

Introduced by Senator Yee

February 23, 2009

An act to amend Sections 8547.2, 8547.8, 19683, and 19683.5 of the Government Code, relating to whistleblower protections.

LEGISLATIVE COUNSEL'S DIGEST

SB 220, as introduced, Yee. Whistleblower protection.

(1) The California Whistleblower Protection Act authorizes a state employee or an applicant for state employment to file a complaint, as specified, with the State Personnel Board alleging reprisal, retaliation, threats, coercion, or similar improper conduct prohibited under the act.

This bill would in addition provide that the act applies to former employees, as specified, and prohibits retaliation in the form of decreasing the job responsibilities of an employee's normal workload.

(2) Existing law provides that in addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure is liable in an action for damages brought against him or her by the injured party. However, any action for damages is not available to the injured party unless the injured party has first filed a complaint with the State Personnel Board, as specified, and the board has issued, or failed to issue, findings, as specified.

This bill would instead eliminate the requirement that the board issue or fail to issue specified findings before an action for damages is authorized. "Protected disclosure" would be defined to mean any good faith communication, including any communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence an improper governmental

activity or any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was for the purpose of remedying that condition.

(3) Existing law provides that in any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof is on the supervisor, manager, or appointing power to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, manager, or appointing power fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee has a complete affirmative defense in the adverse action.

This bill would instead provide that in an adverse action taken against an employee in which the employee demonstrates, by a preponderance of the evidence, that retaliation was a contributing factor to the adverse action taken against him or her, the employee shall have a complete affirmative defense to the adverse action.

This bill would also require the administrative law judge in an administrative action filed on or after January 1, 2009, to make a finding, after the plaintiff has completed presenting the evidence in his or her case in chief, of whether the plaintiff demonstrated by a preponderance of evidence that an activity protected by the California Whistleblower Protection Act was a contributing factor in the alleged retaliation against the complainant. The burden of proof would then shift to the supervisor, manager, or appointing power to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order.

(4) Existing law requires the State Personnel Board to initiate a hearing or investigation of a written complaint of reprisal or retaliation that is prohibited by the California Whistleblower Protection Act within 10 working days of its submission. The executive officer is required to complete findings of the hearing or investigation within 60 working days thereafter and provide a copy of the findings to the complaining state employee or applicant for state employment and to the appropriate supervisor, manager, employee, or appointing authority. Within 60 days

after receiving notification regarding a prohibited act, the appointing power must either serve notice of adverse action, as specified, or set forth in writing its reasons for not doing so. Existing law permits the supervisor, manager, employee, or appointing power to request a hearing before the State Personnel Board regarding the findings of the executive officer if the executive officer finds that the supervisor, manager, employee, or appointing power retaliated against the complainant for engaging in protected whistleblower activities. Existing law provides that every person who violates these provisions is guilty of a misdemeanor.

This bill would instead require the board, within 10 working days of receipt of a whistleblower retaliation complaint, to schedule the matter for an evidentiary hearing before an administrative law judge, as specified. Because a violation of these provisions would be a crime, the bill would impose a state-mandated local program.

(5) Existing law provides that if, after the hearing described in (4) above, the State Personnel Board determines that a violation of the California Whistleblower Protection Act occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief.

This bill would specify that appropriate relief may include reasonable attorney's fees and costs for successful prosecution of a retaliation complaint before the board, and, at the employee's request and with the employee's consent, transfer to or placement in any vacant position for which the employee is qualified.

(6) Existing law requires the board, whenever it determines that a manager, supervisor, or employee, who is not named a party to the retaliation complaint, may have engaged in or participated in any act prohibited by these provisions, to notify the manager's, supervisor's, or employee's appointing power of that fact in writing. Within 60 days after receiving the notification, the appointing power is required to either serve a notice of adverse action on the manager, supervisor, or employee, or set forth in writing its reasons for not taking adverse action against the manager, supervisor, or employee.

This bill would extend the timeframe within which the appointing power must take action, as specified, from 60 days to 4 months.

(7) Existing law requires a public entity that provides for the defense of a state employee charged with a violation of the California Whistleblower Protection Act to reserve all rights to be reimbursed for

any costs incurred in that defense. If a state employee is found to have violated the act, he or she is liable for all defense costs and is required to reimburse the public entity for those costs.

This bill would provide that if a state employee is successful in an action brought before the board pursuant to those provisions, the complaining employee shall be reimbursed for all costs incurred, including reasonable attorney's fees.

This bill would also require the administrative law judge to make any orders that may appear just in order to prevent any named party from being embarrassed, delayed, or put to unnecessary expense, and may make other orders as the interests of justice may require during the administrative hearing, in all cases.

