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WHISTLEBLOWING AND FREE SPEECH IN PUBLIC EMPLOYMENT

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I. Introduction

A. Employers and employees often have different views of employee whistleblowing activities. The employee may see an organization rife with improprieties, which responds to challenges by attempting to cover-up improper activity. The employer, on the other hand, may see an employee who has been a poor performer and who would rather spread gossip than do the job.

B. When an employee undertakes whistleblowing activity, the public employer is presented with several legal issues:

- common law protections for whistleblowers;
- statutory protections for whistleblowers; and
- possible First Amendment implications.

C. All too often, problems occur because the public officials or employees responsible for carrying out the government's duties do not understand their legal and ethical obligations. Public employers can prevent whistleblowing situations by developing comprehensive ethical rules for the workplace and clear procedures for handling reports of governmental improprieties.

II. Common Law Whistleblowing Protections in Washington

A. The general rule in Washington is that employment is at-will. This means that, absent an agreement to the contrary, employers may discharge employees for any reason not expressly prohibited by law. Since 1984, the Washington Supreme Court has recognized that discharges in violation of public policy are an exception to the employment at-will rule. Employees who are discharged in violation of a clear mandate of public policy may bring a tort action for wrongful discharge. Thompson v. St. Regis Paper Co., 102 Wn.2d 219 (1984).

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B. If an employer discharges an employee because that employee engaged in whistleblowing activity, the employer may be liable for wrongful discharge under a public policy violation rationale.

C. The following factors will be considered in determining whether the employee's whistleblowing activity will be protected.

- 1) The degree of alleged employer wrongdoing.
- 2) Whether employer's conduct constituted a violation of the letter or policy of the law.

For the whistleblowing to be protected, the employer must have violated the letter or the policy of the law. If the employer's action is legally permissible and the employee is fired for reporting it, the employee will not be able to sustain a wrongful discharge claim. Farnam v. CRISTA Ministries, 116 Wn.2d 659 (1991). In Farnam, a nursing home employee contacted the press to report that her employer was withholding food and water from terminally-ill patients. This employee was subsequently discharged. The court dismissed the employee's wrongful discharge claim because the Natural Death Act permitted the withdrawal of life-sustaining procedures.

In addition, the employee's subjective belief that the employer's actions violated the law are insufficient. The employee's whistleblowing activity will only be protected if the employer actually violated the letter or purpose of the law. Dicomes v. State, 113 Wn.2d 612 (1989).

- 3) The manner in which the employee reported or attempted to remedy the alleged misconduct.

Employees who report employer wrongdoing to the employer directly or to the appropriate government agency are more likely to be protected against discharge than an employee who reports the employer's alleged misconduct to the media. Farnam, 116 Wn.2d at 672.

- 4) Whether the employee acted to further the public good, as opposed to private or proprietary interests.

The employee's primary purpose for reporting the employer's wrongdoing must be to "further the public good." Farnam, 116 Wn.2d at 671. "Conduct that may be praiseworthy from a subjective standpoint or may remotely benefit the public will not support a claim for wrongful discharge." Id.

D. Remedies

An action for wrongful discharge in violation of public policy is treated as an intentional tort. Consequently, employees who prevail on these claims can recover economic damages, damages for emotional distress and attorney's fees. RCWA § 49.48.030 (1990) (attorney's fees permitted if employee recovers wages or salary owed in excess of what the employer admitted owing); Cagle v. Burns & Roe, 106 Wn.2d 911, 916-19 (1986).

III. Local Government Employee Whistleblower Act
(signed 3/30/92 effective date 1/93)

A. Purpose of Act

The purposes of the Act are two-fold. First, the Act protects local government employees by encouraging disclosure of improper governmental actions and providing remedies for retaliation. Second, the Act safeguards legitimate employer interests by encouraging that complaints be made first to the local government and by providing for speedy dispute resolution.

B. Key Definitions

1) "Improper governmental action" is any action by a local government officer or employee that is (a) undertaken in the performance of the officer's or employee's official duties, whether or not the action is within the scope of the employee's employment; and (b) that is in violation of any federal, state, or local law or rule, is an abuse of authority, is of substantial and a specific danger to the public health or safety, or is a gross waste of public funds. "Improper governmental action" does not include personnel actions. Section 2(1). In addition, employees are not free to disclose matters that would affect a person's right to legally protected confidential communications. Section 5.

2) "Local government" includes cities, counties, school districts, special purpose districts and any

other governmental entity other than the state, federal agencies or an operating system established under RCW § 43.52. Section 2(2).

3) **"Retaliatory action"** means any adverse change in a local government employee's employment status, or the terms and conditions of employment including denial or adequate staff to perform duties, frequent staff changes, frequent and undesirable office changes, letters of reprimand, demotion, transfer, reassignment, reduction in pay, denial of promotion, suspension, dismissal, or any other disciplinary action. Section 2(3).

