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FIRST AMENDMENT RETALIATION

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I. INTRODUCTION

This paper will address: (1) the circumstances in which First Amendment retaliation claims against governmental entities typically arise; (2) the current state of the law regarding liability for such claims; (3) the different liability standards applicable to municipal or individual defendants; and (4) the possibility that conduct leading to a First Amendment retaliation claim may create liability under a different law, such as the Texas Whistleblower Act. The paper includes an appendix containing brief descriptions of many relevant cases involving First Amendment retaliation and Texas Whistleblower Act claims.

II. ANALYSIS

1. Circumstances in which First Amendment retaliation claims typically arise.

The bulk of First Amendment retaliation claims against municipal entities involve governmental employees or former employees claiming that they experienced adverse employment actions as a result of exercising their First Amendment right to free speech. For example, First Amendment retaliation cases include claims by government employees who are disciplined or terminated after making reports to external agencies complaining of financial irregularities or other wrongdoing by their employers. Many First Amendment retaliation cases involve claims that public employers took adverse employment actions against employees who engaged in political activity contrary to the interests of their employers. Prominent among these cases are claims by public employees who find themselves working for elected officials after having actively supported an opposing candidate. Additionally, a public employee's retaliation claims may be based on allegations of violations of the employee's First Amendment association rights. For instance, a public employee claimed to have been subjected to an adverse

employment action by her governmental employer because she was married to a registered sex offender.

However, First Amendment retaliation claims may be raised by individuals who are not, and have not been, public employees. For instance, First Amendment retaliation was alleged by a prisoner who was disciplined after his family members complained about mistreatment in the facility where he was incarcerated. Additionally, private citizens may bring First Amendment retaliation claims based on allegations that, after publicly criticizing a governmental entity, they were harassed by officials of that entity, had a permit or license revoked, or were dropped from a city's list of approved vendors.

2. The current state of the law.

The First Amendment to the United States Constitution states as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment protects the right of citizens to express their own views and beliefs, and this right is not foregone by a decision to accept employment with or otherwise provide services to governmental entities. However, while recognizing the free speech rights of public employees, the Supreme Court has also noted that the government has a stronger interest in regulating the speech of its employees than it has with respect to ordinary citizens, particularly where such speech may disrupt government operations. The Court has determined that the validity of sanctions imposed against a public employee because of his or her speech must be determined by balancing the strength of the government interest against the interest of the employee in expressing an opinion under the particular circumstances of the case at hand. *See,*

Theuman, John E. "Public Employee's Right of Free Speech Under Federal Constitution's First Amendment—Supreme Court Cases," 97 L. Ed.2d 903, 907-908.

A public employee, or former employee, who seeks to establish a case of First Amendment retaliation will have to demonstrate that, as a citizen rather than as an employee, he engaged in public speech, on a matter of public concern, and that his interest in free expression outweighs the government employer's interest in promoting efficiency and integrity in the provision of government services and in maintaining proper discipline. Additionally, the employee will need to show that his protected speech was the motivating cause of an adverse action by his employer.

a) The *Pickering* balancing test.

The United States Supreme Court has developed a balancing test for determining liability for First Amendment retaliation claims. In *Pickering v. Board of Ed. of Township High School District*, 391 U.S. 563 (1968), a case which involved the termination of a public school teacher who had written a letter to the editor which was critical of the school board and superintendent, the Court identified the need to balance the interests of a public employee in commenting upon matters of public concern, and a governmental employer, in promoting the efficiency of the public services it performs through its employees. Under the circumstances presented, the Court found that, "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id*. at 574.

b) The *Connick v. Myers* refinement.

In 1983, the Court refined the *Pickering* balancing test by focusing on the issue of what constitutes speech on a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

In *Connick*, after receiving an unwelcome transfer, an assistant district attorney distributed a questionnaire to her coworkers which concerned a number of internal issues, and which asked whether employees felt pressured to work in political campaigns. The district attorney terminated Myers for refusing to accept her transfer, and he told her that her distribution of the questionnaire, which created dissention in the office, was considered an act of insubordination.

The Court explained that an employee's speech or conduct which does not relate to any matter of political, social, or other concern to the community cannot provide a basis for a claim of First Amendment retaliation. Government officials have wide latitude in managing their offices, without intrusive oversight by the judiciary, and may terminate public employees whose speech relates only to private matters. *Id*. at 146. Whether speech involves a matter of public concern is a question of law which must be determined by the content, form, and context of a given statement, as revealed by the whole record. *Id*. at 147.

Because the Court found that only one portion of Myers' questionnaire involved a matter of public concern, the question involving political campaigns, the Court applied the *Pickering* balancing test to determine whether Myers' termination was justified, noting that a governmental employer's burden in justifying a particular discharge varies depending upon the nature of the employee's speech or conduct. *Id*. at 150. Pertinent considerations regarding the government's interests include whether the employee's statements: (1) impair discipline by superiors or harmony among coworkers; (2) have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary; (3) impede the performance of the employee's duties; or (4) interfere with the regular operation of the public employer's enterprise. *Id*. at 150; *see also*, *Pickering*, 391 U.S. at 570-73; *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Under the circumstances presented in *Connick*, the government's interest in promoting

efficiency and integrity in the discharge of official duties, and in maintaining proper discipline in the public service justified Myers' termination. *Connick*, 461 U.S. at 150.

c) Further refinement under *Garcetti v. Ceballos*.

In 2006, the Court further refined the *Pickering* analysis in a case involving a county deputy district attorney, Ceballos, who claimed that he had been retaliated against after he wrote a memorandum and gave testimony concerning alleged errors in an affidavit supporting a warrant. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Noting that Ceballos had written the memorandum and had offered testimony pursuant to his job responsibilities, the Court held that when public employees make statements pursuant to their official duties, they do not speak as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. *Id.* at 421.

The Court explained that *Pickering* provided a two-step analysis under which the first question is whether the public employee spoke as a citizen on a matter of public concern. If not, the employee is not protected by the First Amendment from employer discipline for that speech. If so, the question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. Determining this issue requires that the Court balance the citizen's rights against the employer's interest and permit only those speech restrictions that are necessary to enable governmental employers to operate efficiently and effectively. *Id*. at 418.

The Court appeared to be sensitive to considerations of general fairness that often arise in cases involving adverse employment actions apparently due to an employee's expression of concern over the wrongful conduct of a superior. The Court noted that public employees have recourse to other avenues of protection against improper personnel actions by public employers,

including whistleblower protection and labor codes which are available to employees who seek to expose wrongdoing by a public employer. *Id*. at 425.

d) More recent refinement under *Lane v. Franks*.

