

David P. Griffin	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§I	
vs.	§	
	§	
CITY OF AUSTIN, RONDELLA	§	
HAWKINS, individually and as an	§	126 th JUDICIAL DISTRICT
employee of the City of Austin, PUBLIC	§	
ACCESS COMMUNITY TELEVISION aka	§	
CHANNEL AUSTIN, GARRY WILKISON	§	
and LINDA LITOWSKY, individually, and as	§	
Executives of Public Access Community	§	
Television, CATHY BEAUDOIN, JACKIE	§	
GOODMAN, CELIA HUGHES, EMANUEL,	§	
LIMEL PALOMU, DANIEL SCARDINO,	§	
DEBORAH L. HILL, TRENA DENLEY,	§	
HELENE CAUDILL, individually and as Board	§	
Members of Public Access Community	§	TRAVIS COUNTY, TEXAS
Television	§	
	§	
Defendants.	§	

PLAINTIFF’S RESPONSE TO DEFENDANTS GARRY WILKISON, LINDA LITOWSKY, CATHY BEAUDOIN, JACKIE GOODMAN, CELIA HUGHES, EMANUEL LIMUEL, JR, OSCAR PALOMO, DANIEL SCARDINO, DEBORAH L. HILL, HELENE CAUDILL AND PUBLIC ACCESS COMMUNITY TELEVISION’S MOTIONS FOR SUMMARY JUDGMENT, AND DEFENDANTS’ PLEA TO THE JURISDICTION, AND ALTERNATIVELY, SPECIAL EXCEPTIONS AND MOTION FOR SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, Plaintiff, DAVID P. GRIFFIN, and in response to Defendants’ GARRY WILKISON, LINDA LITOWSKY, CATHY BEAUDOIN, JACKIE GOODMAN, CELIA HUGHES, EMANUEL LIMUEL, JR., OSCAR PALOMO, DANIEL, SCARDINO, DEBORAH L. HILL, HELENE CAUDILL and PUBLIC ACCESS COMMUNITY TELEVISION ("PACT") Motions For Summary Judgment, Plea to the Jurisdiction and, Alternatively, Special Exceptions, states as follows:

I. HISTORY OF THE DISPUTE

Plaintiff is in agreement with said Defendants’ statement of the history of the dispute in question.

II. EVIDENTIARY SUPPORT

Plaintiff will refer to each of the statements set forth in the Affidavits submitted by Defendants herein, and in addition thereto, will submit the following affidavits in support of Plaintiff’s claims and

response herein:

- A) Affidavit of David P. Griffin
- B) Affidavit of David Fitzpatrick

III. NATURE OF DISPUTE

1. It is interesting that in the first paragraph, first line, Defendants claim and acknowledge that Plaintiff was “formerly an employee of Public Access Community Television (‘PACT’)” and specifically states in the second paragraph that it is an “independent contractor that hires, fires and supervises its own employees” and that “Plaintiff was, prior to his termination, an employee of PACT.” However, in several pleadings filed by Defendants herein, including the original Answer of Defendants to this Petition as well as in both federal and state actions, **DEFENDANTS GARRY WILKISON, LINDA LITOWSKY, CATHY BEAUDOIN, JACKIE GOODMAN, CELIA HUGHES, EMANUEL LIMUEL, JR, OSCAR PALOMO, DANIEL SCARDINO, DEBORAH L. HILL, HELENE CAUDILL AND PUBLIC ACCESS COMMUNITY TELEVISION'S MOTIONS FOR SUMMARY JUDGMENT, DEFENDANTS' PLEA TO THE JURISDICTION, AND ALTERNATIVELY, SPECIAL EXCEPTIONS**, on page 3, paragraph 3, said Defendants state just the opposite, claiming that PACT is not an employer and therefore did not employ Plaintiff, and therefore cannot be held liable for any of the actions complained of herein by Plaintiff. Plaintiff will prove here that Defendant is by definition in fact the employer.

2. Defendants state that Plaintiff does not have a claim upon which damages can be granted based on theories of the “Whistleblower’s Act” and of “right and wrong.” Based on research and discovery thus far, Plaintiff now realizes that based on the premises that the Whistleblower Act only applies to Government employees and the fact that Plaintiff acknowledges he is not a government employee, Plaintiff concedes this issue and withdraws his claims with regards to the legal theory of the Whistleblower Act. However, there was a breach of fiduciary duty on behalf of the City of Austin to oversee the contractual relationship between it and PACT, which directly relates to the hiring and firing policies. Plaintiff concedes that the theory of right and wrong resides in the fact that several criminal activities took place and were covered up by acts of Defendants. Additionally, Defendants claim in the first paragraph on page 3 that Plaintiff is seeking compensatory and punitive damages in unspecified amounts as well as costs of suit, which is true, however, Plaintiff never in any of his pleadings ever requested “attorney’s fees” as Defendants are quite aware that Plaintiff is pro se.

