TEXAS WHISTLEBLOWER ACT UPDATE

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United States District Court for the Southern District of Texas – 2014
United States District Court for the Western District of Texas – 2014

REPRESENTATIVE PUBLISHED DECISIONS

Fort Worth Indep. Sch. Dist. v. Palazzolo, 498 S.W. 3d 674 (Tex. App.—Ft. Worth 2016, pet. filed) (in reversing the jury verdict against the defendant, the court of appeals held, in part, that Section 554.004(b), TEX. GOV'T CODE, is an affirmative defense)

Douglas v. City of Kemp, Texas, 05-14-00475-CV, 2015 WL 3561621 (Tex. App. – Dallas 2015, no pet. h) (a claim against a city concerning allegedly invalid tax assessments is barred by governmental immunity and an appellant must challenge and negate all grounds on which a trial could have ruled on a plea to the jurisdiction or the appellate court must affirm the ruling on the unchallenged ground).

Fort Worth Indep. Sch. Dist. v. Palazzolo, No. 02-13-00006-CV, 2014 WL 69889 (Tex. App. Fort Worth, 2014) (court of appeals reversed the trial court's denial of summary judgment and held that the plaintiff failed to properly initiate the administrative grievance procedures jurisdictionally required by the Texas Whistleblower Act).

Mesquite Indep. Sch. Dist. v. Mendoza, No. 05-12-01479-CV, 2013 Tex. App. LEXIS 6783 (Tex. App. – Dallas 2013, no pet.) (court of appeals reversed the denial of summary judgment and held that the plaintiff could not establish the prima facie elements of her sex discrimination claim).

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REPRESENTATIVE CASES

Morgan v. Denton Indep. Sch. Dist., No. 4:12-CV-290, 2013 U.S. Dist. LEXIS 115408 (E.D. Tex. June 11, 2013) (prevailed on summary judgment on plaintiff's Equal Pay Act discrimination and retaliation claims)

Berkman v. City of Keene, 311 S.W.3d 523 (Tex. App. – Waco 2009, pet. denied) (dismissed for lack of jurisdiction because contract for provision of city utilities did not fall within the limited waiver of governmental immunity for contracts).

Emanuel v. Bastrop Independent School District, 591 Fed. Appx. 302 (5th Cir. 2015) (school counselor's appeal of the lower court's dismissal of her race discrimination and retaliation claims against the school district dismissed for failing to make cognizable legal argument).

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TEXAS WHISTLEBLOWER ACT UPDATE

I. INTRODUCTION

The purpose of this paper is to provide an update of certain recent cases regarding the Texas Whistleblower Act. This is a dynamic area of the law that changes frequently. This paper is divided into several sections: (1) good faith reports to an appropriate law enforcement authority; (2) illegal acts; (3) causal links between a qualifying report and an adverse employment action; (4) initiation of grievance procedures; (5) the statutory affirmative defense; and (6) a brief discussion as to the statute of limitations.

II. ESSENTIAL ELEMENTS OF THE TEXAS WHISTLEBLOWER ACT

The Texas Whistleblower Act is found in Section 554.002 of the Texas Government Code. The Whistleblower Act only covers employees of state or local governmental entities, not private employees. Section 554.002 prevents a state agency or local government from taking an adverse employment action against a public employee who reported in good faith a violation of law to an appropriate law enforcement authority. *Guillaume v. City of Greenville, Tex.*, 247 S.W.3d 457, 461 (Tex. App.—Dallas, 2008, no pet.). The elements of a Whistleblower claim can be considered to determine both jurisdiction and liability. *State v. Lueck*, 290 S.W.3d 876, 883 (Tex. 2009).

A plaintiff must also show that but for his report of a violation of law to an appropriate law enforcement authority, he would not have suffered an adverse employment action. §554.002(a); *Vela v. City of Houston*, 186 S.W.3d 49, 54 (Tex. App. – Houston [1st Dist.] 2005, no pet.) citing *Gold v. City of College Station*, 40 S.W.3d 637, 646 (Tex. App.-Houston [1st Dist.] 2001, no pet.); *Phelan v. Texas Tech University*, 2008 Tex. App. LEXIS 500 *11 (Tex. App. – Amarillo 2008, pet. denied) citing *Vela*, 186 S.W.3d at 54. An employee need not prove, however, that his reporting of the illegal conduct was the sole reason for the employer's adverse action. *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 634 (Tex. 1995); *City of Fort Worth v. Zimlich*, 975 S.W.2d 399, 406 (Tex. App. – Austin 1998) (*Zimlich I*), *rev'd in part on other grounds*, 29 S.W.3d 62, 43 Tex. Sup. Ct. J. 972 (2000). Also, before bringing suit, the employee must initiate the employer's grievance procedures. §554.006(a).

III. GOOD FAITH REPORTS TO AN APPROPRIATE LAW ENFORCEMENT AUTHORITY

The Texas Whistleblower Act bars retaliation against a public employee who reports her employer's or co-worker's "violation of law" to an "appropriate law enforcement authority. To carry her burden, a public employee plaintiff must prove that she had a good faith belief that the conduct reported was a violation of law and that her belief was reasonable in light of her training and experience.

The employee must also have a good faith belief that the entity reported to is an appropriate law enforcement authority. A law enforcement authority is a governmental entity authorized to "regulate under or enforce the law alleged to be violated in the report," or to investigate or prosecute "a violation of criminal law." *See* Tex. Gov't Code § 554.002(b).

The Texas Supreme Court has declined to hold that the Act protects internal reports to workplace supervisors who lacked the Act's specified powers. *See Tex. DOT v. Needham*, 82 S.W.3d 314 (Tex. 2002); *State v. Lueck*, 290 S.W.3d 876 (Tex. 2009); *City of Elsa v. Gonzales*, 325 S.W.3d 622 (Tex. 2010).

The crux of the inquiry is whether the entity itself is an appropriate law enforcement authority as to the law violated. *Duvall v. Texas Department of Human Services*, 82 S.W.3d 474, 478 n. 6 (Tex. App. – Austin 2002, no pet.) citing *Robertson County v. Wymola*, 17 S.W.3d 334, 340-41 (Tex. App.--Austin 2000, pet. denied); *Phelan*, 2008 Tex. App. LEXIS at *19 citing *Wymola*, 17 S.W.3d at 340; *County of Bexar v. Steward*, 139 S.W.3d 354, 360 (Tex. App. – San Antonio 2004, no pet.) also citing *Wymola*. Generally, when the report involves a violation of criminal law, "[p]olice officers and district attorneys are appropriate law enforcement authorities because they are authorized to investigate or prosecute violations of criminal law." *Town of Flower Mound v. Teague*, 111 S.W.3d 742, 755, fn.13 (Tex. App. – Ft. Worth, 2003, pet. denied), citing TEX. GOV'T CODE ANN. § 554.002(b)(2); and TEX. CODE CRIM. PROC. ANN. arts. 2.01, 2.12(3), 2.13 (Vernon Supp. 2003).

- *Connally v. Dallas Independent School District*, 506 S.W.3d 767 (Tex. App. – El Paso Dec. 21, 2016, no pet.)

A school district's departments of professional responsibility, audits, and professional standards are not "appropriate law enforcement authorities" to whom employees could report allegations of criminal violations and thereby trigger the protections of the Texas Whistleblower Act. However, an employee's report to the school district's police department does trigger the protections, even if the report was an oral conversation with district police officers.

Plaintiff Anita Connally was hired by the District as its Director of Compliance. Connally believed that in various instances, the District was not complying with the UIL rules for requiring student-athletes to reside within the attendance zone of the high school for which they played a varsity sport. Connally reported

her suspicions of wrongdoing to the Office of Professional Responsibility (OPR), the Internal Audit Department (IA), and the Professional Standards Office (PSO). These departments were tasked solely with conducting internal, administrative investigations. Investigations found that certain coaches had engaged in fraud by forgery, had falsified district records, provided untruthful statements, and illegally recruited varsity players. The day after the investigation report was released to the public, the superintendent terminated Connally, arguing that she did not act soon enough to prevent the wrongdoing.

Connally sued the district, claiming that it wrongfully terminated her for making reports in violation of the Texas Whistleblower Act. The district filed a plea to the jurisdiction claiming governmental immunity and arguing that the departments to which Connally made reports were not appropriate law enforcement authorities. In response, Connally amended her petition and alleged that she also made reports to the DISD police department and the PSO's manager, who was a commissioned police officer and former detective. After oral argument, the district court dismissed Connally's suit.

On appeal, the Court concluded that the PSO manager was not acting in his capacity as a peace officer, and that Connally could not have had an objective good faith belief that he was an appropriate law enforcement authority. The court found, however, that Connally's affidavit testimony that she informally spoke with certain DISD police officers regarding the problem of parents and coaches falsifying addresses constituted sufficient reports of criminal violations under the Whistleblower Act.

- *Montie v. Bastrop County*, No. 03-16-00123-cv, 2016 WL 6156232 (Tex. App. – Austin Oct. 19, 2016, pet. filed)

A report by an animal shelter manager to her supervisor that the supervisor was violating animal cruelty laws survived dismissal because the County's animal control officers are charged with enforcing animal-cruelty laws.

In this case, Montie asserted that she had been terminated from her job as a manager for a county animal shelter in violation of the Texas Whistleblower Act because she had reported her supervisor, Mollaghan, for cruelty to animals. Specifically, Montie urged that Mollaghan failed to timely euthanize shelter animals that were injured or ill and failed to maintain the animals at the shelter by not providing them with adequate water and food or properly cleaning their cages, and she contended that Mollaghan's actions led to overcrowding and suffering by numerous animals, which Montie asserted violated provisions of the Penal Code as well as the Bastrop County Rabies and Animal Control Order ("Order"). See Tex. Penal Code § 42.092 (prohibiting cruelty to nonlivestock animals); Order § 8.1 (prohibiting abandonment, abuse, or neglect of animals as specified in section 42.092 of Penal Code).

In an amended petition filed after remand Montie asserted, among other things, that she made a complaint to an appropriate law-enforcement authority when she reported the alleged misconduct by Mollaghan to Mollaghan herself. In response, Bastrop County filed a second plea to the jurisdiction asserting that the district court did not have jurisdiction over Montie's claims because Montie's claims did not satisfy the requirements of the Act.

The Court found that Montie pled facts of making reports to an appropriate law enforcement authority, since her petition alleged that she made reports to Mollaghan herself. Even though they were internal reports, because Mollaghan was the supervisor of all of Bastrop County's animal-control officers and because animal-control officers are charged with enforcing animal-cruelty laws, the court denied the County's plea to the jurisdiction.

- *Tex. Health and Human Services Commission v. McMillen*, No. 03-13-00303-CV, 2016 WL 3228678 (Tex. App. – Austin June 8, 2016, no pet.)

