Opinion issued July 3, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-06-00490-CV

THE UNIVERSITY OF HOUSTON, Appellant

v.

STEPHEN BARTH, Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2001–34089

O P I N I O N

The University of Houston ("the University") appeals a judgment rendered pursuant to a jury's verdict finding that the University violated the Texas

Whistleblower Act[1] ("the whistleblower act") by retaliating against Stephen Barth, a tenured professor at the University's Conrad N. Hilton College of Hotel Management, after he reported to university officials that the college's dean had violated the law. Barth was awarded actual damages and attorney's fees against the University based on its violation of the whistleblower act.

Of the six issues raised by the University, the dispositive issues that we address are (1) whether the trial court lacked jurisdiction over Barth's claims because he did not timely initiate the University's grievance procedure; (2) whether legally-sufficient evidence supports a finding that Barth reported a violation of the law to the appropriate law enforcement authorities; (3) whether legally-sufficient evidence supports a finding that Barth reported a violation of the law in good faith; and (4) whether legally sufficient evidence supports the jury's finding that Barth's report of a violation of the law caused the University to take an adverse employment action against him.

We reverse and remand.

Factual & Procedural Background

In February or early March 1999, Barth reported to the University's chief financial officer and to its general counsel that the dean of the University's Conrad

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[1] *See* TEX. GOV'T CODE ANN. §§ 554.001–.010 (Vernon 2004).

N. Hilton College of Hotel Management ("Hilton College"), Alan Stutts, had engaged in questionable accounting practices, mishandled university funds, and entered into an unauthorized contract for services on behalf of the college. In May 1999, Barth also reported Stutts's conduct to the University's internal auditor.

As dean of Hilton College, Stutts was Barth's supervisor. On June 17, 1999, Stutts completed Barth's annual evaluation for the 1998–1999 academic year ("the 1999 evaluation"). In the evaluation, Stutts gave Barth a "marginal" rating with respect to "grantsmanship," which pertained to Barth's success in obtaining outside grants for the college. The marginal rating adversely affected the merit raise received by Barth.

Also in 1999, Barth was denied funds for travel related to his position. In addition, after Barth reported Stutts's conduct, Stutts withdrew his participation in a symposium created by Barth from which Barth received $10,000 in annual compensation. After Stutts stopped participating, one of the symposium's sponsors withdrew its support in December 1999, and the 2000 symposium was cancelled.

On March 10, 2000, Barth filed a grievance with the University's grievance committee. In the grievance, Barth asserted, "Dean Stutts has retaliated against me for making the university administration aware of inappropriate and/or illegal administrative actions by his administration." The following were among the

"retaliatory actions taken by Dean Stutts" cited by Barth: (1) "denial of travel dollars"; (2) "arbitrary and capricious evaluation (disparately imparting [sic] me by denying at least $600–$1,000 increase in salary)"; and (3) "withdrawing support for my initiatives including the Hospitality Legal Symposium, causing its cancellation and a loss of reputation in the industry."

On August 17, 2000, Barth filed a second grievance asserting that Stutts had again retaliated against him by giving Barth a lower-than-deserved merit evaluation for the 1999–2000 academic year ("the 2000 evaluation"), which adversely affected his salary increase for the year 2001.

Barth's grievances were not successfully resolved through the University's grievance process. Soon after, Barth filed suit against the University alleging that it had retaliated against him for reporting Stutts's conduct. Barth asserted that such retaliation was a violation of the whistleblower act.

The University filed a plea to the jurisdiction seeking dismissal of Barth's suit. The University asserted, inter alia, that Barth had not timely initiated the grievance process, as required by the whistleblower act, thereby depriving the trial court of subject-matter jurisdiction.

