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## When the Squeaky Wheel Gets More than Just Grease

*By Colleen D. Zahn*

The Idaho Supreme Court recently decided that a public employee's mere complaint that his public entity employer was violating the law was enough to satisfy Idaho's Whistleblower Act—even though the employer investigated the complaint and resolved the employee's concerns. The Plaintiff in the case was Mark Van—the director of maintenance for Portneuf Medical Center's Life Flight Program. Van was hired by Portneuf in 1997 as a mechanic. He was later promoted to director of maintenance and was responsible for maintaining Portneuf's Life Flight helicopter.

In 2001, the helicopter crashed during a rescue mission. Van witnessed the crash and rushed to the scene to assist the pilot. The National Transportation Safety Board later concluded the crash was caused by pilot error, rather than any maintenance problems. Van, however, believed the public blamed the crash on poor maintenance and became protective of the maintenance department's reputation.

After the crash, Van began reporting what he believed were violations of state and federal law. For example, he complained that the pilots had accumulated too much time on duty, flown too low, taken off with ice on the rotor blades, and overflowed the helicopter by exceeding inspection time intervals. Also, while Portneuf was negotiating the purchase of a new helicopter, Van asked to review the proposed maintenance contract with the vendor, Agusta Helicopter. After reviewing the maintenance agreement, Van told Portneuf that he believed there were several loopholes, through which Agusta could avoid its maintenance responsibilities. Van argued that the loopholes meant that entering into the contract would be a waste of public funds.

Portneuf held several meetings to address Van's concerns. Shortly after one meeting in April 2005, Van was terminated. Portneuf alleged Van's termination was due to his inability to maintain positive interpersonal relationships with his colleagues and his failure to foster a positive team environment. Van filed a lawsuit against Portneuf, alleging that his termination violated Idaho's Whistleblower Act and was a wrongful discharge in violation of public policy. Portneuf filed a motion to dismiss the lawsuit, arguing that Van failed to establish all the elements necessary to support his claims. The district court agreed and dismissed the entire suit. Van appealed the dismissal.

Idaho's Whistleblower Act protects employees of public employers—which includes the state or any political subdivision (meaning cities and counties) or any other governmental entity eligible to participate in the public employee's retirement system, otherwise known as PERSI. The Whistleblower Act provides that a public employer may not take action against its employee because the employee communicated, in good faith, about the existence of any waste of public funds, property or manpower, or any violation or suspected violation of a law, rule or regulation of the state, a political subdivision, or the federal government. The Act goes on to state that the communication shall be made at a time and in a manner which gives the employer reasonable opportunity to correct the waste or violation. The Act also provides that the employer may not take adverse action against the employee for participating in an investigation or other inquiry, or for refusing to carry out a

directive that the employee reasonably believes violates a law, rule or regulation of the state, a political subdivision, or the federal government.

Portneuf argued that Van's complaints were not protected under the Whistleblower Act because they either did not involve violations of the law, or Portneuf had investigated and/or cured any potential violations in response to Van's reports. The Supreme Court disagreed, concluding that as long as a communication of suspected violation of laws, rules or regulations is made in good faith, it is covered under the Act. The Supreme Court stated that for purposes of the Act, it does not matter whether the complaint is thereafter addressed and remedied, or that the complaint only involves a suspected violation. The Supreme Court concluded that a number of Van's complaints involved suspected or confirmed violations of federal regulations and were therefore covered by the Act. The Supreme Court reversed the trial court's order and reinstated Van's claim under the Whistleblower Act.

Another important aspect of this decision is the Supreme Court's conclusion concerning the causation element of Van's Whistleblower claim. In order for Portneuf to be liable under the Whistleblower Act, Van had to show that his termination was caused by his complaints. Portneuf argued that Van could not establish his termination was caused by the complaints because many of the complaints were made years before the termination. Portneuf also argued that it had legitimate reasons for terminating Van—he could not get along with the pilots and was unable to accept solutions other than his own.

The Supreme Court ultimately agreed with Van, and stated that the trial court cannot simply accept the employer's proffered reasons for termination if the employee establishes some evidence indicating that his termination was related to his complaints. The Supreme Court determined that Van's evidence that he made continuing complaints and that his termination followed after the series of complaints was sufficient evidence to require the case to be sent to the jury, despite the fact that Portneuf provided evidence that a number of the complaints happened years before and despite the fact Portneuf had legitimate reasons for terminating Van.

While Van prevailed on some of his arguments, he did not prevail on all of them. Van's complaint about the maintenance agreement was not covered by the Act because it involved the suspected, as opposed to a confirmed, waste of public funds. The Court focused on the language of the Act indicating protected activities include communications about the existence of any waste of public funds. The Supreme Court interpreted this language as including only those confirmed instances of waste, and not those based on any employee's subjective beliefs about what may or may not occur in the future.

The Supreme Court also upheld the trial court's dismissal of Van's wrongful discharge claim. Van was an employee at will and therefore could be terminated for any reason that did not contravene public policy. The public policy exception has been interpreted to protect employees who refuse to commit unlawful acts, who perform important public obligations, or who exercise certain legal rights and privileges—such as reporting to jury duty. Van stated that his termination contravened public policy because it violated the Whistleblower Act. The Supreme Court disagreed, concluding that the Whistleblower Act provides specific remedies for those employees damaged by such conduct. The Supreme Court decided that the existence of the Act and its remedies removed that conduct from coverage under the public policy exception—to conclude otherwise would allow Van to recover twice for the same allegedly wrongful actions.

So what can a public employer do to protect itself from potential Whistleblower claims? First, public employers need to set up a system whereby public employees make complaints of waste or legal violations to an individual who is not otherwise involved in disciplining employees or making hiring, firing and promotion decisions. Whoever is designated to receive the complaints must also be trained how to handle the complaints and how to protect the identity of the complaining employee. One way for employers to protect themselves on the

causation element of the Whistleblower claim is to ensure that such complaints are received by someone who has no authority or ability to make any decisions concerning the employee's status. If the identity of the complaining employee is kept confidential and not released to those in the employee's supervisory chain, then the public employer has a good argument that any employment action taken against the employee did not relate to the employee's complaint.

Second (and this applies to public and private employers alike), it is crucial for employers to fully and completely document the activities leading up to termination of an employee, as well as the reasons for terminating an employee—even if the employee is at-will. If the employee is experiencing ongoing disciplinary issues, all of those issues need to be documented and addressed as they occur and prior to the decision to terminate. Given the Supreme Court's comments in the Van decision, if an employee makes any good faith complaint about a violation of law, regulation, rule or ordinance, then the employee may have a viable claim under the Whistleblower Act that will survive motion practice and go to trial. Meticulous documentation regarding the reasons underlying the employment action will help the employer establish that it had independent reasons for terminating the employee, that were wholly unrelated to the employee's protected activity.