HOW CAN EMPLOYERS LET THE AIR OUT OF BALLOONING WHISTLEBLOWER CLAIMS

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By now, employers know the red flags that appear before an employee lawsuit – a request for a personnel file or use of the term "harassment" when discussing supervisor conduct. Add to that red flag list an emerging landscape – whistleblowers claims – an employee states: you fired me in retaliation for reporting illegal activity. What do you do? Run for the hills? Whistleblower retaliation claims are fact intensive, not easily subject to summary judgment and costly, even if the employer successfully defends against them.

RETALIATION CLAIMS GENERALLY ARE ON THE RISE

On February 4, 2015, the EEOC issued its Fiscal Year 2014 Enforcement and Litigation Data. In the release, it broke down the percentages of the workplace discrimination charges. At the top of the list was retaliation – garnering *42.8%* of all charges filed.

The next year, retaliation charges again topped the list garnering 44.5% of charges filed.[1]

In fact, the EEOC reports that retaliation is the most "frequently alleged basis of discrimination since 2008."[2] Recognizing that phenomena, in August 2016, the EEOC issued its "Enforcement Guidance on Retaliation and Related Issues." The Guidance addresses retaliation under the statutes the EEOC enforces, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, Title V of the Americans with Disabilities Act, Section 501 of the Rehabilitation Act, the Equal Pay Act, and Title II of the Genetic Information Nondiscrimination Act. The Guidance is a helpful road map for employers as it sets out, among other topics, examples of workplace retaliation.

In addition to the surge in retaliation claims based upon these statutes, developments over the past few years have provided individuals greater latitude to file whistleblowing claims – claims alleging conduct such as employer fraud, violations of tax laws, safety regulations, etc. Below are just a few of those developments.

TRENDS IN THE WHISTLEBLOWER ARENA

Employees Need Only Express A "Reasonable Belief" Of A Violation to Survive Dismissal

In 2013, the Third Circuit Court of Appeals held that an employee sufficiently alleges whistleblower protection under the Sarbanes-Oxley Act (SOX) if the employee has any "reasonable belief" that the employer is committing fraud or securities violations. *Wiest v. Lynch*, 710 F. 3d 121 (3rd Cir. 2013). The Third Circuit denied a petition for an en banc review.

In *Sylvester v. Parexel International, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39, 42 (ARB May 25, 2011), the Department of Labor's Administrative Review Board had earlier adopted this "reasonable belief" standard rejecting the prior standard that the First, Fifth, and Ninth Circuits adopted, which held an employee had to allege disclosures "definitively and specifically" related to an existing violation of law.

2016: OSHA Begins The "Whistleblower-Severe Violator Enforcement Program"

Effective May 27, 2016, the Occupational Safety and Health Administration (OSHA) launched a four-year Whistleblower-Severe Violator Enforcement Program (W-SVEP) pilot program, the specific purpose of which is to protect the rights of whistleblowers. OSHA modeled W-SVEP after its Severe Violator Enforcement Program (SVEP). The SVEP program targets employers who "engage in egregious behavior and blatant retaliation against workers who report unsafe working conditions and violations of the law."[3] The W-SVEP program in Region VII covers Kansas, Nebraska, Iowa and Missouri.

2017: Nondisclosure Agreements Create Chilling Effect For Whistleblowers – the Google Black Out Case

In December 2016, a former Googler product manager (a "JOHN DOE" plaintiff) filed a complaint in San Francisco Superior Court against Google claiming that the company's confidentiality and non-disclosure agreements violate whistleblower laws.

John Doe v. Google, Inc., et al. (Case NO. CGC-16556034). DOE claims the confidentiality agreements that all Googlers must sign bar Googlers from saying anything about the company, even to each other. According to the suit, the agreements define confidential information as "without limitation, any information in any form that relates to Google or Google's business that is not generally known."

A January 2017 amended complaint claims that the agreements, allegedly restricting "Googlers' right to speak, right to work and *right to whistle-blow*," violate state laws because employers cannot bar workers from discussing wages or disclosing information to government agencies.

If successful, the California's Private Attorneys General Act (PAGA) claim remedy could result in both a $10,000 fine per violation and "one hundred dollars ($100) for each aggrieved employee per period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." According to the complaint, "Each Googler is paid at least twice a month, amounting to, on information belief, more than 1,560,000 pay periods per year." The Plaintiff is suing on behalf of approximately 65,000 Googlers "at any one time" with thousands more "who continue to be subject to Google's unlawful Confidentiality Agreement and policies." Attorneys' fees are also recoverable.