On June 19, 2014, the United States Supreme Court issued its most recent decision pertaining to the protections that public employees enjoy against retaliation under the First Amendment. In *Lane v. Franks*, 573 U. S. ___, 134 S. Ct. 2369 (2014), the Supreme Court held that the First Amendment protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities.

The opinion, written by Justice Sotomayor, began as follows:

> Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment. Rather, the First Amendment protection of a public employee's speech depends on a careful balance "between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Id. at 2374 (*citing Pickering*, 391 U.S. at 568).

Lane involved an employee of a community college who was responsible for overseeing a program's day-to-day operations, hiring and firing employees, and making decisions with respect to the program's finances. When Lane audited his program's expenses he discovered that an employee on his payroll, who also happened to be a state representative, had not been reporting to work. Lane fired the state representative, and the FBI initiated an investigation into the state representative's employment with the program. Lane testified before a federal grand jury and at the representative's criminal trials about his reasons for firing the representative. The representative was ultimately convicted of mail fraud and theft concerning a program receiving federal funds. Around the time of the trials, the college terminated Lane and he sued

Franks, the college's president, who had terminated him. Lane alleged, among other things, First Amendment retaliation for his testimony against the representative.

The Court applied *Garcetti's* two-step analysis and found that because Lane's testimony at trial, pursuant to a subpoena, was outside of his ordinary job duties, it amounted to speech as a citizen on a matter of public concern. *Id*. at 2378-2380. This is the case even though his testimony related to his public employment and concerned information learned during his employment because the critical question under *Garcetti* is whether the speech itself is within the scope of an employee's duties, not whether it concerns those duties. Further, because Lane's testimony related to public corruption, it involved a matter of public concern. The content, form, and context of the speech made it clear that Lane's testimony involved a matter of public concern.

With respect to the second part of the *Garcetti* inquiry, the Court found that the college identified no government interest in treating Lane differently than it treated any other member of the public. *Id*. at 2381. For these reasons, the Court held that Lane's speech was entitled to protection under the First Amendment. However, the Court determined that the claims against Franks in his individual capacity should be dismissed on the basis of qualified immunity because Eleventh Circuit precedent did not preclude Franks from reasonably believing that a government employer could fire an employee on account of testimony the employee gave outside the scope of his ordinary job responsibilities. *Id*. at 2381.

e) Causation issues.

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), the Supreme Court held that a public employee must demonstrate that his protected speech was a substantial motivating factor in his discharge. The employer then has the burden of

showing a legitimate reason for which it would have discharged the employee even in the absence of his protected conduct. *Id*. The employee can then refute the government employer's explanation by showing that the employer's reason for the adverse action is merely pretextual. *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991).

A public employee's protected speech must be the "but-for" cause of the adverse employment action in order to establish a First Amendment retaliation claim. *Moore v. Brace Cade Huse*, No. 13-10992, 2014 U.S. App. LEXIS 15233, *10 (5th Cir. August 7, 2014) (*citing Hartman v. Moore*, 547 U.S. 250, 260 (2006)). According to the Fifth Circuit Court of Appeals, this means that even if an employee shows that his speech was a substantial or motivating reason for the adverse employment action, the governmental employer may avoid liability if it can show that it would have engaged in the adverse employment action regardless of the employee's protected conduct. *Moore*, 2014 U.S. App. LEXIS 15233 at *11 (*citing Jordan v. Ector County*, 516 F.3d 290, 301 (5th Cir. 2008)); *Haverda v. Hays County*, 723 F.3d 586, 591-592 (5th Cir. 2013).

f) Recent Fifth Circuit cases of interest.

i. <u>*Gibson v. Kilpatrick*: Speech within the scope of job duties?</u>

In *Gibson v. Kilpatrick*, 734 F.3d 395 (5th Cir. 2013), the court considered a claim of First Amendment retaliation involving a police chief, Gibson, who reported misuse of a city credit card by his mayor, Kilpatrick, to outside law enforcement authorities including the FBI, the DEA and the Office of the State Auditor ("OSA"). Gibson assisted in OSA's investigation of Kilpatrick, which found Kilpatrick has misused city funds and ordered Kilpatrick to make repayment for his unauthorized use. Approximately nine months after the conclusion of the OSA's investigation, Kilpatrick began giving Gibson written reprimands, and recommended

Gibson's termination. Gibson sued Kilpatrick in his individual capacity alleging First Amendment retaliation.

Kilpatrick asserted the defense of qualified immunity, arguing that Gibson's speech was not constitutionally protected. Noting that in order to rebut a qualified immunity defense, the plaintiff must show that the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct, the court embarked upon an analysis of whether Gibson had met the elements of a claim for First Amendment retaliation. *Id*. at 400.

The court explained that under *Garcetti*, the Supreme Court created a threshold layer to the retaliation test, requiring that the court determine whether the speech at issue was made pursuant to the employee's duties or as a citizen. *Id*. The court found this question dispositive, finding Gibson's report to outside law enforcement agencies to be official speech within Gibson's duties as police chief because, "[g]iven his position, there was arguably no one else to whom Gibson could confidentially report the information." *Id*. at 401, 404.

It would appear that the United States Supreme Court disagrees with the Fifth Circuit's First Amendment retaliation analysis in *Gibson* because, on June 30, 2014, the Supreme Court vacated this opinion and remanded the case for reconsideration in light of *Lane v. Franks*. *Gibson v. Kilpatrick*, ___ U.S. ___, 134 S. Ct. 2874 (2014).

ii. <u>*Haverda v. Hays County*: Summary judgment regarding causation?</u>

In *Haverda v. Hays County*, 723 F.3d 586 (5th Cir. 2013), Haverda, a corrections officer employed by the Hays County sheriff's office, was demoted after he supported the unsuccessful candidacy of another sheriff by, among other actions, writing a letter to the editor of a local paper. Haverda sued the county, the sheriff's office, and the sheriff, claiming First Amendment

retaliation. Haverda appealed the district court's grant of summary judgment in favor of the defendants. The arguments on appeal focused primarily on causation.

The Fifth Circuit applied the *Mt. Healthy* doctrine under which, once Haverda showed that his protected speech was a motivating factor in his demotion, the defendants could still avoid liability by showing that they would have taken the same adverse employment action even in the absence of the protected speech, but Haverda could still prevail by presenting evidence that his employer's explanation for the adverse action was merely pretextual. *Id*. at 595 (*citing Mt. Healthy*, 429 U.S. at 287).

