BLOWING THE WHISTLE FALLS ON DEAF EARS: REVAMPING TEXAS'S WHISTLEBLOWER JURISPRUDENCE BY APPLYING THE LESSONS OF *GARCETTI* AND SARBANES-OXLEY

Comment

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I. BLOWING THE WHISTLE

A. The Whistleblower's Story

Imagine for a moment that you are working a job you love—the one you dreamed of and the one you worked hard to land. You are a psychologist and you were born for the work, helping people recover from life's turmoil.[1] In the course of your employment, you discover that your employer has been committing Medicaid fraud.[2] You find yourself in an ethical dilemma and weigh your options. Ultimately, you decide that you may face serious repercussions if you do not expose the crime to the appropriate authorities. You place a call to the FBI and become its number-one witness against your employer. Your boss goes to jail and you face another fate—you no longer work at the job you loved and you cannot find employment anywhere in the state. You are now a whistleblower. You might as well have your chest adorned with a large red "W." Not in a million years did you predict that your decision to report a violation of law would result in such unimaginable consequences.

For Amy Brown, this unthinkable scenario was real life.[3] In search of employment, she moved across country with her world turned upside down and her belief system shattered to the core.[4] She had been vindicated in her choice to whistleblow, but as a practical matter, it made no difference.[5] She found herself asking, "What is the satisfaction in being right if as a consequence [I have] to give up everything [I] believed in?"[6] This question reflects the central dilemma a whistleblower faces—do I do what I believe is right, or do I stay silent because the potential ramifications of whistleblowing may destroy my life? Many individuals face this dilemma,

1. The following hypothetical is adapted from C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 50 (2001) (discussing the motivations and repercussions of whistleblowing through whistleblower narratives).

2. "Medicaid fraud is the single biggest source of whistleblowers' complaints." ALFORD, *supra* note 1, at 50.

3. *Id.*

4. *Id.* at 50-51.

5. *Id.* at 51.

6. *Id.*

many choose to blow the whistle, but most say if they had it to do over again, they would have kept their mouths shut.[7] In the wake of blowing the whistle, whistleblowers face a world of bitter consequences and often lose sight of what prompted them to action in the first place.[8]

B. Texas Whistleblowers Need Help

Over twenty years ago, the Texas Legislature passed the Texas Whistleblower Act (the Act).[9] The Act provides whistleblower protection exclusively to state employees.[10] Almost fifteen years ago, the *Texas Tech Law Review* (this very journal) published an article calling for a change to the Act a mere handful of years after the legislature implemented it.[11] Recently, trends in employment law and lack of effective whistleblower legislation have forced the issue of whistleblowing to the forefront of American legal issues.[12] Many employees find themselves in a situation where they are aware of their employers engaging in an activity that the employee either knows or suspects is illegal.[13] Whistleblowers feel the pressure of reporting a superior to be a high stress and frightening ordeal; employers tend to characterize employees who whistleblow as disloyal.[14] While it is widely recognized that whistleblowers provide a substantial benefit to the public, there is no uniform whistleblower protection at the federal level.[15] Therefore, the majority of whistleblowers must seek out protection at the state level and often find themselves coming up short.[16] Notwithstanding the call for change regarding the necessity of effective and efficient whistleblower law, current whistleblower jurisprudence in Texas

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7. *See id.* at 1-2.

8. *See id.* at 2-3.

9. *See* TEX. GOV'T CODE ANN. § 554 (West 2004); *see also* Valerie P. Kirk & Ann Clarke Snell, *The Texas Whistleblower Act: Time for a Change*, 26 TEX. TECH L. REV. 75, 76 (1995) (discussing the implementation and shortcomings of the Texas Whistleblower Act).

10. *See* § 554.

11. *See* Kirk, *supra* note 9, at 77.

12. *See* NATIONAL WHISTLEBLOWERS CENTER, http://www.whistleblowers.org/ (last visited Sept. 26, 2010).

13. *See* ALFORD, *supra* note 1, at 44-52 (providing examples of why whistleblowers ultimately decide to blow the whistle).

14. *See* RENN C. FOWLER & ROBERT D. L'HEUREUX, A GUIDE TO THE WHISTLEBLOWER PROTECTION ACT & RELATED LITIGATION 1 (2001).

15. *Private Sector Whistleblowers: Are There Sufficient Legal Protections? Before the Subcomm. On Workforce Protections of the H. Comm. On Education and Labor*, 110th Cong. 2 (2007) (statement of Richard E. Moberly, Assistant Professor of Law, University of Nebraska College of Law) [hereinafter Moberly, *Private Sector Whistleblowers*]. Professor Moberly is a member of the faculty at the University of Nebraska College of Law where he conducts extensive research on employee whistleblower protections. *Resident Faculty*, THE UNIVERSITY OF NEBRASKA COLLEGE OF LAW, http://law.unl.edu/facstaff/faculty/resident/rmoberly.shtml (last visited Oct. 6, 2010). The United States House of Representatives allowed him to testify as an expert before two committees considering continued legislation on federal whistleblower protections. *Id.*

16. STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW 377 (2001).

makes it nearly impossible for a plaintiff whistleblower to win an action against a state-employer defendant.[17]

Current whistleblower legislation in Texas is ill-designed to achieve the goal of protecting whistleblowers.[18] In light of the fact that Texas whistleblowers are undeniably entitled to legal protections, it is now time for something more than change—it is time for results. In *Garcetti v. Ceballos*, the Supreme Court of the United States made it clear that the constitutional right to whistleblow does not exist; the Court thus imposed on the states the responsibility of developing legislation that promotes actual success for public sector whistleblowers.[19] Therefore, revamping the Texas Whistleblower Act is warranted.[20] Successful revision of the Texas Whistleblower Act begins with an assessment of the current provisions of the Act.[21] The scope of the Act is broad, but crucial terms are undefined.[22] Both plaintiffs bringing suit and courts deciding the issues have difficulty in appreciating the implications of certain factual and procedural questions throughout the whistleblowing process.[23]

This Comment argues that state legislators should go back to the drawing board and clarify the purpose of the Act by defining the broad language that courts have used to stifle whistleblower claims.[24] In order to address the serious implications at play, the Texas Legislature should seek out current examples of innovative whistleblower legislation like the Sarbanes-Oxley Act of 2002. (Sarbanes-Oxley) and its progressive implementation of an internal reporting system.[25] Legislators should develop an internal reporting policy on the state level for public sector whistleblowers that mimics Sarbanes-Oxley's policy in the private sector.[26] Once the legislature makes these simple but significant modifications, whistleblowers and courts will be better equipped to facilitate the positive movement of whistleblower law in Texas.[27]

Primarily, this Comment urges the Texas Legislature to renovate the Texas Whistleblower Act. Part I introduces the concept of whistleblower law and highlights the scope of the issue in Texas.[28] Part II examines the federal stance on public employment-free speech jurisprudence, as

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17. *See Whistleblowers Beware:* State of Texas and TxDOT v. Lueck, THE JEFFERSON COURT BLOG (July 26, 2009), http://texas-opinions.blogspot.com/2009/07/state-and-txdot-v-lueck-tex-2009.html.

18. *See infra* Part IV.

19. *See infra* Part II.A.2.

20. *See infra* Part V.

21. *See infra* Part IV.A.

22. *See infra* Part IV.A.

23. *See infra* Part IV.A.

24. *See infra* Part IV.A.

25. *See infra* Part IV.B.

26. *See infra* Part IV.B.

27. *See infra* Part IV.C.

28. *See supra* text accompanying notes 1-23.

discussed through two seminal Supreme Court cases—*Pickering v. Board of Education* and *Garcetti v. Ceballos*.[29] Part II also discusses Congress's enactment of the Sarbanes-Oxley Act of 2002 as an example of landmark whistleblower legislation.[30] Bringing the Comment to the principal issue, Part III evaluates the provisions and implications of the Texas Whistleblower Act.[31] Additionally in Part III, the Comment analyzes *State v. Lueck*, a Texas Supreme Court case that demonstrates the negative impact of current whistleblower jurisprudence in Texas.[32] Accordingly, Part IV addresses potential solutions to the undesirable application of the Texas Whistleblower Act in Texas courts.[33] Ultimately, this Comment proposes that the Texas Legislature clarify the language of the Act by redefining specific terms and giving Texas whistleblowers the option to blow the whistle internally.[34] The Comment concludes that these changes to the Act will allow whistleblowers and courts alike the chance to be instrumental in shaping whistleblower law in Texas for the better.[35]

II. CURRENT FEDERAL WHISTLEBLOWING

A. The Supreme Court's Approach to Public Employment-Free Speech Jurisprudence

1. Pickering *and Its Balancing Test*

Historically, the whistleblower jurisprudence of the United States Supreme Court has paralleled the Court's public employment-free speech jurisprudence.[36] In fact, the two issues are one in the same; the Court's bearing on whistleblower lawsuits throughout the nation is predicated on its development of public employment-free speech jurisprudence.[37] The Court squarely addressed a public employee's right to free speech (right to blow

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29. *See infra* Part II.
30. *See infra* Part II.
31. *See infra* Part III.
32. *See infra* Part III.B.
33. *See infra* Part IV.
34. *See infra* Part IV.A-B.
35. *See infra* Part IV.C.
36. *See* Joseph O. Oluwole, *On the Road to* Garcetti*: "Unpick" Erring* Pickering *and Its Progeny*, 36 CAP. U. L. REV. 967, 968 (2008) [hereinafter Oluwole, *On the Road to* Garcetti] (concluding that the Supreme Court's public employment-free speech jurisprudence has become increasingly pro-employer); *see also* Joseph O. Oluwole, *The* Pickering *Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133 (2008) [hereinafter Oluwole, *The* Pickering *Balancing Test*] (identifying a framework in which to utilize the *Pickering* balancing test and its use in determining the free speech rights of public employees).
37. *See* Oluwole, *On the Road to* Garcetti, *supra* note 36, at 968; *see also* Oluwole, *The* Pickering *Balancing Test*, *supra* note 36, at 133 (illustrating that the United States Supreme Court's stance on public employment-free speech is equivalent to its whistleblower jurisprudence).

the whistle on an employer) head-on in *Pickering v. Board of Education*.[38] The *Pickering* decision was the first key case considering employees and free speech, with every subsequent Supreme Court case addressing this issue building on its standard.[39] In *Pickering*, the Court articulated a balancing test—known as the *Pickering* balancing test—that weighs "the employee's free speech rights against the public employer's interests in operational efficiency."[40] In the cases since *Pickering*, the Court has attempted to clarify the nuanced balancing test by supplementing it with additional tests and factors, resulting in a public employment-free speech jurisprudence that is confusing and filled with multiple analytical frameworks.[41]

Marvin Pickering was a public school teacher who was fired for voicing his critical opinion of school officials in the local newspaper.[42] The Illinois school that Mr. Pickering worked for put proposals on the ballot regarding the raising of funds for the school district.[43] The proposals included an increased tax rate and bond issues for school construction.[44] Numerous articles by the teachers' union, as well as one by the superintendent, ran in the local paper appealing to voters to support the proposals in order to maintain the educational level in the school district.[45] Mr. Pickering responded to the articles by writing his own editorial that criticized the way the school board was handling the raising of revenues and that highlighted the mismanagement of school funds, which frequently went to athletic programs instead of education.[46] The school board cited Mr. Pickering's letter to the newspaper as the main reason for his termination.[47] At the due process hearing, the board referenced many other justifications for firing Mr. Pickering, albeit justifications that were a result of Mr. Pickering's letter.[48] The board explained that some statements in the letter were false, that the statements would incite controversy and conflict between the staff at the school and the district residents, and that the statements unjustifiably disparaged the reputation of the school administrators by questioning the validity of the proposals.[49]

Mr. Pickering filed suit against the school, claiming a violation of his First Amendment free speech right.[50] The Illinois state courts rejected the

38. *See supra* note 37 and accompanying text.
39. *See supra* note 37 and accompanying text.
40. *See* Oluwole, *On the Road to Garcetti*, *supra* note 36, at 967.
41. *See id.*
42. Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968).
43. *Id.*
44. *Id.* at 565-66.
45. *Id.* at 566.
46. *Id.* at 564.
47. *Id.* at 566.
48. *Id.* at 566-67.
49. *Id.*
50. *Id.* at 565.