Internal Reporting of Violations: Somers v. Digital Realty Trust, Inc., 850 F.3d 1045 (9th Cir. 2017)

Agreeing with the Second Circuit, in March of this year, the Ninth Circuit ruled that the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank Act) whistleblower anti-retaliation protections apply not only to whistleblowers who report alleged wrongdoing to the SEC, but also to those who simply report alleged violations internally to supervisors – thus, recognizing a whole new class of employees entitled to whistleblower protections. The ruling is contrary to the Fifth Circuit decision *Asadi v. G.E. Energy (USA) L.L.C.*, 720 F.3d 620 (5th Cir. 2013), and may provide a sufficient circuit split to garner Supreme Court review. Digital has sought such review. *Digital Realty Trust Inc. v. Paul Somers*, Case No. 16-1276 (2017)

OTHER RECENT DEVELOPMENTS TO FOLLOW

Commodity Futures Trading Commission Amendments: The Dodd-Frank Act established a whistleblower program at the Commodity Futures Trading Commission (CFTC). The CFTC's Whistleblower Program provides monetary incentives to whistleblowers who report possible Commodity Exchange Act violations that lead to a successful enforcement action. Just last month, the CFTC announced that it had adopted amendments to its whistleblower rules. Entitled "Strengthening Anti-Retaliation Protections for Whistleblowers and Enhancing the Award Claims Review Process," they go into effect 60 days after publication in the Federal Register. A factsheet summarizing the amendments is available.[4]

S. 762 – The IRS Whistleblower Improvements Act of 2017: Seen as a way to extend anti-retaliation provisions to "tax" whistleblowers, S. 762 amends IRS Code Section 7623 by adding a new subsection entitled "Civil Action to protect Against Retaliation Cases." The new section protects whistleblowers who "reasonably believe" that a violation of internal revenue laws has occurred. Any person who suffers reprisal as a result may file a complaint with the Secretary of Labor.

STATE STATUTES ARE ALSO CASTING WIDER NETS

Not to be outdone, many states have their own whistleblower laws. For example, California continues to enlarge whistleblower rights. Prior to 2014, California Labor Code Section 1102.5 prohibited employers from retaliating against employees who reported reasonably believed violations of state or federal laws, rules, or regulations to a government or law enforcement agency.

In October 2013, Governor Brown signed SB 496, which *extended* whistleblower protection to employees who report suspected illegal behavior *internally* to "a person with authority over the employee" or to another employee with the authority to "investigate, discover, or correct" the reported violation, or externally to any "public body conducting an investigation, hearing, or inquiry."

SB 496 further provided that whistleblower protection applied regardless of whether disclosing such information is part of the employee's job duties. Thus, a company's human resources manager would be protected for disclosing to a supervisor purported wage violations that he or she is charged with finding and curing.

One year later, Governor Brown signed into law AB 1509, which expanded whistleblower protection to family members of a whistleblower. The law now provides:

> (h) An employer, or a person acting on behalf of the employer, *shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any acts protected by this section.*

THE ANSWER TO HOW EMPLOYERS PROTECT THEMSELVES FROM WHISTLEBLOWER CLAIMS IS NOT "BLOWIN' IN THE WIND" – IT IS IN CONTINUED VIGILANCE

Employers cannot absolutely insulate themselves from these claims. However, to lower the risk of these claims, they should, at a minimum:

- Review confidentiality agreements – do they exempt complaints of illegal conduct?;
- Before issuance, ensure as much as possible that any adverse employment actions are well-grounded, documented and nondiscriminatory;
- Investigate *any* internal complaints of illegal conduct as more jurisdictions are finding anti-retaliation provisions to cover internal complaints and in light of the *Wietz* standard for whistleblower claims. Employers should take potential fraud or other securities violations complaints seriously and conduct appropriate investigations into such allegations;
- Have a formal whistleblower anti-retaliation policy that promotes a reporting friendly work atmosphere; and
- Train supervisors to recognize protected behavior and what may be retaliation.

One cannot predict whether the new administration will impact aggressive enforcement of current whistleblower laws and the passage of bills currently under consideration. One thing is certain, "whistling while you work" has come a long way since the Seven Dwarfs sang their way to work.

Diane O'Malley is a partner at Hanson Bridgett LLP. She represents employers in traditional labor law covering union organizing, negotiations, grievance and interest arbitrations and unfair labor practice claims. She also counsels private and public sector employers regarding every aspect of the employment relationship and the liability that arises from such a relationship, such as discrimination, harassment, retaliation, contract and wage-and-hour claims and class actions.

1 https://www.eeoc.gov/eeoc/newsroom/release/2-11-16.cfm
2 https://www.eeoc.gov/laws/types/retaliation_considerations.cfm
3 https://www.whistleblowers.gov/regionaldirectives/Region7CPL02-16-07.pdf
4 http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/wbruleamend_factsheet052217.pdf