The trial court denied the University's plea to the jurisdiction. We affirmed the denial in *University of Houston v. Barth*, 178 S.W.3d 157 (Tex. App.—Houston [1st

Dist.] 2005, no pet.). Recognizing that the "continuing-violation doctrine" has been applied in Texas whistleblower cases, we concluded, "There are sufficient factual allegations in Barth's pleadings that could invoke the continuing-violation doctrine; whether that doctrine applies and which acts triggered the 90-day limitations period are issues that should be resolved by the trier of fact." *Id.* at 163 (citing *Univ. of Tex.–Pan Am. v. De Los Santos*, 997 S.W.2d 817, 820 (Tex. App.—Corpus Christi 1999, no pet.)).

The case was ultimately tried to a jury, but the jury was not asked to make fact-findings pertaining to whether Barth timely filed his grievances. The jury did find that the University had violated the whistleblower act and that Barth was entitled to actual damages totaling $40,000 and $245,000 in attorney's fees. The trial court rendered judgment on the jury's findings.

Presenting six issues for review, the University appeals the judgment.

Jurisdictional Issue: Timeliness of Grievances

In its second issue, the University contends that the trial court lacked subject-matter jurisdiction over Barth's claims because he did not timely initiate the University's internal grievance procedure.

Whistleblower Act Provisions

The whistleblower act provides, "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." TEX. GOV'T CODE ANN. § 554.002(a) (Vernon 2004). The act requires that, before filing suit, an employee must initiate his employer's grievance procedure not later than the 90th day after the date on which the alleged violation occurred or was discovered by the employee through reasonable diligence. *Id.* § 554.006(b) (Vernon 2004). If the employee does not timely initiate the grievance procedure, then his claims are jurisdictionally barred. *Tex. S. Univ. v. Carter*, 84 S.W.3d 787, 792 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *see* TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2007) (providing, as amended in 2005, that "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity").

Deemed Findings

As mentioned, we concluded in the earlier interlocutory appeal that, given Barth's allegations, whether Barth timely initiated the grievance process was a question of fact to be determined by the fact finder. *Barth*, 178 S.W.3d at 163. Nevertheless, the jury was not asked to make fact findings regarding the timeliness of Barth's grievances.

Barth contends that we must deem as found a finding in support of the judgment that Barth timely filed his grievances. Generally, when a ground of recovery consists of multiple issues, and the jury charge omits issues that constitute only a part of that ground, while other issues necessarily referable to that ground are submitted and found, the omitted elements are deemed found in support of the judgment if no objection is made, and they are supported by some evidence. TEX. R. CIV. P. 279; *Ramos v. Frito-Lay, Inc*., 784 S.W.2d 667, 668 (Tex. 1990). Statutory notice requirements can be the subject of a deemed finding. *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 200 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *see Tex. Tech Univ. Health Sciences Ctr. v. Apodaca*, 876 S.W.2d 402, 410–412 (Tex. App.—El Paso 1994, writ denied) (deeming as found finding that actual notice had been given under Texas Tort Claims Act after court concluded that notice provision was not separate ground of recovery "but was a component of the ultimate issue of the claimant's right of recovery"); *U.S. Fire Ins. Co. v. Ramos*, 863 S.W.2d 534, 537–38 (Tex. App.—El Paso 1993, writ denied) (holding that statutory notice requirement of worker's compensation statute was not independent ground of recovery; thus, notice element could be subject of deemed finding).

Here, the jury made positive liability findings against the University on Barth's whistleblower claim. The University did not object to the lack of submission of the

issue regarding the timeliness of Barth's grievances. If supported by some evidence, we must deem as found findings supporting the conclusion that Barth timely filed his March 10, 2000 and his August 17, 2000 grievances. *See Ramos*, 784 S.W.2d at 668. That is, we review the record to determine whether there is legally sufficient evidence to support the deemed findings. *See In retrograde extrapolation J.F.C.*, 96 S.W.3d 256, 276 (Tex. 2002).

In deciding a legal sufficiency challenge, we determine whether there is evidence that would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). To make this determination, we (1) credit all favorable evidence that reasonable jurors could believe; (2) disregard all contrary evidence, except that which they could not ignore; (3) view the evidence in the light most favorable to the verdict; and (4) indulge every reasonable inference that would support the verdict. *Id.* at 822, 827. But, we may not disregard evidence that allows only one inference. *Id.* at 822.

