
MEMORANDUM

TO: COMMISSION
FROM: K FLACK
SUBJECT: WHISTLEBLOWER CODE
DATE: MARCH 31, 2015

BACKGROUND

The City’s Whistleblower Protection Code requires an employee to file a written retaliation complaint with the Commission. The Executive Director determines whether the complaint is sufficient. A sufficiency finding is necessary for a retaliation complaint to move forward under the City ordinance.

One element of the sufficiency determination requires an employee fit the definition of a “Cooperating Employee.” The Code defines the term “Cooperating Employee,” as “a City employee who in good faith makes a report of alleged improper governmental action ...” “Good faith” means the reporting individual has a reasonable basis in fact for reporting the information.

ISSUE

The definition of good faith seems to clearly include an employee who is mistaken about the facts, but has a reasonable basis to believe those facts to be true. It is not so clear about whether (and if so when) an employee who is mistaken about the law is also protected as a Cooperating Employee.

LAW

An employee alleging retaliation must file a sufficient complaint with the Executive Director. A sufficient complaint contains five elements:

A. Complaint—alleging retaliation

...

3. Contents of the complaint. The complaint alleging retaliation must state:
 - a. The adverse change or changes alleged to be retaliation and the date or dates it occurred;

- b. The person or persons responsible for the adverse change or changes;
- c. **The conduct undertaken** or the conduct perceived to have been undertaken **by the employee that establishes the employee as a cooperating employee;**
- d. The relief the employee is requesting;
- e. If the protected conduct is based on an employee's report to a person other than the Executive Director, some independent evidence that a report was made on a specific date and some evidence of its content; and
- f. Whether the complainant has filed an action in any other forum based upon the same conduct.

SMC 4.20.860 (emphasis added).

“Employee right, responsibilities and limitations

A. Rights

Every employee shall have the right to report in good faith pursuant to this subchapter an assertion of improper governmental action and shall be free from retaliation.

SMC 4.20.810

“Improper governmental action”

A. Improper governmental action means any action by an employee that is undertaken in the performance of the employee's official duties, whether or not the action is within the scope of employment, that:

1. Violates any federal, state, county or City statute, ordinance or rule;
2. Creates a substantial or specific risk of serious injury, illness, peril, or loss, that is a gross deviation from the standard of care or competence that a reasonable person would observe in the same situation;
3. Results in a gross waste of public funds or resources; or
4. Prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification, unless disclosure is legally prohibited. This provision is not meant to preclude the discretion of agency management to adopt a particular scientific opinion or technical finding from among differing opinions or technical findings to the exclusion of other scientific opinion or technical findings.

B. Improper governmental action excludes personnel actions, including but not limited to: employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, reprimands, violations of collective bargaining or civil service laws, or alleged violations of agreements with labor organizations under collective bargaining, or any action that may be taken under RCW Chapters 41.08, 41.12, 41.14, 41.56, 41.59, or 53.18 or RCW 54.04.170 and 54.04.180.

SMC 4.20.805.

ILLUSTRATIVE SCENARIO

A City employee working as a gardener in park maintenance observes two large street sweeper trucks dump “street waste” into a bin labelled “clean green.” Employees

normally segregate “clean green” and “street waste” in two side by side bins. “Clean green” is destined for a local compost manufacturing company after collection by parks maintenance employees. It consists of compostable materials gathered in the City parks and gardens. The employee is concerned that comingling the materials violates environmental regulations. The employee reports their concern that comingling the waste may violate environmental regulations to the crew chief. They point out to the crew chief the department’s notebook entitled, “Environmental Policy and Law.” The book instructs employees that street sweeper waste is garbage because it contains unknown and possible hazardous materials. The crew chief ignores the report. Alarmed that hazardous materials will be disposed of illegally, the employee reports the concern to his Manager. The Manager informs the employee that comingling of street sweeper waste with “clean green” is not a violation of state or federal law, only departmental policy. Over the next four months the crew chief omits the reporting employee from the overtime roster and delivers a bad performance review resulting in the employee not receiving a step raise. The employee files a retaliation complaint based on his good faith report of what they believed to be improper governmental action – a “violation of any federal, state, county or City statute, ordinance or rule.”

QUESTION

When does an employee making a good faith assertion of what they mistakenly believe to be improper governmental action qualify as a Cooperating Employee?

DISCUSSION

State law and Federal law have starkly different answers to this question.

State law requires an investigation of reported improper governmental action before an employee can file a retaliation claim.

Washington State employees may file a successful retaliation complaint *only* if their report of improper governmental action results in an investigation by the State Auditor. State employees may report improper governmental action inside their agency and State law requires

the agency to forward the report to the State Auditor's Office,¹ the only entity empowered to conduct a Whistleblower investigation.² A report based on a good faith but mistaken belief of what constitutes improper governmental action would not be investigated.