First Amendment claim, distinguishing Mr. Pickering's role as citizen from his conflicting role as public school teacher.[51] The courts stated that as a citizen Mr. Pickering would have the right to free speech, but as a public school teacher he was obligated not to speak out about the operation of his school.[52] The Supreme Court disagreed with this rationale.[53] For the first time, it explained the distinction between citizen and employee for purposes of public employment-free speech jurisprudence:

> [I]n a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by the teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.[54]

The Court reasoned that a public employer cannot coerce a public employee into forfeiting free speech rights afforded by the Constitution.[55] The Court, however, did state that the existence of a certain amount of control over employee speech was imperative to the efficient operation of a public employer's workplace.[56] The employee's right to First Amendment protection and the employer's right to control the workplace are thus competing interests; courts must balance these interests in determination of whether the employer's retaliation was improper in light of the First Amendment.[57] The Court referred to the balancing of these competing interests as the *Pickering* balancing test.[58]

With the establishment of this interest-balancing test, the Court was clear that no bright-line rule existed for adjudicating these types of whistleblower claims.[59] Instead, the Court provided factors—the *Pickering* calculus factors—for courts to apply on a case-by-case basis.[60] The

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51. *Id.* at 567-68.
52. *Id.* at 567.
53. *Id.* at 574-75.
54. *Id.* at 574.
55. *Id.* at 568.
56. *Id.*
57. *Id.* at 563.
58. Oluwole, *On the Road to Garcetti*, *supra* note 36, at 976.
59. *Id.*
60. *Pickering*, 391 U.S. at 569; *see also* Oluwole, *On the Road to* Garcetti, *supra* note 36, at 976 (explaining the substance and importance of the *Pickering* calculus factors). Mr. Oluwole provides a comprehensive synopsis of the *Pickering* calculus factors, some that favor employers and some that favor employees. Oluwole, *On the Road to* Garcetti, *supra* note 36, at 976-77. He explains:

> The factors that could be deemed relatively more pro-employer in the Pickering balancing test include: (a) whether the speech would impact "harmony among coworkers" or the employee's immediate superior's ability to maintain discipline; (b) whether the speech is directed toward someone with whom the employee would typically be in contact during his daily work (known as the "close working relationship" factor); and (c) whether the nature of the employment relationship between the employee and the person toward whom the speech is directed is so close "that personal loyalty and confidence are necessary to their proper functioning" (known

articulated factors included both pro-employee factors, such as the promotion of unrestricted debate regarding public matters, and pro-employer factors, such as whether the speech promoted harmony between co-workers.[61] Public employment-free speech scenarios contain an "enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal."[62] Because employees direct these critical statements at those deciding whether appropriate grounds for dismissal exist, there is an inherent conflict of interests in these cases.[63] Balancing these interests seemed to be the only fair way to approach such conflicted claims, although years later the Supreme Court decided that the progression of public employment-free speech jurisprudence warranted a more direct approach to public employee whistleblower claims.[64]

2. Garcetti *and What It Means for the States*

In 2006, the Supreme Court threw a bold wrench into its public employment-free speech jurisprudence with *Garcetti v. Ceballos*.[65] The Court held that no absolute constitutional cause of action exists for public employees who blow the whistle on their employers.[66] Without much elaboration, the Court reiterated the importance of whistleblower actions, but held that precedent did not warrant creating a constitutional claim for employees who speak out pursuant to their employment.[67] The Court reasoned that whistleblower protection available at the state and federal levels, through whistleblower laws and labor codes, was sufficient.[68] In

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as the "confidentiality" factor). These are the determinants or variables considered in assessing the impact of the employee's speech on the operational efficiency of the employer. Factors that could be deemed relatively more pro-employee in the balancing test include: (a) the employee's interest in commenting on matters of public concern and "[t]he public['s] interest in having free and unhindered debate on matters of public importance"; (b) the fact that public employees are more likely than the general citizenry "to have informed and definite opinions" about the matter in question; (c) the ease with which the employer could rebut the content of the employee's statement, albeit false (known as the "ease of rebuttal" factor); and (d) whether there is evidence that the speech actually had an adverse impact on the employer's proper functioning.

Id.

61. Oluwole, *On the Road to* Garcetti, *supra* note 36, at 976-77.
62. *Id.* at 976.
63. *Id.*
64. *See Pickering*, 391 U.S. at 569.
65. *See* Garcetti v. Ceballos, 547 U.S. 410, 417 (2006).
66. *See id.* at 412.
67. *See id.* at 419-20.
68. *See id.* at 412.

essence, *Garcetti* limited *Pickering*, holding that employee statements made in the scope of employment are not deserving of free speech protection.[69]

Mr. Ceballos was a deputy district attorney who discovered what he thought to be considerable misrepresentations in an affidavit used by police to obtain a material search warrant.[70] He then wrote a disposition memorandum that recommended dismissing the case due to purported misconduct by the police officers.[71] Following the memorandum, Mr. Ceballos's supervisors denied him a promotion, reassigned him to trial deputy from calendar deputy, and transferred him to another courthouse.[72] Mr. Ceballos considered these actions retaliatory in nature and filed a § 1983 claim.[73] His supervisors cited staffing needs for their actions but alternatively stated that the memorandum in question did not constitute protected speech.[74] The district court agreed with the supervisors, holding that Mr. Ceballos wrote the memorandum in the scope of his employment duties, so the memorandum did not constitute protected speech.[75] The Ninth Circuit disagreed.[76] Reversing the district court's decision and heavily relying on the First Amendment analysis in *Pickering*, the circuit court held that the allegations made in the memorandum *did* constitute protected speech.[77]

The Supreme Court, however, did not concur with the Ninth Circuit; the Court did not find that it should extend free speech protection to Mr. Ceballos's memorandum.[78] The facts of *Garcetti* required the Court to address the distinction between speaking as a citizen and speaking as an employee—an aspect of the *Pickering* balancing test that needed clarification.[79] The Court made clear that the *Pickering* balancing test exclusively applied to those employees speaking on a matter of public concern as a citizen, not those speaking in the scope of their employment.[80] The *Garcetti* decision stated: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens

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69. *Compare* Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that the constitutional right to whistleblow does not exist), *with* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (holding that public employees are deserving of free speech protections).

70. *Garcetti*, 547 U.S. at 413.

71. *Id.* at 414.

72. *Id.* at 415.

73. *Id.* Section 1983 claims are part of the Civil Rights Act of 1871 and require two things: (1) defendant acted under color of state law, and (2) defendant's actions deprived plaintiff of rights, privileges, or immunities guaranteed by law. *See* 42 U.S.C. § 1983 (2006).

74. *Garcetti*, 547 U.S. at 415.

75. *Id.*

76. *See id.*

77. *Id.* at 415-16.

78. *See id.* at 420-21.

79. *See id.*; Oluwole, *On the Road to* Garcetti, *supra* note 36, at 1018; Oluwole, *The* Pickering *Balancing Test*, *supra* note 36, at 142.

80. *See* Garcetti, 547 U.S. at 420-21; Oluwole, *On the Road to* Garcetti, *supra* note 36, at 976; Oluwole, *The* Pickering *Balancing Test*, *supra* note 36, at 135.

for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[81] The Court's reasoning for this assertion paralleled its explanation of the policy behind allowing government employers control over their workplaces—based on the potential disruptiveness that critical speech could cause, governmental agencies are entitled to broader discretion in exercising the role of employer.[82] The Court went on to say that the government would not be able to provide efficient public services without significant control over an employee's words and actions.[83] No evidence, empirical or otherwise, was present to support the assertion that "absent significant control over employees' words and actions, little chance exists for the efficient provision of public services."[84] The Court also declared that public employees necessarily accept some limitations on their freedoms in the interest of efficiency for their government employers.[85]

The framework for imposing a limitation on an employee's freedom of speech manifested itself in the *Garcetti* test.[86] The *Garcetti* test is seemingly quite simple; it asks whether an employee made a statement "pursuant to official duties" of employment.[87] The Court set forth the pursuant to official duties standard to clarify the convoluted distinction between citizen and employee.[88] If an employee acts pursuant to official employment duties, then the employee is operating as employee and his actions are not protected.[89] If the employee acts outside the scope of employment duties, then the employee is functioning as citizen and his actions are constitutionally protected.[90] Whether employees are acting pursuant to their official duties is quite basic on its face, however, the Court did not provide a means for defining what is indeed "pursuant to" or what exactly "official duties" are.[91]

"[I]n other words, the Court failed to create a framework for defining the scope of an employee's official duties."[92] Without defining the boundaries and scope of the *Garcetti* test, the Court left the workplace open

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81. *Garcetti*, 547 U.S. at 421.

82. *See id.* at 418; Oluwole, *On the Road to* Garcetti, *supra* note 36, at 1016-17.

83. *Garcetti*, 547 U.S. at 418; Oluwole, *On the Road to* Garcetti, *supra* note 36, at 1016-17.

84. Oluwole, *On the Road to* Garcetti, *supra* note 36, at 1018.

85. *Id.* The Court reasoned, without supportive evidence or precedent, that the efficiency of public services warranted the forfeiting of constitutional rights for public employees; this rationale indicated that the opinion was very much pro-employer. *Id.* "Such statements and conclusions . . . were indicative of the Court's inclination in this case to strike the *Pickering* balancing in favor of the employer, and in so doing strengthen the position of employers in the balancing test." *Id.* at 1019.

86. *See* Oluwole, *On the Road to* Garcetti, *supra* note 36, at 1020; Oluwole, *The* Pickering *Balancing Test*, *supra* note 36, at 142.

87. *See supra* note 86 and accompanying text.

88. *See* Oluwole, *On the Road to* Garcetti, *supra* note 36, at 1020.

