

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)



123rd MAINE LEGISLATURE

FIRST REGULAR SESSION-2007

Legislative Document

No. 303

H.P. 247

House of Representatives, January 19, 2007

An Act To Strengthen the Whistleblowers' Protection Act

Reference to the Committee on Judiciary suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative HARLOW of Portland. (BY REQUEST)

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 26 MRSA §835-A** is enacted to read:

3 **§835-A. Qui tam actions**

4 **1. Private actions.** Notwithstanding any other provision of law, a person may bring
5 a civil action for a violation of section 833 for the person and for the State. The action
6 must be brought in the name of the State. The action may be dismissed only if the court
7 and the Attorney General give written consent to the dismissal and their reasons for
8 consenting.

9 **2. Service and filing.** A copy of the complaint and written disclosure of
10 substantially all material evidence and information the person bringing a civil action
11 under this section possesses must be served on the State pursuant to the Maine Rules of
12 Civil Procedure, Rule 4. The complaint must be filed in camera, must remain under seal
13 for at least 60 days and may not be served on the defendant until ordered by the court.
14 The State may intervene and proceed with the action within 60 days after it receives both
15 the complaint and the material evidence and information.

16 **3. Extensions.** The State may, for good cause shown, move the court for extensions
17 of the time during which the complaint remains under seal under subsection 2. The
18 motion may be supported by affidavits or other submissions in camera. The defendant
19 may not be required to respond to any complaint filed under this section until 20 days
20 after the complaint is unsealed and served upon the defendant pursuant to the Maine
21 Rules of Civil Procedure, Rule 4.

22 **4. State response.** Before the expiration of the 60-day period under subsection 2 or
23 any extensions obtained under subsection 3, the State shall:

24 **A.** Proceed with the action, in which case the action must be conducted by the State;
25 or

26 **B.** Notify the court that it declines to take over the action, in which case the person
27 bringing the action has the right to conduct the action.

28 **5. Intervention.** When a person brings an action under this section, only the State
29 may intervene or bring a related action based on the facts underlying the pending action.

30 **6. Rights of parties.** The following provisions apply to the rights of parties to
31 actions brought under this section.

32 **A.** If the State proceeds with an action under this section, it has primary
33 responsibility for prosecuting the action and may not be bound by an act of the person
34 bringing the action. The person initially bringing the action has the right to continue
35 as a party to the action subject to the limitations set forth in paragraphs B to E.

36 **B.** Notwithstanding the objections of the person initiating an action under this
37 section, the State may dismiss the action if the person initiating the action has been
38 notified by the State of the filing of the motion to dismiss and the court has provided
39 the person with an opportunity for a hearing on the motion.

1 C. Notwithstanding the objections of the person initiating an action under this
2 section, the State may settle the action with the defendant if the court determines,
3 after a hearing, that the proposed settlement is fair, adequate and reasonable. Upon a
4 showing of good cause, such a hearing may be held in camera.

5 D. Upon a showing by the State that unrestricted participation during the course of
6 the litigation by the person initiating an action under this section would interfere with
7 or unduly delay the State's prosecution of the case, or would be repetitious, irrelevant
8 or for purposes of harassment, the court may, in its discretion, impose limitations on
9 that person's participation, including, but not limited to:

10 (1) Limiting the number of witnesses the person may call;

11 (2) Limiting the length of the testimony of witnesses described in subparagraph
12 (1); and

13 (3) Limiting the person's cross-examination of witnesses.

14 E. Upon a showing by the defendant that unrestricted participation during the course
15 of the litigation by the person initiating an action under this section would cause the
16 defendant undue burden or unnecessary expense or would be for purposes of
17 harassment, the court may limit participation by the person in the litigation.

18 F. If the State elects not to proceed with an action under this section, the person who
19 initiated the action has the right to conduct the action. At the request of the State, the
20 State must be served with copies of all pleadings filed in the action and must be
21 supplied with copies of all deposition transcripts at the State's expense. When a
22 person proceeds with the action, the court, without limiting the status and rights of
23 the person initiating the action, may permit the State to intervene at a later date upon
24 a showing of good cause.

25 **7. Ongoing investigations or pending actions.** Whether or not the State proceeds
26 with an action under this section, upon a showing by the State that certain actions of
27 discovery by the person initiating the action would interfere with the State's investigation
28 or prosecution of a criminal or civil matter arising out of the same facts, the court may
29 stay discovery of the civil action brought under this section for a period of not more than
30 60 days. Such a showing must be conducted in camera. The court may extend the 60-day
31 period upon a further showing in camera that the State has pursued the criminal or civil
32 investigation or proceedings with reasonable diligence and any proposed discovery in the
33 civil action will interfere with the ongoing criminal or civil investigation or proceedings.

