TEXAS WHISTLEBLOWER ACT UPDATE

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REPRESENTATIVE PUBLISHED DECISIONS

Fort Worth Indep. Sch. Dist. v. Palazzolo, 2014 Tex. App. LEXIS 291 (Tex. App. Fort Worth Jan. 9, 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).

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).

Berkman v. City of Keene, No. 3:10-CV-2378-B, 2011 U.S. Dist. LEXIS 83580 (N.D. Tex. July 29, 2011) (prevailed on summary judgment based on *res judicata* grounds).

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State Bar of Texas
United States Court of Appeals for the Fifth Circuit
United States District Courts for the Northern, Eastern, and Western Districts of Texas

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)

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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 four 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; and (4) initiation of grievance procedures.

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).

- *Univ. of Tex. Southwestern Med. Ctr. at Dallas v. Gentilello*, 398 S.W.3d 680, 686-87 (Tex. 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.

- *Ysleta Independent School District v. Franco*, 417 S.W.3d 443 (Tex. 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, 655 (Tex. 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, 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.

- *Leach v. Tex. Tech Univ.*, 335 S.W.3d 386 (Tex. App. – Amarillo 2011, pet. denied)

Filing a suit in district court does not satisfy the requirement that a party report to an "appropriate law enforcement authority" under the Whistleblower Act.

Leach filed suit against the University and various officials in district court. Leach alleges that filing his original petition in the district court constitutes a good faith report of a violation of law to an appropriate law enforcement authority.

While the original petition may meet the plain meaning of a "report," filing the petition in the district court is not a report to an appropriate law enforcement authority. An "appropriate law enforcement authority. . . is [an entity] charged with the ability to enforce or regulate the laws purportedly breached or investigate the breach of those laws. "The description calls forth visions of police, administrative agencies, district attorneys, the attorney general, and like bodies commonly associated with investigating and enforcing the law. It takes a much greater stretch of the imagination to include a district court within the category. Indeed, precedent recognizes that the role of the judiciary excludes investigative or executive functions of the type contemplated by the statute."

Further, the Act requires the whistleblower to properly initiate administrative remedies before seeking judicial relief. "It makes little sense to have this requirement if filing an original petition in a court of law constitutes an acceptable report under the act."

Even if Leach believed that his lawsuit constituted the requisite report, the good faith requirement has two components, the subjective (what the employee actually believed) and the objective (whether a reasonably prudent person in the same circumstances could have thought that), and whether the latter component exists depends on circumstances such as the information available to the employee, his education and experience, the nature of the dispute, and the nature of the entity involved. In this case, Leach was a successful NCAA division one football coach with a college degree and who received post-graduate legal training. Further, he had the help of several attorneys in this case. As such, a reasonable person in the same circumstances and having the same experience, education, and legal help as Leach would not have ignored statutorily mandated administrative remedies requirements.

- *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.

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.

- *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.

IV. Illegal Acts

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).

- *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.

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

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.

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

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.

- *Tex. Dep't of Aging & Disability Servs. v. Huse*, 2014 Tex. App. LEXIS 5004 (Tex. App. – Waco May 8, 2014, no pet. h.)

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.

V. Causal Link Between a Qualifying Report and An Adverse Employment Action

For a whistleblower case, an employee need not prove 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). 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. 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).

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).

- *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.)

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 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).

- *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 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, 394-95 (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.