89. *See id.*

90. *See id.*

91. *See id.*

92. *Id.*

to many negative effects.[93] For example, two types of encouragement may occur: (1) employers may feel encouraged to draft job descriptions that allow the employers to exercise too much unwarranted control; and (2) employees may feel encouraged to report their concerns to the press or media because they may fear that reporting to their employers will fall under action that is pursuant to official duties.[94]

The Court dealt with concerns regarding the negative effects of the somewhat elusive *Garcetti* test by suggesting an analogue approach of settling public employment-free speech disputes.[95] The Court suggested that protection should not extend to speech that is *related to*—as distinguishable from *pursuant to*—official duties when no relevant analogue to speech by non-governmental working citizens can be illustrated.[96] If a public employee makes a statement that in no way is comparable to speech made by an employee in the private sector, then that speech is subject to retaliation.[97]

> The problem with this "analogue" approach, however, is that it is highly unworkable, since there is an abundance of employee speech related to employee duties that have no relevant analogue to speech by non-government employee citizens. In fact, the very nature of all employment is that employees have duties. However, with respect to government employees, they have duties—and, consequently, speech—which citizens who are not government employees do not.[98]

Therefore, there are grounds for arguing that public sector whistleblowers are under more scrutiny than private sector employees.[99] Even so, the federal government has not taken a uniform stance on public sector whistleblower protection.[100] *Garcetti* defers to the states to develop policies that individually and separately protect whistleblowers when those individuals are acting as employees.[101] The federal government has, however, taken a stance on private sector whistleblowing.[102] In fact, Congress encourages whistleblowing in the corporate world—as evidenced by the passing and implementation of Sarbanes-Oxley.[103]

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93. *Id.* at 1024-25.
94. *Id.*
95. *See id.*
96. *Id.* at 1025.
97. *See id.*
98. *Id.*
99. *See id.*
100. *See* Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 2.
101. *See* Garcetti v. Ceballos, 547 U.S. 410, 411 (2006).
102. *See* Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 4.
103. *Id.*

B. The Sarbanes-Oxley Act and Its Parallel to Public Sector Whistleblower Actions

In response to corporate scandals at places like Enron and WorldCom, Congress passed the Sarbanes-Oxley Act of 2002.[104] Sarbanes-Oxley addressed the issue of private sector whistleblowing by encouraging employees of publicly-traded companies to blow the whistle on fraudulent activity without fear of retaliation in the workplace.[105] Sarbanes-Oxley allows employees who blow the whistle on fraudulent or other unlawful activities to bring a claim against an employer who responds to the whistleblowing with adverse action.[106] "By protecting employees at publicly-traded companies, the hope was to provide protections to a much broader range of employees than had previously been protected by statutes focusing primarily on particular industries."[107] Although this hope represented what most whistleblower scholars believed would be comprehensive and broad protection, data suggests that Sarbanes-Oxley plaintiff-employees rarely win cases.[108] Richard Moberly, a leading legal commentator on whistleblower jurisprudence, recently compiled an empirical study of all Sarbanes-Oxley cases filed through the Department of Labor following the first three years of the legislation's implementation.[109] Professor Moberly found that a mere 3.6% of whistleblowers won relief at the initial administrative proceeding and only 6.5% won relief after appealing the initial finding.[110]

These statistics are alarming, but not wholly indicative of the relevance of Sarbanes-Oxley.[111] Although critics have disapproved of Sarbanes-Oxley for its ineffectiveness in the private sector, it nonetheless provides an example of modern whistleblower legislation that states can look to in developing their own workable whistleblower statutes.[112] Professor Moberly contends that the statistics discussed above are attributable to the burden on a whistleblower to show that the claim is the "right" type of

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104. *See* Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2006); *see also* Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 4 (questioning the sufficiency of Sarbanes-Oxley as private sector whistleblower protection).

105. *See* § 1514A; Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 4.

106. *See supra* note 105 and accompanying text.

107. Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 4.

108. *Id.*

109. *Id.*

110. *Id.* The cases Professor Moberly assessed "consist[ed] of over 700 separate decisions from administrative investigations and hearings." *Id.* Thus, very few claims were able to obtain relief at both the OSHA and ALJ levels. *See id.*

111. *See generally* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007) (discussing which parts of Sarbanes-Oxley do not work as Congress intended) [hereinafter Moberly, *Unfulfilled Expectations*].

112. *See id.*

claim.[113] Decision-makers focus an overwhelming amount of time on whether the right type of employee, employer, alleged misconduct, reporting channel, etc. is present.[114] The majority of claims are not heard on their merits because rigid reporting requirements are difficult to meet.[115] "[O]ver 95% of Sarbanes-Oxley whistleblower cases failed to satisfy one or more of these questions as a matter of law. Thus, very few whistleblowers were actually provided the opportunity to demonstrate that they were the subject of retaliation."[116]

Sarbanes-Oxley demonstrates the danger of rigid reporting requirements, but it also provides a structural model that has great potential.[117] Sarbanes-Oxley requires companies to establish internal reporting procedures that improve the legitimacy of the reporting system by providing a direct line to an authority that has the power to address whistleblower claims.[118] Sarbanes-Oxley does not encourage these internal procedures—it demands them.[119] By doing so, it facilitates disclosures of misconduct by improving information flow.[120]

The implementation of an internal reporting system is an improvement in whistleblower law, but it does not address every potential problem with whistleblower legislation.[121] "[D]espite its broad application to all publicly-traded corporations, Sarbanes-Oxley fails to detail any specifics regarding the disclosure channel."[122] Even so, it illustrates a push towards whistleblower legislation that implements new and innovative concepts and structures.[123] As such, the Texas Legislature can benefit from assessing the Sarbanes-Oxley Act and implementing its own internal reporting system for state employees that includes specific details for Texas courts to consider.[124]

III. CURRENT WHISTLEBLOWING IN TEXAS

Historically, Texas employers practiced at will employment.[125] Job security for employees in an at will state is nonexistent because "[a]n at will employee can be fired for any reason or no reason at all[,] [e]ven if the

113. *See* Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 5.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*; *see* Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1138 [hereinafter Moberly, *Structural Model*].

118. *See* Moberly, *Structural Model*, *supra* note 117, at 1138.

119. *See id.*

120. *See id.* at 1138-39.

121. *See id.*

122. *Id.* at 1161.

123. *See id.*

124. *See generally id.* (pointing out that Sarbanes-Oxley is too limited in scope).

125. *See* R. Rogge Dunn, *Employees' Rights Under the Texas Whistleblower Act and Similar Texas Laws* 2 (1992), http://www.cdklawyers.com/pdfdunn/speech025.pdf.

reason is sadistic, capricious[,] or absurd."[126] The Fifth Circuit's decision in *Phillips v. Goodyear* illustrates an extreme application of at will employment law.[127] In this case, the federal court held that the employer, Goodyear, lawfully terminated the employee, Mr. Phillips, under Texas's at will employment law when Mr. Phillips refused to perjure himself when deposed in an antitrust lawsuit brought against Goodyear by one of its market competitors.[128] Mr. Phillips argued that a public policy exception applied to his termination, stressing to the court that he gave truthful testimony at the deposition, albeit testimony that hurt Goodyear's case.[129] The court rejected the public policy argument, however, and reinforced a strict application of Texas at will employment law.[130] Over time, courts have implemented modern developments in employment law in order to prevent extreme cases like *Goodyear*, as well as to ensure safety in the workplace for all employees.[131] Employees now have the ability to sue employers "on a myriad of legal theories" that serve as exceptions to the bright-line rule of at will employment.[132] One such exception is the Texas Whistleblower Act.[133]

A. The Texas Whistleblower Act

In 1983, the Texas Legislature passed the original version of the Texas Whistleblower Act without disputing its content or relevance.[134] The existing legislative history "indicates a doubtlessly well-intentioned but undeniably perfunctory approach that included no debate and little discussion."[135] In fact, what originally began as House Bill 1075 never received opposition on its way to enactment as the Texas Whistleblower Act.[136] It passed through the House State Affairs Committee without dissent.[137] The Senate discussed no substantive parts of the Act.[138] In fact,

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126. *Id.* at 3.

127. *See* Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1057 (5th Cir. 1981).

128. *Id.*

129. *Id.* at 1055.

130. *Id.* at 1057.

131. *See* Dunn, *supra* note 125, at 4.

132. *Id.*

133. *Id.*

134. CAPITOL RESEARCH SERVICES OF TEXAS, http://capitolresearch-texas.com/reports_subject.html (follow "Employment" hyperlink; then follow "Texas Whistleblower Act (1983 & 1989)" hyperlink) (last visited Oct. 14, 2010).

135. Kirk, *supra* note 9, at 78.

136. *Id.* at 77; *see also The Texas Whistleblower Act: Debate on Tex. H.B. 1075 on the House Floor*, 68th Leg., R.S. (May 20, 1983) (House tape on second reading of the Act); *The Texas Whistleblower Act: Debate on Tex. H.B. 1075 on the House Floor*, 68th Leg., R.S. (May 23, 1983) (House tape on third reading of the Act) (demonstrating the ease by which the Texas Whistleblower Act passed through the Texas Legislature).

137. *See supra* note 136 and accompanying text.

138. *See supra* note 136 and accompanying text.

the only Senate committee discussion reported was that H.B. 1075 passed unscathed through the House.[139] The bill sponsor claimed the drafters of the Act modeled it after federal whistleblower legislation and other state whistleblower statutes.[140] The relevant federal law in 1983, however, was vastly different from the proposed legislation.[141] Not only did the available remedies vary, but the federal law provided employees an opportunity for an administrative hearing rather than an outright cause of action.[142] Furthermore, the state statutes that the sponsor referred to as models actually proved to be quite dissimilar to the proposed legislation that became the foundation of the Act.[143]

Overall, the Texas Legislature put the Act on the fast track without recognition of the potential difficulties and intricacies standing in the way of achieving its effectiveness.[144] "The implications of attempting to impose a general statute applicable to all government employees, if that was the intent, were not carefully considered."[145] Other than a 1989 amendment that further restricts employees by requiring them to utilize whatever individual grievance policies employers have in place before filing suit, the Texas Whistleblower Act has remained largely unchanged for over twenty-five years.[146] Developments in the Act's application in Texas courts necessitate a fresh look at Chapter 554 of the Texas Government Code.[147]

Chapter 554 of the Texas Government Code contains the codified version of the Texas Whistleblower Act.[148] The basic premise of the Act is to protect public employees from employer retaliation when an employee blows the whistle by alleging a violation of law on the part of his employer.[149] The retaliation provision reads: "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 by the employing governmental entity or another public employee to an appropriate law enforcement authority."[150] The

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139. *See supra* note 136 and accompanying text.

140. *See supra* note 136 and accompanying text.

141. *See* Kirk, *supra* note 9, at 78.

142. *Id.*

143. *Id.* The first state to enact a whistleblower statute was Michigan in 1981. *Id.* Of the thirty-eight statutes that existed at the time of the enactment of the Texas Whistleblower Act, "[t]he only acts that appear[ed] reasonably similar, i.e., Hawaii, Maine, and Rhode Island, are patterned after Michigan's act." *Id.* The Texas Whistleblower Act did not fit the Michigan pattern, nor did it resemble any other state's whistleblower statute at the time of its enactment. *Id.*

144. *See id.*

145. *See id.*.

146. CAPITOL RESEARCH SERVICES OF TEXAS, http://capitolresearch-texas.com/reports_subject.html (follow "Employment" hyperlink; then follow "Texas Whistleblower Act (1983 & 1989)" hyperlink) (last visited Oct. 14, 2010).

147. *See infra* Part III.A.1-4.

148. *See* TEX. GOV'T CODE ANN. § 554 (West 2004).

149. *See id.*

150. § 554.002(a).

provision goes on to define what an "appropriate law enforcement authority" is, although many of the relevant definitions of the Act are found in a separate terms section—§ 554.001.[151] Section 554.001 defines the following terms: law, local governmental entity, personnel action, public employee, and state governmental entity.[152] These definitions provide the core of the Texas Whistleblower Act, while also serving as the source of one of its largest problems.[153] The unclear definitions, although seemingly broad in scope, allow for narrow interpretation in Texas courts.[154] These narrow interpretations yield narrow protections for Texas whistleblowers.[155]

1. Employee Reports a Violation of Law in Good Faith

Under the Act, law refers to: "(A) a state or federal statute; (B) an ordinance of a local governmental entity; or (C) a rule adopted under a statute or ordinance."[156] Texas courts have broadened the definition of law to include untraditional notions of law, such as a city charter.[157] The Waco Court of Appeals went as far as to accept a city policy as law because the city council formally adopted the policy in a written resolution.[158] By allowing the term law to encompass some untraditional notions, courts have given whistleblowers ammunition to sue under other unconventional concepts of law.[159] This precedent, however, is not uniform and its effect may be contrary to what the whistleblower intended.[160] For example, regardless of whether an employee considers an internal policy a law per the Act, courts have generally held that internal policies do not meet the

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151. §§ 554.001-002. Subsection (b) defines an appropriate law enforcement authority as "a part of a state or local governmental entity or of 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." § 554.002.

