ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

Date: March 12, 2018

To: Members of the Ethics Commission

From: Kyle Kundert, Senior Policy Analyst

Re: AGENDA ITEM 6: Information Requested by Commissioner Kopp Regarding Whistleblower Protection Provisions.

Summary: This memorandum discusses Staff's research in response to Commissioner Kopp's request for information about California Assembly Bill 403 and its relationship, if any, to the San Francisco Whistleblower Protection Ordinance.

Action Requested: That the Commission discuss the policy considerations described in this Memorandum and provide any further policy direction it may have regarding the Whistleblower Protection Ordinance adopted by the Commission during its January 19, 2018, meeting.

At the Commission's regular February 16, 2018, meeting, Commissioner Kopp requested that Staff research and provide recommendations regarding the differences between the version of Whistleblower Protection Ordinance adopted by the Commission during its January 19, 2018 meeting (copy attached) and California Assembly Bill 403 (AB 403), "the Legislative Employee Whistleblower Protection Act."[1] Specifically, Commissioner Kopp asked Staff to evaluate the merits of AB 403's (1) prohibition on the "interference with" protected activity and (2) requirement that a complainant show that his or her whistleblowing was a "contributing factor" (instead of a "substantially motivating factor") in relation to an alleged adverse employment action taken in response to that whistleblowing.

This memo provides background on those issues to assist the Commission in considering any further policy direction it may wish to provide at its regular meeting on March 16, 2018.

Background: California Whistleblower Protections

1. The California Whistleblower Protection Act

[1] Stats 2018 Ch. 2 § 1 (AB 403), effective Feb. 5, 2018.

The California Whistleblower Protection Act (CWPA) predates AB 403 and protects state employees who disclose improper government activities.[2] The CWPA empowers an injured employee to bring a civil action against another employee who uses his or her official authority or influence to interfere with the former's right to make protected disclosures.[3] It likewise prohibits retaliation.[4] In a civil action or administrative proceeding alleging retaliation, the CWPA creates a burden-shifting scheme: once the complainant demonstrates "by a preponderance of the evidence" that an activity the CWPA protects was a "contributing factor" in the alleged retaliation, the defendant or respondent must demonstrate "by clear and convincing evidence" that "legitimate, independent reasons" would have yielded the same outcome.[5]

2. The Legislative Employee Whistleblower Protection Act (AB 403)

The CWPA specifically excludes any person who is "a Member or employee of the Legislature" from the class of persons who receive protections.[6] AB 403 extends the protections for state employees to legislative employees and therefore creates new protections for legislative employees.[7] The legislature adopted AB 403 to encourage legislative employees to make "protected disclosures" alleging that a state legislator, or another legislative employee, engaged in improper activities, "including sexual harassment."[8]

Like the CWPA, AB 403 prohibits a state lawmaker or another legislative employee from using his or her official authority or influence to interfere with the right of a legislative employee to make a protected disclosure.[9] Also like the CWPA, AB 403 empowers a legislative employee to bring a civil action for damages against an individual who violates the prohibition on interference.[10] Unlike the CWPA, AB 403 also creates criminal liability (up to a year in county jail) for violations of the prohibition on interference.[11] With respect to retaliation, AB 403 adopts the same burden-shifting scheme and

