FIRST AMENDMENT AND WHISTLEBLOWER CLAIMS

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LITIGATION WITH GOVERNMENT EMPLOYERS

I. SCOPE OF THE ARTICLE. This article is limited to a discussion of the employment rights of public employees under the United States Constitution and the Texas Whistleblower Statute. This article excludes those First Amendment claims against governmental entities that do not involve employment rights.

II. CLAIMS ASSERTED PURSUANT TO §1983. 42 U.S.C. §1983 provides a private cause of action for the deprivation of rights, privileges and immunities secured by the laws or the Constitution of the United States. To establish a right of action pursuant to §1983, a plaintiff must establish that the violation (1) occurred under color of state law; and (2) that the complaining party was deprived of a right guaranteed by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535-37, 101 S.Ct. 1908, 1913 (1981), *overruled on other grounds*; *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662. Section 1983 does not create substantive rights but rather establishes a cause of action based on the violation of existing federally protected constitutional and statutory rights.

A. Applicability/Under Color of State Law

Because §1983 is limited to persons acting "under color of state law," it does not apply to actions by federal agencies or federal officials. *Wheelden v. Wheeler*, 373 U.S. 647, 650 (1963). However, a victim who has suffered a constitutional violation by a federal actor may recover damages in federal court. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) at least where Congress has not acted to provide a statutory remedy. .

The State and its agencies are immune from suits for monetary damages under §1983 by virtue of Eleventh Amendment sovereign immunity. However, actions against state officers for injunctive or declarative relief are not barred. *See Ex Parte Young*, 209 U.S. 123 (1908). Additionally, a suit for monetary damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself. *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974).

Counties have no sovereign immunity from suits under §1983. *Howlett v. Rose*, 469 U.S. 356, 375 (1990). Employees are not jurisdictionally required to exhaust administrative remedies prior to filing §1983 claims. *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982).

Municipalities and other local governmental units are not liable by virtue of *respondeat superior* for the actions of their employees. Local governmental liability for constitutional torts brought pursuant to §1983 arises if the plaintiff can establish that the constitutional or statutory violation was caused by an official custom or policy of the governmental entity. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018 (1978). [1] The law also recognizes that a single action by a local governmental official possessing final policymaking authority regarding the action at issue constitutes the official policy of the local government. Whether or not an official has final policy making authority is a question of law for the judge, not a question of fact for the jury. *Gros v. City of Grand Prairie* 181 F3d 613 (5th Cir. 1999) *citing Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). In making its determination, the

[1] The Fifth Circuit has defined official policy as:

1. A policy statement, ordinance, or regulation, or decision that is officially adopted and promulgated by the [local governmental entity]. . .or by an official to whom the [entity] has delegated policy-making authority; or
2. A persistent, widespread practice of [entity] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents the [entity] policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the [school district] or to an official to whom that body had delegated policy-making authority.

Johnson v. Moore, 958 F.2d 92, 94 (5th Cir. 1992)

court is directed by state law which, according to the Fifth Circuit, will always identify some official or body that has the responsibility for making law or setting policy. *Gros supra*. *See also McMillan v. Monroe County,* 117 S.Ct. 1734, 1736-37 (1997).

In *Cornish v. Correctional Services Corp.*, 402 F.3d 545 (5th Cir. 2005) the court examined whether a state contractor performing a state function is acting under color of state law when it terminates an employee. The state function being performed is the incarceration of juvenile offenders. The plaintiff was a former employee of the private contractor who reported acts of assault against a juvenile as well as general acts of malfeasance with regard to adequate staffing. Shortly after making his reports the plaintiff was fired. Rather than file a cause of action pursuant to the Texas Family Code at § 261.110 plaintiff filed suit under 42 U.S. C. § 1983 alleging that the private employer was engaged in state action when it fired him for exercising his First and Fourteenth amendment rights. The appellate court began by acknowledging that the employer was engaged in state action in its role as incarcerator of juvenile offender. This said, however, the court held that this doesn't mean that the employer engages in state action all of the time. In this case the question is whether the employer engaged in state action in terminating the plaintiff. Because the termination was not mandated by a state law or policy the answer is no, the employer was not engaged in state action when it terminated Plaintiff. The court therefore dismissed the case.

In *Brady v. Fort Bend City*, 145 F.3d 691 (5th Cir. 1998), the County appealed from a favorable jury verdict for an sheriff's deputy who was not rehired after politically supporting the incumbent who was displaced by election. Among other arguments, the County argued that the sheriff was not the final policymaker regarding deputies because the Commissioners Court controlled the permitted number of deputies to serve the County. The Fifth Circuit rejected this argument because the Texas Local Government Code makes the sheriff the final policymaking authority with regard to the hiring of deputies because they "serve[] at the pleasure of the sheriff" under the provisions of the Texas Local Government Code.

Plaintiffs' attorneys need to plead with care in the area of municipal liability for employment decisions. It is not enough that a person in position of authority terminates or otherwise adversely affects the plaintiff's employment. That person must be the final policymaker with respect to the specific act over which the plaintiff is complaining. If the decision to demote, terminate, etc. is nonreviewable by any other person or body, then that person has final authority. If however, the decision maker's decision has to be approved or if the employee has a right of appeal to a higher authority, the governmental agency is not going to be liable unless the final authority adopted the impermissible motives of the initial decision maker. *See Beattie v. Madison Co. School District*, 254 F.3d 595 (5th Cir. 2001).

B. Constitutional Violations. The most common constitutional violations alleged in causes of action brought by governmental employees based on §1983 are those based on the First Amendment protection of free speech and association and the Fourteenth Amendment guarantee of due process. Fourteenth Amendment due process claims are beyond the scope of this article.