152. *See* § 554.001(1)-(5).

153. *See id.*; *see also* State v. Lueck, 290 S.W.3d 876, 879-80 (Tex. 2009); City of Waco v. Lopez, 183 S.W.3d 825, 830-31 (Tex. App.—Waco 2005, pet. granted); City of Fort Worth v. DeOreo, 114 S.W.3d 664, 668-70 (Tex. App.—Fort Worth 2003, no pet.); Ruiz v. City of San Antonio, 966 S.W.2d 128, 130-31 (Tex. App.—Austin 1998, no pet.) (illustrating the narrow application of the Texas Whistleblower Act in Texas courts).

154. *See supra* note 153 and accompanying text.

155. *See supra* note 153 and accompanying text.

156. § 554.001(1).

157. *See* City of Beaumont v. Bouillion, 873 S.W.2d 425, 447 (Tex. App.—Beaumont 1993); *rev'd* 896 S.W.2d 143 (Tex. 1995, reh'g overruled) (holding that former city police officers could not bring action under the Texas Whistleblower Act against city and former city officials for alleged violations of the city charter); *see also Texas Whistleblower Act*, TEXAS MUNICIPAL LEAGUE LEGAL SERVICES DEPARTMENT, http://www.tml.org/legal_pdf/2006whistleblower.pdf (discussing the definition of law per § 554.002 of the Act).

158. *See* City of Waco v. Lopez, 183 S.W.3d 825 (Tex. App.—Waco 2005, pet. granted); *see also Texas Whistleblower Act*, *supra* note 157 (discussing the definition of law per § 554.002 of the Act).

159. *See, e.g.*, Ruiz v. City of San Antonio, 966 S.W.2d 128, 130-31 (Tex. App.—Austin 1998, no pet.).

160. *See id.*

requirements of the Act.[161] If the whistleblower makes a report under the false impression that the broken policy is law within the meaning of the statute, this misguided belief dangerously exposes the whistleblower to retaliation without statutory protection.[162] Requiring the report to be in good faith is of no consequence on the outcome of the suit, as courts are more concerned with whether the good faith report actually reported a violation of law that meets the reporting requirements.[163] Good faith seems to be an afterthought—all it really means is that the whistleblower must show the alleged violation was based on both a subjective and an objective belief.[164] Satisfying both the subjective and objective standard is just one battle whistleblowers must win; they must also report to an appropriate law enforcement authority.[165]

2. *Employee Reports to an Appropriate Law Enforcement Official*

Another area of the Act that can cause confusion for a reporting employee is the requirement that an employee make the report to an appropriate law enforcement authority.[166] The specific language of the statute forces whistleblowers to make the same dangerous judgment call they made when considering whether a violation of law had occurred—now they must question what qualifies as an appropriate law enforcement authority.[167] The statute explains that an appropriate law enforcement authority must be part of a federal, state, or local governmental entity.[168] Employees must believe in good faith that the individual they are reporting to "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."[169] Texas courts have narrowly construed what it means to have the authority to regulate, enforce, investigate, and prosecute the law.[170]

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161. *See id.; see also* cases cited *supra* note 157 (demonstrating the rigid application of the term law in Texas courts).

162. *See* TEX. GOV'T CODE ANN. §§ 554.001-002 (West 2004). A governmental employer cannot retaliate against state or city employees who report a violation of law, but law is defined in terms of what is set forth in § 554.001 along with any case law exceptions developed by Texas courts. *See id.; see also Lopez*, 183 S.W.3d at 829-30; *Ruiz*, 966 S.W.2d at 130-31 (demonstrating case law exceptions to the definition of law found in § 554.001 of the Act).

163. *See, e.g., Lopez*, 183 S.W.3d at 829-30; *Ruiz*, 966 S.W.2d at 130-31.

164. *See* Rogers v. City of Fort Worth, 89 S.W.3d 265, 277-79 (Tex. App.—Fort Worth, 2002, no pet.); *see also Texas Whistleblower Act, supra* note 157 (discussing § 554.002 of the Act).

165. *See* § 554.002.

166. *See id.*

167. *See supra* Part II.A.1.

168. § 554.002(b).

169. *Id.*

170. *See* City of Fort Worth v. DeOreo, 114 S.W.3d 664, 669 (Tex. App.—Fort Worth 2003, no pet.).

In *City of Fort Worth v. DeOreo*, a female police officer reported allegations of sexual harassment by a male police officer to her superiors.[171] On the sexual harassment charge, the Fort Worth Court of Appeals held that her superiors were not an appropriate law enforcement authority under the Texas Whistleblower Act, even though her superiors had established themselves as regulators of this kind of activity in the past.[172] The court in this case differentiated the general power to regulate from the power to regulate as the appropriate law enforcement authority (per the definition in § 554.002).[173] This delineation of appropriate law enforcement authority is problematic for whistleblowers.[174] It is another poorly drafted term found in the Act that serves as a barrier for whistleblowers to have their day in court.[175] Without their day in court, employees may not receive the opportunity to demonstrate that they experienced retaliation.[176]

3. *Employee Is Retaliated Against*

In order for an employee to sue an employer under the Act, the employer must suspend, terminate, or take other adverse personnel action against the employee.[177] A personnel action is defined in § 554.001(3) as "an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation."[178] As in other portions of the Act, the retaliation provision gives courts the authority to unconventionally interpret any one of its terms.[179] Some of the terms present in § 554.002 are defined in the general definitions provision of § 554.001.[180] For example, § 554.002 prohibits "adverse personnel action," but § 554.001 defines only "personnel action" without addressing what kinds of personnel actions would constitute adverse actions.[181] The list of actions that qualify as personnel actions includes transfers and work assignments.[182] What constitutes an adverse transfer or an adverse work assignment is necessarily a subjective question that turns on how the employee is personally affected.[183] Because employees may feel differently

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171. *Id.* at 669.

172. *Id.* The court cited *City of Weatherford v. Catron*, a case that held that a city's general authority to regulate sexual harassment claims did not make it an appropriate authority to regulate a whistleblower's claim of sexual harassment under § 554.002(b) of the Act. *Id.*

173. *Id.*

174. *See* discussion *infra* Part IV.A.1.

175. *See* discussion *infra* Part IV.A.1.

176. *See* discussion *infra* Part IV.A.1.

177. TEX. GOV'T CODE ANN. § 554.002 (West 2004).

178. *Id.* § 554.001(3).

179. *See id.* §§ 554.001-002.

180. *See id.*

181. *See id.*

182. *Id.* § 554.001.

183. *See id.* §§ 554.001-002 (referring to the fact that the action is adverse).

about the definition of an adverse personnel action, courts are left with the discretion to make judgment calls on terminology that may or may not reflect the feelings of the affected employee.[184]

At least in one case, a Texas court held that, for purposes of the Act, constructive discharge equals termination.[185] Two emergency room nurses filed suit under the Texas Whistleblower Act, claiming that the hospital and its staff retaliated against them after they reported concern over the new co-director of emergency services implementing questionable trauma policies and procedures.[186] The plaintiffs claimed that the retaliation included daily harassment and intimidation, false accusations of misconduct, denial of ordinary work breaks for lunch and restroom usage, and lack of promotion.[187] Because of the increasingly hostile work environment, the plaintiffs quit their positions at the hospital.[188] Defendants argued that plaintiffs could not state a claim under the Act because they had resigned and not been fired.[189] The court disagreed and stated: "The legislature could not have intended to provide a cause of action to employees who were fired for reporting violations of the law, while at the same time excluding employees who were coerced into resigning."[190] Because termination is a prohibited action under the Act, an employer who forces an employee to resign from a position due to intolerable work conditions will be liable for termination.[191] On the other hand, courts still have the discretion to find that the retaliation in question does not rise to an adverse level; some courts have used this discretion to do exactly that.[192] By holding that the adverse standard should be an objective one, courts may broadly apply the Act without fully considering the individual case on its subjective merits.[193]

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184. *See id.*; Univ. of Tex. Med. Branch at Galveston v. Hohman, 6 S.W.3d 767, 772 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.).

185. *Hohman*, 6 S.W.3d at 773.

186. *Id.* at 771.

187. *Id.* at 772.

188. *Id.*

189. *Id.*

190. *Id.* at 773.

191. *See, e.g.*, *id.*; *cf.* Nguyen v. Technical & Scientific Application, Inc., 981 S.W.2d 900, 901 (Tex. App.—Houston [1st Dist.] 1998, no pet.). *Nguyen* was not a case brought under the Texas Whistleblower Act, but the *Hohman* court cited it to illustrate that it had previously held that constructive discharge was sufficient evidence of a firing. *See Hohman*, 6 S.W.3d at 773. In *Nguyen*, the plaintiff invoked a common law exception to employment at will; the exception required a showing of a firing that the plaintiff fulfilled through constructive discharge. *Nguyen*, 981 S.W.2d at 902.

192. *See* Montgomery Cnty. v. Park, 246 S.W.3d 610, 612 (Tex. 2007). The Texas Supreme Court held that reassignment of duties was petty retaliation not deserving of protection under the Act. *Id.* at 614. It interpreted the Act by an objective standard, stating that "for a personnel action to be adverse within the meaning of the Act, it must be material, and thus likely to deter a reasonable, similarly situated employee from reporting a violation of the law." *Id.* at 612.

193. *Id.* at 614. Justice Jefferson explained the court's reasoning behind its adopted definition of adverse as a balancing test. *Id.* He recognized the interest the state has in protecting employees who have attempted to thwart illegal activities by governmental officials. *Id.* This interest did not surpass

4. *Employee May File Suit*

The Texas Whistleblower Act gives whistleblowing employees that experience retaliation a cause of action against their employers.[194] Section 554.003 of the Act describes the damages and relief available to whistleblowing employees: "A public employee whose employment is suspended or terminated or who is subjected to an adverse personnel action in violation of § 554.002 is entitled to sue for: (1) injunctive relief; (2) actual damages; (3) court costs; and (4) reasonable attorney fees."[195] Furthermore, additional forms of relief that reflect the employment context of the Act are available.[196] Subsection (b) of § 554.003 reads as follows:

> In addition to relief under Subsection (a), a public employee whose employment is suspended or terminated in violation of this chapter is entitled to: (1) reinstatement to the employee's former position or an equivalent position; (2) compensation for wages lost during the period of suspension or termination; and (3) reinstatement of fringe benefits and seniority rights lost because of the suspension or termination.[197]

An employee is entitled to relief if the employee has suffered retaliation at the hands of the employer, but only if the plaintiff-employee establishes another crucial condition—the state-defendant's waiver of sovereign immunity.[198]

5. *Employee Argues Waiver of Sovereign Immunity*

The reason employees are able to file suit against a state actor employer is found in § 554.0035 of the Texas Whistleblower Act.[199] This section provides a statutory waiver of sovereign immunity for claims brought under the Act.[200] The doctrine of sovereign immunity has been a

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his concern for the cost of frivolous litigation under the Act. *See id.* He alluded to an employee's subjective perception of adverse action as a misguided notion. *See id.* One dictionary definition of adverse, however, states that the term means "opposed to one's interests." MERRIAM-WEBSTER'S ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/adverse (last visited Oct. 13, 2010). It seems as though a subjective reading of adverse is acceptable in at least one context. *See id.*

194. *See* TEX. GOV'T CODE ANN. § 554 (West 2004).