3. Defendants correctly state that much of the claims complained of by Plaintiff herein are directly related to his employment with PACT and his subsequent termination and that said employment although it was “at will” does not permit a permissible claim against Defendants. However, if the theory of

right and wrong is applied here, Plaintiff will prove that he was damaged by the negligent and criminal actions of Defendants when they refused to acknowledge and/or take action in connection with the criminal activities, which directly resulted in Plaintiff's damages herein.

4. Addressing the issue that Plaintiff "cannot recover against Defendants for any employment discrimination-type claim", Plaintiff, again, pursuant to discovery thus far, will prove that PACT is an employer by definition and in disputing that "Plaintiff has failed to timely exhaust his administrative remedies against all Defendants" prior to bringing suit, Plaintiff will prove that adequate notice was given on several occasions.

5. In Defendants last paragraph on page 3, Plaintiff agrees that the Whistleblower Act only applies to a government employee-employer relationship and withdraws that claim but denies the balance of said paragraph. Plaintiff did indeed report the incidents complained of in a timely fashion and by means that a normally prudent person of a discriminating nature would follow.

6. Addressing the issue of "slander and libel", Defendants seem to concede that such verbal remarks that could be construed as "slander and libel" do not apply in this instance due to the fact that the complaint was not timely filed. Plaintiff was terminated from his employment on June 30, 2008. Defendants have already conceded under "History of Dispute" that Plaintiff filed his original Petition, alleging such claim against Defendants on January 9, 2009, well within the statute of limitations. In fact he had an additional 21 days in order come within that time period.

7. As stated previous, Plaintiff is not pursuing his claims under the Whistleblower Act. Plaintiff points to the behavior of Defendant Litkowsy as alleged in creating a hostile work environment but Defendants also indicate even if the allegations are true that Defendants do not qualify as an employer and therefore the claim of workplace harassment does not apply. Plaintiff intends to prove that Defendants do qualify as a legal employer and therefore the legal claim is legitimate.

8. Defendants also claim that Plaintiff has no recognizable cause of action for being denied the privileges of producer services at PACT. Plaintiff understands that even though private companies have to conform to local, state and federal codes and regulations, such as smoking sections or handicap access, the broader rights and protections one has under the Constitution applies to the government and not to private enterprise. It does not force a private company to do anything for you. You have the right to take your business elsewhere if you don't agree with their business model and that's about it. PACT, however, is a private entity providing services for a governmental entity (City of Austin "COA") in a government-owned building (COA) and equipment owned by a governmental entity (COA) and Plaintiff intends to prove that PACT is a representative of COA, and that the COA has a direct responsibility to provide said services. Plaintiff will further prove via affidavit that he was not given an explanation as to why he was being denied producers services that he had enjoyed in the past.

9. Defendants further state that due to the fact that Plaintiff failed to name Hostia, his ISP service as a Defendant herein, that there is not recognizable cause of action against Defendants. Plaintiff intends to prove that it was Defendants who used their political persuasion to force a third party to certain

actions that were intended to harm Plaintiff herein. Failing to name Hostia as a Defendant herein does not preclude Plaintiff from simply moving to another service, which he did, but it is an indication that Defendants went out of their way to make life miserable for Plaintiff herein in retaliation.

10. Should discovery be permitted to continue in its normal course, Plaintiff intends to prove that the Defendants and each of them acted “in collusion” and conspired behind closed doors to cover up illegal activities, which actions fall within the theory of right and wrong. Simply stating that Defendants deny such claims does not in effect make them not true. The normal procedure for revealing facts of a case when a party has been put at a disadvantage by not having the black and white paper before him to prove his case is why discovery is permitted.

IV. RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT

A. Employment Related Claims-Discrimination – Defendant PACT is an Employer

The term “Employer” is defined by the Texas Labor Code Title 2, Subtitle A., Chapter 21, Section 21.002, subsection as follows:

(7) "Employee" means an individual employed by an employer, including an individual subject to the civil service laws of this state or a political subdivision of this state, except that the term does not include an individual elected to public office in this state or a political subdivision of this state.

(8) "Employer" means:

(A) a person who is engaged in an industry affecting commerce and who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year;

(B) an agent of a person described by Paragraph (A);

(C) an individual elected to public office in this state or a political subdivision of this state; or

(D) a county, municipality, state agency, or state instrumentality, regardless of the number of individuals employed.”

