Affirmed as Modified and Opinion filed February 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-99-01184-CV

CITY OF HOUSTON, Appellant

V.

GERALD KALLINA, Appellee

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 98-15946

O P I N I O N

The City of Houston appeals a judgment in favor of its former employee, Gerald Kallina, for $250,000 plus attorney's fees on his claim under the Texas Whistleblower Act. Kallina cross-appeals, arguing that the trial court misapplied the cap on damages under TEX. GOV'T CODE ANN. § 554.003(c) (Vernon Supp. 2001). We overrule the City's issues. We sustain in part Kallina's cross-appeal, concluding that the trial court should not have capped the jury's award of backpay. We modify the trial court's judgment to add $64,717 in backpay, and as so modified, we affirm the trial court's judgment.

Background

Kallina worked as division manager in the fixed-asset department of the City of Houston—an executive position without civil-service protection. Kallina's immediate supervisor was Lathenia Harris, and Harris reported to Craig McDowell. Kallina conducted an inventory audit on the Broad Street warehouse ("Broad Street Warehouse"), where the City keeps some of its property as well as abandoned property (for example, suitcases not claimed at airports). After working on the project for a few months, Kallina believed there was so much missing property, that theft had occurred. He told this to Harris. Kallina also believed City policy required that missing assets be reported as stolen if not located after a thirty-day search. If so reported, these assets would be put into a system used to determine if items in pawn shops or items recovered by the police are stolen. On the other hand, if so reported, news of this situation would, under City policy, eventually be required to be given to the Mayor, the Controller, and perhaps to City Council.

On Friday, December 5, 1997, Kallina compiled a report showing 800 tagged items on the Broad Street Warehouse inventory that were missing. These items were worth at least $400,000. On that day, Kallina went to Harris's office and told her that he had finished his report on the missing items and that he was going to add a memorandum to it and send it to Jerry Ferguson, the manager of the Broad Street Warehouse. Kallina also stated that there were quite a few assets missing and that they would probably have to report many assets to the police as being stolen. Harris was on the phone at the time, and she waived her hand, acknowledging Kallina's statements.

On the morning of December 8, 1997, Kallina finalized the accompanying memorandum and put a copy of the memorandum and the report on Harris's desk. That afternoon Harris abruptly informed Kallina that he had two days to resign or he would be fired. He complied and wrote a letter two days later describing the action as an involuntary termination or resignation. Harris and Kallina agreed that his last day of work would be January 9, 1998.

On January 19, 1998, Kallina wrote a letter to Mayor Lee Brown complaining about his dismissal and requesting a hearing. In this letter, Kallina does not indicate any awareness that he has been terminated for being a "whistleblower." However, Kallina testified that, on or about February 27, 1998, he talked to Felix Prince. Kallina testified that it first occurred to him that he had been terminated because of the December 8, 1997 report when he learned that Prince had been treated in a similar manner as Kallina after Prince continued to inquire into the missing inventory at the Broad Street Warehouse.

After a five-day trial, the jury found for Kallina, awarding him approximately $450,000 in actual damages plus attorney's fees. The trial court denied the City's motion for judgment notwithstanding the verdict and motion for new trial. The trial court, however, ruled that, under TEX. GOV'T CODE ANN. § 554.003, Kallina could, as a matter of law, recover no more than $250,000 in actual damages, regardless of the category of actual damage.

Issues Presented

On appeal, the City asserts the following issues: (1) Did Kallina fail to comply with TEX. GOV'T CODE ANN. § 554.006 (Vernon Supp. 2001) such that the trial court lacked subject-matter jurisdiction over his whistleblower claim? (2) Was there any evidence to support the jury's finding that Kallina in good faith reported a violation of law to an appropriate authority? (3) Was there any evidence that Kallina filed this suit not later than the ninetieth day after the alleged violation occurred or was discovered by Kallina through reasonable diligence? (4) Did the trial court abuse its discretion in admitting the testimony of Officer Stevens? (5) Was there factually sufficient evidence to support the jury's finding that the City would not have terminated Kallina's employment at the time that it did based solely on information, observation, or evidence not related to Kallina's good faith report to an appropriate law-enforcement authority? (6) Was there legally and factually sufficient evidence to support the jury's findings as to attorney's fees? On cross-appeal, Kallina asserts that the trial court erred by including the following damages in the damage cap of

TEX. GOV'T CODE ANN. § 554.003(c): backpay, lost retirement benefits, and "Other Actual Damages."

