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Bill Sherman
Chair
Seattle Ethics and Elections Commission
Seattle Municipal Tower
700 5th Ave., Suite 4010
Seattle, WA 98124

Dear Commissioner Sherman:

I am writing to express my concerns regarding proposed changes and additions to SMC 800-870. If the Commission's goal is to encourage whistleblowers to stand up for safety and good government, then the Commission should support a more robust framework than that which is currently being considered.

Whistleblowers are persons who are retaliated against by their employers for reporting a crime, an abuse of power, improper governmental action, or some other violation of public policy. Unlike victims of employment discrimination, who may vindicate their rights in federal or state court or in an administrative forum under a well-established framework of laws and procedures,[1] there is no single federal law protecting all whistleblowers. Instead, there are many individual federal laws related to specific types of whistleblowers and laws protecting government employees.[2]

On the state level, in Washington, there is only the common law and laws protecting government employee whistleblowers. For the past several decades, there has been a common law claim for wrongfully terminated whistleblowers called "wrongful discharge in violation of public policy." This claim applies to anyone working in Washington for private or public employers, and it permits persons who blow the whistle on important issues of public concern to sue in court and obtain lost wages, emotional harm damages,

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[1] For example, Title VII (42 U.S.C. §2000e), 42 U.S.C. §1981, the Washington Law Against Discrimination, RCW 49.60, et. seq., RCW 42.40, and 42.41.
[2] For example, the Toxic Substances Control Act ("TSCA"), *15 U.S.C. § 2622*; the Federal Water Pollution Prevention and Control Act ("FWPPCA"), *33 U.S.C. § 1367*; the Safe Drinking Water Act ("SDWA"), *42 U.S.C. § 300j-9(I)*; the Clean Air Act ("CAA"), *42 U.S.C. § 7622(a)*; the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), *42 U.S.C. § 9610*; the Energy Reorganization Act ("ERA"), *42 U.S.C. § 5851*; and the Solid Waste Disposal Act ("SWDA"), *42 U.S.C. § 6901*, and the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1514A ("SOX").

and attorney fees for the damages they incurred from whistleblower retaliation. *Ford v. Trendwest Resorts*, 146 Wn.2d 146, 154, 43 P.3d 1223 (2002) (lost wages); *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 919, 726 P.2d 434 (1986) (emotional harm damages); RCW 49.48.030 (attorney fees if obtain judgment for wages). The Washington State Supreme Court has basically ended that common law claim for many employees, including state and municipal employees, because the Court has held that if an adequate alternative means exists to vindicate a particular public policy, no cause of action for wrongful discharge exists for that whistleblower, even if it means that the whistleblower cannot obtain damages under the "adequate policy."[3] So, for example, if a private company employee is fired in retaliation for reporting that his manager was using a company car to drive drunk, that employee would not have a wrongful discharge claim in Washington because there are criminal laws that "adequately protect the policy" against drunk drivers.[4] Under current state Supreme Court decisions, that employee would have no recourse. That employee may be unemployed for months or years, and suffer from stress and humiliation associated with the wrongful termination, lose his home, or go into serious debt, and even so, there is no recourse for that employee. Worse, in the future, no employee will dare to report such reckless behavior by management because everyone knows there is no protection from retaliation.

At present, Washington state and municipal employees likely cannot successfully sue for wrongful discharge because a court would likely find that the whistleblower statutes (RCW 42.40 and 42.41) provide an adequate means for protecting the public policy. State and municipal employee whistleblowers are likely limited to statutory whistleblower claims.

In fashioning remedies for victims of whistleblower retaliation, one can easily argue that the bar protecting whistleblowers ought to be set as high as the bar has been set by society in protecting employees from retaliation for reporting discrimination ("civil rights retaliation"). *See* RCW 49.60.210. This is because whistleblowers stand up for safety, stand up against corruption, and stand up against abuses in government, and they sometimes become the focus of retaliation just like persons reporting civil rights violations in the workplace may become the focus of retaliation. We all want to encourage employees to report civil rights violations and improper governmental actions, and we need to protect both classes of employees with robust remedies.

