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The Unclear Definition Of Whistleblower Retaliation

Law360, New York (May 9, 2011) -- The Dodd-Frank Wall Street Reform and Consumer Protection Act was passed in July 2010 and much has been written about many of its provisions, such as paying a bounty to whistleblowers who disclose material information about securities laws violations that leads to substantial U.S. Securities and Exchange Commission recoveries.

The statute and the SEC's November 2010 proposed regulations prompted expressions of support from whistleblower advocates and significant industry criticism including that the bounty provision would undermine corporate compliance programs.

Dodd-Frank also provides protection for whistleblowers from employers who retaliate against them for participating in investigations or engaging in other protected activity. Clearly, Congress wanted to encourage employees or those with knowledge of potential securities, financial services or commodities law violations to disclose information to assist the SEC, U.S. Commodity Futures Trading Commission or the new Consumer Financial Services Board in enforcement efforts and to protect those who do against punishment for coming forward.

Protecting whistleblowers from retaliation is far from new. Congress has incorporated anti-retaliation language in numerous statutory schemes, including to protect employees who disclose information or participate in investigations about safety and regulatory issues relating to the airlines,[1] nuclear energy,[2] commercial motor carriers,[3] railroads[4] and the environment.[5]

More recently, Congress has incorporated similar protections into the 2009 economic stimulus legislation,[6] the 2010 comprehensive health care bill[7] and the food safety law enacted earlier this year.[8] Each of these statutes empowers administrative law judges, administrative agencies and/or federal judges to decide whether an employee engaged in protected activity, was subjected to an adverse employment action relating to the protected activity, and is entitled to reinstatement, back pay, attorneys' fees, and in some circumstances, punitive damages and awards for reputational injury or other special damages.

The procedures for pursuing whistleblower claims and remedies may differ under certain statutory schemes. For example, certain Dodd-Frank retaliation claimants can file suit in federal court within three years after learning of a violation and can recover double back pay, while Dodd-Frank retaliation claimants in the financial services industry must pursue an administrative claim with the U.S. Department of Labor within 180 days after learning of a violation and are not eligible for a multiple of back pay. Whistleblowers claiming retaliation under the health care bill, stimulus legislation and many other statutes must also pursue administrative relief.

The legal principles applicable to retaliation claims in the employment discrimination context continue to evolve as the volume of retaliation disputes rises. U.S. Equal Employment Opportunity Commission statistics reflect that retaliation claims have risen steadily for years, were included in 36 percent of the approximately 100,000 EEOC charges filed in FY 2010 and were the most common claim in those charges.[9]

The U.S. Supreme Court has also issued several decisions in recent years which expanded the protections for those claiming to be the victims of employment related retaliation. The combination of these legislative, administrative and judicial forces will have a dynamic impact on the continued development of the law of whistleblower retaliation.

Many questions will be hotly contested as whistleblower retaliation claims arise from statutes regulating the economic recovery, health care, financial services, food safety and other industries, and from a renewed focus on oil and nuclear power because of recent man-made and natural disasters. These hotly contested issues will undoubtedly include one or more of the following.

What constitutes a reasonable belief that legal violations have occurred?

Determining whether certain protected activity took place is relatively easy, such as whether a whistleblower has testified in an investigation. However, to be protected from retaliation for providing information about alleged illegal activity, a whistleblower must "reasonably believe," even mistakenly, that a legal violation has occurred.

For example, § 1553 of the stimulus bill prohibits an employer from retaliating against an employee for disclosing "information that the employee reasonably believes is evidence of 1) gross mismanagement of an agency contract or grant … or 5) a violation of law, rule or regulation relating to an agency contract (including the competition for or negotiation of a contract.)."[10]

Here, then, an ALJ or federal judge must decide whether the disclosure was protected activity based on an objective "reasonably believes" standard. One expression of this standard is that it is based on knowledge available to a reasonable person under similar circumstances who has the same training and experience as the claimant. In other words, "it depends."

For example, the Fourth Circuit has held in a False Claims Act retaliation case that an employee did not engage in protected activity when complaining about alleged fraud in a government contract bid. The court analyzed whether the employer defrauded the government, concluded that it did not, and denied relief to the terminated employee noting that the employee's belief that the fraud occurred may have been sincere, but it was not objectively reasonable.

Based on this analysis, retaliation claims which are governed by the "reasonably believes" standard will include hard fought challenges about what constitutes protected activity.

In contrast, whistleblowers seeking protection under Dodd-Frank for disclosures relating to the Commodity Exchange Act or the Securities Exchange Act apparently do not need to have a reasonable belief that violations occurred in order to be protected from retaliation.

For example, the commentary to SEC proposed rule 21F-2 emphasizes the importance of determining whether someone is a whistleblower when information is first submitted to the SEC. On the other hand, § 1057 of Dodd-Frank, concerning the financial services industry, expressly incorporates the "reasonably believes" test.

The imminent final SEC rules may address this apparent inconsistency, but it appears that the standards for evaluating protected activity may differ under the same statute.

