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Bill Sherman
Chair
Seattle Ethics and Elections Commission
Seattle Municipal Tower
700 5th Ave., Suite 4010
Seattle, WA 98124

Dear Commissioner Sherman:

Washington Employment Lawyers Association is providing additional information regarding the proposed changes to and additions to SMC 800-870 through this letter. The following explains the basis for the City Council's authority to amend the Whistleblower Code with an option of a superior court cause of action with an actual damages remedy.

Washington superior courts are courts of general jurisdiction with the authority to hear claims of Seattle ordinance violations. The Washington Constitution provides that "[t]he superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; . . . ." WASH. CONST., art. IV, § 6; *see also State v. Golden*, 112 Wn.App. 68, 73, 47 P.3d 587 (2002) (superior courts have broad residual jurisdiction to hear all causes and proceedings over which jurisdiction is not vested exclusively in some other court).

Seattle has the power to enact ordinances that provide a cause of action in superior court to remedy retaliation against whistleblowers. Article XI, section 11 of the Washington Constitution grants large cities the power to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

An ordinance is presumed valid. *City of Pasco v. Shaw,* 161 Wash.2d 450, 462, 166 P.3d 1157 (2007); *HJS Dev., Inc. v. Pierce County,* 148 Wash.2d 451, 477, 61 P.3d 1141 (2003); *Heinsma v. City of Vancouver,* 144 Wash.2d 556, 561, 29 P.3d 709 (2001). An ordinance may be deemed invalid in two ways: (1) the ordinance directly conflicts with a state statute or (2) the legislature has manifested its intent to preempt the field.

Heinsma, 144 Wash.2d at 561, 29 P.3d 709; *see also Chaney v. Fetterly,* 100 Wash.App. 140, 149, 995 P.2d 1284 (2000)

Under the direct conflict prong of the constitutional analysis, the Seattle City Council may legislate in substantive areas where state statutes also govern, as long as the "legislative provisions are [not] contradictory in the sense that they cannot coexist." *City of Seattle v. Eze,* 111 Wn.2d 22, 33, 759 P.2d 366 (1988) (Seattle ordinance which prohibited disorderly bus conduct, and on its face was broader than the corresponding state statute, upheld as within the city's power to enact). An ordinance that "does not attempt to authorize ... what the Legislature has forbidden" and "does [not] forbid what the Legislature has expressly licensed, authorized, or required" is within Seattle's constitutional authority. *Id.* at 33 (citing cases). *Compare City of Tacoma v. Franciscan Foundation*, 94 Wash. App. 663, 665, 972 P.2d 566, 567 (1999) (Tacoma ordinance that provided a cause of action for discrimination by religious organizations, in contrast to RCW 49.60.040(3), which excluded religious or sectarian organizations not organized for private profit" from liability impermissibly conflicted with the legislature's "affirmative policy choice" to authorize an exemption for religious organizations from liability for discrimination).

Indeed, the City has already enacted a similar ordinance, which grants a superior court option with actual damages for discrimination, including discrimination that was not prohibited by state statute at the time the ordinance was adopted. As you know, Seattle City employees who are victims of civil rights discrimination, including on the basis of sexual orientation, may opt to bring their cases into court, which would provide them with the ability to obtain facts through an extensive discovery process supervised by a judge, a jury to hear their claims, and compensatory damages, as anyone may expect to get in a personal injury case, plus attorney fees. The City Council enacted this ordinance in 1999, a full six years before the Washington Legislature amended RCW 49.60, the Washington Law Against Discrimination, to prohibit discrimination on the basis of sexual orientation. The Seattle ordinance provides:

> Any person who claims to have been injured by an unfair employment practice may commence a civil action in Superior Court or any other court of competent jurisdiction, not later than three (3) years after the occurrence of the alleged unfair employment practice
>
> ....
>
> In a civil action under this section, if the court, or jury, finds that an unfair employment practice has occurred, the court may grant such relief as may be awarded by the hearing examiner under this chapter or is authorized by the Washington Law Against Discrimination, Chapter 49.60 RCW, as amended. Damages awarded under this section for humiliation and mental suffering are not subject to the limitation of SMC Section 14.04.140 A or SMC Section 14.04.150 B.

SMC 14.04.185A and C. This provision did not at the time it was adopted, and does not now, conflict with RCW 49.60. So too, an ordinance providing that whistleblowers could opt for superior court and actual damages and attorneys fees as remedies would not conflict with RCW 42.41. Just as the city's discrimination ordinance is consistent with the powers granted to municipalities by the Constitution, so too is the proposed superior court cause of action for city whistleblowers.

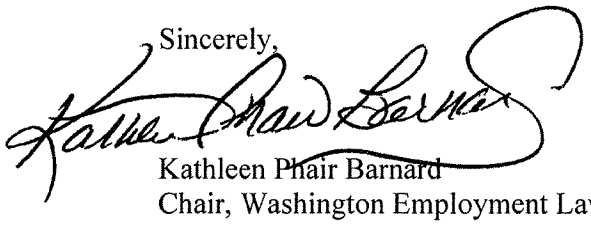
There is no language in RCW 42.41 that indicates that the legislature has forbidden cities from providing a superior court remedy or actual damages in superior court to redress retaliation against whistleblowers. The proposed amendment to the Whistleblower code does provide greater remedies than a city employee would obtain in the state administrative forum. "This difference, however, does not create an impermissible direct conflict; the focus of the article XI, section 11 inquiry is on the conduct proscribed by the two laws (a question of substance), not their attendant punishments (a question of magnitude). The two laws coexist because, although the degree of punishment differs, their substance is nearly identical and therefore an irreconcilable conflict does not arise." *State v. Kirwin*, 165 Wash. 2d 818, 826-27, 203 P.3d 1044, 1048 (2009) (City ordinance prohibiting littering was not preempted by state statute also prohibiting littering, notwithstanding that both enactments prohibited same behavior where ordinance provided for criminal sanction and state statute imposed only civil sanction, since they did not irreconcilably conflict, and since state statute demonstrated legislature's intent not to preempt local littering ordinances) (footnote omitted).

The provision for a more extensive remedy than may be available under RCW 42.41 is also well within the city's authority under the preemption prong of the constitutional analysis. The Washington Supreme Court has stated that "it is generally more sound to analyze the [provision of more extensive remedies] under the preemption prong rather than the direct conflict prong. Attendant penalties will generally matter only if a state statute has disabled local entities from setting their own levels of punishment either by directly stating so in the statute or the language of the statute necessarily expresses intent to establish exclusive authority. *Id.* at 826, n.8, citing, *City of Tacoma v. Luvene,* 118 Wash.2d 826, 827 P.2d 1374 (1992) (the Uniform Controlled Substances Act, ch. 69.50 RCW, only preempted local entities from setting their own degrees of punishment for violations of the act). Here, the Washington legislature has not expressed its intent to establish exclusive authority. To the contrary, it has expressed its intent that municipalities "adopt a policy on the appropriate procedures to follow for reporting such information and shall provide information to their employees on the policy." RCW 42.41.030 (2). The statute is general, not specific as to how the municipality should proceed.

In sum, the Washington Constitution empowers the City to enact protections for city whistleblowers that includes a superior court forum with actual damages.

Please feel free to contact me at any time if WELA can provide any further information or assistance to the Commission.

Sincerely,



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