1. First Amendment/Free Speech. The First Amendment provides in pertinent part that "Congress shall make no law. . .abridging the freedom of speech. . .or the right of the people to peaceably to assemble. . ." U.S. Const. I. Although the Amendment specifically refers only to federal action, it applies to the states through the Due Process Clause of the Fourteenth Amendment. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

A public employer cannot constitutionally compel an employee to relinquish his constitutional rights as a condition of public employment. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Connick v. Myers*, 461 U.S. 138 (1983). The First Amendment protects public employees "as citizens to comment on matters of public agencies for which they work." *Pickering v. Board of Education*, 391 U.S. 563 (1968). The First Amendment "prohibits not only direct limitations on speech but also adverse government action against an individual because of her exercise of First Amendment freedoms." *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999). However, the employee's right of free

speech and association is not absolute when that right conflicts with his role as a public employee. *Kinsey v. Salado I.S.D.*, 950 F.2d 988, 992 (5th Cir.) (en banc), cert. denied, 504 U.S. 941, 112 S.Ct. 2275 (1992).

The four classic elements to an employee's First Amendment claim against governmental employers:

(1) The plaintiff must suffer an adverse employment decision.

(2) The plaintiff's speech must involve a matter of public concern.

(3) The plaintiff's interest in commenting on matters of public concern must outweigh the defendant's interest in promoting efficiency.

(4) The plaintiff's speech must have motivated the defendant's action.

Teague and Burkett v. The City of Flower Mound, et.al., 179 F.3d. 377 (5th Cir. 1999). Obviously the application of these various factors tends to be extremely fact specific and has generated much case law.

In *Garcetti v. Ceballas*, 126 S. Ct. 1951 (2006) the Supreme Court emphasized what can only be considered a fifth element, that the speech was in the capacity of a citizen. Decided last year the case involved a claim brought by an assistant district attorney claiming that he had been terminated in retaliation for having reported, in an official memorandum, his belief that a police officer had lied in order to obtain a search warrant. The plaintiff also told the defense counsel that he believed the officer had lied and testified to that belief in court.

The Supreme Court granted Cert. on the issue of whether the speech in the official memorandum was protected under the Firth Amendment. In reversing the judgement for the Plaintiff the court in a five to four decision held that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities". Such expression reasoned the court is not made in the capacity of a citizen but rather in the capacity of an employee and is therefore unprotected.

a. Adverse Employment Action. Not surprisingly, the Fifth Circuit has taken a restrictive view of what constitutes an "adverse employment action." In fact, the Court has acknowledged that "although the Supreme Court has intimated that the First Amendment protects against trivial acts of retaliation,[2] this court has required something more than the trivial." *Sharp v. The City of Houston*, 164 F.3d 928 (5th Cir. 1999). An "adverse employment action" according to the Fifth Circuit, includes discharge, demotion, refusal to hire, refusal to promote, and reprimand. *Beningfield v. City of Houston*, 157 F3d 369, 376 (5th Cir. 369), *quoting Pierce v. Texas Department of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994). The court will not look solely to the plaintiff's perception as to whether a particular employment action is adverse, rather it will look at the record as a whole, viewed objectively, to determine whether the action was intended to be adverse. *Harris v. Victoria I.S.D.*, 168 F.3d 216 (5th Cir. 1999).

In *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000), *cert. denied* 531 U.S. 811, 121 S.Ct. 52 (2000), the Fifth Circuit illustrated just how restrictive its view is. In this case, Breaux was a 20 year veteran police officer assigned to the Intelligence Unit of the Garland Police Department. In 1992 he was told that his duties in the Intelligence Unit were being redirected to the performance of political investigations for the City Attorney and certain members of the City Council. Breaux was unwilling to perform such investigations and was transferred to patrol. Subsequently, Breaux reported the illegal request to others, including the City Manager. A pattern of retaliation began including retaliatory investigations, suspensions with pay, unjust criticisms, public reprimands which were subsequently

[2] *See Rutan v. Republican Party*, 497 U.S. 62, 76 n. 8 (1990).

withdrawn, psychological and polygraph testing, threats to fire and a transfer to a less desirable position. The Fifth Circuit, faced with ample and undeniable evidence of liability on the part of the City, proceeded to hold that what happened to the plaintiff simply wasn't enough to violate his rights. These retaliatory acts did not "either individually or collectively, constitute adverse employment actions." *Breaux, supra*.

The Fifth Circuit also has refused to hold that the following actions were adverse employment actions:

- Criticism which doesn't result in demotion or discharge. *Harrington v. Harris*, 118 F.3d 359, 366 (5th Cir. 1997)

- False accusations, verbal reprimands and investigations. *Benningfield* at 376.

- Complaints about teaching assignments, administrative matters, and departmental procedures. *Dorsett v. Bd. Of Trustees for St. Colleges & Univ.*, 940 F.2d 121, 123-24 (5th Cir.)

- Investigation by human resources which does not result in disciplinary action. *Peirce v. Texas Dep't of Criminal Justice, Inst. Div.*, 37 F.3d 1146, 1150 (5th Cir. 1994)

- Removal from a position as a cadet trainer at a police academy. *Benningfield* at 377.

- Failure to permit attendance at seminars and conferences. *Benningfield* at 376.

- Public criticism or unsuccessful attempts to criminally prosecute. *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999)

- Retaliatory use of the recall process against a public official. *Id.*

- Assignment of a heavy workload. *Benningfield* at 376.

- Failure to reimburse overtime and travel expenses. *Benningfield* at 377.

- Transfer to another shift, without more. *Benningfield* at 377.

- Transfer from the prestigious "Foot and Bike patrol" to regular patrol. *Serna v. City of San Antonio*, 244 F.3d 479 (5th Cir. 2001).

