WHISTLEBLOWER AND OTHER RETALIATION CLAIMS: UPDATE 2012

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WHISTLEBLOWER AND OTHER RETALIATION CLAIMS: UPDATE 2012

I. PUNITIVE DAMAGES IN RETALIATION CASES: THE SAFESHRED CASE

Under state law, punitive damages can be awarded for actual fraud, malice, and gross negligence. TEX. CIV. PRAC. & REM. CODE §41.003(a). A variety of retaliation/whistleblower statutes permit punitive damages. *See e.g.*, TEX. LABOR CODE §21.2585(a)(2), §451.002(a). However, they usually exclude recovery of punitive damages against a governmental entity. *See e.g.*, TEX. LABOR CODE §21.2585(b); 42 U.S.C. §1981a(b)(1).

The Texas Supreme Court answered a number of questions concerning proof of malice or gross negligence to support punitive damages in a retaliation case. *Safeshred, Inc. v. Martinez*, __ S.W.3d __, 2012 WL 1370862 (Tex. June 8, 2012). *Safeshred* was a *Sabine Pilot* case. The DPS had cited Martinez for numerous safety violations on the Safeshred truck he drove, including unsafe loads. 2012 WL 1370862 at *1. Martinez complained about other safety violations with the Safeshred truck assigned to him, but Safeshred still insisted he drive the truck. *Id.* Finally, Martinez refused to drive because he believed the truck violated safety regulations. *Id.* When Martinez declined to drive, he was told to drive or go home; because he went home, Safeshred fired him. *Id.*

The jury awarded Martinez $7,529.18 actual damages and $250,000.00 punitive damages (which the trial court reduced to $200,000.00 pursuant to section 41.008 of the Texas Civil Practice and Remedies Code). *Id.* at *2. The jury awarded punitives based on both malice and gross negligence. The Supreme Court found no evidence of malice or gross negligence, despite evidence that Safeshred knew of or was deliberately indifferent to the safety violations of which Martinez had complained. *Id.* at *9.

Martinez argued that Safeshred's conscious indifference to the potential harm its conduct posed to Martinez and the general public supported the award of punitive damages. The Texas Supreme Court dismissed consideration of the potential harm to the general public because "the basis for a punitive damages award must have a 'nexus to the specific harm suffered by the plaintiff in that case." *Id*. at *6.

The Supreme Court rejected Martinez's argument that malice in ordering him to drive the unsafe truck could support malice for firing him. The only malice relevant to allowing punitive damages was that surrounding the actual termination itself. *Id.* at *7. Malice in ordering Martinez to drive illegally was not relevant to malice for wrongfully firing him nor was knowledge that driving the truck would be dangerous. *Id.* This was necessary to protect at will employment. *Id*. The injury producing act was the termination, not the instruction to violated the law. *Id.* The employee is not harmed by a violation of law that does not occur. *Id.*

Next, the type of malice necessary to support Safeshred knew that firing him was illegal. *Id.* at. 8. Safeshred's internal classification of "do not hire" was insufficient because it was not qualitatively different than merely firing him. *Id.* Moreover, it never communicated that decision to any third party – there was no objective risk of harm. *Id.*

Safeshred has ramifications for other retaliation and whistleblower claims. First, in most of these claims the employee must prove willful harm, e.g., willful termination, willful retaliation, intent to discriminate, etc.

The gist is the decision to take an adverse employment action motivated by the employee's protected conduct. In all such cases, the harm does not flow from the employee's protected conduct or status. Rather the harm flows from the employer's intentional adverse personnel action, e.g., termination, suspension, denial of promotion, deprivation of job benefits, etc. Consequently, it is malice or gross negligence surround the firing that matters, not that surrounding the protected conduct.

Second, *Safeshred* appears to require some harm other than simply losing the job and its compensation in order to protect at will employment. It then requires proof that the employer intended or was aware of a

punitive damages varies with the act at issue in any particular type of action. *Id.* at *5. When the tort requires willful harm as an element of liability, then that willfulness alone will not justify punitive damages. *Id.* at *5. Every retaliation claim is inherently willful, an attempt to "get back" at the employee. *Id.* Malice requires more than the intent to fire. *Id.* In evaluating whether the employer actually intended substantial injury or was consciously indifferent to a substantial risk of serious injury, the injury must be one independent of and substantially different than the compensable harms normally associated with that cause of action. *Id.*

Therefore, in *Sabine Pilot*, malice can be shown only by clear and convincing evidence that the employer intended or was consciously indifferent to some other additional harm, such as harassment, interference with future employment, or knowledge that the reason for termination was illegal. *Id.* at *8. A malice finding based on the employer's knowledge of illegality would require a showing that the company knew the loads were illegal and was aware that the law did not permit it to fire an employee for refusing to perform an illegal act, but fired anyway. *Id.* At *8 n.6. There was no evidence Martinez was harassed or that

significant and serious risk of harassment or interference with future employment prospects. The opinion implies that such "interference" must be more than fact of termination. This leaves open whether the simple fact of termination could show intent to interfere. Could an employee ever argue that the timing alone of an unexplained termination could damage his reputation? Could the employee argue "conscious indifference" to the clear inference future employers will draw?