The bill would also make technical, conforming changes to those provisions.

(8) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. The Legislature finds and declares the following:
- 2 (a) It is the public policy of this state to protect and safeguard
- 3 the right and freedom of all former, current, and prospective public
- 4 employees, as well as members of the public interacting with state
- 5 government, the California State University, and the University
- 6 of California to report waste, fraud, abuse of authority, violation
- 7 of law, or threat to public health and safety without restraint or
- 8 fear of retribution or actual retribution due to having engaged in
- 9 a protected disclosure reporting those government improprieties.
- 10 (b) Public servants best serve the citizenry when they can be
- 11 candid and honest without reservation in conducting the people's
- 12 business.
- 13 (c) The practice of restraining and retaliating against public
- 14 servants by denying employment or contractual opportunity,
- 15 decreasing the job responsibilities of an employee's normal
- 16 workload, creating hostile work environments, and discriminating

1 in the terms or conditions of employment or contract for these
2 reasons foments unrest and dissatisfaction, deprives the state of
3 the fullest use of its capacities for development and advancement,
4 and substantially and adversely affects the interest of public
5 employees, employers, and the public in general.

6 (d) The practice of restraining and retaliating against others
7 because of their protected disclosure of improper governmental
8 activities is declared to be against public policy.

9 (e) The purpose of this act is to provide effective, efficient
10 remedies that will eliminate these retaliatory practices.

11 (f) This act shall be deemed an exercise of the police power of
12 the state for the protection of the welfare, health, and peace of the
13 people of this state.

14 SEC. 2. Section 8547.2 of the Government Code is amended
15 to read:

16 8547.2. For the purposes of this article:

17 (a) "Employee" means any individual appointed by the Governor
18 or employed or holding office in a state agency as defined by
19 Section 11000, including, for purposes of Sections 8547.3 to
20 8547.7, inclusive, any employee of the California State University.
21 *"Employee" includes any former employee who met the criteria*
22 *of this subdivision during his or her employment.*

23 (b) "Improper governmental activity" means any activity by a
24 state agency or by an employee that is undertaken in the
25 performance of the employee's official duties, whether or not that
26 action is within the scope of his or her employment, and that (1)
27 is in violation of any state or federal law or regulation, including,
28 but not limited to, corruption, malfeasance, bribery, theft of
29 government property, fraudulent claims, fraud, coercion,
30 conversion, malicious prosecution, misuse of government property,
31 or willful omission to perform duty, or (2) is economically
32 wasteful, or involves gross misconduct, incompetency, or
33 inefficiency. For purposes of Sections 8547.4, 8547.5, 8547.10,
34 and 8547.11, "improper governmental activity" includes any
35 activity by the University of California or by an employee,
36 including an officer or faculty member, who otherwise meets the
37 criteria of this subdivision.

38 (c) "Person" means any individual, corporation, trust,
39 association, any state or local government, or any agency or
40 instrumentality of any of the foregoing.

(d) “Protected disclosure” means any good faith communication, *including any communication based on, or when carrying out, job duties*, that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was ~~made~~ for the purpose of remedying that condition.

(e) “Illegal order” means any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or any order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.

(f) “State agency” is defined by Section 11000. “State agency” includes the University of California for purposes of Sections 8547.5 to 8547.7, inclusive, and the California State University for purposes of Sections 8547.3 to 8547.7, inclusive.

SEC. 3. Section 8547.8 of the Government Code is amended to read:

8547.8. (a) A state employee or applicant for state employment who files a written complaint with his or her supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 8547.3, may also file a copy of the written complaint with the State Personnel Board, *in accordance with the provisions of Section 19683*, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint *shall be* filed with the board; ~~shall be filed~~ within 12 months of the most recent act of reprisal ~~complained about~~. *set forth in the complaint.*

(b) Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure; is subject to a fine not to exceed ten thousand dollars (\$10,000) and imprisonment in the county jail for a period not to exceed one year. Pursuant to Section 19683, any state civil service employee who intentionally engages in that conduct shall be disciplined by adverse action as provided by Section 19572.