The March 10, 2000 Grievance

At trial, Barth alleged, in part, that the University retaliated against him for reporting Stutts's conduct by engaging in the following "adverse employment actions" against him: (1) giving Barth a marginal rating for grantsmanship in his 1999 evaluation, (2) denying Barth travel expenses, and (3) withdrawing support for

Barth's legal symposium.[2] Barth initiated the grievance process with regard to these adverse employment actions by filing a grievance on March 10, 2000. For the grievance to have been timely filed, the evidence must support a finding that Barth's March 10 grievance was filed within 90 days of when Barth discovered the whistleblower violation through reasonable diligence. *See* TEX. GOV'T CODE ANN. § 554.006. In other words, the record must contain some evidence that Barth did not discover the violation through reasonable diligence until after December 10, 1999.

Here, the record shows that Barth received a copy of his 1999 evaluation on June 10, 1999. On June 15, 1999, Barth sent a letter to Stutts questioning the evaluation and requesting that Stutts reconsider "several components," including grantsmanship.

The evidence presented also shows that Stutts refused to honor an agreement with Barth in which Stutts had agreed that Barth would receive extra compensation for sitting on the academic council. Barth stated, in a June 19, 1999 meeting with the University's provost, that he believed Stutts was refusing to honor the agreement in retaliation for his reports against Stutts.

On December 2, 1999, Barth sent a letter to the provost in which Barth stated,

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[2] The jury did not award damages for Barth's claim of denied travel expenses. On appeal, the parties do not focus on that claimed adverse employment action.

"This letter is to officially notify you of my belief that I am being retaliated against (directly and indirectly) by the administration of the Conrad N. Hilton College for challenging and/or questioning various practices and/or decisions made by the administration." In response, the provost advised Barth in a December 8, 1999 letter that "it might be appropriate" for Barth to initiate the grievance process.

The evidence also showed that, in 1999, Stutts did not participate in Barth's symposium following Barth's reports of his conduct. In addition, the evidence showed that Barth had received written notification, on December 3, 1999, from the symposium's sponsor that the sponsor was withdrawing its support for the 2000 symposium.

Barth contends that the evidence demonstrates that he was not aware that the University had retaliated against him, with respect to either the 1999 evaluation or the withdrawal of support for the symposium, until January 14, 2000. On that date, Barth obtained, through an open records request, a copy of a colleague professor's evaluation. According to Barth, the colleague's evaluation showed that Barth had been treated disparately because more stringent standards had been applied to review Barth's performance with respect to grantsmanship than to the colleague.

Barth claims that he became aware of the whistleblower violation only when he received a copy of the colleague's evaluation and realized that the colleague was

being treated more favorably. Barth testified that receipt of his colleague's merit evaluation "kind of opened my eyes to just how differently I was being treated," particularly when "added to all the stuff that had gone on through the year."

Crediting all favorable evidence that reasonable jurors could believe and disregarding all contrary evidence except that which they could not ignore, we disagree with Barth that the record contains legally-sufficient evidence to show that he did not discover the adverse employment actions identified in his March 10 grievance until January 14, 2000. As mentioned, the whistleblower act provides that an employee must invoke the applicable grievance or appeal procedures not later than the 90th day after the date on which the alleged violation *was discovered by the employee through reasonable diligence*. TEX. GOV'T CODE ANN. § 554.006(b)(2). We noted in our earlier opinion in this case that, under the continuing-violation doctrine, the focus is on what event, in fairness and in logic, should have alerted the average layman to protect his rights. *Barth*, 178 S.W.3d at 163 (citing *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1560–61 (5th Cir. 1985)).