Third, *Safeshred* leaves unresolved how firing with knowledge the termination itself is illegal amounts to malice or gross negligence. The opinion requires an *additional injury*, one that is functionally different from the injury from termination, e.g., different from the loss of the job's compensation. This implies that the employer's mental attitude is not enough. There must be the intent or conscious indifference to impose the *additional harm*, something more than the intent to end the job and its compensation. However the opinion then states the "additional injury" could be shown by the employer's knowledge the act it requested was illegal and that the law forbids firing the employee for refusing to perform an illegal act. *Id.* At *8 n.6. That appears to dispense with an injury qualitatively different than termination when the employer has actual knowledge that termination is illegal. Then the substantive harm justifying punitive damages is the termination itself.

This leads to a number of difficult problems over the difference between knowing conduct in the abstract violates the law and knowing specific conduct is illegal. Suppose before firing Martinez Safeshred consulted a private lawyer specializing in labor and trucking law. The lawyer advises Safeshred that it is illegal to fire an employee who refuses to violate the law, but none of Martinez's complaints could be violations of law, not even colorable ones. Is advice of counsel a defense to punitive damages? Safeshred now knows the law, but believes the general rule does not apply in this case.

Next, employment actions are often a group effort in which decision makers rely on subordinates for information and advice. In "cat's paw" cases, the employee argues that an intermediate employee is misleading or manipulating the employer to take an adverse action. The actual decision maker believes the decision is justified, but the subordinate acts for illegal reasons. To what extent can the subordinate's malice be attributed to an otherwise innocent decision maker?

Finally, this raises the issue of whether this applies to gross negligence. *Safeshred* speaks of knowing termination is unlawful. Would this apply equally to an employer's conscious indifference to whether it was illegal to fire an employee for refusal to violating the law? Suppose Safeshred's manager fired Martinez without consulting HR or the company attorney. Is turning a "blind eye" to finding out the law conscious indifference that justifies punitive damages? If so, would advice of counsel then be a defense to the diligent employer who tries to find out the law?

II. FIRST AMENDMENT RETALIATION

A. Retaliation: Right to Petition

The U.S. Supreme Court determined that the same analytic framework for a public employee's speech retaliation claim would apply to a claim of retaliation for petitioning the government. *Borough of Duryea, Pa. v. Guarnieri*, 131 S.Ct. 2488 (2011). Guarnieri filed a grievance after being terminated as chief of police; the arbitration decision returned him to office. The City then bombarded him with directives, which resulted in a second grievance. When the arbitrator held the City had to withdraw some directives, Guarnieri filed a §1983 suit claiming retaliation for petitioning through a grievance. The City then denied him overtime pay of $388. Guarnieri amended to add a retaliation claim for filing suit.

The Supreme Court granted review to address a split over whether a public employee who files a grievance or lawsuit, even for solely private concerns, is protected under the Petition Clause from retaliation. 131 S.Ct. at 2493. The Speech Clause and Petition Clauses share a common ground and are integral to the democratic process; nonetheless, there may be cases that require a distinct analysis. 131 S.Ct. at 2494-95. However, the governmental interests apply equally to speech and petitions by the public employee. *Id.* Grievances and lawsuits can be misused for purely personal reasons and are equally disruptive. *Id.* at 2496. The Petition Clause does not empower public employees to 'constitutionalize' their grievances. *Id.* at 2497.

However, petitions from citizens had a historic role in asserting existing rights against the sovereign. 131 S.Ct. at 2499-2500. When public employees seek to petition government as a citizen, the government cannot misuse its role as employer to distort public debate. *Id.* at 2500. Therefore, the same framework for speech retaliation will apply. *Id.* Petitions on a purely private concern must give way to the government's interest. *Id.* If the employee petitions the government on a matter of public concern, then the *Pickering* balancing process will apply. *Id.* at 2500. Consequently, the case was remanded for review under the proper test.

Both Justices Scalia and Thomas express doubt that a lawsuit was a "petition" for the Petition Clause. 131 S.Ct. 2501, 2503. Neither Justice would apply the "public concern," test. *Id.* at 2502, 2506. Scalia argued that the employee should be protected from retaliation for filing a "petition," unless the petition was addressed to the government solely in its capacity

as an employer. *Id.* at 2506. Thomas would not end the analysis if the employee's petition were addressed to the government as sovereign; it could still balance the disruptiveness of petitions like lawsuits against its interest as the employer. *Id.* at 2502.

B. Retaliatory Arrests and Probable Cause: The *Reichle* Case.

In *Hartman v. Moore*, 547 U.S. 250 (2006), the U.S. Supreme Court held that the existence of probable cause defeated a First Amendment claim of retaliatory prosecution for protected speech. The question was whether it likewise barred a claim of retaliatory arrest.

