

SPRING 2014 NEWSLETTER

Employment Case Law Update

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TEXAS SUPREME COURT

***Ysleta Independent School District v. Franco*, No. 13-0072, 2013 Tex. LEXIS 1034 (Tex. December 13, 2013)**

Under the Texas Whistleblower Act, Tex. Gov't Code §554.001, 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.

U. S. DISTRICT COURT

***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.

TEXAS COURTS OF APPEALS

***Fort Worth Independent School District v. Palazzolo*, No. 02-13-00006-CV, 2014 Tex. App. LEXIS 291 (Tex. App.—Fort Worth Jan. 9, 2014, no pet.)**

An employee who invokes a grievance or appeal procedure but goes on to actively circumvent the governmental entity's efforts to redress the conduct at issue does not comply with the Texas Whistleblower Act's initiation of administrative remedies requirement.

Palazzolo, an Assistant Principal, reported allegations of misconduct to several organizations and District officials over a period of several months. He later received a critical appraisal and was transferred to a different school. He filed a grievance claiming that his transfer and appraisal were made in retaliation for his reports. His negative appraisal was amended. Palazzolo then pursued his grievance to a higher level where he indicated that he was content with his transfer and satisfied with the modifications to his appraisal. The Board then voted to take no action on his whistleblower claims. Two weeks later, Palazzolo sued the District claiming violations of the Texas Whistleblower Act, claiming, among other things, that his transfer and negative appraisal were in retaliation for his reports of alleged wrongdoing.

Prior to filing suit under the Texas Whistleblower Act, a claimant must initiate action under the grievance or appeal procedures of the employing state or local governmental entity relating to the adverse personnel action. 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.

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

***Melendez v. Houston Independent School District*, 418 S.W. 3d 701 (Tex. App.—Houston [14th Dist.] Dec. 5, 2013, no pet.)**

Under the Texas Commission on Human Rights Act ("TCHRA"), "current condition of addiction" has the same definition as under the Americans with Disabilities Act ("ADA"). The TCHRA does not have a safe harbor provision, such as that found in the ADA, which covers individuals who have successfully completed a supervised drug rehabilitation program and are no longer engaging in the illegal use of drugs. In any case,

an employee who was, at most, drug-free for a period of several days would not fall within the ADA's safe harbor provision.

Melendez, an administrative assistant in one of the District's schools, claimed that she was forced to resign because of a disability. She sued the District alleging discriminatory discharge due to her recent release from a medical treatment facility where she was treated for abuse of prescription medication. The District argued that the discrimination claim failed as a matter of law because the TCHRA expressly excludes addiction from the definition of disability.

The TCHRA specifically excludes from the definition of disability, "a current condition of addiction to the use of alcohol, a drug, an illegal substance, or a federally controlled substance." The parties disputed the meaning of this exclusion. Finding no guidance among TCHRA cases, the Court looked to cases construing the analogous provision from the ADA and determined that "currently" in this context means that the drug use was sufficiently recent to justify the employer's reasonable belief that the addiction remained an ongoing problem.

Melendez argued that she was free from addiction on the day of her resignation and that she fell within the safe harbor provision which covers individuals who have successfully completed a supervised drug rehabilitation program. The Court rejected her arguments, explaining that, unlike the ADA, the TCHRA has no such safe harbor provision, and that even the ADA's safe harbor provision would not apply because Melendez had not been drug-free for a significant period of time when she resigned.

The Court dismissed Melendez's claims.

***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 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.

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

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. General law enforcement authority, such as that held by a peace officer, is not sufficient under the Texas Whistleblower Act.

Wood, an officer in the City's fire department, reported deficiencies in paramedics' inventory and paperwork to Knappage, 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 a peace officer.

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. Knappage's status as a licensed peace officer did not make him an appropriate law enforcement authority authorized to investigate or prosecute a violation of criminal law. 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.