Standards of Review

In reviewing "no evidence" issues, we consider only the evidence and reasonable inferences therefrom that support the finding in question and disregard all evidence and inferences to the contrary. *Texarkana Memorial Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 838 (Tex. 1997). If there was any evidence of probative force to support the finding, then the issue must be overruled and the finding upheld. *Sherman v. First Nat'l Bank*, 760 S.W.2d 240, 242 (Tex. 1988).

When reviewing a challenge to the factual sufficiency of the evidence, we examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986) (per curiam). After considering and weighing all the evidence, we set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986). The jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Mayes v. Stewart*, 11 S.W.3d 440, 451 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). We may not substitute our own judgment for that of the jury, even if we would reach a different answer on the evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998). The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment. *Mayes*, 11 S.W.3d at 451.

Did the Trial Court Have Jurisdiction under TEX. GOV'T CODE § 554.006(a)?

The City argues for the first time on appeal that the trial court lacked subject-matter jurisdiction under TEX. GOV'T CODE § 554.006(a).[1] The City argues that the trial court

[1] We determine whether the trial court lacked subject-matter jurisdiction under a de novo standard of review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex.1998). Lack of subject-matter jurisdiction can generally be raised for the first time on direct appeal. *See Texas Ass'n of Bus. v. Texas Air*

lacked subject-matter jurisdiction because Kallina failed to initiate his grievance or appeal procedures under CITY OF HOUSTON, TEXAS, CODE OF ORDINANCES § 14-50 and § 14-151. A public employee must initiate action under applicable grievance or appeal procedures of the employing state entity relating to suspension or termination of employment before suing under the Whistleblower Act. *See* TEX. GOV'T CODE ANN. § 554.006(a). The employee must invoke the applicable grievance or appeal procedures not later than the ninetieth day after the date on which the alleged violation occurred. *See id*. Kallina must comply with these administrative prerequisites, which are jurisdictional. *University of Texas Medical Branch at Galveston v. Hohman*, 6 S.W.3d 767, 774 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.).

On January 19, 1998, Kallina sent a letter to Mayor Lee Brown of the City of Houston that informed the City that Kallina believed he had been wrongfully dismissed. In this letter, Kallina requested that "a hearing be conducted concerning my summary dismissal." Kallina had previously signed an "Executive Level Acknowledgment," in which he agreed that he was an executive-level employee and that therefore, he was exempt from all civil-service protections under the City of Houston Charter, Ordinances, and Civil Services Rules and Regulations. Lonnie Vara of the City's Human Resources Department responded in a letter dated February 16, 1998, stating, among other things, that Kallina was "an executive level employee and as such had no civil-service protection or other internal review procedure." Vara also stated that he had reviewed Kallina's situation and was satisfied that the City had not taken any inappropriate action.

The "Executive Level Acknowledgment," Kallina's letter to Mayor Brown, and Vara's letter to Kallina were all exhibits proffered by the City. Further, the City asserted in its trial brief that Kallina was "not entitled to participate in either the grievance or appeal process" and that he was "not entitled to participate in the grievance or appeal procedures

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Control Bd., 852 S.W.2d 440, 445-46 (Tex. 1993).

which are provided for civil service protected employees." Even though the City can assert that the trial court lacked subject-matter jurisdiction for the first time on appeal, on this record, we hold that the City is estopped from arguing that Kallina had grievance or appeal procedures available to him.[2] *See International Piping Sys., Ltd. v. M.M. White & Assocs., Inc*., 831 S.W.2d 444, 449 (Tex. App.—Houston [14th Dist.] 1992, writ denied). The City asserted in the trial court that there were no grievance or appeal procedures available to Kallina. If Kallina had no procedures to initiate, then he satisfied the jurisdictional prerequisite of § 554.006(a). *See Curbo v. State*, 998 S.W.2d 337, 341 (Tex. App.—Austin 1999, no pet.). The City may not deprive the trial court of subject-matter jurisdiction on appeal by asserting a position inconsistent with its position in the trial court. *See International Piping Sys., Ltd.*, 831 S.W.2d at 449; *Perl v. Patrizi*, 20 S.W.3d 76, 83-84 (Tex. App.—Texarkana 2000, pet. denied). Therefore, the City is estopped from arguing that the trial court had no jurisdiction under § 554.006(a) because Kallina did not initiate grievance or appeal procedures.[3]

