



GOVERNMENT ACCOUNTABILITY PROJECT

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Re: Legal remedies for faculty to challenge whistleblower retaliation at private academic institutions

1) Public-policy exception tort suit to the “at will” doctrine

Prohibits an employer from terminating an “at-will” employee if the act is in violation of a state or federal statute or the state’s public policy doctrine.

Protects “at-will” employees who are terminated for refusal to perform an act that is in violation of public policy or for performing an act that complies with public policy.

Protections/Remedies offered: Punitive damages as a penalty for the retaliation.

Strengths: Protects disclosures to management as well as to regulators, with the right to a jury trial for justice.

Weaknesses: Employee cannot be granted reinstatement or other corrective action for workplace retaliation, beyond collecting funds. Need a skilled employment lawyer.

2) California Labor Code Section 1102.5

*Please note that this statute is specific to California state law

Prohibits an employer or someone acting on behalf of the employer from retaliating against an employee who has reported reasonably-believed violations of state or federal laws, rules or regulations. Any rule, regulation or policy that prevents such disclosures (including violations of local rules or regulations) is illegal. Further, they cannot retaliate because they believe the employee has made a disclosure or may make a disclosure.

Protects employees who are retaliated against for internally or externally disclosing information that they reasonably believe violates state or federal laws, rules or regulations, regardless of whether it is part of their job duties.

Protections/Remedies offered: The employee can gain relief through the Labor Commissioner or by filing suit in state court for a jury trial. (The legal decisions are contradictory whether the former’s process of administrative remedies first must be exhausted as a prerequisite for court.) The employee can receive a “make whole” remedy of reinstatement and back pay, plus compensatory damages (for pain and suffering, loss of reputation and similar intangible harms). The employer is liable for a civil penalty as large as \$10,000 per violation. The employer must post notice of the rights in this law on site for employees.

Strengths: It is governed by the employee friendly legal burdens of proof from the federal Whistleblower Protection Act, which means that employees only must demonstrate their whistleblowing was a “contributing factor” to the alleged retaliation, and then the burden of proof shifts to the employer to prove by clear and convincing evidence that it would have acted for legitimate independent reasons even if the whistleblower had remained silent. Liability and consequences for the retaliator, including civil penalties as large as \$10,000 per violation. Internal and external disclosures are protected, with some limitations.

Weaknesses: Since the rulings are contradictory, an employee may have to pursue two actions in order to reach a jury trial. The law does not directly provide for attorney fees and litigation costs, which means it could take a third lawsuit under other California laws to obtain them.

3) [False Claims Act, 31 U.S.C. §3729 and 3730](#)

Prohibits an employer from discharging, demoting, suspending, threatening, or in any other manner discriminating against an employee for challenging contractual fraud against the government.

Specifically, if the academic institution receives federal funding, as a prerequisite it routinely must certify compliance with relevant laws, including sexual discrimination or harassment in connection with the spending. If the certification is false, an employee could bring a False Claims Act (FCA) claim. The FCA would allow an employee to file an action on behalf of the government that indicates its employer was misusing federal funds. All federal grants and contracts require certification by recipients that they are operating lawfully.

Protects [in 31 USC § 3730(h)] employees who are retaliated against for attempting to stop their employer from making a false financial claim to the federal government or to a government contractor.

Protections/Remedies offered: Reinstatement with accrued seniority, two times back pay plus interest, and compensation for special damages including litigation costs and attorneys' fees.

Strengths: Employee does not have to prove actual fraud, only that the employee tried to stop a violation of the FCA. Exceptional recovery for whistleblower, plus attorneys' fees. If the employee tries to prevent the fraud without filing a qui tam lawsuit, the employee still has anti-retaliation rights. Three year statute of limitations.

Weaknesses: It only applies to disclosures involving fraud in federal government contracts. (However, California has a parallel False Claims Act for state contracts: California Government Code § 12650-12656). Retaliation suits can be cost-prohibitive unless brought in conjunction with a qui tam suit. Employee must prove that whistleblowing was the “predominant motivating factor” for the retaliatory action, and not just a contributing factor.

4) [National Defense Authorization Act for FY 2013, 41 U.S.C. §4712](#)

Prohibits government contractors, subcontractors, or grantees from discharging, demoting, or otherwise discriminating against employees as reprisal for disclosing information of misconduct relating to a federal contract or federal funds.

Protects employees of government contractors, subcontractors, or grantees who disclose information that he/she reasonably believes is evidence of gross mismanagement; gross waste of federal funds; abuse of authority; substantial and specific danger to public health or safety; or violation of law, rule, or regulation relating to a federal contract or grant.

Protections/Remedies offered: Abatement of reprisal, reinstatement including back pay and employment benefits, compensatory damages, all costs and expenses reasonably incurred (including attorneys' fees and expert witnesses' fees).

Strengths: Employee-friendly Whistleblower Protection Act burdens of proof, investigation by a federal Inspector General of the alleged illegality or abuse of power. Attorneys' fees and expert witnesses' fees available. Access to a jury trial if after 210 days the employee has exhausted all administrative remedies.

Weaknesses: Protections only apply to contracts or grants provided after 2013.