Here, Barth was aware of his 1999 evaluation on June 17, 1999. The record reflects that he had concerns about the accuracy of his evaluation only a few days after its receipt. The evaluation was completed by Stutts three to four months after Barth initially reported Stutts's conduct to the University's administration and within

approximately one month of Barth's report to the University's auditor. The record further shows that, on June 19, 1999, Barth believed that Stutts was retaliating against him by failing to honor a compensation agreement. As evidenced by his December 2, 1999 letter, Barth continued to believe throughout the year that Stutts was retaliating against him for reporting the conduct. Although it is contrary to the implied timeliness finding, this is evidence that we cannot ignore in conducting our sufficiency review. *See Keller*, 168 S.W.3d at 829. Given this evidence, we cannot conclude in fairness and in logic that Barth was not aware of the violative conduct underlying his March 10 grievance until he received a copy of his colleague's evaluation on January 14, 2000.

Courts have recognized that discovery of a whistleblower violation is not delayed until the time an employee confirmed his belief that his employer had retaliated against him. *See Schindley v. Northeast Tex. Cmty. Coll.*, 13 S.W.3d 62, 67 (Tex. App.—Texarkana 2000, pet. denied); *Villarreal v. Williams*, 971 S.W.2d 622, 626 (Tex. App.—San Antonio 1998, no pet.). We conclude that evidence of when Barth received his colleague's evaluation is not "some evidence" that he did not discover, through reasonable diligence, the whistleblower violation until January 14, 2000.

We hold that the evidence is legally insufficient to support an implied finding

that Barth timely filed his March 10, 2000 grievance.

The August 17, 2000 Grievance

Next, we determine whether legally sufficient evidence supports an implied finding that Barth's August 17, 2000 grievance was timely filed. In that grievance, Barth complains that Stutts retaliated against him by again giving him a lower-than-deserved rating with respect to grantsmanship in Barth's 2000 evaluation.

The University contends that the evidence shows Barth knew of the 2000 evaluation, including his low grantsmanship rating, on May 8, 2000, when Barth first received a copy of the initial version of the evaluation. Barth points to evidence that he did not receive his "final" evaluation, on which he based his second grievance, until August 3, 2000. Thus, the question becomes whether legally-sufficient evidence was presented to support an implied finding that the accrual date for purposes of the second grievance was August 3, 2000.

By analogy, in employment discrimination cases, courts have determined that the limitations period for filing an administrative complaint accrues when the employee receives unequivocal notice of the adverse employment action or when a reasonable person would know of the adverse action. *See Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 928 (Tex. 1996); *Tex. A & M Univ., Corpus Christi v. Vanzante*, 159 S.W.3d 791, 794–96 (Tex. App.—Corpus Christi 2005, no pet.);

Tex. Parks & Wildlife Dept. v. Dearing, 150 S.W.3d 452, 459 (Tex. App.—Austin 2004, pet. denied). Here, the record shows that, after Barth initially received the evaluation on May 8, 2000, Barth and Stutts corresponded regarding the evaluation during the summer of 2000. Stutts requested additional information from Barth related to the evaluation, including information relevant to the grantsmanship rating. Ultimately, Stutts revised portions of the initial evaluation, although the grantsmanship rating, on which Barth bases his grievance, did not change. Barth did not receive the final version of the evaluation until August 3, 2000. The final, revised evaluation is the adverse employment action of which Barth complained in his August 17, 2000 grievance.

Barth presented evidence that Stutts represented to him that the initial May 8, 2000 evaluation was not the final evaluation through evidence showing that Barth was led to believe that the grantsmanship rating might change. Thus, when considered in the context of the record, the May 8 evaluation was not an unequivocal notice of his low grantsmanship rating or necessarily evidence that Barth should have known that his final evaluation would contain an unsatisfactory grantsmanship rating. To the contrary, Barth presented evidence that he received the first unequivocal notice of his low grantsmanship rating on August 3, 2000.

Applying the appropriate standard, we hold that the evidence is legally

sufficient to support an implied finding that Barth timely filed his August 17, 2000 grievance. *See* TEX. GOV'T CODE ANN. § 554.006(b)(2).