Although defendants had offered considerable evidence that Haverda had been doing his job inadequately, the Fifth Circuit overturned the district court's grant of summary judgment because Haverda had offered evidence of pretext which included: conversations he secretly recorded with the sheriff; different treatment of similarly situated employees; and a documented history of positive performance reviews. *Id*. The court explained that the defendants needed to establish that they would have taken the same adverse employment action even in the absence of the protected speech because, "[t]he issue is not whether Haverda *could* have been demoted for the condition of the Jail, but whether he *would* have been demoted if he had not engaged in protected speech." *Id*. at 597 (emphasis in original).

The court emphasized that the Fifth Circuit has held that summary disposition of the causation issue in First Amendment retaliation claims is generally inappropriate, and that summary judgment should be used sparingly in First Amendment cases involving complex fact situations, disputed testimony, and analysis of witnesses' credibility. *Id*. at 595 (*citing Click v. Copeland*, 970 F.2d 106, 113-14 (5th Cir. 1992); *Id*. at 592 (*citing Beattie v. Madison County Sch. Dist*., 254 F.3d 595, 600 (5th Cir. 2001)).

3. Differing liability standards for municipal or individual defendants.

a) Municipal liability.

A First Amendment retaliation claim brought against a governmental entity will proceed via 42 U.S. Code §1983. A municipality may only be held liable for a First Amendment retaliation claim under §1983 when a plaintiff is able to show that the constitutional violation was caused by execution of a government's policy, custom, or practice. *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 694 (1978). The plaintiff must identify a policymaker, an official policy, and a constitutional violation whose moving force is that policy or custom. *Id*.; *Raymond v. Ector County, Tex*., 507 Fed. Appx. 347, 349 (5th Cir. 2013); *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). A municipal entity cannot be held liable under §1983 for unconstitutional acts of its non-policymaking employees, but a municipal employee who holds final policymaking authority may create municipal liability. *See, e.g., Raymond*, 507 Fed. Appx. at 350-351.

For instance, an employee who has discretionary authority to terminate employees but who is subject to employment policies established by a governing board will not be considered a final policymaker whose employment decisions create liability for his governmental entity. *Id*. However, where state law provides a governmental employee with unfettered authority over personnel decisions, such as the authority held by the treasurer as to treasury employees, or by a sheriff as to employees of the sheriff's office, these government employees are final policymakers as to applicable personnel decisions and can create municipal liability. *Id*. at 351, fn. 3 (*citing Van Ooteghem v. Gray*, 628 F.2d 488, 495 (5th Cir. 1980) and *Brady v. Fort Bend County*, 145 F.3d 691, 699 (5th Cir. 1998)).

b) Individual liability.

A governmental official who is sued in his individual capacity for First Amendment retaliation may invoke the defense of qualified immunity. The defense of qualified immunity is designed to protect a government official from liability for his performance of the discretionary functions of his job. See, e.g., *Haverda*, 723 F.3d at 598 (*citing Beltran v. City of El Paso*, 367 F.3d 299, 302-303 (5th Cir. 2004)). In addressing a defendant's claim of qualified immunity, the court applies a two-step analysis, determining: (1) whether, taking the facts in the light most favorable to the plaintiff, the government official's conduct violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the conduct. *Id*. (*citing Lytle v. Bexar County, Tex*., 560 F.3d 404, 409-10 (5th Cir. 2009)). If the answer to both questions is yes, the qualified immunity defense will fail because "a reasonably competent public official should know the law governing his conduct." *Id*. (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)).

In cases involving First Amendment retaliation claims against government workers in their individual capacities, courts generally analyze initially whether, considering the facts in the light most favorable to the plaintiff, plaintiff alleged sufficient facts to establish that: (1) he suffered an adverse employment decision; (2) his speech or conduct involved public speech on a matter of public concern; (3) his interest in commenting on the matter of public concern outweighs the governmental entity's interest in promoting efficiency in its operations or maintaining proper discipline in its provision of services; and (4) his speech or conduct motivated that adverse employment action. *See, e.g., Haverda*, 723 F.3d at 591. If so, the Fifth Circuit easily dispenses with the defendant's claim of qualified immunity, holding that the law is clearly established that a public employee may not be demoted or discharged in retaliation for

exercising his First Amendment rights and that the Supreme Court has consistently held that governmental officials are forbidden from discharging public employees for their political affiliations. *See, e.g., Cox*, 2014 U.S. App. LEXIS 15234 at *17; *Haverda*, 723 F.3d at 599.

4. The Texas Whistleblower Act presents another potential source of liability.

As the Supreme Court acknowledged in *Garcetti*, state whistleblower statutes may provide an alternative source of redress when a public employee suffers an adverse employment action after engaging in speech or conduct which is not protected by the First Amendment. *Garcetti*, 547 U.S. at 425. The Texas Whistleblower Act, found in Section 554.002 of the Texas Government Code, 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.).

a) Reporting requirements.

A plaintiff must prove that he had a good faith belief that the conduct reported was a violation of law and that his belief was reasonable in light of his training and experience. Additionally, the public employee must 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).

Case law concerning whether the Act protects internal reports to workplace supervisors is still developing and depends in part upon 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). Generally, when an employee's 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). However, in contrast to some other states' whistleblower laws, under the Texas Whistleblower Act, an employee's report to a supervisor is not a report to an appropriate law enforcement authority if the employee knows his supervisor's power extends only to ensuring internal compliance with the law purportedly violated. *Univ. of Tex. Southwestern Med. Ctr. at Dallas v. Gentilello*, 398 S.W.3d 680, 686-87 (Tex. 2013); *see also, 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 sufficient.); *see also Ngo v. Green*, No. H-13-3423, 2014 U.S. Dist. LEXIS 9989 (S.D. Tex. Jan. 28, 2014) (Reports to an individual who has authority only for internal compliance are insufficient.). Additionally, filing a suit in district court does not constitute a report to an "appropriate law enforcement authority" under the Texas Whistleblower Act. *Leach v. Tex. Tech Univ*., 335 S.W.3d 386 (Tex. App. – Amarillo 2011, pet. denied).

b) Employee must initiate grievance procedures.

Before bringing suit, the public employee must initiate the employer's grievance procedures. TEX. GOV'T CODE §554.006(a). Compliance with this requirement is essential to the trial court's jurisdiction over a claimant's whistleblower action. *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.). In *Palazzolo* 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.

c) Standard of causation.

