

No. 08-1001

IN THE SUPREME COURT OF TEXAS

THE UNIVERSITY OF HOUSTON
Petitioner,

VS.

STEPHEN BARTH,
Respondent

*On Petition for Review from the
First Court of Appeals
Houston, Texas
Appeal No. 01-06-00490-CV*

APPENDIX TO RESPONSE TO PETITIONER'S BRIEF

1. TEX. EDUC. CODE § 111.35
2. TEX. GOV'T CODE § 321.0136
3. TEX. GOV'T CODE § 554.001
4. TEX. GOV'T CODE § 554.002
5. TEX. GOV'T CODE § 554.0035
6. TEX. GOV'T CODE § 2102.003
7. TEX. GOV'T CODE § 2102.007
8. TEX. R. APP. P. 47.7
9. TEX. R. CIV. P. 94

EXHIBIT 1

C**Effective:[See Text Amendments]**

Vernon's Texas Statutes and Codes Annotated Currentness

Education Code (Refs & Annos)

Title 3. Higher Education

Subtitle F. Other Colleges and Universities

▣ Chapter 111. The University of Houston

▣ Subchapter C. Powers and Duties

→ **§ 111.35. Bylaws; Rules; Regulations**

The board shall enact bylaws, rules, and regulations necessary for the successful management and government of the university.

CREDIT(S)

Acts 1971, 62nd Leg., p. 3272, ch. 1024, art. 1, § 1, eff. Sept. 1, 1971.

HISTORICAL AND STATUTORY NOTES

2002 Main Volume

Prior Laws:

Acts 1961, 57th Leg., p. 811, ch. 370, § 2.

Vernon's Ann.Civ.St. art. 2615g, § 2.

V. T. C. A., Education Code § 111.35, TX EDUC § 111.35

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EXHIBIT 2

C**Effective:[See Text Amendments]**

Vernon's Texas Statutes and Codes Annotated Currentness

Government Code (Refs & Annos)

Title 3. Legislative Branch (Refs & Annos)

▣ Subtitle C. Legislative Agencies and Oversight Committees (Refs & Annos)

▣ Chapter 321. State Auditor (Refs & Annos)

→ **§ 321.0136. Investigation**

An investigation is an inquiry into specified acts or allegations of impropriety, malfeasance, or nonfeasance in the obligation, expenditure, receipt, or use of state funds, or into specified financial transactions or practices that may involve such impropriety, malfeasance, or nonfeasance.

CREDIT(S)

Added by Acts 1987, 70th Leg., ch. 862, § 6, eff. Aug. 31, 1987.

V. T. C. A., Government Code § 321.0136, TX GOVT § 321.0136

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EXHIBIT 3

C**Effective:[See Text Amendments]**

Vernon's Texas Statutes and Codes Annotated Currentness

Government Code (Refs & Annos)

Title 5. Open Government; Ethics (Refs & Annos)

▣ Subtitle A. Open Government

▣ Chapter 554. Protection for Reporting Violations of Law (Refs & Annos)

→ § 554.001. Definitions

In this chapter:

(1) "Law" means:

- (A) a state or federal statute;
- (B) an ordinance of a local governmental entity; or
- (C) a rule adopted under a statute or ordinance.

(2) "Local governmental entity" means a political subdivision of the state, including a:

- (A) county;
- (B) municipality;
- (C) public school district; or
- (D) special-purpose district or authority.

(3) "Personnel action" means an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation.

(4) "Public employee" means an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity.

(5) "State governmental entity" means:

(A) a board, commission, department, office, or other agency in the executive branch of state government, created under the constitution or a statute of the state, including an institution of higher education, as defined by Section 61.003, Education Code;

(B) the legislature or a legislative agency; or

(C) the Texas Supreme Court, the Texas Court of Criminal Appeals, a court of appeals, a state judicial agency, or the State Bar of Texas.

CREDIT(S)

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 721, § 1, eff. June 15, 1995.