McMillen, a former Deputy Counsel of appellee Texas Health & Human Services Commission's Office of the Inspector General (OIG), sued the Commission and its Executive Commissioner in his official capacity alleging violations of the Texas Whistleblower Act and other claims.

McMillen had prepared a memorandum regarding "the legality of the Commission's practice of obtaining payments from certain recipients of Medicaid benefits"; gave the memorandum to Karen Nelson, who was "a Deputy Inspector General for the Commission"; and made another report regarding the practice to "the head of the OIG Internal Affairs Division" and "the Commission's Executive Commissioner." Several months later, McMillen was fired.

Previously, the Austin court of appeals reversed the trial court's denial of the plea to the jurisdiction of the Commission and its Commissioner and dismissed McMillen's claims for lack of jurisdiction, concluding that a report of a violation of federal civil Medicaid law to supervisors and other employees higher up the chain of command at the OIG was not a report of a violation of law to an appropriate law enforcement authority. McMillen appealed, and the Texas Supreme Court ultimately held that the OIG was "an appropriate law-enforcement authority" to report the Commission's alleged violation of the federal civil Medicaid law, and

remanded the case to this Court with instructions to "consider the remaining elements of this Whistleblower claim." His report to an internal inspector general's office was sufficient, but only because the inspector was charged with enforcement of a law as against everyone, both inside and outside the organization. The Court explained that "the OIG ... has outward-looking powers" and "has authority regarding those who handle funds contrary to the laws the OIG is charged with enforcing, whether or not the violators are within the Commission."

Considering the remaining elements of McMillen's Whistleblower claim, the Supreme Court's directive, and the jurisdictional evidence and pleadings, the court of appeals concluded that the trial court has jurisdiction to consider this claim, and affirmed the trial court's order denying the Commission's plea to the jurisdiction as to the Whistleblower claim.

- *In re Liebbe*, No. 05-15-01078-cv, 2016 WL 3346047 (Tex. App. – Dallas June 15, 2016, pet. denied)

Liebbe worked for Dallas ISD as the manager of its Professional Standards Office, reporting directly to Tonya Grayson, the Executive Director of Human Capital Management. In July of 2014, Liebbe discovered that Grayson had failed to disclose her criminal history in her job application, which was a direct violation of DISD policy. Liebbe contacted Freddie Jackson, a DISD employee that provided transportation for DISD Superintendent Mike Miles, telling Jackson he needed to speak to Miles to give him the opportunity to take corrective action. The next day, DISD's Chief of Human Capital Management, Carmen Darville, handed Liebbe a letter informing him that he was being placed on administrative leave; no reason was provided for DISD's action.

On August 26, 2014, Liebbe filed a written complaint with the Texas Education Agency reporting potential violations of the education code, the penal code, and the administrative code. Liebbe filed a similar complaint on September 3, 2014 with the DISD Board of Trustees. Two days later, Liebbe was notified that he was being terminated

In February 2015, Liebbe filed a verified petition to take pre-suit depositions to investigate a potential claim. Liebbe stated in his petition that he suspected he was terminated because of his attempt to report to Miles Grayson's failure to disclose her criminal history, and because he filed a complaint with the TEA and the DISD Board of Trustees. DISD asserted that the court lacked subject matter jurisdiction to order the requested discovery because Liebbe failed to plead facts sufficient to establish a waiver of DISD's immunity from suit. After a hearing, an associate judge denied Liebbe's petition, stating that Liebbe had failed to establish a basis for concluding his potential whistleblower claim would not be barred by governmental immunity. After a de novo hearing, the trial court affirmed, and Liebbe appealed.

The court stated that while civil procedure Rule 202 does allow a person to petition the court for an order authorizing a deposition, a person generally "cannot obtain by Rule 202 what it would be denied in the anticipated action." A court must have subject matter jurisdiction over the anticipated action for a party to properly obtain rule 202 presuit discovery.

The Court focused on whether Superintendent Miles was an appropriate law enforcement authority. An authority's power to discipline its own or investigate internally does not support a good faith belief that the authority is an appropriate law enforcement officer. The authority must have "outward-looking powers," the ability to enforce, investigate, or prosecute violations of the law against third parties outside of the entity itself. The court held that there was no evidence that Liebbe believed Superintendent Miles had authority to enforce the district policy outside the school district, and that Miles' authority to regulate conduct within DISD was insufficient to confer law enforcement authority status.

- *Pulkrabek v. Univ. of Tex. Southwestern Medical Center*, No. 05-14-01341, 2016 WL 3004476 (Tex. App. – Dallas May 25, 2016, pet. denied)

Plaintiff was employed by UTSW as manager of its Institutional Animal Care and Use Committee. Plaintiff's job duties included monitoring compliance with National Institute of Health ("NIH") guidelines and reporting any violations to the NIH Office of Laboratory Animal Welfare ("OLAW"). In January 2012, Plaintiff informed an internal UTSW department that it was non-compliant with guidelines pertaining to the humane testing of animals. After the department failed to address the issue, Plaintiff reported the violations to OLAW. Within a week of her report, UTSW placed Plaintiff on administrative leave, and then terminated her employment on August 31, 2012.

Plaintiff sued UTSW asserting a claim under the Texas Whistleblower Act. Plaintiff claimed she was terminated for reporting the violations to OLAW. The trial court granted UTSW's plea to the jurisdiction and dismissed Plaintiff's claim with prejudice. Plaintiff appealed, arguing that the trial court erred in granting UTSW's plea because she alleged sufficient jurisdictional facts to establish waiver of governmental immunity under the Act.

Plaintiff argued that under the Health Research Extension Act of 1985 ("HREA"), OLAW is an appropriate law enforcement authority because it "enforces" allegations of noncompliance with the

federal policy guidelines for the care of animals involved in medical research and testing. The court noted, however, that HREA fails to identify OLAW or its enforcement or regulatory powers. Instead, "HREA grants authority to the Health and Human Services secretary, acting through the NIH director, to establish guidelines and authorizes the NIH director to revoke grants or contracts for failure to meet those guidelines." Plaintiff also relies on the Public Health Service ("PHS") Policy of Humane Care and Use of Laboratory Animals to support her position. However, the court stated that this is merely a policy and not a law. Affirming the decision of the lower court, the court held that Plaintiff did not establish a waiver of UTSW's governmental immunity because the PHS Policy is not law and OLAW is not an appropriate law enforcement authority for purposes of the Texas Whistleblower Act.

- *Loer v. City of Nixon*, No. 13–14–00582–CV, 2015 WL 9257031 (Tex. App.—Corpus Christi-Edinburg Dec. 17, 2015, no pet.)

In this case, the court of appeals held that Loer's report of alleged violations of law by the chief of police *to the chief of police* was not a report to an appropriate law enforcement authority. The court wrote that: "[w]e conclude that an experienced peace officer, such as Loer, could not reasonably believe that the wrongdoer receiving such a report would investigate or prosecute his own violations of the law." The court of appeals relied, in part, on *County of Bexar v. Steward*, 139 S.W.3d 354 (Tex. App.–San Antonio 2004, no pet.), quoting that "a peace officer's actions should be more closely examined in evaluating the officer's good faith belief that his report was to an appropriate law enforcement authority."

- *Univ. of Texas at Austin v. Smith*, No. 03–14–00509–CV, 2015 WL 7698091 (Tex. App.—Austin Nov. 25, 2015, no pet.)

The court of appeals decided this case based on Supreme Court precedent discussed below concerning who qualifies as an appropriate law enforcement authority under the Texas Whistleblower Act. More specifically, the court of appeals held that Smith's reports to the University's Office of Internal Audits were not reports to an appropriate law enforcement authority and that she did not have a reasonable good faith belief that they were. Smith acknowledged that she believed that Internal Audits could only enforce matters internally and lacked any outward-looking authority to regulate third parties, and that she believed that Internal Audits would forward her reports to authorities who would be, presumably, appropriate law enforcement authorities. Under several Supreme Court cases discussed below, these are precisely the factors that demonstrate that Smith did not make a report to an appropriate law enforcement authority. Moreover, relying on *Weatherspoon* (below), the court of appeals found of no consequence that the University of Texas System contains a Police Department, as its existence does not convert Internal Audits into an appropriate law enforcement authority.

- *Office of Attorney General v. Weatherspoon*, 472 S.W.3d 280 (Tex. Sept. 18, 2015) (per curiam)

In this case, the Supreme Court reversed the Austin court of appeals and dismissed Weatherspoon's case because she had not made a report to an appropriate law enforcement authority. The Supreme Court held that reports of alleged violations of law made to supervisors with power only to oversee internal compliance within an entity, even if the supervisors must forward the complaints to another department with outward looking authority to regulate under or enforce the law alleged to be violated or investigate or prosecute criminal violations against third parties are not reports to an appropriate law enforcement authority under the Texas Whistleblower Act. This is true even when the employer's official policy requires employees to follow that process. In such situations, the employee may have a good faith belief that reports of alleged wrongdoing will be sent to an appropriate law enforcement authority, but not that the supervisors receiving the employee's report are appropriate law enforcement authorities. The Court considered this case very similar to *Texas Department of Human Services v. Okoli*, 440 S.W.3d 611 (Tex. 2014).

Additionally, the Court noted that simply because some of an employer's divisions investigate and prosecute crime does not convert the entire employer into an appropriate law enforcement authority.

Also, the Court responded to Weatherspoon's argument that, if following policy which required her to make reports to her supervisor was insufficient under the Whistleblower Act, then employees have no safe way of reporting alleged violations of law. The Court explained that a governmental employer may not by policy do what the Whistleblower Act prohibits: discipline an employee for making a protected report.

- *Ezell v. Wells*, No. 2:15–CV–00083–J, 2015 WL 4191751 (N.D. Tex. July 10, 2015)

In this case, the federal district court held that a report to a sheriff's department of alleged civil law violations (unlawful employment discrimination and unlawful deprivation of civil rights of prisoners) did not constitute reports of violations of law to an appropriate law enforcement authority, unless the plaintiffs, in good faith, believed them to be "the appropriate

entities to report employment discrimination and federal civil rights violations to." At the motion to dismiss stage, "allegations that the employee reasonably believed he was reporting violations to the appropriate law enforcement authorities are sufficient to survive a motion to dismiss."

- *TCEQ v. Resendez*, 450 S.W.3d 520 (Tex. Nov. 21, 2014)

Reports of alleged violations of law to supervisors, the TCEQ director of air quality division, and to a state senator's office were not reports to an "appropriate law enforcement authority." Resendez, a thirty-four year TCEQ employee, was given the job of investigating the location of a vehicle purchased with Texas Emissions Reduction Plan, a program administered by the TCEQ. When she discovered that the owner had been deported to Mexico, she told supervisors that "individuals who were in the country illegally" were receiving TERP funds. She also made the same report to Senator Hinojosa's office.