The standard of causation under the Texas Whistleblower Act is similar to that applied to claims of First Amendment retaliation. Under the Act, an employee need not prove that his reporting of the illegal conduct was the sole reason for the employer's adverse action, but he must establish "but-for" causation, showing that he suffered an adverse employment action that would not have occurred when it did if the report had not been made. *See, e.g., City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000); *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 634 (Tex. 1995); *Tex. Natural Resource Conservation Comm'n v. McDill*, 914 S.W.2d 718, 723 (Tex. App . – Austin 1996, no writ). The Whistleblower Act states that "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." TEX. GOV'T CODE §554.004(b). Texas courts of appeals are inconsistent in their analysis of the interaction between the "but-for" causation standard which is an element of a whistleblower plaintiff's case and this affirmative defense. *Steele v. City of Southlake*, 370 S.W.3d 105, 116-26 (Tex. App.—Ft. Worth 2012, pet. denied); *City of Houston v. Levingston*, 221 S.W.3d 204, 237-38 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

In *Steele*, the Ft. Worth Court of Appeals treated the affirmative defense as a powerful option for a governmental employer. The court recognized that because the Whistleblower Act does not require an employee to prove that the his report was the *sole* reason for the adverse employment action, plaintiffs may present evidence that their report of a violation of law, while not sufficient in itself to cause the adverse employment action, constitutes an indispensable component in the employer's decision. Such evidence will generally involve circumstantial evidence regarding an employer's motives, but can meet a plaintiff's burden of proof on causation. However, if an employer then provides evidence that conclusively establishes that any possible consideration by the employer of the employee's report was only superfluous to the adverse employment action because the adverse action would have occurred regardless of the report, then the Section 554.004(b) affirmative defense defeats the plaintiff's circumstantial evidence and precludes liability. *Steele*, 370 S.W.3d at 118-19.

By contrast, in *Levingston*, the Houston Court of Appeals for the First District treated the Section 554.004(b) affirmative defense as essentially a negation of the causation element of a plaintiff's cause of action. *Levingston*, 221 S.W.3d at 238 (*citing Harris County v. Vernagallo*, 181 S.W.3d 17 (Tex. App.—Houston [14th Dist.] 2005, pet. denied)). The court did not consider whether a plaintiff's report could be a necessary but insufficient reason for an adverse employment action that could be refuted by an employer's demonstration that the report was superfluous in its decision making process, and it did not discuss the impact of circumstantial evidence of an employer's motives. Instead, the court perceived the causation standard for which the plaintiff bears the burden of proof as co-extensive with the purported affirmative defense, explaining that, "[i]f the plaintiff was fired solely for a reason unrelated to his report of illegal activity, then his report could not have been a cause of his termination. Conversely, if the

report was a cause of his termination, the plaintiff could not have been fired solely because of an unrelated reason." *Id*. (internal citations and quotations omitted).

III. CONCLUSION

Public employees do not forego their First Amendment rights when they accept public employment, and, as citizens, they remain free to offer critical public comments about matters of public interest or to participate freely in the political process. However, when a government employee engages in public speech pursuant to his job responsibilities, he is not acting as a citizen, but rather as a member of the governmental entity, and his speech is not protected under the First Amendment. Additionally, the First Amendment does not protect a government employee who offers public comments about private matters. Courts are not interested in reviewing internal personnel and discipline decisions made by government employers in response to employee speech or conduct that does not fall within the ambit of constitutional protection.

However, courts recognize that governmental entities may have legitimate reasons for imposing restrictions on or consequences for an employee's public speech and conduct. A governmental entity's legitimate interests include concerns over internal discipline and morale, as well as possible interference with employees' ability to perform their duties or interference with the entity's operations. Even as to speech or conduct which is protected by the First Amendment, governmental employers may impose restrictions as necessary to enable them to operate efficiently and effectively and to maintain appropriate discipline.

Additional First Amendment Retaliation Cases

FIFTH CIRCUIT COURT OF APPEALS

***Harris v. Pontotoc County School District,* 635 F.3d 685 (5th Cir. 2011)**

Derek Harris, a student at South Pontotoc Middle School, was accused of hacking into the school's computer system and was sent to alternative school. Derek's mother was the secretary for the principal of South Pontotoc Middle School. As a result of this incident, the Superintendent decided to reassign Ms. Harris to an assistant teaching position to limit her access to computers containing confidential information. Ms. Harris had a conversation with the Superintendent about her son's treatment and her reassignment during which Ms. Harris called the Superintendent a liar and allegedly used profanity. The Superintendent terminated Ms. Harris' employment over the phone. Derek and his mother sued the District and Superintendent alleging, among other things, that Ms. Harris was wrongfully terminated in retaliation for protected First Amendment speech. The district court granted summary judgments to the District.

As for Ms. Harris's First Amendment claim, the First Amendment protects a public employee's speech in cases of alleged retaliation only if the speech addresses matter of "public concern". If the speech is not of public concern, the Court will not question an employer's motivation for taking action against the employee. The Court held that Ms. Harris' First Amendment rights were not violated because her speech did not address a matter of public concern. The Court found that evidence in the record shows only a mother who complained about the treatment her child received in a discrete incident and an employee who was upset at being reassigned. These matters are personal and Ms. Harris did not speak predominantly as a citizen and thus, the District was entitled to summary judgment on this claim.

***Porter v. Epps*, 659 F.3d 440 (5th Cir. 2011); *Juarez v. Aguilar*, 666 F.3d 325 (5th Cir. 2011)**

In a suit alleging retaliation in violation of the First Amendment, members of the governing body of a governmental entity can be held liable for failing to renew a contract of an employee even if they never made a formal vote to reject renewal of the employee's contract.

Juarez was employed by the Brownsville Independent School District on a one year contract that could be renewed annually. Juarez reported alleged financial irregularities to the FBI. At the conclusion of the year, the Board of Trustees did not renew Juarez's contract. Juarez alleges that the school board members did not renew his contract in retaliation for his having reported possibly illegal conduct to law enforcement authorities. Juarez sued the board members in their individual capacities. The board members moved for summary judgment, arguing that they could not be held personally liable because they could only perform "adverse employment actions" under the First Amendment by formal vote of the Board. Since there was no vote on Juarez's contract, they contended that they could not be held liable under the First Amendment.

The Court rejected the school board members' argument, holding that their informal agreement not to vote or renew Juarez's contract was just as much an adverse employment action as if they had actually voted. Merely permitting the contract to expire did not change the nature of the act of nonrenewal.

