
SENATE BILL 5591

State of Washington

61st Legislature

2009 Regular Session

By Senators Kline, Pridemore, Fairley, and McDermott

Read first time 01/27/09. Referred to Committee on Government Operations & Elections.

1 AN ACT Relating to whistleblower protection; amending RCW
2 42.40.010, 42.40.020, 42.40.030, and 42.40.050; amending 2008 c 266 s
3 1 (uncodified); and adding a new section to chapter 42.40 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 42.40.010 and 1995 c 403 s 508 are each amended to
6 read as follows:

7 It is the policy of the legislature that employees should be
8 encouraged to disclose, to the extent not expressly prohibited by law,
9 improper governmental actions, and to fulfill legal and/or professional
10 obligations to report and disclose information arising from or as part
11 of job responsibilities. It is the intent of the legislature to protect
12 the rights of state employees making these disclosures. It is also the
13 policy of the legislature that employees should be encouraged to
14 identify rules warranting review or provide information to the rules
15 review committee, and it is the intent of the legislature to protect
16 the rights of these employees.

17 **Sec. 2.** RCW 42.40.020 and 2008 c 266 s 2 are each amended to read
18 as follows:

1 As used in this chapter, the terms defined in this section shall
2 have the meanings indicated unless the context clearly requires
3 otherwise.

4 (1) "Abuse of authority" means an arbitrary or capricious exercise
5 of, or willful failure to exercise, power that adversely affects the
6 rights of any person or that results in personal gain or advantage to
7 himself, herself, or other persons.

8 (2) "Auditor" means the office of the state auditor.

9 ((+2)) (3) "Employee" means any individual employed or holding
10 office in any department or agency of state government.

11 ((+3)) (4) "Good faith" means the individual providing the
12 information or report of improper governmental activity has a
13 reasonable basis in fact for reporting or providing the information.
14 An individual who knowingly provides or reports, or who reasonably
15 ought to know he or she is providing or reporting, malicious, false, or
16 frivolous information, or information that is provided with reckless
17 disregard for the truth, or who knowingly omits relevant information is
18 not acting in good faith.

19 ((+4)) (5) "Gross mismanagement" means the exercise of management
20 responsibilities in a manner grossly deviating from the standard of
21 care or competence that a reasonable person would observe in the same
22 situation.

23 ((+5)) (6) "Gross waste of funds" means to spend or use funds or
24 to allow funds to be used without valuable result in a manner grossly
25 deviating from the standard of care or competence that a reasonable
26 person would observe in the same situation.

27 ((+6)) (7)(a) "Improper governmental action" means any action by
28 an employee undertaken in the performance of the employee's official
29 duties:

30 (i) Which is a gross waste of public funds or resources as defined
31 in this section;

32 (ii) Which is in violation of federal or state law or rule, if the
33 violation is not merely technical or of a minimum nature;

34 (iii) Which is of substantial and specific danger to the public
35 health or safety;

36 (iv) Which is gross mismanagement; ((+))

37 (v) Which is an abuse of authority; or

1 (vi) Which prevents the dissemination of scientific opinion or
2 alters technical findings without scientifically valid justification,
3 unless state law or a common law privilege prohibits disclosure. This
4 provision is not meant to preclude the discretion of agency management
5 to adopt a particular scientific opinion or technical finding from
6 among differing opinions or technical findings to the exclusion of
7 other scientific opinions or technical findings. Nothing in this
8 subsection prevents or impairs a state agency's or public official's
9 ability to manage its public resources or its employees in the
10 performance of their official job duties. This subsection does not
11 apply to de minimis, technical disagreements that are not relevant for
12 otherwise improper governmental activity. Nothing in this provision
13 requires the auditor to contract or consult with external experts
14 regarding the scientific validity, invalidity, or justification of a
15 finding or opinion.

16 (b) "Improper governmental action" does not include personnel
17 actions, for which other remedies exist, including but not limited to
18 employee grievances, complaints, appointments, promotions, transfers,
19 assignments, reassignments, reinstatements, restorations,
20 reemployments, performance evaluations, reductions in pay, dismissals,
21 suspensions, demotions, violations of the state civil service law,
22 alleged labor agreement violations, reprimands, claims of
23 discriminatory treatment, or any action which may be taken under
24 chapter 41.06 RCW, or other disciplinary action except as provided in
25 RCW 42.40.030.

