HUNTON ANDREWS KURTH

Lawyer Insights

Third-Party Drug-Testers—Not Just Employers—Owe No Duty to Employees

The Texas Supreme Court has issued an opinion holding that "third-party testing entities hired by an employer do not owe a common-law negligence duty…

By Holly Williamson and Marshall Horton
Published in Texas Lawyer| December 19, 2023


The Texas Supreme Court has issued an opinion holding that "third-party testing entities hired by an employer do not owe a common-law negligence duty to their clients' employees." Houston Area Safety Council, Inc. v. Mendez, 671 S.W.3d580, 590 (Tex. 2023) ("Mendez"). In a positive development for employers that drug test their employees, the Mendez opinion also strengthens prior Texas Supreme Court precedent that held employers owe no duty to their employees when employees complain that their employers negligently collected specimens for drug testing. Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705 (Tex. 2003) ("Solomon"). In other words, it logically follows that if employers do not owe a duty to employees for the drug tests administered by the employers in-house, a third-party hired by the employers to administer the employers' drug testing programs, likewise, do not owe a legal duty to employees for drug tests that the employees claim were administered negligently.

Mendez, a pipefitter, was assigned by his employer to work at a refinery. Pursuant to that refinery's policy, Mendez's employer instructed him to report to the Houston Area Safety Council ("HASC") to provide hair and urine samples for drug and alcohol screenings. HASC collected the hair samples from Mendez and sent his hair specimen to the laboratory, Psyche medics, for laboratory analysis. Psyche medics reported that Mendez's hair sample tested positive for cocaine.

The refinery required Mendez to provide a second sample to a different collection site, which also sent the sample to the laboratory for testing. The second sample tested negative for cocaine, as did a third independent collection that Mendez independently had tested by a different laboratory at his own expense.

Mendez sued, and ultimately settled with, his employer. He then sued HASC and Psyche medics, alleging that they negligently collected, transported, tested, and reported the results of his first hair sample, causing him to lose his job. HASC and Psyche medics filed traditional and no-evidence summary judgment motions, asserting that they did not owe Mendez a legal duty of care and that there was no evidence of breach, causation, or damages. The trial court granted the traditional summary judgment motions on grounds that HASC and Psyche medics did not owe Mendez a legal duty. Mendez appealed, and the Texas Supreme Court agreed with the trial court, holding that neither HASC nor Psyche medics owed Mendez a duty: Considering the competing factors above—the risk to employees, public safety, existing protections and regulations, the possible burdens on third-party testing administrators, the

Third-Party Drug-Testers—Not Just Employers—Owe No Duty to Employees
By Holly Williamson and Marshall Horton
Published in Texas Lawyer| December 19, 2023

employment-at-will doctrine—as well as our well-established tort principles, we hold that the third-party testing entities hired by an employer do not owe a common-law negligence duty to their clients' employees. Whether such a duty is desirable is a separate policy question for the Legislature, which can balance competing factors apart from the common law.

Before determining there was no duty, the Court balanced the risk to employees against the burden such a duty would place on the employment-at-will doctrine. Noting that it had previously determined in Solomon that employers who conduct in-house drug testing do not owe a duty to employees, the Court stated, "it would make little sense that an employer—who has a direct relationship with the employee—has no duty to its employee, but a third-party entity—which has no relationship with the employee—does." Mendez, 671

S.W.3d at 588, n.52.

The Mendez court also relied on the economic loss rule and qualified privilege available as a defense in the defamation context to find that neither HASC nor Psyche medics owed Mendez a duty as a matter of law: Declining to recognize the proposed duty is consistent with our existing tort law. Take defamation and the economic-loss rule, for example. In the defamation context, Texas law recognizes a "qualified privilege" that "protects a former employer's statements about a former employee to a prospective employer." The privilege extends to a former employer's "communications made in good faith on subject matter in which the author has a common interest with the other person, or with reference to which he has a duty to communicate to the other person." It is widely recognized that "common interest" includes a prospective employer's inquiry to a prospective employee's former employer about that individual as an employee.

Id. at 588-89.

The Mendez court stated further:

The reason for this privilege is clear. If an employer can be sued for speaking in good faith about its former employee to a prospective employer, the former employer might be hesitant to disclose important information about the employee's fitness, including information about past drug use. The third-party drug-testing companies at issue here are in a position similar to that held by former employers protected by the qualified privilege—assuming they are acting without malice, of which there is no allegation. The drug-testing companies are in possession of information that is damaging to the prospective employee's reputation but pertinent to the employee's fitness for the job. The common law already recognizes a qualified privilege shielding from liability the disclosure of similar information in other contexts. Declining to impose the requested duty on drug-testing companies thus conforms with the common law's treatment of analogous conduct and avoids imposing greater potential liability on drug-testing companies than on others who communicate with employers about prospective employees.

Id. at 589-90 . Finally, the Court stated as follows:

[O]ur courts of appeals "have uniformly . . . den[ied] recovery of purely economic losses in actions for negligent performance of services" absent "[p]rofessional malpractice", which is not at issue here. The Restatement (Third) of Torts: Liability for Economic Harm, which we discussed extensively in LAN/STV v. Martin K. Eby Construction Co., also limits liability for negligently performed services to "loss suffered (a) by the person or … group of persons for whose benefit the actor performs the service; and (b) through

reliance upon [the service] in a transaction that the actor intends to influence." In this case, [HASC] and Psyche medics performed their collection and testing services for the benefit of Turnaround, not Mendez.

Id. at 590.

Thus, the Texas Supreme Court held that HASC and Psyche medics, as third-parties to the drug tests, provided their services for the benefit of Mendez's employer and not for the benefit of Mendez. Accordingly, as third-parties to the drug testing, neither HASC nor Psyche medics owed a duty to Mendez.

Holly Williamson *is a partner in the firm's Labor & Employment group in the firm's Houston office. Holly represents clients before administrative agencies, such as the Department of Labor, the Department of Justice, the EEOC, the Texas Commissions on Human Rights and the Texas Workforce Commission. She can be reached at* +1 *(713) 229-5717 or hwilliamson@HuntonAK.com.*

Marshall Horton *is a senior attorney in the firm's Labor & Employment group in the firm's Houston office. Marshall's involvement includes taking and defending depositions, drafting dispositive motions, pleadings, discovery and resolving cases through negotiation, mediation, arbitration, and trial. He can be reached at +1 (713) 220-4024 or marshallhorton@HuntonAK.com.*