As you may know, it is less clear whether municipal whistleblowers have the same rights and remedies as compared to victims of civil rights related retaliation in Washington and as compared to state employee whistleblowers. For civil rights retaliation, RCW 49.60 provides dual forums and separate remedies, depending on the forum, for persons who have been victims of retaliation for reporting civil rights violations:

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[3] *See Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168 125 P.3d 119 (2005)*;
[4] *See Cudney v. ALSCO, Inc.*, 172 Wash. 2d 524, 259 P.3d 244 (2011).

> It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

RCW 49.60.210. If they satisfy certain criteria, Washingtonians may opt to proceed through an administrative process and administrative hearing, which could provide them with remedies as follows:

> [A]n order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, or to take such other action as, in the judgment of the administrative law judge, will effectuate the purposes of this chapter, including action that could be ordered by a court, except that damages for humiliation and mental suffering shall not exceed twenty thousand dollars, and including a requirement for report of the matter on compliance.

RCW 49.60.250 (see RCW 49.60.240 for criteria and procedures). Typically, the advantage of the administrative process is speed and economy, but there may be limited ability to develop facts supporting one's case, no jury, and capped damages. Or Washington victims of civil rights violations in employment may opt to bring their cases into court, which would provide them with the ability to obtain facts through an extensive discovery process supervised by a judge, a jury to hear their claims, and compensatory damages, as anyone may expect to get in a personal injury case, plus attorney fees:

> Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the ***actual damages sustained*** by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

RCW 49.60.030(2). Under this framework, a victim of civil rights retaliation may opt for either forum and in one, obtain speed and economy with damage caps, and in the other, have the ability to ferret out the facts supporting their claim, obtain actual damages and attorney fees.

The Seattle Municipal Code echoes state law and provides a dual forum and separate

remedies to victims of civil rights retaliation:

> It is unfair employment practice within the City for any [e]mployer, employment agency, or labor organization to penalize or discriminate in any manner against any person because they opposed any practice forbidden by this chapter or because they made a charge, testified or assisted in any manner in any investigation, proceeding, or hearing initiated under the provisions of this chapter;

SMC 14.04.040 (F). If they satisfy certain criteria, Seattle City employees may opt to proceed through an administrative process and administrative hearing, which could provide them with:

> [An] order [directing] the respondent to take such affirmative action or provide for such relief as is deemed necessary to correct the practice, effectuate the purpose of this chapter, and secure compliance therewith, including but not limited to hiring, reinstatement, or upgrading with or without back pay, lost benefits, attorney's fees, admittance or restoration to membership in a labor organization, admittance to participation in a guidance, apprentice training or retraining program, or such other action which will effectuate the purposes of this chapter, including action which could be ordered by a court, except that damages for humiliation and mental suffering shall not exceed Ten Thousand Dollars ($10,000.00). Back pay liability shall not accrue from a date more than two (2) years prior to the initial filing of the charge.

SMC 14.04.180 (C). Again, typically, the advantage of the administrative process is speed and economy, but there may be limited ability to develop facts supporting one's case, no jury, and capped damages. Or Seattle City employees who are victims of civil rights retaliation may opt to bring their cases into court, which would provide them with the ability to obtain facts through an extensive discovery process supervised by a judge, a jury to hear their claims, and compensatory damages, as anyone may expect to get in a personal injury case, plus attorney fees:

> Any person who claims to have been injured by an unfair employment practice may commence a civil action in Superior Court or any other court of competent jurisdiction, not later than three (3) years after the occurrence of the alleged unfair employment practice
>
> ….
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> In a civil action under this section, if the court, or jury, finds that an unfair employment practice has occurred, the court may grant such relief as may be awarded by the hearing examiner under this chapter or is authorized by the Washington Law Against Discrimination, Chapter 49.60 RCW, as

> amended. Damages awarded under this section for humiliation and mental suffering are not subject to the limitation of SMC Section 14.04.140 A or SMC Section 14.04.150 B.

SMC 14.04.185A and C. Under this framework, a victim of civil rights retaliation may opt for either forum and in one, obtain speed and economy with damage caps, and in the other, obtain extensive discovery, actual damages and attorney fees.

