

RESOLUTION ELF-04- 2008

Administrative Exhaustion for University of California Whistleblower Complainants

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Government Code Section 8547.10(c) to read as follows:

- 1 § 8547.10.
- 2 [Subdivisions a and b remain unchanged.]
- 3 (c) In addition to all other penalties provided by law, any person who intentionally
- 4 engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university
- 5 employee, including an officer or faculty member, or applicant for employment for having
- 6 made a protected disclosure shall be liable in an action for damages brought against him or
- 7 her by the injured party. Punitive damages may be awarded by the court where the acts of
- 8 the offending party are proven to be malicious. Where liability has been established, the
- 9 injured party shall also be entitled to reasonable attorney's fees as provided by law.
- 10 However, any action for damages shall not be available to the injured party unless the
- 11 injured party has first filed a complaint with the university officer identified pursuant to
- 12 subdivision (a), and the university has either reached or failed to reach a decision regarding
- 13 that complaint within the time limits established for that purpose by the regents.
- 14 [Subdivisions d, e and f remain unchanged.]

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Does not allow University of California whistleblower complainants to challenge the decisions of the University regarding their whistleblower complaints.

This Resolution: Would allow University of California whistleblower complainants to challenge the decisions of the University regarding their whistleblower complaints.

The Problem: University of California (“the University”) employees that wish to complain of illegal activities (“whistleblowers”) are presently required to file an informal complaint with the University prior to obtaining the right to file a civil action. The University may conduct an administrative proceeding to adjudicate the complaint, and the University employee is bound by the determinations reached by the University in all except the rarest of cases. The Whistleblower Protection Act (Government Code §8547 *et seq.*) allows for independent review of whistleblower complaints brought by state employees, and employees of California State University, yet decisions of the University of California remain unreviewable. As Justice Werdegar wrote in her concurring opinion:

“For whistle blowing employees to be confident they are protected against retaliation, they must have recourse to a fair and impartial decisionmaking process outside the line management of their employing agency or university. If the same government organization that has tried to silence the reporting employee also sits in final judgment of the employee's retaliation claim, the law's protection against retaliation is illusory. The Legislature recognized and met the need for independent review by expressly authorizing civil claims for retaliation by state agencies, the University of California, and the California State University. (§§ 8547.8, 8547.10, 8547.12.) Yet today's decision eliminates meaningful independent review for University of California employees. 2 As a result, a University employee, knowing that any complaint of retaliation will be decided by the University itself, will be unable to act ‘without fear of retribution.’ (§ 8547.1.) The legislative goal will be defeated, as University employees will have less reason to be ‘candid and honest without reservation in conducting the people's business.’ (*Ibid.*)”

Miklosy v. U.C. Regents, supra, 2008 Cal. LEXIS 9370 at *55-56.

The concurring decision concluded, “I urge the Legislature to revisit this statute and if, as I suspect, it intended to create only a requirement that complainants exhaust their internal remedies, to amend the statute in a manner that makes that intent clear.” *Miklosy v. U.C. Regents, supra*, 2008 Cal. LEXIS 9370 at *63. This proposed Emergency Late Filed resolution addresses the concern raised by the court.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Heather E. Borlase, Bayer & Borlase, 912 Cole Street, #238, San Francisco, CA 94117. (415) 558-9960. Email: heatherborlase@aol.com.

RESPONSIBLE FLOOR DELEGATE: Heather E. Borlase