The Fifth Circuit has held that the following actions *were* adverse in the context of a First Amendment claim:

- Transfer to another shift which results in a demotion. *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996); *Click v. Copeland* 970 F.2d 106, 110 (5th Cir. 1992)

- Formal reprimands. *Benningfield* at 377; *Pierce v. Texas Dept. of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994)(although reprimands which are later rescinded through internal personnel proceedings are not adverse employment actions, *Benningfield* at 377)

b. Public Concern. Whether speech is addressed to a matter of public concern is a question of law to be decided by the court based on the content, form, and context of a given statement as revealed by the record as a whole. *Coughlin v. Lee*, 946 F.2d 1152, 1156 n. 3 (5th Cir. 1991). In making this determination, the court should examine whether the speech can be "fairly considered as relating to [a] matter of political, social, or other concern to the community[.]" *Connick, supra at* 146. Simply because the statements are controversial or inappropriate does not mean that they

do not deal with a matter of public concern. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) Rather, "debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Victor v. McElveen* 150 F.3d 451, 456 (5th Cir. 1998), *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection. *Brawner v. City of Richardson, Texas*, 855 F.2d 187, 191-92 (5th Cir. 1988).

In considering whether the speech involves a matter of public concern the Fifth Circuit has said, "(T)here is perhaps no subset of matters of public concern more important than bringing official misconduct to light." *Davis v. Ector County, Texas*, 40 F.3d 777, 782(5th Cir. 1994). Thus, much of the speech activity for which employees are commonly terminated is per se of public concern. Significantly, virtually all matters that could be the subject of whistleblowing under the Texas Act would also be matters or public concern for First Amendment purposes.

The fact that an employee's speech contains an element of personal interest does not foreclose the issue of public concern. Speech may be a mix of public and private concerns. However, "mixed speech" cases cause special problems for plaintiffs in First Amendment cases. These cases arise when a plaintiff complains about a matter of public concern which affects the terms and conditions of his own employment. The Fifth Circuit's policy has been to apply a test which seeks to determine whether the plaintiff is speaking primarily as a citizen or employee; however, their application in specific cases has been hard to reconcile.

In *Teague, supra*, two police officers sued the City alleging that they were terminated in retaliation for having investigated and reported a fellow officer for aggravated perjury. When the police chief learned that the officers were going to present the case to a grand jury, he took the case from the officers and had a private firm investigate the matter. The private firm exonerated the accused officer. The plaintiffs, unsatisfied with the outcome based on what they believed to be overwhelming evidence, requested a private meeting with the chief. The chief refused, telling the officers that the D.A.'s office had already looked into the matter and cleared the accused officer. The plaintiffs then went to the D.A. and were told that the D.A.'s office had not looked into the matter at all. The plaintiffs then filed a grievance against the chief and requested to meet with the town manager. The plaintiffs were thereafter transferred to another unit at their request. Their successor reported a backlog of cases in the plaintiffs' former department. The chief initiated an investigation and ultimately fired the plaintiffs for dereliction of duty. The Fifth Circuit acknowledged that police misconduct constituted a matter of public concern, but went on to hold that the even though the speech in question was predominantly pubic, that in **context**, the speech was the grievance was primarily private, i.e. "(i)t was made in the setting of a private employee-employer dispute." *Teague, supra*.

Compare this case with the Court's decision in *Benningfield v. The City of Houston*, 157 F.3d 369 (5th Cir. 1998). In *Benningfield*, the plaintiffs complained about sexual discrimination and a hostile working environment in the police department where they worked. They alleged that as a result of these complaints the police department waged a campaign of retaliation against them which resulted in their constructive retaliation. The Court, given these facts, held that their speech did constitute a matter of public concern. The Court specifically held that the fact that the employee chooses to communicate privately with his employer rather than spread his views before the public does not automatically exclude the speech from being public. *Beningfield v. The City of Houston*, 157 F.3d 369 (5th Cir. 1998), *citing Thompson v. City of Starkville, Miss.*. 901 F.2d 463-65 (5th Cir. 1990). The Court found in *Benningfield* that even though personal concerns certainly played a major role in the plaintiff's grievances, that the fact that they had alleged other wrongdoing in the department in the form of document tampering, made the speech public. *Id*.

In *Bradshaw v. Pittsburg I.S.D.* 207 F.3d 814 (5th Cir. 2000), the plaintiff, a high school administrator, got involved in a dispute with the superintendent and board trustees regarding the terms of her contract. In several memos directed to the superintendent attempting to effectuate a buy-out of her

contract, Bradshaw also made references to irregularities regarding an activity fund and the fact that she was speaking out as a citizen. The court, characterizing such communication as settlement negotiations, held that such speech was predominantly personal communications and not addressed to matters of personal concern. The message to practitioners from this case is to be wary of cases where the employee and the employer are in a dispute prior to the exercise of any First Amendment activity. Courts are particularly skeptical of attempts to manufacture a First Amendment claim out of a pre-existing dispute. *See Mt. Healthy City School District v. Doyle*, 429 U.S. at 285.

The following have been found by the Fifth Circuit to constitute matters of public concern:

- Reports by an IAD officer that another police officer had testified dishonestly at a disciplinary hearding. *Branton v. City of Dallas*272 F.3d 730 (5th Cir. 2001)

- Protesting improper promotions by filing grievances and aiding others in filing grievances. *Thompson v. City of Starksvill, Miss.*, 901 F.2d 456, 464 (5th Cir. 1990)

- Complaints about tampering with criminal histories in a police department through internal grievance procedures. *Benningfield v. The City of Houston*, 157 F.3d 369, 375 (5th Cir. 1998)

- Complaints to the school board by faculty representatives about the school principal. *Harris v. Victoria I.S.D.*, 168 F.3d 216 (5th Cir. 1999)

- Reporting sexual harassment of supervisors. *Wilson v. U.T. Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992)

- Reporting suspected criminal activity of city council members. *Schultea v. Woods*, 27 F.3d 112, 1120 (5th Cir. 1994); *superceded on other grounds*, 47 F.3d 1427 (1994)(en banc)

- Complaints made by a black officer at a meeting that only black officers were required to participate in a specially funded patrol of a predominantly black area. *Victor v. McElveen*, 150 F.3d 451 (5th cir. 1998)

The following have been determined not to constitute matters of public concern:

