Protections for Public Employees Who 'Blow the Whistle" Appear to Be Inadequate

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There can be little doubt about the importance and value of public employees willing to “blow the whistle” on governmental employers or supervisors who are engaged in corruption, a violation of law or an act threatening health and safety. Misrepresentations and misdeeds by governmental officials that can affect domestic or foreign policy frequently come to light through the courageous disclosures of these individuals. In the private sector, corporate malfeasance rarely would be exposed without the willingness of employees to communicate with regulators.

This is recognized in state and local legislation designed to protect these whistleblowers, as well as by judicial and administrative determinations. However, a review of existing statutes and case law shielding public employees from retaliation for this kind of activity demonstrates that this protection remains inadequate, and may not be sufficient to allay the natural and inherent fear of reprisal felt by most employees.

The Basic Antiretaliation Statute, Civil Service Law § 75-b

In 1984, the Legislature enacted Civil Service Law § 75-b, which grants public employees protections against retaliation for engaging in various forms of whistleblowing. One of the primary purposes of this legislation was to assure public employees that they would not face retaliation if they disclosed certain information to another governmental entity. A whistleblowing claim can be raised as a defense during disciplinary proceedings, can form the basis for a contract grievance or can be the predicate for a claim made in court in certain limited circumstances. Two decades later, and as is discussed below, it is questionable whether the statute has fulfilled its purpose.

Generally speaking, the law prohibits retaliatory action by public employers against public employees, but this, as noted, applies to information reported within government only. Significantly, Civil Service Law § 75-b does not provide any protections against retaliation for public employees who disclose governmental misconduct or perceived misconduct to members of the media. Nevertheless, the type of disclosure that is protected under the statute is broad. Unlike its private sector counterpart, Labor Law § 740, Civil Service Law § 75-b is not limited to the reporting of health and safety violations that present a substantial and specific danger to the public health and safety. The latter protects public employees who have no more than a reasonable belief that the conduct about which he or she complains constitutes some form of a violation of law, rule or regulation by the public employer. By contrast, under Labor Law § 740 the employee must be able to prove that the complaints were in response to an actual health and safety violation of a law, rule or regulation by the private employer.

The narrow substantive protections and procedures for private sector employees contained in the Labor Law reflect the continuing reluctance by the state Legislature and the courts to eliminate the common law employment-at-will doctrine. The at-will doctrine is premised on the arguably antiquated idea that the employer-employee relationship is created through a freely negotiated agreement between the employer and employee, and may be terminated by either party. The doctrine leads to a strict construction of the applicable statutes, resulting in limited procedural and substantive protections for those private sector and public sector whistleblowers who lack contractual or statutory tenure protections.

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Despite the differences between Civil Service Law § 75-b and Labor Law § 740, courts continue to confuse their substantive standards when considering a whistle-blower claim by public employees. This confusion may be the result of a decision by the Legislature, some 20 years ago, to make Labor Law § 740 procedures applicable to plenary actions commenced pursuant to Civil Service Law § 75-b(3)(c).

Employee’s Preliminary Notification Requirements

Civil Service Law § 75-b(2)(a) prohibits public employers from terminating or taking an adverse personnel action against a public employee because the employee disclosed information to a governmental body regarding

a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or . . . which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.

Civil Service Law § 75-b(2) broadly defines “improper governmental action” to include any action “which is in violation of any federal, state or local law, rule or regulation.”

Before reporting this information to another governmental agency, however, the public employee must make a good faith effort to provide the public employer with the information to be disclosed, and must give the employer a reasonable time to “take appropriate action, unless there is an imminent and serious danger to public health or safety.” Although the statute requires the employee to engage in this pre-disclosure notification, it does not require public employers to issue policies, or to conduct training identifying the appropriate procedure to be followed regarding such notification. This is problematic, because courts have been applying the notification requirement strictly.

