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Trends in Whistleblower Retaliation Claims, and How Companies Can Steer Clear of Trouble

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Whistleblower retaliation litigation is on the rise, and a recent decision from the U.S. District Court for the Southern District of New York is expected to boost it further. Whistleblowers can expect to find protection against employer retaliation as courts continue to make statutory protections more readily available. Companies are not without protections themselves, however. The trend in these cases has also established key factors employers should monitor to increase the likelihood of success against such claims.

The New York decision is part of a rising trend among some other courts to remove old barriers to whistleblower retaliation complaints. In *Sharkey v. J.P. Morgan Chase & Co., et al,* the plaintiff alleged "violations of the SOX anti-retaliation statute." The district court initially found that the plaintiff had not sufficiently identified the illegal conduct on which she based her whistleblower complaint. Ultimately, the district court renounced the prior court-established pleading standard for whistleblower claims and paved the way for a far more lenient pleading standard under the Sarbanes-Oxley Act of 2002 (SOX). In doing so, the court followed a trend among the U.S. Courts of Appeals for the Second, Third and Sixth Circuits. Now, whistleblower retaliation protections may be easier for employees to obtain and tougher for employers to defeat based on imprecise allegations.

SOX offers protection for employees of publicly traded companies who complain of financial improprieties that th ey believe violate rules or regulations of the U.S. Securities and Exchange Commission or other provisions of federal law that amount to fraud against shareholders. Despite the language of the statute requiring that whistleblowers need only a "reasonable belief" that the conduct about which they are complaining is illegal, until recently whistleblowers had to specifically allege which of six laws they believed had been violated "definitively and specifically" to gain protection under SOX. This was a much tougher standard than the statutory standard because it required the whistleblower to determine which law or laws the company had broken. The company, in turn, could potentially defeat the allegation by showing that its conduct did not violate that specific law. Last year, however, the Second Circuit in *Nielson v. AECOM Tech. Corp*. was asked to decide whether a whistleblowing employee had to "definitively and specifically" allege one of the listed categories of fraud or securities violations in the SOX statute. The Second Circuit concluded that this standard is not required under SOX. The court decided that SOX protections extend to whistleblowers even if the whistleblower is not sure which law was broken, but they had

a *reasonable belief* that one of the six identified in the statute was violated.

The district court's decision follows the Second Circuit's ruling to broadly interpret whistleblower protections under the statute. The protections include, among others, that an employer may not take an adverse employment action against a whistleblower simply because the employee blew the whistle. Under the statute, adverse employment actions include discharge, demotion or unfavorable reassignment, threats, harassment or discrimination in the terms and conditions of employment. The U.S. Department of Labor's Administrative Review Board (ARB) expanded the definition of "adverse employment action" in the 2011 *Menendez v. Halliburton, Inc. decision*. There, the ARB held that an employee may suffer an adverse employment action even if he or she did not experience a tangible consequence. As such, even "outing" the whistleblower by making the whistleblower's name known to colleagues and superiors constitutes an adverse employment action.

Employers, however, are not without remedy against allegations of retaliation. Companies can mitigate the potential for whistleblower success in court by reviewing some factors examined by courts when deciding whistleblower retaliation cases. Generally, courts look at the totality of the circumstances and weigh the facts when deciding a whistleblower retaliation matter. Important factors have emerged that may tip the scales in the company's favor and defeat a retaliation claim. These may include the number of decision-makers involved in the adverse employment action, whether the protected activity was the direct cause of the adverse action, whether proper documentation exists to support the company's contention that the adverse action was justified and not based upon the employee's involvement in protected activity, the temporal proximity of the adverse action to the employee's involvement in protected activity or evidence that the decision to take the adverse action was being contemplated before the employee's involvement in protected activity.

Allegations of retaliation can be more difficult to prove when more than one person is involved in the decision to terminate, or take some other adverse employment action against, a whistleblower. Multiple decision-makers are less likely to have a retaliatory motive for taking an adverse action or are less likely to have information that the employee has engaged in protected activity. Therefore, companies should consider whether to use a panel of management-level decision-makers when taking an adverse employment action against the whistleblower. Since companies should not single-out and treat differently employees who have blown the whistle and are protected by SOX, this multi-person panel may be necessary for all adverse actions taken against employees, whether or not they are whistleblowers.

Another defense the company can offer is to show that it followed its own policies and procedures in taking the adverse action against the whistleblower. By showing that the employee engaged in conduct that is prohibited by company policies, and demonstrating that disciplinary procedures were followed in taking the adverse action, the company may be able to show that the conduct was not in retaliation for whistleblowing.

Companies will also want to show if an adverse action was contemplated before the employee engaged in protected activity. Courts are likely to examine the company's documentation of prior performance issues, disciplinary measures taken and communications considering the necessity of an adverse employment action against the whistleblower. Companies have used a clear and well-documented record of prior offenses, e-mail threads or other communications that the employer was concerned about the employee's conduct to justify the adverse action that was eventually taken. This evidence goes a long way to rebut an allegation that the whistleblower suffered retaliation.

Temporal proximity is a key factor examined by courts and, alone, may sufficiently demonstrate retaliation if the employee's engagement in protected activity occurs close in time to an adverse employment action. A time lapse of less than two months may be sufficiently close in time to support an allegation of retaliation. Should an adverse action against a whistleblowing employee be necessary, employers should closely examine the employee's personnel file for evidence of the aggrieved behavior and discipline that pre-dates the whistleblowing. While temporal proximity is not necessarily determinative of the company's motive for taking an adverse action, it is an important factor and should not be overlooked.

Employers should be aware of the lenient standard to which whistleblowers are held when alleging violations, and the trend for broadly interpreting whistleblower protections. A defendant company's success may depend on maintaining a thorough personnel file, documenting concerns about employee performance and following a consistent set of policies and procedures in making any adverse employment decisions.

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