, to be held early in March 1997.

1. Prior to the conference, the parties will be expected to attempt a settlement of any or all issues of fact and law, and to develop stipulations of facts and procedural matters. At the conference, they shall report on their efforts.

2. The prehearing conference will focus primarily on the scheduling of an evidentiary hearing in or around Grand Prairie, Texas. In addition, the parties should be prepared to discuss trial preparation in the context of the final rules of practice and procedure of this Office, 28 C.F.R. Part 68, particularly those sections governing prehearing statements and prehearing conferences, i.e., §68.12(b).

3. An original and two copies of all pleadings shall be filed with my office.

4. The parties should not provide copies to the Judge of either discovery requests or responses. If, however, a request for relief is filed, it should be accompanied by the underlying requests or responses. I will not entertain any discovery motion unless:

A) I direct otherwise, or

B) the motion is accompanied by a certification that the moving party has conferred, or has made a reasonable effort to confer, with the opposing party concerning the matter.

SO ORDERED:

Dated and entered this 25th day of February, 1997.

MARVIN H. MORSE
Administrative Law Judge