- A public employee's filing of a workers' compensation claim and his assertion of rights under the Workers' Compensation Act. *Dallas County v. Gonzales*, 183 S.W.3d 94 (Tex.App.–Dallas [5th Dist.] 2006)

- Comments made to a fellow employee informing that employee of his civil rights in the context of an IAD investigation. *Fiesel v. Cherry*, No. 01-20142 (5th Cir. 2002)

- A pattern of retaliatory voting and official legislative action on the part of public officials. *Zilich v. Longo*, 34 F.3d 359, 363 (6th Cir. 1994)

- General grievances regarding conditions of employment

- Communication of personal religious views through the wearing of a cross pin. *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir. 2001)

Neither the accuracy of the speech nor the motivation of the speaker should affect the classification of the speech as a matter of public concern. *Denton v. Morgan*, 136 F.3d 1038 (5th Cir. 1998). However, retaliation based on an erroneous belief that a person has spoken out on an issue of public concern is not actionable because no conduct, i.e. speaking out, has occurred. *Jones v. Collins*,

132 F.3d 1048 (5th Cir. 1998).

c. Balancing Test. Once a court determines that the speech addresses a matter of public concern, the court must balance the public employee's interest in commenting upon matters of public concern against the interest of the state, as an employer, in promoting the efficiency of public services through its employees. In performing the balancing, the "manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose."*Victor* supra at 457, *quoting Rankin* at 388. Among the factors to be considered by the court are whether the statement causes discord among employees or affects discipline by supervisors, whether the statement affects working relationships for which personal loyalty and confidence are necessary, or whether the statements interferes with the speaker's ability to perform his job or interrupts the efficient running of the operation. *Id*. However, maintaining harmony cannot be the sole measure of the government's interest when there are other important governmental interests involved in the employee's speech. When, for instance, the protected speech involves reports of sexual or racial discrimination, the government has a strong interest in bringing such illegal actions to light, even at the expense of disruption in the workforce.

The absence of any rule or regulation prohibiting the particular speech is certainly persuasive on the issue of whether or not the report disrupts the governmental process. In *Branton, supra,* the plaintiff was an IAD officer who observed what she believed to be dishonest testimony during a disciplinary hearing before the assistant city manager. Following the hearing, she reported the dishonest testimony to the assistant manager. Shortly thereafter, she was stripped of many of her responsibilities by the chief of police. In overturning the summary judgment entered against her, the Court noted that there was no city regulation or police department rule which prohibited IAD officers from communicating with hearing officers. Additionally, the plaintiff in *Branton* presented evidence that other IAD officers had had similar communications with hearing officers in the past. These considerations when weighed against the importance of eliminating perjury in the governmental process tipped the balance in Branton's favor.

In *Anderson v. Pasadena I.S.D.*, 184 F.3d 439 (5th Cir. 1999), the Fifth Circuit reversed a dismissal of an employee's First Amendment claims based on freedom of speech and association. Anderson was a long time employee of the Pasadena Independent School District who had never received a negative performance evaluation during his first 33 years of service. He had risen to the level of Area Superintendent within the district. Anderson voiced criticism of an upcoming bond election and supported a candidate who was opposing a board member up for re-election. When Anderson refused to agree to publicly and privately support the bond issue, he was reassigned to a menial job and received his first negative evaluation.

The Court in *Anderson* reversed the district court's decision to dismiss the case because the special relationship between Anderson and the school board was essential to the efficient running of the district. Despite Anderson's allegations in his petition that he was "second-in-command" and "supervised half of the district campuses," the Court held that the decision as to whether or not Anderson could effectively perform his duties while opposing the bond election was a fact specific matter which precluded dismissal.

Practitioners should be aware that grandiose allegations concerning the power and importance of an employee's position in the governmental entity may work against the employee in the application of the balancing test.

d. Causation. Once a governmental employee establishes that he has engaged in protected speech and that his interest in engaging in such speech outweighs any interest on the part of the employer, the court must then determine whether or not the employee's speech was the cause of the adverse employment decision.

An adverse employment action may be illegal even though it is not entirely motivated by protected activity. The standard is that of *Mt. Healthy v. Doyle, infra*., the "but for" standard. The proper inquiry is whether the employer would have taken the same adverse action, at the time it was taken, had

the protected activity not occurred.

According to some Fifth Circuit, the jury must decide "any remaining factual disputes as to whether plaintiff's protected speech was a substantial or motivating factor in the adverse employment decision, or whether the employer would have made the same employment decision in the absence of the protected speech." *Branton v. City of Dallas*, 272 F.3d 730, 739 (5th Cir. 2001) *citing Gardetto v. Mason*, 100 F.3d 803, 811 (10th Cir. 1996). Although this standard would seem to indicate that summary judgment on the issue of causation is contraindicated, such has not been the case in several Fifth Circuit cases.

In *Beattie v. Madison Co. School District*, 254 F.3d 595 (5th Cir. 2001), the Fifth Circuit upheld a summary judgment against a former school secretary who alleged that she was terminated because she supported the opponent of the incumbent for school superintendent. The Court upheld on two bases: First, the school board members who were the final decision makers produced affidavit evidence that they had no knowledge of Beattie's support for the candidate; and Second, the district presented evidence of complaints against Beattie which the Court found was evidence sufficient to justify the termination even absent the protected speech.