State whistleblowers have a statutory framework providing dual forums and separate remedies to state employee whistleblowers. The purpose of the state whistleblower statute is as follows: "employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures." RCW 42.40.010.

At the administrative level, state employees report improper governmental actions to the State Auditor, who conducts and investigation, and under the framework, "Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW." RCW 42.40.050(1)(a). This presumption may be rebutted by the offending agency "by proving by a preponderance of the evidence that there have been a series of documented personnel problems or a single, egregious event, or that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower and that improper motive was not a substantial factor." RCW 42.40.050(2). Thus, the employee is presumed to be entitled to "actual damages" as set forth in RCW 49.60 as though the employee were bringing forward a civil rights retaliation claim.

The administrative framework does not provide the employee with an administrative hearing, only with a report drafted by the auditor outlining the facts supporting findings that there is reasonable cause to believe an employee has engaged in improper governmental action, which is sent to the offending agency, the governor, and the attorney general. It appears the hope is that the remedies available to the whistleblower will be informally granted by the offending agency:

> The auditor has no enforcement power except that in any case in which the auditor submits an investigative report containing reasonable cause determinations to the agency, the agency shall send its plan for resolution to the auditor within fifteen working days of having received the report. The agency is encouraged to consult with the subject or subjects of the investigation in establishing the resolution plan. The auditor may require periodic reports of agency action until all resolution has occurred. If the auditor determines that appropriate action has not been taken, the auditor shall report the determination to the governor and to the legislature and

> may include this determination in the agency audit under chapter 43.09 RCW.

RCW 42.40.040(9)(b). However, a state employee whistleblower need not wait around for voluntary action by the offending agency.

The state employee whistleblower may file an action in superior court for "actual damages" and "attorney fees" because, "[i]t is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW." RCW 49.60.210. Thus, the judicial remedy for state employee whistleblower retaliation has been rolled into RCW 49.60 and state employee whistleblowers have the same rights and remedies in superior court, as do victims of civil rights retaliation. This is a robust and effective remedy for state employee whistleblowers equal to those provided to victims of civil rights violations who are employees in Washington suing under RCW 49.60 and employees of the City of Seattle suing under RCW 49.60 or SMC 14.04.185.

Unfortunately, municipal whistleblowers do not have such obvious rights and remedies. The state municipal whistleblower statute is problematic because it does not specifically provide dual forums and separate remedies to municipal employee whistleblowers. RCW 42.41 provides for an administrative process that results in a hearing and capped remedies.

> Relief that may be granted by the administrative law judge consists of reinstatement, with or without back pay, and such injunctive relief as may be found to be necessary in order to return the employee to the position he or she held before the retaliatory action and to prevent any recurrence of retaliatory action. The administrative law judge may award costs and reasonable attorneys' fees to the prevailing party.

RCW 42.41.040(7). The remedies appear to include a "loser pays" provision for attorney fees, which does not appear in civil rights, common law claims, or in the state whistleblower law. This provision may discourage municipal whistleblowers from appearing in this forum, fearing that they will have to pay the City's attorney fees if they lose.

There is no explicit right in the statute for a municipal whistleblower to opt for state superior court instead of the administrative forum. However, at least one federal district court has found that the language of RCW 42.41 is permissive and allows a plaintiff to bring the claim in state superior court, rather than to remain in the administrative forum, but no Washington appellate court has ruled on this issue one way or the other. *Eklund v. City of Seattle*, 2008 WL 112040 (W.D.Wash. 2008).

The state whistleblower statute contains an opt out provision that allows municipalities to opt out from RCW 42.41 so long as the local government "adopts a program for reporting alleged improper governmental actions and adjudicating retaliation resulting from such reporting shall be exempt from this chapter if the program meets the intent of this chapter." The City of Seattle has sought to "opt out" by creating its own policies and procedures. SMC 4.20.800-860.

In 2011, this Commission considered whether to amend SMC 4.20. The proposed amendments are problematic in two major ways. First, the proposed amendments lack a civil remedy provision. Second, the framework for adjudicating whistleblower complaints in the administrative forum does not focus on the whistleblower—the whistleblower is not even a party.