Relying on its previous decision in Okoli that held that internal reports are not reports to appropriate law enforcement authorities, even when said reports are required to be passed on to the agency's enforcement arm, the court held that Resendez's internal reports were not made to appropriate law enforcement authorities. Internal compliance authority "cannot support a good-faith belief that [a supervisor] had the power to enforce the Government Code's fraud reporting provisions or to pursue criminal charges." Resendez's report "was an internal report up a chain of command, and we have consistently held that such reports are insufficient under the Act."

The Court noted that no one in TCEQ's fraud investigation program was empowered to enforce any law, the program was tasked with investigating fraud on the part of TERP-find grantees, "not with reporting omissions on the part of TCEQ employees," and there was no evidence that Resendez knew of the fraud investigation program when she made her reports or that the program existed during her employment with the TCEQ.

With regard to the report to Senator Hinojosa's office, the Court found that to also be insufficient under the Act. The Court noted that the Act restricts "'law[-]enforcement authority' to its commonly understood meaning," and that a state senator's role was to create laws, not enforce them. Resendez argued that Senator Hinojosa, as a member of the Senate and the Texas Legislative Council, had authority to investigate activities of state agencies. The Court responded that, "[m]ere investigatory power is insufficient, however; the Act requires the power to investigate criminal violations." Resendez's allegations of wrongdoing concerned alleged criminal violations, but any investigatory power Senator Hinojosa had was legislative, not prosecutorial. Moreover, the Court noted that Senator Hinojosa was not a member of the Texas Legislative Council at the time of Resendez's reports and reasoned that his future service did not save Resendez's argument. The Court noted that there was no objectively reasonable basis "for the belief that a member of the Texas Legislature has the power to enforce any law or engage in a criminal investigation." Additionally, the Court noted that Resendez's 34 years of work in Texas government renders any such belief all the less reasonable.

- *Ellis v. Lubbock County Hospital District d/b/a University Medical Center*, No. 07-13-00368, 2014 WL 6478627 (Tex. App. – Amarillo Nov. 19, 2014, pet. denied)

A hospital professional's report of alleged unlawful conduct to hospital officials, supervisors, and the hospital's compliance department did not constitute reports to an appropriate law enforcement authority, nor could the official in good faith have believed that they were.

Ellis, a surgical technologist, observed a surgical procedure where the surgeon removed tissue from the patient, and, in an act of horseplay, he tossed it to a surgical tech who tossed it back to the surgeon. Ellis believed the conduct she witnessed constituted criminal assault, negligence, malpractice, an ethical breach, and that it violated various rules and regulations of the hospital.

Ellis immediately reported her observation to the team coordinator, then a person she believed to be the hospital's head of education, then a person described as "second in charge," and then to the hospital compliance hotline. Shortly thereafter, Ellis was "essentially blackballed" by the hospital, and fired a few weeks after making the report.

None of those to whom Ellis reported the alleged wrongful conduct could have investigated or prosecuted her complaints outside of the hospital. In her deposition, Ellis acknowledged this limitation, testifying that 'in the hospital, you go through chain of command and they take care of it."

- *Hunt County Community Supervision and Corrections Dept. v. Gaston*, 451 S.W.3d 410 (Tex. App. – Austin Sept. 19, 2014, pet. filed)

A state district court judge is not an appropriate law enforcement authority under the Texas Whistleblower Act for reporting alleged violations of § 42.12, Texas Code of Criminal Procedure, and § 39.02, Texas Penal Code.

Gaston, a probationary supervision court officer for the Hunt County Community Supervision and Corrections Department (HCCSCD), served as a representative of HCCSCD in Hunt County criminal cases involving probationers. Community supervision and corrections departments (CSCDs) serve the district courts handling criminal cases within the district. CSCDs are established by, and operate under the oversight of, a committee or board comprised of the district's presiding judges. Gaston alleges that she was terminated for divulging to one such judge, Judge Tittle, that other personnel had engaged in illegal conduct – accepting payment in lieu of actual service of probationary hours.

The court's analysis focused on whether Judge Tittle was an appropriate law enforcement authority for the alleged violations of law reported under the Texas Whistleblower Act. Gaston argued that the Judge had oversight power, but the court found that Gaston failed to evidence an objective good faith belief that Judge Tittle was an appropriate law enforcement authority. The court found that the Act's definition of "appropriate law enforcement authority," and the component phrase "authorized to … regulate under or enforce the law alleged to be violated in the report," was not intended to encompass a court's authority to apply the reported-about "law" in the cases and proceedings before it.

It should be noted that one justice issued an extensive dissenting opinion concerning whether the district court judge constitutes an appropriate law enforcement authority, and this specific question has not been decided by the Texas Supreme Court.

- *Texas Department of Human Services v. Okoli*, 440 S.W.3d 611 (Tex. Aug. 22, 2014)

A report by an employee to a supervisor who was required to forward that report to a part of the state agency with outward-looking law-enforcement authority was not a good faith report to an appropriate law enforcement authority under the Texas Whistleblower Act.

This decision, that a report to a supervisor who would then have to report the alleged violation to an appropriate law enforcement authority, rests on the Supreme Court's previous decisions in, for example, *Texas Dep't of Transportation v. Needham*, 82 S.W.3d 314 (Tex. 2002), *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello*, 398 S.W.3d 680 (Tex. 2013), *Ysleta Indep. Sch. Dist. v. Franco*, 417 S.W.3d 443 (Tex. 2013) (per curiam), *Canutillo Indep. Sch. Dist. v. Farran*, 409 S.W.3d 653 (Tex. 2013) (per curiam).

The Texas Department of Human Services (TDHS) includes the Office of Inspector General (OIG) charged with investigating and enforcing violations of law or fraud. Okoli reported wrongdoing to her supervisors who did not have law enforcement authority. Okoli did not make a report directly to the OIG. For Okoli's reports to have reached an appropriate law-enforcement authority, Okoli's supervisors would have had to forward them to the OIG for prosecution. The Court found that there is no reason why a TDHS supervisor is any more likely to pass on a report to the OIG than the university administrators in *Gentilello* were to pass on reports of violations of federal law to federal authorities.

- *University of Houston v. Casey*, 439 S.W.3d 463 (Tex. App. – Houston [1st Dist.] July 3, 2014, pet. denied)

A professor who made reports to school officials of another professor's alleged illegal acts could not show that he had a reasonable belief that the school officials were appropriate law enforcement authorities.

In October, 2011, Casey reported to the Assistant Vice President for Faculty Affairs, the Vice President of Legal Affairs, and the Chief Audit Executive that another professor had taken a consulting trip that violated the University's Manual of Administrative Policies and Procedures (MAPP) and state law. Casey did not make any other reports or contact anyone outside the University.

On August 17, 2011, Mark Smith, Dean of the College removed Casey, a tenured professor of geology at the University, from his position as Chairman of the Department of Earth and Atmospheric Sciences. Casey alleged that this was in retaliation for his reports regarding the other professor.

The Court concluded that Casey failed to raise a material fact issue regarding whether he had an objective reasonable belief, based on his training and experience, that the school officials were appropriate law enforcement authorities.

- *City of Sachse v. Wood*, No. 05-13-00773-CV, 2014 Tex. App. LEXIS 3325 (Tex. App. – Dallas March 26, 2014, pet. filed)

A claimant must have a good faith belief that he reported a violation of the law to an appropriate law enforcement authority, which must be someone with authority to enforce that particular law.

Wood, an officer in the City's fire department, reported deficiencies in paramedics' inventory and paperwork to Knappage, his supervisor and the officer in charge of the City's emergency medical services operations. After his termination, Wood sued the City claiming violation of the Texas Whistleblower Act, alleging that he made reports to an appropriate law enforcement authority because he reported violations of law to Knappage, who, as a peace officer, would

have a duty to report the violations that Wood reported to the district attorney.

The court rejected Wood's argument, explaining that the DSHS is the agency empowered to take disciplinary action for violations of the Texas Emergency Health Care Act. The court found that nothing in the record indicated that Wood could have, in good faith, believed Knappage's status as a peace officer made him an appropriate law enforcement authority authorized to investigate or prosecute the particular violation reported. An appropriate law enforcement authority must have the authority to regulate, enforce, investigate, or prosecute the particular law violated; general authority is not enough.

The court dismissed Wood's whistleblower claim for lack of subject matter jurisdiction.

- *Nieto v. Permian Basin Community Centers for MHMR*, No 11-13-00012-CV, 2014 Tex. App. LEXIS 1003 (Tex. App. – Eastland Jan. 30, 2014, no pet.)

An employee did not report a violation of law to an appropriate law enforcement authority under the Texas Whistleblower Act when she reported alleged violations of Medicaid/Medicare regulations to the executive director and compliance officer of her company.

Relying on *Ysleta ISD v. Franco*, the court explained that an appropriate law enforcement authority must actually be responsible for regulating or enforcing the law allegedly violated, not merely responsible for ensuring internal compliance with the law. In determining that Nieto did not have an objectively reasonable belief that the executive director and compliance officer of her company were appropriate law enforcement authorities under the Act, the court considered Nieto's age and college education.

The court affirmed the order of the trial court granting the defendant's plea to the jurisdiction.

- *Ngo v. Green*, No. H-13-3423, 2014 U.S. Dist. LEXIS 9989 (S.D. Tex. Jan. 28, 2014)

An employee's report of alleged misuse of government property, made to the City Controller, was jurisdictionally insufficient under the Texas Whistleblower Act, Tex. Gov't Code §554.001.

Ngo, an Assistant City Auditor with the City of Houston, reported alleged misuse of a City computer to his supervisor, the City Auditor, who shared Ngo's report with the City Controller. The following month, Ngo was suspended from his position with the City. Ngo claimed that the Controller and the City violated the Texas Whistleblower Act by suspending him.

The court, relying on *Ysleta ISD v. Franco*, dismissed Ngo's whistleblower claim explaining that reports to an individual who has authority only for internal compliance are insufficient to state a claim under the Texas Whistleblower Act.

- *Ysleta Independent School District v. Franco*, 417 S.W.3d 443 (Tex. Dec. 13, 2013)

Under the Texas Whistleblower Act, a report of alleged violations of law made to a chief academic officer charged only with internal compliance is jurisdictionally insufficient.

Franco, a principal at a pre-kindergarten academy in the Ysleta Independent School District sent a memorandum to his immediate supervisor, the chief academic officer, reporting various asbestos hazards. Eventually, the District indefinitely suspended Franco, and he filed a whistleblower claim. The District filed a plea to the jurisdiction, which was denied by the courts below.