Likewise, in *Gonzales v. Dallas County*, 249 F.3d 406 (5th Cir. 2001), the Court found that the plaintiff's First Amendment claim must fail because the County would have fired Gonzales even absent the protected speech. In *Gonzales*, the plaintiff was a deputy who made a report to an assistant district attorney of bribery on the part of the constable for whom he worked. Gonzales testified at a grand jury proceeding and the constable was ultimately charged with bribery. About six weeks after being indicted for bribery, the constable learned that Gonzales had been involved in an altercation while working off-duty at a grocery store. The chief deputy working for the constable was assigned to investigate the incident. Following her investigation, the chief deputy recommended that Gonzales be fired which recommendation was adopted by the constable. Gonzales filed suit alleging that his termination was in retaliation for having reported the illegal activity of th constable. The district court denied the qualified immunity claim of the constable. The Fifth Circuit overturned the district court and held that the constable was entitled to immunity. Although there was a hotly contested dispute regarding the underlying facts of the incident and the subsequent investigation, the Fifth Circuit held nevertheless that the facts, even if as described by Gonzales supported a decision to terminate based on excessive force. Curiously, Gonzales had been put back to work with backpay. Evidently, the Civil Service Commission found that the reasons articulated did not constitute grounds for termination.

e. <u>There must be "speech."</u> In *Steadman v. Texas Rangers*, 179 F.3d 360 (5th Cir. 1999), the Court addressed the requirement that there must actually be "speech" as opposed to adherence to a specific belief system, for First Amendment protection to be triggered. In *Steadman*, three female applicants sought to be named to the Texas Rangers. As of 1993, no woman had ever been selected for membership. One of the applicants for the position, Sheppard, scored the highest of the individuals taking the exam. Prior to Sheppard's oral interview before the board, a woman named Steadman was interviewed. After Steadman's interview, Senior Ranger Captain Cook, who chaired the committee, insisted on reviewing the scores of the board members on Steadman. He also convinced the members to change their scores because he wanted Steadman, and not Sheppard, to be named to the Rangers. Cook told one of the board members that they were not going to promote Sheppard because she was to "independent" and "opinionated." In short, Cook believed that Sheppard was a women's libber. The Court found that even though Cook held this belief and even though it was this belief that caused him to blacklist her, that the belief was not based on any speech of Sheppard's. The Court, noting that Sheppard was clearly an advocate of woman's rights, did not **say** anything which would constitute protected speech. The lesson to be learned from this case is that you must **always** identify and articulate actual speech on the part of the employee to trigger constitutional protection.

f. <u>Political Patronage/Association</u>. It is well established that governmental entities are forbidden to fire or threaten to fire employees solely because they do not support the political party in power. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990); *Branti v. Finkel*, 445 U.S. 507

(1980). The Fifth Circuit affirmed this limitation on political patronage in *Brady v. Fort Bend, supra*. Additionally, campaigning for a particular candidate relates to a matter of public concern. *Vojvodich v. Lopez*, 48 F.3rd 879, 885 (5th Cir. 1995). It doesn't matter if the employee's interest in campaigning is also self-serving in that it will ensure job security if the candidate wins, it is still public speech. *Brady, supra*. However, plaintiffs should take care in their pleading and proof. The Fifth Circuit in *Dudley v. Angel*, 209 F.3d 460 (5th Cir. 2000) held that the district court erred in denying a public official's motion for summary judgment because there was not adequate evidence that the plaintiff's political affiliation was the motivating reason for the adverse employment action. The lesson to be learned is to specify the patronage causing the animus and set forth facts evidencing such animus.

If, however, the governmental employer "can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," a claim based on political patronage can be defeated. *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999), *quoting Branti v. Finkel*, 445 U.S. 507, 518 (1980).[3]

III. WHISTLEBLOWER ACT. The Texas Whistleblower Act is found in Sections 554.001-554.010 of the Texas Government Code. The purpose of this Act is to protect government employees who report what they believe are violations of law thereby promoting lawful conduct on the part of those who direct and conduct the affairs of public bodies. *Travis County v. Colunga*, 753 S.W. 2d 716 (Tex. App.-Austin, 1988, writ denied) The Act is designed to promote the enhancement of governmental openness. *Castaneda v. Texas Department of Agriculture*, 831 S.W. 2d 501 (Tex. App.-Corpus Christi 1992, writ denied). The Whistleblower Act contains an express waiver of the State's sovereign immunity. *Tex. Gov. Code* §554.0035.

A. What Constitutes "Whistleblowing" Under the Statute. The Act applies to any employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority. The conduct reported must be illegal under either a state or federal statute. *City of Beaumont v. Boullion*, 896 S.W.2d 143 (Tex. 1995). Whether the complained of conduct constitutes a violation of "law" is a question of law for the Court. *Rogers v. City of Ft. Worth*, 89 S.W.3d 265, 274 (Tex.App.–Ft. Worth 2002, no pet.).

To be in good faith the employee must actually believe that a violation has occurred and that belief must be objectively reasonable in light of the employee's training and experience. *Wichita County v. Hart*, 917 S.W. 2d 779 (Tex. 1996). Because of their training and experience in assessing legal violations, the reasonableness of a peace officer's belief will be examined more closely than will the belief of a person who is not in law enforcement. *Harris County Pct. Four Constable Dep't. v. Grabowski*, 922 S.W.2d 954, 956 (Tex. 1996) A report of an alleged violation may be in good faith even though incorrect as long as a person with the employee's training and experience would have believed that the conduct was illegal. *Texas Department of Transportation v. Needham*, 82 S.W.3d 314 (Tex. 2002).

The report must be made by a governmental "employee." A governmental employee is one who received pay from the governmental entity. *City of Cockrell Hill v. Johnson*, (Tex App.--Ft.Worth 2001) Thus a report of illegal activity on the part of an unpaid person, (unpaid reserve officer or counsel member for example) does not carry whistleblower protection. The test to determine whether a person is an employee or independent contractor is the test of day to day control. *Denton Co. v. Howard*, 22 S.W.3d 113 (Tex App.-- Ft. Worth 2000).

In *Rogers v. City of Ft. Worth*, 89 S.W.3d 265 (Tex.App.–Ft.Worth 2002), the Court held that an employee who made a report of illegal activity at the request of his boss was still protected under the Act

[3]The Courts have also extended political patronage cases to prohibit governmental retaliation against government contractors and service providers. *See O'Hare Truck Serv., Inc. v. city of Northlake*, 518 U.S. 712, 720 (1996).

if he also believed the act to violate an ordinance of the City.