26 ~~((+7))~~ (8) "Matters of public concern" means matters of interest
27 to the community as a whole, whether for social, political, or other
28 reasons, and must include discussions that disclose any (a) evidence of
29 corruption, impropriety, or other malfeasance on the part of government
30 officials; (b) violations of law; or (c) incidence of
31 fraud, abuse, or gross mismanagement.

32 (9) "Public official" means the attorney general's designee or
33 designees; the director, or equivalent thereof in the agency where the
34 employee works; an appropriate number of individuals designated to
35 receive whistleblower reports by the head of each agency; or the
36 executive ethics board.

37 ~~((+8))~~ (10) "Substantial and specific danger" means a risk of

1 serious injury, illness, peril, or loss, to which the exposure of the
2 public is a gross deviation from the standard of care or competence
3 which a reasonable person would observe in the same situation.

4 ~~((+9+))~~ (11) "Use of official authority or influence" includes
5 threatening, taking, directing others to take, recommending,
6 processing, or approving any personnel action such as an appointment,
7 promotion, transfer, assignment including but not limited to duties and
8 office location, reassignment, reinstatement, restoration,
9 reemployment, performance evaluation, determining any material changes
10 in pay, provision of training or benefits, tolerance of a hostile work
11 environment, or any adverse action under chapter 41.06 RCW, or other
12 disciplinary action.

13 ~~((+10+))~~ (12)(a) "Whistleblower" means:

14 (i) An employee who in good faith reports alleged improper
15 governmental action to the auditor or other public official, as defined
16 in subsection ~~((+7+))~~ (9) of this section, initiating an investigation
17 by the auditor under RCW 42.40.040; or

18 (ii) An employee who is perceived by the employer as reporting,
19 whether they did or not, alleged improper governmental action to the
20 auditor or other public official, as defined in subsection ~~((+7+))~~ (9)
21 of this section, initiating an investigation by the auditor under RCW
22 42.40.040.

23 (b) For purposes of the provisions of this chapter and chapter
24 49.60 RCW relating to reprisals and retaliatory action, the term
25 "whistleblower" also means:

26 (i) An employee who in good faith provides information to the
27 auditor or other public official, as defined in subsection ~~((+7+))~~ (9)
28 of this section, in connection with an investigation under RCW
29 42.40.040 and an employee who is believed to have reported asserted
30 improper governmental action to the auditor or other public official,
31 as defined in subsection ~~((+7+))~~ (9) of this section, or to have
32 provided information to the auditor or other public official, as
33 defined in subsection ~~((+7+))~~ (9) of this section, in connection with
34 an investigation under RCW 42.40.040 but who, in fact, has not reported
35 such action or provided such information; or

36 (ii) An employee who in good faith identifies rules warranting
37 review or provides information to the rules review committee, and an

1 employee who is believed to have identified rules warranting review or
2 provided information to the rules review committee but who, in fact,
3 has not done so.

4 **Sec. 3.** 2008 c 266 s 1 (uncodified) is amended to read as follows:

5 The legislature finds and declares that government exists to
6 conduct the people's business, and the people remaining informed about
7 the actions of government contributes to the oversight of how the
8 people's business is conducted. The legislature further finds that
9 many public servants who expose actions of their government that are
10 contrary to the law or public interest face the potential loss of their
11 careers and livelihoods.

