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SENATE BILL 1043

48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007

INTRODUCED BY

Sue Wilson Beffort

AN ACT

RELATING TO PUBLIC EMPLOYMENT; ENACTING THE WHISTLEBLOWER PROTECTION ACT; PROHIBITING PUBLIC EMPLOYER RETALIATORY ACTION AGAINST PUBLIC EMPLOYEES IN CERTAIN CIRCUMSTANCES; PROVIDING FOR GRIEVANCE PROCEDURES; PRESCRIBING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the "Whistleblower Protection Act".

Section 2. PURPOSE.--It is the purpose of the Whistleblower Protection Act to encourage public employees to notify the appropriate persons of illegal acts of public concern. This reporting is encouraged in order to protect the public and employees and to assist public bodies charged with ensuring adequate safety and health standards.

Section 3. DEFINITIONS.--As used in the Whistleblower

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1 Protection Act:

2 A. "blacklist" means to inform others that a public
3 employee acted in a manner that is protected by the
4 Whistleblower Protection Act with the intention of hindering
5 the public employee's ability to obtain employment;

6 B. "commission" means the human rights commission;

7 C. "director" means the director of the division;

8 D. "division" means the human rights division of
9 the labor department;

10 E. "improper act" means a practice, procedure,
11 action or failure to act on the part of a public employer that
12 is of public concern and violates a state or federal law,
13 federal regulation or state administrative rule;

14 F. "public employee" means a person who works for
15 or contracts with a public employer;

16 G. "public employer" means:

17 (1) any department, agency, office,
18 institution, board, commission, committee, branch or district
19 of state government, including appeals, district, magistrate
20 and metropolitan courts, district attorneys and charitable
21 institutions for which appropriations are made by the
22 legislature;

23 (2) any political subdivision of the state,
24 created under either general or special act, that receives or
25 expends public money from whatever source derived, including

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1 counties, county institutions, boards, bureaus or commissions;
2 municipalities; regional authorities; entities created through
3 joint powers agreements; drainage, conservancy, irrigation or
4 other special districts; and school districts;

5 (3) any entity or instrumentality of the state
6 specifically provided for by law, including the New Mexico
7 finance authority, the New Mexico mortgage finance authority
8 and the New Mexico lottery authority; and

9 (4) every office or officer of any entity
10 listed in Paragraphs (1) through (3) of this subsection;

11 H. "retaliatory action" means blacklisting or the
12 discharge, suspension, demotion, disciplining or any
13 discriminatory or adverse employment action against a public
14 employee in the terms and conditions of public employment; and

15 I. "secretary" means the secretary of labor.

16 Section 4. PUBLIC EMPLOYER RETALIATORY ACTION

17 PROHIBITED.--A public employer shall not take any retaliatory
18 action against a public employee because the public employee:

19 A. discloses or threatens to disclose an activity,
20 policy or practice of the public employer that constitutes an
21 improper act or that the public employee believes in good faith
22 constitutes an improper act;

23 B. provides information to, or testifies before, a
24 public body as part of an investigation, hearing or inquiry
25 into an improper act; or

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1 C. objects to or refuses to participate in an
2 activity, policy or practice that constitutes an improper act.

3 Section 5. BLACKLISTING PROHIBITED.--A public employer
4 shall not blacklist a current or former public employee.

5 Section 6. GRIEVANCE PROCEDURE--PENALTY FOR DIVULGING
6 INFORMATION.--

7 A. A public employee claiming to be subject to a
8 retaliatory action prohibited by the Whistleblower Protection
9 Act may file with the division a written complaint that states
10 the name and address of the public employer alleged to have
11 engaged in the retaliatory action, all information relating to
12 the retaliatory action and any other information that may be
13 required by the commission. All complaints shall be filed with
14 the division within one hundred eighty days after the alleged
15 retaliatory action was committed.