Furthermore, when it is unclear whether the employer has a post-termination grievance procedure, or when it is unclear what the procedure is, and the terminated employee timely notifies the employer that the employee is invoking the grievance procedure, the terminated employee has adequately implicated the grievance procedures. *See Hohman*, 6 S.W.3d at 774-75. In this case, Kallina's January 19, 1998, letter was sufficient to put the City on notice that he was seeking some type of administrative relief in

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[2] In any event, we conclude that the ordinances cited by the City did not provide Kallina with any grievance or appeal procedures. We previously granted the City's motion for judicial notice of CITY OF HOUSTON, TEXAS, CODE OF ORDINANCES §§ 14-50, 14-150, 14-151, and § 2-2, Rule 11. We also take judicial notice of the following: (1) Article Va of the Charter of the City of Houston; and (2) CITY OF HOUSTON, TEXAS, CODE OF ORDINANCES §§ 14-27, 14-28, 14-33, 14-34, 14-35, 14-36, 14-37, and 14-38. These authorities show that the ordinances as to which the City requested judicial notice do not apply to Kallina.

[3] Therefore, the cases cited by the City—where plaintiffs did have grievance or appeal procedures available to them—are not on point. *See, e.g., Johnson v. City of Dublin*, 46 S.W.3d 401, 404-5 (Tex. App.—Eastland 2001, pet. denied) (plaintiff did not initiate grievance procedures available to him).

connection with his alleged constructive discharge. We hold that the City is estopped from arguing that Kallina had grievance or appeal procedures available to him under the ordinances cited by the City and that the City has not shown that Kallina failed to satisfy § 554.006(a).[4] *See* TEX. GOV'T CODE ANN. § 554.006; *International Piping Sys., Ltd.*, 831 S.W.2d at 449; *Perl*, 20 S.W.3d at 83-84; *Hohman*, 6 S.W.3d at 774-75. We overrule the City's first issue.

Was There Any Evidence to Support the Jury's Finding That Kallina in Good Faith Reported a Violation of Law to an Appropriate Authority?

In its second issue, the City asserts that there was no evidence to support the jury's finding that Kallina in good faith reported a violation of law to an appropriate authority. At times in the trial court and on appeal, the City has argued that Kallina must prove that he reported an actual violation of the law and that he reported it to an enforcement authority who actually was the appropriate authority. This is not the law. Under the Texas Whistleblower Statute, Kallina need only prove that he in good faith reported a violation of law to an appropriate authority, regardless of whether or not his good faith belief was correct. *Wichita County v. Hart*, 917 S.W.2d 779, 784-85 (Tex. 1996); *City of Houston v. Leach*, 819 S.W.2d 185, 193 (Tex. App.—Houston [14th Dist.] 1991, no writ). In this regard, the trial court instructed the jury, among other things, as follows:

> "Good Faith" as used in this question means (1) that Plaintiff, GERALD KALLINA believed that the conduct reported was a violation of law; and (2) that

[4] In its reply brief, the City also argues that, even if Kallina initiated administrative remedies under the Texas Whistleblower Act by his January 19, 1998 letter, these procedures were exhausted by Vara's February 16, 1998 letter to Kallina. Therefore, the City asserts that this suit is barred under TEX. GOV'T CODE ANN. § 554.006(d)(1) because Kallina did not file suit within thirty days of the exhaustion of these procedures. We need not address this argument because the City did not assign error or brief this issue in its appellant's brief. *See* TEX. R. APP. P. 38.1(e) & (h); *Texas Nat. Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986); *Houghton v. Port Terminal R. R. Ass'n*, 999 S.W.2d 39, 51 (Tex. App.—Houston [14th Dist.] 1999, no pet.). In any event, this argument lacks merit because § 554.006(d)(1) only applies when a final decision is *not* rendered within 61 days after the initiation of the procedures; whereas, under this argument, a decision was rendered within 61 days of the initiation of these procedures. *See* TEX. GOV'T CODE ANN. § 554.006(d)(1); *Castleberry Indep. School Dist. v. Doe*, 35 S.W.3d 777, 780-81 (Tex. App.—Fort Worth 2001, pet. dism'd w.o.j.).