C. Reporting Mechanisms

1) Each local government must adopt a policy on procedures for reporting improper government actions and must provide this information to its employees. Section 3(2).

a) The policy must list persons inside and outside of the local government to whom employees can report. This list must include the county prosecuting attorney. Section 3(3).

b) The local government must post the policies and procedures for protecting employees against retaliation. Section 3(4).

c) The local government can require employees to submit a report of governmental improprieties to the local government before going to outside entities. Employees can bypass this requirement in the case of an emergency. Section 3(5). In the absence of an emergency, an employee who fails to make a good faith attempt to report to the local government where such a report is required will not be protected by the Act. Section 3(5).

2) Local governments that establish their own reporting systems and procedures for dealing with retaliation are exempt from the Act as long as their programs meet the intent of the Act. Section 6.

D. Prohibitions

It is unlawful for a local government to take retaliatory action because an employee, in good faith,

provided information that improper government action occurred. Section 4(1).

- The employee must prove a causal link between his reporting and the employer's adverse action.
- The employer can defend by proving the action was not taken because of the employee's report.
- The employee, not a third party, must provide the information regarding the improper government action.
- It is unclear under the Act whether improper government action must have actually occurred or whether the employee's subjective belief that the action was improper is sufficient. The definitions section seems to require that improper action actually occur. Such an interpretation is consistent with the decisions in Farnam and Dicomes.

E. Relief Available

- 1) Procedure for seeking relief
 - a) Employees must provide written notice to the local government within 30 days of the alleged retaliatory action. Section 4(2), 4(3).
 - b) The local government has 30 days to respond to the allegation. Section 4(3).
 - c) After the 30 day response period, the employee can request a hearing. The employee must submit the request for a hearing to the local government within 15 days after the government's response period has ended. Section 4(4).
 - d) If a hearing is requested, the local government must apply for a hearing before an administrative law judge (ALJ). Section 4(5).
 - e) At the hearing, the employee has the burden of proving his claim beyond the preponderance of the evidence. Section 4(6).

f) The final decision of the ALJ is subject to judicial review under the "arbitrary and capricious" standard, meaning that a judge can only overturn the ALJ's decision if the judge determines there is no rational factual or legal basis for arriving at such a decision. Section 4(9).

2) Relief Granted Under the Act.

- a) Reinstatement, with or without back pay
- b) Injunctive relief necessary to return the employee to the position he or she held before the retaliatory action and to prevent the recurrence of retaliation
- c) Costs and attorneys' fees
- d) Penalty assessed against each individual retaliator or up to \$3,000 plus recommendation that retaliator be suspended or dismissed.

Section 4(7), 4(8).

- e) Act does not provide for general economic damages or damages for emotional distress.

IV. Free Speech and Public Employees

A. First Amendment

The United States Constitution prohibits Congress from "abridging the freedom of speech"

- This prohibition applies to the states so local employees are protected. In addition, the Washington State Constitution extends a state guarantee to the right of free speech. Art. I, § 5.

B. First Amendment Protection

- Discharging a public employee because he or she has spoken out about the local government's improprieties may violate the First Amendment and Art. I, § 5 of the state constitution.
- To determine whether a public employer violates the First Amendment when it discharges an

employee for whistleblowing activity, a court will apply a four-part test.

1) The public employee must establish his speech dealt with a matter of public concern. Connick v. Myers, 461 U.S. 138 (1983); Binkley v. Tacoma, 114 Wn.2d 373, 382 (1990).

This public concern element has been broadly interpreted. A court will examine the content, form and context of the speech and will determine the speech dealt with a public concern if there is any element of public concern present. Connick, 461 U.S. at 154 (Court determined that public concern test was satisfied when employee distributed 14-question survey and only one question involved issue of public concern); Binkley, 114 Wn.2d at 382-83 (drafting and distributing "Vote of No Confidence" regarding supervisor assumed to include element of public concern). However, the public concern element is not satisfied if the speech primarily regards an employee's grievance with the public employer's internal policies. Meyer v. UW, 105 Wn.2d 847, 851 (1986).

2) The public employee must prove that his interest in commenting on matters of public concern is greater than the employer's interest in promoting the efficiency of the public services it performs. Binkley, 114 Wn.2d at 382. In administering this balancing test, a court will examine many factors such as:

- whether the employee serves a confidential, policymaking or public contact role. Dicomes v. State, 113 Wn.3d 612, 625 (1989) (executive secretary to state medical boards held policymaking position; consequently, the state's need for political loyalty and confidentiality outweighed the employee's interest in commenting on the boards' budgeting process).
- importance of employee having close personal relationship with superior. Id.; Meyer, 105 Wn.2d at 851.

- degree of public concern of speech, Binkley, 114 Wn.2d at 383 ("Vote of No Confidence" letter invoked only a slight public interest because it primarily involved the employees' dissatisfaction with their supervisor).

