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**Date:** February 1, 2023

**Subject:** *Brickman et al. v. OAG*

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**I. Available Relief Under the Whistleblower Act**

The Whistleblower Act makes available several non-exclusive categories of relief:

(a) A public employee whose employment is suspended or terminated or who is subjected to an adverse personnel action in violation of Section 554.002 is entitled to sue for:

- (1) injunctive relief;
- (2) actual damages;
- (3) court costs; and
- (4) reasonable attorney fees.

(b) In addition to relief under Subsection (a), a public employee whose employment is suspended or terminated in violation of this chapter is entitled to:

- (1) reinstatement to the employee's former position or an equivalent position;
- (2) compensation for wages lost during the period of suspension or termination; and
- (3) reinstatement of fringe benefits and seniority rights lost because of the suspension or termination.

(c) In a suit under this chapter against an employing state or local governmental entity, a public employee may not recover compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount that exceeds:

- ....
- (4) \$250,000, if the employing state or local governmental entity has more than 500 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year.

Tex. Gov't Code § 554.003. Accordingly, Plaintiffs here are entitled to several non-exclusive categories of relief, each of which must be taken into account in any valuation.

**a. Injunctive Relief/Reinstatement and Front Pay - § 554.003(a)(1), (b)(1)**

The three mediating plaintiffs have voluntarily taken reinstatement off the table in their settlement demands, though each is likely to seek a temporary injunction in the district court if the Supreme Court were to deny the pending PFR. The disruption caused by the likely granting of a temporary injunction is significant.

Some courts have held that reinstatement is a mandatory remedy under the Whistleblower Act, which is a textually sound reading. Tex. Gov't Code § 554.003(b) ("[A] public employee whose employment is suspended or terminated in violation of this chapter *is entitled to*: (1) reinstatement to the employee's former position or an equivalent position[.]" (emphasis added)); see *Dallas County v. Glasco*, 2004 WL 1202008, at \*3 (Tex. App.—Dallas June 2, 2004, no pet.) ("Under section 554.003(b)(1), the County's duty to reinstate Glasco's employment is mandatory, and the statute contains no exception.") (citing *City of University Park v. Van Doren*, 65 S.W.3d 240, 252 (Tex. App.—Dallas 2001, pet. denied)).

Other courts have held that front pay is available in lieu of reinstatement where that is not practical, and that such a front pay award is not subject to the \$250,000 damages cap. See *City of Houston v. Livingston*, 221 S.W.3d 204, 234

(Tex. App.—Hous. [1st Dist.] 2006, no pet.) (“[W]e hold that an award for front pay in lieu of reinstatement is not subject to the statutory cap on compensatory damages in section 554.003(c) of the Texas Whistleblower Act.”); *see also Powers v. Northside ISD*, 951 F.3d 298, 308 (5th Cir. 2020) (“The statute allows for recovery of back pay, as well as front pay, when job reinstatement is not feasible.”). However, these cases improperly conflate federal statutes and causes of action under other employment statutes. The text of the Whistleblower Act itself says that “future pecuniary losses” are subject to the cap. Moreover, by simply offering reinstatement—an outcome which each of the plaintiffs would likely reject—the Office can cut off any front pay award at the time of judgment.

**b. Back Pay - § 554.003(a)(2), (b)(2), (b)(3)**

Whistleblower plaintiffs are permitted to sue for back pay, which is not specifically included in the \$250,000 damages cap. Tex. Gov’t Code § 554.003(c). Reinstatement of benefits and seniority can be included under this category. *Id.* § 554.003(b)(3). But the Office is likely limited in the extent to which it could affirmatively award benefits such as years of service credit for the state employee retirement system. This is a particularly acute problem with respect to Penley, who has not adequately explained his entitlement to the ~\$665k in benefits that he has demanded.

**c. Other Compensatory Damages - § 554.003(a)(2), (c)**

Other compensatory damages are subject to the \$250,000 damages cap. In front of a Travis County jury, it is likely that each plaintiff would reach this cap. Note that the cap is judicially applied; the jury itself can come back with any number that it wants for compensatory damages, which is what will be reported in the media, but the Court is limited to the cap when entering judgment.

**d. Fees and Costs - § 554.002(a)(3), (a)(4)**

Plaintiffs are entitled to court costs and attorneys’ fees. Each of the plaintiffs’ lawyers have provided an estimate to this point in the case. In general, fees fights can be difficult to make significant headway on, particularly in front of unfavorable judges. Because the trial judge will make factual findings regarding reasonableness and necessity of hours and appropriateness of hourly rates, there is an unfavorable standard of review. Moreover, because we are paying our outside counsel at a rate of \$540 per hour, and that fact is public record, it is going to be difficult to challenge an hourly rate at or below that amount.

