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Whistleblower Protection for Public Safety Employees

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❖ Federal Whistleblower Act

For federal employees, there is protection for whistle blowing activity under the [Whistleblower Protection Act](#), first enacted in 1989 and amended in a major way by the [Whistleblower Protection Enhancement Act of 2012](#).

The statute protects employees (and applicants for federal employment) against retaliatory personnel actions taken because they made a protected disclosure of information concerning government activity which they reasonably believe evidences either a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, so long as the disclosure is not specifically prohibited by law, and if the information “is not specifically

required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.”

Protected disclosures also include “any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences — (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”

The Whistleblower Protection Enhancement Act expanded on the Whistleblower Protection Act of 1989 by strengthening a wide range of protections for disclosures of government wrongdoing. It eliminated loopholes that had resulted in the protection of whistleblowers only when they are the first to report misconduct as opposed to subsequent reporters, clarified that whistleblowers are protected for challenging the consequences of government policy decisions, and also clarifies that protection of critical infrastructure information did not override protection of whistleblowers under the Act.

In [*Department of Homeland Security v. MacLean*](#), #13-894, 135 S. Ct. 913, 2015 U.S. Lexis 755, the U.S. Supreme Court held that a federal appeals court did not err in finding that the federal Transportation Security Administration (TSA) violated an air marshal’s whistleblower rights by firing him for disclosing to a reporter that the TSA had decided to cut costs by removing air marshals from some flights even though there was supposedly credible information that al Qaeda was planning attacks on passenger flights in the U.S. The reason given for his firing was disclosing sensitive security information without authorization.

When Congress used the phrase “specifically prohibited by law” in crafting an exception to the federal Whistleblower statute, it chose not to use the phrase “specifically prohibited by law, rule, or regulation,” and therefore did not remove protection for unauthorized disclosures that violated rules or regulations but not laws. TSA administrative regulations did not qualify as “law” for purposes of the exception, and the statute authorizing the TSA to issue regulations did not specifically prohibit the disclosures at issue.

In [*McCarthy v. Merit Sys. Protection Bd.*](#), #15-3072, 2016 U.S. App. Lexis 560 (Fed. Cir.), an attorney hired by the International Boundary and Water Commission, a federal agency, within four months of hiring had prepared four legal memos challenging activities of the Commission as “gross mismanagement,” contrary to existing law, and characterizing certain officers as lacking “core competencies.” He also then submitted a report entitled “Disclosures of Alleged Fraud, Waste and Abuse” to the Office of Inspector General (OIG) and other federal agencies and informed his supervisor of his reports. His supervisor then

fired him, listing his alleged failure to support the executive staff in a constructive manner as the reason.

Relevant case law at that time established that reports made to an employee's supervisor about the supervisor's own conduct and reports made in the normal course of the employee's duties were not protected under the federal Whistleblower Protection Act. (For an example of this under prior law, see [Lane v. Dept. of Homeland Security](#), #DC-1221-10-0231-W-1, 2010 MSPB 245, ruling that under the federal Whistleblower Act, a disclosure will not be protected if it is made as part of an employee's normal duties reported through normal channels or if the disclosure is made to the wrongdoer). As a result, an administrative law judge, the Merit System Protection Board, and the U.S. Court of Appeals for the Federal Circuit found no unlawful retaliation.

While these claims were pending, however, Congress enacted the Whistleblower Protection Enhancement Act of 2012, under which the legal memos at issue could be protected disclosures. That law can be applied retroactively to pending whistleblower cases. The plaintiff did not raise the issue of the change in the law while his petition for a rehearing was pending, however. Accordingly, the Merit System Protection Board refused to reopen his case, a ruling the federal appeals court upheld as the plaintiff had failed to exhaust his available Office of Special Counsel administrative remedies with respect to his legal memos, leaving the MSPB without jurisdiction to reopen his case.

❖ **First Amendment Issues**

Putting aside state and federal statutory protections for whistleblowers, the question often arises whether public employees have broader constitutional protection for whistleblowing under the First Amendment to the U.S. Constitution guaranteeing free speech. In [Garcetti v. Ceballos](#), #04-473, 547 U.S. 41 (2006), a 5-4 decision of the Supreme Court held that public employees who make statements as part of their official duties are not protected by their First Amendment purposes or insulated from disciplinary action.

Public employees who are simply performing their job duties, the majority reasoned, are not speaking as citizens on a matter of public concern in a manner that requires balancing of their First Amendment rights against the employer's interest in efficient performance.

