

SUBJECT: Suits against employers who retaliate against reporters of child abuse

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 5 ayes — Bosse, Janek, Dutton, Martinez Fischer, Nixon

2 nays — Clark, Hope

2 absent — Smithee, Zbranek

WITNESSES: For — Malcolm Greenstein; Lonnie Hollingsworth, Jr., Texas Classroom Teachers Association; Rosa Thomas; *Registered but did not testify*: Eric Hartman, Texas Federation of Teachers

Against — None

On — Charles Childress, Texas Department of Protective and Regulatory Services; Cathy Douglass, Texas Association of School Boards

BACKGROUND: Under Family Code, sec. 261.101, certain professionals have a duty to report suspected child abuse or neglect within 48 hours to law enforcement or to the Department of Protective and Regulatory Services (DPRS). These include anyone licensed or certified by the state or any employee of a facility licensed, certified, or operated by the state where the person has direct contact with children during the course of normal duties. It includes teachers, nurses, day-care workers, and doctors. A professional who does not make the required report is subject to a Class B misdemeanor, punishable by up to 180 days in jail and/or a maximum fine of \$2,000. A false report of abuse or neglect made knowingly is a Class A misdemeanor, punishable by up to one year in jail and/or a maximum fine of \$4,000, and a repeat offense is a state jail felony, punishable by 180 days to two years in a state jail and an optional fine of up to \$10,000.

Civil Practice and Remedies Code, chapter 41 sets standards for recovery of punitive or exemplary damages designed to punish the defendant, including capping such damages at three times the damages the plaintiff receives to compensate for his or her actual losses (actual damages).

Under the Whistleblower Act (Government Code, chapter 554), a public employee cannot be fired, demoted, or otherwise disciplined for reporting in good faith the illegal activities of a government entity or another public employee. Public employees can sue their employers for such retaliatory conduct.

DIGEST:

CSHB 3473 would prohibit an employer from discriminating against a professional employee who, in good faith, either:

- ! reported suspected child abuse or neglect to a supervisor, a facility manager, a state regulatory agency, or a law enforcement agency, or
- ! initiated or cooperated in an investigation or proceeding by a state agency related to an allegation of child abuse or neglect.

The bill also would provide a cause of action against the employer for a professional who was discriminated against for a good-faith report. An employee who prevailed in his or her suit could recover:

- ! actual damages and/or an injunction;
- ! exemplary damages, if the employer was a private employer;
- ! court costs; and
- ! reasonable attorney's fees.

The person also would be entitled to be reinstated to his or her former position or a comparable one, to reinstatement of all benefits and seniority, and to compensation for lost wages.

In such a retaliation or discrimination suit, the plaintiff would have the burden of proof, but he or she could make an initial rebuttable case of being discriminated against by showing that the adverse action that was the basis of the complaint against the employer occurred within 60 days of reporting the abuse or neglect. If such an initial case was made, the employer at least would have to offer evidence to rebut that initial case.

The bill would give the employer an affirmative defense if the employer would have taken the action against the employee anyway for a reason unrelated to the employee's report of abuse or neglect or of initiation or cooperation with an investigation of an allegation of abuse or neglect.

A suit authorized by this bill could be brought in the district or county court in which the plaintiff lived or worked or where the defendant did business.

If a public employee was entitled to sue under the Whistleblower Act, he or she would have to bring the claim under that statute. Otherwise, a public employee could sue under the bill's cause of action.

The bill would exclude from its protections people who reported their own abuse or neglect of a child or who initiated or cooperated in an investigation or proceeding regarding their abuse or neglect of a child.

This bill would take effect September 1, 2001, and would apply only to reports of abuse or neglect made on or after that date.

**SUPPORTERS
SAY:**

CSHB 3473 would help protect children from abuse and neglect by preserving the ability of the adults around them to help them. Suspicions of child abuse may go unreported because of the adult's fear of negative consequences. Alleviating those fears would empower professionals to do what their conscience and the law tells them to do. This bill would protect only people who made good-faith reports of child abuse or neglect.

CSHB 3473 also is needed to eliminate the double bind that many professionals, such as teachers and day-care workers, can find themselves in regarding reporting child abuse and neglect by coworkers or parents. If the suspected abuser is an employee or customer of the employer, the employer may prefer that a report not be made or may wish to screen the professional's concerns before having them reported. However, the professional can be criminally liable for not reporting child abuse or neglect.

The rebuttable presumption that CSHB 3473 would create is necessary and fair. Once an employee showed that he or she was fired, demoted, or disciplined soon after reporting child abuse, the presumption would force the employer to come forward with the legitimate reasons, if any, for taking that action. The employer would know and have evidence regarding why the action was taken. The presumption simply would force the party with the information to produce it.

OPPONENTS
SAY:

CSHB 3473 unnecessarily would increase the costs of doing business, including for child-care facilities that could be subject to new potential liability and lawsuits. Even in other settings, not enough evidence exists that child abuse is underreported by professionals to justify imposing new burdens on businesses' freedom to handle employment matters without the threat of litigation.

The rebuttable presumption that the bill would create against an employer who took a negative action against an employee within two months of the employee's report would be unfair. Such a presumption assumes without any proof that the employer has done something wrong. It also would eliminate any chance that the employer could have a lawsuit dismissed for lack of evidence, even when the only evidence in the plaintiff's favor was the timing of events.

NOTES:

The committee substitute added the good-faith requirement, the section excluding those who report their own child abuse and neglect from the bill's protections, the affirmative defense provision, and the exclusion of public employees with Whistleblower claims from suits under the bill.