

Police Officer or Deputy City Attorney as Whistleblower

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Presentation Outline

1. Recognizing Whistleblower Activities
2. Freedom of Speech
3. Determining Whether Police Officer's Speech Is Protected



Presentation Outline

4. Attorney-Client Privilege Issues When In-House Counsel Sues For Whistleblower Retaliation
5. Responding Appropriately To Whistleblower Activity



Recognizing Whistleblower Activities

California Whistleblower Statutes

Labor Code § 1102.5
(amendment effective January 1, 2014)



Recognizing Whistleblower Activities

California Whistleblower Statutes

- California Occupational Safety and Health Act of 1973 (“Cal/OSHA”)
- Fair and Employment Housing Act (“FEHA”)



Elements of Whistleblower Claim

For a *prima facie* case of retaliation, the plaintiff employee must:

- Report suspected unlawful activity; or
- Oppose an employer's unlawful practice; or
- Refuse to participate in unlawful activity.



Elements of Whistleblower Claim

If the plaintiff establishes a *prima facie* case of retaliation, the employer must show it had a legitimate, non-retaliatory reason for the adverse action.



Case Study – Attorney’s Speech

- Amy is a new deputy city attorney with no labor and employment law experience.
- She noticed the city does not pay overtime to police officers who work more than 8 hours in a day. She believes this practice violates the Labor Code, thus, she reported her concern to the Chief.
- Did Amy engage in protected speech?



Case Study – Officer's Speech

- * Officer Tyler reports to his Field Training Officer his concern that another police officer was rude and disrespectful to the police dispatcher in violation of Department policy on employee conduct.
- * Did Tyler engage in whistleblower activity?



Freedom of Speech

- When a public employee speaks as a private citizen on matters of public concern, he/she is potentially engaging in speech protected under the First Amendment.



Serious Consequences of Whistleblower Lawsuits

- * Reinstatement
- * Damages, e.g., Backpay
- * Special damages
- * Punitive damages
- * Litigation costs
- * Interest
- * Attorneys' fees
- * Imprisonment in county jail
- * Monetary fine



Freedom of Speech

Public employees who make statements pursuant to their official duties are not entitled to First Amendment protection.

Garcetti v. Ceballos (2006) 547 U.S. 410,
421-422.



Case Study – Public Concern

- Officer Paul speaks at a city council meeting. He claims that two accidents could have been prevented if the budget was not drastically cut.
- Paul states the council's budget cuts resulted in serious physical injuries during the accidents.
- Did Paul speak on a matter of public concern?



Case Study – Public Concern

- Deputy City Attorney Tammy sent a disposition memo to dismiss a criminal case when she learned the arresting police officer did not book into evidence all of the narcotics confiscated from the arrestee, and the officer did not explain why some was missing.
- Tammy was later given a written reprimand for her disposition memo.
- Did Tammy engage in protected speech?



Case Study – Public Concern

- Sergeant Henry files grievance against Captain Greg claiming hostile work environment because the captain is “very autocratic, controlling and critical.”
- He claims the captain’s approach is destroying the morale and confidence of the police officers.
- Did Henry speak on a matter of public concern?



Determining Whether a Police Officer's Speech Is Protected

- Was the communication confined to the officer's chain of command?
- Was the communication made pursuant to the police officer's job duties?
- Did the police officer speak in direct contravention to supervisor's orders?

Dahlia v. Rodriguez (9th Cir. 2013) 735 F.3d 1060.



Determining Whether a Police Officer's Speech Is Protected

- (1) Did the employee speak on a matter of public concern?
- (2) Did the employee speak as a private citizen or public employee?
- (3) Was the employee's protected speech a substantial or motivating factor in the adverse action?



Determining Whether a Police Officer's Speech Is Protected

- (4) Did the Agency have an adequate justification for treating the employee differently from the general public?
- (5) Would the Agency have taken the adverse employment action even absent the protected speech?

Hagen v. City of Eugene (9th Cir. 2013) 736 F.3d 1251, 1257.



Case Study - Police Officer's Speech

- Detective Joe expressed to Commander Alison his disagreement with the Police Chief's decision to transfer his partner to another division.
- Joe later received a written reprimand for inconsequential matters for which other detectives were not reprimanded.
- Did Joe engage in protected activity?



Case Study - Police Officer's Speech

- Police Officer Terrence notes on 10 different incident reports that a fence surrounding a construction site is unsafe and nearby residents have complained. Nothing is done.
- Terrence thus writes to the mayor and the local newspaper about the dangerous condition.
- Has Terrence engaged in whistleblower activity?



Case Study - Police Officer's Speech

- Gene is a sworn investigator. He discusses with the director of human resources the city's practices regarding background investigations.
- Gene expresses concern that certain tactics may be unlawful, but he is unsure.
- Did Gene engage in protected activity?



Attorney-Client Privilege Issues When In-House Counsel Sues For Whistleblower Retaliation

Rules of Professional Conduct of the State Bar of California

Rule 3-600, Organization as Client, provides:

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.



Protection of Attorney-Client Privileged Information

- * Sealing and protective orders
- * Limiting the admissibility of evidence
- * Orders restricting the use of testimony in successive proceedings
- * *In Camera* proceedings

General Dynamics Corp. v. Superior Court (Rose)
(1994) 7 Cal.4th 1164, 1191.



Protection of Closed Session Communications With Counsel

Roberts v. City of Palmdale
(1993) 5 Cal.4th 363.



Protection of Closed Session Communications With Counsel

“Primary Purpose” test

North Pacifica, LLC v. City of Pacifica (N.D. Cal. 2003) 274 F.Supp.2d 1118.

Larson v. Harrington (E.D.Cal.1998) 11 F.Supp.2d 1198.



Responding Appropriately to Whistleblower Activity



Responding Appropriately

What is an Adverse Action?



Adverse Actions

- Discharge
- Threatening to Discharge
- Demotion
- Suspension
- Written Reprimand
- Counseling Memorandum
- Failing to Promote



Adverse Actions

- Elimination of the Employee's Position
- Loss of Pay
- Refusing to Follow up on an Employee's Complaints
- Negative Performance Evaluation
- Changing Job Duties
- Paid Administrative Leave



Responding Appropriately

**Ensure No Retaliatory Intent
for the Adverse Action**



Responding Appropriately

- Employee Has **Low** Burden of Proof:
Preponderance of the Evidence
- Employer Has **High** Burden of Proof:
Clear and Convincing Evidence



Questions?

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