16 B. The director shall advise the public employer
17 that a complaint has been filed against the public employer and
18 shall furnish the public employer with a copy of the complaint.
19 The director shall promptly investigate the alleged retaliatory
20 action. If the director determines that the complaint lacks
21 probable cause, the director shall dismiss the complaint and
22 notify the public employee and public employer of the
23 dismissal. The complaint shall be dismissed subject to appeal
24 as in the case of other orders of the commission.

25 C. If the director determines that probable cause

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1 exists for the complaint, the director shall attempt to achieve
2 a satisfactory adjustment of the complaint through persuasion
3 and conciliation.

4 D. The director and staff shall neither disclose
5 what has transpired during the attempted conciliation nor
6 divulge information obtained during any hearing before the
7 commission or a commissioner prior to final action relating to
8 the complaint. An officer or employee of the labor department
9 who makes public in any manner whatsoever any information in
10 violation of this subsection is guilty of a misdemeanor and
11 upon conviction shall be fined not more than one thousand
12 dollars (\$1,000) or imprisoned up to one year.

13 E. A public employee who has filed a complaint with
14 the division may request and shall receive an order of
15 nondetermination from the director one hundred eighty days
16 after the division's receipt of the complaint. The order of
17 nondetermination may be appealed pursuant to the provisions of
18 Section 39-3-1.1 NMSA 1978.

19 F. If conciliation fails or if, in the opinion of
20 the director, informal conference cannot result in conciliation
21 and the public employee has not requested a waiver of right to
22 hearing pursuant to the provisions of Subsection I of this
23 section, the commission shall issue a written complaint in its
24 own name against the public employer. The complaint shall set
25 forth the alleged retaliatory action, the secretary's rule or

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1 the section of the Whistleblower Protection Act alleged to have
2 been violated and the relief requested. The complaint shall
3 require the public employer to answer the allegations of the
4 complaint at a hearing before the commission or hearing officer
5 and shall specify the date, time and place of the hearing. The
6 hearing date shall not be more than fifteen or less than ten
7 days after service of the complaint. The hearing shall be held
8 in the county where the public employer is located or the
9 alleged retaliatory action occurred.

10 G. Within one year of the filing of a complaint by
11 an aggrieved public employee, the commission or the director
12 shall:

13 (1) dismiss the complaint for lack of probable
14 cause;

15 (2) achieve satisfactory adjustment of the
16 complaint as evidenced by order of the commission; or

17 (3) file a formal complaint on behalf of the
18 commission.

19 H. Upon the commission's petition, the district
20 court of the county where the public employer is located or the
21 alleged retaliatory action occurred may grant injunctive relief
22 pending hearing by the commission or pending judicial review of
23 an order of the commission so as to preserve the status quo or
24 to ensure that the commission's order as issued will be
25 effective. The commission shall not be required to post a

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1 bond.

2 I. The public employee may seek a trial de novo in
3 the district court in lieu of a hearing before the commission;
4 provided that the public employee requests from the director,
5 in writing, a waiver of the public employee's right to hearing
6 within sixty days of service of written notice of a probable
7 cause determination by the director. The director shall
8 approve the waiver request and shall serve notice of the waiver
9 upon the public employee and public employer. The public
10 employee may request a trial de novo pursuant to Section 39-3-1
11 NMSA 1978 within thirty days from the date of service of the
12 waiver. Issuance of the notice shall be deemed a final order
13 of the commission.

14 J. If an public employee prevails in an action or
15 proceeding brought pursuant to this section, the court may
16 award actual damages, punitive damages and reasonable attorney
17 fees.

18 K. If the public employee does not prevail in an
19 action or proceeding brought pursuant to this section and the
20 court finds that the complaint is frivolous, the court shall
21 award the public employer reasonable attorney fees.

22 Section 7. HEARING PROCEDURES.--

23 A. The public employer may file a written answer to
24 the complaint, appear at the hearing, give testimony and be
25 represented by counsel and may obtain from the commission

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1 subpoenas for any person or for the production of any evidence
2 pertinent to the proceeding. The public employee shall be
3 present at the hearing and may be represented by counsel. Each
4 party shall have the right to amend the party's complaint or
5 answer.

