From the courtroom: Take care when disciplining whistleblowers

The federal Whistleblower Protection Act (WPA) forbids federal employers from retaliating against an employee whose workplace complaint amounts to reporting potential employer wrongdoing. Under the WPA, the employer must show it would have taken the same action against the employee even if he had not blown the whistle.

Recent case: Enrico worked for the U.S. Department of the Interior as a probationary maintenance worker. He contacted OSHA to complain that he and others had to make unsafe entries into confined spaces.

Enrico was let go at the end of his probationary period.

He sued, arguing he had lost his job in retaliation for contacting OSHA.

The court said the department had to show it would have discharged Enrico even if he had not contacted OSHA. The court said factors it would consider included whether:

- The department had strong evidence to support its discharge decision
- There was any motive for agency officials to punish Enrico for reporting alleged wrongdoing
- The department had treated others who were not whistleblowers more favorably under similar circumstances.

The Interior Department argued that there were no other probationary employees who had not been retained for the same reasons Enrico was let go, so therefore that factor shouldn't count. The court agreed.

Interior also argued that it had actually been receptive to Enrico's complaints before he went to OSHA, showing it wasn't motivated to punish Enrico for bringing the problem to its attention. Plus, OSHA didn't issue a fine, since the Interior Department fixed the problem when it learned of Enrico's complaint. It also stood by its reasons for not retaining Enrico.

Those factors were enough for the court to conclude that the Department of the Interior would not have retained Enrico even if he had never called OSHA. (*Lucchetti v. U.S. Department of the Interior*, 9th Cir., 2018)

Court hearing federal whistleblower case upholds broad **arbitration agreement**

A federal court in Texas has upheld a broad arbitration clause, concluding it applies to all claims related to employment.

Significantly, the court said that included actions the employer allegedly took after it fired a worker and not just disputes that arose during the time the worker was employed.

Recent case: James went to work for Intratek Computer, a California-based company that provided information technology services to various federal agencies.

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At the time, he signed an acknowledgment included in the employee handbook, agreeing that he would arbitrate any disputes related to his employment.

James was terminated after allegedly witnessing the president of the company trying to “bribe” Department of Veterans Affairs officials with “lavish dinners, happy hours and trips” in order to obtain lucrative contracts.

He sued, claiming whistleblower status. He also alleged that Intratek officials retaliated against him by interfering with his attempts to secure another job after he was terminated from Intratek.

Intratek argued that all James’s claims should go to arbitration.

James countered that the arbitration clause didn’t apply to claims he had about how the company treated him after it fired him.

But the court disagreed. It said James had agreed to a very broad arbitration clause covering every possible claim arising out of the employment relationship.

It also noted that the federal whistleblower statute James claimed protected him didn’t specifically say employees could not waive their right to a federal trial on their whistleblowing claims.

The court sent all of James’s claims to arbitration. (Robertson v. Intratek Computer, WD TX, 2018)

Beware firing health care whistleblowers

Texas state law protects health care workers and others from discharge for reporting potential health and safety violations to their employer or an outside agency. Firing someone who made a good-faith whistleblowing report can backfire badly.

Recent case: Juanita and Melissa worked for the Stockdale Residence and Rehabilitative Center, a nursing home facility.

At staff meetings, the women often voiced concerns about a particular resident, believing her to be a potential danger to other patients. At one point, Melissa became so concerned about the resident that she sought to have her banished from the facility—she allegedly threatened to stab another resident with a butter knife.

About a week later, the facility fired both women after another employee reported they had allegedly verbally abused the patient.

Juanita and Melissa sued, claiming that as whistleblowers, they were protected from retaliation.

They cited the Texas Health and Safety Code, which provides that employees who in good faith report a violation of the law to authorities relating to care, services or conditions at the facility may not be suspended, terminated, disciplined or discriminated against for reporting the violation, cooperating with authorities or initiating an investigation.

Essentially, they argued that if a patient is threatening another patient with violence, that threat is an obvious danger to the other patient and reporting it or pushing to get the threatening patient moved is part of their job, and protected activity.

The nursing home claimed it fired the women for verbally abusing the patient.

But the court said the women had a case. Their whistleblowing case may proceed. (Valadez and Miller v. Stockdale Texas SNF, Court of Appeals of TX, 2018)

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Final note: Courts don’t like it when employers present dubious disciplinary claims soon after protected activity occurs.

Remember these key factors of the Whistle Blower Protection Act

Employees have a legal right to blow the whistle without retaliation or harassment when:

- Publicizing company policies or practices that violate antitrust, securities or consumer protection laws
- Reporting fraud, corruption or other forms of law-breaking covered by the Racketeer Influenced and Corrupt Organizations Act (RICO), the Whistleblower Protection Act, or state whistle-blower statutes
- Disclosing information about fraudulent activities within a publicly held corporation, in violation of the Sarbanes-Oxley Act
- Reporting the gross mismanagement, waste, or abuse of stimulus funds under the American Recovery and Reinvestment Act of 2009.

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