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## **Whistleblower Protection for Public Safety Employees**

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### **❖ Introduction**

In recent years, state and federal legislators, as well as the courts, have been increasingly concerned with protecting whistleblowers, including employees of public safety agencies, who report misconduct, especially illegal acts by fellow employees and supervisory personnel.

A number of states and the federal government have enacted whistleblower protection statutes and the courts have also examined the parameters of whistleblower protection on the basis of public policy or the First Amendment.

This two-part article takes a brief look at some of these developments, concluding with some suggestions to consider and a list of relevant and useful resources and references.

## ❖ State Law Protection

Most state law whistleblower protection is statutory, although some state courts have adopted whistleblower protection on the basis of clearly articulated public policy. The overall goal is generally to protect those who report suspected wrongdoing and threats to public health and safety, with the focus largely on clearly illegal actions. The specifics of state law protection for whistleblowing employees vary from state to state. Some common issues are what kind of disclosures or reports are protected against retaliation, to whom must disclosures or reports be made.

### *What Disclosures Are Protected?*

Many state whistleblower protection statutes explicitly set forth specific categories of disclosures that are protected by law, with any disclosure falling outside those very specific boundaries unprotected. Frequently, this involves reports of illegal conduct to the proper authorities with the power to investigate or prosecute.

In [\*Baumann v. District of Columbia\*](#), #13-7189, 795 F.3d 209 (D.C. Cir. 2015), a police chief sanctioned an officer for releasing to the media a recording of an Emergency Response Team's radio communications during an incident involving a suspect exchanging gunfire with officers and barricading himself inside a home. The officer claimed that this was unlawful retaliation in violation of a D.C. Whistleblower protection statute. The whistleblower claim was rejected as the plaintiff failed to show how the release of the recording was a "protected disclosure" under the statute as in effect at the time of the incident.

Similarly, in [\*Wilson v. Tregre\*](#), #14-31179, 787 F.3d 322 (5th Cir. 2015), a former chief deputy in the sheriff's office sued the sheriff, claiming that his termination after he raised complaints about recordings being made in interrogation rooms violated his rights under a state whistleblower protection statute. He failed to establish a claim under the Louisiana whistleblower statute, because he did not show that the sheriff's office, in making the recordings, committed an actual violation of Louisiana state law.

In [\*Coleman v. District of Columbia\*](#), #12-7114, 794 F.3d 49 (D.C. Cir. 2015), at least some of the disclosures were found to be possibly protected. The case involved a discharged fire captain who sued the department under a D.C. whistleblower protection act. The trial court granted summary judgment to the defendant department, but a federal appeals court ruled that this was erroneous.

The plaintiff claimed that she was unlawfully terminated in response to her protected communications to supervisors following a major fire at a high rise building. The trial

court, the appeals court found, should have considered her communications individually, rather than grouping them into broad categories for consideration.

Considering the communications individually, however, a reasonable jury could determine that at least one of these communications qualified as a protected complaint, because it disclosed alleged gross mismanagement or a substantial and specific danger to public health and safety. Additionally, the defendant department failed to show by clear and convincing evidence that it had legitimate, non-retaliatory reasons for its actions.

In [\*Ellis v. CCA of Tenn. LLC\*](#), #10-2768, 650 F.3d 640, 112 Fair Empl. Prac. Cas. (BNA) 791 (7th Cir. 2011), nurses who worked in the health care unit of a privately run jail failed to show that their employer violated an Indiana state whistleblower protection law by allegedly constructively discharging them for complaining about safety problems at the jail. The plaintiffs could not point to any violation of the law that they reported, which was a prerequisite to making a claim under the whistleblower statute

Courts in some cases have said that to be protected, the employee must have an objectively reasonable belief that there was illegal conduct. In one such case, the Executive Director of the Idaho Peace Officer Standards and Training Council (POST) was terminated for allegedly failing to comply with directives regarding budget difficulties. POST was having personnel management issues, and how to address issues raised in an audit report. He sued, claiming that his firing violated two provisions of a state whistleblower's act involving good faith communication regarding a violation or suspected violation of the law, or refusal to carry out what an employee believes to be an unlawful directive.

Finding that he had not engaged in protected activity, the trial court granted summary judgment to the defendant. The ruling was affirmed by the Idaho Supreme Court, which found that the plaintiff's belief that some of the directives given to him were illegal simply were not objectively reasonable. [\*Black v. Idaho State Police\*](#), #39822, 155 Idaho 570, 314 P. 3d 625 (Idaho 2013).

