

Employment Law Update

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Texas Whistleblower Act

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Texas Whistleblower Act

A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law to an appropriate law enforcement authority.

Tex. Gov't Code § 554.002(a)



What is a “good faith report”?

- * The employee’s belief must be objectively reasonable.
- * The report must be about a violation of: (1) a federal statute; (2) an ordinance of a local governmental entity; or (3) a rule adopted under a statute or ordinance.
- * A violation of an internal policy is not covered by the Act.



What is an “appropriate law enforcement official”?

A report is made to an appropriate law enforcement official if the official is part of a state or local governmental entity or the federal government that the employee in good faith believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law.

Tex. Gov't Code § 554.002(b)



University of Texas Southwestern v. Gentilello (Tex. 2013)

- * Having internal compliance responsibilities does not make one a law enforcement authority for the purpose of the Act.
- * Texas Supreme Court reversed jury verdict in favor of Plaintiff, which had been affirmed by Court of Appeals.



Texas A&M University Kingsville v. Moreno (Tex. 2013)

- * Case was decided on the same day as Gentilello.
- * President of University was not an appropriate law enforcement authority because he had only managerial power to compel internal compliance with the law.



Affirmative Defenses

- * If the adverse action takes place more than 90 days after the report, the employee loses the presumption that the action was taken because of the employee's report.
- * An employer is not liable under the Act if the employer would have taken the adverse employment action against the employee based on information, observation, or evidence that is not related to the report.

Tex. Gov't Code § 554.004



Steele v. City of Southlake (Tex. App.—Fort Worth 2012)

- * The city could lawfully discipline the plaintiff because of his deceptive impersonation of another officer in sending an email to higher management.
- * The city was required to show only that it would have discharged the plaintiff for a lawful reason unrelated to his protected report.
- * The city was not required to show that the lawful reason was the “sole” reason.



Failure to Use Internal Policies Bars Claim

- * 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 the Act.
- * The employee must institute the applicable grievance or appeal procedures not later than the 90th day after the date on which the alleged violation of the Act: (1) occurred; or (2) was discovered by the employee through reasonable diligence.

Tex. Gov't Code § 554.006



Fort Bend Independent School Dist. v. Gayle (Tex. App.—Houston [1st Dist.] 2012)

- * An employee can fulfill the grievance requirement by simply initiating the grievance.
- * An employee does not necessarily have to participate in the grievance proceeding.



Alcala-Garcia v. City of La Marque
(Tex. App.—Houston [14th Dist.] 2012)

- * Plaintiffs filed suit without initiating the grievance process because they believed: (1) that it did not apply to exempt employees; and (2) that the process would have been futile.
- * The mayor told Plaintiffs that the grievance procedure did not apply to them because they were not hourly employees.
- * Court found that the process applied to all employees, notwithstanding the mayor's faulty advice, and initiating the grievance process was a jurisdictional prerequisite to their right to pursue their claims.



Plea to the Jurisdiction: A tool to resolving Chapter 21 claims



Mission v. Consolidated Independent School District (Tex. 2012)

- * A plaintiff must show a prima facie case of discrimination.
- * When an employee is replaced by an older employee, an age discrimination claim must be supported by direct evidence of discriminatory intent.



ADEA: Motivating Factor or “But For” Standard?



Hernandez v. Grey Wolf Drilling, L.P. (Tex. App.—San Antonio 2011)

- * ADEA standard—A plaintiff bringing a disparate-treatment claim pursuant to ADEA must prove that age was the “but for” cause of termination. The employer does not have the burden to prove it would have taken the action regardless of age. *Gross v. FLB Financial Services* (2009).
- * TCHRA standard—A plaintiff does not have the burden to prove that he would not have been fired “but for” his age. A plaintiff may prevail by showing that age was one of the factors that motivated the termination decision.



Sexual Harassment



Waffle House, Inc. v. Williams (Tex. 2011)

- * Plaintiff alleged that she suffered unwanted sexual touching in the workplace. Plaintiff brought tort claims for negligent supervision and retention.
- * All claims against the employer are preempted by TCHRA. Allowing the tort claims to proceed against the employer would clash with Chapter 21's elaborately crafted statutory scheme that incorporates a legislative attempt to balance various interests and concerns of employees and employers.



Cherry v. Shaw Coastal (5th Cir. 2012)

- * Same-sex sexual harassment cases are more common.
- * Hostile Work Environment: multiple sexually explicit text messages, multiple acts of unwanted touching of intimate areas, sexually explicit comments.
- * Jury verdict thrown out by trial court.
- * Fifth Circuit reinstated jury verdict finding that the conduct was “severe and pervasive.”



Equal Employment Opportunity Commission v. Boh Construction (5th Cir. 2012)

- * Male construction worker alleged same-sex harassment by supervisor who referred to him in homophobic epithets and lewd gestures.
- * Jury returned a verdict on behalf of the plaintiff.
- * 5th Circuit vacated jury verdict finding that there was no evidence that the supervisor was homosexual or motivated by sex.
- * 5th Circuit agreed to hear this case en banc.



Investigations



City of Round Rock v. Rodriguez (Tex. 2013)

- * Do public sector employees in Texas have the right to have a union representative present during an internal investigatory interview when the employee reasonably believes that the interview may result in disciplinary action?
- * Supreme Court: Section 101.001 creates a right to form labor unions or other organizations. It does not create rights once the organization is formed. Therefore, there is no right to union representation when an employee reasonably believes that an investigatory interview may result in disciplinary action.



Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn. (2009)

- * Plaintiff reports sexual harassment in response to questions during a sexual harassment investigation. Plaintiff is then terminated and alleges the termination was in retaliation for reporting sexual harassment.
- * Trial court and 6th Circuit hold that plaintiff did not initiate the investigation, and therefore, she did not engage in protected conduct.
- * Supreme Court: An employee who participates in an employer's internal investigation is protected from retaliation.



Questions?

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