Defendant LINDA LITOWSY in her Affidavit in Support of PACT’s Motion for Summary Judgment filed in the Federal action referenced by Mr. Heller herein in his affidavit in the case of “David P. Griffin v. Public Access Community Television, et al.” Cause No. A-09-CV-107-LY, consistently references that there were only fourteen (14) full-time employees. However, as evidentiary proof of this statement, Defendants attached the following documents:

(a) “Quarter January 1 thru March 31, 2007 – Texas Workforce Commission Report. In this document it lists a total of 14 “full-time employees” and an additional three (3) part-time employees, with one of said employees, namely Orlando Lopez brought on as a full time employee on March 3, 2007. If we base conclusions on this one document alone, PACT is by definition, an employer as it employed seventeen (17) employees during the required “20 or more calendar weeks in the current or preceding calendar year.”

(b) Interestingly enough, Defendants also provided a 2-page IRS document covering the period of March 31, 2007 through April 30, 2007, listing a total of seventeen (17) employees

being employed by Public Access Community Television;

(c) Additionally filed with the same pleadings, Defendants attached a Quarter April 1, 2007 thru June 30, 2007- Texas Workforce Commission Report, said document, which also indicates 14 full-time employees and 3 part-time employees for a total of seventeen (17) employees.

(d) The same holds true of the Wage Report Information reported to the Texas Workforce Commission's Unemployment Tax Services – Employer's Quarterly Report filed on August 3, 2007, again indicating a total of 17 employees, and specifically setting forth the total number of employees for April 2007 as 16, May, 2007 as 16 and June 2007 as 17 with page 2 of said document specifically setting forth names, social security numbers, gross wages and Texas Taxable wages.

(e) Quarterly Report dated July 1, 2007 thru September 30, 2007 indicating a total of 17 employees; Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Report filed October 29, 2007, indicating 17 employees in July 2007, 16 employees in August 2007 and 15 employees in September 2007 together with names, social security numbers, gross wages and Texas Taxable wages.

(f) Quarterly Report October 1, 2007 thru December 31, 2007 Texas Workforce Commission Report indicating 14 full-time and 2 part-time employees, for a total of 16 employees.

(g) Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Report filed on January 17, 2008 showing 15 employees in Oct 2007, 14 employees in November 2007, 15 employees in December 2007, said document also naming the names, social security number, gross wages and Texas Taxable wages;

(h) Quarter January 1, 2008 thru March 31, 2008 Texas Workforce Commission Report showing 14 full time employees and 1 part-time employee, for a total of 15 employees;

(i) Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Report filed on March 28, 2008 showing 15 employees in January, February and March of 2008, with said document also naming the names, social security number, gross wages and Texas Taxable wages;

(j) Quarter April 1, 2008 thru June 30, 2008 Texas Workforce Commission Report showing 14 full time employees and 9 part-time employees for a total of 23 employees; and

(k) Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Report filed on July 31, 2008 showing 20 employees in April 2008, 17 employees in May 2008 and 20 employees in June of 2008, with said document also naming the names, social security number, gross wages and Texas Taxable wages.

It was not until Defendants supplied the above referenced documents (a)-(k) that Plaintiff was able to

scrutinize the documentation and found that he was purposely misled by the attorneys for Defendants who professed that there were only 14 employees when in fact this was a misrepresentation. An examination of the documentation clearly indicates that there were more than 14 employees for the time period of 20 weeks or more per definition by the Texas Labor Code. Defendants contend that only full-time employees are to be counted. However the Texas Labor Code does not distinguish between full-time and part-time employees but is defined as “an individual employed by an employer”. (Emphasis added.) Therefore, pursuant to the definition of employer as “a person who is engaged in an industry affecting commerce and who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year”, PACT is as defined under the law indeed an Employer. Plaintiff was misled by counsel for Defendants in wrongly assuming that counsel would not make false representations in order to “win” his case and therefore was incorrect when he agreed that “there is only one true fact, there is only 14 employees.” Plaintiff now realizes that this information was incorrect and untruthful and that Plaintiff mistakenly relied on Defendants’ misrepresentations.

This is not the first time that Defendant’s counsel has made false and misleading statements to the Court. In the federal action referenced herein (Griffin v. PACT, Cause No. A-09-C-107-LY) Plaintiff specifically addresses each of these misrepresentations of Defendants ranging from misinforming the court that certain parties had not been served to stating that certain documents had not been filed timely nor certain documents having ever been filed. (See Plaintiff’s Response to Defendants’ Advisory to the Court; Objection to Continuance of Hearings Based on Vacation Request, Motion for Removal of Censorship and Motion for Expedited Hearing On All Matters filed June 2, 2009, a copy of which is attached to Plaintiff’s Affidavit in support hereof.

Motion for Sanctions:

Pursuant to Texas Rules of Civil Procedure, Rule 10.001 which states that:

10.001. Signing of Pleadings and Motions

The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) each allegation or other factual contention in the pleading or motion has evidentiary

support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;
and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.
(Emphasis Added)

In this instance, counsel for Defendants deliberately misled this Court and the Plaintiff herein by falsifying and under reporting the number of employees actually employed by PACT. Since Plaintiff is not saavy in the legal arena, he relied on these falsified representations to his detriment and it was only after substantial discovery came into play that he became aware of the truth.