195. *Id.* § 554.003 (Section 554.003 is titled *Relief Available to Public Employee*).

196. *See id.* § 554.003(b).

197. *Id.*

198. *See* discussion *infra* Part III.A.5.

199. *See* § 554.0035 (Section 554.0035 is titled *Waiver of Immunity*).

200. *See id.* The waiver section of the Act provides the following:

> A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter.

Id.

part of Texas jurisprudence since 1847.[201] It encompasses two principles of immunity: immunity from liability and immunity from suit.[202] When present, sovereign immunity precludes claims against a state actor.[203] When immunity from suit is not present, the state actor has no choice but to consent to suit.[204] Waiver of immunity is one way in which a state actor consents to suit.[205] Without this consent, "a trial court does not have subject matter jurisdiction over the action."[206] Therefore, a plea to the jurisdiction is a means by which a state-defendant may challenge a suit brought against them.[207]

Before the enactment of the Texas Tort Claims Act (TTCA) in 1969, courts did not readily impose waiver of immunity upon state-defendants.[208] The TTCA provided a limited set of circumstances in which waiver of sovereign immunity would be warranted; however, jurisdictional challenges based on sovereign immunity increased substantially after the ratification of the right to interlocutory appeal in 1997.[209] The Texas Legislature codified the right to interlocutory appeal in an amendment to § 51.014(a) of the Texas Civil Practice and Remedies Code.[210] The amendment gave state-defendants explicit authority to appeal a grant or denial of a plea to the jurisdiction.[211] This authority to appeal allows "the issue of sovereign immunity to be determined prior to a trial on the merits."[212] It gives state-defendants another procedural means by which to determine the sovereign immunity issue without having to proceed to a full-blown trial on the merits.[213] State-defendants then began to reproduce summary judgment motions, renaming them as pleas to the jurisdiction.[214]

Due to the nonexistence of rules to govern this new application of sovereign immunity jurisprudence, problems began to arise regarding whether courts should assess factual issues outside the pleadings in order to

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201. Rebecca Simmons & Suzette Kinder Patton, *Plea to the Jurisdiction: Defining the Undefined*, 40 ST. MARY'S L.J. 627, 634 (2009).

202. *Id.*

203. *Id.*

204. *See id.*

205. *See id.* When the waiver provision of the Act is satisfied pursuant to the requirements of the rest of the chapters of the Act, a state employer's sovereign immunity is abolished. § 554.0035.

206. *See* Simmons, *supra* note 201, at 634.

207. *See id.*

208. *See id.*

209. *Id.*

210. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (West 2006); *see* Simmons, *supra* note 201, at 640-41.

211. *See supra* note 210 and accompanying text. The amendment provides the following: "A person may appeal from an interlocutory order of a district court, county court at law, or county court that: . . . grants or denies a plea to the jurisdiction by a governmental unit. . . ." *See supra* note 210 and accompanying text.

212. *See* Simmons, *supra* note 201, at 641.

213. *Id.* at 641-42.

214. *Id.* at 649.

rule on the immunity issue.[215] "Whereas the absence of jurisdictional facts underlying the pleadings could be attacked by a motion for summary judgment accompanied by evidence, a plea to the jurisdiction was historically assessed by reviewing the pleadings."[216] The popularity of pleas to the jurisdiction generated a tension between the need for further inquiry into the jurisdictional facts versus a review of the pleadings alone.[217] In *Bland Independent School District v. Blue*, the highest court of the state held that evidence may be used to support pleas to the jurisdiction because to do so would be consistent with motions for summary judgment.[218] The tension continued to mount, however, as courts applied varied approaches to dealing with the merits of an immunity claim.[219] These discrepancies forced the need to address the standard of review for pleas to the jurisdiction by developing a uniform test.[220] Eventually, the Texas Supreme Court set forth the standard of review for pleas to the jurisdiction in *Texas Department of Parks & Wildlife v. Miranda*.[221]

The issue in *Miranda* was how Texas appellate courts could resolve pleas to the jurisdiction without interfering with a plaintiff's right to have the merits of the case heard by a jury.[222] The Mirandas were visiting a state park when a falling tree limb injured Mrs. Miranda.[223] The Mirandas sued the Texas Department of Parks & Wildlife (the Department) under the TTCA, claiming negligence and waiver of sovereign immunity.[224] The Department responded with a plea to the jurisdiction that contained supporting evidence.[225] Both the trial and appellate courts held that a denial of the plea was warranted because it was improper to consider any evidence

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215. *Id.* at 642.

216. *Id.*

217. *Id.* at 643.

218. Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 553 (Tex. 2000). Without a defendant's ability to attach evidence to a plea to the jurisdiction, plaintiffs would be able to allege requisite elements of immunity waiver whether present or not, "and the appellate court [would be] constrained to 'construe the pleadings in favor of the plaintiff'" regardless of the accuracy of the allegations. *See* Simmons, *supra* note 201, at 642-43.

219. *See* Simmons, *supra* note 201, at 647. The two approaches taken by Texas courts were as follows: "(1) if the facts were intertwined with the merits, the courts refused to review the merits to resolve the plea; or (2) they reviewed the evidence and resolved the plea irrespective of the merits." *Id.* The difficulty presented was that, in some cases, avoiding the merits was impossible. *Id.* at 643; *see also* Tex. Dep't of Criminal Justice v. Miller, 51 S.W.3d 583, 586-87 (Tex. 2001) (holding that simply referencing immunity waiver in the pleadings is insufficient to establish that waiver occurred).

220. *See* Simmons, *supra* note 201, at 648.

221. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 225-28 (Tex. 2004); *see* Simmons, *supra* note 201, at 648.

222. *See supra* note 219 and accompanying text. Pleas to the jurisdiction prevent Texas Whistleblower Act claims from being heard on the merits by giving Texas courts the authority to dismiss cases on technical grounds. *See* discussion *infra* Part IV.A.2.

223. *See* Simmons, *supra* note 201, at 649.

224. *Id.*

225. *Id.*

at this stage of the case.[226] The Texas Supreme Court disagreed.[227] "Citing *Bland*, the supreme court held that the trial court was required to fully examine the evidence to determine whether a fact issue existed regarding the alleged gross negligence."[228] Because the undisputed evidence in *Miranda* implicated both the factual merits and the jurisdictional issue, the court developed a mode of analysis that centers on whether the evidence (the facts) is necessary to the resolution of the jurisdictional issue.[229]

If the plea to the jurisdiction challenges the pleadings, the court must decide whether the pleadings affirmatively convey jurisdiction to that court.[230] The court must give effect to the pleader's intent, construing the pleadings liberally—even affording plaintiffs the opportunity to amend when the issue is sufficiency of the pleadings.[231] The court may, however, grant a plea to the jurisdiction without opportunity to amend when the pleadings affirmatively negate jurisdiction.[232] If the plea challenges whether jurisdictional facts exist, the court must consider any supporting evidence that is necessary in determining the jurisdictional issue.[233] If this determination presents a fact issue, then the court may not grant a plea to the jurisdiction because a fact finder must determine the fact issue.[234]

These guidelines presented a standard of review for pleas to the jurisdiction—guidelines, but not rules.[235] The application of *Miranda* was thus left to the sound discretion of the courts.[236] The two dissenting opinions in *Miranda* urged the development of hard and fast rules, but the majority responded "by referencing the long history of the plea to the jurisdiction as evidence of its usefulness."[237] Texas Whistleblower Act claims embody one useful application of the plea to the jurisdiction; accordingly, pleas to the jurisdiction have become common in a state actor's defense against a whistleblower claim.[238] Because sovereign immunity is waived in claims that meet the requirements of the Act, courts implicate *Miranda* when they construe the immunity provision.[239] The issue is whether an employee must merely allege a violation of the Act in order to waive immunity.[240] The Texas Supreme Court addressed "[t]he

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226. *Id.*
227. *Id.*
228. *Id.* at 650.
229. *Id.* at 650-51.
230. *Id.* at 651.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *See id.* at 654.
236. *See id.*
237. *Id.*
238. *See id.* at 667.
239. *See id.* at 667-68.
240. *Id.* at 668.

issue [of] whether such a bare-bones pleading is sufficient under *Miranda*" with *State v. Lueck*.[241]

B. *The Reason* State v. Lueck *Matters*

In the summer of 2009, the Texas Supreme Court decided *State v. Lueck*—a decision that further limits whistleblower protection under the Texas Whistleblower Act.[242] The Texas Department of Transportation (TxDOT) fired Mr. Lueck from his position as Assistant Director of TxDOT's Traffic Analysis Section after Mr. Lueck reported what he believed to be violations of state and federal law in an e-mail to the Director of the Transportation Planning and Programming Division at TxDOT, Mr. James Randall.[243] Mr. Randall was the point person at TxDOT dealing with a contract dispute concerning the implementation of a new data system that Mr. Lueck was responsible for managing.[244] The system's purpose was to facilitate TxDOT's compliance with federal and state traffic-data reporting standards.[245] The contract dispute was between TxDOT and Cooper Consulting Company, a private vendor hired in 1999 to develop a new reporting system after a "1995 Federal Highway Administration report concluded that Texas's system for collecting, analyzing, and reporting traffic data violated federal standards."[246] The dispute centered on an unpaid fee of $350,783.[247] After investigation by the state auditor, TxDOT felt the fee was excessive.[248] Mr. Randall suspended all work on the new system, advising Cooper that TxDOT would not be paying for any more work that had not been approved prior to the dispute.[249] Cooper responded with a demand letter asking for the fee within thirty days, after which Cooper would terminate the contract.[250] Mr. Lueck's e-mail to Mr. Randall specifically addressed the issue of whether or not TxDOT should pay the fee or accept termination of the contract.[251] Mr. Lueck urged Mr. Randall to resolve the dispute, stating that without Cooper's system, "TxDOT 'is not capable of handling this data and will, therefore, never be in compliance.'"[252] TxDOT subsequently refused to pay the fee, choosing

241. *Id.*
242. *See* State v. Lueck, 290 S.W.3d 876, 876 (Tex. 2009).
243. *Id.*
244. *See id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* (quoting Mr. Lueck's position in the e-mail sent to Mr. Randall).

termination of the contract.[253] The agency then fired Mr. Lueck for lack of trustworthiness and negligence.[254]

In response to his termination, Mr. Lueck brought suit against the State of Texas and TxDOT under the Texas Whistleblower Act.[255] Mr. Lueck alleged that the e-mail sent to Mr. Randall represented a good faith report to an appropriate law enforcement authority of a violation of state and federal law because TxDOT would effectively violate the law if the department allowed the cancellation of the contract with Cooper.[256] TxDOT responded to Mr. Lueck's claim under the Act by filing a plea to the jurisdiction that asserted that Mr. Lueck was not entitled to sue under the Act because his actions did not meet its reporting requirements and thus, did not provide authority for waiver of sovereign immunity.[257] Specifically, TxDOT argued that the e-mail was not a report to an appropriate law enforcement authority and that no violation of law had occurred.[258] Therefore, the state-defendants maintained that no consent to sue existed and the trial court did not have subject matter jurisdiction over the claim.[259] Mr. Lueck then filed second amended special exceptions and a motion to dismiss the plea to the jurisdiction.[260] He argued that his pleadings alone satisfied the unambiguous language of the immunity provision.[261] The department argued that the court must delve into the evidence in this case because it was necessary to determine the jurisdictional issue.[262]

The trial court, however, dismissed the plea to the jurisdiction and the department subsequently appealed.[263] The appellate court affirmed the trial court decision, holding that Mr. Lueck's pleadings alone demonstrated the

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253. *Id.*

254. *Id.* The support TxDOT cited for its accusations of negligence and lack of trustworthiness was that Mr. Lueck's e-mail constituted a justification for a charge that he should have known was excessive. *Id.*

255. *Id.*

256. *Id.* The requisite elements of (1) a good faith report of a violation of the law and (2) to an appropriate law enforcement authority are found in § 554.002(a) of the Texas Whistleblower Act. *See* TEX. GOV'T CODE ANN. § 554.002(a) (West 2004).

