



**The Latest (and definitely not the greatest) News**

From the World of Whistleblower/Retaliation Claims

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Tamara E. Jones  
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**AGENDA**

1. The Origins of Retaliation and Whistleblower Claims (*i.e.*, Where did those laws come from?)
2. Retaliation Claims: Interesting Case Law Developments
3. Tips for Developing an Effective Whistleblower/No-Retaliation Program for Your Organization



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**Where Did They Come From?**

Origins of Retaliation Claims



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## Federal/Oregon Retaliation Laws

- Fair Labor Standards Act (federal) and Oregon wage and hour laws
- Title VII (federal) and ORS 659A.030 (discrimination and harassment)
- FMLA and OFLA (includes when an employee asks about leave options)
- Workers' Compensation (Oregon)
- Making complaints about safety-related issues (OSHA and OR-OSHA)



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## Little-Known Whistleblowing Disclosures/Activities

- Bringing a civil proceeding **in good faith** against an employer
- Reporting criminal activity by another person, or cooperating with any law enforcement agency conducting a criminal investigation, or causing criminal charges to be brought against anyone
- Testifying **in good faith** at a civil proceeding or criminal trial
- Testifying **in good faith** at an unemployment compensation hearing
- But wait, there's more! For a helpful list:
  - [http://www.oregon.gov/boli/TA/docs/T\\_FAQ\\_Protected\\_Classes\\_2014.pdf](http://www.oregon.gov/boli/TA/docs/T_FAQ_Protected_Classes_2014.pdf)



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**What does “in good faith” mean?**



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## ORS 659A.203 - Public Employers May Not:

- Prohibit employees from talking to the government about their employer's "activities."
- Prohibit, discipline or threaten to discipline employees for disclosing information that the employee **"reasonably believes"** is evidence of:
  - A violation of any federal or state law, rule or regulation by the state, agency or political subdivision;
  - **Mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety** resulting from action of the state, agency or political subdivision.



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## ORS 659A.203 - Definitions



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## Mismanagement

Must involve more than mere routine complaints regarding a public employer's policies.

Instead, it must relate to serious misconduct that is of public concern and that does or could undermine the employer's ability to perform its mission.

- Hall v. Douglas County, 226 Or. App. 276 (2009)



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### Gross Waste of Funds

An expenditure that is significantly out of proportion to the benefit expected to accrue to the agency and is more than a debatable expenditure.

– OAR 839-010-0010(6)



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### Abuse of Authority

To “deliberately exceed or make improper use of delegated or inherent authority or to employ it in an illegal manner.” OAR 839-010-0010(1).

– An employee’s complaint of political favoritism does not rise to the magnitude of a protected disclosure of abuse of authority. *Fox v. Josephine County*, 2010 BL 178545, 7 (D. Or. 2010)



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### Substantial & specific danger to public health & safety

“A specified risk of serious injury, illness, peril or loss, to which the exposure of the public is a gross deviation from the standard of care or competence that a reasonable person would observe in the same situation.” OAR 839-010-0010(10).

- The reported activity must rise in magnitude to a level of public concern in order for complaints about it to be protected. *Bjurstrom v. Oregon Lottery*, 202 Or. App. 162 (2005)



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## Employee Privacy Rights?



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## ORS 659A.203

A "public employer" may not disclose the "identity" of an employee who complains about any of the things identified in ORS 659A.203 "without the written consent of the employee during any investigation of the information provided by the employee..."

ORS 659A.218



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## ORS 659A.199: Also applicable?

It is an unlawful employment practice "for an employer" to discriminate or retaliate against an employee because "the employee has **in good faith** reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."



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## A True Story



"Remember the good old days when it was a suggestion box?"

659A.199 v. 659A.203

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- A national chain was in the process of building a much-welcomed store in one of our members' cities.
- A city employee who was responsible for installing street signs into the concrete sidewalks located outside the store complained to his supervisor about the thickness of the concrete. He was reportedly concerned that the signs could blow over and hurt someone.



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- Soon thereafter, someone who identified himself as a "city employee" called the national chain and told them that their sidewalks do not have enough concrete to keep city-required signs from falling over. In other words, the signs could blow over and hurt someone.



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- First question: Is contacting a corporation about something like this covered under ORS 659A.203? What about ORS 659A.199?



- Second question: Is there anything wrong with "us" investigating who made the call?



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## Retaliation and Former Employees

**General Truth #1:** Former employees can bring claims against you if you retaliated against them post-employment.



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## Retaliation and Former Employees

**General Truth #2:** Current employees who were reinstated after an arbitrator or court orders their reinstatement should be treated with caution.