"Good faith" means that (1) the employee believed that the conduct reported was a violation of law and (2) the employee's belief was reasonable in light of the employee's training and experience. *Harris County Precinct Four Constable Dep't. v. Grabowski*, 922 S.W.2d 954, 955 (Tex. 1996).

B. Reporting Violations of Law - "Law" for purposes of the Act means a state or federal statute, an ordinance of a local governmental entity, or a rule adopted under a statute or ordinance. Section 554.001. The Act does not protect reports of violations of internal policy not promulgated pursuant to statute or ordinance. *Harris County Precinct Four Constable Department v. Grabowski*, 922 S.W.2d 954, 956 (Tex. 1996). However, there may be violations of internal policies which also constitute criminal acts.

In *Texas Dept. of Assistive and Rehabilitative Services v. Howard*, 182 S.W.3d 393 (Tex. App.–Austin [3d District] 2005) held:

> Neither the Act itself nor the definition of "report" provided in *Castenada*, however, require the use of specific phrasing in a whistleblower report, nor do they require that a whistleblowing employee state his complaint in the affirmative, as opposed to reporting the matters in the form of a query. *See Castaneda*, 831 S.W.2d at 503-04. Rather, the Act only requires a disclosure of information by a public employee tending to directly or circumstantially show a violation by a public employer.

182 S.W. at 400-01.

Practice Pointer: As elementary as it sounds, plaintiff's practitioners should not undertake representation unless the client or the practitioner is able to identify the actual law, ordinance or officially adopted rule which has been violated.

C. Report Must Be to an Appropriate Law Enforcement Agency. An appropriate law enforcement agency is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law. Section 554.002(b) The Texas Supreme Court has recently addressed the issue of what constitutes an "appropriate law enforcement agency." In *Texas Department of Transportation v. Needham*, 82 S.W.3d 314 (Tex. 2002 rehearing denied), Needham was a long time employee of TxDOT. While on an out of town trip, he observed a co-employee whom he believed was driving while intoxicated. Needham instructed another employee to drive the intoxicated employee's car back to the motel. Some time later, Needham reported to two separate supervisors his belief that the co-employee was driving while intoxicated. Shortly thereafter, Needham was written up, demoted and placed on suspension for twelve months. The trial court entered a judgment for Needham based on a jury verdict in his favor and this judgment was upheld by the court of appeals.

The Texas Supreme Court reversed, holding that Needham's report to TxDOT was not a report to an appropriate law enforcement agency. Needham argued that an appropriate law enforcement agency must have: (1) the power and duty under the law to decide disputes concerning the lawfulness of the matter being reported; (2) the power and duty to order a halt or a change in the matter reported; (3) the power to legislate or regulate with respect thereto; or (4) the power to arrest, prosecute or *otherwise discipline* on account of the alleged violation being reported. *City of Dallas v. Moreau*, 697 S.W.2d 472 (Tex.App.–Dallas 1985, no writ). The Supreme rejected these criteria, holding that they pre-dated the 1995 amendments to the Whistleblower Act which specifically limits an appropriate law enforcement agency as one who has the authority to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law. Tex. Gov't. Code §554.002(b). Holding that the TxDOT had no authority to regulate under, enforce, investigate or prosecute a violation of Texas'

DWI laws, the Court found that TxDOT was not an appropriate law enforcement agency.[4]

Following *Needham*, the 14th District Court in Houston overturned a jury award to a City employee who was terminated after reporting both theft and violations of the City's inventory procedures to his supervisor. In *City of Houston v. Kallina*, 97 S.W.3d 170, 173(Tex.App.–Houston [14th Dist.] 2002) *pet. for rev. dism'd.* The Court found that the supervisor was not an appropriate law enforcement authority because neither the supervisor nor any other employee in the department had authority to investigate, enforce or prosecute a violation of the State's penal laws. The Court goes on to say that although the Whistleblower Statute also protects employees who report violations of "a rule adopted under a statute or ordinance" that Kallina presented no evidence of a report of such a rule. *Id.* at 174. It therefore appears that there may be a small window left after *Needham* in which an employee, if he can establish a report of a violation of a policy actually passed or approved by the governing body, can still make out a whistleblower case by virtue of a report to his supervisor.

The *Needham* case will have a dramatic impact on whistleblower cases. Internal complaints are no longer actionable unless the agency for which the employee works actually has the authority to legislate or enforce the law alleged to have been violated. Many cases in which plaintiff's attorney had the option to choose between Whistleblower and First Amendment claims may now be relegated to exclusively First Amendment claims.

D. Retaliation Prohibited. A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, an employee who "blows the whistle." Under the Act, "personnel action" means an action which affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation. Section 554.001.

In *Hill v. Burnet Co. Sheriff's Dept.*, (Tex.App.–Austin 2002), The Austin Court of Appeals recognized held that retaliatory actions taken against a whistleblower could result in a constructive discharge. The defendant in *Hill* sought to have the plaintiff's case dismissed because there was no "adverse employment action," since the plaintiff resigned. The Court of Appeals, after identifying various instances in which the plaintiff was singled out for different treatment from her co-workers, held that, although a fact finder might ultimately find that the acts complained of did not rise to constructive discharge, such allegations did plead a cause of action under the Act.

E. Rebuttable Presumption. The employee has the burden of proof under the Whistleblower Act except if the adverse action complained of occurs not later than the 90th day after the date on which the employee reports the violation, the suspension, termination, or other adverse personnel action is presumed, subject to rebuttal, to be because the employee made the report.

In *Ruiz v. City of San Antonio*, 966 S.W. 2d 128 (Tex. App.–1998), the court applied this presumption to overturn a summary judgment for the City based on several affidavits establishing non-retaliatory reasons for the plaintiff's discharge. The court, noting that 90 day presumption applied, also identified the "inherent difficulty of producing direct evidence of an employer's illegal motivation, especially at the summary judgment stage of the proceedings." *Ruiz* at 132. The *Ruiz* case may be strong ammunition for fending off summary judgment motions in cases where the adverse action occurred within 90 days of any of the reports of illegal activity.