The failure to follow the notification procedure before going to another governmental agency can be fatal to a Civil Service Law § 75-b claim challenging an employer’s retaliatory action. Furthermore, reporting of the misconduct to the supervisor who allegedly engaged in the misconduct is insufficient to satisfy the pre-disclosure requirement under Civil Service Law § 75-b(2)(b).

In Brohman v. New York Convention Center Operating Corp., the First Department affirmed the granting of summary judgment dismissing a Civil Service Law § 75-b claim based on the failure of the plaintiff to make a good faith effort to notify the appointing authority or its designee of the information to be disclosed. The court stated that the appointing authority for the agency was the board of directors and its designee was its president and chief executive officer. Although the plaintiff had spoken with a vice-president as both a friend and sounding board, the First Department concluded that this conversation was insufficient to meet the statutory pre-disclosure notice requirement. Decisions such as Brohman demonstrate that notwithstanding the need to adhere strictly to the statute, the ability of a state employee to provide proper pre-disclosure notification is frequently complicated by a general lack of clarity as to who or what is the appointing authority or its designee for a particular agency.

The timing of the pre-disclosure notice can also be fatal. The dismissal of a Civil Service Law § 75-b claim by a terminated probationary pharmacy employee was affirmed by the Appellate Division, Third Department based on an admission in the pleadings that the employee had contacted outside agencies regarding alleged violations “the next day” after he had communicated his concerns to his supervisors. The Appellate Division concluded that the petitioner had failed to grant his supervisors a reasonable amount of time under Civil Service Law § 75-b(2)(b) to investigate and correct the problem.

The confusion regarding the pre-disclosure obligation is compounded in state employment. Under Executive Order 5.39, issued by Governor George Pataki, every state officer or employee must report promptly to the New York State Inspector General’s Office “any information concerning corruption, fraud, criminal activity, conflicts of interest or abuse by another state officer or employee relating to his or her office or employment, or by a person having business dealings with a covered agency relating to those dealings.” Unlike Civil Service Law § 75-b, the Executive Order does not require pre-disclosure notification to an agency’s appointing authority prior to contacting the New York State Inspector General’s Office.

Reporting the information to the Inspector General’s Office is not a perfect cure for an employee worried about retaliation.
Making Out a Retaliation Claim or Defense

Assuming that the pre-disclosure notification aspects of the statute have been satisfied, the next question is how an employee can assert a claim if he or she is the subject of retaliation for whistleblowing.

As noted, Civil Service Law § 75-b(2) prohibits public employers from taking an adverse personnel action against a public employee who engages in protected conduct under the statute. Pursuant to Civil Service Law § 75-b(1)(d), the phrase “personnel action” is defined as “an action affecting compensation, appointment, promotion, transfers, assignments, reinstatement or evaluation of performance.”

The cases are fact-specific with regard to what constitutes an adverse personnel action. The Fourth Department has held that a public employer’s actions aimed at precluding an employee from appointment from a civil service preferred eligibility list constituted retaliatory “personnel action” as defined in Civil Service Law 75-b(1)(d). On the other hand, statements made by a member of a county board of supervisors to a county manager that he intended to offer a board resolution seeking the county manager’s resignation or non-appointment was found insufficient to constitute an “adverse personnel action” actionable under Civil Service Law § 75-b.

Satisfying the burden of proof can be difficult. In order to establish a Civil Service Law § 75-b claim, § 75-b(3)(a) provides that a public employee must establish that “but for” the protected activity, the adverse personnel action by the public employer would not have occurred. Accordingly, a Civil Service Law § 75-b claim will not be sustained where the public employer demonstrates a separate and independent basis for the adverse personnel action. Without proof that a termination resulted solely from the protected activity, the disciplinary action will not be disturbed.

This standard, as applied by the courts, is more stringent than the burden of proof in a whistleblower claim brought under the First Amendment, or a retaliation claim commenced under Title VII, 42 U.S.C. § 2000e-3(a). In a recent decision, Judge Scheindlin of the Southern District questioned whether a private sector whistleblower suing his or her former employer in a Labor Law § 740 lawsuit had the burden to establish causation.