The Supreme Court avoided that question of whether the First Amendment protects political speech from a retaliatory arrest based on probable cause. *Reichle v. Howards*, __ U.S. __, 2012 WL 1969351 (June 4, 2012). Instead, the Court held only that the alleged right was not clearly established; the Secret Service agents involved were entitled to qualified immunity.

In 2006, Vice President Cheney visited a Colorado shopping mall accompanied by a secret service detail. Plaintiff Howards was there as well. Agent Doyle heard Howards say he would ask Cheney how many kids he killed today. Howards then approached Cheney and told him his policies on Iraq were disgusting. As Cheney moved on, Howards touched his shoulder. Agent Reichle then interviewed Howards about whether he had assaulted Cheney, specifically asking if he touched Cheney. Howards falsely denied even touching Cheney. Reichle then arrested Howards for lying to a federal officer in violation of 18 U.S.C. §1001. Howards was turned over to local police; harassment charges under state law were later dropped.

Howards sued Reichle and Doyle under *Bivens* for retaliatory arrest based on political speech. The district court and the Tenth Circuit (over a dissent) held the officers were not entitled to qualified immunity. The Supreme Court granted review to resolve an inter-circuit split over (1) where a First Amendment retaliatory arrest claim exists if the officer had probable cause to arrest, and (2) whether the law was clearly established in 2006. Ultimately, the Court chose to answer only the latter question.

First, the Court said it had never held the Speech Clause provided a specific right to be free from arrest supported by probable cause. *Hartman* was limited to whether the right included freedom from prosecution supported by probable cause. Arrest and prosecution presented different issues. Unlike prosecutions, there is no presumption of regularity. Also, in prosecution the officer deciding to prosecute is not the same person as the arresting officer; there is an additional causation link between the animus of the arresting officer and the prosecutor's decision.

Second, reasonable police officers could (and many judges did) conclude *Hartman* applied to arrests. *Hartman* was decided against lower court precedents that treated retaliatory arrests and prosecutions similarly. However, the majority expressly stated it did not suggest *Hartman* extends to arrest; that issue was reserved.

Justice Ginsburg's concurrence rejected the majority's reasoning. *Hartman* did not extend to arrests; it rested on a break in the chain of causation between the prosecutor's decision and the arresting officer's animus towards the protected speech. There was no reason to grant qualified immunity to ordinary law enforcement officers. However, she concluded that officers assigned to protect public officials had a right to take into account even political speech in deciding whether swift action was necessary to protect the official from an immediate physical threat. Retaliatory animus cannot be inferred from on the spot assessments made to determine if the official is in jeopardy.

Reichle leaves open two major questions. First, the majority states the Court has never held that *Bivens* applies to First Amendment claims. This leaves open the possibility that federal officials may have no personal liability for First Amendment retaliation claims.

Second, the majority declined to address Howards' argument that under *Hartman* the existence of probable cause does not limit the First Amendment right and is only a causation issue. This leaves open whether the existence of probable cause goes to the right involved or to causation. Specifically, Reichle made a *Mt. Healthy* argument that if there was probable cause then the arrest would have occurred in any case, much like the employer who argues it would have fired the employee for neutral reasons anyway.

C. The Expansion of *Garcetti* for Official Speech.

In *Garcetti v. Ceballos*, the U.S. Supreme Court held that when public employees make statements pursuant to their official duties, they do not speak as citizens for First Amendment purposes and such communications are not protected from discipline. 547 U.S. 410, 421 (2006).

A number of recent decisions have found a variety of instances of "official speech" that were unprotected. In *Elizondo v. Parks*, 431 Fed. Appx. 299, 304 (5th Cir. 2011) the Court held that a private expression about whether a public employee will perform his work was "official speech" under *Garcetti* even though the employee argued the requested task might be illegal. In *Elizondo*, for budget reasons, two employees were asked to accept a transfer to another agency "on paper" so they could be paid by a different grant but continue to work for the first agency. *Id.* at 300. Elizondo refused the reassignment; he advised his

supervisor this was fraud on the second agency's grant. *Id.* He was then terminated.

The Fifth Circuit held this was official speech under *Garcetti*. A statement about whether one will or will not do one's job is necessarily speech "pursuant to one's job duties." 431 Fed. App'x at 304. This was so even though the employee expressed concerns that fraud or illegality was involved. *Id.*

In *Watts v. City of Jackson*, 827 F. Supp. 2d 724 (S.D. Miss. 2011), police officer Watts spoke with an FBI agent about the mayor, who was ultimately indicted. Two days after the interview, the mayor told Officer Watts he had been "running his mouth" and he would get him later. Soon Officer Watts was transferred to the graveyard shift and to work weekends. City policy expressly required officers to cooperate with all law enforcement agencies. The evidence showed police officers routinely cooperated with the FBI and were paid to do it.