6 B. A panel of three members of the commission
7 designated by the chair shall sit, and a decision agreed upon
8 by two members of the panel shall be the decision of the
9 commission. However, a commissioner who has filed or been a
10 party to a complaint shall not sit on the panel hearing that
11 complaint. Hearings also may be conducted by a hearing officer
12 employed by the division or, if the hearing officer is
13 unavailable, one member of the commission may be designated by
14 the chair to act as a hearing officer. A hearing officer shall
15 have the same powers and duties as the commission.

16 C. The public employee or the public employee's
17 representative shall present to the commission or the hearing
18 officer the case supporting the complaint. Evidence concerning
19 prior attempts at conciliation shall not be received. The
20 director shall not participate in the hearing, except as a
21 witness.

22 D. The commission and the hearing officer shall not
23 be bound by the formal rules of evidence governing courts of
24 law or equity but shall permit reasonable direct examination
25 and cross-examination and the submission of briefs. Testimony

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1 at the hearing shall be taken under oath and recorded by tape
2 or otherwise. Upon the request of any party, testimony shall
3 be transcribed; provided that all costs of transcribing shall
4 be paid by the party so requesting. Each commissioner and the
5 hearing officer may administer oaths.

6 E. Upon the conclusion of a hearing conducted by a
7 hearing officer, the hearing officer shall prepare a written
8 report setting forth proposed findings of fact and conclusions
9 of law and recommending the action to be taken by the
10 commission. The hearing officer shall submit the report to a
11 review panel consisting of no more than three members of the
12 commission designated by the chair. A commissioner shall not
13 sit on the panel reviewing the hearing officer's report issued
14 in connection with a complaint filed by or against that
15 commissioner. A decision by a majority of the members of the
16 review panel shall be the decision of the commission. If the
17 commission finds from the evidence presented at any hearing
18 held pursuant to this section that the public employer has
19 engaged in a retaliatory action, it shall make written findings
20 of fact, conclusions of law and its decision based upon the
21 findings of fact and conclusions of law. The commission may
22 adopt, modify or reject the proposed findings of fact and
23 conclusions of law and the action recommended by the hearing
24 officer. Within five days after any order is rendered by the
25 commission following a hearing, the commission shall serve upon

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1 the public employee and public employer, and their attorneys,
2 if any, a written copy of the order by certified mail to the
3 addresses of record. The public employee and public employer
4 shall be deemed to have been notified on the tenth day
5 following the mailing. As part of its order, the commission
6 may require the public employer to pay actual damages to the
7 public employee and to pay reasonable attorney fees, if the
8 public employee was represented by private counsel, and to take
9 such affirmative action as the commission considers necessary,
10 including a requirement for reports of the manner of
11 compliance.

12 F. If the commission finds from the evidence that
13 the public employer has not engaged in a retaliatory action, it
14 shall make written findings of fact and serve the public
15 employee and public employer with a copy of the findings of
16 fact and with an order dismissing the complaint.

17 Section 8. ENFORCEMENT.--If a public employer does not
18 comply with an order of the commission, the secretary may
19 request the attorney general or district attorney to secure
20 enforcement of the commission's order by a district court. The
21 proceeding shall be initiated by the filing of a petition in
22 the district court of the county where the public employer is
23 located or the alleged retaliatory action occurred. A copy of
24 the petition shall be served on the public employer personally
25 or by certified mail, return receipt requested. The court may

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1 make and enter upon the proceedings an order to decree
2 enforcement of the order of the commission.

3 Section 9. APPEAL.--A party may appeal the final decision
4 of the commission pursuant to the provisions of Section
5 39-3-1.1 NMSA 1978.

6 Section 10. POSTING OF LAW AND INFORMATION.--Every public
7 employer shall keep posted in a conspicuous place on the public
8 employer's premises notices prepared by the division that set
9 forth excerpts of the Whistleblower Protection Act and other
10 relevant information as determined by the secretary.

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