The Supreme Court reversed, explaining that under the Texas Whistleblower Act, a report to someone charged only with internal compliance is jurisdictionally insufficient. Additionally, the Court held that Franco failed to show that he had an objective, good-faith belief that the District's chief academic officer qualifies as an appropriate law-enforcement authority under the Act.

- *Canutillo Indep. Sch. Dist. v. Farran*, 409 S.W.3d 653 (Tex. Aug. 30, 2013)

Complaints to a school superintendent, an assistant superintendent, an internal auditor, and the school board about alleged misconduct of a third party with whom the district contracted are not good-faith complaints of a violation of law to a law enforcement authority under the Texas Whistleblower Act.

Yusuf Farran allegedly observed employee theft and falsification of time cards, as well as that Cesspool Services, a contractor, was allegedly overpaid, did not dispose of grease-trap waste as per the terms of its contract with the district, and violated state law regarding the regulating and use of government funds and city regulations governing waste. Farran reported these alleged improprieties to the superintendent, assistant superintendent, internal auditor, and to the Board of Trustees. Some trustees were displeased with the reports and one threatened Farran's job if he continued to complain about the grease-trap issues.

Later, Farran was suspended for threatening calls that he made on his own time, away from work, to a man who he suspected was having an inappropriate relationship with Farran's wife. Farran was proposed for termination based on several grounds. After the due process hearing, which resulted in the hearing officer finding good cause for the termination, the Board terminated Farran.

The Supreme Court found that Farran's reports were not good-faith complaints of a violation of law to a law enforcement authority, as there "is no evidence that these officials had authority to enforce the allegedly violated laws outside of the institution itself, against third parties generally." The only evidence Farran offered was that district officials were responsible for internal compliance with the laws. There was no evidence of an objective, good-faith belief that school officials to whom Farran complained had authority to "enforce, investigate, or prosecute violations of law against third parties" or had authority to "promulgate regulations governing the conduct of such third parties." The Court re-stated a previous holding that "[a]uthority of the entity to enforce legal requirements or regulate conduct within the entity itself is insufficient to confer law-enforcement authority status," even when the recipient of the complaint can investigate and punish noncompliance internally.

- *Univ. of Tex. Southwestern Med. Ctr. at Dallas v. Gentilello*, 398 S.W.3d 680 (Tex. Feb. 22, 2013)

An employee's report to a supervisor is not a report to an appropriate law enforcement authority under the Whistleblower Act, where the employee knows his supervisor's power extends only to ensuring internal compliance with the law purportedly violated. Other states' whistleblower laws accommodate internal reports to supervisors; Texas law does not.

Dr. Larry Gentilello, a professor of surgery at The University of Texas Southwestern Medical Center (UTSW), occupied distinguished chair positions in the Burn, Trauma and Critical Care Division. After he raised concerns with his supervisor, Dr. Robert Rege, about lax supervision of trauma residents at Parkland Hospital, a hospital served by UTSW—that residents were treating and operating on patients without proper supervision "contrary to proper Medicare and Medicaid requirements and procedures"—Gentilello was stripped of his faculty chair positions. He then filed a whistleblower suit, alleging that the demotion was in retaliation for his reports of violations of unspecified federal patient-care and resident-supervision rules.

The Texas Supreme Court found that Gentilello knew his supervisor's power extended only to ensuring internal compliance with the law purportedly violated. That is, the supervisor, while overseeing internal adherence to the law, was empowered only to refer suspected violations elsewhere and lacked free-standing regulatory, enforcement, or crime-fighting authority.

The Texas Supreme Court held that the Act's constricted definition of a law-enforcement authority requires that a plaintiff's belief be objectively reasonable. Therefore, "purely internal reports untethered to the Act's undeniable focus on law enforcement—those who either make the law or pursue those who break the law—fall short." The jurisdictional evidence must show more than a supervisor charged with internal compliance or anti-retaliation language in a policy manual urging employees to report violations internally. For a plaintiff to satisfy the Act's good-faith belief provision, the plaintiff must reasonably believe the reported-to authority possesses what the statute requires: the power to (1) regulate under or enforce the laws purportedly violated, or (2) investigate or prosecute suspected criminal wrongdoing. Since Gentilello could not provide evidence of any objectively reasonable belief in such power, the Supreme Court reversed the court of appeals' judgment and dismissed the case for lack of jurisdiction.

For an entity to constitute an appropriate law-enforcement authority under the Act, it must have authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties. Authority of the entity to enforce legal requirements or regulate conduct within the entity itself is insufficient to confer law-enforcement authority status.

IV. ILLEGAL ACTS BY A PUBLIC EMPLOYEE

For a whistleblower claim, there must be some law prohibiting the complained of conduct. *Phelan*, 2008 Tex. App. LEXIS at *8-*9 n. 2 citing *LLanes v. Corpus Christi Independent School District*, 64 S.W.3d 638, 642-43 (Tex. App.--Corpus Christi 2001, pet. denied).

- *Neighborhood Centers Inc. v. Walker*, No. 01-14-00844-CV, 2016 WL 3345484 (Tex. App. – Houston [1st Dist] – May 24, 2016, pet. filed)

Neighborhood Centers, a private, non-profit corporation that provides services to low-income communities in Houston, also operates the Promise Community School, an open-enrollment charter school established pursuant to Texas Education Code chapter 12.

Walker was hired to work as a third-grade teacher at the Promise Community School. She alleged that while employed with Neighborhood Centers, she observed health code violations and various testing irregularities, which she described as "cheating irregularities," "special education testing irregularities," and untimely provision of Individual Education Plans. Walker eventually filed a workers' compensation claim for health issues that she asserts were caused by the health code violations that she observed.

Walker alleges that after filing the workers' compensation claim, she was demoted and reassigned to an Interventionist and Girl Scout Leader. Walker's workers' compensation claim was then denied. Walker then reported her observations regarding testing violations and health code violations to the Texas Education Agency and the Texas Health Department. She asserted that once these reports came to light, Neighborhood Centers terminated her employment.

Walker then filed suit, bringing claims of, among other things, retaliation under the Whistleblower Protection Act. Neighborhood Centers filed a plea to the jurisdiction, arguing that it was not a "political subdivision" or "local governmental entity" under the Whistleblower Protection Act. The trial court denied the plea as to the claim under the Whistleblower Protection Act, and Neighborhood Centers appealed.

On appeal, Neighborhood Centers argued that charter schools are not a political subdivision under the Act, because it does not have the characteristic of a state governing board or traditional powers of subdivisions of the state, such as the power to assess and collect taxes, an elected governing body, or jurisdiction over a portion of the state.

The court of appeals held that Neighborhood Centers' immunity from Walker's suit against it under the Whistleblower Act is expressly waived by the Whistleblower Act and the Education Code.

In construing the applicable statutes, the court noted that (1) the Whistleblower Act expressly states that it applies to public school districts, (2) the Education Code expressly provides that a charter school is subject to federal and state laws and rules governing public schools, (3) the Whistleblower Act contains an express waiver of immunity that applies to public schools, and (4) the recent amendment of Education Code Section 12.1056 provides that charter schools are immune from liability and suit to the same extent as public schools. Therefore, the court concluded that the legislature clearly expressed its intention that the Whistleblower Act applies to open-enrollment charter schools just as it applies to public schools.

- *City of Houston v. Smith*, No. 01-14-00789-CV, 2015 WL 4967020 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015, no pet.)

In this case, the court lacked subject-matter jurisdiction over the Smith's Whistleblower Act claim because he did not report a violation of law by a public employee. Instead, Smith's reports of alleged violations of law were by an independent contractor and independent contractors are explicitly not covered by the Whistleblower Act. In other words, the court found that Smith was unable to meet his burden of showing that he reported a violation of law by "the employing governmental entity or another public employee." The Act defines "public employee" as "an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity." The reports of alleged violations of law were against an independent contractor and the Whistleblower Act did not apply.

- *Lubbock-Crosby County Community Supervision and Corrections Dept. v. Lance*, Cause No. 07-14-00222-CV, 2014 WL 7369938 (Tex. App.—Amarillo Dec. 22, 2014, no pet.)

In this case, the court held that Lance had failed to establish that he had reported a violation of law and, therefore, the court lacked subject matter jurisdiction over his Whistleblower claim. Lance reported to law enforcement that "CPS failed to make a nonemergency removal of a child." In the litigation, Lance argued that CPS conduct constituted a violation of 11 statutes. The court, however, noted that a review of the evidence established that he did not report any conduct that would violate any of the 11 statutes. In other words, "Lance failed to specify any law that CPS violated by the conduct that he reported to law enforcement."

Interestingly, the court found it significant that Lance knew that what CPS could do to effect a nonemergency removal is to file papers with a court, and that CPS did not have authority to remove the child in question from the home. The court noted that "the conduct that Lance reported was not CPS's failure to remove the child but, rather, CPS's failure to ask the appropriate court for the authority to remove the child. Because CPS's authority to perform the action reported by Lance to law enforcement is dependent on obtaining authority from a third-party, a fact Lance knew due to his prior employment with CPS, we cannot conclude that Lance's report to law enforcement was a good faith report of a violation of a legal duty owed by CPS."

- *Hernandez v. Dallas Indep. Sch. Dist.*, Cause No. 3:14-CV-0022-BK, 2014 WL 7231929 (N.D. Tex. Dec. 17, 2014)

In this case, the district court granted a motion to dismiss a whistleblower act claim because Hernandez could not reasonably identify which law had been violated. The court noted that, although he identified § 31.029 of the Education Code in his pleading, which provides for the purchase of instructional materials for bilingual classes, he could not connect that law to his many complaints to the TEA, OPR, or CPS. Additionally, Hernandez also claimed retaliation for three letter complaints he submitted, only one of which included a "statutory citation – '19 TAC Chapter 89.'"

The court described this as being to "a large collection of rules regarding adaptations for special populations," and noted that Hernandez failed to cite any specific provisions allegedly violated. Hernandez, who brought the claim *pro se*, was allowed leave to replead.

- *Bell County v. Kozeny*, No.10-14-00021-CV, 2014 WL 4792656 (Tex. App. – Waco, Sept. 25, 2014, pet. filed)

Even though a plaintiff has the burden of identifying the specific law that he alleges was violated, a court may allow the plaintiff to replead if this deficiency is curable in response to a defendant's plea to the jurisdiction.

Kozeny's live pleading asserted that the alleged wrongdoing that he reported, "falsification of training records to the State of Texas for licensing of Bell County employees," "is a crime." While Bell County correctly argued in its plea to the jurisdiction that this conclusory statement does not satisfy the requirement to identify the specific law or laws that he alleges were violated, the Court allowed Kozeny to replead, since the pleading defect was curable.