Forums, Procedures for § 75-b Claims Can Be Impediments to Employees

When a public employee is subjected to disciplinary action under the procedures of Civil Service Law § 75, or any other procedure under state or local law, the only forum for raising the statutory whistleblower defense is the administrative disciplinary hearing or arbitration. If a collective bargaining agreement contains a provision prohibiting the employer from taking improper adverse personnel actions, and has a provision calling for final and binding arbitration, a public employee can challenge what is claimed to be a retaliatory personnel action through the grievance arbitration mechanism under Civil Service Law § 75-b(3)(b).

Pursuant to Civil Service Law § 75-b(3)(a), disciplinary arbitrators and administrative hearing officers must rule on the merits of the statutory defense in the arbitration award or hearing officer decision.

The statutory requirement that a Civil Service Law § 75-b whistleblower claim must be presented in the context of a disciplinary arbitration or a disciplinary administrative hearing is problematic for a variety of reasons.

Although unlawful discrimination and retaliation are “accomplished usually by devious and subtle means,” most statutory and contractual disciplinary procedures do not provide the employee with an opportunity to conduct discovery, nor provide sufficient time to gather the necessary evidence to prove the employer’s unlawful motivation. Even a public employee’s ability to compel the production of documents through a subpoena duces tecum is constrained by the CPLR requirement that such subpoenas be court ordered.

In addition, evidence gathering to prove the retaliatory motive is difficult because employees often are suspended during the disciplinary process. Many collective bargaining agreements permit employers to suspend the employee without pay pending the final outcome of disciplinary charges. Similarly, Civil Service Law § 75(3) permits the employer to suspend the employee for 30 days upon issuance of disciplinary charges, without having to provide any justification. If the employee is unable to proceed with the hearing within 30 days, the
employee can remain on suspension until the conclusion of the case.

Finally, and although Civil Service Law § 75-b rights have existed for close to 20 years, many arbitrators and hearing officers simply remain unfamiliar and untrained regarding the statutory whistleblower protections for public employees.

The value of being able to raise a Civil Service Law § 75-b defense in a Civil Service Law § 75 proceeding is substantially undermined by the fundamental inequality of the parties’ positions: the public employer issues the charge and is the final decision maker of both the disciplinary charges and the whistleblower defense. In essence, under Civil Service Law § 75-b(3)(a), the employer has the final statutory authority to determine whether or not it was unlawfully motivated.

Relatedly, public employees fighting a § 75 disciplinary charge face yet another major obstacle when raising a whistleblower defense: the lack of a neutral hearing officer. Under the statutory scheme a public employer has wide discretion in selecting a hearing officer, and is not mandated to select a neutral individual. Although the Legislature has passed bills in three legislative sessions in the past decade which would have required public employers to utilize independent hearing officers during Civil Service Law § 75 hearings, they were vetoed by Governors Cuomo and Pataki. Despite the continuing lack of independent hearing officers in disciplinary proceedings, credibility determinations by such hearing officers regarding the motivation for, and the substance of, the disciplinary charges are granted great deference by a reviewing court.

**Administrative Remedies Limited**

Even if the employee is successful in establishing a whistleblower defense, the permissible remedies in an administrative or arbitral forum are quite limited. An arbitrator or Civil Service Law § 75 hearing officer who determines that the disciplinary action or proposed disciplinary action was based solely on conduct protected by Civil Service Law § 75-b can recommend to the employer only the dismissal of the disciplinary charges, and, if appropriate, reinstatement of the employee with back wages. A prevailing employee is not entitled to be reimbursed for his or her attorney fees and costs, nor is the employee entitled to receive compensatory or punitive damages.

An exception concerns school employees. Teachers and administrators subject to discipline under Education Law § 3020-a may be eligible for the granting of attorney fees and costs if the hearing officer determines that one or more of the disciplinary charges were frivolous.