> Plaintiffs [sic] belief was reasonable in light of his training and experience. Malice on the part of the Plaintiff does not by itself negate good faith.
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> A report is made "to an appropriate law enforcement authority" if the authority is part of a state or local government 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 the criminal law.[5]

Accordingly, we must decide whether, under the above definitions, some evidence supports the jury's finding that Kallina made a good faith report. Considering only the evidence and reasonable inferences therefrom that support the finding in question and disregarding all evidence and inferences to the contrary, we hold that there was some evidence of probative force to support this finding.[6] *See Texarkana Memorial Hosp., Inc.*, 946 S.W.2d at 838; *Sherman*, 760 S.W.2d at 242. There was some evidence of each of the following: (1) Kallina subjectively believed that a violation of law, *e.g.* theft, had occurred and that Harris was an appropriate authority to whom to report it; (2) This belief was reasonable in light of Kallina's training and experience; (3) Kallina reported this theft in good faith to Harris; and (4) The City terminated Kallina's employment because of this good faith report.

Kallina presented evidence that the Broad Street Warehouse had VCR's, TV's, luggage, firearms, and other valuable movable property, some of which was left unclaimed by people in Harris County. There was evidence of a lack of inventory control in this Warehouse and of a large number of missing items, having a value of at least $400,000. There was some evidence that Kallina in good faith believed that employees of the City committed theft. Several of the City's witnesses, including Harris, admitted that theft is a violation of law. The City admitted that the controls at the Broad Street Warehouse were

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[5] The parties have not challenged the propriety of the jury charge, and we do not address this issue.

[6] On appeal, the City has not asserted or briefed the issue of whether factually sufficient evidence supports this finding, and we do not address this issue.

not very good, and Harris admitted that there was an investigation of possible theft at the Broad Street Warehouse by the Public Integrity Review Group ("PIRG").

After the City terminated Kallina, the Manager of the Broad Street Warehouse—Jerry Ferguson—wrote a vague interoffice memo dated January 23, 1998 to Kallina's successor. In this memo, Ferguson stated that he had determined the "attached items" to be scrap that had been disposed of in previous sales. The City argues that this shows that the missing property was sold in past auctions and not stolen; however, Ferguson did not attach any list of assets to the memo. Ferguson did not testify at trial, and the City did not proffer any back-up documentation showing how Ferguson made this determination, *e.g.*, records showing that the tagged items in question had been sold at a particular auction. Felix Prince testified that there were no records showing that these items were sold at auction, as Ferguson claimed. In any event, the items were not reported as stolen. Further, following Kallina's termination, the City terminated this employee, Felix Prince, after he continued to look into the Broad Street situation.[7] Harris also testified that, in the three years that she had been in her position as of the time of trial, only three or four items had been reported stolen from the Broad Street Warehouse.

Harris herself testified that she had overall administrative responsibility for the fixed-asset group and for the inventory system, that she enforced rules for the Finance and Administration department, and that her job was to enforce the rules and to make sure that there was no criminal activity at the Broad Street Warehouse. Kallina also testified that Harris had the authority to enforce, regulate, and investigate violations of criminal law. There was legally sufficient evidence to support the jury's finding that Kallina in good faith reported a violation of law to an appropriate authority. We overrule the City's second issue.

[7] Prince filed a separate whistleblower lawsuit against the City that is not part of this case.

Did the Evidence Show, as a Matter of Law, That Kallina Filed this Suit Later than the Ninetieth Day after the Alleged Violation Occurred or Was Discovered by Kallina Through Reasonable Diligence?

The Texas Whistleblower Act establishes the following statute-of-limitations period for whistleblower claims:

> **§ 554.005 Limitation Period.**
>
> Except as provided by Section 554.006, a public employee who seeks relief under this chapter must sue not later than the 90th day after the date on which the alleged violation of this chapter:
>
> (1) occurred; or
>
> (2) was discovered by the employee through reasonable diligence.

TEX. GOV'T CODE ANN. § 554.005 (Vernon 1994).