- *Fannin County Community Supervision and Corrections Department v. Spoon*, No. 06-13-00103-CV, 2014 WL 3513388 (Tex. App. – Texarkana Sept. 23, 2014, pet. filed)

A county's personnel policy manual can be considered a law under the Texas Whistleblower Act on which a protected report can be made under the Act.

Spoon allegedly made a number of reports to the District Attorney concerning alleged illegal activity taking place within her department. An issue arose in the case as to which rules Spoon could claim were violated that would be considered a law under the Texas Whistleblower Act.

The court noted that, under § 554.001(1), Texas Government Code, "a rule adopted under a statute or ordinance of a local governmental entity constitutes a law under the Act." As applicable to this matter, the court noted that § 76.002(a) of the government Code gives judges the authority to establish a community supervision and corrections department, such as the one within which Spoon worked and about which she allegedly made whistleblower reports. Section 76.006 provides that "employees are governed by personnel policies and benefits equal to personnel policies for and benefits of other employees of that county."

With regards to this case, Spoon was governed by the Fannin County personnel policies and procedures. The court noted that § 158.009 of the Texas Local Government Code allows a Commissioner's Court to "'adopt publish, and enforce rules regarding:…matters relating to the selection of county employees and their procedural and substantive rights, advancement, benefits, and working conditions of county employees.'" The Fannin County Commissioner's Court had adopted Section 3.09 of the County Personnel and Policy Manual prohibiting the very activities Spoon reported to the District Attorney. For these reasons, the court found that Section 3.09 of the Policy Manual was a law under the Texas Whistleblower Act.

- *Tex. Dep't of Aging & Disability Servs. v. Huse*, No. 10-13-00244-CV, 2014 WL 2463082, (Tex. App. – Waco May 8, 2014, no pet.)

A State of Texas employee's report that her employer had not complied with a Settlement Agreement between the United States of America and the State of Texas was not a report of a violation of a law.

Under the Whistleblower Act, an employee is required to show that she in good faith: 1) reported a violation of law, 2) to an appropriate law enforcement authority. "Law" as used in Section 554.002(a) is defined as: (A) a state or federal statute; (B) an ordinance of a local governmental entity; or (C) a rule adopted under a statute or ordinance. Tex. Gov't Code Ann. § 554.001(1).

The Settlement Agreement was not a "law" as defined in Section 554.001(1). It was an agreement between the United States and the State of Texas. The Settlement Agreement by its terms was a voluntary effort by the State to meet the concerns of the Department of Justice and to avoid costly litigation.

- *Dallas Independent School District v. Watson*, No. 05-12-00254, 2014 Tex. App. LEXIS 2383 (Tex. App. – Dallas Feb. 28, 2014, pet. filed)

Under the Texas Whistleblower Act, a school district employee's report of a belief that conduct might happen in the future that might violate the law does not amount to a good-faith report of an existing or past violation of law.

Watson worked as a plumber for DISD for nineteen and a half years until he was terminated in 2007. On July 11, 2007, Debbie Pruitt, Watson's supervisor, notified him to stop his normal duties and start gas tests at schools in their division, and she allegedly demanded that Watson do three tests a day. Watson and his co-worker completed one test that day. The next day, a heated argument ensued between Pruitt and Watson over Watson's progress on the gas tests. On July 13, Watson called the Texas Railroad Commission (TRC) and later the Texas State Board of Plumbing Examiners (TSBPE), to inform them he was being pressured into doing gas tests in an unsafe, hurried-up manner. On July 16, Watson was informed that he was being taken off the gas tests. Shortly

thereafter, he was notified that his employment was being terminated due to his insubordination and hostile and belligerent behavior.

Watson filed suit, claiming he was terminated in violation of the Texas Whistleblower Act. The trial court denied DISD's plea to the jurisdiction, the case went to trial, and in accordance with the jury's verdict, the court entered judgment in favor of Watson. The court of appeals reversed the trial court's judgment and dismissed the case for lack of subject-matter jurisdiction. Watson's allegations merely recited his prediction that completing three gas tests on a single day in the future might be "unsafe" and "hurried-up." A report of belief that laws might be violated in the future is not a good-faith report of existing or past violation of law required to support a claim under the Texas Whistleblower Act.

- *College of the Mainland v. Meneke*, No. 14-12-01056-CV; 2014 Tex. App. LEXIS 740 (Tex. App. – Houston [14th Dist.] Jan. 23, 2014, no pet.)

Reports of violations of unspecified internal administrative policies, as opposed to violations of law, cannot serve as the basis for a viable whistleblower claim.

In his capacity as the Information Security Officer of the College of the Mainland, Douglas Meneke reviewed the college's information security practices. Based on his review, Meneke reported to his supervisor, the college's Chief Information Security Officer and Associate Vice President of Information Technology Services, and to auditors from the Texas Higher Education Coordinating Board, that the college's Director of IT Applications for Financial Services had inappropriate programming access to the college's computer system and that he believed the college's count of nursing students was inflated.

The college later terminated Meneke's employment for various reasons that the college considered good cause, and Meneke sued the college asserting a claim for retaliatory discharge under the Texas Whistleblower Act. The college filed a plea to the jurisdiction seeking dismissal of Meneke's suit, which the trial court denied.

While there is no requirement that an employee identify a specific law when making a report, there must be some law prohibiting the complained-of conduct, and the law must be a state or federal statute, an ordinance, or a rule adopted under a statute or ordinance. Other complaints, including alleged violations of an agency's internal procedures and policies, will not support a claim. Meneke's reports of "inappropriate access" to the college's computer system by certain employees and of "data being changed inappropriately" by a college employee – essentially violations of college policy – do not amount to violations of law the establish a valid whistleblower claim. Further, Meneke's assertion that the complained-of conduct amounts to "falsification of data" in violation of Tex. Penal Code Ann. § 37.10 fails because he could not meet the requirement of showing that the conduct was done knowingly or intentionally.

Therefore, the court of appeals reversed the trial court's order denying the college's plea to the jurisdiction, and rendered judgment dismissing the suit for lack of subject matter jurisdiction.

- *Univ. of Houston v. Barth*, 403 S.W.3d 851 (Tex. 2013)

A university's administrative policies are not "law" under the Whistleblower Act when the policies are not enacted by the board of regents, as required by the university's enabling statute. Conversely, rules enacted by the board of regents under an enabling statute "are of the same force as would be a like enactment of the legislature." *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805, 808 (Tex. 1932).

Barth, a professor at the University of Houston, and formerly a practicing attorney, was unable to rely on the University's administrative policies as "law" under the Whistleblower Act. The Supreme Court found that the University's administrative policies are not "law" under the Whistleblower Act when the policies are not enacted by the Board of Regents, as required by the University's enabling statute. Additionally, Barth could not establish a good faith reliance on the law. "While Barth's belief satisfies the subjective prong, we hold that Barth failed to satisfy the objective prong given his legal training, experience as a former practicing attorney, and familiarity with the University's rules from serving on the faculty senate." Therefore, the trial court lacked jurisdiction over the portion of Barth's claims related to administrative policies.

In reaffirming their earlier decision in *Univ. of Tex. Southwestern Med. Ctr. at Dallas v. Gentilello*, 398 S.W.3d 680, 686-87 (Tex. 2013), the Court found that "Barth could not have believed in good faith . . . that the University's general counsel, CFO, internal auditor, or associate provost possessed the power to either (1) regulate or enforce state civil law relating to the University's contracting with third parties or (2) prosecute or investigate the alleged criminal law violations."

Further, compliance with the university's policy for reporting suspected criminal activity to a school official combined with the possibility that the report would be forwarded to the university police did not constitute a report to an appropriate law enforcement authority.

Finding that the trial court lacked a basis for subject matter jurisdiction over the entirety of Barth's claims, the Supreme Court summarily reversed the court of appeals and dismissed Barth's suit against the University.

V. CAUSAL LINK BETWEEN A QUALIFYING REPORT AND AN ADVERSE EMPLOYMENT ACTION

For a whistleblower case, an employee need not prove that his report of the illegal conduct was the sole reason for the employer's adverse action. *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 634 (Tex. 1995); *City of Fort Worth v. Zimlich*, 975 S.W.2d 399, 406 (Tex. App. – Austin 1998) (*Zimlich I*), *rev'd in part on other grounds*, 29 S.W.3d 62, 43 Tex. Sup. Ct. J. 972 (2000). Rather, to show causation, a public employee must demonstrate that after he reported a violation of law, in good faith, to an appropriate law enforcement authority, the employee suffered discriminatory conduct by his employer that would not have occurred when it did had the report not been made. *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67, 43 Tex. Sup. Ct. J. 972 (Tex. 2000) (*Zimlich II*); *Hinds*, 904 S.W.2d at 637; *see Torres v. City of San Antonio*, No. 04-15-00664, 2016 WL 7119056 (Tex. App. – San Antonio Dec. 7, 2016, no pet.) (City's summary judgment denied where even though City offered several reasons why employee was not selected for position, the employee is not required to prove that his reporting of violations was the *sole* reason for his non-selection). This causation standard has been described as a "but for" causal nexus requirement. *Tex. Natural Resource Conservation Comm'n v. McDill*, 914 S.W.2d 718, 723 (Tex. App . – Austin 1996, no writ); *but see Bates v. Pecos County*, No. 08–15–00100–CV, 2017 WL 1164597 (Tex. App. – El Paso March, 29, 2017, no pet.) (County employee's complaint to her employer of not receiving overtime pay—presumably, a report of a violation of the Fair Labor Standards Act prohibiting employers from failing to pay overtime – was not a report to the appropriate authorities to handle federal wage and hour violations, and the employee's one report to the proper federal authority was made *after* her termination, and therefore could not be considered a basis for her termination.); *Jones v. City of Port Arthur*, No. 09-14-00442-cv, 2016 WL 6809207 (Tex. App. – Beaumont Nov. 17, 2016, pet. granted) (employee's reports to OSHA and TCEQ fail to overcome summary judgment where the evidence in the record shows conclusively that the decision-makers had no prior knowledge of Jones's reports, so he could not have been terminated because of those reports.)

If the adverse employment action occurs within ninety days of the employee's report, a rebuttable presumption is created that the action would not have occurred but for the report. Tex. Gov't Code Ann. §554.004(a); *Tex. Dep't of Human Servs. V. Hinds*, 904 S.W.2d 629, 637 (Tex. 1995); *Upton County, Tex. v. Brown*, 960 S.W.2d 808, 823 (Tex. App. – El Paso 1997, no writ). The employer can rebut this presumption by demonstrating that it would have taken the employment action even if the employee had not made the report. "In whistleblower cases, the statutory presumption of retaliation relieves the plaintiff of the *initial* burden to prove that he was terminated for reporting allegedly illegal activities…. When, however, the defendant discloses the facts in her possession and such evidence is sufficient to support a finding of non-retaliation, the case proceeds as if no presumption ever existed." *Texas A&M Univ. v. Chambers*, 31 S.W.3d 780, 784 (Tex. App. – Austin, 2000, no pet.).