Conclusion Regarding Jurisdictional Issue

In sum, the evidence is legally sufficient to support a finding that Barth timely filed his August 17, 2000 grievance, but is not legally sufficient to support a finding that Barth timely filed his March 10, 2000 grievance. We hold, therefore, that (1) the trial court had subject-matter jurisdiction over the claims identified in Barth's August 17, 2000 grievance, i.e., claims based on Barth's allegation that the University retaliated against him by underrating his performance in the 2000 evaluation and (2) the trial court did not have subject matter jurisdiction over Barth's claims identified in his March 10, 2000 grievance, i.e., claims based on his 1999 evaluation and on Stutts's withdrawal of his support for the 2000 symposium. *See Thomas v. Long*, 207 S.W.3d 334, 338–39 (Tex. 2006) ("[I]t is proper for a trial court to dismiss claims over which it does not have subject matter jurisdiction but retain claims in the same case over which it has jurisdiction.").

When reversing a trial court's judgment, we should render the judgment that the trial court should have rendered, except when a remand is necessary for further proceedings. TEX. R. APP. P. 43.3. Here, because we cannot determine precisely which actual damages and attorney's fees were awarded by the jury for which claims,

it is necessary to reverse the trial court's judgment and remand the case to the trial court for further proceedings. *See id.*; TEX. R. APP. P. 44.1(b). On remand, the trial court should dismiss those claims over which it lacks jurisdiction, as discussed above, and permit Barth to pursue a new trial of those claims over which the court has jurisdiction. *See Thomas*, 207 S.W.3d at 339.

We sustain the University's second issue, in part, and deny it, in part.

Remaining Issues

In its remaining issues, the University (1) challenges the legal and factual sufficiency of certain elements of Barth's whistleblower cause of action, (2) asserts charge error, and (3) challenges the jury's award of attorney's fees. Because we have determined that remand is the appropriate disposition, at this point, we need not consider the University's arguments relating to factual sufficiency, charge error, or attorney fee's error; a favorable disposition on these arguments would result in no greater relief for the University. *See* TEX. R. APP. P. 47.1. We consider only those remaining arguments that could result in the greater relief of rendition: namely, those arguments asserting that the evidence was legally insufficient to support the jury's whistleblower-liability finding.

Good Faith Report of Law Violation to Appropriate Law Enforcement Authority

To succeed on his whistleblower claim, Barth was required to prove that he

reported, in good faith, a violation of the law to an appropriate law enforcement authority. *See* TEX. GOV'T CODE ANN. § 554.002(a). At trial, Barth asserted three grounds to support his whistleblower claim: (1) retaliation for his report to university officials that Stutts violated the Texas Penal Code; (2) retaliation for his report to university officials that Stutts violated the University's internal rules; and (3) retaliation for his report to university officials that Stutts violated state statutes and regulations governing the administration of government contracts. The record does not reveal on which of these grounds the jury made its liability finding against the University. Thus, to prevail on appeal, the University must attack each ground. *See Britton v. Tex. Dep't of Criminal Justice*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

In its first issue on appeal, the University asserts that the evidence is legally insufficient to show that Barth reported the alleged Penal Code violations to the appropriate law enforcement authorities because university officials cannot enforce or investigate Penal Code violations. In its third issue, the University asserts that the evidence is legally insufficient to show that Barth reported a violation of the law in good faith (1) because the University's internal rules are not "laws" for purposes of the whistleblower act and (2) because Barth did not report the Penal Code violation in "good faith."