(c) In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats,

1 coercion, or similar acts against a state employee or applicant for
2 state employment for having made a protected disclosure shall be
3 liable in an action for damages brought against him or her by the
4 injured party. Punitive damages may be awarded by the court
5 ~~where if~~ the acts of the offending party are proven to be malicious.
6 Where liability has been established, the injured party shall also
7 be entitled to reasonable attorney's fees as provided by law.
8 However, any action for damages shall not be available to the
9 injured party unless the injured party has first filed a complaint
10 with the State Personnel Board pursuant to subdivision (a), ~~and~~
11 ~~the board has issued, or failed to issue, findings pursuant to Section~~
12 ~~19683.~~

13 (d) This section is not intended to prevent an appointing power,
14 manager, or supervisor from taking, directing others to take,
15 recommending, or approving any personnel action or from taking
16 or failing to take a personnel action with respect to any state
17 employee or applicant for state employment if the appointing
18 power, manager, or supervisor reasonably believes any action or
19 inaction is justified on the basis of evidence separate and apart
20 from the fact that the person has made a protected disclosure as
21 defined in subdivision ~~(b)~~ (d) of Section 8547.2.

22 (e) (1) In any civil action or administrative proceeding, once
23 it has been demonstrated by a preponderance of evidence that an
24 activity protected by this article was a contributing factor in the
25 alleged retaliation against a former, current, or prospective
26 employee, the burden of proof shall be on the supervisor, manager,
27 or appointing power to demonstrate by clear and convincing
28 evidence that the alleged action would have occurred for legitimate,
29 independent reasons even if the employee had not engaged in
30 protected disclosures or refused an illegal order. ~~If the supervisor,~~
31 ~~manager, or appointing power fails to meet this burden of proof~~
32 ~~in an adverse action against the employee in any administrative~~
33 ~~review, challenge, or adjudication in which retaliation has been~~
34 ~~demonstrated to be a contributing factor, the employee shall have~~
35 ~~a complete affirmative defense in the adverse action.~~

36 (2) *In an administrative action filed on or after January 1, 2009,*
37 *the administrative law judge shall make a finding, after the plaintiff*
38 *has completed presenting the evidence in his or her case in chief,*
39 *of whether the plaintiff demonstrated by a preponderance of*
40 *evidence that an activity protected by this article was a contributing*

1 factor in the alleged retaliation against the complainant. The
2 burden of proof shall then shift to the supervisor, manager, or
3 appointing power to demonstrate by clear and convincing evidence
4 that the alleged action would have occurred for legitimate
5 independent reasons even if the employee had not engaged in
6 protected disclosures or refused an illegal order.

7 (3) In an adverse action taken against an employee in which
8 the employee demonstrates, by a preponderance of the evidence,
9 that retaliation was a contributing factor to the adverse action
10 taken against him or her, the employee shall have a complete
11 affirmative defense to the adverse action.

12 (f) Nothing in this article shall be deemed to diminish the rights,
13 privileges, or remedies of any employee under any other federal
14 or state law or under any employment contract or collective
15 bargaining agreement.

16 SEC. 4. Section 19683 of the Government Code is amended
17 to read:

18 19683. (a) The State Personnel Board ~~shall initiate a hearing~~
19 ~~or investigation of a written complaint of reprisal or retaliation as~~
20 ~~prohibited by Section 8547.3 shall, within 10 working days of its~~
21 ~~submission. The executive officer shall complete findings receipt~~
22 ~~of a whistleblower retaliation complaint filed with the hearing~~
23 ~~State Personnel Board pursuant to the provisions of Section 8547.8~~
24 ~~of this code or investigation within 60 working days thereafter,~~
25 ~~and shall provide a copy Section 87164 of the Education Code,~~
26 ~~schedule the complaining state employee or applicant matter for~~
27 ~~state employment and to an evidentiary hearing before an~~
28 ~~administrative law judge upon a determination that the appropriate~~
29 ~~supervisor, manager, employee, or appointing authority. complaint~~
30 ~~meets all filing requirements mandated by the State Personnel~~
31 ~~Board.~~ When the allegations contained in a complaint of reprisal
32 or retaliation are the same as, or similar to, those contained in
33 another ~~appeal, appeal or complaint~~, the executive officer may
34 consolidate the appeals or complaints into the most appropriate
35 format. ~~In these cases, The case shall be conducted in accordance~~
36 ~~with the time limits described~~ State Personnel Board's normal
37 rules governing appeals, hearings, investigations, and disciplinary
38 proceedings. The administrative law judge shall make a finding,
39 after the plaintiff has completed presenting the evidence in his or
40 her case in chief, of whether the plaintiff demonstrated by a

1 *preponderance of evidence that an activity protected by this*
2 ~~subdivision~~ *article was a contributing factor in the alleged*
3 *retaliation against the complainant. The burden of proof shall then*
4 *shift to the supervisor, manager, or appointing power to*
5 *demonstrate by clear and convincing evidence that the alleged*
6 *action would have occurred for legitimate independent reasons*
7 *even if the employee had not—apply engaged in protected*
8 *disclosures or refused an illegal order. The hearing shall be limited*
9 *to no more than 10 hearing days. Any hearing involving*
10 *consolidated appeals or complaints shall also be limited to no*
11 *more than 10 hearing days, absent good cause.*