"Circumstantial evidence may be sufficient to establish a casual link between the adverse employment action and the reporting of illegal conduct. Such evidence includes: (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 company policies regarding employment decisions, (4) discriminatory treatment in comparison to similarly situated employees, and (5) evidence that the stated reason for the adverse employment action was false. But evidence that an adverse employment action was preceded by a superior's negative attitude toward an employee's report of illegal conduct is not enough, standing alone, to show a causal connection between the two events. There must be more." *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 69 (Tex. 2000); citing *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996). An actionable adverse employment action can be less severe than termination. *Burleson v. Collin County Community College District*, No. 05-15-01361-cv, 2017 WL 511196 (Tex. App. – Dallas Feb. 8, 2017, no pet.) (Whether officers' claim was barred could not be resolve by plea to the jurisdiction, as there was a factual dispute whether the employment actions of write ups, schedule changes, reassignment, and loss of flex time constituted adverse employment actions under the Act).

- *Barnett v. City of Southside Place*, No. 01-16-00026-CV, 2017 WL 976067 (Tex. App.—Houston [1st Dist.] March 14, 2017, no pet.)

The Texas Whistleblower Act does not extend its protections to former employees.

Michael Barnett was a detective for the City of Southside Place, Texas, from March 2013 to September 2014. In 2014, Barnett notified his Chief of Police, Stephen McCarty, that he had learned that the City had implemented an illegal ticket quota practice with its officers. McCarty in turn prepared a

memorandum to the Texas Rangers, summarizing a list of grievances against the City Manager, David Moss, including the ticket quota requirement. McCarty and Barnett met with Texas Ranger Jeff Owls and reported the alleged ticket quota practice. The next day, Barnett submitted a letter of resignation, effectively giving his two weeks' notice. During the two weeks Barnett remained with the City, Moss instigated an investigation into Barnett and asked Barnett to submit answers to written questions and documents. In response, Barnett refused to answer and informed Moss he was resigning his position with the City effective immediately. After Barnett's resignation, Moss prepared a Notice of Termination stating that Barnett was terminated for insubordination. As a result, the City submitted a Texas Commission on Law Enforcement ("TCOLE") Separation of Licensee ("F-5") reflecting that Barnett had been "dishonorably discharged."

Barnett filed suit against the City alleging that he had suffered adverse employment actions in retaliation for reporting a violation of the law by the City to the Texas Rangers in violation of the Act. The City filed its plea to the jurisdiction, arguing among other things, that the City did not take any adverse employment actions against Barnett. The trial court granted the City's plea and dismissed Barnett's whistleblower claim with prejudice. Barnett appealed contending that the trial court erred in granting the City's plea because the evidence raises a fact issue regarding whether he was suspended, terminated, or suffered some other adverse personnel action because he reported a violation of law by the City.

The Court of Appeals affirmed the trial court's grant of the City's plea to the jurisdiction, finding that Barnett did not suffer an adverse employment action because he resigned, and any actions taken by the City after his resignation could not be actionable adverse personnel actions under the Act because the Act only extends its protections to public employees, not former employees. The Court's holding turned on the definition of public employees in the Act. The Act defines "public employees" as "an employee…who ***is paid*** to perform services for a state or local governmental entity," and the Court placed emphasis on the fact that the definition includes the phrase "who is paid," finding that the definition necessarily assumes an ongoing employment relationship. The Court found that because the alleged adverse employment actions occurred after Barnett's resignation, he could not establish that was covered by the Act.

- *Beaumont Indep. Sch. Dist. v. Guillory*, No. 09-15-00531-CV (Tex. App.—Beaumont May 12, 2016, no pet.)

A school principal sought a temporary injunction to prevent alleged retaliation against her by the school board in violation of the Texas Whistleblower Act. After she was interviewed by an investigator from the District Attorney's office about the former principal and improper testing during the STAAR exam, Guillory received notice that she was being reassigned to an assistant principal position and receiving a salary cut. BISD filed a plea to jurisdiction, maintaining that it had already been investigating the alleged improper testing and that it was unaware that she made any reports to investigators. After a hearing, the trial court granted Guillory's application for temporary injunction. BISD appealed.

The court of appeals disagreed, holding that Guillory failed to establish that she suffered retaliation under the Whistleblower Act for making a report to investigators because no one knew that she reported the alleged improper testing to law enforcement. Guillory herself testified that on the date of the interview no one else was on campus and that she did not tell the superintendent about the interview until after she received notice of her reassignment. As a result, Guillory failed to establish that she suffered retaliation for making a report to law enforcement, and BISD's governmental immunity was not waived as to her claim under the Whistleblower Act. The trial court erred in denying BISD's plea to jurisdiction.

- *Ward v. Lamar University*, No. 14–14–00097–CV, 484 S.W.3d 440 (Tex. App.—Houston [14th Dist.] Jan. 12, 2016, no pet.) (op. on reh'g)

On rehearing from a case previously decided, the court of appeals, in relevant part, found a fact question as to whether Ward had suffered material adverse employment actions from Lamar University, but that she had not suffered material adverse employment actions from the Texas State University System. With respect to Lamar University, Ward alleged that she lost procurement responsibility, 15 people from her supervision, and her authority over her department, though her pay and job title remained the same. The court also noted that "she no longer reported directly to the Vice President for Finance; instead, she reported to the new Senior Associate Vice President, an individual with no previous finance experience. Such an action is some evidence that she lost job prestige." The loss of the procurement duties meant losing the duties which allowed her to discover the questionable transactions she reported. "Removing the very authority that allowed a whistleblower to find wrongdoing in the first place is some evidence of an action that would likely dissuade a reasonable, similarly situated worker from making a report under the Act."

With regard to the System, Ward identified implied threats of termination as adverse employment actions, but she was never terminated. Citing a Texas court of appeals case from 2000 and a case from the federal Seventh Circuit, the court held that "[u]nfulfilled threats to fire do not constitute actionable adverse employment decisions."

- *City of Killeen v. Gonzales*, No. 03–14–00384–CV, 2015 WL 6830599 (Tex. App.—Austin Nov. 3, 2015)

In this case, the court of appeals noted that, in order to show a causal link, "the employee must demonstrate that after she reported a violation of the law in good faith to an appropriate law-enforcement agency, the employee suffered discriminatory conduct by her employer that would not have occurred when it did if the employee had not reported the illegal conduct." At a minimum, the evidence on causation must show that "the person who took the adverse employment action *knew* of the employee's report of illegal conduct." The court of appeals found that Gonzales had not provided any direct evidence that the decision-maker for her termination had any knowledge of Gonzales' reports of alleged violations of law. Additionally, the court of appeals found that the circumstantial evidence constituted no more than a mere scintilla of evidence that resulted in only guesses and suspicions. The court of appeals reversed the trial court's judgment, granted the City's plea to the jurisdiction, and dismissed Gonzales' lawsuit with prejudice.

- *Morales v. Hidalgo County Irrigation Dist. No. 6*, Cause No. 13-13-00265-CV, 2015 WL 1284664 (Tex. App.—Corpus Christi-Edinburg Mar. 19, 2015, no pet.)

In this case, the court found that Morales established each of the elements of a whistleblower claim. Importantly, however, the court noted that the District provided no evidence with its plea to the jurisdiction and that Morales had alleged sufficient facts in his petition as to each jurisdiction element. With regard to causation, the court noted that Morales had been suspended prior to making his reports, but then terminated by vote of the District's Board, notwithstanding that an investigation into his conduct did not recommend termination. Morales pled that the Board was aware of the reports of misconduct he had made during his suspension at the time they voted. Of interest, the District argued that the suspension was the adverse employment action, and since that took place prior to Morales' reports, he cannot show that his termination was caused by his reports. The court was unconvinced and noted that the District made no argument and presented no evidence that the termination was a foregone conclusion of the suspension, so the causal chain was not broken in any way.

- *Fort Worth Independent School District v. Palazzolo*, No. 02-13-00006-CV, 2014 WL 69889 (Tex. App. – Fort Worth Jan. 9, 2014, no pet.)

The lifting at a school of a trespass warning against a parent who had allegedly threatened an assistant principal and his daughter, after the assistant principal had been transferred out of the school and after the assistant principal had decided to transfer his daughter to another school, is not an adverse employment action within the meaning of the Whistleblower Act.

Palazzolo, a former FWISD assistant principal, filed a whistleblower lawsuit alleging that the school district retaliated against him for good faith reports of violations of law by, among other things, lifting a trespass warning against the parent of a student at his school who had allegedly previously threatened Palazzolo's daughter, who was also a student at the school.

For a viable claim under the Whistleblower Act, the public employee must demonstrate that he suffered an adverse employment action committed by the employer. An adverse personnel action is one that "would be likely to dissuade a reasonable, similarly situated worker from making a report under the Act." *Montgomery Cnty. v. Park*, 246 S.W.3d 610, 614 (Tex. 2007). Factors considered to determine whether an act is an adverse employment action include whether the act negatively affected the employee's prestige, opportunity for advancement, working conditions, pay or income, or ability to obtain outside employment. *Montgomery Cnty. v. Park*, 246 S.W.3d 610, 614 (Tex. 2007). Further, the employee must establish a "but for" causal nexus between the protected activity and the employer's prohibited conduct. *See City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000).

The summary judgment evidence confirmed that FWISD did not lift the trespass warning until after Palazzolo had been reassigned to another school and after he had made the decision to remove his daughter from the school. Therefore, the court held that, as a matter of law, FWISD's lifting the trespass warning after Palazzolo's reassignment and after he decided to remove his daughter from the school was not an adverse employment action.

- *City of El Paso v. Parsons*, 353 S.W.3d 215 (Tex. App. – El Paso Oct. 5, 2011, no pet.)

A personnel action is adverse under the Texas Whistleblower Act if it would be likely to dissuade a reasonable, similarly-situated worker from making any report covered by the Act.

The City of El Paso's chief trainer for the fire department, Chief Parsons, was transferred to a less prestigious position within the fire department after reporting to his immediate supervisor that several fire fighters had failed to participate in mandatory training.

The City argued that Parson's transfer to a less prestigious position did not constitute an adverse employment action because he received a $2,000 raise. Additionally, the City argued that Parsons still retained many of the same responsibilities. However, there were many tasks that Parsons "could" have performed that he was instructed not to.

Applying the objective standard applicable to cases brought under the Texas Whistleblower Act, the court concluded that under the specific facts of this case, Chief Parsons' reassignment would, as a matter of law, be likely to deter a similarly-situated, reasonable employee from reporting a violation of the law and, thus, was materially adverse.

