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Recent Trends In Whistleblower Litigation – Part I

An Increasing Challenge for Employers and Their Counsel

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Part II of this article will appear in the August issue of The Metropolitan Corporate Counsel *with a discussion of recent cases and ways to protect the company.*

Introduction

In the past five years, the amount of whistleblower litigation has exploded. This may be the result of the publicity associated with Enron and people like Sherron Watkins, the well-publicized whistleblower who exposed the financial "shenanigans" going on down in Texas. It could be the publicity that has been generated by the passage of the Sarbanes-Oxley Act[1] ("SOX") in 2002 – which created a broad new private right of action for corporate whistleblowers. It may also be the raft of well-publicized six and seven-figure verdicts, in favor of alleged whistleblowers, that seem to be making the news everyday.[2]

Indeed, in just the past few months, several Sarbanes-Oxley whistleblower cases have made the news with verdicts in favor of the complaining whistleblower:

• In February 2005, a bank in Virginia was ordered to *reinstate* its CFO (who had been fired in 2002) – and pay him back-pay plus his attorney's fees.[3]

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• In March of this year, a federal district judge ordered two executives reinstated and awarded $700,000 in damages, finding that they were discharged in violation of the Sarbanes-Oxley whistleblower provisions.[4]

• In May 2005, an Administrative Law Judge ordered the car rental company Hertz to reinstate a corporate employee and pay her $154,364 of back pay, plus interest and attorney's fees, also finding that she was fired in retaliation for attempting to expose financial wrongdoing at the company.[5]

Adding to the popularity of these claims is the broad class of potential plaintiffs. One does not need to be a member of a protected group, be over 40 or have a disability, in order to bring a whistleblower lawsuit. These claims may be brought by *anyone* in the company, from the senior vice president to the clerk in the Accounting Department. Indeed, it is often an employee who is on the verge of discipline – who decides to "blow the whistle" on some alleged wrongdoing. Many of the most recent cases involve executives at the highest levels of the company, facing potential discipline, who decide to "blow the whistle." These executives likely have knowledge of all of the company's greatest assets as well as its greatest weaknesses. Moreover, while plaintiffs certainly do not succeed in every case, a whistleblower litigation can disrupt operations, cost the company substantial sums of money, and generate unfavorable publicity – none of which is good for business.[6] Lastly, as illustrated by the cases highlighted at the start of this article, judges in SOX cases seem increasingly willing to order reinstatement in addition to sizeable monetary damages, despite the inevitable disruption the reinstatement of a terminated employee will bring to a company.

Whatever the reason – it is clear that the average employee (as well as the average plaintiff's attorney) is much more attuned today to the potential for a whistleblower claim.

All of this sends one message – that counsel need to take whatever proactive steps they can to prevent such charges and lawsuits, or at least to make sure that in the event a claim is filed – your company or client will prevail.

In order to help you achieve that

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result, this article will examine some recent whistleblower cases, focusing on the Sarbanes-Oxley Act, to detect trends that seem to be appearing in these claims. If nothing else, we should all learn some lessons from the companies that found themselves on the losing side of these litigations.

First, let's examine the sheer number of laws which protect potential whistleblowers:

Federal Statutes

1. Sarbanes-Oxley – The whistleblower statute which has certainly gotten the most publicity over the past two years is Sarbanes-Oxley. In summary, the SOX whistleblower provision provides that no employer may discharge, suspend or discipline an employee who has "provided information, caused information to be provided, or otherwise assisted in an investigation" regarding any conduct "which the employee *reasonably believes*" may constitute a violation of Sarbanes-Oxley, any rule or regulation of the SEC, or any federal law which regulates shareholder fraud. Notably, the SOX whistleblower *does not* have to prove that the reported activity was actually illegal, but must only prove that he/she "reasonably believed" that the conduct was a violation of the law.[7]

SOX provides for a broad range of relief designed to make the complaining employee "whole," including: reinstatement to his/her former job or position, back pay with interest, "special damages," and the recovery of all costs and attorney's fees associated with successful litigation. The Act also provides for criminal penalties for employers found to have engaged in unlawful retaliation.