In the context of a disciplinary arbitration under a collective bargaining agreement, there is statutory authority for the arbitrator to “take other appropriate action as is permitted in the collectively negotiated agreement.” Similarly, when determining a non-disciplinary grievance asserting a violation of Civil Service Law § 75-b, an arbitrator may “take such action to remedy the violation as is permitted by the collectively negotiated agreement.” This is of limited value, however. Few, if any, collective bargaining agreements contain provisions granting arbitrators additional remedial powers related to protected activities under Civil Service Law § 75-b. Moreover, the statute is also unclear as to whether an arbitrator has the inherent authority to refer the matter to the New York State Inspector General’s Office or another appropriate agency.

**Court Proceedings for Certain Employees**

Pursuant to Civil Service Law § 75-b(3)(c), public employees who lack protection under a collective bargaining agreement, Civil Service Law § 75, or other state or local law, have the same rights as private employees to commence a whistleblower lawsuit in a court of competent jurisdiction – but with the same limitations set forth in Labor Law § 740. These workers – who may be, for example, probationary or provisional – are entitled to commence an Article 78 proceeding or plenary action asserting a Civil Service Law § 75-b(3)(c) claim. Unlike Article 78 proceedings seeking judicial review of disciplinary action imposed following an administrative hearing, litigation brought by these otherwise unprotected public employees requires the trial court to determine all the factual and legal questions presented.

Under Labor Law § 740(5), courts can order a successful Civil Service Law § 75-b plaintiff the following
forms of relief: injunction; reinstatement to the same or similar positions; back wages and benefits; seniority; and reasonable costs and attorney fees. Punitive damages and compensatory mental anguish damages are unavailable to a successful plaintiff, however. Recovery for loss of anticipated lost wages, anticipated lost overtime compensation and the value of anticipated lost benefits also are unavailable.

Notwithstanding the ability to recover costs and attorney fees, the other limitations, along with the strict waiver provision of Labor Law § 740(7), discussed below, can discourage public employees who do not have tenure protections from reporting governmental misconduct. If they fear retaliation, they may be unwilling to waive all other possible statutory claims, and as a practical matter few have the resources to fund prolonged litigation.

If they do go forward in court, decisional law indicates that while a whistleblower claim may be able to survive a motion for summary disposition in the employer’s favor, ultimate success is at best uncertain.

In an Article 78 proceeding brought pursuant to Civil Service Law § 75-b(3)(c), the Second Department held that if affidavits present a material issue of fact regarding the public employer’s motivation, the public employee is entitled to a trial. In Sisson v. Lech, the Fourth Department reversed a directed verdict in favor of a public employer in a Civil Service Law § 75-b lawsuit brought by a terminated provisional employee. During the trial, evidence was presented that the termination was related to the fact that the employee reported that his superior was acting in an improper manner to the public employer’s motivation.

In Garrity v. University at Albany, the Appellate Division, Third Department affirmed the dismissal of the Civil Service Law § 75-b claim, but reversed the dismissal of the petitioner’s alternative claim under CPLR article 78 that his discharge was the result of bad faith. The appellate panel concluded that a trial was necessary because the probationary employee had not received an evaluation until his termination, his termination occurred simultaneously with the investigation triggered by his complaints, and the employer had failed to submit any documentary evidence supporting its assertion that the employee had been insubordinate.

A public employer’s motion for summary judgment in a Civil Service Law § 75-b was denied when the employee presented sufficient facts, including an alleged threatening comment by her supervisor, to support her claim that she was terminated for complaining about the misuse of grant monies for partisan political purposes. In addition, the employee was able to demonstrate temporal proximity between her termination and her request for whistleblower status from the municipal investigatory agency.

On the other hand, summary judgment was granted to a public employer in a federal court claim brought under the Civil Service Law when the plaintiff was unable to establish that her reassignment was retaliatory, or related to the complaints reported to the employer by the employee’s mother.

Specific Issues in Court Proceedings

A number of important procedural issues must be carefully examined before commencing a plenary court action or proceeding under Civil Service Law § 75-b or Labor Law § 740.

