

AMENDED IN ASSEMBLY JULY 2, 2009

AMENDED IN SENATE APRIL 13, 2009

SENATE BILL

No. 220

**Introduced by Senator Yee
(Coauthor: Senator DeSaulnier)**

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 amended, 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. *For purposes of these provisions, protected disclosure means any good faith communication 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.

This bill would also require that when the injured party has requested a right-to-sue notice from the board, as provided, that request must be made before an action for damages is available. ~~“Protected disclosure” would be defined to mean any good faith communication, including~~ *The existing definition of protected disclosure would be revised to specifically include 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 otherwise falls within the definition above.*

~~(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 also 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)~~

(3) 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 also allow the board~~ *instead require the board to either initiate a hearing or investigation of a written complaint of any improper acts prohibited by the act within 10 working days of its submission, or, upon written request of the aggrieved complaining person submitted to the board within 10 working days of the submission of a complaint,* ~~to~~ *issue a right-to-sue notice containing specified information to the person within 10 working days of submission of a written complaint, as provided the request,* instead of initiating a hearing or investigation. Because a violation of these provisions would be a crime, the bill would impose a state-mandated local program.

~~(5)~~

(4) 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, but would not be limited to,~~ 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)

(5) 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.

(7)

(6) 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

1 government, the California State University, and the University
2 of California to report waste, fraud, abuse of authority, violation
3 of law, or threat to public health and safety without restraint or
4 fear of retribution or actual retribution due to having engaged in
5 a protected disclosure reporting those government improprieties.

6 (b) Public servants best serve the citizenry when they can be
7 candid and honest without reservation in conducting the people’s
8 business.

9 (c) The practice of restraining and retaliating against public
10 servants by denying employment or contractual opportunity,
11 decreasing the job responsibilities of an employee’s normal
12 workload, creating hostile work environments, and discriminating
13 in the terms or conditions of employment or contract for these
14 reasons foments unrest and dissatisfaction, deprives the state of
15 the fullest use of its capacities for development and advancement,
16 and substantially and adversely affects the interest of public
17 employees, employers, and the public in general.

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

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

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

26 SEC. 2. Section 8547.2 of the Government Code is amended
27 to read:

28 8547.2. For the purposes of this article:

29 (a) “Employee” means any individual appointed by the Governor
30 or employed or holding office in a state agency as defined by
31 Section 11000, including, for purposes of Sections 8547.3 to
32 8547.7, inclusive, any employee of the California State University.
33 “Employee” includes any former employee who met the criteria
34 of this subdivision during his or her employment.

35 (b) “Improper governmental activity” means any activity by a
36 state agency or by an employee that is undertaken in the
37 performance of the employee’s official duties, whether or not that
38 action is within the scope of his or her employment, and that (1)
39 is in violation of any state or federal law or regulation, including,
40 but not limited to, corruption, malfeasance, bribery, theft of

1 government property, fraudulent claims, fraud, coercion,
 2 conversion, malicious prosecution, misuse of government property,
 3 or willful omission to perform duty, or (2) is economically
 4 wasteful, or involves gross misconduct, incompetency, or
 5 inefficiency. For purposes of Sections 8547.4, 8547.5, 8547.10,
 6 and 8547.11, “improper governmental activity” includes any
 7 activity by the University of California or by an employee,
 8 including an officer or faculty member, who otherwise meets the
 9 criteria of this subdivision.

10 (c) “Person” means any individual, corporation, trust,
 11 association, any state or local government, or any agency or
 12 instrumentality of any of the foregoing.

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

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

26 (f) “State agency” is defined by Section 11000. “State agency”
 27 includes the University of California for purposes of Sections
 28 8547.5 to 8547.7, inclusive, and the California State University
 29 for purposes of Sections 8547.3 to 8547.7, inclusive.

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

32 8547.8. (a) A state employee or applicant for state employment
 33 who files a written complaint with his or her supervisor, manager,
 34 or the appointing power alleging actual or attempted acts of
 35 reprisal, retaliation, threats, coercion, or similar improper acts
 36 prohibited by Section 8547.3, may also file a copy of the written
 37 complaint with the State Personnel Board, in accordance with the
 38 provisions of Section 19683, together with a sworn statement that
 39 the contents of the written complaint are true, or are believed by
 40 the affiant to be true, under penalty of perjury. ~~The complaint shall~~

1 ~~be filed with the board within 12 months of the most recent act of~~
2 ~~reprisal set forth in the complaint. If a complaint is filed with the~~
3 ~~board, it shall be filed within 12 months of the most recent act of~~
4 ~~reprisal covered by the complaint.~~

