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December 3, 2018

San Francisco Board of Supervisors
The Honorable Malia Cohen, Board President
The Honorable Sandra Lee Fewer, Supervisor, District 1
The Honorable Catherine Stefani, Supervisor, District 2
The Honorable Aaron Peskin, Supervisor, District 3
The Honorable Katy Tang, Supervisor, District 4
The Honorable Vallie Brown, Supervisor, District 5
The Honorable Jane Kim, Supervisor, District 6
The Honorable Norman Yee, Supervisor, District 7
The Honorable Rafael Mandelman, Supervisor, District 8
The Honorable Hillary Ronen, Supervisor, District 9
The Honorable Ahsha Safai, Supervisor, District 11
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

"The Board of Supervisors will be derelict in its duties to San Francisco's estimated 864,816 taxpayers and 33,000 to 40,000 City employees if you fail to add additional Whistleblower Protection Ordinance amendments."

Re: **Agenda Item 10 – Expanding Whistleblower Protections**

Dear Board of Supervisors,

The Board of Supervisors will be derelict in its duties to San Francisco's estimated 864,816 taxpayers and 33,000 to 40,000 full- and part-time City employees if you fail to add additional Whistleblower Protection Ordinance amendments to agenda item 10 on Tuesday, December 4.

Voters passed Proposition "C" 15 years ago directing the Board of Supervisors in 2003 to enact a meaningful Whistleblower Protection Ordinance (WPO). The amendments before you on Tuesday aren't meaningful and need additional work:

1. Training

There are a number of problems with which City employees will be trained on the whistleblower amendments and how:

- **It Will Take a Generation of New Hires Before All Employees Receive Training on the Amendments**. §4.115(f)(1) of the proposed amendments indicates that each City department will only be required to "*publicize and promote whistleblower protections as part of each department's* ***new hire*** *training programs*." It will take a generation of turn-over of all City employees before all employees receive the training, because of the loop-hole that only new-hires will receive handouts in their new-hire orientation packet. The City can — and should — do better than this by creating a training program for all City employees, not just new-hires.

"It would be like restricting providing sexual harassment prevention training only to new hires; it would take a generation of turn-over in City employees before *all* employees receive sexual harassment prevention training; that woud be bizarre."

  It would be like restricting providing sexual harassment prevention training only to new hires; it would take a generation of turn-over in City employees before **all** employees would receive sexual harassment prevention training.

- **Only Supervisors Will Be Required to Take Web-based On-Line Training**. §4.115(f)(2) of the proposed amendments indicates that DHR in collaboration with the Controller's Office and the Ethics Commission "*shall prepare web-based training for supervisors regarding their responsibilities*." Clearly, ***all*** City employees — not just supervisors and managers — should be required to take the web-based training.

- **Training Implementation Delay Is Too Long**. During the Rules Committee hearing on November 28, an amendment was introduced in §4.115(f)(2) delaying implementation of the training by a full year, to January 1, 2020. This is ridiculous. The Board of Supervisors has been sitting on this legislation since April 11, 2016 and there's no reason why it should take four years — until 2020 — to begin training City employees adequately. DHR, the Controller's Office and the Ethics Commission should have started work years ago developing the training materials. T**he training should begin no later than March 1, 2019**. How long does it take to develop a web-based training module? DHR does ***not*** need 13 months between now and January 1, 2020 to develop such a training module!

- **No Training for Employees of City Contractors**. §4.117(d) indicates that the City Controller will develop a "*notice of the whistleblower protections for employees of contractors*," the notice will be posted in each City department, and "*City contractors shall distribute the notice of protections to all of their employees*." This isn't enough. For one thing, if employees of contractors are given access to City computers, they should be required to take the on-line training module.

2. **Provision to Allow Complaints Be Filed With Other City Departments and Agencies Must Be Reinstated.** As noted below, the amendments submitted by the Ethics Commission in April 2016 explicitly provided in §4.100 *Findings* that City employees should be allowed to file complaints with ***any*** City agency or department, not just to an employee's own department. But that provision was deleted, restricting employees to filing complaints only at their own City department.