***Jordan v. Ector County*, 516 F.3d 290 (5th Cir. 2008)**

In order to establish a first amendment retaliation claim, a plaintiff-employee must show that he or she engaged in speech on a matter of public concern by establishing that he or she made "outward signs" of political affiliation that was in conflict with the interests of the decision-maker involved in the adverse employment action against the employee.

When the longtime Ector County District Clerk decided against seeking reelection in 2002, two employees in the Clerk's office, Jordan and Morgan, ran for office. Morgan won. Jordan did not quit her job but continued to give some indications that she would run against Morgan in 2006. Morgan fired her in 2005.

Jordan brought suit alleging that she was terminated in retaliation for her 2002 candidacy or her expected 2006 candidacy. The Fifth Circuit held that her anticipated 2006 candidacy, standing alone, was insufficient to establish that she had engaged in protected speech because she had not actually said that she would be a candidate in 2006. However, because Jordan ran for office in 2002 and, thereafter, gave vague indications that she might run in 2006, there was a continuity of speech sufficient to establish that her termination in 2005 could be connected to her candidacy in 2002. Moreover, Jordan's candidacy in 2002 was a matter of public concern protected by the First Amendment. The Fifth Circuit did not, however, state whether Jordan had a right to run for office that was protected by the First Amendment – just that her speech in connection with her 2002 candidacy was protected as outward signs of political affiliation.

***Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008)**

While speech made by an employee pursuant to the employee's official duties is not protected by the First Amendment, speech made by an employee that does not relate to the employee's official duties is entitled to further consideration under the First Amendment – even if it is made in conjunction with speech that is not protected. That the employee's speech is made to someone outside the employee's chain of command or to third-parties is evidence that it does not relate to the employee's official duties.

Davis was an internal auditor with the UT System. Her supervisor requested that she conduct an investigation into the possibility that other employees were intentionally accessing pornography on UT computers. Davis' investigation concluded that other employees were intentionally accessing pornography, some of which was probably child pornography. Davis alleged that as a result of her discoveries, her supervisors and other employees caused her working conditions to deteriorate and she was constructively discharged. Davis alleged that the conditions became markedly worse after she sent a complaint letter to various administrators in the UT System stating that she had filed complaints with the FBI concerning the child pornography evidence and with the EEOC regarding the treatment of African-American and female employees.

Davis brought suit against two supervisors for allegedly retaliating against her for engaging in protected speech in violation of the First Amendment. The supervisors moved for dismissal of Davis' claims, alleging that Davis' alleged speech was made pursuant to her official duties, and therefore not protected by the First Amendment. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Fifth Circuit held that the inquiry into whether the employee's speech is constitutionally protected involves three considerations: First, whether the employee's speech is pursuant to his or her official duties. If it is, then the speech is not protected by the First Amendment. Second, if the speech is not pursuant to official duties, then it must be determined whether the speech is on a matter of public concern. Third, if the speech is on a matter of public concern, the *Pickering* test must be applied to balance the employee's interest in expressing such a concern with the employer's interest in promoting the efficiency of the public services it performs through its employees. In a case involving a statement that includes speech, some of which is pursuant to official duties and some of which is not, the court must separate out the various aspects of the speech and proceed with the analysis on a section by section basis. In this case, the Fifth Circuit held that portions of Davis' complaint letter not relating to her official duties, as well as her complaints to the FBI and EEOC are entitled to proceed to the second stage of analysis (viz., whether the speech is on a matter of public concern).

***Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007)**

When a police officer speaks to the media about an accident while in uniform, on-duty and working at the scene of an accident, the officer's speech is not protected by the First Amendment. It is not protected by the First Amendment even if speaking with the press is not part of the regular duties of the officer and if speaking with the press was unauthorized. Statements made subsequently regarding the same event while the officer is off-duty to other media outlets (including talk shows) are also not protected by the First Amendment because they are a continuation of the earlier unprotected speech.

Nixon made critical remarks to the media about the police handling of a high-speed chase while he was in uniform, on-duty and working at the scene of the accident that resulted from the chase. Nixon also made subsequent, off-duty statements on radio talk shows about the incident. Nixon was not authorized to make statements to the media. The Fifth Circuit held that Nixon's speech was not protected by the First Amendment because it was made pursuant to his official duties. In addition, it did not matter whether Nixon was authorized to speak to the media and his subsequent, off-duty statements were merely a continuation of his on-duty statements. Finally, even if the subsequent statements were protected speech, Nixon's First Amendment rights were not violated because the harm resulting from his statements outweighed his right to make them.

***James v. Tex. Collin County*, 535 F.3d 365 (5th Cir. 2008)**

A county policy prohibiting employees from political campaigning while working does not violate the First Amendment, because it is sufficiently viewpoint neutral and limited in scope.

A county employee sued the county alleging violations of his First Amendment rights arising from the termination of his employment subsequent to his lost bid to become the

Republican nominee for county commissioner. Essentially, his employment was terminated pursuant to the county policy that prohibited political campaigning by employees while working. The court found that there was no evidence that the termination violated the First Amendment and the county policy was sufficiently viewpoint neutral and limited in scope.

***Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008)**

For a First Amendment retaliation claim, it is an objectively unreasonable violation of an employee's First Amendment rights if the employee was fired because of constitutionally protected speech.

Charles, a systems analyst for the Texas Lottery Commission, sent emails that raised concerns about racial discrimination and retaliation within the Commission and that alleged violations of Texas law and the mishandling of funds to high-ranking Commission officials and members of the Texas Legislature. Grief, a commission official, told Charles to meet with his immediate supervisor to answer questions about the emails. Charles asked the supervisor to give the questions in writing, and the supervisor agreed. Later that day, Grief fired Charles on the spot for insubordination for refusing to respond to requests from superiors. Charles sued Grief and the Commission for employment retaliation in violation of his First Amendment free speech rights. Grief's motion for dismissal based on qualified immunity was denied.

The Fifth Circuit Court affirmed the denial in part, because the district court correctly determined that, if Charles could prove that the defendant fired him for his "speech," plaintiff successfully alleged an objectively unreasonable violation of his First Amendment rights, because the speech for which he was putatively fired was entitled to constitutional protection.

TEXAS SUPREME COURT

***Institutional Div. Tex. Dep't Crim. Justice v. Powell,* 318 S.W.3d 889 (Tex. 2010)**

A claim of retaliation requires a retaliatory adverse action which is more than *de minimus*.