Whether a Civil Service Law § 75-b plaintiff or petitioner is entitled to a jury trial is open to question. In Scaduto v. Restaurant Associates Industries, Inc., the Appellate Division, First Department concluded that a defendant’s motion to strike a plaintiff’s jury demand in a whistleblower lawsuit should have been granted because the remedies permitted under Labor Law § 740(5) are all equitable in nature.

There may be subject matter jurisdiction limitations on pursuing a whistleblower claim against particular public employers. It has been held that lawsuits against the state of New York under Civil Service Law § 75-b(3)(c) cannot be litigated in federal court because Civil Service Law § 75-b does not constitute a waiver of New York’s sovereign immunity under the Eleventh Amendment to the U.S. Constitution. Rather, a Civil Service Law § 75-b court action or proceeding against the state of New York must be litigated in New York State Supreme Court. The Court of Claims lacks subject matter jurisdiction over such claims.

Civil Service Law § 75-b(3)(c) claims can, however, be litigated in federal court as a pendent claim. Nevertheless, some District Court judges are reluctant to rule on a pendent Article 78 proceeding that sets forth a Civil Service Law § 75-b claim.

It also is possible that the claim will be dismissed based on that familiar municipal defense – failure to serve a notice of claim. Courts have ruled that a notice of claim is a procedural prerequisite for the commence-

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ment of a court action under Civil Service Law § 75-b against certain political subdivisions. In Ringle v. County of Onondaga, the Appellate Division held that an action or Article 78 proceeding regarding an alleged violation of Civil Service Law § 75-b will be dismissed if a notice of claim has not been filed pursuant to Municipal Law § 50-a and County Law § 52.

The waiver of the plaintiff’s other legal rights by commencing a state statutory whistleblower lawsuit is another important consideration. Based on the draconian election of remedies provision contained in Labor Law § 740(7), a public employee waives the right to assert any other state law causes of action or contractual claims regarding the challenged adverse action by commencing such a lawsuit under Civil Service Law § 75-b. It also should be noted that the pursuit of a whistleblower claim in arbitration, through the service of a demand for arbitration, can constitute a waiver of the right to pursue a plenary cause of action.

Finally, estoppel or claim preclusion can become an issue. In De Cinto v. Westchester County Medical Center, the Second Circuit Court of Appeals suggested that a determination under Civil Service Law § 75-b should be granted collateral estoppel effect in subsequent First Amendment litigation. In Verbeek v. Teller, however, the District Court, presiding over a First Amendment lawsuit, denied an employer’s application for an order giving preclusive effect to a Civil Service Law § 75 hearing officer’s decision, which had rejected a whistleblower defense in a prior administrative proceeding. The court based its ruling on a finding that the burden of proof necessary to establish a Civil Service Law § 75-b defense is more stringent than the standards needed to establish a First Amendment claim based on the same facts.

In Hagemann v. Molinari, the District Court declined a request by a public employer to apply the doctrine of judicial estoppel to a plaintiff’s Civil Service Law claim, based on what the employer claimed were inconsistent allegations made by the plaintiff in a related state court defamation action. The court found that prior assertions were not sufficiently adopted by the state court.

In rendering a determination regarding estoppel, a court may also look at the quality of the prior proceedings. The Appellate Division, Third Department ruled that an administrative decision denying, without a hearing, an OSHA retaliation claim was not entitled to collateral estoppel in a subsequent state whistleblower action.

### Whistleblower Protection Under New York City Administrative Code


Pursuant to New York City Administrative Code § 12-113(b)(1), New York City mayoral and non-mayoral departments and agencies are prohibited from taking an adverse personnel action against an employee for reporting information or conduct that the employee knows, or reasonably believes, to involve corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority. Under the 2003 amendments, the term “adverse personnel action” is broadly defined to include disciplinary action, a denial of promotion and other forms of retaliation such as a negative performance evaluation, a loss of office space or equipment and an unwanted transfer or reassignment. The New York City Department of Investigation is granted primary jurisdiction to receive and investigate complaints of retaliation against city employees.