   The Ethics Commission had gotten it wrong that the complaints should be filed only with supervisory employees. It would be folly for the Board of Supervisors to believe that a whistleblower would be comfortable reporting misconduct only to their direct supervisor, and employees may not be comfortable filing a complaint only at their own City department for fear of bullying and retaliation. Fearing this, whistleblowers may be more comfortable simply leaking information anonymously to members of the press or to state, local, and federal law enforcement agencies.

   The Board of Supervisors should reinstate the provision recommended by the Ethics Commission to allow employees to file complaints with any City agency or City department.

3. **Provision to Allow Complaints Be Filed With State and Federal Agencies Must Be Reinstated**

   San Francisco's 2014–2015 Civil Grand Jury issued its report, "*San Francisco's Whistleblower Protection Ordinance Is in Need of Change*" three-and-a-half years ago. It was dated May 2015 and posted on-line on June 8, 2015. From there, San Francisco's Ethics Commission held several hearings, adopted proposed amendments to the WPO unanimously on March 28, 2016 and forwarded the amendments to the Board of Supervisors on April 11, 2016.

   Of note, both the Grand Jury and the Ethics Commission recommended expanding WPO amendments to allow City employees to file both "in-house" disclosures and complaints, and also allow reporting disclosures "out-of-house" to state and federal agencies. The Grand Jury had indicated disclosures made to the media should also be permitted.

   After then-Board President London Breed received the proposed amendments from Ethics on April 11, 2016 she slouched towards Bethlehem and didn't formally introduce the amendments to the Board of Supervisors for two months, until June 14, 2016. The amendments Breed introduced retained the Ethics Commission's provision City employees could file complaints with local, State, or federal government agencies and retain anti-retaliation protections, since retaliation would be prohibited. The Ethics Commission recommended amendments explicitly included:

   - **§4.100 FINDINGS:** "This Chapter protects all City officers, and employees, and contractors operating within the scope of a contract with the City and County of San Francisco, from retaliation … (2) For filing a complaint with any supervisory employee at the complainant's department *or* ***at another City, County, state or federal agency***."
   - **§4.105(a) COMPLAINTS:** "Any person may file a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or with any supervisory employee at the complainant's department ***or at another City, County, state or federal agency*** …"

   It appears Ethics Commissioners may have never been informed that the amendment to permit filing complaints with state or federal agencies was removed.

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   The two sections above, need to be re-instated into the WPO amendments, first in part because the proposed WPO amendments appear to violate California's Whistleblower Protection Act, in particular, retaliation prohibited by California Labor Code §1102.5(b). State Labor Code §1102.5(a) specifically states that employers — in this case, the City itself — may not ***adopt*** any rule or regulation preventing employees from disclosing information to a government agency, for instance to a state or federal agency. By removing — through omission — the explicit provision complaints ***can*** be filed with state agencies, the proposed WPO amendments appear to be *deliberately* ***adopting*** a rule to discourage City employees from filing complaints with the state of California in violation of Labor Code §1102.5(a).

And second, of the 329 lawsuits filed by City employees that has cost the City over $70 million since January 1, 2007 it is thought that the vast majority of Plaintiffs in the lawsuits had to obtain a "*Right-to-Sue*" letter from either the U.S. EEOC or from California's Department of Fair Housing and Employment, both of which are either state or federal agencies. Without restoring the language Ethics recommended for §4.100 Findings and §4.105(a) Complainants, City employees would receive no anti-retaliation protections whatsoever if they file complaints with either agency.

4. First Amendment Protections Must Be Added

Superior Court Judge Claudia Wilken ruled in the *Derek Kerr v. The City and County of San Francisco* lawsuit involving wrongful termination that although Campaign and Government Conduct Code §4.115(c) does not contain anti-retaliation protections for protected First Amendment speech, she noted in her Court Order that San Francisco's current Sunshine Ordinance explicitly ***does*** state in §67.22(d) that City employees ***absolutely*** **are** guaranteed these First Amendment protections when they speak on matters of public concern. On page 40 of her Order, Wilken noted:

> *"… Although section 4.115 of the Campaign and Government Conduct Code allows for the sanctioning of an officer or employee who engages in retaliation, S.F. Campaign & Gov't Conduct Code §4.115(c), it does not appear to provide for review or reversal of the unlawful decision itself, and Defendants did not argue to the contrary at the hearing. Further, by its terms, section 4.115 only sets forth a policy against retaliation for the filing of formal complaints and participating in formal investigations,* ***not retaliation for any protected First Amendment speech*** *…"*
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> — *Derek Kerr, v. The City and County of San Francisco; Mitchell H. Katz; Mivic Hirose; and Colleen Riley*, 10-cv-05733-CW Document76, *Order Granting in Part and Denying in Part Motion for Summary Judgment* (Docket No. 40) and *Granting Motion to Seal* (Docket No. 61), (U.S. District Court for the Northern District of California, Sep. 6, 2012), p. 40.

Wilken also had noted on page 38 of her order the language of Sunshine §67.22(d):

> **Sunshine Ordinance §67.22(d): Release of Oral Public Information**.
>
> "(d) *Public employees shall not be discouraged from or* **disciplined** *for the expression of their* ***personal opinions on any*** **matter of public concern** ***while not on duty****, so long as the opinion (1) is not represented as that of the department and does not misrepresent the department position; and (2) does not disrupt coworker relations, impair discipline or control by superiors, erode a close working relationship premised on personal loyalty and confidentiality, interfere with the employee' performance of his or her duties or obstruct the routine operation of the office in a manner that outweighs the employee's interests in expressing that opinion. In adopting this subdivision,* ***the Board of Supervisors intends merely to restate and affirm court decisions recognizing the First Amendment rights enjoyed by public employees****. Nothing in this section shall be construed to provide rights to City employees beyond those recognized by courts, now or in the future, under the First Amendment, or to create any new private cause of action or defense to disciplinary action."*[Emphasis added]

Those First Amendment protections need to be explicitly duplicated in Campaign and Government Conduct Code §4.115(a). The Board of Supervisors needs to replicate the extant language in Sunshine Ordinance §67.22(d) into Campaign and Government Conduct Code §4.115(c) [i.e., into the WPO].

Multiple City employees have prevailed in both San Francisco's Superior Court and in Federal Court alleging wrongful termination for First Amendment Free Speech reasons, often off-duty, because the WPO doesn't provide such anti-retaliation protections. Incorporating the extant language in the Sunshine Ordinance into the Whistleblower Protection Ordinance should be a no-brainer for the Board of Supervisors.

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Incorporating the extant language in the Sunshine Ordinance into the WPO should be a no-brainer for this Board."

Why has it taken the Board of Supervisors two-and-a-half year to consider meaningful amendments to the City's Whistleblower Protection Ordinance (WPO) that voters had specifically requested a decade-and-a-half ago?

Don’t be derelict in your duties; fix these flaws now, for once and for all.

Respectfully submitted,

Patrick Monette-Shaw, *Columnist, Westside Observer* Newspaper

cc: Angela Calvillo, Clerk of the Board
Victor Young, Rules Committee Clerk
Alisa Somera, Legislative Deputy Director, Clerk of the Board's Office
Sophia Kittler, Legislative Aide to Supervisor Cohen
Lee Hepner, Legislative Aide to Supervisor Peskin
Tim Ho, Legislative Aide to Supervisor Safai
Cathy Mulkey-Meyer, Legislative Aide to Supervisor Safai
Suhagey Sandoval, Legislative Aide to Supervisor Safai
Jack Gallagher, Legislative Aide to Supervisor Stefani
Ellie Miller Hall, Legislative Aide to Supervisor Stefani
Wyatt Donnelly-Landolt, Legislative Aide to Supervisor Stefani
Angelina Yu, Legislative Aide to Supervisor Fewer
Ian Fregosi, Legislative Aide to Supervisor Fewer
Edward Wright, Legislative Aide to Supervisor Kim
Kitty Fong, Legislative Aide to Supervisor Kim

Testimony to Full Board: Don’t Be Derelict on Whistleblower Protection Ordinance Amendments; Analogy: Would You Restrict Sexual Harassment Prevention Training Only to New-Hires?