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

13 (c) In addition to all other penalties provided by law, any person
14 who intentionally engages in acts of reprisal, retaliation, threats,
15 coercion, or similar acts against a state employee or applicant for
16 state employment for having made a protected disclosure shall be
17 liable in an action for damages brought against him or her by the
18 injured party. Punitive damages may be awarded by the court if
19 the acts of the offending party are proven to be malicious. Where
20 liability has been established, the injured party shall also be entitled
21 to reasonable attorney's fees as provided by law. However, any
22 action for damages shall not be available to the injured party unless
23 the injured party has first filed a complaint with the State Personnel
24 Board pursuant to subdivision (a), and either (1) the board has
25 issued, or failed to issue, findings pursuant to Section 19683; or
26 (2) the injured party requested a right-to-sue notice from the board
27 pursuant to Section 19683.

28 (d) This section is not intended to prevent an appointing power,
29 manager, or supervisor from taking, directing others to take,
30 recommending, or approving any personnel action or from taking
31 or failing to take a personnel action with respect to any state
32 employee or applicant for state employment if the appointing
33 power, manager, or supervisor reasonably believes any action or
34 inaction is justified on the basis of evidence separate and apart
35 from the fact that the person has made a protected disclosure as
36 defined in subdivision (d) of Section 8547.2.

37 (e) ~~(1) Once~~ *In any civil action or administrative proceeding,*
38 *once* it has been demonstrated by a preponderance of evidence
39 that an activity protected by this article was a contributing factor
40 in the alleged retaliation against a former, current, or prospective

1 employee, the burden of proof shall be on the supervisor, manager,
2 or appointing power to demonstrate by clear and convincing
3 evidence that the alleged action would have occurred for legitimate,
4 independent reasons even if the employee had not engaged in
5 protected disclosures or refused an illegal order. If the supervisor,
6 manager, or appointing power fails to meet this burden of proof
7 in an adverse action against the employee in any administrative
8 review, challenge, or adjudication in which retaliation has been
9 demonstrated to be a contributing factor, the employee shall have
10 a complete affirmative defense in the adverse action.

11 ~~(2) In an administrative action filed on or after January 1, 2010,~~
12 ~~the administrative law judge shall make a finding, after the plaintiff~~
13 ~~has completed presenting the evidence in his or her case in chief,~~
14 ~~of whether the plaintiff demonstrated by a preponderance of~~
15 ~~evidence that an activity protected by this article was a contributing~~
16 ~~factor in the alleged retaliation against the complainant. The burden~~
17 ~~of proof shall then shift to the supervisor, manager, or appointing~~
18 ~~power to demonstrate by clear and convincing evidence that the~~
19 ~~alleged action would have occurred for legitimate independent~~
20 ~~reasons even if the employee had not engaged in protected~~
21 ~~disclosures or refused an illegal order.~~

22 ~~(3) In an adverse action taken against an employee in which the~~
23 ~~employee demonstrates, by a preponderance of the evidence, that~~
24 ~~retaliation was a contributing factor to the adverse action taken~~
25 ~~against him or her, the employee shall have a complete affirmative~~
26 ~~defense to the adverse action.~~

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

31 SEC. 4. Section 19683 of the Government Code is amended
32 to read:

33 19683. (a) The State Personnel Board shall either:

34 (1) Initiate a hearing or investigation of a written complaint of
35 ~~reprisal or retaliation as any improper acts~~ prohibited by Section
36 8547.3 within 10 working days of its submission. The executive
37 officer shall complete findings of the hearing or investigation
38 within 60 working days thereafter, and shall provide a copy of the
39 findings to the complaining state employee or applicant for state
40 employment and to the appropriate supervisor, manager, employee,

1 or appointing authority. When the allegations contained in a
2 complaint of reprisal or retaliation are the same as, or similar to,
3 those contained in another appeal, the executive officer may
4 consolidate the appeals into the most appropriate format. In these
5 cases, the time limits described in this subdivision shall not apply.

6 (2) Upon the written request of the ~~aggrieved person~~
7 *complaining person, submitted to the board within 10 working*
8 *days of the submission of a complaint pursuant to Section 8547.8,*
9 *issue a right-to-sue notice to the complaining person within 10*
10 *working days of submission of a written complaint of reprisal or*
11 *retaliation as prohibited by Section 8547.3 days of the request.*
12 The right-to-sue notice shall notify the complaining person of his
13 or her right to file a civil action against any person who is subject
14 to the provisions of Section ~~8547.3~~ *within one year after the filing*
15 *of the complaint with the State Personnel Board 8547.3 within two*
16 *years after receipt of the right-to-sue notice.* The superior courts
17 of the State of California shall have jurisdiction of those actions,
18 and the complaining person may file in these courts. An action
19 may be brought in any county in the state in which the unlawful
20 practice is alleged to have been committed, in the county in which
21 the records relevant to the practice are maintained and
22 administered, or in the county in which the complaining person
23 would have worked but for the alleged unlawful practice. If the
24 defendant is not found within any of these counties, an action may
25 be brought within the county of the defendant's residence or
26 principal office.