As has been delineated above, the traditional framework for protecting victims of civil rights retaliation is to provide dual forums and separate remedies so that victims of civil rights retaliation may opt for a speedy and economical, but capped, resolution of their claims, or pursue their claims in court where they may benefit from pursuing actual damages in a forum that provides extensive discovery and a jury. In addition, state employee whistleblowers have access to an informal process at one end of the spectrum and full rights and remedies at the other. In contrast to victims of civil rights retaliation who are employed privately, by state or local governments, or by the City of Seattle, City of Seattle employees who blow the whistle on improper government actions have no explicit right in the Code to seek actual damages in superior court, no explicit right to a jury, and no explicit right to discovery supervised by a judge. This makes no sense. The Commission should amend the code to include the same provisions as are contained in SMC 14.04, which states in part:

> Any person who claims to have been injured by an ~~unfair employment practice~~ adverse change may commence a civil action in Superior Court or any other court of competent jurisdiction, not later than three (3) years after the occurrence of the alleged ~~unfair employment practice~~ adverse change.
>
> ….
>
> In a civil action under this section, if the court, or jury, finds that an ~~unfair employment practice~~ adverse change has occurred, the court may grant such relief as may be awarded by the hearing examiner under this chapter or is authorized by the Washington Law Against Discrimination, Chapter 49.60 RCW, as amended. Damages awarded under this section for humiliation and mental suffering are not subject to the limitation of SMC Section 14.04.140 A or SMC Section 14.04.150 B.

It is fair to conclude that the nature of the "adverse change" will likely determine the forum. Minor forms of retaliation may be resolved at the administrative level, as may be

claims in which the SEEC moves quickly and aggressively to protect whistleblowers thereby limiting their damages and offering a speedy resolution of the case—the SEEC will have to work to earn the trust of City employee whistleblowers and cultivate a reputation for quick and effective action. Some cases will nonetheless go to superior court because the damages are higher than the cap, or because a judge is needed to ensure that the City provides the discovery required under the civil rules for superior court, or because the whistleblower does not trust that the City will investigate itself impartially.

The current amendment also provides for an administrative hearing, but the whistleblower is not a party. SMC 14.04.870 (proposed amendment). In terms of vindicating the policy of encouraging persons to come forward to report improper governmental action, this approach may be enough due process if a whistleblower explicitly has the superior court remedy, but without it, one must wonder if a whistleblower will feel protected when the SMC, on its face, provides the whistleblower with no personal remedy. Another problem is that if the executive director finds no basis to take a whistleblower's case forward, again, there is no explicit remedy in the SMC for that whistleblower. This may dissuade whistleblowers from reporting improper governmental action, because under this framework, they may conclude that they are second class citizens: whereas the SMC and state and federal law provide dual forums and separate remedies to victims of civil rights retaliation and to state employee whistleblowers, unless they obtain counsel who may be aware of the *Eklund* decision and its implications (they may not seek counsel since the right to counsel is severely limited in the proposed amendment, because attorney fees offsets capped emotional harm damages), they will only know from the language of the code that they must put all of their trust in the executive director (a City employee), who can take in their report and choose to do nothing with it, even after an investigation has begun and witnesses have been interviewed, which they may perceive as an unacceptable risk of being discovered without any meaningful recourse. We suggest that in addition to the civil remedy, the Commission also explicitly state:

> The findings at the administrative level are not intended to limit the whistleblower's right of action in civil court (meaning no res judicata or collateral estoppel effect shall be applied against the whistleblower).

That way, since the whistleblower has no control over the administrative process, the whistleblower is not bound by its outcome, but the City would be, which would lessen the costs to both parties in the superior court forum.

We owe it to our City of Seattle employee whistleblowers who report improper governmental action to provide them with the same remedies we provide to city employees, state employees, and Washington citizens who are victims of civil rights retaliation, and that we provide to state employee whistleblowers. This is especially true in an environment in which the common law claim of wrongful discharge in violation of public policy has been so limited to City of Seattle employees by our Supreme Court.

Please feel free to contact me at any time to discuss this further.

Sincerely,

(*sent without signature to avoid delay*)

Jack Sheridan