Pursuant to Texas Rules of Civil Procedure, Rule 10.002, “A party may make a motion on for sanctions, describing the specific conduct that appears to violate Section 10.001” and further directs that “The court on its own initiative may enter an order describing the specific conduct that appears to violate Section 10.001 and direct the alleged violator to show cause why the conduct has not violated that section” and “The court may award to a party prevailing on a motion under this section the reasonable expenses” in “presenting or opposing the motion, and if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment and out-of-pocket expenses incurred or caused by the subject litigation.” The Defendants’ counsel in this case by a deliberate act of omission of the truth as to the number of employees employed by PACT has cost the Plaintiff herein, costs of service and court fees in both the Federal and State actions in that Defendants’ main defense all along has been relying on the allegation that Defendants employed less than the minimum statutory amount of 15 employees within the statutory time period in order to qualify as an Employer, thus permitting Plaintiff’s claims to be honored.

Defendant PACT is an Employer

Since it is now established by the facts hereinbefore set forth that PACT is an employer, Plaintiff’s claim that Defendants WILKISON and LITOWSKY are managers of PACT and Defendants CATHY BEAUDOIN, JACKIE GOODMAN, CELIA HUGHES, EMANUEL LIMUEL, JR., OSCAR PALOMO, DANIEL SCARDINO, DEBORAH L. HILL AND HELENE CAUDILL are Board members and generally implicating that these Defendants acted within the course of their positions as a manager or as a Board member for PACT stands because Defendants are an “employer” under the definition and jurisdiction is proper.

The final paragraph of Defendants Motion on page 6 through the end of their “argument” on page 7 is moot and does not stand as PACT is as defined by the Texas Labor Code an Employer.

Responding to Defendants position that “**Plaintiff has failed to exhaust his administrative prerequisites prior to filing suit against Defendants,**” Plaintiff emphatically denies such representation. Please see Plaintiff’s affidavit in opposition to Defendants’ motion for summary judgment in which he

states that he took every available redress for the actions complained of in his Petition that a normally prudent individual would pursue including reporting in January of 2008 directly to his superior Garry Wilkison regarding missing equipment and two months later reporting to Garry Wilkison that there was equipment mislabeled as City of Austin property that should have been designated as PACT property. In early June, Plaintiff after receiving no reasonable explanation from his superiors went to the Board of Directors of PACT and specifically two board members readdressing the complaints voiced to his superiors regarding the theft of equipment. Two weeks after Plaintiff's termination from PACT on or about June 30, 2008, Plaintiff filed the appropriate complaint with the EEOC, a copy of such document is attached in support of Defendants' motion herein and the outcome therefrom was a determination that it was "inconclusive." Receiving no response from the Board, Plaintiff took his complaint of illegal activities by sending correspondence to the Chief of Police of Austin Police Dept., and three weeks later to the Mayor of the City of Austin. In response to those letters, Plaintiff was directed by the Information Officer of the Austin Police Department to contact the investigating officer assigned to theft allegations which Plaintiff did. When no response was had, Plaintiff thereafter filed a complaint with the Austin Police Monitoring Office in November 2008 and on January 9, 2009, Plaintiff as pro se, filed his Petition in the within Court. As Defendants set forth in their "History of Dispute," that case was removed to the Federal Court and as stated subsequently dismissed without prejudice permitting the Plaintiff to re-petition this Court for relief, which Plaintiff did in filing the instant action on June 24, 2009. Therefore, although Plaintiff may not have dotted all his "I's" and crossed all his "T's", Plaintiff did in fact exhaust all efforts that a normally prudent person would do by doing due diligence to resolve this matter before resorting to litigation.

In Rondella Hawkins' affidavit in support of the City of Austin's Motion for Summary Judgment, paragraph 5, she states that there is contract between the City and PACT as independent contractor and that PACT answers solely to its Board of Directors regarding staffing. In paragraph 6, Ms. Hawkins indicates that she does not have supervisory authority over any PACT employee or board member. However the contract that Ms. Hawkins' references and attaches specifically states in Section 13.C. under "Workforce:"

"If the City or the City's representative notifies the Contractor that any worker is incompetent, disorderly or disobedient, has knowingly or repeatedly violated safety regulations, has possessed any firearms, or, has possessed or was under the influence of alcohol or drugs on the job, the Contractor shall immediately remove such worker from contract services, and may not employ such worker again on contract services without the City's prior written consent."