On appeal, however, the University does not address the third ground on which Barth based his whistleblower claim in the trial court: Barth's claim that the University retaliated against him for reporting to University officials that Stutts violated state law regulating the administration of government contracts. More specifically, the University offers no substantive argument or authority to show that (1) state laws regulating government contract administration are not "laws" for purposes of the whistleblower act; (2) the persons to whom Barth reported Stutts's conduct were not appropriate law enforcement authorities with respect to those laws regulating government contract administration; or (3) Barth did not report a violation of those laws in good faith.[3]

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[3] In its statement of the issues and sub-issues, the University globally references legal insufficiency of the evidence related to certain whistleblower claim elements. These oblique references to legal insufficiency do not raise challenges to Barth's whistleblower claim premised on his report that Stutts violated the law governing the administration of state contracts. Rather, when read in context, the issues and sub-issues introduce the University's challenges to Barth's claims that he was retaliated against for reporting violations of the Penal Code and violations of the University's internal rules. Our review of the briefs indicates that the University makes no affirmative, substantive argument directed toward Barth's whistleblower claim based on his report of a violation of the law governing the administration of state contracts. We recognize that we must "construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule." *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004); *see* TEX. R. APP. P. 38.9. And we are cognizant that the statement of an issue should be treated as covering every subsidiary issue. TEX. R. APP. P. 38.1(e). Nevertheless, "we know of no authority obligating us to become advocates for a particular litigant through performing their research and developing their argument for them." *Tello v. Bank One, N.A.*, 218

An appellant must attack all independent bases or grounds that fully support the trial court's complained-of ruling or judgment. *Britton*, 95 S.W.3d at 681. If no error is assigned to an independent ground that could, if meritorious, fully support the complained-of ruling or judgment, then we must accept the validity of the unchallenged, independent ground. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Britton*, 95 S.W.3d at 681. Concomitantly, when a separate and independent ground that supports a judgment is not challenged on appeal, the appellate court must affirm the lower court's judgment. *Britton*, 95 S.W.3d at 681.

Here, the University has not challenged a distinct ground of recovery asserted by Barth in the trial court to support the jury's whistleblower liability finding, namely, Barth's claim that the University retaliated against him for reporting to University officials that Stutts violated state law governing the administration of government contracts. Because the University has not challenged a ground asserted by Barth in the trial court on which whistleblower liability may have been based, we must affirm the judgment on this unchallenged ground. *See id.*

S.W.3d 109, 116 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Jordan v. Jefferson County*, 153 S.W.3d 670, 676 (Tex. App.—Amarillo 2004, pet. denied)). If we were to construe the University's briefing as challenging the legal sufficiency of the evidence to support the jury's liability finding based on Barth's claim that the University retaliated against him for reporting Stutts's violation of the laws governing the administration of government contracts, we would improperly become an advocate for the University. *See id.* This we cannot do.

We overrule the University's legal-sufficiency challenges presented in its first and third issues.

Barth's Reports Caused An Adverse Employment Action

The second question of the charge asked the jury, "Did The University of Houston take adverse personnel actions(s) against Stephen Barth in retaliation for his reports of a violation of law to an appropriate law enforcement authority?" The jury responded, "Yes." The third question asked the jury, "Do you find that The University of Houston would have taken the adverse personnel actions(s) it took against Stephen Barth based solely on information, observation, or evidence that is not related to Stephen Barth's report(s) of violation(s) of law?" The jury again responded affirmatively.

In its fourth issue, the University raises what we construe to be a challenge to the legal sufficiency of the evidence supporting a finding that Barth's reports of law violations caused the University to retaliate against Barth by giving him a marginal rating for grantsmanship in the 2000 evaluation.[4]

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[4] The University specifically attacks the jury's answer to the third question. The University asserts that the evidence established, as a matter of law, that it would have taken the action it did against Barth based solely on information, observation, or evidence that is not related to Barth's report of law violations. In this regard, the whistleblower act provides,

> It is an affirmative defense to a suit under this chapter that the

A public employee suing under the whistleblower act must prove that he suffered discriminatory or retaliatory conduct by the employer that would not have occurred when it did if the employee had not reported a law violation. *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000); *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 633 (Tex. 1995). That is, the employee must establish a "but for" causal connection between the reported law violation and the employer's actions. *City of Forth Worth v. Johnson*, 105 S.W.3d 154, 163 (Tex. App.—Waco 2003, no pet.). The employee need not establish that the reported violation of law was the *sole* cause of the employer's action. *Hinds*, 904 S.W.2d at 635.