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[2] Gov't Code §§ 8547 *et seq.*, effective May 7, 1999; *see also* Stats. 2010 ch. 160 § 2 (AB 1479), effective Jan. 1, 2011 (adding § 8547.13, governing written complaints alleging retaliation and introducing the "contributing factor" legal standard).
[3] *Id.* § 8547.3.
[4] *Id.* § 8547.3(b) (defining "use of official authority or influence" to include personnel actions, "including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action"); *id.* § 8547.13.
[5] *Id.* § 8547.13(g); *see also id.* § 8547.8(c) (authorizing an injured person to bring a civil action for damages, including punitive damages, but only after filing a complaint with the State Personnel Board).
[6] *Id.* § 8547.2(a). In its synopsis of AB 403, the Assembly Judiciary Committee explained "separation of powers issues" led to the exclusion of legislative employees from the CWPA. Assem. Com. on Judiciary, Rep. on Assem. Bill No. 403 (2017-2018 Reg. Sess.) Mar. 14, 2017, p. 1.
[7] AB 403 defines "legislative employee" to mean "an individual, other than a Member of either house of the Legislature, who is, or has been, employed by either house of the Legislature," including "volunteers, interns, fellows, and applicants." Gov't Code § 9149.32(b).
[8] Gov't Code § 9149.32(c).
[9] *Id.* § 9149.33(a); *see also id.* § 9149.32(a) (defining "interfere" to mean "to intimidate, threaten, coerce, or command, or attempt to intimidate, threaten, coerce, or command a legislative employee who attempts to make a protected disclosure.").
[10] *Id.* § 9149.33(c).
[11] *Id.* § 9149.33(b).

standards of proof from the CWPA.[12]

Staff's Analysis

1. "Interference With"

The San Francisco Board of Supervisors adopted the Whistleblower Protection Ordinance in 2000 when it first enacted the Campaign & Governmental Conduct Code.[13] The original version provided that "No City officer or employee may intimidate, threaten, coerce, or interfere with any individual because that individual has filed a complaint with, or is participating in or cooperating with an investigation or proceeding of, the Ethics Commission."[14]

The Board of Supervisors deleted the language regarding intimidation and interference in 2002 when it amended the ordinance to expand the categories of protected activity and to "clarify that protections for whistleblowers apply only when the whistleblower is subject to certain adverse employment actions."[15] These amendments reflect a legislative intent to protect City officers and employees from negative personnel actions such as termination, suspension, and demotion causally connected to their engagement in protected activity. The sponsor's use of the word "clarify" in the legislative materials indicates that the Board of Supervisors never intended that interference or intimidation alone would comprise retaliatory activity, but that such interference or intimidation must rise to the level of an adverse employment action.

Current City law prohibits some types of interference with officers and employees who engage in protected activity. First, the Whistleblower Protection Ordinance imposes on all City officers and employees a "duty to cooperate." SF C&GCC § 4.125(b). Second, the Charter prohibits officers from engaging in "official misconduct," which would include a willful lack of cooperation or a willful attempt to prevent others from cooperating. SF Charter § 15.105(e).

In addition, AB 403, like the CWPA before it, prohibits interference with protected activity, which is to say the underlying complaints that might form the basis of eventual retaliation (rather than retaliation complaints themselves). As Staff explained during the January 19, 2018 regular meeting of the Ethics Commission, the Commission lacks jurisdiction over provisions contained in the Whistleblower Protection Ordinance that address duties assigned to the Controller's Office Whistleblower Program. As a result, and under the advice of the City Attorney's Office, Staff deleted sections not within the Commission's jurisdiction from the ordinance the Commission adopted on January 19. If Commissioners wish to explore further a prohibition on interference, Staff will engage with the Controller's Office, the City Attorney's Office, the District Attorney's Office, the Department of Human Resources, and other stakeholders to whom protect disclosures may be made.

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[12] *Id.* § 9149.35(b)(1). The legislative history makes clear that lawmakers intentionally adopted the burden of proof and causation standards from the CWPA. However, in none of the Committee Reports regarding AB 403 did legislators contemplate the merits of using "contributing factor" as the standard of causation.
[13] File No. 000358, Ord. No. 71-00, approved Apr. 28, 2000.
[14] SF C&GCC § 4.115(a) (2000).
[15] Sup. Matt Gonzalez, Introduction Form, File No. 020017, Jan. 7, 2002 (amending Ord. No. 29-02, approved Mar. 15, 2002).