VI. INITIATION OF GRIEVANCE PROCEDURES

"A public employee must initiate action under the grievance or appeal procedures of the employing state or local governmental entity relating to suspension or termination of employment or adverse personnel action before suing under this chapter." §554.006(a), Tex. Gov. Code. In other words, before an employee can sue her employer in district court under the Whistleblower Act, she must first initiate the grievance procedures of her governmental employer. *Ruiz v. Austin Indep. Sch. Dist.*, 2004 Tex. App. LEXIS 4725 *17 (Tex. App. – Austin 2004, no pet.). The failure of an employee to comply with the requirement to properly initiate administrative remedies deprives a district court of jurisdiction over a whistleblower claim. *Id*. at *18 citing *Gregg County v. Farrar*, 933 S.W.2d 769, 777 (Tex. App. – Austin 1996, writ denied). The purpose of § 554.006 is to allow the employer "'the opportunity to correct its errors by resolving disputes before being subjected to the expense and effort of litigation.'" *Aguilar v. Socorro Indep. Sch. Dist.*, 296 S.W.3d 785, 789 (Tex. App.—El Paso 2009, no pet.) quoting *City of San Antonio v. Marin*, 19 S.W.3d 438, 441 (Tex. App. – San Antonio 2000, pet. denied) (citations omitted).

"The employee must invoke the applicable grievance procedures not later than the 90th day after the date on which the alleged violation of this chapter: (1) occurred; or (2) was discovered by the employee through reasonable diligence" Tex. Gov't Code Ann. §554.006(b). The initiation of internal grievance procedures tolls the 90 day statute of limitations for filing suit under the Texas Whistleblower Statute. Tex. Gov't Code Ann §554.006(c).

- *Northside Indep. Sch. Dist. v. Powers*, 662 Fed. Appx. 306 (5th Cir. Dec. 5, 2016)

In this case, in July 2013, the plaintiffs were suspended, challenged the suspensions pursuant to the district's DFBA (Local) grievance policy, and those grievances were denied on December 3, 2013. On December 10, 2013, the district's Board voted to terminate the plaintiffs and notified them in writing that they could initiate a hearing process to challenge the termination pursuant to Chapter 21 of the Texas Education Code. The plaintiff initiated the TEA hearing examiner process, which concluded in April 22, 2014, with the Board's final vote to terminate their employment. The plaintiffs filed suit on May 22, 2014, alleging, in part, whistleblower retaliation.

The district argued that its DFBA (Local) policy expressly states that whistleblower retaliation complaints are to be initiated under that policy and that the Board will make final decision on such grievances. For this reason, the 30-day limitations period started running on December 3, 2013 and suit was not timely filed.

The plaintiffs argued that the suit was timely because they followed the grievance procedures for challenging their termination, i.e. those procedures found in Chapter 21 of the Texas Education Code. Indeed, the notice letter advising them of their right to appeal their termination indicated that they could challenge the proposed termination through the procedures set out in the attached policies and included the district's DFBA (Legal) policy which directed the plaintiffs to the Chapter 21 hearing process. The plaintiffs timely initiated the Chapter 21 hearing process.

The district court and the Fifth Circuit both found that the plaintiffs timely filed suit, marking the end of the Chapter 21 process as the beginning on the clock for statute of limitations purposes.

- *Ninan v. Houston Community College System*, No. 14–14–00713–CV, 2015 WL 4985116 (Tex. App.—Houston [14th Dist.] August 20, 2015)

In this case, Ninan failed to initiate the College's grievance process to challenge terminations, arguing that he was not required to initiate the existing grievance policy because a fact question existed as to whether the complaint procedures applied to terminations. Ninan unquestionably was familiar with the grievance procedures, as he had previously used them, and after litigation had been filed challenging his termination, and Ninan's counsel had asked the College's attorney about whether an appeals process existed to challenge the termination. The College's counsel referred Ninan's counsel to the relevant policy, but Ninan did not file a complaint with the College.

Generally, if an employer "has no grievance policy or it is unclear whether an applicable grievance procedure exists, a terminated employee's claim under the whistleblower statute will not be barred by the statutory requirement that the employee must initiate action under the governmental entity's grievance procedures." To determine whether an employer's complaint policy extends to terminations, courts apply the standard rules of contract interpretation.

The court of appeals analyzed the relevant policy language and disagreed with Ninan, holding that he was required to have initiated the College's grievance procedures and that his failure to do so resulted in courts lacking jurisdiction to hear his claim.

- *Boswell v. Ector Indep. Sch. Dist.*, No. 11-15-00013-CV, 2016 WL 1443606 (Tex. App.—Eastland April 7, 2016, pet. denied)

A former teacher's failure to plead the initiation of the Chapter 21 grievance process deprived the trial court of subject matter jurisdiction over his whistleblower claim.

Boswell was hired as the ROTC Junior Army Instructor for Odessa High School on a yearly contract. Appellant alleges that he was fired in retaliation for reporting several alleged instances of illegal conduct on the part of officials with the school district.

He filed suit alleging various claims, including wrongful termination under the Texas Whistleblower Act. The District's motion to dismiss his claims was granted, and Boswell appealed. The court of appeals affirmed the dismissal of his whistleblower claim.

The court reasoned that before a state employee claiming whistleblower status can sue his employer in district court for retaliation under the Texas Whistleblower Act, he must first invoke his employer's applicable "grievance or appeal procedures" within ninety days. TEX. GOV'T CODE ANN. § 554.006(a). Failure to timely initiate administrative action acts as a jurisdictional bar to relief and cuts off a grievant's right to judicial review. Following the El Paso Court of Appeals' decision in *El Paso Indep. Sch. Dist. v. Kell*, 2015 WL 3630712 (Tex. App. – El Paso June 10, 2015, pet. denied) (see below), the court noted that a Chapter 21 hearing with the Commissioner is "possibly the only way" under the Education Code for a term contract teacher to challenge a proposed termination. Boswell's failure to plead the initiation of the Chapter 21 (Texas Education Code) process deprived the trial court of subject-matter jurisdiction to consider his whistleblower claim, so his appeal was overruled.

- *Mata v. Harris County, Texas*, No. 14-14-00363, 2016 WL 675379 (Tex. App. – Houston [14th Dist.] Feb. 18, 2016, no pet.)

An employee must initiate available grievance procedures in order to bring suit under the Texas Whistleblower Act.

Wilfrido Mata sued Harris County under the Texas Whistleblower Act. Harris County filed a plea to the jurisdiction asserting suit was barred because Mata failed to comply with administrative prerequisites before filing suit. The trial court granted Harris County's plea and dismissed the case, and the Court of Appeals affirmed.

A claimant first must "initiate action under the grievance or appeal procedures" of his governmental employer before suing under the Whistleblower Act. Tex. Gov't Code Ann. § 554.006(a) (West 2012). Compliance with section 554.006(a)'s initiation requirement is a jurisdictional prerequisite. *See Tarrant County v. McQuary*, 310 S.W.3d 170, 174 (Tex. App.–Fort Worth 2010, pet. denied); see also Tex. Gov't Code Ann. § 311.034 (West 2013) ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity."); *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 510–11 (Tex.2012) (section 311.034, as amended, "evinces the Legislature's intent that all statutory prerequisites are now jurisdictional requirements as to governmental entities and are properly asserted in a plea to the jurisdiction"); *Fort Bend Indep. Sch. Dist. v. Gayle*, 371 S.W.3d 391, 394–95 (Tex. App.–Houston [1st Dist.] 2012, pet. denied); *Jordan v. Ector County*, 290 S.W.3d 404, 406 (Tex. App.–Eastland 2009, no pet.).

Because administrative procedures with the Sheriff's Office were available and Mata did not initiate the remedies prescribed by the Sheriff's Office, the trial court lacked jurisdiction to hear his whistleblower suit.

- *El Paso Indep. Sch. Dist. v. Kell*, Cause No. 08-14-00056-CV, 2015 WL 3630712 (Tex. App. – El Paso June 10, 2015, pet. denied)

In this case, the court was faced with the question whether an assistant principal who was proposed for termination, who did not request a Chapter 21 (of the Education Code, Subsection F) administrative hearing to challenge her termination, who was terminated by the district, but then filed a DGBA grievance within 90 days of the notice of termination, initiated the district's grievance procedures.

In deciding the question, the court decided that Chapter 21 is the way that a teacher proposed for termination can challenge the termination. The legislature created a highly formalized, quasi-independent hearing proceeding that is similar to a bench trial. The court wrote that "[t]his comprehensive procedure strongly suggests that the legislature intended for teachers to use this process to challenge

terminations." The court also noted that even if Chapter 21 hearings are not the exclusive method to challenge proposed terminations, El Paso ISD's policy itself "specifies that it applies only when no other proceedings are available." In other words, the policy states that before teachers who believe they are whistleblowers who suffered retaliation can file suit, they "must initiate action under the District's grievance or appeal procedures relating to ... termination of employment...." The court held that "EPISD's grievance procedures relating to termination of employment are those set out by statute in Chapter 21, Subsection F. Simply put, the terms of the policy itself redirect Kell to the Chapter 21 process, and Kell has not shown that any alternate processes exist." Because Kell never attempted to invoke the Chapter 21 hearing process, the court found that she lost the right to judicial review of her whistleblower claim.

- *Ward v. Lamar University*, No. 14–14–00097–CV, 484 S.W.3d 440 (Tex. App.—Houston [14th Dist.] Jan. 12, 2016, no pet.) (op. on reh'g)

In this case, the court found that a fact issue existed as to whether Ward initiated a grievance as required by the Act. Ward sued both Lamar University and the Texas State University System. Neither entity appears to have an established grievance procedure system. Ward, however, sent communications to a superior, the President of the University, and to the Vice Chancellor of the System, apparently asking for relief from retaliatory acts. The court held that, when the steps of a grievance process is unclear, an employee's request to ranking officials to invoke the procedure (whatever it is) cannot be denied effect.

- *Robinson v. Dallas County Community College Dist.*, Cause No. 3:14-CV-4187, 2015 WL 1879798 (N.D. Tex. April 24, 2015)

In this case, the district court granted a motion to dismiss a whistleblower act claim because reports to individual members of the Board of Trustees, or even to the entire Board, did not qualify as a report to an appropriate law enforcement authority. The Board's responsibility for ensuring internal compliance and following the Education Code does not make it an appropriate law enforcement authority. Robinson's claims concerned alleged violations of Texas law by the District by its allegedly spending college district tax revenue to support programs and students of independent school districts. Robinson was allowed an opportunity to replead. Robinson re-plead and his claims were ultimately dismissed in *Robinson v. Dallas County Community College District*, No. 3:14–CV–4187–D, 2015 WL 5123347 (N.D. Tex. Sept. 1, 2015).