As a result, a Los Angeles Deputy District Attorney could be disciplined for statements he made in a memorandum that his superiors found to be "inflammatory or misguided." He claimed that a sheriff's deputy was untruthful in a search warrant affidavit.

The Deputy D.A. alleged that his supervisors reassigned him and denied him a promotion in retaliation for his memo about a criminal case. When his grievance was denied, he filed

a 42 U.S.C. § 1983 suit, alleging that his superiors violated his First Amendment rights. The district court granted the defendants a summary judgment, but the Ninth Circuit reversed.

Writing for the majority, Justice Kennedy said: “Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services. ...”

“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

Whistleblower Issue

Dissenting, Justices Stevens, Souter and Ginsburg, would have given “qualified” protection to public employee whistleblowers’ duty-based speech commenting on “official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety.”

Most whistleblower statutes do not protect media disclosures. An employee is only insulated from reporting perceived misconduct to the appropriate public officials. Supporters of the employee believed that the decision will silence those who fear retribution for reporting corruption, or who want to reveal terrorist-related security problems. Management representatives believe that the decision will protect governments from frivolous lawsuits filed by disgruntled employees who claim to be whistleblowers.

Violations of open meeting laws also are frequently alleged in public employment law claims, but these laws are intended to protect the public and are not a remedy for a public employee who has been disciplined.

Garcetti Applied

A number of courts subsequently applied the principles set down in *Garcetti* to reject whistle blowing claims asserted by public employees on the basis of the First Amendment. In [Ruotolo v. City of New York](#), #06-3886, 514 F.3d 184 (2nd Cir. 2008), for instance, the Second Circuit rejected a retaliation lawsuit filed by a NYPD sergeant after he wrote a report about health concerns at his precinct. He was required to prepare the report in his role as the precinct Safety Officer, and was not writing as a private citizen.

Similarly, in [Houskins v. Sheahan](#), #06-2283, 548 F.3d 480 (7th Cir. 2008) the court overturned a \$240,000 verdict awarded to a Cook County Sheriff's employee. Filing a police report is not a matter of public concern, and an "internal complaint ... is an obvious form of speech made pursuant to official duties under the *Garcetti* standard; it would require mental gymnastics to see it otherwise."

The Supreme Court declined to review a Seventh Circuit ruling that vacated a \$210,000 verdict in favor of a corrections officer. She had alleged retaliatory action after she complained that she was stopped from searching a vehicle that two senior prison officials used to leave the facility. Her complaint about prison security was not protected under the First Amendment because of the Supreme Court's decision in *Garcetti*. [Spiegla v. Hull](#), #05-3722, 481 F.3d 961, 2007 U.S. App. Lexis 7396, 25 IER Cases (BNA) 1508 (7th Cir.), cert. denied. #07-273, 52 U.S. 975 (2007).

A public employee's motive "is not dispositive in determining whether his or her speech addresses a matter of public concern." Relying on the *Garcetti* decision, speech on a purely private matter, such as an employee's dissatisfaction with the conditions of his employment, does not pertain to a matter of public concern. [Sousa v. Roque](#), #07-1892-cv, 578 F.3d 164, 2009 U.S. App. Lexis 18844, 29 IER Cases (BNA) 1042 (2d Cir.).

Also relying on *Garcetti*, a California appellate panel affirmed the termination of a county law librarian after he sent a scathing e-mail criticizing his superiors. If a public employee makes statements pursuant to official job duties, the employee is not speaking as a private citizen and lacks First Amendment protections. [Kaye v. Board of Trustees of the San Diego Co. Law Library](#). #D053644, 179 Cal.App.4th 48, 29 IER Cases (BNA) 1826, 2009 Cal. App. Lexis 180 (4th Dist. 2009).

In [Bradley v. James](#), #06-2283, 479 F.3d 536 (8th Cir. 2007), a federal appeals court rejected a First Amendment claim brought by a former university police captain who was fired after making allegations of intoxication against the chief of police. His speech was not constitutionally protected because it was made pursuant to his official and professional duties, and not as a private citizen.

Ninth Circuit Development

Following *Garcetti*, the U.S. Court of Appeals for the Ninth Circuit in [Eng v. Cooley](#), #07-56055, 552 F.3d 1072 (9th Cir. 2009), cert. denied, *Cooley v. Eng.*, #08-1571, 528 U.S. 1110 (2010), developed a five-part test for deciding when a public employee's speech had constitutional protection:

“(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.”

Showing that First Amendment protection for public employee whistleblowers is not a dead letter, an *en banc* panel of the 9th Circuit applying that test overruled a previous decision, [Huppert v. City of Pittsburg](#), #06-17362, 574 F.3d 696 (9th Cir. 2009) which held that an officer had no First Amendment protection from employer retaliation for his report of internal corruption to the FBI.