The district court applied *Garcetti* for two reasons. First, City policy expressly required Watts to cooperate with the FBI, so this was speech pursuant to duty. Second, voluntary statements to the FBI owed their existence to his obligations as a police officer.

In *Mitchell v. Okolona Sch. Dist.*, No. 10-CV-135, 2011 WL 1226023 (N.D. Miss. Mar. 29, 2011), the school superintendent alleged retaliatory termination for "speaking out" against racial discrimination by hiring better qualified Caucasians instead of less qualified minorities. The district court held that *Garcetti* applied to the "symbolic speech" of her hiring decisions. As superintendent, it was her job to make hiring decisions.

In *Salazar v. Kleberg County*, No. 11-0150, 2012 WL 1610542, *5 (S.D.Tex. May 8, 2012) a deputy's complaint to his supervisor regarding the supervisor's use of excessive force fell within *Garcetti*. Reporting fellow officer's use of excessive force was part of his work duties.

However, a police chief comments to city council members critical of the city's "red light camera" program were not official speech in *Clancey v. City of College Station*, No. 09-CV-1480, 2011 WL 335148 (S.D. Tex. Jan. 31, 2011). The program was put on the city commission for discussion. Police Chief Clancy told the city manager and some councilmen that the program was a "scam" to raise money, an "under-the-table" tax, and the program should be run to improve safety rather than "bilk" citizens for money. The district court held that this was speech as a citizen. First, the police chief was not responsible for supervising the program. Moreover the remarks were aimed at the motives of the City Council rather than the operation of the police department. Though his position might give him specialized knowledge, that did not make his statement official speech. Second, remarks were made against the background of public debate over policy. His remarks were aimed at the City Council's motives rather than internal police department matters.

D. Speech on Matters of Public Concern.

In *Clancey*, statements critical of the red light camera program were more than discussions of efficient use of public monies. There was public interest in the program. Moreover, the exact statements implied corrupt motives of the council members and misuse of public funds. This would be of wider interest to the public who must decide who to elect.

However, charges of improper behavior are not always matters of public concern. *Brown v. Bd. of Trustees Sealy Indep. Sch. District*, No. 11-1755, 2012 WL 1640840 (S.D.Tex. May 9, 2012). In *Brown*, plaintiff reported that an assistant superintendent was intoxicated at a public function. The district court found this was not speech on a matter of public concern. "Official misconduct" usually referred to conduct that is illegal or seriously corrupt. It must be more than merely distasteful. Here, plaintiff plead no facts that intoxication violated the law or an express school policy.

Also, personal threats are not matters of public concern. In *Moore v. Christus St. Elizabeth Hosp.*, No. 10-0078, 2011 WL 1533462 (E.D.Tex. March 9, 2011) *aff'd at* 2011 WL 1533460 (E.D.Tex. April 20, 2011), plaintiff nurse was upset at a clerk over a medication error and said "If I could kill a couple of people and get away with it, I probably would." This was a threat, not speech reporting misconduct. In *Dowdy v. College of Mainland*, __ F.Supp.2d ___, 2011 WL 3269908 (S.D.Tex. 2011), *aff'd* __ Fed. Appx. ___, 2012 WL 1080536 (5th Cir. April 2, 2012), a community college police officer was involved in a discussion of pay issues, when he began to express his frustration the human resources director who had filed a sexual harassment complaint against him. He said he might hire someone to point a gun at her, to "barf" on her, to "pop" her, or to run her off the road. Plaintiff was terminated for these remarks. His First Amendment retaliation claim was that his remarks expressed "frustration" with HR issues. The district court held this was not merely blowing off steam.

III. GOVERNMENTAL IMMUNITY AGAINST WORKER'S COMPENSATION RETALIATION CLAIMS.

Labor Code chapter 451 makes retaliation for claiming worker's compensation benefits actionable. Labor Code chapter 504 makes portions of the worker's compensation laws applicable to political subdivisions, i.e., cities, counties, school districts, and other political subdivisions of the state. Section 504.002(a)(10) provides that chapter 451 applies to

political subdivisions as well. In 1995, the Texas Supreme Court held that this waived governmental immunity for worker's compensation retaliation claims. *City of LaPorte v. Barfield*, 898 S.W.3d 288, 298 (Tex. 1995).

However, in 2001 the Government Code was amended to require that a statute shall be construed to waive sovereign immunity only if the waiver is in clear and unambiguous terms. TEX. GOV'T CODE §311.034. In 2005, Labor Code chapter 504 was amended to provide that nothing in the chapter waives immunity or creates a new action. TEX. LABOR CODE §504.053(e). In light of this, the Texas Supreme Court decided that the Legislature had "muddled" whether chapter 504 waived immunity for chapter 451 claims. *Travis Central Appraisal Dist. v. Norman*, 342 S.W.3d 54, 58 (Tex. 2011). Because Government Code §311.034 now required a waiver be clear and unambiguous, Labor Code §504.002 no longer met the standard for a waiver.