- *Milteer v. University of Texas at Dallas*, No. 05-13-01076, 2014 WL 5581315 (Tex. App. – Dallas Nov. 4, 2014, no pet.)

A suit will be barred on the grounds of limitations if the plaintiff does not abide by the Whistleblower Act's deadlines regarding the filing of grievances.

The Whistleblower Act gives plaintiffs 90 days to file a grievance, running from the date the alleged violation of the Act occurs or was discovered by the employee through reasonable diligence. If the employee utilizes the entity's grievance procedures, the employee must sue not later than the 30th day after the date the procedures are exhausted.

Milteer was terminated effective August 10, 2011. On August 12, 2011, Milteer sent an email to various employees, citing the non-retaliation provisions of the UT System providing protection from retaliation for reporting suspected wrongdoing. Milteer utilized the applicable appeal procedures, which were finalized on November 7, 2011. Milteer did not file suit until January 31, 2012, eighty-five days after his appeal had been exhausted.

Milteer argued that he did not know of his whistleblower claim in time to file a grievance; however, in light of his August 12, 2011 email raising the issue of retaliation, the Court found that Milteer was aware of the allegedly wrongful nature of the termination.

- *Fort Worth Independent School District v. Palazzolo*, No. 02-13-00006-CV, 2014 WL 69889 (Tex. App. – Fort Worth Jan. 9, 2014, no pet.)

An employee who invokes a grievance or appeal procedure, but then actively circumvents the governmental entity's efforts to investigate and redress the conduct at issue, does not comply with the Texas Whistleblower Act's grievance initiation requirement. Such an employee fails to properly initiate the grievance procedures.

Palazzolo, an assistant principal, reported allegations of misconduct to several organizations and District officials over a period of several months. Palazzolo received an allegedly critical appraisal and was transferred to a different school. He filed grievances claiming that his transfer and appraisal were made in retaliation for his reports. During the grievance process, his appraisal was amended. Palazzolo appealed his grievance to a higher level, and ultimately to the Board, where he essentially indicated that he was content with his transfer and satisfied with the modifications to his appraisal. The Board voted to take no action on his whistleblower claims. About two weeks later, Palazzolo sued the District alleging violations of the Texas Whistleblower Act, claiming, among other things, that his transfer and allegedly

negative appraisal were in retaliation for his reports of alleged wrongdoing.

Prior to filing suit under the Texas Whistleblower Act, a claimant must initiate a grievance under the procedures of the employing state or local governmental entity. Tex. Gov't Code Ann. 554.006(a). Compliance with this requirement is essential to the trial court's jurisdiction over a claimant's whistleblower action. The court explained that, although the Act does not dictate what actions are required to "initiate" a grievance, the goal of this provision is to afford the governmental entity an opportunity to investigate and correct its errors and to resolve disputes before incurring the expense of litigation. Therefore, a party who invokes a grievance or appeal procedure but then actively circumvents the governmental entity's efforts to redress the complained-of conduct does not comply with the Act's initiation requirement. In other words, such a party does not properly initiate the grievance procedures.

The court found that Palazzolo actively circumvented the District's efforts to redress the conduct described in his grievance by indicating to the Board that he had no further dispute with his transfer and appraisal report. The court reversed the trial court's denial of the District's motion for summary judgment.

- *Fort Bend Indep. Sch. Dist. v. Gayle*, 371 S.W.3d 391 (Tex. App. – Houston [1st Dist.] 2012, pet. denied)

The Whistleblower Act does not require a public employee to exhaust his or her administrative remedies before filing suit; instead, the employee is only required to initiate the grievance or appeal and allow the employer 60 days in which to render a decision.

Alice Gayle was an administrator at Fort Bend ISD. After learning that the school's administration had recommended her termination, Gayle resigned in early November 2010. Shortly thereafter, Gayle's legal counsel sent a written grievance to the school, asserting that she had been constructively discharged in retaliation for reporting the school's failure to comply with requirements of the Even Start Family Literacy Grant. The school made various attempts to schedule a grievance hearing pursuant to the school's grievance policies at a mutually agreeable time with Gayle's counsel. The hearing was eventually set for January 14; however, the day before the hearing, Gayle filed a whistleblower lawsuit against the school, and her counsel sent the school a notice that she had filed the lawsuit and that the grievance hearing was now moot. The school filed a plea to the jurisdiction, alleging that Gayle had failed to satisfy the Act's grievance-initiation requirement – a jurisdictional prerequisite to suit. The school argued that Gayle was required to not just file the notice of grievance, but to also participate in the school's grievance procedure during the mandated sixty-day period so that the school has an opportunity to investigate and resolve the dispute before litigation.

As a prerequisite to initiating suit under the Whistleblower Act, a claimant must first "initiate action under the grievance or appeal procedures" of her governmental employer. Tex. Gov't Code Ann. § 554.006(a). After the claimant initiates the grievance or appeal, the employer has sixty days to address the dispute through its administrative process before the claimant may file a lawsuit. *Id.* § 554.006(d). "If a final decision is not rendered before the 61st day after the date [grievance or appeal] procedures are initiated," the claimant has two choices: she may either exhaust the remedies available to her under the employer's grievance procedure or terminate the grievance and file suit. Id. Thus, section 554.006 does not require a claimant to exhaust her administrative remedies before filing suit; instead, she is only required to initiate the grievance or appeal and allow the grievance authority sixty days in which to render a decision. If a complainant files suit after initiation, but before the sixty-day statutory period, the government's proper remedy is abatement, not dismissal. Since Gayle properly initiated a grievance in compliance with the school's grievance policy, the court refused to dismiss for lack of jurisdiction, and noted that the question of whether the school is entitled to abatement was not before the court at this time.

VII. STATUTORY AFFIRMATIVE DEFENSE

Section 554.004(b), TEX. GOV'T CODE, provides employers an affirmative defense: "It is an affirmative defense to a suit under this chapter that the employing state or local governmental entity would have taken the action against the employee that forms the basis of the suit based solely on information, observation, or evidence that is not related to the fact that the employee made a report protected under this chapter of a violation of law."

- *Fort Worth Indep. Sch. Dist. v. Palazzolo*, 498 S.W. 3d 674 (Tex. App.—Ft. Worth July 7, 2016, pet. filed)

In this case, the Fort Worth court of appeals held, in part, that Section 554.004(b) is an affirmative defense available to governmental employers, as opposed to merely being an inferential rebuttal. Not only was it designated as such by the legislature, but it bears the "'hallmark characteristic of'" an affirmative defense, placing the burden of proof on the defendant to establish the defense and obtain a jury verdict. The court also found that Section 554.004(b) operates precisely like an affirmative defense does and balances

the legislature's competing interests in protecting whistleblowers while allowing for legitimate governmental action.

- *Lopez v. Tarrant Cnty, Tex.*, No. 02-13-00194-CV, 2015 WL 5025233 (Tex. App.—Ft. Worth Aug. 25, 2015, rehearing of pet. denied)

Under the Texas Whistleblower Act, it is an affirmative defense for the employer to show that it would have taken the questioned action against the employee based solely on some other information, observation, or evidence that is not related to the employees protected report or a violation of law.

The court of appeals found that Tarrant County conclusively established its affirmative defense that it terminated Lopez's employment for a reason unrelated to her assault allegations, finding that there was sufficient evidence that Lopez's behavior and accusations towards a supervisor were the independent reasons for her termination. The court went on to state that once the defendant establishes its affirmative defense that the employee was terminated for an independent reason, that this tends to negate the plaintiff's ability to show the causation element of her whistleblower claim, because to show causation in a whistleblower case, "a public employee must demonstrate that after she reported a violation of the law in good faith to an appropriate law enforcement authority, the employee suffered discriminatory conduct by the employer that *would not have occurred* when it did if the employee had not reported the illegal conduct." The court found that based on the summary judgment evidence brought forth by the County, and the fact that Lopez failed to counter the County's assertion that she would have been fired based on her conduct on June 30, 2010, Tarrant County conclusively proved that they were entitled to summary judgment based on their affirmative defense under Section 554.004(b).

VIII. STATUTES OF LIMITATIONS

Section 554.005, Tex. Gov't Code, provides that except "as provided by Section 554.006, a public employee who seeks relief under this chapter must sue not later than the 90th day after the date on which the alleged violation of this chapter: (1) occurred; or (2) was discovered by the employee through reasonable diligence."

Section 554.006(a) states that a public employee "must initiate action under the grievance or appeal procedures of the employing state or local governmental entity relating to suspension or termination of employment or adverse personnel action before suing under this chapter." Additionally, Section 554.006(b) requires that the employee "must invoke the applicable grievance or appeal procedures not later than the 90th day after the date on which the alleged violation of this chapter: (1) occurred; or (2) was discovered by the employee through reasonable diligence." The time "used by the employee in acting under the grievance or appeal procedures is excluded, except as provided by Subsection (d), from the period established by Section 554.005." § 554.006(c).

Section 554.006(d) states that, "[i]f a final decision is not rendered before the 61st day after the date procedures are initiated under Subsection (a), the employee may elect to: (1) exhaust the applicable procedures under Subsection (a), in which event the employee must sue not later than the 30th day after the date those procedures are exhausted to obtain relief under this chapter; or (2) terminate procedures under Subsection (a), in which event the employee must sue within the time remaining under Section 554.005 to obtain relief under this chapter."

In *Prairie View A & M University v. Chatha*, 381 S.W.3d 500, 510, 515 (Tex. 2012), the Supreme Court held, in part, that a plaintiff's failure to meet the statute of limitations on a claim against a governmental defendant resulted in a lack of subject matter jurisdiction. This holding transcends Texas Whistleblower Act claims, but applies to it.

Courts have applied *Chatha* to Texas Whistleblower Act claims. *See, e.g., Travis County v. Rogers*, No.03–14–00186–CV, 2015 WL 4718726 *4 (Tex. App.—Austin July 29, 2015, no pet.). This is also an issue in an on-going appeal before the Texas Supreme Court in *Fort Worth Indep. Sch. Dist. v. Palazzolo*, No. 16-0911 (*Fort Worth Indep. Sch. Dist. v. Palazzolo*, 498 S.W. 3d 674 (Tex. App.—Ft. Worth July 7, 2016, pet. filed)).

As a statute of limitations is jurisdictional, it can be challenged using a plea to the jurisdiction. *See Travis County v. Rogers*, No.03–14–00186–CV, 2015 WL 4718726 (Tex. App.—Austin 2015, no pet.). However, some courts disagree. *See, e.g., Beaumont Indep. Sch. Dist. v. Thomas*, No. 09-15-00029-CV, 2016 WL 348949 (Tex. App.—Beaumont Jan. 28, 2016) (citing pre-*Chatha* case law).