12 ~~((It is the policy of the legislature that employees should be
13 encouraged to disclose, to the extent not expressly prohibited by law,
14 improper governmental actions, and it is the intent of the legislature
15 to protect the rights of state employees making these disclosures. It
16 is also the policy of the legislature that employees should be
17 encouraged to identify rules warranting review or provide information
18 to the rules review committee, and it is the intent of the legislature
19 to protect the rights of these employees.~~

20 ~~This act shall be broadly construed in order to effectuate the
21 purpose of this act.))~~

22 **Sec. 4.** RCW 42.40.030 and 2008 c 266 s 3 are each amended to read
23 as follows:

24 (1) An employee shall not directly or indirectly use or attempt to
25 use the employee's official authority or influence for the purpose of
26 intimidating, threatening, coercing, commanding, influencing, or
27 attempting to intimidate, threaten, coerce, command, or influence any
28 individual for the purpose of interfering with the right of the
29 individual to: (a) Disclose to the auditor (or representative thereof)
30 or other public official, as defined in RCW 42.40.020, information
31 concerning improper governmental action; or (b) identify rules
32 warranting review or provide information to the rules review committee.

33 (2) A public employee must not be prohibited or otherwise
34 restricted in providing information or expressing opinions to state or
35 local elected officials, or to courts or law enforcement, on matters of

1 public concern, nor be subject to acts of retaliation because the
2 employee has expressed such opinions.

3 (3) Nothing in this section authorizes an individual to disclose
4 information otherwise prohibited by law, except to the extent that
5 information is necessary to substantiate the whistleblower complaint,
6 in which case information may be disclosed to the auditor or public
7 official, as defined in RCW 42.40.020, by the whistleblower for the
8 limited purpose of providing information related to the complaint. Any
9 information provided to the auditor or public official under the
10 authority of this subsection may not be further disclosed.

11 **Sec. 5.** RCW 42.40.050 and 2008 c 266 s 6 are each amended to read
12 as follows:

13 (1)(a) Any person who is a whistleblower, as defined in RCW
14 42.40.020, and who has been subjected to workplace reprisal or
15 retaliatory action is presumed to have established a cause of action
16 for the remedies provided under chapter 49.60 RCW.

17 (b) For the purpose of this section, "reprisal or retaliatory
18 action" means, but is not limited to, any of the following:

- 19 (i) Denial of adequate staff to perform duties;
- 20 (ii) Frequent staff changes;
- 21 (iii) Frequent and undesirable office changes;
- 22 (iv) Refusal to assign meaningful work;
- 23 (v) Unwarranted and unsubstantiated letters of reprimand or
24 unsatisfactory performance evaluations;
- 25 (vi) Demotion;
- 26 (vii) Reduction in pay;
- 27 (viii) Denial of promotion;
- 28 (ix) Suspension;
- 29 (x) Dismissal;
- 30 (xi) Denial of employment;
- 31 (xii) A supervisor or superior behaving in or encouraging coworkers
32 to behave in a hostile manner toward the whistleblower;
- 33 (xiii) A change in the physical location of the employee's
34 workplace or a change in the basic nature of the employee's job, if
35 either are in opposition to the employee's expressed wish;
- 36 (xiv) Issuance of or attempt to enforce any nondisclosure policy or
37 agreement in a manner inconsistent with prior practice; or

1 (xv) Any other action that is inconsistent compared to actions
2 taken before the employee engaged in conduct protected by this chapter,
3 or compared to other employees who have not engaged in conduct
4 protected by this chapter.

5 (2) The agency presumed to have taken retaliatory action under
6 subsection (1) of this section may rebut that presumption by proving by
7 a preponderance of the evidence that there have been a series of
8 documented personnel problems or a single(~~(7)~~) egregious event(~~(7~~~~or~~
9 ~~that)~~) justifying the agency action or actions (~~(were justified)~~) by
10 reasons unrelated to the employee's status as a whistleblower and by
11 showing that improper motive was not a (~~(substantial)~~) material factor.

12 (3) Nothing in this section prohibits an agency from making any
13 decision exercising its authority to terminate, suspend, or discipline
14 an employee who engages in workplace reprisal or retaliatory action
15 against a whistleblower. However, the agency also shall implement any
16 order under chapter 49.60 RCW (other than an order of suspension if the
17 agency has terminated the retaliator).

18 NEW SECTION. Sec. 6. Section 3 of this act is added to chapter
19 42.40 RCW.

20 NEW SECTION. Sec. 7. If any provision of this act or its
21 application to any person or circumstance is held invalid, the
22 remainder of the act or the application of the provision to other
23 persons or circumstances is not affected.

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