12 ~~(b) If the executive officer finds that the supervisor, manager,~~
13 ~~employee, or appointing power retaliated against the complainant~~
14 ~~for engaging in protected whistleblower activities, the supervisor,~~
15 ~~manager, employee, or appointing power may request a hearing~~
16 ~~before the State Personnel Board regarding the findings of the~~
17 ~~executive officer. The request for hearing and any subsequent~~
18 ~~determination by the board shall be made in accordance with the~~
19 ~~board's normal rules governing appeals, hearing, investigations,~~
20 ~~and disciplinary proceedings.~~

21 (e)

22 (b) ~~If, after the hearing, hearing described in subdivision (a),~~
23 ~~the State Personnel Board determines that a violation of Section~~
24 ~~8547.3 occurred, or if no hearing is requested and the findings of~~
25 ~~the executive officer conclude that improper activity has occurred,~~
26 ~~the board may order any appropriate relief, including, but not~~
27 ~~limited to, at the employee's request and with the employee's~~
28 ~~consent, transfer to or placement in any vacant position for which~~
29 ~~the employee is qualified, reasonable attorney's fees and costs for~~
30 ~~successful prosecution of a retaliation complaint before the State~~
31 ~~Personnel Board, reinstatement, backpay, restoration of lost service~~
32 ~~credit, if appropriate, compensatory damages, and the expungement~~
33 ~~of any adverse records of the state employee or applicant for state~~
34 ~~employment who was the subject of the alleged acts of misconduct~~
35 ~~prohibited by Section 8547.3.~~

36 ~~(d)~~

37 (c) Whenever the board determines that a manager, supervisor,
38 or employee, who is named a party to the retaliation complaint,
39 has violated Section 8547.3 and that violation constitutes legal
40 cause for discipline under one or more subdivisions of Section

1 19572, it shall impose a just and proper penalty and cause an entry
2 to that effect to be made in the manager's, supervisor's, or
3 employee's official personnel records.

4 (e)

5 (d) Whenever the board determines that a manager, supervisor,
6 or employee, who is not named a party to the retaliation complaint,
7 may have engaged in or participated in any act prohibited by
8 Section 8547.3, the board shall notify the manager's, supervisor's,
9 or employee's appointing power of that fact in writing. Within ~~60~~
10 ~~days~~ *four months* after receiving the notification, the appointing
11 power shall either serve a notice of adverse action on the manager,
12 supervisor, or employee, or set forth in writing its reasons for not
13 taking adverse action against the manager, supervisor, or employee.
14 The appointing power shall file a copy of the notice of adverse
15 action with the board in accordance with Section 19574. If the
16 appointing power declines to take adverse action against the
17 manager, supervisor, or employee, it shall submit its written reasons
18 for not doing so to the board, which may take adverse action
19 against the manager, supervisor, or employee as provided in
20 Section 19583.5. A manager, supervisor, or employee who is
21 served with a notice of adverse action pursuant to this section may
22 file an appeal with the board in accordance with Section 19575.

23 (f)

24 (e) In order for the Governor and the Legislature to determine
25 the need to continue or modify state personnel procedures as they
26 relate to the investigations of reprisals or retaliation for the
27 disclosure of information by public employees, the State Personnel
28 Board, by June 30 of each year, shall submit a report to the
29 Governor and the Legislature regarding complaints filed, hearings
30 held, and legal actions taken pursuant to this section.

31 (f) *In all cases, including those where individually named*
32 *respondents have joined in a consolidated hearing, the*
33 *administrative law judge shall make any orders that may appear*
34 *just in order to prevent any named party from being embarrassed,*
35 *delayed, or put to unnecessary expense, and may make other orders*
36 *as the interests of justice may require during the administrative*
37 *hearing.*

38 SEC. 5. Section 19683.5 of the Government Code is amended
39 to read:

1 19683.5. If a state employee is successful in an action brought
2 pursuant to Section 19683, the complaining employee shall be
3 reimbursed for all costs *and reasonable attorney's fees* incurred
4 pursuant to Section 995.3.

5 SEC. 6. No reimbursement is required by this act pursuant to
6 Section 6 of Article XIII B of the California Constitution because
7 the only costs that may be incurred by a local agency or school
8 district will be incurred because this act creates a new crime or
9 infraction, eliminates a crime or infraction, or changes the penalty
10 for a crime or infraction, within the meaning of Section 17556 of
11 the Government Code, or changes the definition of a crime within
12 the meaning of Section 6 of Article XIII B of the California
13 Constitution.