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# TRAINING BULLETIN

## NINTH CIRCUIT COURT RULES OFFICERS MAY SUE FOR WHISTLEBLOWER RETALIATION REGARDLESS OF STATE PERSONNEL BOARD DECISION

By: Michael P. Stone, Esq. and Muna Busailah, Esq.

On September 14, 2015, the United States Court of Appeals for the Ninth Circuit issued its opinion in the case of *Wabakken v. Cal. Dep't of Corr. & Rehab (Wabakken)* (Case No. 13-56075). The main issue before the Court was whether a State Personnel Board's decision precludes a claimant from filing a whistleblower retaliation claim in district court. The Court ruled that pursuant to *State Board of Chiropractic Examiners v. Superior Court*, 45 Cal. 4th 963, 976 (2009), a State Personnel Board's decision does not have preclusive effect under theories of res judicata and collateral estoppel and thus does not prevent a claimant from filing a whistleblower retaliation claim in district court.

The underlying case involved David Wabakken, a Lieutenant with the California

Department of Corrections and Rehabilitation (CDCR). Between June 18, 2007, and May 6, 2011, Wabakken disclosed alleged improper governmental activities to his superiors, including negligent supervision of inmates, unauthorized exhibition of films to inmates, abuse of overtime work, and permittance of contraband onto the premises.

During the period Wabakken made these disclosures, the CDCR charged him with three notices of adverse action, with the third and final notice of adverse action resulting in his termination. Among other misconduct, the CDCR alleged Wabakken of illegally communicating with an officer under investigation, making derogatory comments against staff, and falsifying reports.

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Wabakken appealed the three adverse actions to the State Personnel Board which overturned two of the adverse actions and determined that termination was too harsh a penalty for the third action. Subsequently, Wabakken filed suit in district court, alleging the CDCR violated both state and federal whistleblower statutes as well as intentional infliction of emotional distress.

The Ninth Circuit determined that under California Supreme Court precedent, “a court may not give preclusive effect to the decision in a prior proceeding if doing so is contrary to the intent of the legislative body that established the proceeding in which res judicata or collateral estoppel is urged.” (*State Board of Chiropractic Examiners*, supra, 976.) The Court found that the Legislature did not intend the State Personnel Board to have preclusive effect against complaining employees because it expressly authorized damages for whistleblower retaliation, and in doing so expressly acknowledged the existence of a parallel administrative remedy in state court. Regardless of the State Personnel Board’s decision in a prior case, that decision does not preclude a claimant from seeking damages for whistleblower retaliation since the Legislature intended employees to have such a remedy when it created the law.

*Wabakken* is important because it reaffirmed the Court’s commitment to protecting those who speak out against misconduct and wrongdoing. Officers may pursue whistleblower

retaliation claims in court regardless of the outcome of their case before the State Personnel Board. This ruling solidifies officers’ right to seek damages for any loss they may have suffered as a result of speaking up as a whistleblower.

**Michael P. Stone** is the firm’s founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 35 years, following 13 years as a police officer, supervisor and police attorney.

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