**II. Plaintiffs’ Demands and Claim Valuation**

**a. Plaintiffs’ Demands**

Name	Front Pay	Back Pay	Compensatory	Fees/Costs
Maxwell	\$760,000	\$427,500 + \$42,750 (interest)	\$250,000	\$493,417
Vassar	\$78,192	\$202,000	\$250,000	\$275,000
Penley	\$408,000 + \$665,190 (benefits)	\$282,039	\$250,000	\$260,000

Name	Total
Maxwell	\$1,973,667
Vassar	\$805,192 (\$1.2mm demand)
Penley	\$1,865,229
Total	\$4,644,088 (\$5,038,896)

Name	Total (minus Front Pay)
Maxwell	\$1,213,667
Vassar	\$727,000
Penley	\$792,039 (\$1,457,229 with benefits)
Total	\$2,732,706 (\$3,397,896)

**b. Valuation**

Because Plaintiffs' front pay is specifically subjected to the cap on compensatory damages, *see* Tex. Gov't Code § 554.003(c), Plaintiffs' true opening demands are best determined by subtracting out the claimed front pay amounts entirely.

Plaintiffs' claims to back pay are based on alleged difficulties finding comparable work and their assertions in their settlement demands regarding their efforts to mitigate. Proving a failure to mitigate in this venue would be challenging, assuming that the assertions in the demand letters are corroborated. If failure to mitigate is not a significant factor (with the possible exception of Penley), back pay becomes a rote mathematical calculation.

Each Plaintiff has asserted that they would receive from a jury \$250,000 in other compensatory damages for things such as pain and suffering. This is a reasonable position for them to take, given the venue.

None of the Plaintiffs' attorneys have provided sufficient information to evaluate their claims to fee amounts. Based on the input of outside counsel, none of the attorneys should recover more than Vassar's counsel, who has done the lion's share of the work on the case. Moreover, duplication of hours is highly likely given that each Plaintiff has their own attorney. Even in low-leverage situations, reductions of attorneys' fees in the range of 20% are not uncommon—and often much greater reductions are possible through negotiations.

Any amounts must be discounted to present value – Plaintiffs' demands are based on what they could earn on their best day at trial. It is true that a future judgment is likely susceptible to adjustment for pre- and post-judgment interest. That said, assuming an inflation rate of 6.5% and a period of three years between now and any potential judgment in Plaintiffs' favor, the present value of any future judgment is approximately 80% of the nominal value.

Based on the above assumptions, and leaving aside any risk reductions, the following numbers would essentially constitute fully meeting Plaintiffs' demand:

Name	Max Settlement Value
Maxwell	\$970,933.60
Vassar	\$581,600
Penley	\$633,631.20
Total	\$2,186,164.8

By applying some additional, modest reductions—(1) no attorney makes more than Joe Knight, and (2) an additional 20% reduction to each plaintiff's settlement demand to account for litigation risk—a high-end estimate of settlement at mediation is:

Name	High Settlement Value
Maxwell	\$597,150
Vassar	\$436,200
Penley	\$475,223.40
Total	\$1,508,573.40

### III. Notable Cases

*Alief ISD v. Perry*, 440 S.W.3d 228 (Tex. App.—Hous. [14th Dist.] 2013, pet. denied) (affirming judgment of \$250,000 capped mental anguish damages and \$62,500 in lost wages)

*Breaux v. City of Garland*, 1997 WL 726447 (N.D. Tex. Nov. 12, 1997) (refusing to award prejudgment interest “because the Act does not provide, either in the former or current version of § 554.003, for such an award”)

*City of Denton v. Grim*, 2022 WL 3714517 (Tex. App.—Dallas Aug. 29, 2022, pet. filed) (affirming \$2,759,195.49 judgment)

*City of Houston v. Livingston*, 221 S.W.3d 204 (Tex. App.—Hous. [1st Dist.] 2006, no pet.)

*City of Weatherford v. Catron*, 83 S.W.3d 261 (Tex. App.—Ft. Worth 2002, no pet.) (affirming award of prejudgment interest)

*Powers v. Northside ISD*, 951 F.3d 298 (5th Cir. 2020)

*Robertson County v. Wymola*, 17 S.W.3d 334 (Tex. App.—Austin 2000, pet denied) (affirming award of pre- and post-judgment interest)