This has ignited a storm of cases over applying *Norman* to state level agencies. Labor Code chapter 501 applies portions of the worker's compensation laws to state agencies. Section 501.002(a)(10) provides that chapter 451 shall apply to the extent it is not inconsistent with chapter 501. Before 2005, section 501.002(b) expressly adopted chapter 451 to the extent not inconsistent with the chapter; section 501.002(c) provided that nothing in the chapter would authorize an action for damages beyond that authorized by the Texas Tort Claims Act. In 2000, the Texas Supreme Court, citing *Barfield*, held this waived immunity for chapter 451 claims. *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1 (Tex. 2000).

Afterwards, §451.002(b) was amended to simply state that, for the purposes of chapter 451, the state agency shall be considered the employer. After *Arnold*, the El Paso and Corpus Christi courts of appeal have all held that *Fernandez* is still good law. *Texas Workforce Comm'n v. Olivas*, 349 S.W.3d 174, 177 (Tex. App.–El Paso 2011, pet. filed); *Texas Dep't of Aging and Disability Services v. Beltran*, 350 S.W.3d 410, 416 (Tex. App.–El Paso 2011, pet. filed); *Texas Dep't of Family and Prot. Services v. Parra*, 347 S.W.3d 362, 366 (Tex. App.–El Paso 2011, pet. filed); *Office of Atty' Gen. v. Diaz*, No. 13-10-0479, 2011 WL 4998684 (Tex. App.–Corpus Christi, Oct. 20, 2011, pet. filed)(mem. op.); *Department of Aging and Disability Services v. Powell*, No. 13-10-0126, 2011 WL 2090247 (Tex. App.–Corpus Christi, May 26, 2011, pet. filed)(mem. op.).

All these case are pending before the Supreme Court which has requested merits briefing in each of them. The State's principal argument is that *Fernandez* "lowered the bar" on statutory construction to find waiver by relying on the implied result rather than the express terms. Government Code §311.034 overturned *Fernandez* and forbids considering anything other than the statute's plain language. The counter-argument is that the Legislature has not amended §501.002 to overrule *Fernandez*. This is significant because the Legislature added §504.053(d) after *Barfield*. The employees also argue that §311.034 does not overturn the rule that statutory construction should not be applied mechanically to defeat clear legislative intent or the statute's purpose.

IV. TEXAS WHISTLEBLOWER STATUTE.

The Whistleblower Act protects a public employee who in good faith reports a "violation of law" by his employing agency or another public employee to "an appropriate law enforcement authority." TEX. GOV'T CODE §554.002(a). "Law" means a state or federal statute, a local government ordinance, or a rule adopted under a statute or ordinance. TEX. GOV'T CODE §554.001(1). "Appropriate law enforcement authority" is a part of local, state, or federal government that the employee in good faith believes is authorized to (1) regulate or enforce the law allegedly violated in the report, or (2) investigate or prosecute a violation of criminal law. TEX. GOV'T CODE §554.002(b).

Disputes continually arise over what is a "violation of law," who is an "appropriate law enforcement authority," and when mistakes are nonetheless "good faith." The Supreme Court's recent attempt to clarify this stirred more debate. *See State v. Lueck*, 290 S.W.3d 876 (Tex. 2009). The caselaw has developed quickly because pleading the elements of liability under §554.002 is jurisdictional and therefore subject to interlocutory appeal. *Id.* at 884. Consequently, whether plaintiff has adequately plead a report of a "violation of law" to "an appropriate law enforcement authority" is subject to immediate interlocutory review. *University of Houston v. Barth*, 313 S.W.3d 817, 818 (Tex. 2010); *Galveston Indep. Sch. Dist. v. Jaco*, 303 S.W.3d 699, 700 (Tex. 2010).

In *Lueck*, the FHA had determined TxDOT's system for collecting and reporting traffic data did not comply with federal law. 290 S.W.3d at 879. TxDOT turned to a private vendor to develop software that provides compliant reports; Lueck was responsible for managing the program. *Id.* TxDOT determined the vendor had severely overcharged for its services by $250,000.00. When the director of Planning and Programming said it would not pay, the vendor threatened to cancel the contract. *Id.* Lueck then sent the director an email advising him to negotiate rather than let the vendor cancel. *Id.* He stated TxDOT could not handle the data without the software and would never be able to comply with the federal standards. *Id.* He urged the director to use the email when discussing the vendor with the director of Contract Services. *Id.*

TxDOT terminated the vendor and fired Lueck for attempting to justify a $250,000.00 overcharge.

