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Is There Liability For Retaliation When You Don't Hire That Whistleblower?

From the Experts

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Employers are generally well-versed in the restrictions imposed by Title VII and other anti-discrimination laws with respect to the hiring process. Few employers would be surprised to learn that refusing to hire a job applicant because of her race, sex, age, disability or other protected characteristic is flatly prohibited by a panoply of federal, state and local laws. Most employers also recognize that, because Title VII explicitly prohibits retaliation against "employees or applicants," an employer cannot legally decide to not hire a candidate because she had previously made a complaint or filed a charge against a prior employer.

Less familiar to many employers is the law applicable to hiring employees with a history of whistleblowing against prior employers. And a recent interim final rule published by the U.S. Department of Labor suggests that the protections afforded whistleblowers may be much broader than most people realize.

This article addresses the protection of whistleblowers in the hiring process under three of the most significant federal laws governing whistleblowing: the False Claims Act (FCA), the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Under the FCA the prevailing view is that there is no protection for applicants based on their whistleblowing history. However, the law is less clear with respect to SOX and Dodd-Frank, due in large part to recent regulations issued by the Occupational Safety and Health Administration (OSHA). There may also be state law protections that are beyond the scope of this article.

The False Claims Act

The FCA was enacted to prevent fraud on the federal government. It prohibits any person from knowingly making false or fraudulent claims on the government, and includes an anti-retaliation provision that provides "all relief necessary" to any "employee, contractor, agent or associated others" who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against because of lawful acts done … in furtherance of an action under this section or other efforts to stop one or more violations of this subchapter." The FCA does not, however, contain a definition of "employee."

In *Vander Boegh v. EnergySolutions Inc.*, the U.S. Court of Appeals for the Sixth Circuit considered whether applicants are protected from retaliation under the FCA, and concluded that they are not. In ruling that an applicant who alleged that he was denied a position because he engaged in protected whistleblowing activity involving a former employer did not have standing under the FCA, the court relied largely on the plain language of the statute—buttressing its opinion with the legislative history and the opinions of a few other courts. In examining the language of the FCA, the court noted that while the FCA's anti-retaliation provision originally only applied to "any employee," it was amended in 2009 to apply to "[a]ny *employee, contractor or agent*." However, despite this amendment, the Sixth Circuit

found that “Congress still intended to limit the FCA to employment-like relationships.” The court further noted that “other courts have overwhelmingly concluded that the term ‘employee’ in the FCA did not extend to persons outside the employer-employee relationship.”

The Sixth Circuit also rejected Vander Boegh’s arguments regarding the FCA’s legislative history. Vander Boegh argued that because the legislative history mentions “blacklisted” workers, Congress necessarily intended the FCA to protect applicants. The court concluded that because “the term ‘blacklisted’ [in the FCA’s legislative history] is couched in the phrase ‘[t]emporary, blacklisted or discharged workers,’” it “merely suggests that ‘employee’ extends to former employees, as well as present employees.” As such, the court granted summary judgment to the company on this claim.

Employers should be careful to note that the touchstone of FCA jurisdiction is the existence, *at any point in time*, of an employer-employee relationship between the plaintiff and the defendant. Thus, while applicants may not be covered by the FCA’s retaliation provision, individuals may gain FCA protection once they are hired by an employer, even if the whistleblowing at issue related to a prior, unrelated employer. In *Caestra v. Mylan Inc.*, the defendants made the mistake of waiting until after they hired an applicant to terminate him allegedly based on his assertion of an FCA claim against a previous employer. While the defendants argued that they could not be liable under the FCA because the plaintiff’s whistleblowing did not relate to his current employer, the district court concluded that because the plaintiff was an employee of the defendants, he had stated a prima facie case for a violation of the FCA’s anti-retaliation provision.

Taken together, *Vander Bough* and *Caestra* suggest that while a company’s decision not to hire an applicant based on FCA whistleblowing may be lawful, once an employment relationship is established, the risks to the employer increase dramatically.

SOX and Dodd-Frank

SOX was enacted in 2002 in response to numerous corporate accounting scandals, such as Enron and Worldcom. Its purpose was to increase corporate responsibility by setting new or expanded requirements for all U.S. public companies and their boards, management and public accounting firms. In 2010, Dodd-Frank imposed additional regulations across large portions of the financial industry. Like the FCA, both SOX and Dodd-Frank include anti-retaliation provisions.

SOX states that: “No [covered entity], or any officer, employee, contractor, subcontractor, or agent of such company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee…to provide information, cause information to be provided, or otherwise assist in an investigation” relating to violation of various enumerated laws, including laws relating to “fraud against shareholders.” For its part, Dodd-Frank provides that: “No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower” in providing information to or testifying before the Securities and Exchange Commission, or “making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, this chapter,…, and any other law, rule, or regulation subject to the jurisdiction of the Commission.”

Thus, like the FCA, SOX bars retaliation against “employees,” while Dodd-Frank protects “whistleblowers” from retaliation by “employers.” Despite this language, which would seem to limit the protections of SOX and Dodd-Frank to individuals who have established an employer-employee relationship with a defendant, the protections of those laws may be far broader than those of the FCA. In March of this year—more than three years after the publication of the interim final rule—the Department of Labor (DOL) issued final regulations regarding SOX retaliation. Among other things, the regulations include an exceedingly broad definition of “employee” that is not limited to individuals who have actually established an employment relationship with a covered entity: “Employee means an individual presently or formerly working for a covered person, *an individual applying to work for a covered person,* or an individual whose employment could be affected by a covered person.”

Surprisingly, the new regulations have not garnered much attention from commentators and are largely untested by courts. Indeed, the proposed interim rule only prompted five sets of comments, none of which related to the definition of employee.

The DOL’s sweeping definition of “employee” appears to conflict with prior SOX jurisprudence. In *Bogenschneider v. Kimberly Clark Global Sales,* the Western District of Wisconsin dismissed a case brought by an employee against his employer’s law firm, holding that even if the firm was an “agent” of the employer, “because he does not allege that he had an employment relationship with [the firm], he cannot sustain a claim against that defendant.” In reaching this conclusion, the *Bogenschneider* court relied on the U.S. Supreme Court’s decision in *Lawson v. FMR*, where the court “stated multiple times…that § 1514A is best read as requiring an employment relationship.” Thus, although *Bogenschneider* did not turn on the definition of “employee,” its narrow construction of the term “employer” seems inconsistent with the DOL’s expansive definitions.

Ultimately, because this issue is largely untested, employers who are faced with an applicant with a history of whistleblowing under SOX or Dodd-Frank must be wary when considering whether to hire such applicants. The DOL’s broad interpretation of the scope of SOX (and presumably Dodd-Frank) creates significant risks for employers who elect not to hire applicants who have “blown the whistle” on their prior employers under those statutes.

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