In its third issue, the City asserts that, as a matter of law, the evidence at trial proved that Kallina's claim was barred by this statute of limitations. The evidence at trial did indicate that Kallina filed suit more than ninety days after he was constructively terminated. However, Kallina testified that, on or about February 27, 1998, he talked to Felix Prince and learned that, after Prince continued to inquire into the missing inventory at the Broad Street Warehouse, the City had treated Prince in a similar manner as it had treated Kallina. Kallina testified it was only after he spoke to Prince at this time that he discovered that the City terminated him because of his December 8, 1997 report. It is undisputed that Kallina filed this suit within ninety days of February 27, 1998. Under the applicable standard of review, we hold that the evidence did not show that, as a matter of law, Kallina filed suit more than ninety days after he discovered through reasonable diligence that he had been constructively terminated. *See Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283-86 (Tex. 1998). Therefore, we overrule the City's third issue.

Did the Trial Court Abuse its Discretion in Admitting the Testimony of Stevens?

In its fourth issue, the City asserts that the trial court abused its discretion by admitting the testimony of Officer Stevens—a former PIRG Officer. Stevens testified that he had

previously worked in the inspector general's office investigating criminal activity by city employees, that he had investigated criminal activities at the Broad Street Warehouse based on the allegations of Kallina and Prince, and that he had spoken to Jim Badowski about these allegations. On appeal, the City argues that the trial court abused its discretion by allowing Stevens to testify because his testimony was covered by the law-enforcement privilege under TEX. GOV'T CODE ANN. § 552.108 (Vernon Supp. 2001) and because his testimony was irrelevant, highly inflammatory, prejudicial, and confusing to the jury.

The City claims that it preserved error on this issue because the trial court denied the Houston Police Department's motion to quash the subpoena of Stevens and for a protective order.[8] The trial court denied this motion only to the extent that it sought to completely preclude Stevens from testifying based on allegations that his testimony was privileged under TEX. GOV'T CODE ANN. § 552.108 and would be irrelevant and inflammatory. To the extent that the granting of this pre-trial motion may have preserved error, we hold that the trial court did not abuse its discretion. The City did not prove that all of Stevens's testimony was covered by this law-enforcement privilege or was irrelevant to Kallina's claims, and the record does not show that the City put on any evidence to prove up this privilege. The City further claims that it preserved error during trial by reurging this motion to quash and for protective order; however, it only mentioned the motion and it did not obtain a ruling on this motion.[9] The City did not object to most of Stevens's testimony at trial. The City only objected twice, and both of its objections were sustained. We hold that the City did not

[8] The City also alleges it preserved error because Kallina allegedly agreed to item 8 of the City's Motion in Limine. Even though the Order signed by the court regarding this motion indicates that item 8 was not ruled on, the City claims that Kallina implicitly agreed to item 8 based on statements made at the pre-trial conference. Presuming that there was an order in limine as to item 8, we believe that this item did not cover Stevens's testimony, and in any event, that it preserved no error because it was not raised when Stevens testified at trial. *See* TEX. R. APP. P. 33.1; *Rendleman v. Clarke*, 909 S.W.2d 56, 58 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd).

[9] The only objection or motion of the City ruled on by the trial court at the time Stevens was called to testify was a motion for mistrial. This motion specified no grounds other than that it was "based upon the ruling that Officer Stevens will be called to testify." This motion was too general to preserve any error.

preserve error as to the admission of Stevens's testimony. *See* TEX. R. APP. P. 33.1; *Rendleman v. Clarke*, 909 S.W.2d 56, 58 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd) (to preserve error as to erroneous admission of evidence, a party must present to the trial court—(1) a *timely* request, objection, or motion; (2) state the specific grounds of the complaint; and (3) obtain a ruling before the testimony is offered and received).

Even if the City had preserved error, the only potentially valid objections that might have been preserved by the City were that Stevens's testimony was inadmissible under TEX. GOV'T CODE ANN. § 552.108 and TEX. R. EVID. 401 and 403. It would not have been an abuse of discretion for the trial court to have found that Stevens's testimony was admissible under TEX. R. EVID. 401 and 403 and not barred by TEX. GOV'T CODE ANN. § 552.108. Stevens's testimony occupies only four pages in the reporter's record. He testified that he had started an investigation as to whether there was criminal activity going on at the Broad Street Warehouse. Similar testimony came in through others, including Harris. We overrule the City's fourth issue.

Was There Factually Sufficient Evidence to Support the Jury's Finding That the City Would Not Have Terminated Kallina When it Did Based Solely on Information, Observation, or Evidence Unrelated to Kallina's Good Faith Report to an Appropriate Law-Enforcement Authority?