3) The public employee must prove that his speech has a substantial or motivating factor in the adverse employment decision of which he complains. Binkley, 114 Wn.2d at 382; Jordan v. Oakville, 106 Wn.2d 122, 131 (1986).

4) If the public employee proves all of the above, the employer can defend itself by proving it would have reached the same decision even in the absence of the employee's protected conduct. Binkley, 114 Wn.2d at 382; Jordan, 106 Wn.2d at 131 (city demonstrated that employee was discharged because of budgetary concerns, not because of the employee's political activities).

C. First Amendment Claims

1) A public employee who brings an action for a violation of his free speech rights will most likely proceed under 42 U.S.C. § 1983. Section 1983 provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage of any state, . . . subjects, or causes to be subjected, any citizen of the United States to deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable"

a) Violations of free speech are actionable under 42 U.S.C. § 1083. See Connick v. Myers, 461 U.S. 138 (1983).

b) Damages in a § 1983 claim can include:

- economic damages, such as back pay. see id. at 141-42.
- emotional distress. Mekolny v. Painter, 653 F.2d 1164 (8th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).

- punitive damages, if the employer's conduct is judged to be willful and malicious or reckless regarding the federal rights of others. Smith v. Wade, 461 U.S. 30 (1983).
- injunctive relief, such as reinstatement. See Connick, 461 U.S. at 141.
- attorney's fees. 42. U.S.C. § 1988.

c) Sovereign Immunity -- Municipalities and other local governments are not immune from suit under § 1983. Monell v. Department of Social Serv's. of New York, 436 U.S. 658 (1978). The local government is only liable for its own actions, however. It is not liable for any First Amendment violations caused by an individual employee if that employee is not acting on behalf of the local government. Id. at 691-94.

d) Due Process -- As an incident to any First Amendment claim the discharged employee may assert that he was discharged without due process. Public employees have been found to have a property interest in continued employment. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 1985). Because of this property interest, a public employee cannot be discharged without receiving a fair hearing. Id.

2) The Washington State Constitution may also be used to support a claim that the local government abridged the public employee's free speech.

D. Statutory Restrictions on Public Employee Speech/Political Activity

1) RCW § 41.06.250 -- most state employee are prohibited from soliciting funds for or paying funds to any partisan political organization; some employees are excepted under § 41.06.070.

2) RCW § 35.17.160 -- prohibits city officers and employees from (1) exerting their influence to induce other employees to contribute to or favor any particular candidate for city office; and (2) contributing to any person for election purposes.

V. **Codes of Ethics and Whistleblowing Policies**

A. Local governments can prevent whistleblowing by encouraging employees to engage in ethical conduct, setting forth ethical rules and developing internal policies for handling reports of improprieties.

B. **Provisions for Ethical Codes.**

A number of public organizations, including cities and counties, have developed comprehensive ethics codes for their employees. The following elements are common to these codes:

1) **Policy statement**

A general policy statement discusses the importance of impartiality, cautions against the use of public office for private gain and emphasizes the need for public confidence in government functions.

2) **Definitions of important terms**

3) **Prohibitions**

a) **Conflict of interest**

These provisions prohibit employees from engaging in transactions that are, or appear to be, incompatible with the employee's official functions or that would impair, or appear to impair, the employee's independent judgment. Conflict of interest provision also prohibit employees from engaging in business transactions involving their employer in which the employee has a direct or indirect financial interest.

b) **Improper use of official position**

These provisions typically prohibit employees from using their official position, working time, employer funds or employer property for their individual benefit or the benefit of a third party.

c) **Gifts and loans**

Most ethics codes forbid employees from soliciting or accepting anything of value when

it would appear that such value was given or solicited to obtain special consideration.

d) Privileged information

Ethics codes generally prohibit employees from disclosing privileged or proprietary information that is not otherwise public knowledge when the information is obtained because of the employee's official position.

e) Restrictions after leaving employment

Some ethics codes prohibit former employees from engaging in activities that would have been a conflict of interest while the employee was working for the employer. These provisions typically restrict the employee from engaging in such activities for a short period of time, such as one year.

4) Disclosure Requirements

Many public employers require their employees to make a statement disclosing:

- the names and addresses of the employee's immediate family
- persons and entities in which the employee has a financial interest and who also transact business with the employer
- any direct or indirect interest the employee has in real property.

C. Policies and Procedures for Reporting Ethical Improprieties

1) Ethics codes and policies should encourage employees to report misconduct internally and, only if necessary, to the governmental agency with enforcement responsibilities.

2) The local government should designate one person or entity to investigate claims of governmental impropriety and to make recommendations.

3) Employees should be assured that their complaint will be kept confidential consistent with

the local government's need to investigate and take action, and that they will not be subject to adverse employment action for reporting governmental misconduct to an appropriate person or entity, or for participating in investigations or hearings related to the misconduct.

4) A local government employer should consider taking prompt, effective action to discipline any employee or officer who interferes with an employee's right to report governmental misconduct.