Powell, an inmate, was charged with creating a disturbance – an institutional disciplinary infraction. Powell alleged that this was in retaliation for complaints his family had made about mistreatment at the facility. The Department held a disciplinary proceeding and determined the disturbance charges were supported by evidence. Powell was unable to call certain witnesses and subsequently, filed suit against the Department alleging that he was denied due process because he was denied the opportunity to call certain witnesses. Powell sued the officers for retaliation for his family's complaints about his alleged mistreatment at the facility. The officers filed special exceptions and the Department filed a plea to the jurisdiction. The trial court granted the officers' special exceptions and the Department's plea to the jurisdiction dismissing the suit.

On appeal, Powell abandoned his claim of denial of due process against the Department and asserted a constitutional claim against the Department based on retaliation. However, the

only constitutional claim made against the Department at the trial court level related to Powell's inability to present evidence on his behalf.

The Texas Supreme Court held that prisoners have a First Amendment right to be free from retaliation for complaining about a prison official's misconduct, and a violation of this right is actionable under 42 USC §1983. To prevail on a claim of retaliation, one must establish a retaliatory adverse action which is more than "*de minimus*" – i.e., acts which would chill or silence a person of ordinary firmness from future First Amendment activities. While Powell was charged with a disciplinary infraction, the record contains no allegation or evidence of any punishment threatened or imposed for the alleged infraction. Powell asserts only that disciplinary proceedings were instituted. The Court found that it was unable to conclude that Powell has alleged an adverse action that was more than *de minimus* and thus, his §1983 claim fails.

Additional Texas Whistleblower Act Cases

TEXAS SUPREME COURT

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

Under the Whistleblower Act, Tex. Gov't Code §554.001, reports of alleged violations of law made to a chief academic officer charged only with internal compliance is jurisdictionally insufficient. In the school context, reporting to school officials not charged with enforcing laws outside the district falls short.

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

The Supreme Court reversed the courts below, noting that a report to someone charged only with internal compliance is jurisdictionally insufficient, and that Franco failed to show an objective, good-faith belief that the ISD qualifies as an appropriate law-enforcement authority under the act.

***Canutillo Indep. Sch. Dist. v. Farran*, 409 S.W.3d 653 (Tex. 2013) (per curiam)**

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 a finding of 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.

***Texas A&M University, Kingsville v. Moreno*, 399 S.W.3d 128 (Tex. 2013)**

Unlike whistleblower protection statutes in other jurisdictions, the Texas Whistleblower Act does not protect an employee who makes a purely internal report of a violation of law. The Act gives a restrictive meaning to "appropriate law enforcement authority" and only protects an employee who reports to authorities that "actually promulgate regulations or enforce the laws, or to authorities that pursue criminal violations."

Moreno sued her employer, Texas A&M University—Kingsville ("TAMUK"), alleging she was terminated in violation of the Texas Whistleblower Act. Moreno was an assistant vice president and comptroller of TAMUK, and claimed that her supervisor fired her for reporting to the University's President that her supervisor's daughter received in-state tuition in violation of state law. The trial court granted TAMUK's plea to the jurisdiction, and the court of appeals reversed. TAMUK appealed, arguing that Moreno's internal report did not meet the requirements of the Act in that Moreno did not make a good-faith report of a violation of law to an "appropriate law enforcement authority," as required under the Texas Whistleblower Act.

The Supreme Court agreed with TAMUK and dismissed Moreno's suit. In so finding, the Supreme Court denied Moreno's claim that because she reported a violation of law to her University's President, she met the requirements under the Act. Significant to the Court, was the fact that the President only had the authority to enforce compliance with state law on his campus. This fact did not support a finding that Moreno had a good faith belief that the President could "regulate under or enforce the law alleged to be violated" or to "investigate or prosecute a violation of criminal law." Tex. Gov't Code § 554.002(b). A whistleblower cannot reasonably believe that they are reporting a violation to an appropriate authority if the supervisor's authority

extends no further than being able to ensure the entity complies with the law. The Court pointed out that the Texas Act, as opposed to other whistleblower statutes in other jurisdictions, does not protect purely internal reports.

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

A plaintiff must show that he had a subjective *and objective* good-faith belief that he was reporting a violation of law to the "appropriate law enforcement authority" in order to be protected under the Texas Whistleblower Act. A plaintiff fails to show an objective good-faith belief that he was reporting a violation of law to the "appropriate law enforcement authority" when he admits to knowing that his supervisor only oversaw compliance with federal law and would have to report any violations of law to an external law-enforcement authority. The Texas Whistleblower Act ("the Act") is outward looking and does not protect purely internal reports. Finally, failure to establish a report to the "appropriate law enforcement authority" is a jurisdictional bar to suit.

Gentilello, a professor of surgery at The University of Texas Southwestern Medical Center ("UTSW"), was stripped of his faculty chair position sometime after reporting to his supervisor what he believed to be violations of Medicare and Medicaid requirements and procedures. Gentilello filed a whistleblower suit charging that his demotion was in retaliation for his reporting the violations to his supervisor. UTSW filed a plea to the jurisdiction, alleging that the suit was barred by governmental immunity because it lacked the Act's jurisdictional elements. The lower courts denied UTSW's plea to the jurisdiction, and UTSW filed an interlocutory appeal.

The Texas Supreme Court held that an employee must show a subjective and objective good-faith belief that he reported a violation of law to the "appropriate law enforcement authority." In order to find an objective good-faith belief, the Court held that an employee's belief must have been reasonable in light of the employee's training and experience. Failure to make such a finding is a jurisdictional bar to suit. The Court found that the Texas Whistleblower Act gives a limited definition to "appropriate law enforcement authority" and only includes authorities that may regulate under or enforce provisions of law. This definition is more limited than the protection offered employees under federal or other state whistleblower statutes. The Court found that "the bare power to urge compliance or purge noncompliance" with legislative directives does not transform a supervisor, who can only take internal action to ensure that the entity complies with the law, into an "appropriate law enforcement authority." Under that standard, the Court held that based on Gentilello's training and experience, he could not have had a good-faith belief that his internal report satisfied the requirements of the Act. Finally, the Court rejected Gentilello's claim that UTSW's internal anti-retaliation policy was sufficient to establish his good-faith belief that he was reporting a violation of law to the "appropriate law enforcement authority." The Court refused to broaden the applicability of the Texas Whistleblower Act to a purely internal report of a violation of law based on an entity's commitment to internal compliance with the law. The Court held that UTSW's immunity remained intact, and reversed the judgment of the court of appeals and dismissed for lack of jurisdiction.