HISTORICAL AND STATUTORY NOTES

2004 Main Volume

The 1995 amendment, in subd. (1)(B), substituted "entity" for "body"; in subd. (2), substituted "governmental entity" for "government" and added "a political subdivision of the state, including a"; added a new subd. (3); renumbered former subds. (3) and (4) as (4) and (5), respectively; in new subd. (4), substituted "an employee or appointed officer" for "a person", "is paid to perform" for " , for compensation, performs" and "entity" for "body under a written or oral contract"; and, in new subd. (5), in the introductory language, substituted "governmental entity" for "agency".

Section 11 of Acts 1995, 74th Leg., ch. 721 provides:

"The changes in law made by this Act apply only to a suspension or termination of employment of a public employee or to other adverse personnel action taken against a public employee on or after the effective date [June 15, 1995] of this Act. A suspension or termination of employment of a public employee or other adverse personnel action against the employee, within the meaning of the law changed by this Act, that is taken before the effective date of this Act is governed by the law existing on the date the suspension, termination, or other adverse personnel action occurred, and the former law is continued in effect for that purpose."

Prior Laws:

Acts 1983, 68th Leg., p. 4751, ch. 832, § 1.

Vernon's Ann.Civ.St. art. 6252-16a, § 1.

V. T. C. A., Government Code § 554.001, TX GOVT § 554.001

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EXHIBIT 4

**Effective:[See Text Amendments]**

Vernon's Texas Statutes and Codes Annotated Currentness

Government Code (Refs & Annos)

Title 5. Open Government; Ethics (Refs & Annos)

▣ Subtitle A. Open Government

▣ Chapter 554. Protection for Reporting Violations of Law (Refs & Annos)

→ **§ 554.002. Retaliation Prohibited for Reporting Violation of Law**

(a) 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.

(b) In this section, a report is made to an appropriate law enforcement authority if the 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.

CREDIT(S)

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 721, § 2, eff. June 15, 1995.

HISTORICAL AND STATUTORY NOTES

2004 Main Volume

The 1995 amendment designated the existing text of the section as subsec. (a), and therein, following "state", deleted "agency", substituted "governmental agency" for "government", substituted "take other adverse personal action" for "discriminated" and inserted "by the employing governmental entity or another public employee"; and added subsec. (b).

Section 11 of Acts 1995, 74th Leg., ch. 721 provides:

“The changes in law made by this Act apply only to a suspension or termination of employment of a public employee or to other adverse personnel action taken against a public employee on or after the effective date [June 15, 1995] of this Act. A suspension or termination of employment of a public employee or other adverse personnel action against the employee, within the meaning of the law changed by this Act, that is taken before the effective date of this Act is governed by the law existing on the date the suspension, termination, or other adverse personnel action occurred, and the former law is continued in effect for that purpose.”

Prior Laws:

Acts 1983, 68th Leg., p. 4751, ch. 832, § 2.

Vernon's Ann.Civ.St. art. 6252-16a, § 2.

V. T. C. A., Government Code § 554.002, TX GOVT § 554.002

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EXHIBIT 5

C**Effective:[See Text Amendments]**

Vernon's Texas Statutes and Codes Annotated Currentness

Government Code (Refs & Annos)

Title 5. Open Government; Ethics (Refs & Annos)

▣ Subtitle A. Open Government

▣ Chapter 554. Protection for Reporting Violations of Law (Refs & Annos)

→ § 554.0035. Waiver of Immunity

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.

CREDIT(S)

Added by Acts 1995, 74th Leg., ch. 721, § 4, eff. June 15, 1995.

HISTORICAL AND STATUTORY NOTES

2004 Main Volume

Section 11 of Acts 1995, 74th Leg., ch. 721 provides:

“The changes in law made by this Act apply only to a suspension or termination of employment of a public employee or to other adverse personnel action taken against a public employee on or after the effective date [June 15, 1995] of this Act. A suspension or termination of employment of a public employee or other adverse personnel action against the employee, within the meaning of the law changed by this Act, that is taken before the effective date of this Act is governed by the law existing on the date the suspension, termination, or other adverse personnel action occurred, and the former law is continued in effect for that purpose.”