In Section 15, titled "Living Wages and Benefits", it states:

"The minimum wage for City employees was \$10.00 per hour at time of solicitation of this contract. This minimum wage is required for any Contractor employee assigned to this contract. , , Additionally, the City provides health insurance for its employees, and for a nominal rate, employees may obtain coverage for their family members. Contractors must make available health insurance with optional family coverage for all Contractor employees assigned to this contract. The provisions of this section do not apply to any subcontractors, interns, volunteers, or other non-employees of Contractor."

Sections 18.A of said contract refers to ownership by City of all copyrights and Section 18.B. indicates any

inventions made are the property of the City.

In contradiction to Ms. Hawkins' representations and the contract itself, the City's own contract permits it to have true control over the hiring, firing, wage determination, wages to be paid and other examples how the City has absolute control over PACT and the Board of Directors.

Plaintiff contends that he did meet his obligation of exhausting all administrative remedies prior to filing the instant lawsuit. In fact as can be seen by Plaintiff's affidavit submitted herewith, he initiated contact with the City of Austin EEOC in Austin on July 15, 2008, merely weeks after his wrongful termination. After completing the application for complaint, the city worker advised that because the City was a respondent in the action, that the complaint could not be investigated by the City of Austin and Plaintiff was therefore informed that the complaint would be processed through the San Antonio office of the EEOC.

B. Texas Whistleblower Statute – Replaced with Breach of Fiduciary Duty as Legal Theory

As previously set forth herein, Plaintiff concedes that he does not meet the prerequisites necessary to file a claim under the Texas Whistleblower Statute as he acknowledges that his employment was with a Contractor for the City and not the City itself. However, as previously set forth herein due to the contractual relationship between PACT and the City, the City of Austin breached its fiduciary duty. Ms. Hawkins states that she oversees “employees in the areas of cable TV and utility franchise management, utility ratemaking, oversight of the public access TV management contract, management of City's community technology initiative and collections/claims services” (cited Rondella Hawkins, Affidavit, Exhibit B, to Defendant City of Austin Defendants City Of Austin and Rondella Hawkins' Plea To The Jurisdiction, Motion For Summary Judgment And, Alternatively, Special Exceptions). Ms. Hawkins and the City of Austin breached their fiduciary duty to the public and Plaintiff herein by doing the following:

1. Failing to report or investigate a crime, specifically theft of City property, although the PACT-CITY contract (Sec. 35) specifically states that “The Contractor shall comply with all applicable laws, rules, regulations, procedures and policies, of the Federal, State and local governments” which includes criminal theft of property in violation of

Texas Rules of Civil Procedure, § 6.01. REQUIREMENT OF VOLUNTARY ACT OR OMISSION. c) A person who omits to perform an act does not commit an offense unless

a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

2. By permitting City property to be illegally sold by PACT (their Contractor) to third Parties, in violation of

Texas Rules of Civil Procedure, § 6.01. REQUIREMENT OF VOLUNTARY ACT OR OMISSION b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

3. By negligently permitting the facilities of PACT to fall below industry standards;

4. By failing to pursue remedies available after it was disclosed in a City audit that Time Warner for years had been under-reporting revenues due the City;

5. By condoning forgery of documentation for personal gain, in violation of

Texas Penal Code §32.32 FALSE STATEMENT TO OBTAIN PROPERTY OR CREDIT - (a) For purposes of this section, "credit" includes: (2) **furnishing** property or **service** on credit; (4) comaking, endorsing, or **guaranteeing a note or other instrument for obtaining credit;** **(b) A person commits an offense if he intentionally or knowingly makes a materially false or misleading written statement to obtain property or credit for himself or another.** (c) An offense under this section is: (4) a state jail felony if the value of the property or the amount of credit is \$1,500 or more but less than \$20,000; AND

Texas Penal Code §32.21 FORGERY - (a) For purposes of this section:

(1) "Forge" means:

(A) to alter, make, complete, execute, or authenticate any writing so that it purports:

(i) to be the act of another who did not authorize that act;

(ii) to have been executed at a time or place or in a numbered sequence other than was in fact the case; or

(iii) to be a copy of an original when no such original existed;

(B) to issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged within the meaning of Paragraph (A); or

(C) to possess a writing that is forged within the meaning of Paragraph (A) with intent to utter it in a manner specified in Paragraph (B).

(2) **(A) printing or any other method of recording information;**

b) A person commits an offense if he forges a writing with intent to defraud or harm another.; AND

Code of Criminal Procedure Chapter 12. 01. Felonies

(B) theft by a public servant of government property over which he exercises control in his official capacity.

The City of Austin breached its fiduciary duty to the public by failure to act in a timely manner to investigate the theft of City property and condoning criminal acts of Defendant Wilkison in forging documentation, all resulting in loss of City property.