Permissible remedies for a violation of § 12-113(b)(1) include reinstatement to the position the employee held, or an equivalent position, with back wages; reinstatement of full seniority rights; and “other measures necessary to address the effects of the adverse personnel actions.”

An employee has limited procedural rights regarding court review, however. Unlike New York City Administrative Code § 8-502, which grants victims of employment discrimination the right to commence a plenary legal action in a court of competent jurisdiction, § 12-113 does not give victims of retaliation for whistleblowing such a right. Notwithstanding this restriction, § 12-113(f) provides that the statute should not be construed to limit the rights of an employee with regard to seeking judicial review of an adverse administrative determination (i.e., a CPLR article 78 proceeding).

The local law also provides some guidance for an investigation and follow-up. Pursuant to New York City Administrative Code § 12-113(b)(2), and upon the request of the complaining employee, those receiving the report of the alleged adverse personnel action are required to make reasonable efforts to protect the anonymity of the employee.

If the department’s investigation results in a determination that a retaliatory adverse personnel action has taken place, the Commissioner of Investigation is obligated to report the findings and recommendations to the appropriate agency head. After receiving the commissioner’s findings, the agency head must decide whether to take remedial action, and is required to report back to the commissioner regarding his or her decision. If the commissioner concludes appropriate remedial action has not taken place, the commissioner is authorized to
consult with the agency head and provide a “reasonable opportunity” for the agency to take appropriate action. If the agency continues to refuse to remedy the retaliation, the commissioner is authorized to submit the findings and the agency’s response to the mayor or, for non-mayoral agencies, to the officials or board that appointed the agency head.52

Unfortunately, New York City Administrative Code § 12-113 does not make any explicit reference to the substantive and procedural provisions contained in Civil Service Law § 75-b. In addition, it is silent regarding the role of the Commissioner of Investigation during the disciplinary administrative or arbitral process when an employee asserts a Civil Service Law § 75-b defense. Although it provides many important substantive protections, it falls short as a fully realized approach to whistleblower protection for the New York City workforce.

**Protections for Reporting “Improper Quality of Patient Care”**

In 2002, the Legislature enacted Labor Law § 741, which prohibits both public and private health care employers from retaliating against employees for disclosing, or threatening to disclose, to a supervisor or a public body, an employer’s activity, policy or practice that the employee believes, in good faith, constitutes “improper quality of patient care.”53 The law supplements, to some degree, the protections contained in Public Health Law § 2803-d, which are enforced through the New York State Department of Health.54

As with Civil Service Law § 75-b, Labor Law § 741(3) mandates that the employee present the improper patient care issue to the employer, and provide the employer with a reasonable opportunity to correct the activity, policy or practice, unless the employee has a reasonable belief that there is an imminent threat to public health or safety or to the health of a specific patient.

Pursuant to Labor Law § 741(1)(d), the phrase “improper quality of patient care” means, with respect to patient care, any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient.

Under Labor Law §§ 740(4)(d) and 741(4), enforcement of the substantive provisions of Labor Law § 741 is undertaken by the commencement of a lawsuit, which must be started within two years of the retaliatory action. However, because of the strict construction usually applied by state courts in interpreting whistleblower provisions, the difference between the procedures set forth in Civil Service Law § 75-b(3)(a) and Labor Law §§ 740(4) and 741(4) may result in unanticipated waivers of statutory protections by public employees. The procedure contained in Labor Law § 740 may be construed to prohibit a public employee from asserting a claim of retaliation based on the prior disclosure of improper quality of patient care as a defense during the disciplinary process, or the commencement of a plenary action under this section may lead a court to rule that the employee waived his or her right to assert a whistleblower defense in an arbitral or administrative forum.