In its fifth issue, the City asserts that there was factually insufficient evidence to support the jury's failure to find in the City's favor on the affirmative defense contained in question no. 1. By answering yes to this question, the jury found that the City would not have terminated Kallina when it did, based solely on information, observation, or evidence unrelated to Kallina's good faith report to an appropriate law-enforcement authority. The City attacks the factual sufficiency of this finding.[10] When a party with the burden of proof

[10] The City does not attack the legal sufficiency of this finding; in fact, it admits that there was some evidence to support the challenged finding.

at trial complains of the factual sufficiency of the evidence, we weigh all the evidence and overturn the finding only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Kiefer v. Continental Airlines*, 10 S.W.3d 34, 41-42 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). We may not reverse and remand if we conclude simply that the evidence preponderates toward an affirmative finding on the City's defense. *See id*. We may reverse only when the great weight of the evidence supports this defense. *See id*.

After reviewing all the evidence in the record, we conclude that the jury's failure to find for the City on its affirmative defense is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Kallina introduced evidence of a motive why Harris would not want stolen assets to be listed as such and reported to the police. While the City did present evidence that Kallina was asked to resign or be terminated because of poor job performance, lack of computer skills, and failure to stay late on December 5, 1997 to finish a report, the City's evidence in this regard was not that strong. Several witnesses testified positively regarding Kallina's job performance, including Craig McDowell, Lathenia Harris's supervisor. McDowell testified that he was surprised that Harris wanted to fire Kallina, that Kallina was a pretty good employee, who, to McDowell's knowledge, was honest. Felix Prince testified that Kallina was one of the best people he ever worked for and that Prince and the other workers in the department were surprised and shocked that Harris had given Kallina two days to resign or be terminated. The evidence indicated that neither Harris nor anyone else ever took disciplinary action against Kallina or noted in writing any problems with Kallina's job performance.

Regarding his computer skills, Kallina testified that he had computer skills and that he helped implement a new accounting system using the computer. Prince testified that Kallina knew how to generate reports. The City never told Kallina that his alleged lack of computer skills was a problem. Kallina testified that his job as an executive-level manager did not require him to have extensive computer skills but only required him to supervise

people who did. The City introduced no evidence of prior written warnings or counseling sessions.

As to the City's claim that Kallina failed to complete an urgently needed report on December 5, 1997, Kallina testified that he did finish the report on that day and that he provided Harris with all of the data that she requested. Harris found fault with Kallina's work on that report, but she did admit that he did not miss a deadline for this report. Shobna George, a witness called by the City, testified that Kallina was a hard-working man. Prince also testified that the City indicated to him that Prince's lack of computer skills was one of the reasons for his termination, just as it had been for Kallina. The great weight and preponderance of the evidence does not support a finding in favor of the City on its affirmative defense, and the jury's failure to find in the City's favor as to this defense was not clearly wrong and unjust. *See id*. We overrule the City's fifth issue.

Was There Legally and Factually Sufficient Evidence to Support the Jury's Award of Attorney's Fees?

In its sixth issue, the City attacks the legal and factual sufficiency of the jury's findings as to reasonable and necessary attorney's fees. As an expert witness for Kallina on reasonable and necessary attorney's fees, Charles Mansour testified concerning his background and legal experience. He also testified as follows: (1) he reviewed the records of Kallina's counsel—including pleadings and discovery materials; (2) $150 per hour was a reasonable billing rate; (3) Kallina's counsel had spent 400 hours bringing the case to trial; and (4) therefore $60,000 should be the fees for trial. He also testified as to appellate fees. While Mansour's testimony was succinct, it is also true that the City did not significantly impugn Mansour's conclusions in its cross-examination of him. Further, the City did not offer an expert witness as to attorney's fees and did not controvert any of Kallina's evidence as to reasonable and necessary attorney's fees. Under the familiar standards of review for legal and factual sufficiency, we hold that the evidence was legally and factually sufficient

to support the jury's findings as to attorney's fees. *See Neidert v. Dozers*, 681 S.W.2d 847, 848 (Tex. App.—Eastland 1984, no writ). We overrule the City's sixth issue.

Did the Trial Court Err in Applying the Statutory Cap of TEX. GOV'T CODE 554.003(c) to All of Kallina's Damages?

