

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00521-CV

Roger Fay, Appellant

v.

**Texas A&M University, Geochemical and Environmental Research Group;
The College of Geosciences and Maritime Studies; Dr. Ray Bowen; Dr. Robert Duce;
Dr. Norman Guinasso; Dr. Roger Sassen; and Dr. David Schink, Appellees**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT
NO. D-1-GN-97-08888, HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING**

MEMORANDUM OPINION

This is an appeal by Roger Fay from the order of the district court of Travis County granting a plea to the jurisdiction in a whistleblower suit. Appellee is Texas A&M University (the University). We will affirm the order.

Fay filed suit pleading that he was a long-time employee of the University, acting as associate director in one of its research centers. Pleading further, he asserted that in 1996 he learned of several incidents that he believed constituted violations of University policy, as well as state and federal law. Fay informed his supervisor that the research center never performed certain work and that some employees were turning in false expense accounts and were filing false claims for reimbursement. He alleged further that he reported, in good faith, the claimed violations to the director and associate director of the center and several other University officials including the Texas

A&M Research Foundation, the provost, and the internal auditor. Fay averred, finally, that the University retaliated against him for making the reports by stripping him of authority of office, by assigning him trivial tasks, and by eventually firing him.

The University filed a plea to the jurisdiction asserting that the district court was without subject-matter jurisdiction because Fay had failed to plead sufficient allegations to waive the University's sovereign immunity. After hearing, the district court granted the plea, dismissing the lawsuit without specifying the grounds for dismissal.

On appeal, Fay, by one issue, maintains that he had complied with the requirements of the Whistleblower Act by following the University's written directives and published policies to report fraud, a crime punishable under the Penal Code, to the internal auditor.

The Whistleblower Act waives a state entity's immunity from suit for retaliatory discharge when a public employee 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 § 554.002(a). A report is made to an "appropriate law enforcement authority" if that authority is 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.

Id. § 554.002(b).

Fay points out that a University regulation required an employee to report suspected fraud to his supervisor, the CEO, or to the Director of Internal Audit. He then argues that "when the

State of Texas (here the University) tells an employee where to report a crime that is precisely where the crime is to be reported for purposes of the Texas Whistleblower Act.” We disagree.

By not reporting to anyone with the authority to regulate, enforce, investigate, or prosecute fraud, Fay failed to establish that he reported the claimed fraud to “an appropriate law enforcement authority” under the Whistleblower Act. An “appropriate law enforcement authority” must be actually responsible for regulating under or enforcing the law allegedly violated. *University of Tex. Sw. Med. Ctr. at Dall. v. Gentilello*, 398 S.W.3d 680, 685 (Tex. 2013); *Texas Dep’t of Transp. v. Needham*, 82 S.W.3d 314, 321 (Tex. 2002). Fay did not plead or establish any jurisdictional facts indicating that anyone to whom he did report had the authority to regulate, enforce, investigate or prosecute fraud. *Needham*, 82 S.W.3d at 320. It is plain that the University officials had no authority to regulate under or enforce penal laws for the commission of fraud; nor did they have authority to investigate or prosecute such penal violations. *Id.*

The order of the district court is affirmed.

Bob E. Shannon, Justice

Before Chief Justice Rose, Justices Bourland and Shannon*

Affirmed

Filed: July 12, 2017

* Before Bob E. Shannon, Chief Justice (retired), Third Court of Appeals, sitting by assignment. See Tex. Gov’t Code § 74.003(b).