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## Retaliation Claims: Interesting Case Law Developments



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## “Adverse Employment Actions” – *Really?*

Examples of actions that could be “adverse employment actions,” according to the Ninth Circuit Court of Appeals:

- Removing an employee from a particular job assignment resulting in economic consequences (loss of extra pay);
- Prohibiting an employee from using break time to travel between work sites, thereby requiring her to use unpaid time for work travel;
- Rescinding a previously approved vacation; and
- Removing an employee from an unpaid position on an employer-sponsored committee.



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## “Adverse Employment Actions” – *Really?*

Examples of actions that could be “adverse employment actions”, according to the Ninth Circuit Court of Appeals:

- Putting an employee on paid administrative leave, when the leave has economic consequences:
  - The employee missed out on taking a promotional exam;
  - The employee forfeited on-call and holiday pay; and
  - The employee was prevented from further on-the-job development of his skills.



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### 1st Amendment: *Lane v. Franks et al.*

- Newly hired director (Lane) oversaw a non-profit program run by local community college to help at-risk youth (called "CITY").
- An audit of the program's expenses revealed that a State Representative was on CITY's payroll, yet was not reporting to CITY's offices for work.
- New director terminated the State Representative's employment, which in turn triggered a federal investigation, and the new director testified to a federal grand jury regarding his reasons for terminating the State Representative.



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### 1st Amendment: *Lane v. Franks et al.*

- Following the director's testimony, the Community College's president (Franks) decided to cancel the CITY program altogether and terminate the director's employment.
- The director sued and alleged, among other reasons, that he was retaliated against in violation of his First Amendment Rights.




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### 1st Amendment: What's Protected?

- The First Amendment protects a public employee's free speech rights when the speech is made as a private citizen on a matter of public concern.
- Accordingly, the employee must have spoken "as a citizen," not an employee. This is true even if the speech relates:
  - To the employee's job; or
  - Information learned on the job.



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### 1<sup>st</sup> Amendment: *Lane v. Franks et al.*

When a public employee testifies truthfully outside of the scope of ordinary job duties, he or she testifies as a private citizen and not as a public employee for purposes of First Amendment protections.

- This remains the case even when the testimony in question relates to the public employee's job or concerns information that the employee learned through employment.



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### *Quinn v. St. Louis Cnty.* (8<sup>th</sup> Cir 2011)

- Employee alleged that her office was moved and repainted to white after she selected a "custom color," she was excluded from meetings, she lost responsibilities, her new boss called her a problem employee, yelled at her, and unfairly accused her of turning in work late.
  - This all occurred after she took FMLA leave for "stress" and complained about sexual harassment by a County Commissioner before that.
- Employee then took a second FMLA LOA, which was challenged by her new boss. A lawsuit followed.



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### *Quinn v. St. Louis Cnty.* (8<sup>th</sup> Cir 2011)

- Court: Employee failed to establish that she suffered a cognizable adverse employment action.
  - The fact that claimant felt harassed is not the issue – subjective feelings do not show retaliation.
- Also, Quinn wasn't fired, and she couldn't prove constructive discharge.




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## Retaliation: Texas Style

- McLennan County, Texas, and nine current and former deputies settled a suit alleging the deputies were fired or demoted in retaliation for supporting the sheriff's opponent in a 2012 election.
- Each publicly supported Randy Plemons, who ran against Sheriff McNamara in the 2012 Republican primary election for county sheriff.
- Cost of settlement: \$2 million.




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- Oral complaints of protected activity will provide protection to employees
- The employee who brings a claim doesn't have to be the employee who actually did something protected under a law.
- An employee who can show that the decision-maker was influenced by the employee's supervisor will be protected if the supervisor was motivated by discriminatory animus and intended for his/her conduct to result in an adverse employment action.




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## Tips for Creating a Climate Within Your Organization that Discourages Improper Conduct and Encourages Whistleblowing




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## Develop and implement policies

- No improper conduct (i.e., a statement that the organization doesn't approve of the things identified in ORS 659A.203);
- A prohibition against retaliation;
- The availability of an "open door" for even (supposedly) minor concerns.



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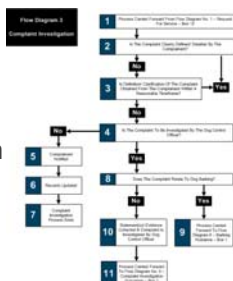
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## No-Retaliation Policy Essentials

- ☐ Examples of prohibited adverse actions
- ☐ Complaint reporting procedure
- ☐ Complaint investigation procedure (with no guarantee of confidentiality)



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## Open Door Policy



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### Open Door Policy Basics:

- Permit employees to bring complaints to the attention of their supervisors at any time, either orally or in writing.
  - Supervisors must be cautioned to be receptive to complaints to avoid creating a perception that complaints will not be taken seriously.