The Supreme Court held this was neither a good faith report of a violation of law nor made in good faith to an appropriate law enforcement agency. *Id.* at 878. First, a warning of regulatory noncompliance is not a report of a violation of law. *Id.* A statement that if TxDOT did not act it would violate federal law by not remedying noncompliance was insufficient. *Id.* at 885. A prediction of possible regulatory noncompliance was not a report of a violation of law which the agency regulated or enforced. *Id.* An internal policy recommendation over the proper way to remedy regulatory noncompliance was not a report of violation of law under §554.002. *Id.*

Second, the Director of Planning was not an appropriate law enforcement authority. *Id.* He was not charged with enforcing or regulating the federal law allegedly violated. *Id.* Lueck could not believe in good faith that the director had such authority because his email stated the director had to discuss the vendor's contract with another department. *Id.* at 886.

In *City of Elsa v. Gonzalez*, 325 S.W.3d 633 (Tex. 2010), the Texas Supreme Court addressed similar issues. Gonzales was the city manager. When the mayor accepted a position as director of a county program, the city attorney issued an opinion that the mayor's potential conflict of interest in dual service was moot; under the state Constitution, acceptance of the county position was an automatic resignation as mayor. 325 S.W.3d at 624. The city council voted to accept the "resignation" and Gonzales was instructed to send county officials a copy of the city attorney opinion and the council's vote. *Id.* Then, a city council meeting notice was posted to consider Gonzalez's continued employment. *Id.* Gonzalez appeared at the meeting and verbally objected that the meeting was illegal because the notice violated the Texas Open Meetings Act ("TOMA"). *Id.* The council proceeded despite his objection and terminated him. *Id.*

Gonzalez argued he was fired for reporting two violations of law: (1) reporting the mayor's conflict of interest by sending the letters to county officials, and (2) reporting the TOMA violation to the city council. The Texas Supreme Court reversed the verdict for Gonzalez and rendered for the City. Transmitting the city attorney's opinion letter was not a good faith report of a violation of law. The opinion letter was hypothetical; a conflict might arise if the mayor remained in office, but it was moot because he had automatically resigned. *Id.* at 627. Any belief that the mayor might violate the law by remaining in office was not a good faith report of a past or existing violation of law. *Id. citing Lueck*, 290 S.W.3d at 885.

As for the alleged TOMA violation, the city council was not an "appropriate law enforcement authority." 325 S.W.3d at 627-28. "Law enforcement authority" does not include an entity whose power does not extend beyond its ability to comply with that law by acting, by refusing to act, or by preventing a violation by acting or refusing to act. *Id.* at 628. The council's authority to decide not to meet did not suffice to give him a good faith belief it was an appropriate law enforcement authority for TOMA violations. *Id.*

In the wake of *Lueck* and *Gonzalez*, the courts of appeal have struggled over when reports of noncompliance with regulatory or entitlement laws concern a "violation of law." Also, they have struggled with whether the head of a governmental unit is a "law enforcement authority" for reports that his subordinates have failed to comply with laws applicable to the agency.

A. When a Complaint Asserts a "Violation of Law."

In *Mullins v. Dallas Indep. Sch. Dist.*, 357 S.W.3d 182 (Tex. App.–Dallas 2012, pet. filed), a maintenance worker complained to DISD of various violations of plumbing and maintenance record-keeping codes; willful violations of these code were criminal. *Id.* at 190-92. However, each of the reports failed to state conclusions or facts showing either a violation of the codes or that the conduct was a crime. *Id.* He failed to state any facts showing he had a good faith belief the conduct of which he complained was a crime or that he reasonably could have believed it criminal.

In *Moreno v. Texas A & M Univ.-Kingsville*, 339 S.W.3d 902 (Tex. App.–Corpus Christi 2011, pet. filed), the assistant VP for Finance advised the university president that she did not believe a part-time teacher was entitled to waiver for his daughter's tuition rate. Texas Education Code §54.059 provided that a half-time teacher was entitled to register himself at or his family members at the rate for Texas residents without regard to actual residency. 19 Texas Administrative Code §21.29 provided a nonresident faculty member teaching at least half-time shall pay resident tuition rates for family members. After Moreno's supervisor was classified as faculty, he applied for and received a waiver for his daughter for the January 2008 term; however, he did not receive any teaching assignments. *Id.* at 905. Moreno got an advice from the Texas Higher Education Coordinating Board that "half time" meant the teacher had to spend half his time teaching; simply being a part-time teacher was insufficient. *Id.* Moreno told her supervisor and the TAMUK president that he was not entitled to the waiver; the president sided with Moreno and the supervisor had to pay the additional tuition. *Id.* The supervisor then terminated her. *Id.*

TAMUK argued that Moreno's statements did not report a violation of law or have a good faith belief he violated it. First, the Corpus Christi Court concluded

that the statute and the rule stated he was *entitled* to the waiver only if he was employed half-time as a teacher. *Id.* at 908. If he paid resident tuition without complying with the requirements, he did not comply with the statute. *Id.* The Court concluded that there existed "a law that prohibits the complained-of conduct." *Id.*

Second, Moreno had a good faith belief he violated the statute. *Id.* at 909. TAMUK argued *Lueck*, that at the time Moreno complained he had not yet failed to have teaching obligations; she was complaining only about a possible future violation. *Id.* He had received the waiver and TAMUK had not assigned classes to him. The Court concluded she was reasonable to believe he violated the statute. *Id*.