27 (b) If the executive officer finds that the supervisor, manager,
28 employee, or appointing power retaliated against the complainant
29 for engaging in protected whistleblower activities, the supervisor,
30 manager, employee, or appointing power may request a hearing
31 before the State Personnel Board regarding the findings of the
32 executive officer. The request for hearing and any subsequent
33 determination by the board shall be made in accordance with the
34 board's normal rules governing appeals, hearings, investigations,
35 and disciplinary proceedings.

36 (c) If, after the hearing described in subdivision (a), the State
37 Personnel Board determines that a violation of Section 8547.3
38 occurred, *or, if no hearing is requested and the findings of the*
39 *executive officer conclude that improper activity has occurred,*
40 the board may order any appropriate relief, including, but not

1 limited to, at the employee's request and with the employee's
2 consent, transfer to or placement in any vacant position for which
3 the employee is qualified, ~~reasonable attorney's fees and costs for~~
4 ~~successful prosecution of a retaliation complaint before the State~~
5 ~~Personnel Board~~, reinstatement, backpay, restoration of lost service
6 credit, if appropriate, compensatory damages, and the expungement
7 of any adverse records of the state employee or applicant for state
8 employment who was the subject of the alleged acts of misconduct
9 prohibited by Section 8547.3.

10 (d) Whenever the board determines that a manager, supervisor,
11 or employee, who is named a party to the retaliation complaint,
12 has violated Section 8547.3 and that violation constitutes legal
13 cause for discipline under one or more subdivisions of Section
14 19572, it shall impose a just and proper penalty and cause an entry
15 to that effect to be made in the manager's, supervisor's, or
16 employee's official personnel records.

17 (e) Whenever the board determines that a manager, supervisor,
18 or employee, who is not named a party to the retaliation complaint,
19 may have engaged in or participated in any act prohibited by
20 Section 8547.3, the board shall notify the manager's, supervisor's,
21 or employee's appointing power of that fact in writing. Within 60
22 days after receiving the notification, the appointing power shall
23 either serve a notice of adverse action on the manager, supervisor,
24 or employee, or set forth in writing its reasons for not taking
25 adverse action against the manager, supervisor, or employee. The
26 appointing power shall file a copy of the notice of adverse action
27 with the board in accordance with Section 19574. If the appointing
28 power declines to take adverse action against the manager,
29 supervisor, or employee, it shall submit its written reasons for not
30 doing so to the board, which may take adverse action against the
31 manager, supervisor, or employee as provided in Section 19583.5.
32 A manager, supervisor, or employee who is served with a notice
33 of adverse action pursuant to this section may file an appeal with
34 the board in accordance with Section 19575.

35 (f) In order for the Governor and the Legislature to determine
36 the need to continue or modify state personnel procedures as they
37 relate to the investigations of reprisals or retaliation for the
38 disclosure of information by public employees, the State Personnel
39 Board, by June 30 of each year, shall submit a report to the

1 Governor and the Legislature regarding complaints filed, hearings
2 held, and legal actions taken pursuant to this section.

3 (g) In all cases, including those in which individually named
4 respondents have joined in a consolidated hearing, the
5 administrative law judge shall make any orders that may appear
6 just in order to prevent any named party from being embarrassed,
7 delayed, or put to unnecessary expense, and may make other orders
8 as the interests of justice may require during the administrative
9 hearing.

10 SEC. 5. Section 19683.5 of the Government Code is amended
11 to read:

12 19683.5. If a state employee is successful in an action brought
13 pursuant to Section 19683, the complaining employee shall be
14 reimbursed for all costs and reasonable attorney's fees incurred
15 pursuant to Section 995.3.

16 SEC. 6. No reimbursement is required by this act pursuant to
17 Section 6 of Article XIII B of the California Constitution because
18 the only costs that may be incurred by a local agency or school
19 district will be incurred because this act creates a new crime or
20 infraction, eliminates a crime or infraction, or changes the penalty
21 for a crime or infraction, within the meaning of Section 17556 of
22 the Government Code, or changes the definition of a crime within
23 the meaning of Section 6 of Article XIII B of the California
24 Constitution.