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### Open Door Policy Basics

- Provide that employees may take their complaints through the chain of command if they believe that their complaints have not been properly resolved.
- Note: Relying solely on an open-door policy where supervisors handle complaints is unlikely to encourage employees to report misconduct.




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### Communication

Communicate – from the top – that your organization disapproves of improper conduct **and** retaliation by its elected officials, managers and employees.




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## Ways to communicate no-improper-conduct and no-retaliation





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## Communication

- Hold regularly scheduled meetings for those departments where unlawful or unethical conduct is most likely to occur.
  - Examples: Administration, finance, departments that issue permits or work with money, elections, etc.



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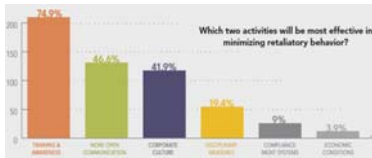
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## Communication

- Conduct training for your managers/supervisors on how to prevent retaliation claims.
- Consider training for your other employees, too.

Which two activities will be most effective in minimizing retaliatory behavior?



Activity	Percentage
Training & Awareness	74.9%
Clear Policy Communication	66.4%
Corporate Culture	41.9%
Disciplinary Measures	30.4%
Complaints Resolution Process	9%
Economic Conditions	3.9%



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Effectively investigate and enforce claims of improper conduct





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Investigate

- Investigate impartially, thoughtfully and consistently.
- Ensure that your documents relating to the whistleblowing employee and the investigation that follows are professional and objective.
- Create a follow-up plan after an employee engages in protected activity.



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**Questions?**

“Take the attitude of a student:  
“Never be too big to ask questions,  
“Never know too much to learn something new.”

- Og Mandino  
(Author of The Greatest Salesman in the World)



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## That's All She Wrote!

Thank you for listening.

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## CIS UPCOMING EVENTS: Training

### Sewer Backups – Risk Management

Sept 9 <sup>th</sup> – John Day	8:00 - 10:30 am
Sept 9 <sup>th</sup> – Ontario	2:30 - 5:00 pm
Sept 10 <sup>th</sup> – La Grande	9:00 – 11:30 am
Sept 11 <sup>th</sup> – Condon	9:00 - 11:30 am

### Mental Illness Crisis Intervention

Nov 3 <sup>rd</sup> – Baker City	8 am – 5 pm
Nov 10 <sup>th</sup> – Bend	8 am – 5 pm

### Force Response Civil Liability Prevention

Nov 10 <sup>th</sup> – Albany	8 am – 5 pm
Nov 14 <sup>th</sup> – Philomath	8 am – 5 pm

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## CIS UPCOMING EVENTS: Training

### Safe Driver Training: Distracted Driving

Sept 19<sup>th</sup> – Gladstone 8:30 - 10:45 am  
 Oct 13<sup>th</sup> – John Day/Prairie City 1:00 – 3:15 pm  
 Oct 14<sup>th</sup> – Burns 9:00 – 11:15 am  
 Oct 14<sup>th</sup> – Vale/Ontario 1:00 – 3:15 pm  
 Oct 15<sup>th</sup> – La Grande 8:00 – 10:15 am  
 Oct 15<sup>th</sup> – Pendleton 2:00 – 4:15 pm  
 Oct 16<sup>th</sup> – Condon 9:00 – 11:15 am  
 Oct 28<sup>th</sup> – North Bend 2:00 – 4:15 pm  
 Oct 29<sup>th</sup> – Bandon 8:30 – 10:45 am or 1:30 – 3:45 pm

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## Upcoming Webinars

**CIS Hire-to-Retire Series** 10:00 – 11:00 am Pre register online  
 September 23, **Tuesday** Topic: "Hiring - Best Practices"  
 October 30 Topic: "Orientation - Best Practices"  
 November 13 Topic: "Retention - Best Practices"  
 December 16, **Tuesday** Topic: "Retire/Transition Best Practices"

## Upcoming Conferences

**LOC Fall Conference** September 25-27 Eugene  
**CIS Annual Conference** February 25-27, 2015 Portland

### PLAN AHEAD:

<http://learn.cisoregon.org> -> Upcoming Events (in the Quick Links box)

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## Employment issues?

Who  you gonna call?



• **CALL CIS** - When considering employee discipline or termination.



• **CALL both CIS Pre-Loss and LGPI** - If you are considering discipline or termination of a union employee, and your entity is a member of LGPI.

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