Moreno does not confront the distinction between a law that prohibits conduct and a law that establishes qualifications or entitlements for a benefit. The statute and rule in *Moreno* did not criminalize applying for a waiver if one was not or would not be entitled to it. It merely made the person ineligible to pay a lower tuition rate. Neither the statute nor the rule prohibited conduct at all; they merely set a standard. Moreover, one could argue that the supervisor did not "violate" the law at all; the 'violator' was the person who authorized the waiver. Absent a statute penalizing wilfully false applications or innocently paying the wrong rate, one could argue Moreno's supervisor did not "violate" the statute simply by applying for and receiving the waiver. Otherwise, every applicant who is rejected has "violated a law."

Moreover, if there was a dispute over what "half-time" teaching meant, then *Lueck* may well apply. The "law" at issue concerned regulatory noncompliance – when is a teacher "half-time." This was an internal debate over the interpretation of the regulation. An internal policy recommendation over the proper way to remedy regulatory noncompliance was not a report of violation of law under §554.002. *Lueck*, 290 S.W.3d at 878.

B. Authority to Enforce or Regulate the Law Violated or to Investigate a Crime.

A recurring issue is whether the unit of government or its head is a "law enforcement authority" for laws or regulations applicable to that agency. It has been difficult to discern whether the unit's obligation to comply with a law means it enforces or regulates that law for the purposes of §554.002(b)(1). Likewise, does the agency head's power to direct employees to comply with applicable law make the head a law enforcement authority?

In *Leach v. Texas Tech. University*, 335 S.W.3d 386, 395-96 (Tex. App.–Amarillo 2011, pet. denied), the Amarillo Court held that a lawsuit for breach of contract filed in a district court was not a report to an appropriate law enforcement authority. Leach could not have a good faith belief because he had specialized knowledge about the subject matter of his suit as well as legal representation in filing it. *Id.* at 397-98.

In *Dallas County v. Logan*, 359 S.W.3d 367 (Tex. App.–Dallas 2012, pet. filed), the Dallas County did not reach the issue of whether a private investigative firm hired by the county was an appropriate law enforcement authority. Logan alleged he reported violations of law by the county constable to the County Judge and private investigators hired by the County. The County argued the County Judge could not be a "law enforcement authority" because the County elected not to classify him as "employee" for worker's compensation purposes. *Id.* at 374. The County Judge was part of the County, regardless of his worker's compensation classification. *Id.* The Court then found the County failed to preserve the issue of whether either the investigator or the County Judge had authority to enforce or regulate the law at issue.

In *Texas Water Dev. Bd. v. Neal*, No. 03-09-0459-CV, 2010 WL 1730029 (Tex. App.–Austin April 28, 2011)(mem. op.), plaintiff complained to his supervisors that the TWDB had failed to develop policies to train on and prevent job discrimination, as required by the Labor Code, chapter 21. The Austin court of appeals held that, though TWDB had to comply with chapter 21, it was not the authority to regulate or enforce the chapter 21. Neal could not have a good faith belief TWDB enforced chapter 21 because he was an experienced human resources manager in public employment. A duty to comply with a statute was not equivalent to a right to enforce it.

The question of when, under §554.002(b)(2), the employing agency is or can in good faith be considered an authority to investigate or prosecute a crime continues to cause disputes. In *Texas Dep't of Human Services v. Okoli*, 317 S.W.3d 800 (Tex. App.–Houston [1st Dist.], 2010, pet. filed), Okoli reported to his supervisors that another employee was falsifying records for benefit applications. TDHS's express policy was that employees should report crimes and fraud in TDHS programs up the chain of command, rather than directly to the TDHS division that investigated fraud and unlawful use of funds. The Houston Court concluded that this policy plus the fact that some TDHS division could investigate crimes gave Okoli a good faith belief his supervisors were a "law enforcement authority." 317 S.W.3d at 807-8.

Compare Santa Fe Indep. Sch. Dist. v. Falgout, No. 14-11-0447-CV, 2012 WL 1606332, *4 (Tex. App.–Houston [14th Dist.] May 8, 2012, no pet. h.). Falgout was an assistant principal who reported that her principal ordered her how to rate certain teachers on evaluations required by state regulations. Falgout claimed this was criminal falsification of government records. The Houston Court concluded that the authority to evaluate teachers was not equivalent to

authority to investigate or prosecute crimes. Falgout's belief was not "good faith" owing to her years of experience in school administration.