General complaints or gripes about one's supervisor are generally not protected by whistleblower statutes. Under the Maryland Whistleblower Acts, an employee's complaint about the behavior of a supervisor is not a protected disclosure. Thus, a state corrections employee had no cause of action based on alleged retaliation for filing a grievance against the warden. The retaliation complaint lacked a "public interest" component. [\*Montgomery v. Eastern Correctional Institution\*](#), #2003-13, 20 IER Cases (BNA) 1019, 377 Md. 615, 835 A.2d 169 (2003).

Similarly, a New Jersey appeals court reversed a large verdict won by a police officer when such gripes were involved. An allegation that superiors should not have issued two gun

permits is not the kind of employee complaint the law was designed to protect, and does not shield an employee from disciplinary action. The appellate panel said his complaints were “a litany of disaffection with the Police Department and disappointment with the way in which he had been treated over the years by his superiors.”

The officer lacked a sufficient basis that either of the gun permits was illegal, or in violation of public policy. At most, the permits were judgment errors on the part of city officials involved and could not reasonably have been seen as the type of conduct upon which a whistleblower claim may be premised. [\*McLelland v. Moore\*](#), #A-4534-98T5, 343 N.J. Super. 589, 779 A.2d 463, 2001 N.J. Super. Lexis 353 (N.J. App. 2001).

On the other hand, a Texas traffic officer who was transferred for low ticket-writing could file a state whistleblower lawsuit complaining of an illegal quota system. [\*Austin \(City of\) v. Ender\*](#), #03-00-00286-CV, 30 S.W.3d 590, 2000 Tex. App. Lexis 6644, 16 IER Cases (BNA) 1432.

### ***Reported to Whom?***

Frequently, disclosures protected by whistleblower statutes must be made to the proper authorities, and not just anyone. In one case, an employee of the Texas Department of Human Services reported wrongdoing to his supervisor, who allegedly then disciplined him for doing so. He then reported the wrongdoing he claimed to have witnessed to his supervisor’s supervisor, and subsequently to the lead program manager, after which he was fired. He sued his former employer under a state Whistleblower statute.

The Supreme Court of Texas rejected the claim, holding that the plaintiff had not reported the alleged misconduct to appropriate law enforcement authorities (in this case the state’s Office of Inspector General) as required for coverage under the statute.

The court overturned a finding by an intermediate appeals court that the supervisors constituted appropriate law enforcement authorities. Additionally, the plaintiff, under the circumstances, could not have believed in good faith that he had done what was required for protection under the statute. [\*Tex. Dep’t of Human Servs. v. Okoli\*](#), #10-0567, 440 S.W.2d 611, 2014 Tex. Lexis 685, 57 Tex. Sup. Ct. J. 1214

The filing of an internal grievance was not a “report” within the meaning of the Texas Whistleblower Act, which prohibits taking adverse personnel action against a public employee who in good faith reports a violation of law. A divided appellate court rejected the appeal of a sergeant’s demotion. [\*County of Bexar v. Steward\*](#), #04-03-00580-CV, 139 S.W.3d 354, 21 IER Cases (BNA) 677, 2004 Tex. App. Lexis 4249 (4th App. Dist. 2004).

In contrast, in [\*Brown v. Mayor of Detroit\*](#), #132016, 478 Mich. 589, 734 N.W.2d 614 (2007), a police detective and a deputy police chief who reported alleged illegal conduct by fellow officers to the professional accountability bureau and to the chief of police were protected by Michigan Whistleblowers' Protection Act, where the act protects reports made within employee's own agency. "... the WPA does not require that an employee of a public body must report violations or suspected violations to an outside agency ..."

Reports to the media, discussions with neighbors, or a chat with a friendly bartender will not be protected under a state whistleblower statute, although in some instances First Amendment rights may come into play as will be discussed next month in Part 2 of this article.

In [\*Dennison v. Penna. Dept. of Corrections\*](#), #3:01cv56, 268 F. Supp. 2d 387 (M.D. Penna. 2003), affirmed *Dennison v. Pa. Dep't of Corr.*, 173 Fed. Appx. 972, 2006 U.S. App. Lexis 8330 (3d Cir. Unpub. 2006), a federal court upheld the right of management to fire a prison psychologist who released confidential records to public advocates and the news media. Whistleblower laws, the court said, protect only those who report misconduct to the appropriate public officials.

### ***Multiple Whistleblowers***

In one case, a deputy sheriff was not the first employee to report another deputy for alleged multiple unlawful acts, including a murder, a cover-up, and involvement in methamphetamine transactions, but he was still protected. Additionally, substantial evidence supported a verdict that terminating the deputy for falsely reporting wiretapped conversations was a pretext.

The appeals court ruled, however, that substantial evidence did not support the award of \$2,006,015 in lost actual earnings, but upheld an award of \$2,500,000 in non-economic damages. [\*Hager v. County of Los Angeles\*](#), #B238277, 228 Cal. App. 4th 1538, 2014 Cal. App. Lexis 758, 38 IER Cas. (BNA) 1669.