Quoting from the Business Law: Breach of Fiduciary Duty by Business Law Attorneys at Garg & Associates, P.C.:

A fiduciary duty is a special type of duty owed where there has been a special relationship created between individuals or between an individual and an entity. This special duty is not created by an agreement between the parties, but simply by the nature of the relationship. When that special duty has been breached, a cause of action may ensue to recoup damages resulting from the breach. To prosecute a case of breach of fiduciary duty, one is not necessarily obligated to prove there existed an agreement between the parties that formed the fiduciary relationship, but show the existence of a special duty and the breach of it. The fiduciary relationship can be formed by agreement, but can also be formed by the existence of a special relationship between the parties. Texas case law has defined a fiduciary relationship to be “when a person is under a duty, created by law or contract, to act on or give advice for the benefit of another within the scope of the relationship,” that person has a fiduciary relationship with the other person. Whether a person has a fiduciary duty is a factual question,

In describing the elementary nature of a fiduciary relationship, the Texas Supreme Court wrote in *Texas Bank & Trust, v. A. E. Moore*: “When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions. If the existence of strained relations should be suffered to work an exception, then a designing fiduciary could easily bring about such relations to set the stage for a sharp bargain. . . mischief would result more often from engrafting exceptions upon the general rule than from a strict adherence thereto.” The Court also stated in an earlier case: “the term ‘fiduciary’ is derived from the civil law and contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. Further, the term [fiduciary] includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations.”

Formal as well as informal relationships give rise to a fiduciary relationship.

In order to prove breach of a fiduciary relationship, the plaintiff must show that the defendant breached the duty created by the relationship and that the defendant was the plaintiff’s fiduciary. The fiduciary duty in issue cannot extend to matters “beyond the underlying relationship of the parties.” The plaintiff must also show that the defendant’s breach of the duty resulted in an injury to the plaintiff or in a benefit to the defendant even if the plaintiff suffered no loss. There is an equitable presumption of unfairness when parties under a fiduciary relationship enter into a transaction and one of the parties does not benefit or profit from the relationship and the other does. When the presumption of unfairness is made, the burden to prove the transaction was fair and to produce evidence of the fairness shifts to the party seeking to enforce the agreement (the fiduciary).

Misapplication of fiduciary property can be considered a crime under Texas Penal Code §32.45. In pertinent part, the statute reads: “A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.” The severity of penalties for such actions is commensurate to the value of the misappropriated funds. Additionally, if the crime was committed against an elderly person, the penalty is increased to the next higher category.

In the criminal case of *Showery v. State*, 678 S.W.2d 103 (Tex.App. – El Paso 1984, pet. ref’d.), Showery, a doctor, provided services to the complainant and promised her help with getting a refund of her payment by filing the necessary insurance paperwork. Dr. Showery informed the complainant that her payments to him were payments in full. However, Dr. Showery made claims to the insurer that far exceeded the amounts paid by the complainant. The insurer denied most of

the claim, but paid the doctor at least the sums collected from the complainant. Dr. Showery deposited the claim checks into his account, but did not refund any money to the complainant. Dr. Showery was found to be the complainant's fiduciary and she was found to be the beneficiary. The court stated "[w]hen [Dr. Showery] received the funds from Prudential, he held them in trust for the benefit of the complainant. This trust arose from the original contract for services, the fees paid and the claim for insurance reimbursement. By depositing these proceeds in his business bank account and refusing to tender them to his patient, he breached a fiduciary obligation and imposed continuing loss upon the beneficiary." Dr. Showery was convicted under the statute and given four years in prison. His grounds on appeal were overruled and the 4-year sentence was upheld.

A fiduciary relationship was established in normal course between the City of Austin ("COA") and its citizens to uphold the law. As a citizen and a producer at PACT, the fiduciary responsibility was breached when the citizen (the Plaintiff herein) complained of criminal activity first to the Board of Directors of PACT, then to Rondella Hawkins, the Contract Manager and thereafter the Austin Police Chief and Austin City Mayor. However no action was taken by said authorities despite repeated attempts by Plaintiff to bring it to their attention. When the COA failed to acknowledge the thefts reported, it broke its fiduciary responsibility to protect the assets of the City from being squandered by third parties. COA failed its fiduciary responsibility to the citizens of Austin when it failed to maintain public facilities by permitting the facility to fall behind on Texas Building Code Violations via no fire alarms or sprinkler systems in the public building, and no working security system. COA broke its fiduciary responsibility to its citizens by failing to properly monitor the financial activities of Time Warner resulting in financial loss to the City. Despite the fact that Rondella Hawkins as Contract Manager of PACT was made aware that certain documents were being forged for personal gain by PACT management (Garry Wilkison), the COA did indeed breach its fiduciary responsibility by failing to take appropriate action. By failing to take action, the COA and Rondella Hawkins became conspirators with PACT management in the commission of a crime similar to that set forth in the criminal case of Showery v. State noted above, by permitting personal financial gain to be had by third parties by illegally disposing of City assets. Pursuant to Texas law, Rondella Hawkins despite the fact that she did not profit personally from actions of PACT management did breach her fiduciary duty to the City by concealing this illegal activity from her superiors.