On cross-appeal, Kallina raises issues that appear to be of first impression regarding how to apply the damage cap in TEX. GOV'T CODE ANN. § 554.003(c) to the jury's damage awards in this case. In construing this statute, our objective is to determine and give effect to the legislature's intent. *See National Liability and Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). We presume that the legislature intended the plain meaning of its words. *Id*. If possible, we must ascertain the legislature's intent from the language it used in the statute and not look to extraneous matters for an intent the statute does not state. *Id*. As to the City of Houston, this statute caps at $250,000 the following damages under a whistleblower claim: "compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." TEX. GOV'T CODE ANN. § 554.003(c).

Under the unambiguous language of § 554.003(c), nonpecuniary and future-pecuniary damages are capped at $250,000 for Kallina. Past-pecuniary damages have no cap. The trial court capped the jury's award of $64,717 in backpay. On appeal, the City makes no argument in defense of this ruling. We hold that, under the unambiguous language of § 554.003(c), the trial court should not have capped this award because it was an award of past-pecuniary damages.

Kallina argues that the awards for "Retirement Plan Benefits Lost" and "Other Actual Damages" were also outside the cap. We disagree with Kallina as to these two awards. As to the retirement benefits, Kallina's expert testified that Kallina would not have received retirement benefits until 2005 and that this damage element calculated the present value of the lost retirement income Kallina would have received in the future. Therefore, this award was for future-pecuniary damages that are capped.

As to the "Other Actual Damages," the only testimony as to the amount of damages in this category was $13,410 for selling Kallina's antique gun collection and $27,992 for increased interest to be paid based on refinancing required by Kallina's termination. We hold that the latter amount included future damages—increased interest expense to be paid after the verdict—while the alleged loss for being forced to sell the gun collection was past-pecuniary damage. The jury awarded $35,000, and it is not possible to tell how much of this amount was future damages and how much was past damages. This raises the issue of the effect of Kallina's failure to segregate his past and future damages in the "Other Actual Damages" category. We hold that, in order to be able to argue that a damage element is outside the statutory cap of § 554.003(c), a whistleblower plaintiff must make sure that the jury charge segregates that damage element from nonpecuniary and future-pecuniary damage elements. *See* TEX. GOV'T CODE ANN. § 554.003(c). Because the "Other Actual Damages" element of damages contained both past and future pecuniary damages, Kallina did not place these damages outside the cap by obtaining a jury finding as to a category of damages that includes only past-pecuniary damages. Therefore, we sustain Kallina's issue on cross-appeal, but only as to the $64,717 of backpay, which the trial court erroneously included in the damage cap when it rendered judgment.

Conclusion

The trial court had subject-matter jurisdiction because the City is estopped from arguing that Kallina had grievance or appeal procedures available to him under the ordinances cited by the City and because the City has not shown that Kallina failed to satisfy TEX. GOV'T CODE ANN. § 554.006(a). There was legally sufficient evidence to support the jury's finding that Kallina in good faith reported a violation of law to an appropriate authority. Kallina's claims are not barred by the statute of limitations because the evidence did not show that, as a matter of law, Kallina filed suit more than ninety days after he discovered through reasonable diligence that he had been constructively terminated. The trial court did not abuse its discretion by admitting the testimony of Officer Stevens. There

was factually sufficient evidence to support the jury's failure to find in favor of the City on its affirmative defense. There was sufficient evidence to support the jury's findings as to attorney's fees. We overrule the City's six issues.

As to Kallina's cross-appeal, under the unambiguous language of TEX. GOV'T CODE ANN. § 554.003(c), the trial court should not have capped the $64,717 award for backpay; however, the trial court correctly applied the statutory damage cap to the other two damage elements as to which Kallina asserts error. We sustain Kallina's issue on cross-appeal only as to the $64,717 award for backpay, and we overrule the remainder of that issue. We modify the trial court's judgment to increase the amount of actual damages awarded to Kallina and against the City from $250,000 to $314,717, and, as so modified, we affirm the trial court's judgment.

/s/ Norman R. Lee
Senior Justice

Judgment rendered and Opinion filed February 14, 2002.
Panel consists of Justices Yates, Wittig, and Lee.[11]
Publish — TEX. R. APP. P. 47.3(b).

[11] Senior Justices Don Wittig and Norman R. Lee sitting by assignment.