In a whistleblower claim, "[c]ircumstantial evidence may be sufficient to establish a causal link between the adverse employment action and the reporting of illegal conduct." *Zimlich*, 29 S.W.3d at 69. Such evidence includes discriminatory

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> employing state or local governmental entity would have taken the action against the employee that forms the basis of the suit based solely on information, observation, or evidence that is not related to the fact that the employee made a report protected under this chapter of a violation of law.

TEX. GOV'T CODE ANN. § 554.004(b) (Vernon 2004). We recognized, in *City of Houston v. Levingston*, that although statutorily labeled as an "affirmative defense," proof under this section actually negates the causation element of a plaintiff's whistleblower case. 221 S.W.3d 204, 238 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Harris County v. Vernagallo*, 181 S.W.3d 17, 23 n. 12 (Tex. App.—Houston [14th Dist.] 2005, pet. denied)). Thus, the actual inquiry here is whether legally sufficient evidence supports the jury's finding regarding causation, i.e., that Stutts retaliated against Barth because he reported his conduct.

treatment in comparison to similarly-situated employees. *Id.* Evidence that only one similarly-situated employee was treated differently from the plaintiff can be legally sufficient circumstantial evidence to show causation. *See Johnson*, 105 S.W.3d at 168.

In this case, Barth argued that Stutts evaluated another professor, a similarly-situated employee, using more favorable standards with respect to grantsmanship. The University contends that the other professor was not a similarly-situated employee. It points to evidence showing that the other professor had distinct qualifications, experience, and accomplishments, which support a higher rating.

At trial, Barth offered the other professor's evaluation, which appears to show a more relaxed standard with respect to grantsmanship than the standard applied to Barth in his evaluation. Barth also relied on the findings and recommendations of the University's grievance committee, which evaluated Barth's grievances. The evidence shows that the committee considered the other professor to be a similarly-situated employee. The University's grievance committee also agreed that Barth had been treated disparately with respect to his 2000 evaluation. The committee found that Barth's rating for grantsmanship "was arbitrary and unfair."[5] The grievance

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[5] As permitted by university procedure, the provost decided not to follow the grievance committee's recommendations to the extent that they were favorable to Barth and denied Barth any relief on his grievances.

committee's report specifies and compares the standards used to rate Barth in the area of grantsmanship with those used to rate the other professor. The committee concluded that disparate standards had been applied to the two similarly-situated employees, resulting in a lower rating for Barth.

The University also points to evidence indicating that Barth had received "marginal" ratings in his evaluations in previous years. Barth acknowledges that his low ratings in grantsmanship in earlier years may have been justified, but contends that the evidence demonstrates that he successfully obtained grants for the symposium during the time period included in the 2000 evaluation.

The University also asserts that Barth did not deserve a better rating in grantsmanship because the symposium, which was the source of the grants which Barth brought to Hilton College, had lost money each year it was held. Barth contends that the profitability of the symposium was not a factor in the evaluation. Barth testified that he was only required to obtain funding for the project, which he did.

In sum, Barth presented evidence disputing the reasons proffered by the University for his low grantsmanship rating in 2000; the jury was free to disbelieve the University's explanation in this case. Viewing the evidence as required, we conclude that the evidence supports a finding that Barth's reports of Stutts's actions

was "a cause" of Barth receiving a marginal rating with respect to grantsmanship in the 2000 evaluation. The record thus contains legally sufficient evidence to support a causation finding.

We overrule the University's legal-sufficiency challenge presented in its fourth issue.

Conclusion

We reverse the judgment of the trial court and remand for further proceedings.

Laura Carter Higley
Justice

Panel consists of Justices Nuchia, Alcala, and Higley.

Justice Alcala, dissenting.