



## Legal Alert

### **Understanding the Consequences of Local Elected Official Misconduct on Public Agencies**

With the multitude of state and federal investigations that ensued during the Trump Administration, much attention was paid to elected official misconduct nationally. However, in recent months, misconduct by elected officials has also become a hot-button topic locally here in our own backyard in California. Local elected officials across the state have found themselves embroiled in misconduct ranging from sexual harassment to making racist remarks. When stories of misconduct by local elected officials such as this break, much attention is often focused on the officials themselves and what, if any, consequences they will face as a result of their actions. But what happens to the cities and public agencies that accused elected officials serve in situations like these?

#### **Vicarious Liability that Flows to Public Agencies**

Local elected officials such as city councilmembers and board commissioners may well not have legislative immunity with regard to actions toward individual employees. This is particularly true if the elected official acts unilaterally. Typically, when an elected official acts as a legislator, he or she has absolute immunity. But that immunity can be lost when the legislator takes actions outside the “sphere of legitimate legislative activity.” Accordingly, if an elected official takes any unilateral actions concerning an individual employee, he or she could risk loss of legislative immunity. Even actions taken collectively with the full council might conceivably lack immunity if they relate to specific individuals instead of furthering general city policy.

For example, public agencies are almost always named as a defendant in workplace harassment lawsuits involving the misconduct of governing members. That is because under the Fair Employment and Housing Act (“FEHA”), elected officials are considered supervisors. FEHA defines a supervisor as “any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority...requires the use of independent judgment.” Because a city council generally has the authority to make employment decisions regarding, at minimum, the city manager, councilmembers fit within the definition of “supervisor.” As such, it follows that public agencies can face liability when an elected official is accused of harassment, or when an elected official knows about harassment and fails to take action. The accusation need not come from another local elected official or a staff member of

the official for the agency to face liability. An accusation of misconduct from *any* employee within the agency's organizational structure exposes the agency to liability.

Also, elected officials may expose a city to liability in a FEHA lawsuit because the city is responsible for harassment against its employees even if carried out by a nonemployee, if the city knew or should have known about the harassment and failed to take corrective action. Therefore, for example, even if we consider a city councilmember to be a member of the public for purposes of the FEHA, if a city employee complains about harassment by the councilmember, the city must take immediate action to investigate and, if necessary, prevent the harassment from continuing.

### **The Resulting Negative and Financial Impacts on Public Agencies**

Besides negative publicity, media attention, and potential protests of residents that a public agency could face once accusations of misconduct by an elected official are publicized, public entities must also navigate the financial repercussions of such misconduct.

Once an accusation is made against a local elected official, it may be prudent for an agency to retain a third-party, neutral investigator. The cost of a thorough investigation can rack up quickly as the investigator conducts witness interviews of all relevant parties and then drafts a comprehensive investigation report issuing their conclusions. If the Complainant opts to pursue litigation naming the agency as a defendant, the public entity now faces the cost of retaining legal counsel to guide it through all aspects of the litigation process. Litigation costs can be substantial. Further, losing the case at trial will subject the agency to a substantial damages award that could easily reach into the seven-figures when Complainant's attorneys' fees are included. Local elected officials named as defendants in a harassment case may also be personally liable for punitive damages.

### **Best Practices for when Misconduct Occurs**

It is essential that a public agency establish and adhere to an effective communication strategy when situations like these arise. Externally, agencies must settle on a communication strategy that both reassures the public and prevents uninformed theories from spreading. In order to accomplish these objectives, agencies should consider designating a spokesperson and someone to monitor social and traditional media to determine if response is necessary in real time. Internally, agencies should advise staff that investigations and/or lawsuits take time, keep information confidential, be respectful, and refrain from engaging in speculation.

### **Potential Solutions to Prevent Misconduct**

At the end of the day, local elected officials cannot be forced to participate in workplace investigations, do not take orders, and cannot be disciplined. So, what steps should agencies take to try to prevent these situations from occurring in the first place?

AB 1661, codified at Government Code section 53237.1, requires "local agency officials" to attend two hours of sexual harassment prevention training every two years. This training includes practical examples aimed at instructing the local agency official in the prevention of sexual harassment, discrimination and retaliation. However, from the increase in misconduct allegations we are seeing from local elected officials, the existing preventative tools may not be having their intended effect in deterring such misconduct. In the absence of new legislation from Sacramento, agencies should consider conducting mandatory harassment trainings on an annual basis if not

semi-annually to keep the issue at the forefront. Consideration should also be given to customizing the training with scenarios relevant to elected officials and requiring in person attendance.

Further, agencies should consider including a clear and conspicuous section at the forefront of their orientation materials for newly elected officials as well as re-elected incumbents emphasizing the vicarious liability on the agency that flows from official misconduct. If elected officials are continuously reminded to understand the gravity of their actions in bringing scandal and financial repercussions not only onto themselves but also the constituents and agency they work for, they may think twice in engaging in such behavior.

*The information in this Legal Alert was provided by Liebert Cassidy Whitmore.*