

**SUBJECT:** Limiting damages for governmental whistleblowers

**COMMITTEE:** State Affairs — committee substitute recommended

**VOTE:** 14 ayes — Seidlits, S. Turner, Black, Bosse, Carter, Craddick, Danburg, Hilbert, Hochberg, B. Hunter, D. Jones, McCall, Ramsay, Wolens

0 nays

1 absent — Alvarado

**WITNESSES:** For — Ann Clarke Snell; Jim Allison, County Judges and Commissioners Association of Texas; Dorcas A. Green, Walsh, Anderson, Underwood, Schulze & Aldridge, P.C.; Jan P. Patterson; Don William King, Jr. City of San Antonio; Arthur L. Walker, Walker, Bright & Whittenton; Mark Mendez, Tarrant County Commissioners Court; William W. Krueger, III; Sheila Gladstone; Frank Battle, Texas Association of School Boards; Thomas P. Brandt; Robert Lemens, Texas Association of Counties

Against — Richard Levy, Texas AFL-CIO

On — Tom Smith, Public Citizen; Carey Smith, Toni Hunter

**BACKGROUND:** Chapter 554 of the Government Code, the state's Whistleblower Act, protects persons who report wrongdoing ("blow the whistle") by their governmental employers. The law prohibits state agencies and local governmental bodies from firing or making a personnel decision that adversely affects a public employee who reports a violation of law by the governmental entity to a law enforcement agency. The act provides for both exemplary (punitive) and actual damages.

**DIGEST:** CSHB 175 would remove exemplary damages from the list of damages a public employee can sue for after being subject to an adverse personnel action — such as being fired — because of reporting an unlawful act by the public employer to a law enforcement agency.

The bill would cap compensatory damages — including future financial losses, emotional pain, suffering, inconvenience, mental anguish, loss of

enjoyment of life and other nonfinancial losses — at \$50,000 if the public employer had 100 or fewer employees; \$100,000 if the public employer had 101 to 200 employees; \$200,000 if the public employer had 201 to 500 employees, and \$250,000 if the public employer had more than 500 employees.

Whistleblowers would continue to be entitled to reinstatement to their former position or to an equivalent position.

A governmental entity's sovereign immunity would be waived and abolished in whistleblowing suits. However, the governmental entity would have an affirmative defense if it could show that it took an action against its employee based solely on information that was not related to the fact that its employee reported government wrongdoing to a law enforcement agency.

A whistleblower would be required to initiate action under, but no longer exhaust, the grievance or appeal procedures of the public employer before suing. A state public employee could file a whistleblowing suit in a district court in the county where the action arose or in Travis County. A local public employee could file a whistleblowing suit in a district court where the action arose or in any county that has established with the county in which the cause of action arose a council of governments or other regional commission.

A supervisor who made an adverse personnel decision regarding a whistleblowing public employee would be liable for a civil penalty of up to \$5,000, rather than the current \$1,000.

The attorney general would be required to supply the Legislative Audit Committee with a brief memorandum describing cases in which a state governmental entity was required to pay \$10,000 or more in a whistleblower case. The Legislative Audit Committee could require the state auditor to audit or investigate agencies involved in such cases.

The bill would take immediate effect if approved by two thirds of the membership of each house, and its changes would apply only to a

suspension or termination of employment or other adverse personnel action taken on or after the effective date.

**SUPPORTERS  
SAY:**

CSHB 175 would amend the Whistleblower Act to lessen its punitive impact on the taxpayers while maintaining and refocusing its protection of those who report wrongdoing. The current act, instead of punishing public officials for retaliating against whistleblowers, forces the taxpayers to pick up the tab for excessive litigation costs and high jury awards associated with whistleblower lawsuits. Rather than saving the taxpayer money by encouraging the reporting of fraud, the act creates a situation that often costs the taxpayers dearly. In one such suit recently the Legislature was asked to appropriate nearly \$20 million dollars to a whistleblower. CSHB 175 would eliminate punitive damages against governmental entities, since the only ones being "punished" are the taxpayers.

CSHB 175 would also cap actual damages at a level that would not bankrupt public treasuries. Most whistleblowers report wrongdoing to remedy a situation — not to be enriched at the taxpayers' expense.

Whistleblowers would be more than adequately compensated under CSHB 175. They would also be able to regain their legal expenses and lost wages as well as generous actual damages. They would be guaranteed a fair trial in a neutral county. They would also be entitled to be restored to their former position or to a position similar to their former position.

In addition, the civil fines against supervisors found guilty of retaliating against whistleblowers would be raised from \$1,000 to \$5,000, which would create a much stronger deterrent for public officials who try to cover up wrongdoing by firing a whistleblower.

**OPPONENTS  
SAY:**

CSHB 175 would remove some of the teeth from the state's whistleblower law. The bill would weaken the law by removing the authority of a jury to award punitive damages to public employees who prove they were fired for reporting government corruption, discouraging public employees from reporting corruption and stripping juries of authority to penalize a governmental agency for firing a whistleblower. Under CSHB 175 a state agency would be more likely to fire a whistleblower, secure in knowing it would only get a slap on the wrist for doing so.

In the private sector punitive damages work. Corporations once burned by such awards are usually twice shy about continuing practices that got them in trouble. Punitive damages should be kept in the public sector for the same reasons they are allowed in the private sector.

CSHB 175's cap on actual damages would result in whistleblowers having no protection from being financially penalized if they expose public corruption.

The recent whistleblower case in which a large amount of punitive damages was awarded reflected the careful deliberation of a jury and due consideration by appeals courts of the particular situation. This single case provides insufficient justification for changing the whistleblower law as there have been very few state-level cases in which punitive damages have been paid or where such damages have been high.

NOTES:

Rep. Hirschi intends to offer a floor amendment that would raise the maximum civil fine against supervisors found guilty of retaliating against whistleblowers from \$5,000 to \$15,000. Rep. Hirschi also plans to offer an amendment allowing a public employee to make a report of governmental wrongdoing to the law enforcement authority that he believes in good faith can investigate or prosecute the wrongdoing.

The committee substitute would cap actual damages at between \$50,000 and \$250,000, depending on the size of the employing entity's labor force. It would allow venue in any county that has established with the county in which the cause of action arises a council of governments or other regional commission. It would allow state cases to be filed in the county where the action accrued or Travis County. The substitute would also add a provision establishing a mechanism to audit or investigate certain whistleblower cases.

SB 411 by Montford, the companion bill, passed the Senate on May 9 and was referred to the House State Affairs Committee.