***Galveston Independent School District v. Jaco*, 303 S.W.3d 699 (Tex. 2010)**

Under the Texas Whistleblower Act, whether the reporting of a violation of the University Interscholastic League's (UIL) rules to UIL officials is a good-faith report of a violation of law to an appropriate law-enforcement authority is a jurisdictional question.

Jaco sued Galveston ISD under the Texas Whistleblower Act alleging that he was demoted from Director of Athletics and Extracurricular Activities for reporting a high school football player's violations of the UIL's eligibility rules to UIL officials. In its plea to the jurisdiction, Galveston ISD asserted that governmental immunity barred Jaco's claims, because Jaco failed to make a good-faith report of a violation of law to an appropriate law-enforcement authority as required by the Whistleblower Act.

The Court held that whether Jaco's reporting of a violation of the UIL rules to the UIL was a good faith report of a violation of law to an appropriate law-enforcement authority is a jurisdictional question. The court reversed and remanded to the court of appeals to determine whether Jaco alleged a violation under the Whistleblower Act. See below, *Galveston ISD v. Jaco*, 331 S.W.3d 182 (Tex. App.—Houston [14th Dist.], January 11, 2011, pet. denied).

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.

***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)**

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.

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

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 recite 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.

***Univ. of Tex. at San Antonio v. Wells*, No. 04-10-00615-CV, 2011 Tex. App. LEXIS 920 (Tex. App.—San Antonio February 9, 2011, no pet.)**

To establish jurisdiction under the Texas Whistleblower Act, a university employee's internal report of fraudulent activity is insufficient, because it is not a report to an appropriate law enforcement authority.

Wells worked in the University's Office of P-20 Initiatives. Her responsibilities included ensuring the integrity of expenditures and personnel assignments in accordance with legal requirements and contract terms. She alleges that she discovered illegal activities being carried out by her supervisors and that she reported these activities to the University's Manager of Compliance. The Manager of Compliance allegedly told Wells that if the fraud was occurring, the Office of Compliance would report the fraud to the police department and that Wells would be protected by the Whistleblower Act. After Wells was fired, she brought suit under the Texas Whistleblower Act.

The University filed a plea to the jurisdiction, which the trial court denied. On appeal the court found that UTSA, a university, has no authority to regulate under or enforce Texas's laws relating to fraud, nor does it have authority to investigate or prosecute criminal laws relating to fraud. Further, the fact that the Manager of Compliance told Wells that the Office would report the fraud to the police department showed that Wells did not reasonably believe in good faith that UTSA was an appropriate law enforcement authority. For these reasons, the trial court's order was reversed, and the claims against UTSA were dismissed for lack of jurisdiction.

***Galveston ISD v. Jaco*, 331 S.W.3d 182 (Tex. App.—Houston [14th Dist.] 2011, pet. denied)**

Under the Texas Whistleblower Act, the reporting of a violation of a University Interscholastic League ("UIL") rule does not constitute the reporting of "violation of a law," which is necessary for subject-matter jurisdiction.

Shortly after Jaco became the School District's Director of Athletics and Extracurricular Activities, he learned that a student on the Ball High School football team was in violation of a UIL rule regarding parent residency. Jaco discussed the matter with the UIL and school officials, and submitted a written report to the UIL, which in turn held that the high school forfeited certain wins and was disqualified from competing for the state championship. A few weeks after the report, the superintendent reassigned Jaco to the position of athletic trainer.

Jaco brought a constructive discharge claim against the District under the Texas Whistleblower Act. The District filed a plea to the jurisdiction, which the trial court denied. The appellate court, however, determined that a UIL rule does not constitute a "law," under Whistleblower Act. Since the court determined that the elements of such a claim are jurisdictional, the appellate court reversed the trial court's denial of the District's plea to the jurisdiction.

***West Houston Charter School Alliance v. Pickering*, No. 01-10-00289-CVm 2011 Tex. App. LEXIS 6589 (Tex. App. – Houston [1st] August 18, 2011, no pet.)**

In the context of a claim under the Whistleblower Act, a claimant does not satisfy the Act's requirement to exhaust the governmental entity's grievance process by merely communicating her complaints, but not initiating the process under the school's procedure after it had been provided to her.

Pickering, the school's administrator, filed a suit against the charter school alliance and several of its board members, asserting that the school violated the Texas Whistleblower Act by retaliating against her after she reported to the Texas Education Agency that the board was holding meetings in violation of the Texas Open Meetings Act. The school filed a plea to the jurisdiction, contending that Pickering failed to initiate a grievance under the school's grievance procedure before filing suit. Pickering responded that the school's grievance procedure did not apply to her and that she had appealed the school's actions by a letter her attorney sent to the school board.

A jurisdictional prerequisite to initiating suit under the Whistleblower Act is that the claimant must first initiate action under the grievance or appeal procedures of her governmental employer. Merely complaining of the school's action without attempting to comply with the school's known grievance procedure does not satisfy the Whistleblower Act's requirements. Instead, the employee must initiate action under the actual grievance or appeal procedures of the employing entity.

***Mullins v. Dallas Indep. Sch. Dist.*, 357 S.W.3d 182 (Tex. App. – Dallas 2012, pet. denied)**

A party bringing a whistleblower claim must allege both a violation of a law and a good faith report of such violation to an appropriate law enforcement authority. Although the claimant need not identify the specific law that was violated, there must be some law prohibiting the complained of conduct to give rise to a claim under the Whistleblower Act; other complaints and grievances, including violations of an agency's internal policies and procedures, will not support a whistleblower claim. An entity's power to investigate a violation does not render it an appropriate law enforcement authority unless the plaintiff reported a violation of criminal law within the entity's investigatory powers or unless the plaintiff demonstrates a good faith belief that the authority had investigatory powers concerning such a criminal violation.

A school district employee filed a whistleblower action claiming that he was terminated in retaliation for his reports to the district's office of professional responsibility concerning violations of city construction codes and tampering with government records. The court granted the school district's plea to the jurisdiction, finding that Mullins had presented no evidence that he reasonably believed at the time he made his report that the office of professional responsibility had the authority to investigate such violations.

***City of Fort Worth v. Lane*, No. 02-11-00048-CV, 2011 Tex. App. LEXIS 10071 (Tex. App. – Fort Worth December 22, 2011, no pet.)**

A plaintiff may state a claim for relief under the Whistleblower Act by making a good faith report of a violation of law even in the absence of an actual violation of law. The threshold question is whether a reasonably prudent employee in the plaintiff's situation would have believed that a violation of law occurred.

