

Supreme Court of Texas

No. 25-1072

Kimberley Richards,
Petitioner,

v.

Houston Classical, Inc. d/b/a Houston Classical Charter School,
Respondent

On Petition for Review from the
Court of Appeals for the Fourteenth District of Texas

JUSTICE LEHRMANN, concurring in the denial of the petition for review.

This case involves a single statutory claim: employer retaliation against “a professional . . . who in good faith[] reports child abuse.” TEX. FAM. CODE § 261.110(b). The narrow issue presented is whether an open-enrollment charter-school employee is a “professional” as the statute defines that term. The court of appeals answered that question no and held that Section 261.110 did not waive the charter school’s immunity from the employee’s suit. I concur in the Court’s denial of review without further comment on the merits of this employee’s claim or the specific issue presented. I write separately to (1) highlight a

statutory mismatch between the general obligation all persons have to report child abuse and the protection extended to only a subset of persons who suffer adverse employment actions following such reporting and (2) consider existing common-law causes of action available to persons who are retaliated against by their employers for complying with the law.

I

The common law imposes no general duty to report illegal conduct and no corresponding prohibition on discriminating against employees who report violations of the law. *See Perry v. S.N.*, 973 S.W.2d 301, 309 (Tex. 1998); *Austin v. HealthTrust, Inc.–The Hosp. Co.*, 967 S.W.2d 400, 403 (Tex. 1998). In the child-abuse context, however, the Family Code reflects the “strong policy to protect children from abuse” by imposing obligations to report such abuse on *all* persons. *Scott & White Mem’l Hosp. v. Thompson*, 681 S.W.3d 758, 760 (Tex. 2023) (citation omitted); TEX. FAM. CODE § 261.101(a) (directing that “a person having reasonable cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect . . . shall immediately make a report”). The Code also provides more specific reporting directives for a “professional,” defined as “an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children.” TEX. FAM. CODE § 261.101(b). Regardless of which subsection applies, individuals required to make a report who knowingly

fail to do so commit a Class A misdemeanor punishable by up to one year in jail, a fine, or both.¹ *Id.* § 261.109; TEX. PENAL CODE § 12.21.

Having imposed these reporting obligations, the statute in turn prohibits an employer from taking adverse employment action against a “professional” who has complied with them. Specifically:

An employer may not suspend or terminate the employment of, discriminate against, or take any other adverse employment action against a person who is a professional and who in good faith:

(1) reports child abuse or neglect to:

- (A) the person’s supervisor;
- (B) an administrator of the facility where the person is employed;
- (C) a state regulatory agency; or
- (D) a law enforcement agency; or

(2) initiates or cooperates with an investigation or proceeding by a governmental entity relating to an allegation of child abuse or neglect.

TEX. FAM. CODE § 261.110(b). And the statute creates a cause of action for a “professional” subjected to such action. *Id.* § 261.110(c)–(e). However, the cause of action does not extend to other persons who—adhering to their Section 261.101(a) obligations—report child abuse and suffer an ensuing adverse employment action. This statutory incongruence is troubling given that the Legislature “has voiced a strong policy to protect children from abuse by requiring” general reporting.

¹ Under limited circumstances, the offense is classified as a state jail felony. TEX. FAM. CODE § 261.109; TEX. PENAL CODE § 12.35(a)–(b) (providing that a state jail felony is punishable by up to two years in jail and a fine).

See Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins, 926 S.W.2d 287, 291 (Tex. 1996).

I recognize that, as a general matter, a statutory cause of action may encompass as broad, or as narrow, a class of persons as the Legislature deems appropriate. *See, e.g., Austin*, 967 S.W.2d at 401 (“Rather than create a one-size-fits-all whistleblower statute, the Texas Legislature has instead opted to enact statutes that protect specific classes of employees from various types of retaliation.”). Here, the Legislature made a policy choice to extend retaliation protection only to employees who qualify as “professional[s],” and it was the Legislature’s prerogative to do so. But having imposed a reporting duty on all persons and gone so far as to criminalize violations of that duty, in my view the employment-retaliation protections should have the same reach. In order to align the state’s public policy protecting children with the realities of employment, I urge the Legislature to consider amending the statutory scheme to provide a remedy for *all* employees—not just professionals—who have been retaliated against for reporting child abuse in compliance with their legal duty to do so.

II

Absent a statutory remedy,² a person who does not qualify as a professional but suffers an adverse employment action for complying

² The petitioner did not assert a claim under the Texas Whistleblower Act, and I express no opinion on the merits of such a claim. *See* TEX. GOV’T CODE § 554.002(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.”).

with reporting obligations is limited to possible remedies under the common law. Common-law causes of action for wrongful discharge from employment contravene Texas’s employment-at-will doctrine and are thus exceedingly rare. However, we recognized a narrow exception to the doctrine in *Sabine Pilot Service, Inc. v. Hauck*, which covers “the discharge of an employee for the sole reason that the employee refused to perform an illegal act.” 687 S.W.2d 733, 735 (Tex. 1985). We later elaborated that the exception provides recourse for employees who are “unacceptably forced to choose between risking criminal liability or being discharged from [their] livelihood.” *Winters v. Hou. Chronicle Publ’g Co.*, 795 S.W.2d 723, 724 (Tex. 1990). And when the failure to report a crime is itself a crime, *Sabine Pilot* prohibits an employer from retaliating against an employee who refuses to keep silent. *See Ed Rachal Found. v. D’Unger*, 207 S.W.3d 330, 333 (Tex. 2006) (explaining that the *Sabine Pilot* “exception would allow a whistleblower to state a claim if failing to blow the whistle would itself be a criminal act”).

In this case, petitioner Richards asserts she was fired because she complied with her legal duty to report suspected child abuse, but she does not allege her employer initially instructed her to violate that duty. We have not had occasion to evaluate whether *Sabine Pilot* encompasses such a fact pattern. *See, e.g., Hillman v. Nueces County*, 579 S.W.3d 354, 356–58 (Tex. 2019) (examining the validity of a *Sabine Pilot* claim brought by a prosecutor who asserted he was fired for refusing his supervisor’s instruction to withhold exculpatory evidence); *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 660 (Tex. 2012) (describing *Sabine Pilot* as “providing a remedy when an employee refuses to comply with

an employer's directive to violate the law and is subsequently fired for that refusal"). Nor are we presented with that opportunity here, as Richards did not plead a *Sabine Pilot* claim.

I therefore express no definitive view, but I leave open the claim's potential applicability in the absence of an employer's express directive to an employee to violate the law, at least in some circumstances. In this case, for example, the person identified in Richards's report as the perpetrator of the alleged abuse was her boss. The threat of adverse employment action against an employee for reporting abuse by a supervisor is obvious, forcing the employee to choose between abiding by her reporting obligations and keeping her job. That is the very choice we deemed unacceptable in *Sabine Pilot*. *See id.* I look forward to the opportunity to further address this issue in an appropriate case.

With these additional thoughts, I respectfully concur in the denial of the petition for review.

Debra H. Lehrmann
Justice

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