The court reasoned that, after *Garcetti*, courts must make a “practical” inquiry to determine the scope of a government employee’s professional duties and that *Huppert* erred in concluding that California broadly defines police officers’ duties as a matter of law for the purpose of First Amendment retaliation claims. The court also held that being placed on administrative leave, as the plaintiff was, could amount to an adverse employment action. The dismissal of the retaliation claim was therefore reversed. [Dahlia v. Rodriguez](#), #10-55978, 2013 WL 4437594, 735 F.3d 1060 (*en banc* 9th Cir. 2013), certiorari denied by *Burbank v. Dahlia*, #13-620, 2014 U.S. Lexis 1529.

In *Dahlia*, the plaintiff claimed that within days after he reported corruption in the Burbank Police Department (BPD) to the Los Angeles County Sheriff’s Department (LASD), he was placed on administrative leave with pay, in retaliation for his LASD report.

The *Dahlia* court reasoned that when a department member goes outside his or her chain of command to report corruption to an outside agency (or to the public media) that member acts as a “citizen” and not as an employee; therefore the First Amendment protects the member from retaliation within his employment on account of his “protected speech.”

- The *Dahlia* decision is covered in more depth in a previous article in this publication, [Blowing the Whistle on Police Corruption](#) by Michael P. Stone and Muna Busailah, 2013 (10) AELE Mo. L. J. 501.

❖ Suggestions to Consider

Here are some suggestions to consider in relationship to employee whistle blowing.

1. Departments and agencies should adopt policies and procedures that welcome employee whistle blowing that reports violations of the law and threats or dangers to

employees or public health and safety, as well as waste of public funds and resources.

2. Such policies and procedures must include clear mechanisms for bypassing immediate supervisors when they themselves are the ones committing the infractions. Those who engage in illegal actions, corruption, or endanger others understandably do not want their actions reported, but their actions are a corrosive force that immeasurably damages the functioning of a public safety department or agency and can sabotage its public relations and the cooperation of the public in carrying out its mission. Their actions can also potentially lead to immense civil liability.
3. Reports from whistleblowers should all be taken seriously and rigorously investigated in a manner that respects the legal and procedural rights and dignity of any employees accused of misconduct.
4. Such policies and procedures must take into account the appropriate provisions of federal or state statutes providing protection for whistleblowers, as well as the constitutional free speech rights of employees under the U.S. and state constitutions (state constitutional protections may, in some instances be broader than First Amendment protections, while in other jurisdictions they may interpret state free speech guarantees in “lockstep” with how federal courts have interpreted the First Amendment).
5. While whistle blowing based on a reasonable belief of illegal conduct or substantial danger should be encouraged, it is also important to have sanctions in place and enforced against those who make frivolous or knowingly/recklessly false reports or file reports maliciously for illegitimate personal motives. Reports made based on reasonable beliefs, however, even if they turn out upon investigation to be unfounded, should not be discouraged.

❖ Resources

The following are some useful resources related to the subject of this article.

- [Information on Whistleblower Protection Act and Whistleblower Protection Enhancement Act](#), U.S. Securities and Exchange Commission.
- [Know Your Rights When Reporting Wrongs](#), U.S. Office of Special Counsel.
- [Videos](#) on federal Whistleblower Rights and Protection, U.S. Office of Special Counsel.

- [Whistleblower Protection Act](#). Wikipedia article.
- [Whistleblower Requirements and Protection](#). AELE Case Summaries.

❖ **Prior Relevant Monthly Law Journal Articles**

- [Blowing the Whistle on Police Corruption](#), 2013 (10) AELE Mo. L. J. 501.
- [Code of Silence Litigation - Officer Use of Force](#), 2013 (1) AELE Mo. L. J. 101.

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- [Blowing the Whistle: Barriers to Federal Employees Making Disclosures](#),” Office of Policy and Evaluation of the Merit Systems Protection Board ((November 2011).
- [Whistleblower Protections for Federal Employees](#), Merit Systems Protection Board (2010).
- [Be Prepared Before You Blow the Whistle: Protection Under State Whistle-blowing Laws](#), by Patricia A. Patrick, Fraud Magazine (September/October 2010).
- [Prohibited Personnel Practices](#), Merit Systems Protection Board (June 2010).
- [An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements](#), by Gerard Sinzduk, 96 Cal. L. Rev. 1633 (2008).
- [The \(Federal\) Whistleblower Protection Act: An Overview](#), Congressional Research Service Doc. RL33918 (Mar. 2007).

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