2. Title VII, the ADEA, the ADA and the FMLA – All of these federal employment and civil rights laws prohibit retaliation against any employee who has made a complaint, or assisted in the investigation of a complaint under any of these statutes.[8]

3. False Claims Act – This federal statute permits employees who "blow the whistle" against a government contractor to receive a percentage of any funds recovered by the government as the result of that complaint. It allows for triple damages and a reward to the employee.[9]

4. Energy Reorganization Act – The Energy Act provides for whistleblower protection for any employee of an entity licensed by the Nuclear Regulatory Commission, who participates in or testifies in any proceeding before the NRC.[10]

5. Occupational Safety and Health Act – OSHA, and many of its state counterparts, creates a course of action for any employee who is retaliated against for making an OSHA complaint or requesting an OSHA inspection, believing there is a "safety violation" which threatens physical harm or presents an imminent danger in the workplace.[11]

6. Clean Air Act – the Clean Air Act prohibits retaliation against an employee for assisting in the enforcement of that statute.[12]

7. Aviation Investment and Reform Act – prohibiting retaliation against an employee of an air carrier for reporting a safety violation.[13]

State Whistleblower Statutes

Most states also have their own state whistleblower laws, which vary widely in strength and breadth.

1. New York – The New York Whistleblower Statute, § 740 of the Labor Law, is quite narrow. As a general matter, it protects employees who are retaliated against for making complaints regarding issues that affect public health and safety. It also protects health care workers who make complaints regarding issues of patient safety. The New York statute does not, for example, protect employees who complain of accounting or financial irregularities.

2. New Jersey – The New Jersey Conscientious Employee Protection Act ("CEPA") is very broad. It prohibits retaliation against employees who complain, internally or outside the company, about a broad range of activity - including ethics and financial issues within a company. CEPA lawsuits in New Jersey have risen by 175% in just the past three years – from 100 cases in 2001 to 275 cases in 2004.

How Does A Sarbanes-Oxley Complaint Work?

A Sarbanes-Oxley complaint is filed in the first instance with the OSHA division of the Federal Department of Labor. A copy of the complaint does not ever have to go to the employer. The DOL has 60 days to investigate the complaint. A hearing may then be held before an Administrative Law Judge at the Department of Labor, who may order *any* relief allowed by the statute. In addition to backpay *and* attorney's fees, the complainant may be ordered reinstated.[14] ALJ decisions may also be appealed within the DOL. If the DOL fails to render a final decision within 180 days of the filing of the complaint, the employee may bring suit in federal court.

Notably, a SOX complainant also has the option, once he/she has exhausted the administrative process at the DOL, to withdraw the DOL complaint and proceed *de novo* in federal court. The company *does not* have that same option.

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[1] *The Sarbanes Oxley Act of 2002, 18 U.S.C., §1514* et. seq.

[2] *Jury Verdict Research, a national consulting firm, reports that between 1997 and 2003 Whistleblower suits averaged the highest median verdict of any type of employment litigation, $338,000 as compared to $178,500 for "standard" employment discrimination claims.*

[3] Welch v. Cardinal Bankshares Corp., *No. 2003-SOX-15, 2005 WL 990535 (Feb. 15, 2005) (Purcell, A.L.J.).*

[4] Bechtel v. Competitive Technologies, Inc., *No. CIV. 3:05CV629(AVC), 2005 WL 1138790 (D. Conn. May 13, 2005) (Covello, J.).*

[5] *Hertz Corp. Ordered to Pay $154,364, Rehire Employee in Whistleblower Case, 83 DAILY LAB. REP. A-9 (2005).*

[6] *The case results at the DOL thus far have actually been trending toward employers; as of January 2005 out of 132 cases filed at the DOL – only three were decided on the merits in favor of the whistleblower.*

[7] *The Sarbanes-Oxley Act of 2002, 18 U.S.C.§ 1514A* et seq. *When SOX was passed, the legislative sponsors stated the whistleblower provision should be framed so as to "encourage and protect" those who report "what they believe" to be illegal activity. Clearly, the SOX drafters did not want to require that the whistleblower prove he/she was "correct," when deciding whether to blow the whistle.*

[8] *Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e* et seq.*; Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §621* et seq.; *American Disabilities Act (ADA) of 1990, 42 U.S.C. §12101* et seq.; *Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §2601* et seq.

[9] *False Claims Act, 31 U.S.C. §§3729* et seq.

[10] *Energy Reorganization Act (ERA) Public Law 95-601, Nov 6, 1978 42 U.S.C. § 5851.*

[11] *Occupational Safety and Health (OSH) Act of 1970, 29 USC 651* et seq.

[12] *Clean Air Act, 42 U.S.C. § 7401* et seq.

[13] *Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121.*

[14] *Reinstatement may be ordered by the ALJ at the DOL, after an investigation, but before there has been a full evidentiary hearing as a method of "interim relief." Such preliminary order of reinstatement will not be stayed, pending an appeal by the company.*