**Protections for Union Whistleblowing Under the Taylor Law**

New York’s Public Employment Relations Board (PERB) has found that whistleblowing by a public employee in the context of union activity constitutes protected activity under the Taylor Law. In Hudson Valley Community College55 PERB held that a local union president’s filing of a complaint with the New York State Department of Labor regarding a health and safety hazard constituted protected activity under the Taylor Law. The board found that the employer had violated the Taylor Law by serving disciplinary charges under Civil Service Law § 75 against the unit president in retaliation for his filing the complaint with the Department of Labor.56

Nevertheless, reflecting the sometimes uncertain scope of the protection, PERB’s assistant director ruled in County of Ulster57 that a union representative’s comments regarding patient care at a county’s health care facility made to a newspaper reporter during an interview at the union’s office, was not protected by the Taylor Law, but may be protected by Civil Service Law § 75-b.

It should be noted that claims of retaliation for whistleblowing activities in a union context can be pursued as a defense in a Civil Service Law § 75 hearing without fear that it would impair a later improper labor practice charge against the public employer. Under the Taylor Law, PERB is prohibited from granting preclusive effect to any finding of fact or conclusion of law reached by a Civil Service Law § 75 hearing officer.58

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**Courts will grant greater weight to public employee speech regarding governmental misconduct than to other forms of public employee speech.**
Protection for Filing Complaint Under Public Employment Safety And Health Act (PESHA)

Retaliation against a public employee for filing a health and safety complaint with the New York State Department of Labor under the Public Employment Safety and Health Act (PESHA), Labor Law § 27-a(10), or for instituting any proceeding under PESHA, is prohibited.

A PESHA discrimination complaint should be filed within 30 days of the claimed retaliation. In *Hartnett v. New York City Transit Authority*, however, the Court of Appeals upheld the discretion of the Commissioner of the New York State Department of Labor to accept administrative complaints beyond the 30-day period.

Following receipt of a complaint, the commissioner will conduct an investigation and render a determination within 90 days. During PESHA complaint inspections of the workplace, employees are entitled to be represented by their union. If the commissioner determines that there has been a violation, he or she can request New York’s State Attorney General to bring an action in state court for injunctive and any other appropriate relief, including reinstatement of the employee with back wages. In *Hartnett*, the Court held that such an action must be commenced within three years, pursuant to CPLR 214(2).

First Amendment Protections For Whistleblowers

In addition to the statutory protections against retaliation for “blowing the whistle” on governmental misconduct, as discussed above, public employees have First Amendment rights to engage in free speech and association, which provide additional, if limited, protections.

Whistleblowing activity, like other forms of speech by a public employee under the First Amendment, will be weighed against the interests of the public employer under the *Pickering* balancing test established by the United States Supreme Court. First Amendment standards can work against the employee if his or her activity is too closely connected to a mere workplace dispute, rather than to the employee’s desire to protect the public. When the content and context of the whistleblowing activity involves the employee’s job performance, and is made at the workplace during a personal dispute with a supervisor regarding the performance of those duties, the speech may be deemed unprotected as not touching upon a matter of public concern.

On the other hand, in *Vasbinder v. Ambach*, the Second Circuit found that state supervisory staff had violated the First Amendment by demoting a vocational-rehabilitation employee for the employee’s reporting of overcharges and duplicative billing to police authorities. In *Hulbert v. Wilhelm*, the Seventh Circuit affirmed a judgment in favor of a public employee retaliated against for requesting an investigation regarding the open burning of allegedly toxic materials by the Highway Department. Disclosure of information regarding improper procedures of a municipal agency relating to building permits has been found by the Sixth Circuit to touch upon a matter of public concern because it relates to public safety, and hence is protected. Similarly, speech concerning fraud and misuse of government funds during a Medicaid fraud investigation was found to touch upon a matter of public concern.

It therefore may be seen that in applying the *Pickering* balancing test, courts will grant greater weight to public employee speech regarding governmental misconduct than to other forms of public employee speech. Nevertheless, in a given instance, even a high level official reporting such misconduct may find himself unprotected by the First Amendment.