Are persons other than the whistleblower protected?

The anti-retaliation statutory provisions typically refer to protecting the person who discloses information, participates in an investigation or engages in other protected activity. Earlier this year, however, the Supreme Court expanded the protections against retaliation in the Title VII employment discrimination context to include so-called "associational retaliation."

In Thompson v. North American Stainless LP,[11] the court held 8-0, in an opinion by Justice Antonin Scalia, that the fiance of an employee who filed a gender discrimination complaint against the company could proceed with his own retaliation claim that he was fired because of his fiance's complaint.

The court held that the claimant fell "within the zone of interests protected by Title VII" because "we think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiance would be fired." While the court stopped short of specifying which other "third parties" would be protected, the opinion stated that "firing a close family member will almost always" satisfy the standard, but "inflicting a milder reprisal on a mere acquaintance will almost never do so."

Needless to say, there is an infinite number of outcomes between those two ends of the relationship spectrum. In fact, a Florida federal court held in March 2011 that an employee can sue his employer for retaliation based on his being fired after his wife filed a discrimination complaint against her employer where the fired spouse's employer was a service provider to his wife's employer. The fired spouse stated a plausible claim contending that his wife's employer induced the service provider to fire him in retaliation for her claim. As such, the fired spouse fell within the Title VII "zone of interests."

Will the concept of associational retaliation find its way into decisions under the new economic and industry-specific health and safety statutes? It is likely to since Congress incorporated retaliation protections to encourage reporting of legal violations. Based on the reasoning by Justice Scalia, a person who is fired because someone with whom they have a close personal relationship has engaged in protected activity could very well fall "within the zone of interests" protected by the health care bill, Dodd-Frank or other anti-retaliation statutory protections.

The "zone of interests" analysis presents many difficult issues for employers, not the least of which is how an employer will know whether someone whom it plans to discipline has a close relationship with another person who has engaged in protected activity, and whether the relationship is close enough for inclusion in the zone of interest? Stay tuned.

What employer conduct constitutes unlawful retaliation?

Certain prohibited conduct is identified in the anti-retaliation provision, for instance that an employee may not be discharged or demoted. Other prohibited conduct is defined more broadly, such as that an employee may not be "otherwise discriminated against" for making protected disclosures.[12]

The broad language breeds uncertainty over the type and degree of conduct that may constitute prohibited retaliation. The Supreme Court announced a generous standard to evaluate allegedly retaliatory conduct for employment discrimination claims, holding that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

The rationale was that anti-retaliation protections were designed to prohibit employer action that might deter an employee from complaining to the EEOC. That rationale might apply equally to prohibit employers from deterring employees against reporting nuclear safety violations, gross mismanagement of stimulus funds or violations of the securities laws;[13] therefore, one would expect that the broader standard will be adopted for whistleblower retaliation claims.

How might this "dissuade a reasonable worker" standard be applied? The plaintiff in Burlington Northern & Santa Fe Railway Co. v. White, complained that a reassignment to less favorable duties was unlawful retaliation. Justice Breyer explained that the context within which the complained of conduct occurred is crucial.

For example, a schedule change might be irrelevant to some, but could be a substantial concern to others and while a supervisor refusing to invite an employee to lunch is "normally trivial," it could be retaliatory if the lunch is a training event that is important to professional advancement.

Other courts have evaluated whether disabling a security key fob, denying access to email or issuing a warning of potential termination could constitute unlawful retaliation. There obviously are no clear lines to distinguish actionable retaliatory conduct from that which does not create employer exposure.

Answers to these and other questions will be very fact specific and are subject to standards for which clear guidance has not been established, creating greater uncertainty for employers faced with retaliation claims. Implementing preventive measures like training supervisors how to respond to retaliation claims and reviewing and revising internal policies for reporting and investigating claims will be critical, as many have said.

Yet, there is no doubt that the statistics and legal developments are trending in favor of more expansive definitions of who is protected from retaliation and what conduct may constitute actionable retaliation.

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[1] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121.

[2] Energy Reorganization Act of 1974, 42 U.S.C. § 5801 et seq.

[3] Surface Transportation Assistance Act, 49 U.S.C. § 31100 et seq.

[4] Federal Railroad Safety Act, 49 U.S.C. § 20101, et seq.

[5] Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq.; Safe Drinking Water Act, 42 U.S.C. § 300f et seq.; Solid Waste Disposal Act, 42 U.S.C. § 6901 et seq.; Toxic Substances Control Act, 15 U.S.C. 2601 § et seq.; Clean Air Act, 42 U.S.C. § 7401 et seq.; CERCLA, 42 U.S.C. § 9601 et seq.

[6] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

[7] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119.

[8] FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885.

[9] EEOC Charge Statistics, FY 1997 through FY 2010,
http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm

[10] Stimulus Bill, § 1553(a).

[11] 131 S. Ct. 863 (2011).

[12] Stimulus Bill, § 1553(a).

[13] Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006).