“Cooperation is Key” - Second Circuit Affirms Employer’s Ability to Fire an Employee for Refusal to Cooperate In an Internal Investigation

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In 2004, as then NY Attorney General Elliot Spitzer focused his efforts to root out fraud in an insurance brokerage giant, Marsh & McLennan, two Marsh executives, William Gilman and Edward McNenney, were caught in his crosshairs. When asked by Marsh to cooperate with its internal investigation of the AG’s claims of ‘fixed’ or illegal commission arrangements and bid-rigging by insurance brokers, the two declined to speak to Marsh’s outside lawyers. This refusal was probably with good reason, as the two executives had just been named as co-conspirators by executives of insurance carrier AIG, who had just pled guilty to conspiracy. Thus, they were faced with the prospect of criminal charges, and were likely concerned that the company lawyers would turn over their statements to the AG’s office.

Marsh, faced with this refusal, took the decisive step of firing the two executives, based on their refusal to cooperate with the internal investigation.

Fast forward to 2010, and after being convicted and then later absolved of criminal wrongdoing, the two men sued Marsh for lost severance and other benefits, under their employment agreements. The overall theory of the case was that Marsh’s lawyers were acting as an agent of the government when conducting their internal investigations, and that their terminations violated their constitutional right not to incriminate themselves.

A recent decision by the Second Circuit just upheld a lower court decision that we had reported on in February of last year which had found that these firings were lawful. In so doing, the Court of Appeals confirmed several key principles that should strengthen the rights of all companies when conducting internal investigations.

First, the Court made clear that, when dealing with an investigation by a private employer, an employee does not have a constitutional right “not to incriminate themselves.” As most law students are taught, the Fifth Amendment applies only when the government is conducting the questioning, and – even when faced with a demand by the government that it do an investigation – a private entity is not the government.

Second, the Court of Appeals also affirmed the District Court’s ruling that Marsh was acting reasonably in investigating the matter, and had the right to demand that the two executives cooperate with that investigation. The Court held that Marsh’s “interview demands were reasonable

as a matter of law because at the time they were made, Gilman and McNenney were Marsh employees who had been implicated in an alleged criminal conspiracy for acts in the scope of employment, and that imperiled the company." (p. 8) The Court further stated "Marsh was presumptively entitled to seek information from its own employees about suspicions of on-the-job criminal conduct. Marsh could take measures to protect its standing with investors, clients, employees, and regulators. Marsh also had a duty to its shareholders to investigate any potentially criminal conduct by its employees that could harm the company." Again, this affirms a valuable legal principle, that all companies can now 'take to the bank', when they conduct internal investigations.

Third, the Court affirmed that Marsh had the right to fire the two employees for refusing to cooperate with the investigation. It stated: "Marsh's demands placed Gilman and McNenney in the tough position of choosing between employment incrimination (assuming of course the truth of the allegations). But though Gilman and McNenney 'may have possessed the personal rights to [not sit for interviews], that does not immunize [them] from all collateral consequences that come from [those] act[s],' including leaving Marsh 'with no practical option other than to remove [them].'…'[T]here would be a complete breakdown in the regulation of many areas of business if employers did not carry most of the load of keeping their employees in line and have the sanction of discharge for refusal to answer what is essential to that end." (p. 12)

The Second Circuit reiterated a fact that we often remind clients of, you are not the police and you do not have the ability to 'force' an employee to cooperate with an investigation. As a private entity, an employer's only weapon is the threat of discipline or termination. While this weapon should be used sparingly, there are certainly situations where it is warranted. Indeed, one would argue that – whether they were 'guilty' of any wrongdoing or not – all employees should understand that it is essential that they cooperate with company investigations and that there will be serious consequences if they do not. This decision makes this even clearer.

What can employers take away from this decision?

- First, the Second Circuit has affirmed the importance of internal investigations. In fact, especially in this era of increased regulatory scrutiny, they are essential. When a company is faced with a whistleblower or with claims of wrongdoing – whether civil or criminal – it simply must investigate in order to understand what happened, who is at fault, and how to remediate the situation. The company owes this duty to itself and its shareholders.

- Second, you do have the right to demand cooperation from your employees in those investigations. Employees who say "no", or "not without my lawyer" or "this violates my rights", can be firmly told that they are mistaken. Employees may have rights under union contracts, employment contract and company policies. However, even under those contracts and policies, they must cooperate in internal investigations. They certainly do not have a constitutional right to refuse to cooperate.

On that note, you should make sure that your company policies state prominently that employees must cooperate in investigations and may be disciplined for a refusal to cooperate.

- Third, employers can (and should) discipline those employees who refuse to cooperate. For one, this sends a strong message to the rest of your workforce that such behavior will not be tolerated. Further, it establishes a corporate culture and practice which makes it clear that the company will not tolerate bad behavior, and also will not tolerate those who try to 'hide' or protect the bad actors. This is a powerful message to send.