257. *Lueck*, 290 S.W.3d at 879. A plea to the jurisdiction is now an accepted and popular means by which a state-defendant may defend a suit against them brought under the Texas Whistleblower Act. *See id.*

258. *Id.* The unclear definitions in the Act made these arguments feasible. *See id.*

259. *Id.* at 880.

260. *Id.* at 879.

261. *Id.* at 879-80 (citing § 554.0035—the immunity provision of the Act). TxDOT reiterated the argument in the plea to the jurisdiction by claiming "that Lueck's pleadings affirmatively demonstrated that he did not allege a violation under the Act because the e-mail he sent did not report an actual violation of the law, and his supervisor to whom he sent the e-mail report was not a law enforcement authority." *Id.* at 880.

262. *Id.*

263. *Id.* The right to interlocutory appeal after the denial of a plea to the jurisdiction is found in § 51.014(a)(8) of the Texas Civil Practice & Remedies Code. *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (West 2006).

jurisdiction of the court to hear the case.[264] TxDOT appealed once again, this time to the Texas Supreme Court.[265] The supreme court disagreed with the lower courts, reversing the decision and dismissing the cause of action.[266] The reason *Lueck* matters to Texas whistleblowers is that it illustrates the means by which Texas courts are dismissing claims under the Texas Whistleblower Act without assessing their merits.[267] As such, it illustrates the need for reform in order for Texas whistleblowers to be heard.[268]

IV. PROPOSAL: WHAT IS NECESSARY FOR TEXAS WHISTLEBLOWERS TO BE HEARD

A. Clarifying the Language and Defining the Undefined

To begin to facilitate change in Texas whistleblower jurisprudence, the language of the Texas Whistleblower Act needs an overhaul.[269] The legislature found it necessary to include a definitions section in the Act, but did not sufficiently define all essential terms within it.[270] The poorly drafted and ambiguous language of the Act has led Texas courts to interpret the statute narrowly.[271] Although these narrow interpretations do not cut against the plain language of the statute, they do contravene the policy behind the Act.[272] A narrow interpretation of the Act does not reflect the Texas Legislature's intent to protect whistleblowers.[273] In fact, interpreting the Act narrowly undercuts the policy considerations that drove ratification of the Act in the first place—courts are dismissing whistleblower claims made in good faith before considering the merits of these claims.[274] In order to provide optimal protection for Texas whistleblowers, courts should adjudicate whistleblower claims based on their merits instead of based on

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264. *Lueck*, 290 S.W.3d at 880.

265. *Id.*

266. *Id.* at 886.

267. *See id.*

268. *See infra* Part IV.

269. *See* discussion *infra* Part IV.A.1-2.

270. *See* TEX. GOV'T CODE ANN. § 554.001 (West 2004).

271. *See id.* §§ 554.001-002. An employee's interpretation of what constitutes a violation of law or an appropriate law enforcement authority does not necessarily fit within these definitions. *See, e.g.*, *Lueck*, 290 S.W.3d at 880. Furthermore, the definitions do not consider what practically happens in the workplace when an employee blows the whistle. *See, e.g.*, City of Fort Worth v. DeOreo, 114 S.W.3d 664, 667 (Tex. App.—Fort Worth, 2003, no pet.).

272. *See* § 554; *Lueck*, 290 S.W.3d at 880.

273. *See The Texas Whistleblower Act: Hearing on Tex. H.B. 1075 Before the S. State Affairs Comm.*, 68th Leg., R.S. (May 27, 1983) [hereinafter *Hearing*] (Senate tapes available at Senate Staff Services, Capitol Extension, Room E1.714, Austin, TX).

274. *Lueck*, 290 S.W.3d at 880; *see also Hearing*, *supra* note 273 (indicating that dismissal on the merits undercuts the legislature's intent to protect whistleblowers).

whether the claim is the right type of claim.[275] The Texas Legislature can achieve optimal protection for whistleblowers by amending the Texas Whistleblower Act to include more liberal reporting requirements.[276] The best way to do this is to focus on two definitions: (1) violation of law and (2) appropriate law enforcement authority.[277] Doing so will allow Texas courts to take a reasonable approach to analyzing diverse whistleblower claims.[278]

1. Liberal Definitions Provide for Liberal Reporting Requirements

One predominant problem causing narrow whistleblower protections is that narrow reporting requirements confuse whistleblowers and restrict courts by making it nearly impossible to define whether the right kind of whistleblowing occurred.[279] The act of whistleblowing becomes "difficult for employees to predict ahead of time, but it also requires line-drawing by decision-makers that can narrow the scope of the protections more restrictively than intended by" a legislative body.[280] "Passing legislation that clearly repudiates decisions narrowing [the Act's] scope could alleviate the tendency of decision-makers to draw restrictive legal boundaries in whistleblower cases."[281] By going back to the drawing board to supplement certain definitions, the Texas Legislature will clarify its intent to enact legislation that actually provides whistleblowers with legal protections.[282] The Texas Legislature must recognize that courts are construing the definitions too narrowly—it should revamp the Act in order to affect its application in Texas courts.

It is unsettling that many Texas whistleblowers report in good faith what they believe to be violations of law, only to be informed that their reports do not constitute a violation of the law as required by § 554.002 of the Act and as defined by § 554.001.[283] In *State v. Lueck* for example, Mr. Lueck was confident that TxDOT would break the law if it broke its contract.[284] This belief was held both subjectively and objectively in good faith.[285] The Texas Supreme Court, however, held that the e-mail did not report a violation of law because at the time of the report, TxDOT was still

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275. *See* Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 5.
276. *See* discussion *infra* Part IV.A.1.
277. *See* discussion *infra* Part IV.A.1.
278. *See* discussion *infra* Part IV.A.2.
279. *See* Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 5.
280. *Id.*
281. *See id.* at 7.
282. *See Hearing*, *supra* note 273.
283. *See* TEX. GOV'T CODE ANN. §§ 554.001-002 (West 2004); State v. Lueck, 290 S.W.3d 876, 880 (Tex. 2009).
284. *See* State v. Lueck, 290 S.W.3d 876, 879 (Tex. 2009).
285. *See id.*

in compliance.[286] The court did not consider the fact that breaking the contract might lead to an imminent violation of the law.[287] This fact illustrated the merits of Mr. Lueck's whistleblower claim—Mr. Lueck subjectively and objectively believed that a violation of law was inevitable.[288] Courts do not protect reports of imminent violations of law, although many of these warnings come to fruition.[289] The fact that these reports are unprotected contradicts general whistleblower legislation theory—protecting whistleblowers protects the public from unlawful, and perhaps even harmful, activities *before* they occur.[290]

Another example of the need to clarify and broaden protected violations of law is *Ruiz v. City of San Antonio*.[291] In *Ruiz*, a city police officer reported fellow officers for violations of internal department policies that the plaintiff characterized as violations of law.[292] Although the whistleblower in this case believed the violations met the requirements of the Texas Whistleblower Act, the Austin Court of Appeals held that "the Act does not protect violations of internal policy not promulgated pursuant to statute or ordinance."[293] The problem with this holding is that courts have applied its narrow stance even when internal policies have historically served as avenues for relief.[294] *City of Fort Worth v. DeOreo* illustrates this by showing how a narrow interpretation in one case is unfair as applied to another set of facts.[295]

In *DeOreo*, a female police officer reported alleged acts of sexual harassment by her fellow officers to her supervisors and to internal affairs.[296] The Fort Worth Court of Appeals held that the Texas Whistleblower Act did not protect her internal reports of sexual harassment.[297] Because sexual harassment is undeniably against the law, the court held that the reason the reports were unprotected was that the internal reporting channels the plaintiff employed were not eligible as an appropriate law enforcement authority per the Act.[298] The internal channels

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286. *See id.* at 880.

287. *See id.*

288. *See id.*

289. *See id.*

290. *See* Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 1-2. Whistleblowers provide a public benefit particularly in cases where public health or safety is involved, as when a state's reporting statistics on highway safety are not in compliance. *See id.*; *Lueck*, 290 S.W.3d at 876.

291. *See* Ruiz v. City of San Antonio, 966 S.W.2d 128, 129 (Tex. App.—Austin 1998, no pet.).

292. *Id.* at 130.

293. *Id.*

294. *See* City of Fort Worth v. DeOreo, 114 S.W.3d 664, 667 (Tex. App.—Fort Worth 2003, no pet.).

295. *See id.*

296. *Id.* at 667-68.

297. *Id.* at 669. Although the sexual harassment reports were not protected under the Act, the court held that reports of criminal activity did afford the female officer protection in this case. *Id.* at 669-70.

298. *Id.* at 668-69.

were established and frequently used, but still did not provide protection from workplace retaliation.[299]

In fact, the court in *DeOreo* stated that the Texas Commission on Human Rights was the only proper agency to report to in this case.[300] An appropriate law enforcement authority per the statute is "one that has the authority to regulate under, enforce, investigate, or prosecute."[301] The court recognized that the police department did in fact hold this general power, but that "a city's general authority to regulate under, enforce, and investigate claims of sexual harassment is not enough to make it an appropriate law enforcement authority under the Act."[302] The police department had the authority to investigate the claims; the department had previously disciplined officers for similar behavior in the past.[303] The whistleblower believed that her report was to an appropriate authority, but a prior narrow reading of the Act barred her claim.[304] "The combined effect of the [Act's] rigid report recipient requirement and the court's narrow interpretation thereof effectively allowed the police department's internal procedures to serve as a shield against whistleblower liability."[305]

To deal with this undesirable effect, the Texas Legislature should relax reporting requirements by redefining (1) a violation of law, and (2) an appropriate law enforcement authority.[306] Violations of law under the Act should include violations of law that are imminent, but that have not yet occurred.[307] Whistleblowers provide the greatest benefit to society when they stop harmful activity before it has a negative effect on the public.[308] Without protecting this category of violations, whistleblowers will be less likely to report potential disasters or scandals.[309] Furthermore, the legislature should draft a provision that accounts for well-established internal policies—these too should be considered violations of law.[310]

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299. *See id.*

300. *Id.* at 669 (citing City of Weatherford v. Catron, 83 S.W.3d 261, 268-69 (Tex. App.—Fort Worth 2002, no pet.)).

301. *Id.*; *see also* TEX. GOV'T CODE ANN. §§ 554.002 (West 2004). The statute pairs regulation and enforcement with "the law alleged to be violated in the report" and investigation and prosecution with "a violation of criminal law." *Id.*

302. *DeOreo*, 114 S.W.3d at 669 (citing *Catron*, 83 S.W.3d at 268-69) ("holding as a matter of law that the City is not an appropriate law enforcement authority under section 554.002(b) for the reporting of another employee's violation of federal or state sexual harassment laws"); *see also* Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CAL. L. REV. 1633, 1647 (2008) (arguing that legislatures should loosen rigid reporting requirements in whistleblower legislation).

303. *See* Sinzdak, *supra* note 302, at 1647.

304. *See id.*

305. *Id.*

306. *See id.*

307. *See* discussion *infra* notes 308-09.

308. *See* Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 1-2.

309. *See id.* at 2.

310. *See* discussion *supra* notes 300-05 and accompanying text.

