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WHEN EMPLOYEES SPEAK UP:

FREE SPEECH, WHISTLEBLOWING, AND HARASSMENT COMPLAINTS

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Whistleblower Protections under the IPPEA

What is the IPPEA

Idaho legislature enacted the Idaho Protection of Public Employees Act (IPPEA) in 1994. See I.C. §§6-2101-2109.

The IPPEA created a cause of action for public employees who experience adverse action *as a result of* reporting waste and violations of a law, rule or regulation. See I.C. § 6-2101.



Important Definitions

“Adverse Action”: To discharge, threaten, or otherwise discriminate against an employee in any matter that affects their employment, including compensation, terms, conditions, location, rights, immunities, promotions, or privileges. (I.C. § 6-2103(1))

“Employee”: A person who performs a service for wages or other remuneration. (I.C. § 6-2103(3))

“Employer”: ...any political subdivision...[and] includes an agent of an employer. (I.C. § 6-2103(4)).

“Good faith” a reasonable basis in fact for the communication/participation. Lacking where the employee knew or reasonably should have known the report is malicious, false or frivolous. (I.C. § 6-2104(1)(b) and (2)(b)).

IPPEA Employee Protections

An employer may not take adverse action against:

- An employee who communicates in good faith the existence of alleged waste of public funds, property, or manpower, or a suspected violation of law/rule/regulation;
- An employee who participates in an investigation, hearing, court proceeding, etc.; or
- An employee who has objected to or refused to carry out a directive that the employee reasonably believes violates a law/rule/regulation.

Employee Remedies

- Civil action for injunctive relief or actual damages, or both, subject to the tort cap.
- Very short 180-day time limit to file after occurrence of alleged violation.
- Entitled to recover reasonable attorney fees. But note, so is the government if the action had no basis in law or fact. I.C. §6-2107.
- Court may order reinstatement, plus back pay and benefits.

Employer Obligations and Takeaways

1. An employer may not implement rules or policies that unreasonably restrict an employee's **ability to document the existence** of any waste of public funds, property or manpower, or a violation or suspected violation of any laws, rules or regulations. I.C. § 6-2104(4).
2. Must use appropriate means to **notify its employees** of their protection under the IPPEA.
3. Avoid taking unlawful adverse action.

IPPEA HYPOTHETICAL

Jane works for a county road and bridge department. She overhears a coworker mention that a contractor may be overbilling the county. Without verifying the claim herself, Jane posts about it on her personal social media, naming the contractor and her department director. She also files a written complaint with the board of county commissioners.

Jane had already received a written warning for performance issues the month before. Two weeks after her complaint, the department reorganizes her role as part of a broader restructuring that had been under discussion for several months. Jane believes the reorganization is retaliation.

1. Did Jane make her post in “good faith”?
2. Does a social media post qualify for IPPEA protections?
3. Is the reorganization lawful? What about the performance issues?



Public Employee Speech: First Amendment Protections

Legal Landscape: The Pickering-Connick Test

- *Pickering v. Board of Education*, 391 U.S. 563 (1968)- a public-school teacher was terminated after writing a letter to the editor critical of district officials but not those he worked with day-to-day. The Supreme Court reasoned he spoke on a matter of public concern, holding Pickering's rights to free speech outweighed the school board's interests in a disruption-free workplace.
- *Connick v. Myers*, 461 U.S. 138 (1983)- New Orleans District Attorney Harry Connick Sr. fired assistant district attorney Sheila Myers after learning that Myers distributed a questionnaire to fellow employees, questioning various office policies. Applying (what became) the Pickering-Connick test, the Supreme Court found most (but not all) of the issues on her questionnaire were more akin to a private grievance rather than issues of public concern. Balancing these interests, the Court found in favor of D.A. Connick due to the disruption created in the office.

Enter *Garcetti*

- In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court introduced a new threshold inquiry, holding that **when public employees make statements pursuant to their official job duties, they have no First Amendment protections.**
- The effect of *Garcetti* is that many employees' free-speech cases now cannot make it past this threshold inquiry to the Pickering-Connick balancing test.

Putting it together

The ***Garcetti*** Threshold: Is it citizen speech or employee speech? Consider an employee's job duties.

If speech is part of the job → **stop analysis, discipline is allowed, not protected speech.**

If speech is outside the job → go to Pickering-Connick.

The ***Pickering-Connick*** Test

1. Is the speech about a public issue? Corruption, misuse of funds, public policy, etc. versus personal grievances or office drama. If yes, go to step 2, balancing.

2. Balancing. Weigh importance of the issue to the public and value of the speech against workplace disruption, damage to relationships, loss of trust and confidence, etc.

EMPLOYEE SPEECH HYPOTHETICAL

Marcus is a building inspector for an Idaho county. Part of his job is writing internal reports flagging code violations. Frustrated that his supervisor keeps overruling those reports for well-connected developers, he does two things: he sends his supervisor a memo documenting the overruled violations, and, on his own time, he writes an op-ed in the local paper accusing the county of letting unsafe buildings pass inspection to favor campaign donors.

After the op-ed runs, developers complain, a county commissioner demands discipline, and morale in the department drops. The county wants to terminate Marcus and asks whether it can.

1. Garcetti threshold: which statements were made as part of his job, and which as a citizen?
2. Public concern: is the op-ed a public issue or a private workplace grievance?
3. Balancing: how do you weigh the value of his speech against the disruption to the department?

Harassment Complaints: The Clock Starts Now



What Should I do? Follow your Policy!

A good anti-harassment policy will:

- Describe what constitutes discrimination, harassment, hostile work environment, and retaliation.
- Guide employees on how and where to report.
- Guide supervisors on what to do when they receive a report of harassment.
- Outline limits of confidentiality to meet expectations upfront.
- Note that once a complaint is received, it cannot be withdrawn by the complainant.
- Instruct how to engage a neutral investigator.
- Follow-up requirements: notification, discipline, documentation.

Taking Action



Take it seriously immediately



Assess interim measures



Engage a neutral or third-party investigator



Preserve confidentiality (within limits)



Make findings and take action



Follow up

HARASSMENT HYPOTHETICAL

Sarah, a department supervisor, tells you in passing that one of her employees, Maria, mentioned feeling “uncomfortable” around a coworker but asked Sarah not to say anything. Sarah isn’t sure whether it rises to the level of harassment and didn’t get specific details. Maria has not filed a formal complaint.

Your harassment policy states that supervisors who receive reports of harassment must immediately notify HR and that complaints cannot be withdrawn once received. Sarah asks you: “Does this even count as a complaint? She told me not to do anything about it.”

- 1. Does this count as a complaint?**
- 2. Can Maria withdraw it?**
- 3. What should Sarah have done?**



Defenses Against Claims of Discrimination and Harassment

Defenses: the Why and the What

- **Legitimate, Non-Discriminatory Explanations:** Ability to show an adverse action was based on documented performance, conduct, or economic factors rather than protected characteristics.
- **Faragher-Ellerth Defense:** Used in harassment cases, an employer may avoid liability by showing they had anti-harassment policies, and the employee failed to use them, or that the employer acted promptly to address and correct the behavior.
 - Changes since the *Me Too* movement?
- **Same Actor Defense:** When the same person who hired the employee is also the one to fire them, suggesting discrimination was not the motive.

QUESTIONS?

Staff update

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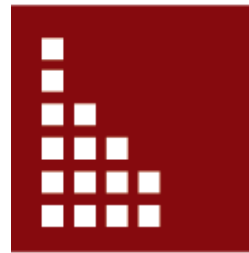


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