In *Mullins*, a maintenance worker complained to the DISD Office of Professional Responsibility of violations of safety laws and construction codes. 357 S.W.3d at 186. The OPR's mission was to promote integrity and prevent waste, fraud, and abuse. *Id.* at 189. It could investigate unethical behavior and report crimes to appropriate law enforcement agencies. *Id.* Its investigatory power was limited to investigations into fraud and abuse in DISD programs. *Id.* This did not give it authority to investigate or enforce violations of OSHA, state plumbing codes, or local construction codes. *Id.* at 189-91. Mullins could not have a good faith belief OPR did have that authority because OPR's website clearly stated the contrary, as did OPR's response to his complaint. *Id.*

In *Moreno*, 339 S.W.3d at 912-13, the Corpus Christi Court held the university president was a "law enforcement authority" for a complaint that a teacher was not qualified to receive resident tuition for a family member under Texas Education Code §54.059. Rather than ask if the university or its president had authority under the Education Code to enforce the statute, the court focused on the president's power to direct employees to comply with the law. University policy required employee report "suspected fraud" to a supervisor or the university president. The president said he was required to ensure compliance with state laws and regulations. The Corpus Christi Court concluded that the agency head's ability to discipline or require employees to comply with the is sufficient to make the head a "law enforcement authority," or is evidence to support a good faith belief. *Id.* at 912.

Petitions for review have been filed for *Okoli*, *Mullins*, *Logan*, and *Moreno*. The Supreme Court has requested merits briefs in *Mullins*, *Okoli*, and *Moreno*.

C. Exhaustion of Administrative Remedies.

A public employee must initiate action under the government entity's grievance or appeal procedures applicable to adverse personnel actions, suspension, or termination not later that 90 days after the action or the employee discovered it through reasonable diligence. TEX. GOV'T CODE §554.006. If a decision on the grievance is not made within 60 days, the employee may elect to sue or to exhaust the grievance procedure. *Id.* Section 554.006 does not require exhaustion as prerequisite to sue; rather plaintiff is required only to give the governmental unit 60 days to make a decision. *University of Texas Med. Branch v. Barrett*, 159 S.W.3d 631, 632 (Tex. 2005). If suit is filed prematurely after initiating the grievance, the remedy is abatement, not dismissal. *Id.* at 632-33.

Section 554.006 does not require the employee to "meaningfully participate" in the procedure after filing the grievance. *Fort Bend Indep. Sch. Dist. v. Gayle*, ___ S.W.3d ___, 2012 WL 1139321 (Tex. App.–Houston [1st Dist.] 2012, pet. filed). In *Gayle*, plaintiff filed a written grievance as required by school procedure; the next step was a conference with the administration. However, she never agreed to a date for a meeting. *Id.* at *1. The Houston Court rejected the school district's argument that by 'ducking' the conference, she deprived the district of an opportunity to redress the grievance. *Id.* at *6. First, the statute requires only initiating a complaint. Second, the district had 60 days to investigate and Gayle had provided a lengthy, detailed complaint. Third, engrafting a requirement of "meaningful participation" would give the government unilateral power to extend the 60 day deadline. It would create disputes without clear guidelines to judge what level of participation satisfied §554.006.

The San Antonio Court recently addressed this exhaustion requirement when the applicable personnel policies are ambiguous. *Leyva v. Crystal City*, 357 S.W.3d 93 (Tex. App.–San Antonio 2011, no pet.). There, Leyva was fired after making a police report of ballot box tampering and accusing the mayor of involvement. *Id.* at 95. The City personnel policy provided a grievance procedure that began by an "employee" filing a writing complaint with the employee's supervisor. *Id.* at 96. Leyva sued without filing a grievance. The trial court dismissed, but the San Antonio Court reversed.

The City's grievance procedure did not expressly state it applied to terminated employees. *Id.* at 100. After applying the usual rules of construction, the policy was ambiguous. *Id.* at 101. Because it was ambiguous as a matter of law, the Court adopted the construction favorable to the plaintiff – it did not apply to terminated employees. *Id.* at 102-3.

Uncertainty over whether a terminated employee may file a grievance creates two more problems. First, the Supreme Court has not resolved whether the initiating of the grievance process is jurisdictional. *Barrett*, 159 S.W.3d at 632-33. Second, if there is no applicable grievance process, then plaintiff must sue within 90 days after the adverse action. TEX. GOV'T CODE §554.005. Thus, a wrong guess can result in dismissal either way.

However, if there is uncertainty, the employee may give notice of a Whistleblower claim within the §554.005 90 day period, which then tolls the period to file suit for the 60 day period in §554.006 expires. *Bates v. Randall County*, 297 S.W.3d 828, 834 (Tex. App.–Amarillo 2009, pet. denied).

Bates and *Leyva* demonstrate that genuine uncertainty generally works to favor the employee's decision. In *Bates*, uncertainty allowed the employee to give a notice and toll limitations; the county had the burden to conclusively prove the grievance procedure

did not apply. 297 S.W.3d at 835. In *Leyva*, ambiguity allowed the employee to skip filing a grievance; the city had the burden to show the grievance procedure clearly did apply.