The presumption however is not properly placed before the jury. In *Texas A&M University v. Chambers*, 31 S.W. 2d 780 (Tex App.–Austin 2000) the court found that it was reversible error to include the statutory presumption in the jury charge. The court reasoned that the presumption was only designed to allocate the burdens of proof, and that charging the jury on the presumption was an impermissible comment on the weight of the evidence.

[4]The Court went on to hold that Needham didn't have a "good faith belief" that TxDOT was an appropriate law enforcement agency.

F. Affirmative Defense. It is an affirmative defense under the Act if the employing governmental agency would have taken the action against the employee based solely on information, observation, or evidence that is not related to the fact that the employee made a report protected by the Act.

G. Causation. Whistleblower cases are no different than most discrimination cases in that the critical question often revolves around causation. The whistleblower is not required to demonstrate that his reporting of illegal conduct was the sole cause for his employer's action but rather that the after he blew the whistle he suffered discriminatory conduct which would not have occurred when it did had he not made the report. *Texas Department of Human Services v. Hinds*, 904 S.W. 2d 629 (Tex. 1995). The appropriate causation is the "but for" nexus. *City of Ft. Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000)(*Zimlich II*).

The employee may use circumstantial evidence to establish causation. The Supreme Court in *Zimlich II* set out the following evidence which may be used to establish a nexus between the whistleblowing and the adverse action:

(1) Knowledge of the report of illegal conduct;

(2) Expression of a negative attitude toward the employee's report of the conduct;

(3) Failure to adhere to established policies regarding employment decisions;

(4) Discriminatory treatment in comparison to similarly situated employees; and

(5) Evidence that the stated reason for the adverse action is false.

Zimlich II at 69. However, the Court in *Zimlich* found that a negative attitude regarding the report followed by an adverse action, standing alone, was not enough to establish causation. *Id.*

Always remember that a causal link between the report of the illegal act and the adverse employment act is presumed if the adverse act occurred within 90 days of the date of the whistleblowing. It is only if the adverse action occurs after the 90 day window that the employee must prove a causal link, at least for now.

H. Remedies Available.

1. Generally. A public employee who has been suspended, terminated, or subjected to an adverse personnel action can sue for:

(a) Injunctive relief;

(b) Actual damages;

(c) Court costs;

(d) Prejudgment interest; and

(e) Reasonable attorneys fees.

2. Additionally, an employee who has been suspended or terminated is entitled to:

(a) Reinstatement to the employee's former position or an equivalent position;

(b) Compensation for wages lost during the period of suspension or termination; and

(c) Reinstatement of fringe benefits and seniority rights lost because of the suspension or termination.

3. Mental Anguish. Mental anguish is an actual damage under the statute. Mental anguish in the past is properly awarded when a jury finds that a plaintiff has suffered public humiliation, shame, depression and embarrassment. *Wichita County v. Hart*, 892 S.W.2d 912 (Tex. App.-Austin 1994), *rev'd. o.o.g.*, 917 S.W.2d 779 (Tex. 1996) Mental anguish in the future is properly awarded if there is a reasonable probability that mental anguish will be suffered in the future. *Lubbock County v. Strube*, 953 S.W.2d 847 (Tex. App.-Austin 1997) However, such future damages must be proven with direct evidence of the nature, duration or severity of the plaintiff's anguish. Id.

4. Future Lost Earnings. Future lost earnings are recoverable under the Act. *Housing Authority of City of Crystal City v. Lopez*, 955 S.W.2d 152 (Tex. App.–Austin, 1997, no writ). In *Zimlich, supra*, the jury awarded damages for future lost earnings because the plaintiff did not receive a promotion and attendant raise. The City took the position that damages related to the failure to promote were too speculative to support future lost wages. The court held that "a plaintiff cannot be expected to prove future lost earnings with absolute certainty." *Zimlich* at 412. The court went on to say that "the mere fact that lost future earnings are inherently speculative will not defeat an award so long as the plaintiff proves the amount of such damages with the degree of certainty of which it is susceptible." *Id*., *citing Bonney v. San Antonio Transit Co.*, 325 S.W. 2d 117, 121 (1959). The *Zimlich* court concluded that the amount that the plaintiff might have earned in the future must be left largely to the sound judgment and discretion of the jury." *Id*., *citing McIver v. Gloria*, 169 S.W.2d 710, 712 (Tex. 1943).

5. Punitive Damages. The 1995 amendments to the Whistleblower Act eliminated punitive damages. (Sec. 554.003) Of course, punitive damages are still available in causes of action arising before June 15, 1995.

6. Attorneys Fees. In *Town of Flower Mound v. Teague*, 2-00-193-CV (Tex. App.–Ft. Worth 2003) the Appeals Court approved a jury award of attorneys fees of 25% of the "recovery" and found that the term "recovery" included the damages awarded together with prejudgment interest.

7. Caps. Compensatory damages (future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and nonpecuniary losses) are capped according to the size of the employer as follows:

(1) $50,000, if the employing state or local governmental entity has fewer than 101 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;

(2) $100,000, if the employing state or local governmental entity has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;

(3) $200,000, if the employing state or local governmental entity has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;

(4) $250,000, if the employing state or local governmental entity has more than 500 employees in each of 20 or more calendar weeks in the calendar

year in which the suit is filed or in the preceding year.

8. Collection of Judgment. When a whistleblowing claim is brought against a state agency, collection of the damage award may take legislative action. *Texas Dept. of Human Services v. Green*, 855 S.W.2d 136, 145 (Tex. App.--Austin 1993, writ denied).

I. Limitations. The Whistleblower Act requires that suit be filed not later than the 90th day after the date the alleged violation occurred or was discovered by the employee through reasonable diligence. Failure to comply with the statutory requirements deprives the court of jurisdiction. *Gregg Co. v. Farrar*, 933 S.W.2d 769, 777 (Tex. App.–Austin 1996, writ denied).