### ***Other Reasons for Adverse Actions***

Defendants can sometimes avoid liability for adverse actions taken against allegedly whistleblowing employee if they can demonstrate other legitimate non-retaliatory motives for their actions.

In [\*Bowyer v. District of Columbia\*](#), #13-7012, 793 F.3d 49 (D.C. Cir. 2015), fire investigators for the District of Columbia sued under the D.C. Whistleblower Protection

Act, claiming that they had been unlawfully reassigned to less desirable jobs in retaliation for them having accused some of their superiors of gross mismanagement and workplace racial discrimination.

But the employer made the un rebutted explanation that they had been reassigned because prosecutors refused to work with them and not because of their filing of Equal Opportunity complaints regarding alleged racial discrimination. The plaintiffs' failure to rebut this explanation meant that they had failed to create a genuine issue of material fact as to the reason for their reassignment. Additionally, their transfers to their new assignments occurred before their racial discrimination complaints were filed.

A mere denial will not suffice, however. In one case, a county employee claimed that she had been fired from her job as director of the county's 911 department in violation of a state whistleblower protection statute after she questioned the transfer of county funds from the county's ambulance funds and raised concerns about the ambulance service provided to the county.

The Michigan Supreme Court held that the plaintiff had presented sufficient evidence so that reasonable people could differ as to the true motivation for eliminating her job. The defendants, therefore, should not be granted summary judgment, [\*Debano-Griffin v. Lake County\*](#), #143841, 493 Mich. 167, 828 N.W.2d 634 (2013)..

Retaliation cannot exist without knowledge. Although a deputy sheriff reported misconduct to his superiors, he was not a protected whistleblower because the decision to terminate him was made by senior officers who were unaware of his complaints about coworkers. [\*Phelps v. Cortland Co.\*](#), #86000, 706 N.Y.S.2d 522, 2000 N.Y. App. Div. Lexis 4649.

### ***Other Defenses and Bars***

In one case, a Correctional Department Lieutenant filed a lawsuit in federal court claiming both federal civil rights violations and violations of a California state whistleblower protection statute by his employer. He claimed that adverse actions, including his dismissal, were taken in retaliation for him disclosing alleged improper governmental actions to his superiors, including negligent inmate supervision resulting in an escape, exhibiting a movie to inmates that violated Department policy, attempts to collect overtime for work not done, and allowing in contraband.

The trial court rejected the state whistleblower claim, finding that the plaintiff was barred from "relitigating" it because it had already been litigated during hearings before the state Personnel Board. A federal appeals court reversed, finding that the decision by the state

Personnel Board did not preclude the plaintiff under theories of either *res judicata* or collateral estoppel from litigating his whistleblower retaliation damage claim in the trial court. [Wabakken v. CA Dep't of Corr. & Rehab.](#), #13-56075, 801 F.3d 1143 (9th Cir. 2015).

Sometimes, the issue is who the whistleblower can recover from. A former employee of the District of Columbia, fired from his job as an elevator inspector, sued the employer and four supervisors for violation of a District Whistleblower Protection Act. His firing was for allegedly soliciting work for his private business while on duty.

A federal appeals court ruled that he had no possible claim against the individuals, as the statute provided no cause of action against individuals at the time of his firing. A subsequent amendment to the law allowing such claims did not apply retroactively. [Payne v. District of Columbia Government](#), #11-7116, 722 F.3d 345 (D.C. Cir. 2013).

A variety of immunity defenses may also arise in such cases. In one, an African-American police officer was terminated after he blew the whistle on a detective and fellow officer in connection with a missing person's investigation he assisted them in, and in which the three of them failed to arrest two suspects or collect certain evidence in what later turned into a murder prosecution. The detective and other officer, both of whom are Caucasian were only recommended for suspension by the same Internal Affairs investigation that resulted in his firing.

A jury awarded him \$3.5 million on a whistleblowing claim, \$2.5 million on a breach of contract claim, and \$500,000 (half compensatory and half punitive damages) on a race discrimination claim for the disparate discipline. An intermediate state appeals court overturned the whistleblowing and contractual awards, while upholding the race discrimination disparate discipline award.

The city was protected from the whistleblowing claim by sovereign immunity, since whistleblowing is a tort rather than contract cause of action. As for the contract claim; it was based on statute saying that non-probationary officers can only be fired for cause, so the court found that it was not a "contract." [Holmes v. Kansas City Bd. of Police Cmsnrs.](#), #WD72852, 364 S.W.3d 615, 2012 Mo. App. Lexis 133, 2012 WL 26588.

***Continued in Part Two***



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## **AELE Monthly Law Journal**

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