Lane, a lawyer for the City, based her whistleblower claim on her allegation that the City had violated competitive procurement laws in soliciting bids for a contract to perform a healthcare audit. The court found that although the City was not required to follow competitive bid procedures in awarding contracts for professional services, it chose to do so regarding the contract in question. Because the City chose to put this contract out for competitive bids, the plaintiff's belief that the City was required to follow these procedures was reasonable under the circumstances of the case. As such, Lane's report of a violation of competitive bid procedures constituted a good faith report of a violation of law under the Whistleblower Act.

The court reversed the trial court's grant of the City's plea to the jurisdiction.

***Leyva v. Crystal City, Texas*, 357 S.W.3d 93 (Tex. App. – San Antonio 2011, no pet.)**

When it is unclear whether an employer's grievance procedures apply to terminated employees, a whistleblower claim will not fail on the basis of a terminated employee's failure to initiate administrative remedies.

Leyva was placed on administrative leave after being accused of failing to execute her job duties and responsibilities when her supervisor found a security vault unlocked after Leyva's shift. The vault held ballot boxes from a recent election. While on administrative leave, Leyva filed a police report alleging ballot box tampering and sent a letter to the City Manager denying the charges against her and advising him that she had made a good faith report of possible violations of law to a law enforcement agency. Leyva returned to work, but three weeks later she was terminated for insubordination. She did not file a written grievance after her termination, claiming that the City did not have a grievance policy that applied to her as a former employee, and that her letter to the City Manager while she was on administrative leave had initiated action under the City's grievance policy.

The City argued that because Leyva failed to institute a post-termination grievance, she had failed to initiate administrative remedies before filing suit under the Whistleblower Act, and therefore the City had not waived its sovereign immunity. The court disagreed, holding that the trial court erred in granting the City's plea to the jurisdiction based on Leyva's failure to initiate a grievance after her termination because it was unclear whether the City's grievance procedures applied to terminated employees.

***Wu v. Texas A&M International Univ.*, No. 04-11-00180-CV, 2011 Tex. App. LEXIS 8897 (Tex. App. – San Antonio November 9, 2011, no pet.)**

For purposes of a claim under the Texas Whistleblower Act, the EEOC is not an appropriate law enforcement authority to which a public employee would report a violation of the First Amendment, since the EEOC does not have the authority to regulate, investigate, enforce, or prosecute such a violation.

***Dallas Area Rapid Transit v. Carr*, 309 S.W.3d 174 (Tex. App. – Dallas 2010 pet. denied)**

An employee cannot establish a Whistleblower Act retaliation claim based on complaints that police officers working for the same employer failed to arrest a suspect. If, how, and when to arrest a suspect is within a police officer's discretion and failure to do so does not constitute a violation of law for purposes of the Whistleblower Act.

Carr was employed by Dallas Area Rapid Transit (DART) as a bus operator. A patron approached her bus, spoke to her in an aggressive tone, used a racial epithet, and pulled a knife on her. Carr called dispatch. A DART police officer caught the man but, instead of arresting him, the officer issued the man a citation for disorderly conduct. After learning that the man only received a citation, Carr appeared at a DART board meeting to complain. Subsequently, Carr was involved in another altercation with a patron, which led to the patron filing a complaint against Carr. The complaint was investigated and Carr was terminated.

Carr brought suit alleging retaliation in violation of the Whistleblower Act. DART filed a plea to the jurisdiction, which the trial court denied. On appeal, the court of appeals reversed the decision of the trial court and rendered judgment for DART, holding that complaints about a police officer's failure to arrest a subject do not constitute complaints of illegal conduct for purposes of the Whistleblower Act.

Flores v. City of Liberty, Texas, 318 S.W.3d 551 (Tex. App. – Beaumont 2010, no pet.)

A police officer who reported the killing of a cat by a fellow police officer did not have a reasonable good faith belief that the killing was a violation of law, based on his training, experience, and responsibilities, sufficient to satisfy the requirements of the Texas Whistleblower Act.

Beginning in February of 2006 and continuing throughout the remainder of the year, Flores was accused of multiple infractions by his employer. On or about November 2, 2006, Plaintiff Hugo Flores, a police officer, reported that Officer Pearson had committed animal cruelty by killing a cat. On December 11, 2006, Flores was terminated. The Court of Appeals, however, held that there was no evidence that he reported a violation of law by another city official. The Court of Appeals noted that while Flores may have had a subjective belief that the killing of the cat was a violation of law, the Court of Appeals ultimately found that the belief was not reasonable for an officer who possessed Flores' training, experience, and responsibilities. The Court of Appeals specifically noted that there was no evidence that Flores witnessed the killing or that he knew the details of the killing. In fact, once an investigation was conducted, it was established that no crime had been committed.

***Bates v. Randall County*, 297 S.W.3d 828 (Tex. App. – Amarillo 2009, pet. filed)**

Employees who verbally tried to initiate the County's grievance process but who were thwarted from doing so may be able to establish that their efforts were sufficient to toll the 90-day limitations period to file litigation under the Texas Whistleblower Act.

In this whistleblower case, the County terminated two employees, Bates and Reynero. After the reading of their termination letters, Reynero attempted to discuss the decision with the decision-maker but was prevented from doing so. The County argued that there was no applicable grievance procedure for the plaintiffs to engage in because they were no longer employees, though the County treated later actions as attempts to initiate the grievance process. The court found that "when it is unclear whether an employer has a post-termination grievance procedure, the terminated employee's notice to the employer that he believes an adverse personnel action was taken against him due to a good faith report of a violation of the law by the governmental entity, if made within 90 days, is sufficient to toll the limitations period of *section 554.005*." The court also noted that the Act does not require exhaustion of the grievance process, but only that the employees initiate it.

In regard to attorney's fees, the County argued that because the plaintiffs did not recover more than was offered to them in settlement, that the court was required to assess the costs of

suit against the plaintiffs under § 89.004 of the Texas Local Government Code. Section 89.004 requires that before a person can sue a county or an elected county official, that the person must present the claim to the commissioner's court, and if the commissioner's court does not offer to settle the plaintiff's claims for more than the plaintiff recovers after trial, then the plaintiff shall pay the costs of the suit. The court held that because compliance with the Texas Whistleblower Act's grievance procedures provides notice as to the plaintiff's claims, § 89.004's presentment requirement does not apply.

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.