C. Libel and Slander

First, once again counsel for Defendant Litowsky has misstated the facts in this case. He states that "Plaintiffs defamation allegations are against Defendant Litkowsky only." However, a re-reading of the original petition herein also clearly names Garry Wilkison as making defamatory remarks (See paragraph 27 of Plaintiff's original complaint, under the heading Slander, Libel, Harassment.)

Defendant Litowsky states that Plaintiff's claims of libel and slander are barred by the statute of limitations. However, as previously stated, Plaintiff was terminated from his employment on June 30, 2008, the incident in question took place in the second week of June, 2008. Defendants have already agreed under "History of Dispute" that Plaintiff filed his original Petition, alleging such claim against said

Defendant on January 9, 2009, well within the statute of limitations, i.e. less than one year from the date the cause of action accrued. Tex. Civ. Prac. & Rem. Code Ann. Section 16.002; *San Antonio Credit Union v. O'Connor*, 115 S.W. 3d 82, 96 (Tex App. -- San Antonio, 2003 pet. denied). In fact he had an additional 21 days in order come within that time period. Wherefore, the claim of libel and slander against Plaintiff by Defendant Litowsky is not barred from the statute of limitations.

Publication of Defamation

Defendant contends that there was no publication of the defamatory remarks made by Litkowsky. However, Plaintiff intends to prove otherwise by affidavit and testimony of third parties that when Plaintiff left Ms. Litowsky's office after the incident in question, he directly went to three co-workers that he had spent the entire day with in a seminar. Plaintiff asked for their opinion as to the comments made by Litkowsky, each individual questioned, denied the allegations by Litowsky. Three days later, Plaintiff approached Maria Stein in an effort to reconfirm her opinion as to the incident and was so distraught by these actions that she informed Plaintiff that she had sent an email to Ms. Litowsky, stating that she wanted no involvement in this incident and that Ms. Litowsky had already spoken to her personally about the incident. After the incident in question, and when producer Gloria Morales requested assistance from Plaintiff with her production at PACT, Linda Litkowsky specifically told her that she should not work with him because of his temperament and that he didn't have the temperament to deal with her special needs. (See, Affidavit of Gloria Morales attached hereto). Plaintiff is aware of other defamatory remarks made to other individuals who are currently employed at PACT but for fear of redress by management they can only speak the truth if subpoenaed by this Court. Plaintiff requests the opportunity to continue with discovery so that the truth will reveal itself.

Harassment

"Harassment", is defined as "a wide range of offensive behaviour. It is commonly understood as behaviour intended to disturb or upset. In the legal sense, it is behaviour which is found threatening or disturbing." ([www:http://en.wikipedia.org/wiki/Harassment](http://en.wikipedia.org/wiki/Harassment)). The FFC defines workplace harassment as:

"Unwelcome verbal or physical conduct based on race, color, religion, sex (whether or not of a sexual nature and including same-gender harassment and gender identity harassment), national origin, age (40 and over), disability (mental or physical), sexual orientation, or retaliation (sometimes collectively referred to as "legally protected characteristics") constitutes harassment when: **The conduct is sufficiently severe or pervasive to create a hostile work environment;** or

1. **A supervisor's harassing conduct results in a tangible change in an employee's employment status or benefits** (for example, demotion, **termination**, failure to promote, etc.)."

Emphasis Added. (<http://www.fcc.gov/owd/understanding-harassment.html>).

Defendants contend that even if there were harassment by Defendants in creating a hostile work environment, Plaintiff is barred from pursuing any claims against Defendants because PACT is not an

employer. However, the evidence set forth herein proves that PACT is an employer. Plaintiff sets forth in his affidavit attached hereto and the actions complained of herein do fall within the realm of harassment causing harm to Plaintiff by the actions of both Defendants Wilkison and Litowsky.

E. Collusion and Conspiracy to Cover Up Illegal Activity.

Defendants rightly state that Defendants conspired in a cover up of theft and other illegal activities but indicate that since there was no employment relationship with any of the Defendants that Plaintiff does not have a valid claim against said Defendants. However, as defined by the Texas Labor Code, PACT does qualify as an employer. That being said, there was a contractual relationship between PACT the Contractor and the City of Austin via Rondella Hawkins and the Board at PACT which pursuant to the Contract with the City indicates that it has the power and oversees the day to day activities at PACT; that when Plaintiff, a law abiding citizen, began to report wrongdoings, his complaints fell on deaf ears and the City turned a blind eye to the activities at PACT. In the past, there has been a theft of over \$300,000 and a conviction of the former Administrators of PACT under Rondella Hawkins' watch. Plaintiff believes that this is the reason why the City, mostly Rondella Hawkins, has ignored the complaints against the new management to protect her own status with the City.