The legislature must also consider who whistleblowers are reporting to.[311] Accordingly, a new definition of appropriate law enforcement authority is warranted.[312] Any "entity [that] has [the] general authority to regulate under, enforce, investigate, or prosecute" should qualify as an appropriate law enforcement authority.[313] The definition of appropriate law enforcement authority is somewhat broad as is, but it is not clear in the definitions section of the Act.[314] The legislature should add another provision to the definitions section that explicitly states that general power to regulate, enforce, investigate, or prosecute is sufficient to meet the requirements of the Act.[315] These new definitions will loosen reporting requirements for whistleblowers but not give them an unfair advantage.[316] More liberal reporting requirements will give courts the discretion to assess the merits of a Texas Whistleblower Act claim through reasonable analysis.[317]

2. *Liberal Reporting Requirements Allow for Reasonable Analysis*

Liberal reporting requirements reflect the practical motivations that go through a whistleblower's mind before the whistle is blown.[318] If a whistleblower knows that reporting requirements are rigid, then the likelihood that whistleblowing will occur is slim.[319] Known rigid reporting requirements discourage whistleblowing because they entail an increased risk of exposure and defeat, which may outweigh whatever good the whistleblower hopes to accomplish.[320] When the knowledge of rigid reporting requirements is unknown, however, many whistleblowers suffer the devastating disappointment of having their case dismissed on a technicality.[321] The loss of protection from retaliation on technical grounds may discourage other potential whistleblowers from even considering a

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311. *See* discussion *supra* notes 300-03 and accompanying text.

312. *See* discussion *supra* notes 300-03 and accompanying text.

313. TEX. GOV'T CODE ANN. § 554.002 (West 2004).

314. *Id.* §§ 554.001-002.

315. *See* City of Fort Worth v. DeOreo, 114 S.W.3d 664, 667-69 (Tex. App.—Fort Worth, 2003, no pet.). Because the court recognized that some entities may have the general authority to serve as a law enforcement authority even though they do not meet the requirements of the Act as construed in Texas courts, the legislature should renounce this narrow interpretation by amending the Act. *See supra* notes 269-314. This amendment will illustrate to Texas courts that a rigid requirement is not what the legislature intended and will encourage change in Texas whistleblower jurisprudence. *See supra* notes 269-314.

316. *See* Sinzdak, *supra* note 302, at 1661-62.

317. *See* discussion *infra* Part IV.A.2.

318. *See* Sinzdak, *supra* note 302, at 1661-62.

319. *Id.* at 1662.

320. *Id.*

321. *See id.* at 1663.

good faith claim.[322] Therefore, whether an employee is aware or unaware (most are unaware) of the intricacies involved in blowing the whistle on an employer, rigid reporting requirements halt the practice of whistleblowing altogether.[323]

> [B]ecause employees are generally unaware of whistleblower rights, their selection of a report recipient is primarily driven by practical considerations. These considerations include the type and significance of the alleged misconduct, the employee's status within the organization (both in terms of experience and position), the organizational status of the wrongdoers, the organization's culture, and the fear of retaliation. A single reporting requirement cannot account for the diversity of situations employees face.[324]

Because rigid reporting requirements do not reflect the diversity of whistleblower claims, they also do not reflect a reasonable approach to whistleblower jurisprudence.[325] Texas should incorporate a reasonableness standard in its whistleblower jurisprudence in order to effectuate the purpose of the Texas Whistleblower Act.[326] Whether or not a Texas employee is aware or unaware of the requisite reporting elements of the Act, the legislature should compel courts to give Texas whistleblowers an opportunity to have their cases heard on the merits.[327] This means eliminating technical dismissals by making reporting requirements more flexible.[328] The legislature can partially accomplish this by supplementing the definitions of violation of law and appropriate law enforcement authority as discussed above.[329] It can further accomplish this by developing internal reporting policies at the state level.[330]

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322. *Id.* at 1660-62. *Lueck* is an example of a technical dismissal that may discourage whistleblowers from taking action. *See* State v. Lueck, 290 S.W.3d 876, 879 (Tex. 2009).

323. *See* Sinzdak, *supra* note 302, at 1660-62.

324. *Id.* at 1661.

325. *See id.* at 1660-62.

326. *See Hearing*, *supra* note 273. The legislature intended the Texas Whistleblower Act to provide relief to whistleblowers who report employers in good faith. *See* TEX. GOV'T CODE ANN. § 554.002 (West 2004). Texas courts have construed the requirement of a good faith report to mean that the employee made the report due to a subjective and objective belief in the validity of the claim. *See* Rogers v. City of Fort Worth, 89 S.W.3d 265, 277 (Tex. App.—Fort Worth 2002, no pet.). More flexible reporting requirements reflect the consideration of not just the employee's subjective basis to the claim, but the objective basis as well. *See* Sinzdak, *supra* note 301, at 1661-62.

327. *See* Sinzdak, *supra* note 302, at 1662-63.

328. *See id.*

329. *See* discussion *supra* Part IV.A.1.

330. *See* discussion *infra* Part IV.B.

B. Developing Internal Reporting Policies

Internal reporting policies for Texas whistleblowers will provide a beneficial supplement to current procedure under the Texas Whistleblower Act.[331] Because statutory interpretation is a necessarily subjective endeavor, supplementing any amendments to the language of the statute with "[p]rocedural and structural modifications that encourage effective employee whistleblowing" will ease the pressure on Texas courts to effectively construe the Act.[332] Realistically, many whistleblowers initially report wrongdoing internally because they are unaware of the proper external avenues.[333] Also, many whistleblowers feel the appropriate way to handle a whistleblowing report is to allow their employer the opportunity to cure the issue.[334] This feeling is likely the result of a sense of loyalty to the employer or a sense of uncertainty regarding the external avenue.[335] Sarbanes-Oxley is an example of a legislative body responding to the practicality of internal reporting by explicitly implementing an internal policy that encourages whistleblowing in the workplace.[336] The Texas Legislature should consider adding an internal reporting policy at the state level based on its practicality, as well as its utility by other legislative bodies.[337]

1. Realistically, Whistleblowing Happens Internally First

Currently, reporting requirements under the Texas Whistleblower Act provide strictly external channels for whistleblowers.[338] "The main problem with an external reporting requirement is that it ignores the practical reality that most whistleblowers report internally first."[339] The preference of internal reporting is attributable to many factors.[340] An employee may not want to report externally due to strong feelings of loyalty to an employer.[341] This sense of loyalty may also represent the desire to keep the relationship between employee and employer amicable.[342]

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331. *See* discussion *infra* Part VI.B.1-2.

332. *See* Moberly, *Private Sector Whistleblowers*, *supra* note 15, at 8.

333. *See* Sinzdak, *supra* note 302, at 1652.

334. *Id.* at 1654-55.

335. *Id.* at 1652.

336. *See* Moberly, *Structural Model*, *supra* note 118, at 1141-78. Professor Moberly discusses the power of the internal reporting structure of Sarbanes-Oxley in the private sector. *Id.* By encouraging employees to become active monitors in the workplace, whistleblowers are better protected and legislation becomes more effective. *See id.*

337. *See* discussion *infra* Part IV.B.1-2.

338. *See* TEX. GOV'T CODE ANN. § 554.002 (West 2004).

339. *See* Sinzdak, *supra* note 302, at 1652.

340. *Id.*

341. *Id.*

342. *Id.*

Practically, employees are driven to internal reporting because they do not know external avenues exist; employees who are aware of external avenues may fear that going the external route will expose them to retaliation.[343] To some whistleblowers, the slight chance of disruption at their job outweighs whatever good they see resulting from blowing the whistle.[344]

Courts in at least one state have recognized and articulated the negative implications of strict external reporting requirements.[345] The California Court of Appeals explained that the negative effects of external reporting are associated with a whistleblower's intuitive notion of self-preservation.[346] The court noted that a lack of internal reporting channels leads to one of two discouraging options—either report externally and risk disruption or report internally and risk exposure to retaliation.[347] As the court stated, "[t]hese discouraging options would leave the employee with only one truly safe course: do nothing at all."[348] If the legislature meant to encourage whistleblowing by enacting the Texas Whistleblower Act, limiting reporting channels strictly to external avenues is counter to that purpose.[349] Thus, developing internal reporting channels for Texas whistleblowers becomes imperative to effectuate the purpose of the Act.[350] Sarbanes-Oxley illustrates whistleblower legislation that contains explicit internal reporting requirements.[351]

Sarbanes-Oxley also illustrates why a legislative body should include internal reporting in whistleblower legislation.[352] It is legislation that provides an example of how internal reporting channels encourage blowing the whistle while also discouraging the disincentives that silence whistleblowers.[353] Designating an internal recipient of whistleblower reports will increase the likelihood that an employee will decide to blow the whistle.[354] Employees will decide to blow the whistle on wrongdoing

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343. *Id.*

344. *See id.* at 1653.

345. *See* Collier v. Superior Court, 279 Cal. Rptr. 453, 455-56 (Cal. Ct. App. 1991). Like Texas's, California's whistleblower statute contains an explicit external reporting requirement. *See* Sinzdak, *supra* note 302, at 1653.

346. *See* Collier, 279 Cal. Rptr. at 456.

347. *Id.*

348. *Id.*

349. *See* Moberly, *Structural Model*, *supra* note 118, at 1141.

350. *See id.* at 1141-42.

351. *See* Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2006).

352. *See* Moberly, *Structural Model*, *supra* note 118, at 1141. Because the United States Congress enacted Sarbanes-Oxley, it is a model piece of whistleblower legislation that state legislatures should take heed of. *See* § 1514A .

353. *See* Moberly, *Structural Model*, *supra* note 118, at 1141. Once again, disincentives to blowing the whistle include retaliation, disruption of the workplace, and loss of protection due to rigid reporting requirements. *See id.*; *see also* Sinzdak, *supra* note 302, at 1661-62 (giving examples of disincentives to whistleblowing).

354. *See* Moberly, *Structural Model*, *supra* note 118, at 1141-42.

because they believe it is their duty as a loyal employee to do so.[355] The role of the whistleblower shifts from snitch to hero when whistleblowing is encouraged in the workplace.[356] Also, Sarbanes-Oxley requires internal reports go to the highest authority within the organization; in most corporate settings, the company board of directors is this authority.[357] The highest authority within an organization likely has a fiduciary duty to address alleged misconduct.[358] Therefore, a whistleblower can be more confident that the company will investigate the claim.[359] This confidence, in conjunction with a good faith belief that misconduct has occurred or is occurring, is the boost a whistleblower needs to take a stand against the misconduct.[360] The Texas Legislature can help Texas whistleblowers take a stand against the misconduct of state actors by developing an internal reporting policy under the Texas Whistleblower Act.[361] Under the Act, an internal reporting policy at the state level can be administered through the human resources offices of individual agencies or through a specific agency that can be created or appointed (if already in existence) by the legislature; no matter what the centralized internal reporting authority is, the internal reporting requirement will promote cost efficiency and mistake clarification in litigating whistleblower claims.[362]

2. *Cost Efficiency and Mistake Clarification*

Internal reporting policies are not just practical, but also cost efficient and useful in clarifying whistleblower mistakes.[363] The reason internal reporting requirements increase cost efficiency is that they decrease the amount of time it takes to adjudicate a whistleblower claim.[364] Internal reporting requirements move the whistleblowing process along more quickly because the whistleblower makes the initial report to a source that can control the circumstances surrounding the alleged wrongdoing.[365]

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355. *See id.* at 1141.