34 **8. Alternative remedy.** Notwithstanding subsections 4 and 6, the State may elect to
35 pursue its claim through any alternate remedy available to the State, including any
36 administrative proceeding to determine a civil penalty. If such an alternate remedy is
37 pursued in another proceeding, the person initiating the action has the same rights in that
38 proceeding as that person would have had if the action had continued under this section.
39 A finding of fact or conclusion of law made in another proceeding that has become final
40 must be conclusive on all parties to an action under this section. For purposes of this
41 subsection, a finding or conclusion is final if it has been finally determined on appeal to
42 the appropriate court of the State or the United States, if all time for filing such an appeal

1 with respect to the finding or conclusion has expired or if the finding or conclusion is not
2 subject to judicial review.

3 **9. Award to plaintiff.** The following provisions govern awards to plaintiffs in
4 actions brought under this section.

5 A. If the State proceeds with an action brought by a person under this section, that
6 person must be awarded no less than 15% and no more than 25% of the proceeds of
7 the action or settlement of the claim, depending upon the extent to which the person
8 substantially contributed to the prosecution of the action, except that, if the court
9 finds the action to be based primarily on disclosures of specific information, other
10 than information provided by the person bringing the action, relating to allegations or
11 transactions in a criminal, civil or administrative hearing or from the news media, the
12 court may award to the person an amount not to exceed 10% of the proceeds of the
13 action, taking into account the significance of the information and the role of the
14 person in advancing the case to litigation. A payment to a person under this
15 paragraph must be made from the proceeds of the action. That person must also
16 receive an amount for expenses the court finds to have been necessarily incurred, plus
17 reasonable attorney's fees and costs awarded against the defendant.

18 B. If the State does not proceed with an action under this section, the person bringing
19 the action or settling the claim must receive an amount the court determines is
20 reasonable for collecting the civil penalty and damages. The amount may not be less
21 than 25% or more than 30% of the proceeds of the action or settlement and must be
22 paid out of the proceeds of the action. That person must also receive an amount for
23 expenses the court finds to have been necessarily incurred, plus reasonable attorney's
24 fees and costs awarded against the defendant.

25 C. Whether or not the State proceeds with an action under this section, if the court
26 finds that the action was brought by a person who planned and initiated the violation
27 of section 833 upon which the action was brought, then the court may, to the extent
28 the court considers appropriate, reduce the share of the proceeds of the action the
29 person would otherwise receive under paragraph A or B, taking into account the role
30 of that person in advancing the case to litigation and relevant circumstances
31 pertaining to the violation. If the person bringing the action is convicted of criminal
32 conduct arising from that person's role in the violation of section 833, that person
33 must be dismissed from the civil action and may not receive any share of the
34 proceeds of the action. Such a dismissal may not prejudice the right of the State to
35 continue the action.

36 **10. Frivolous action.** If the State does not proceed with an action under this section
37 and the person bringing the action conducts the action, the court may award to the
38 defendant its reasonable attorney's fees and expenses if the defendant prevails in the
39 action and the court finds that the claim of the person bringing the action was frivolous or
40 brought primarily for purposes of harassment.

41 **11. Barred actions.** The following actions may not be brought under this section:

1 A. An action by a former or present member of the Armed Forces of the United
2 States against a member of the armed forces arising out of that person's service in the
3 armed forces;

4 B. An action against a member of the Legislature or a member of the judiciary if the
5 action is based on evidence or information known to the State when the action was
6 brought;

7 C. An action based upon allegations or transactions that are the subject of a civil suit
8 in which the State is already a party; and

9 D. An action based upon the public disclosure of allegations or transactions in a
10 criminal, civil or administrative hearing, in a legislative or administrative hearing,
11 audit or investigation or by the news media, unless the action is brought by the
12 Attorney General or the person bringing the action is an original source of the
13 information. For purposes of this paragraph, "original source" means an individual
14 who has direct and independent knowledge of the information on which the
15 allegations are based and has voluntarily provided the information to the State before
16 filing an action under this section that is based on that information.

17 **12. State not liable for certain expenses.** The State is not liable for expenses a
18 person incurs in bringing an action under this section or fees and expenses to a prevailing
19 defendant. In civil actions brought under this section by the State, the provisions of Title
20 14, chapter 311 apply.

21 **SUMMARY**

22 This bill authorizes a private citizen to bring an action on behalf of the State for
23 violations of the Whistleblowers' Protection Act.