V. PLEAS TO THE JURISDICTION

Plaintiff has withdrawn his claim of whistleblower and therefore the point is moot but contends that jurisdiction is relevant as to breach of fiduciary duty. Also, as has been previously set forth above, PACT is under the Texas Labor Code definition, an employer (see pages 4-5 of this pleading). The Defendants herein also indicate that Plaintiff as an employee of PACT did not exhaust all of his administrative remedies. However, as set forth above under IV Response to Motion for Summary Judgment herein (pages 6-7), and evidenced by Plaintiff's affidavit attached hereto, Plaintiff, as a normally prudent person, did in fact take all necessary action in an effort to exhaust all efforts in doing his due diligence to resolve this matter before resorting to litigation.

Plaintiff Negates there are Jurisdictional Defects

In summary, as has been pled above, there are no jurisdictional defects with regards to Plaintiff's claims herein.

VI. SPECIAL EXEPTIONS

The special exception that Defendants have requested herein should be denied in their entirety pursuant to Rules 90 and 91 of the Texas Rules of Civil Procedure in that Plaintiff has addressed each and every issue claimed by Defendants herein and specifically states once again addressing each individual issue:

1. Plaintiff has addressed herein with specificity that PACT is indeed an employer as

defined by the Texas Labor Code citing: "Employer" means: (A) a person who is engaged in an industry affecting commerce and who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year". As cited above commencing with the time period January 1, 2007 through and including June 30, 2008, PACT did employ between 16 and 17 employees for April, May and June of 2007, PACT employed 17 employees, in July, 2007 PACT employed 15 employees; in August and September of 2007, PACT did employ 15 employees and October, 2007, PACT employed 15 employees, and in only one instance, namely November of 2007, PACT employed only 14 employees. However, in December of 2007, the employee count was back up to 15. Further in January, February and March of 2008, the total number of employees was 15. In April, May and June of 2008, the total number of employees was 20, 17 and 20 respectively. Wherefore, pursuant to the definition of "employer", PACT is definitely an employer.

2. As previously forth, Plaintiff is in agreement that since he was not employed by a government entity, that the Whistleblower Act does not apply and hereby withdraws such claim.

3. Again, see paragraph 2, above. Plaintiff withdraws his claim under the Whistleblower Act.

4. Again, see paragraphs 2 and 3 above.

5. Defendants' statement that Plaintiff did not file the appropriate complaint with the EEOC within the time required by law is untrue. Plaintiff was terminated on June 30, 2008. Plaintiff filed a complaint with the EEOC on July 9, 2008. See EEOC filing attached Plaintiff's affidavit herein.

6. Responding to paragraphs 6, 7 and 8, Plaintiff denies these exceptions as Plaintiff now asserts his claim of breach of fiduciary duty on behalf of City of Austin and reasserts his claims of harassment, hostile work environment, libel and slander against Defendants PACT, the Board and specifically Defendants Litowksy and Wilkison. Plaintiff, therefore, intends to prove these specific damages given time and discovery permitting.

WHEREFORE, Plaintiff prays that Defendants' Motion for Summary Judgment, Plea to the Jurisdiction and alternatively special circumstances be denied in their entirety; that Plaintiff be permitted to continue with discovery herein and amend his complaint to disallow his claims under the theory of Whistleblower Act and assert in its place breach of fiduciary duty and reassert his claim of right and wrong. Plaintiff further prays that Defendants and each of them take nothing by way of their pleadings herein and that Plaintiff be awarded his costs herein and that an award of sanctions be imposed on John Heller, counsel

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for defendants herein for his deliberate falsification of the records herein and submitting pleadings that he knew or should have known to be false.

Respectfully submitted,

David P. Griffin, Plaintiff Pro Se

CERTIFICATE OF MAILING

I hereby certify that on _____ day of December, 2009, I served a true and correct copy of the above and foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS GARRY WILKISON, LINDA LITOWSKY, CATHY BEAUDOIN, JACKIE GOODMAN, CELIA HUGHES, EMANUEL LIMUEL, JR, OSCAR PALOMO, DANIEL SCARDINO, DEBORAH L. HILL, HELENE CAUDILL AND PUBLIC ACCESS COMMUNITY TELEVISION'S MOTIONS FOR SUMMARY JUDGMENT, AND DEFENDANTS' PLEA TO THE JURISDICTION, AND ALTERNATIVELY, SPECIAL EXCEPTIONS AND MOTION FOR SANCTIONS**

on each of the following individuals, by depositing the same in a sealed envelope, applying appropriate postage and addressed as follows:

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