In our scenario, if the State standard were adopted, the employee's good faith but mistaken report would not lead to an investigation and the employee would not qualify as a Cooperating Employee. The employee would have no recourse under the City's Whistleblower Code for the alleged retaliation.

Federal law allows more flexibility.

Federal case law³ under Sarbanes-Oxley Act (SOX) applies an "objectively reasonable" test to evaluate retaliation suits brought under SOX. SOX prohibits retaliation if an employee:

...Provide(s) information ... regarding any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C] section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders ...⁴

Case law requires a protected report to show:

- 1) The communication definitely and specifically related to one of the listed SOX categories;
- 2) The report was based on an objective and reasonable belief of a violation; and,
- 3) The reporter had a subjective belief that the conduct being reported violated a listed law.

In Van Asdale, two gaming corporations, IGT and Anchor, engaged in merger negotiations. Anchor's major asset during merger negotiations was a patent. During due diligence Anchor employees found a competing patent raising questions regarding the Anchor valuation and reported this to Anchor executives. Anchor employees did not disclosed the competing patent and Anchor successfully merged into IGT. Later, Lena and Shawn Van

¹ To qualify as a Whistleblower, an employee's concern must result in the initiation of an investigation by the State auditor. RCW 42.40.020(10)(a)(i).

² State departments must have designated individuals to whom employees can make Whistleblower reports. Within 15 days of receiving a report, the department must communicate that report to the Auditor. RCW 42.40.040

³ Van Asdale v. International Gaming Technology, 577 F.3d at 1066 (9th Cir, 2009)

⁴ 18 U.S.C. § 1514A (a)(1)(C). (Emphasis added).

Asdale, IGT lawyers who had previously been with Anchor, reported to the post-merger executive team that some Anchor executives had known about the competing patent prior to the merger, had not disclosed it, and as a consequence IGT may have been misled regarding Anchor's valuation. This discussion with IGT's post-merger executive team included prior Anchor executives. A few months after the discussion, both Van Asdales were fired.

The couple sued IGT under SOX, on the theory that their dismissals were retaliation for reporting possible violation of securities laws.

The court found the Van Asdale reports definitively and specifically related to shareholder fraud and the Van Asdale had an objectively reasonable belief that non-disclosure of the competing patent was a material omission during merger negotiations, a transaction covered by the Securities Act.

Lastly, the Court found that subjectively, given the lack any showing of bad faith, the Van Asdales reasonably believed the non-disclosure could be a law violation.

Allen v. Administrative Review Board,⁵ an opinion adopted by the Ninth Circuit, protects good faith reports that mistakenly report what an employee thought would fit under SOX, if the "reasonable but mistaken belief that an employer violated some provision of Federal law relating to fraud is objectively reasonable." ... "[O]bjective reasonableness ... is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." (Citations omitted).

In Allen, the terminated employee was the company accountant. The court upheld the administrative dismissal of her retaliation complaint using the objectively reasonable test:

"Because she is a licensed CPA, the objective reasonableness of [the terminated employee's] belief must be evaluated from the perspective of an accounting expert. [The terminated employee] knew that the internal consolidated financial statements for the Central Division, which she alleged did not comply with SAB-101, were not financial statements submitted to the SEC. [The terminated employee] testified that she knew these internal financial statements did not need to be SAB-101 compliant."

⁵ Allen v. Administrative Review Board, 514 F3d. 468, 478 (5th Cir. 2008)

In our scenario, applying the Federal test, the City employee's mistaken report would likely qualify them as a Cooperating Employee and allow them to proceed under the Whistleblower ordinance.

- The communication definitely and specifically related to a violation of local, state and federal laws; those surrounding the disposal of hazardous waste.
- The employee's report had a reasonable basis in fact, leading him to subjectively believe that a violation may be occurring and,
- A reasonable person could find the report of possible "improper governmental action," ("violates any federal, state, county or City statute, ordinance or rule) to be both an objective and a reasonable belief based on the facts known to the employee: the department wide information entitled, "Environmental Policy and Law; the departmental policy of segregating the waste; separate disposal plans; and, his experience and knowledge as a professional gardener.

Recommendation:

The Commission should adopt the Van Asdale standard.

An employee making a good faith report of what they mistakenly believe to be improper governmental action is a Cooperating Employee if:

- a. A reasonable person would find that the employee's mistaken report of improper governmental action was objectively reasonable based on the knowledge available to a reasonable person in the same factual circumstances with the same or similar training and experience as the reporting employee:⁶ and,
- b. The reported improper action definitely and specifically relates to one of the four definitions of improper governmental action.⁷

⁶ Per Van Asdale: A subjective belief that the conduct being reported violated a listed law and this belief must be objectively reasonable.

⁷ Per Van Asdale: An employee's communication must definitely and specifically relate to one of the list SOX violations.