Finally, as explained below, any further amendment to the Whistleblower Protection Ordinance will trigger additional meet and confer obligations with the City's collective bargaining units, which will delay the implementation of the amendments adopted by the Commission during the January 19, 2018, meeting.

2. "Contributing factor"

In determining what standard of causation to impose, the City must resolve whether it wishes to create liability for managers and supervisors who take adverse employment actions against employees even where they would have taken the same action absent whistleblowing (or where multiple factors contributed to their decision), or only where the employee's whistleblowing meaningfully caused the employer to take the adverse employment action. In considering this question, Staff reviews several contexts in which courts have evaluated causation in the retaliation and discrimination contexts.

First, the US Supreme Court has ruled that in retaliation claims under Title VII of the Civil Rights Act of 1964, a complainant must demonstrate that "but for" a retaliatory motive, the employer would not have taken the adverse action.[16] Because Title VII requires a plaintiff to prove retaliation "because of" the plaintiff's whistleblowing, the Supreme Court held that mixed motives are not sufficient, and that a plaintiff must prove that his or her protected activity actually caused the adverse employment action.[17]

In contrast, the California Supreme Court has held that the phrase "because of" does not require proving "but for" causation. Interpreting the State's Fair Employment and Housing Act (FEHA) in cases involving discrimination (not retaliation),[18] the California Supreme Court held that a plaintiff must prove that discrimination was a "substantial motivating factor":

> Requiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, for reasons explained above, proof that discrimination was a substantial factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.[19]

Therefore, while the California Supreme Court interprets causation in FEHA cases to require less than the US Supreme Court in Title VII cases, FEHA's "substantial motivating factor" standard requires more than the "contributing factor" standard that the CWPA (and now AB 403) requires. Following the logic of

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[16] *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

[17] Federal law imposes a higher standard for proving retaliation than it does for proving discrimination. *See* Chris Ceplenski, *Retaliation claims in California: What does employee have to prove?*, CALIFORNIA HR, Oct. 28, 2013 ("In short, the [Supreme] Court's rulings have provided that cases of discrimination only need to show that the discrimination occurred; they do not need to show that there were no other factors at play. In other words, the Supreme Court has ruled that in the cases of discrimination, it is a violation of Title VII even if there are other, non-discriminatory reasons for the action at hand.").

[18] FEHA, Gov't Code §§ 12900 *et seq*.

[19] *Harris v. City of Santa Monica*, 56 Cal. 4th 203, 232 (2013).

the California Supreme Court in *Harris*, the "contributing factor" standard may create liability for "mere thoughts or passing statements," which is to say "a remote or trivial reason,"[20] instead of in instances where an employee's whistleblowing actually caused the adverse employment action.

Given that federal law imposes a higher standard in retaliation cases than in discrimination cases, and that the California Supreme Court's reasoning in *Harris* persuades that the "substantial motivating factor" standard achieves deterrent purposes while also ensuring against expansive liability, Staff believes that preserving the "substantial motivating factor" applied in FEHA cases as the legal standard in the City's Whistleblower Protection Ordinance remains an appropriate approach.

Meet & Confer Obligations

State law requires the governing body of a public agency to bargain in good faith with employee representatives to reach agreement on issues relating to wage rates, benefits, or other terms and conditions of employment.[21] Because a City officer or employee's appointing authority may impose disciplinary action, up to and including dismissal, upon any City officer or employee who violates the City's whistleblower protections, additional changes to the Whistleblower Protection Ordinance would have to undergo additional meet and confer processes with the City's collective bargaining units. In that case, referral to the Board of Supervisors of the amendments adopted by the Commission during the January 19, 2018, meeting, along with their enactment and implementation, would be delayed until after that meet and confer process can again be concluded.

[20] *See* California Civil Jury Instructions (CACI) 2507 (Revised June 2013) (explaining that a "substantial motivating reason" need not be the only reason but must be "more than a remote or trivial reason.").
[21] Gov't Code § 3505.