

Show of hands for who's read the Whistleblower Protection Ordinance?

[SLIDE 1] Whistleblower Protection: SF C&GCC § 4.115

(a) RETALIATION PROHIBITED. No City officer or employee may terminate, demote, suspend or take other similar adverse employment action against any City officer or employee because the officer or employee has in good faith (i) filed a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or a written complaint with the complainant's department, alleging that a City officer or employee engaged in improper government activity by: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest, (ii) filed a complaint with the Controller's Whistleblower Program, or (iii) provided any information or otherwise cooperated with any investigation conducted under this Chapter.

1. 3 elements of retaliation: adverse employment action, protected activity, and a causal link between the two
 - a. Adverse employment action: an employee faces termination, demotion, suspension, or other similar adverse employment action
 - i. "Other similar adverse employment action" defined in our regulations to include negative decisions regarding appointment, promotion, transfer, reassignment, performance evaluations, or other disciplinary action
 - b. Protected activity: an employee exercises a right defined in the ordinance
 - i. What kinds?
 1. A complaint (written or verbal) to the Ethics Commission, the Controller, the DA, or the City Attorney – or a written complaint to the own dep't, but only for a narrow category of items
 2. A complaint to the Whistleblower Program

3. Participating in an investigation conducted under the Whistleblower Ordinance
 - ii. Note: it's what you do, not who you are
 1. Complaints related to discrimination against protected classes like gender or race go to EEO
 - iii. Note also: protected activity doesn't cover First Amendment activity like reporting to the press
 1. An employee can bring a civil action in federal court to vindicate their first amendment rights – and stands to win substantially more in damages
- c. Causal link between the two: the protected activity led to the adverse employment action (i.e. meaningfully caused it)
 - i. At the very least, that means we have to show the employer knew or suspected that a complainant had engaged in protected activity

[NO SLIDE] Process:

1. Step 1: Preliminary Review
 - a. Preliminary investigation to establish 2/3 elements and the chronology
 - i. If we find protected activity and adverse employment action, causation is factual question to be decided at investigation
 - ii. We seldom dismiss if we get those 2/3, unless there's no universe of facts that could result in causation
 1. E.g. the adverse employment action took place before the protected activity, or before the investigating department contacted the complainant's department
 - b. Step 2: Investigation:
 - i. By Charter mandate we investigate these confidentially

- ii. I won't go deeply into the process but it always begins with a complainant interview and may include reviewing the complainant's personnel file, referring part of the matter to the Civil Service Commission to conduct an inspection service re: a hiring process, and other evidence-gathering techniques

What guides our investigation?

[SLIDE 2] Burden & Standard of Proof: SF C&GCC § 4.115(b)(iii)

(iii) Burden of Establishing Retaliation. In order to establish retaliation under this Section, a complainant must demonstrate by a preponderance of the evidence that the complainant's engagement in activity protected under Subsection (a) was a substantial motivating factor for the adverse employment action. The employer may rebut this claim if it demonstrates by a preponderance of the evidence that it would have taken the same employment action irrespective of the complainant's participation in protected activity.

1. Burden of Proof: “a complainant must demonstrate”
 - a. Really the Ethics Commission stands in the shoes of the complainant
 - b. Important thing is: no presumption of retaliation
2. Standard of proof: “preponderance of the evidence” = more likely than not
 - a. 50% plus a feather
3. Confessions? Hardly: but proof by inference:
 - a. Proximity in time
 - b. Employer expressed opposition to the protected activity
 - c. The explanations for the adverse employment action were otherwise false and pretextual – leading to the conclusion that retaliation substantially motivated the action
4. If Staff establishes retaliation, the burden shifts to respondent to prove they would have taken the same action even without the protected activity
 - a. By same standard: preponderance of the evidence
 - b. How to prove they would have taken that action?
 - i. Documented history of performance issues

What happens when we prove someone retaliated?

[Slide 3] Penalties:

SF C&GCC § 4.115(c):

1. Charter § C3.699-13: penalty up to \$5000 per violation
 - a. That's personal liability
2. Discipline: Commission can recommend but cannot take
 - a. Note: a lot of complainants feel real urgency toward their complaints but the fact is that the Ethics Commission cannot reverse personnel matters, restore the status quo, require rehiring, vacate a performance appraisal, etc.

What's the difference between Charter penalties and civil penalties?

[SLIDE 4] SF C&GCC § 4.115(b)(ii)

1. An aggrieved employee can file a complaint with the Ethics Commission within 2 years of the alleged retaliation
- OR-
2. That employee can file their own lawsuit in San Francisco Superior Court, but still limited to the same penalties

Other options:

3. Remember that someone can bring a federal lawsuit for violation of constitutionally protected rights and get a much bigger result
4. Someone can also file a complaint with:
 - a. DHR's EEO, for discrimination claims, or the Civil Service Commission, for improper selection process
 - b. The State Department of Fair Employment and Housing (DFEH), for discrimination claims
 - c. The State Department of Industrial Relations Division of Labor Standards Enforcement, for violations of various state labor code sections

Final note: The Board of Supervisors is considering amendments that Staff, in coordination with the Controller's Office, DHR, and the City's bargaining units, has proposed for the ordinance.

Changes will include:

1. Whistleblowing can include allegations that contractors and employees of contractors behaved improperly, and contractors and their employees themselves will be entitled to whistleblower protection
2. An employee will no longer have to complain in writing to their own department, and it won't be for those specific categories of things – it will just be what's generally covered, meaning misuse of City funds, or improper government activity – which is expanded to cover violations of federal, state, or local law
3. If a supervisor receives a complaint of retaliation, he or she will face a duty to refer the complainant to the Ethics Commission
4. After a finding of retaliation, the Ethics Commission may recommend restoring the status quo (cancelling the adverse employment action)
5. Impose a whistleblower protection awareness training that the Controller and Ethics Commission will prepare and that all city departments will distribute