356. *See id.* at 1141-42. "Contrary to popular belief regarding the traitorous nature of such 'snitches,' social science research demonstrates that whistleblowers often are employees with long tenure who believe they will serve the organization's best interests by providing information about organizational wrongdoing." *Id.* at 1142. Two recent documented examples of this proposition are Sherron Watkins and Cynthia Cooper—the whistleblowers in the Enron and WorldCom scandals respectively. *Id.* These two women claimed that their loyalty to their respective companies drove them to whistleblow on the corporate misconduct they witnessed. *Id.*

357. *See* § 1514A.

358. *See* Moberly, *Structural Model*, *supra* note 118, at 1144.

359. *See id.*

360. *See id.*

361. *See* discussion *supra* notes 352-60 and accompanying text.

362. *See* discussion *infra* Part IV.B.2; *see also* Sinzdak, *supra* note 302, at 1654 (discussing cost efficiency and mistake clarification as benefits of an internal reporting system).

363. *See* Sinzdak, *supra* note 302, at 1654.

364. *Id.* at 1654-55.

365. *Id.*

Whereas an external authority may have to compel an internal authority to correct wrongdoing, an internal authority has the ability to control the circumstances as soon as the whistleblower brings the alleged misconduct to light.[366] Internal reports take the intermediary out of the whistleblowing equation.[367] Taking the intermediary out of the equation does not just save time and money; it also provides an opportunity to cure when the whistleblower has a mistaken belief regarding the employer's conduct or its legality.[368]

An external report of mistaken misconduct may lead to costly investigation and unnecessary litigation.[369] If provided the opportunity to cure either the mistake or the conduct, an employer could repair the situation quickly by easing the employee's misapprehension or ordering the misconduct to cease.[370] Supporters of the internal reporting system argue that employers should be presented with an opportunity to cure the problem, and as such, whistleblower legislation should present employees with incentives to report internally first.[371] Supporters also argue that internal reporting requirements help preserve the established chain of command and avoid unwarranted negative publicity.[372] Not all whistleblower scholars, however, support internal reporting requirements.[373]

Because there are reasons to criticize internal reporting requirements, the Texas Legislature should amend the Texas Whistleblower Act to include an option to report internally *or* externally.[374] Some critics of the internal system believe that it promotes cover-ups and does nothing to curb retaliation.[375] Another criticism of internal reporting requirements is that the success of internal reporting is contingent upon whether an employer is willing to cure the alleged wrongdoing.[376] An employer's willingness to fix the problem is not an assumption all whistleblowers can make.[377] Moreover, there may be instances in which external reporting is necessary due to the type of unlawful activity occurring.[378] Environmental law violations, for example, may require enforcement from an external source in order to guard against all potential detriments.[379] Allowing internal reporting to be an option—in addition to external avenues—will account for

366. *See id.*
367. *See id.*
368. *Id.*
369. *Id.*
370. *See id.*
371. *Id.*
372. *Id.*
373. *Id.* at 1655.
374. *See id.*
375. *Id.*
376. *Id.*
377. *See id.*
378. *Id.* at 1656.
379. *Id.*

the diversity of whistleblower claims.[380] Providing Texas whistleblowers reporting options will encourage them to weigh the options.[381] An opportunity to weigh options is a tool that will create better-educated whistleblowers.[382] The more tools the legislature affords Texas whistleblowers and courts, the more instrumental whistleblowers and courts can be in facilitating positive change.[383]

C. Whistleblowers and Courts Facilitate Change As Well

1. Whistleblower Jurisprudence Begins Practically with Education

Whistleblowers must be educated on the intricacies of Texas whistleblower law if change is to occur.[384] Lack of knowledge of the intricacies of whistleblower legislation is one of the most prevalent problems for whistleblowers.[385] Because whistleblowers may be unaware of their options under a whistleblower statute, they have an enhanced likelihood of acting impulsively.[386] Impulsive whistleblowers feel compelled to follow their moral compasses, blowing the whistle without considering whether they are doing it the right way.[387] The best method to inform state employees of the right way to whistleblow is to obligate state employers to educate their employees on the Texas Whistleblower Act.[388]

Currently, § 554.009(a) of the Act requires a state employer to "inform its employees of their rights under [the Act] by posting a sign in a prominent location in the workplace."[389] Section 554.009(b) provides that "[t]he attorney general shall prescribe the design and content of the sign."[390] The current sign prescribed by the attorney general is in essence a one-page reproduction of the retaliation provision of the Act.[391] The problem with

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380. *See id.*

381. *See* discussion *infra* Part IV.C.1.

382. *See* discussion *infra* Part IV.C.1.

383. *See* discussion *infra* Part IV.C.

384. *See* discussion *infra* notes 385-88 and accompanying text.

385. *See* Sinzdak, *supra* note 302, at 1661.

386. *See id.*

387. *See id.*

388. *See infra* notes 388-94 and accompanying text.

389. TEX. GOV'T CODE ANN. § 554.009(a) (West 2004) (Section 554.009 is titled *Notice to Employees*).

390. TEX. GOV'T CODE ANN. § 554.009(b) (West 2004).

391. ATTORNEY GENERAL OF TEXAS, http://www.oag.state.tx.us/AG_Publications/pdfs/whistleblower_poster.pdf. The current sign prescribed by the attorney general reads as follows:

> YOU HAVE THE RIGHT TO NOT REMAIN SILENT[:] The law known as the "Whistleblower Act" prohibits retaliation against public employees who report official wrongdoing. The Act states that "a state or local government 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 by the employing governmental entity or another public employee to an appropriate law enforcement authority." (TEX. GOV'T CODE ANN.

this approach is two-fold: (1) a mere posting requirement is arbitrary, and (2) the language of the sign contains terminology that may be misunderstood by employees. Requiring employers to post the sign in a "prominent" place is subjective, and thus not effective. Employees may overlook the sign or an employer may strategically place the sign in a low-traffic area of the workplace. Furthermore, even if employees read the sign, they may still misinterpret key terms. These key terms include violation of law and appropriate law enforcement authority—terms previously discussed as rigid and problematic for Texas courts to interpret.[392] If Texas courts have had difficulty interpreting these terms under the Act, the terms will likely be difficult for Texas whistleblowers to understand as well.

Whether or not the Texas Legislature relaxes the rigid reporting requirements of the Act, it should enhance the notice provision of the Act with the requirement that state employers incorporate whistleblower education courses in their workplace training programs. This addition will clarify an employee's rights under the Act, and it will serve as a catalyst for dialogue between employees and employers concerning whistleblower issues. The legislature can make this educational policy more feasible by implementing the internal reporting channels previously discussed.[393] The internal report recipient can also be responsible for educating employees on whistleblower rights. The dialogue that will result from the combination of an educational course policy and an internal reporting policy will give employees insight into how willing their employers will be to cure whistleblower issues. Like internal reporting alone, this insight will prevent whistleblower mistakes and promote cost-efficiency.[394] Even so, the reality of the matter is that some claims will end up in court. When they do, Texas courts must stay mindful of the interests of both employees and employers.[395]

2. *Whistleblower Jurisprudence Ends Fairly When Courts Balance Interests*

Although the United States Supreme Court limited the application of the *Pickering* balancing test in *Garcetti*, the Court also held that claims under state whistleblower laws are entirely different causes of action.[396] By

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§ 554.002(a) (Vernon 1999). For more information or additional copies, please call (512) 463-2185.

Id.

392. *See supra* Part IV.A.

393. *See supra* Part IV.B.

394. *See supra* Part IV.B.

395. *See infra* Part IV.C.2.

396. Garcetti v. Ceballos, 547 U.S. 410, 411-12 (2006). The Court explained that federal and state whistleblower laws represent appropriate measures for dealing with retaliation in the workplace; thus,

deferring to the states in *Garcetti*, the Supreme Court has not precluded state courts from assessing the interests at stake per *Pickering*.[397] As such, Texas courts are not bound to the bright-line rule of *Garcetti* and should consider all interests involved when adjudicating whistleblower claims. By considering the interests of both employee and employer, courts will be able to differentiate claims deserving of relief from those deserving dismissals. The challenge is that claims must make it to court before this analysis is viable. Loosening reporting requirements will allow good faith claims to make it to court; balancing interests will allow good faith claims to prevail. The *Pickering* Court explained that public employment-free speech scenarios are diverse in fact pattern and complicated in nature.[398] A balancing test accounts for the diverse and complicated character of public sector whistleblower claims.[399] Texas courts should consider implementing a similar test within the framework of the Texas Whistleblower Act, whether the legislature revamps the Act or the Act remains unchanged.

V. CONCLUSION: TEXAS WHISTLEBLOWERS DEMAND LEGISLATURE'S ATTENTION

Throughout the nation and in the state of Texas, whistleblowers play a crucial role in the workplace.[400] Because whistleblowers deserve protection from retaliation, legislatures should be held accountable in their development of ineffective whistleblower legislation. The basic premise that whistleblower laws should be effective is unwavering, but "[t]he statutes, the case law, and the attitudes of agencies and the courts continue to change. The goal of the law has not changed: true whistleblowers ought to be protected."[401] Thus, true whistleblower claims should not slip through the cracks of futile legislation containing overly strict reporting requirements.[402] These rigid reporting requirements stifle otherwise worthy claims, and they destroy the lives of good faith whistleblowers.[403]

Revisiting the story of Amy Brown, imagine now that Amy lives in Texas.[404] Amy is your sister, mother, daughter, or wife. She is a teacher at a public school in Austin. It has come to her attention that the school principal has been sexually harassing many of her female colleagues. These particular colleagues are new to the school district and fearful that reporting

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the Court held that its precedent did not support creating a blanket constitutional cause of action for employees who whistleblow. *Id.*

397. *See id.*

398. Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).

399. *See id.* at 568-69.

400. *See* KOHN, *supra* note 16, at 1.

401. *See* FOWLER, *supra* note 14, at 1.

402. *See supra* Part IV.A.

403. *See* ALFORD, *supra* note 1, at 50-51.

404. *See supra* note 1 and accompanying text.

the principal will be disadvantageous to their careers. Amy is a veteran at the school and feels a sense of responsibility in protecting her workplace from this type of behavior. She decides that the right thing to do is to report the principal to the school board. The school board transfers her to another school to avoid the issue. Amy is devastated and files a claim under the Texas Whistleblower Act. She is even more devastated when the trial court grants the school's motion for summary judgment because it finds that, under the current application of the reporting requirements of the Act, the school board did not constitute an appropriate law enforcement authority. Amy never gets her day in court; she never gets to tell her story. Amy took a chance, blew the whistle, and found herself unprotected from retaliation.

The Texas Legislature recognized the need to protect true whistleblowers like Amy by enacting the Texas Whistleblower Act.[405] The legislature, however, drafted the Act too rigidly and without consideration of its potential negative application in Texas courts.[406] Texas courts have narrowly applied the Act, and whistleblower jurisprudence in Texas does not currently afford Texas whistleblowers adequate legal protections.[407] Because the legislature has a responsibility to provide adequate protections for Texas whistleblowers, it is imperative that the legislature revamp the Texas Whistleblower Act.[408] In order to revamp the Act successfully, the legislature should supplement the current provisions of the Act with provisions that give Texas whistleblowers a better chance to have the merits of their cases heard.[409] Only after the legislature rebuilds the foundation of the Texas Whistleblower Act will Texas whistleblowers and courts begin to aid in the necessary transformation of Texas whistleblower jurisprudence.[410]

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405. *See* TEX. GOV'T CODE ANN. § 554 (West 2004).
406. *See* discussion *supra* Part III.
407. *See* discussion *supra* Part III.A.
408. *See* discussion *supra* Part IV.A.1.
409. *See* discussion *supra* Part IV.
410. *See* discussion *supra* Part IV.C.