Strengthening Protections For Whistleblowers

In view of the inherent risks to those employees who report wrongdoing on the part of employers, it is apparent that existing statutes and case law protecting whistleblowers in New York provide inadequate procedural protections and remedies. In order to fulfill New York’s public policy of encouraging public employees to make these kinds of disclosures, the statutory framework needs to be amended.

As a first step, an open discussion and debate regarding the continued reliance and viability of the common law at-will doctrine should be undertaken. Such a debate is warranted based on the substantial changes in our economy over the past two centuries. Although whistleblower laws may be remedial in nature, courts frequently construe the statutory provisions strictly because they are in derogation of this common law doctrine.

Even, and especially, if no change is made to this doctrine, modification of current procedural law can advance the expressed policy of the state. For example, all final determinations regarding claims of retaliation against whistleblowers made at the administrative level should be determined by a neutral party. At present, the authority given to a public employer or agency to, in effect, judge itself with respect to unlawful motivation and remedies under Civil Service Law § 75-b and New York City Administrative Code § 12-113 appears to be inconsistent with the general principle of checks and balances. This is compounded by the deference given by courts to findings made during Civil Service Law § 75 hearings, especially when whistleblowing is raised as a defense to the disciplinary action.
Further, the burdens of proof and available remedies should be reexamined. It is unclear that the Legislature intended to impose a more stringent burden of proof to make out a statutory whistleblower claim than what is necessary to establish an analogous First Amendment cause of action, yet it appears that employees face precisely that. In addition, if the intent of these laws is to deter retaliation by employers, perhaps employers should face more than having to pay back wages when a whistleblower is successful in demonstrating that he or she was punished for undertaking this protected activity.

The need for such additional remedies was understood by the Legislature in 2002 when it amended Labor Law § 740(4) to permit a court to order a civil penalty against an employer for retaliating against an employee for disclosing improper quality of patient care. In the public sector, arbitrators and hearing officers authorized to hear whistleblower claims also should be granted the power to impose penalties on an employer and to make appropriate referrals to appropriate outside authorities upon a finding that an employee has been retaliated against for whistleblowing.

Finally, the Legislature should consider modifying the current waiver provision contained in Labor Law § 740(7). By requiring employees to surrender all other possible statutory and contractual claims by the mere filing of a whistleblower lawsuit, this provision deters them from undertaking a court challenge to what they perceive to be retaliation for whistleblowing.

**Conclusion**

It takes courage for a person economically dependent on an employer to report that the employer is engaged in wrongful conduct. The people of this state, through their legislature, should insure that such employees are guaranteed adequate and fair legal protections and remedies when they decide to “blow the whistle” on their employers.

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9. 293 A.D.2d 299, 740 N.Y.S.2d 312 (1st Dep't 2002).
12. Id. at 1017.
21. CPLR 2307.
24. Education Law § 3020-a(4)(c).
28. These might also include those who are temporary or seasonal employees. Certain judicial employees also fall into this category. All may be represented by a union, but do not have protections as tenured employees.
33. 266 A.D.2d 858, 697 N.Y.S.2d 805 (4th Dep’t 1999).
34. 301 A.D.2d 1015, 755 N.Y.S.2d 471 (3d Dep’t 2003).


40. *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270 (2d Cir. 1996).


46. 821 F.2d 111, 116–17 (2d Cir. 1987).


52. N.Y.C. Admin. Code § 12-113(e).

53. Labor Law § 741(2) ("Lab. Law").

54. See 10 N.Y.C.R.R. § 81.8.


57. 34 PERB ¶ 4546 (2001).


64. 926 F.2d 1333 (2d Cir. 1991).

65. 120 F.3d 648 (7th Cir. 1997).


68. See *Dangler v. N.Y. City Off-Track Betting Corp.*, 193 F.3d 130 (2d Cir. 1999).


70. See McKinney’s Cons. Laws of N.Y., Book 1, § 304.

71. Lab. Law § 740(4)(d).