Additionally, a public employee must initiate action under the employer's grievance or appeal procedures relating to suspension, termination, or adverse personnel action before filing suit under the Act. (§554.006 *Tex. Gov. Code*) A grievance or appeal procedure is one designed to resolve employee disputes, not merely to investigate possible wrongdoing. *City of Houston v. Cotton*, 31 S.W.3d 823, (Tex. App. Hous (1st Dist) 2000) The employee must initiate such action within 90 days of the date on which the adverse act occurred or was discovered by reasonable diligence. While formal pleading specificity is not required of a whistleblower, the grievance should describe the wrongful act and the remedy sought. *City of Austin v. Ender*, 30 S.W.3d 590 (Tex. App.--Austin 2000). The time used by an employee under the grievance process is excluded in the computation of the 90 day limitations period except that if a final decision is not rendered before the 61st day after the date grievance or appeal is initiated, the employee may elect to: (1) exhaust the applicable procedures and sue not later than the 30th day after the date those procedures are exhausted; or (2) terminate the grievance or appeal and file suit within the remaining 90 day period. *Castleberry Independent School District v. Jane Doe*, 35 S.W. 3d 777 (Tex App.--Ft. Worth 2001)

Exhaustion of the grievance procedure is a jurisdictional prerequisite to the bringing of a whistleblower action.[5] *Texas Southern University v. Carter*, 84 S.W.3d 787 (Tex. App.–Houston [1st Dist.] 2002); *University of Texas Med. Branch v. Savoy*, 86 S.W.3d 782 (Tex.App.–Beaumont). The failure to properly exhaust any applicable administrative procedures, at least within the 60 day period referenced above, will subject the plaintiff to a plea to the jurisdiction and dismissal of the suit.

Texas courts have held that if it is unclear whether the grievance procedure applies to a terminated employee's claim under the Whistleblower Act, then the exhaustion requirement does not apply. *Caldwell Co. Sheriff's Dept. v. Crider*, 03-02-00321CV (Tex.App.–Austin 2003); *Curbo v. State*, 998 S.W.2d 337, 342 (Tex.App.–Austin 1999, no pet.). Additionally, if the grievance procedures are unclear, notice of the claim given to the employer is sufficient to initiate the grievance procedure. *University of Tex. Med. Branch v. Hohman*, 6 S.W.3d 767, 775 (Tex. App.–Houston [1st Dist.] 1999, pet. dism'd w.o.j.).

However, there must in fact be a grievance procedure in place to extend the 90 day period. In *Jordan v. Jefferson County*, 153 S.W.3d 670, (Tex. App. Amarillo [7th Dist.] 2004), the plaintiff filed suit after the 90 day deadline but argued that she was attempting to obtain a grievance hearing during the 90 day period. The Court, holding that the evidence established that there was no grievance procedure in place, found that the plaintiff's suit was untimely.

In *University of Texas Medical Branch at Galveston v. Barrett*, 159 S.W.3d 631 (Tex. 2005), the Supreme Court addressed a jurisdictional attack against a plaintiff who had filed suit 27 days after initiating the grievance procedure. The defendant argued that since the plaintiff had not waited the 60

[5]While there are some courts of appeals who have taken the position that the limitations provisions of the Whistleblower Act are in the nature of affirmative defenses and therefore properly raised in a motion for summary judgment rather than a plea to the jurisdiction, the overriding lesson here is that failure to follow the limitations provisions will defeat your claim, sooner or later.

days required by the statute, that his case should be dismissed for want of jurisdiction. The Court held that the appropriate remedy in such a case, was to abate the prematurely filed action until the end of the 60 day period, provided that the appeal was timely filed and could continue for the required 60 day period.

The plaintiff's practitioner should always promptly investigate whether there is a grievance procedure and what is required under the procedure. According to case law, each step must be exhausted, at least within the 60 day statutory period. In *University of Texas Med. Branch v. Savoy*, 86 S.W.3d (Tex. App.–Beaumont 2002), the plaintiff initiated a Level 1 and Level 2 appeal, but failed to proceed to Level 3. As the Level 2 decision was made within the 60 day period, she was required to proceed to Level 3 and her failure to do so was jurisdictionally fatal. Her case was dismissed.

In *Texas Board of Pardons and Paroles v. Feinblatt*, 82 S.W.3d 513 (Tex.App.–Austin 2002), the Board of Pardons and Paroles alleged that Feinblatt was precluded from bringing suit under the Texas Whistleblower Act because he had failed to exhaust his administrative remedies. The Board's grievance procedures required employees to file a grievance within 15 days of the act being grieved upon. The Court of Appeals rejected this argument holding that the 90 day limitation in the Act trumped the local grievance procedure. Therefore, since Feinblatt had filed his grievance within 90 days, he was not precluded from bringing his whistleblower action.

If arbitration is involved, there is case law to support the proposition that decisions made by the arbitrator regarding the reason for termination are not binding in whistleblower actions. *Domingues v. City of San Antonio*, 985, 505, 508 (Tex. App.–1998) *rehearing overruled*. In other words, even when an arbitration decision is adverse to an employee, he still has the right to pursue his rights under the Whistleblower Act.

In *Villareal, et al. v. Williams and the City of Falfurrias*, 971 SW2d 622 (Tex. App.-San Antonio 1998), the Court of Appeals held that a claim for a retaliatory act accrues when the employee receives unequivocal notice of the discriminatory decision, not when the effects of such decision are realized. *See also Schindley v. N. Texas Com. Col.*, 13 S.W.3d 62 (Tex. App.–Austin 2000)

J. Venue. State employees may file suit in the district court of the county in which the cause of action arises or in a district court of Travis County. Local government employees may file suit may file suit in the district court of the county in which the cause of action arises or in a district court of any county in the same geographic area that has established with the county in which the cause of action arises a council of governments or other regional commission under Chapter 391, Local Government Code.