V. T. C. A., Government Code § 554.0035, TX GOVT § 554.0035

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EXHIBIT 6

C**Effective: September 1, 2003**

Vernon's Texas Statutes and Codes Annotated Currentness
Government Code (Refs & Annos)
Title 10. General Government (Refs & Annos)
 ▣ Subtitle C. State Accounting, Fiscal Management, and Productivity
 ▣ Chapter 2102. Internal Auditing
 → § 2102.003. Definitions

In this chapter:

- (1) "Administrator" means the executive head of a state agency.

- (2) "Assurance services" means an examination of evidence for the purpose of providing an independent assessment of risk management, control, or governance processes for an organization. Assurance services include audits as defined in this section.

- (3) "Audit" means:
 - (A) a financial audit described by Section 321.0131;
 - (B) a compliance audit described by Section 321.0132;
 - (C) an economy and efficiency audit described by Section 321.0133;
 - (D) an effectiveness audit described by Section 321.0134; or
 - (E) an investigation described by Section 321.0136.

- (4) "Consulting services" means advisory and related client service activities, the nature and scope of which are agreed upon with the client and are intended to add value and improve an organization's operations. Consulting services include counsel, advice, facilitation, and training.

- (5) "State agency" means a department, board, bureau, institution, commission, or other agency in the executive branch of state government.

CREDIT(S)

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1997, 75th Leg., ch. 1122, § 11, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 380, § 2, eff. Sept. 1, 2003.

HISTORICAL AND STATUTORY NOTES

2008 Main Volume

Acts 1997, 75th Leg., ch. 1122, in subd. (3), substituted “means” for “includes” and substituted “in the executive branch of state government” for “of the state”.

Acts 2003, 78th Leg., ch. 380 rewrote this section which formerly read:

“In this chapter:

“(1) “Administrator” means the executive head of a state agency.

“(2) “Audit” means:

“(A) a financial audit described by Section 321.0131;

“(B) a compliance audit described by Section 321.0132;

“(C) an economy and efficiency audit described by Section 321.0133;

“(D) an effectiveness audit described by Section 321.0134; or

“(E) an investigation described by Section 321.0136.

“(3) “State agency” means a department, board, bureau, institution, commission, or other agency in the executive branch of state government.”

Prior Laws:

Acts 1989, 71st Leg., ch. 787.

Vernon's Ann.Civ.St. art. 6252-5d, § 3.

V. T. C. A., Government Code § 2102.003, TX GOVT § 2102.003

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EXHIBIT 7

C**Effective: September 1, 2001**

Vernon's Texas Statutes and Codes Annotated Currentness

Government Code (Refs & Annos)

Title 10. General Government (Refs & Annos)

▣ Subtitle C. State Accounting, Fiscal Management, and Productivity

▣ Chapter 2102. Internal Auditing

→ § 2102.007. Duties of Internal Auditor

(a) The internal auditor shall:

(1) report directly to the state agency's governing board or the administrator of the state agency if the state agency does not have a governing board;

(2) develop an annual audit plan;

(3) conduct audits as specified in the audit plan and document deviations;

(4) prepare audit reports;

(5) conduct quality assurance reviews in accordance with professional standards as provided by Section 2102.011 and periodically take part in a comprehensive external peer review; and

(6) conduct economy and efficiency audits and program results audits as directed by the state agency's governing board or the administrator of the state agency if the state agency does not have a governing board.

(b) The program of internal auditing conducted by a state agency must provide for the auditor to:

(1) have access to the administrator; and

(2) be free of all operational and management responsibilities that would impair the auditor's ability to review independently all aspects of the state agency's operation.

CREDIT(S)

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 2001, 77th Leg., ch. 804, § 3, eff. Sept. 1, 2001.

REVISOR'S NOTE

2008 Main Volume

The source law refers to “board or commission.” The revised law omits the reference to “commission” because “commission” is included within the meaning of “board.”

HISTORICAL AND STATUTORY NOTES

2008 Main Volume

Acts 2001, 77th Leg., ch. 804 in subsec. (a)(1) and (6) added the reference to the administrator of a state agency when the agency does not have a governing board and in subsec. (a)(5) inserted the reference to Section 2102.011.

Prior Laws:

Acts 1989, 71st Leg., ch. 787.

Acts 1991, 72nd Leg., 1st C.S., ch. 4, § 9.01.

Vernon's Ann.Civ.St. art. 6252-5d, § 6.

V. T. C. A., Government Code § 2102.007, TX GOVT § 2102.007

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EXHIBIT 8

C

Vernon's Texas Rules Annotated Currentness

Texas Rules of Appellate Procedure

↗ Section Two. Appeals from Trial Court Judgments and Orders (Refs & Annos)

↗ Rule 47. Opinions, Publication, and Citation (Refs & Annos)

→ **47.7. Citation of Unpublished Opinions**

(a) *Criminal Cases.* Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, “(not designated for publication).”

(b) *Civil Cases.* Opinions and memorandum opinions designated “do not publish” under these rules by the courts of appeals prior to January 1, 2003 have no precedential value but may be cited with the notation, “(not designated for publication).” If an opinion or memorandum opinion issued on or after that date is erroneously designated “do not publish,” the erroneous designation will not affect the precedential value of the decision.

CREDIT(S)

Eff. Sept. 1, 1997. Amended by Supreme Court Dec. 23, 2002, eff. Jan. 1, 2003; March 10, 2008, and Aug. 20, 2008, eff. Sept. 1, 2008. Approved by Court of Criminal Appeals Sept. 30, 2008, eff. Sept. 30, 2008.

NOTES AND COMMENTS

2008 Electronic Pocket Part Update

Comment to 2008 change: Effective January 1, 2003, Rule 47 was amended to prospectively discontinue designating opinions in civil cases as either “published” or “unpublished.” Subdivision 47.7 is revised to clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated “do not publish” should be considered “unpublished” cases lacking precedential value. All opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged. Subdivisions 47.2 and 47.7 are amended to clarify that memorandum opinions are subject to those rules.

Rules App. Proc., Rule 47.7, TX R APP Rule 47.7

Current with amendments received through June 15, 2009

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EXHIBIT 9

C

Vernon's Texas Rules Annotated Currentness
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
 ↖ Section 4. Pleading
 ↖ C. Pleadings of Defendant
 → **Rule 94. Affirmative Defenses**

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

CREDIT(S)

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by order of March 31, 1941, eff. Sept. 1, 1941.

GENERAL COMMENTARY--1966

2003 Main Volume

Rule 94 superseded Vernon's Ann.Civ.St. art. 5540, requiring that limitations be specially pleaded.

Following is an excerpt from an address delivered by Robert W. Stayton before the Dallas Bar Association, October 4, 1941, (The Dallas Bar Speaks, 1941).

“In the field of affirmative defenses the procedure remains the same; they have to be specially set up in the answer in a manner to show valid defenses; but, as in the case of the cause of action, negligent pleading of conclusions of law or evidence is not penalized. This time as already noticed, the extensive list of illustrative affirmative defenses is borrowed from the Federal rules, but it is not exclusive.”

(For further discussion, see Rule 85, General Commentary.)

OPINIONS OF SUBCOMMITTEE ON INTERPRETATION OF RULES

2003 Main Volume

Actions on insurance contracts

This rule supersedes the line of decisions holding that the plaintiff suing on an insurance policy is required to negative in his pleading the existence of any exceptions to general liability contained in the policy. Under this rule, the defendant must now plead the presence of such exceptions, if he wishes to rely upon such exceptions, as issues in the case to defeat liability. If the defendant fails to raise such issues by proper pleading, they are entirely out of the case and plaintiff need present no evidence upon such matters in order to recover on the policy. If, however, the defendant does specifically plead such exceptions and thus raise them as issues in the case, the plaintiff has the same burden of proof upon such properly raised issues as he had prior to the adoption of this rule. 6 T.B.J. 308; 8 T.B.J. 36.

HISTORICAL NOTES

2003 Main Volume

Source

Federal Rule 8(c), first sentence, unchanged.

Vernon's Ann. Texas Rules Civ. Proc., Rule 94, TX R RCP Rule 94

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