

Litigating Whistleblower Retaliation Claims

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9/11 Act Transportation Whistleblower Protections

- Public Transportation Employees
 - § 1413 of National Transit Systems Security Act of 2007 ("NTSSA") protects public transportation employees
- Railroad Employees
 - § 1521 amends the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109
- Commercial Motor Carrier Employees
 - § 1536 amends the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105

Public Transportation Employees: Coverage and Protected Conduct

- Covers employees of a public transportation agency, a contractor or subcontractor of such agency, or an officer or employee of such agency
- Providing information or assisting an investigation regarding conduct which the complainant reasonably believes constitutes a violation of Federal law relating to public transportation safety or security, or reporting fraud, waste or abuse of federal grants or other funds intended to be used for public transportation safety or security.
- Refusal to violate or assist in violation of Federal law, rule or regulation.

Public Transportation Employees: Protected Conduct

- Cooperating with safety or security investigation by the DOT, DHS or NTSB.
- Reporting a hazardous safety or security condition.

Railroad Employees: Coverage and Protected Conduct

- Covers employees of a railroad carrier and contractors and subcontractors.
- Providing information or assisting an investigation regarding conduct which the complainant reasonably believes constitutes a violation of Federal law relating to railroad safety or security fraud, waste or abuse of federal grants or other funds intended to be used for railroad safety or security.
- Protects refusal to work under certain conditions.

Commercial Motor Carrier Employees: Coverage and Protected Conduct

- Covers employees of commercial motor carriers
- Protects refusal to operate a vehicle where the operation would violate a regulation, standard or order related to commercial motor vehicle safety, health, or security, or because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

Commercial Motor Carrier Employees: Protected Conduct

- Reporting hours on duty
- Cooperating with DOT, DHS or NTSB Investigation:
 - The employee's cooperation (or the respondent's perception that the employee is about to cooperate) with a safety or security investigation by the DOT, DHS or NTSB.
- Filing a complaint or beginning a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard or order.

9/11 Act Transportation Whistleblower Protections: Burden of Proof & Remedies

■ Burden of Proof:

- SOX and AIR21 burden
 - Contributing factor
 - Clear and convincing evidence

■ Remedies:

- Reinstatement
- Backpay
- Compensatory damages
- Punitive damages capped at \$250,000

9/11 Act Transportation Whistleblower Protections: Removal Option

- If DOL has not issued a final decision within 210 days after the filing of the complaint, the complainant can remove claim to federal court.
- Either party can request a jury trial

Whistleblower Protections for DOD Contractor Employees

- Section 846 of National Defense Authorization Act for Fiscal Year 2008 (H.R. 4986) amends 10 U.S.C. § 2409
- Protects disclosures to Congress, an Inspector General, the Government Accountability Office, or a Department of Defense contractor oversight employee concerning information that the employee reasonably believes evidences
 - gross mismanagement of DOD contract or grant
 - gross waste of DOD funds
 - substantial and specific danger to public health or safety, or
 - violation of law related to a Department of Defense contract

Whistleblower Protections for DOD Contractor Employees

- Complaint filed with the IG
- IG can order reinstatement, back pay, compensatory damages, and attorney fees and costs.
- 210 days after filing, plaintiff can remove complaint to federal court and can elect a jury trial
- Plaintiff can also pursue FCA retaliation claim

DOL/ALJ/ARB Procedures

- Appeal from OSHA to ALJ is *de novo*
- Formal rules of evidence do not apply
- ARB reviews ALJ's conclusions of law *de novo* and reviews the ALJ's factual determinations under the substantial evidence standard.
- No private right of action under Section 11(c) of OSH
- Failure to exhaust administrative remedies waives claim
 - *McClendon v. Hewlett-Packard Co.*, 2005 WL 2847224 (D.Idaho Oct. 27, 2005)
 - *Willis v. Vie Fin. Group, Inc.*, 2004 WL 1774575 (E.D.Pa. Aug. 6, 2004)

Removal to Federal Court

- Prior to issuance of final order, complainant alone has option to remove to federal court for *de novo* hearing
 - SOX – 180 days
 - ERA – 1 year
 - 9/11 Transportation Whistleblower Protection Provisions – 210 days

Choice of Forum

- Nineteen states have adopted statutes protecting whistleblowers in the private sector.
- Many of the state statutes limit protection to external disclosures
- 43 states recognize public-policy exception to employment at will
 - Termination is contrary to a well-established public policy

Choice of Forum

- DOL
 - formal rules of evidence do not apply
 - broad scope of discovery
 - Protective orders disfavored
 - Motive for whistleblowing irrelevant
- Federal court
 - whistleblower retaliation claim can be combined with tort claims
 - Punitive damages and jury trial
 - Subpoena power

Protected Conduct

Objective Reasonableness

- *Allen v. Administrative Review Board*, No. 06-60849 (5th Cir. Jan. 22, 2008).
 - “Importantly, an employee’s reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected.”
 - “objective reasonableness of an employee’s belief cannot be decided as a matter of law if there is a genuine issue of material fact [and if] reasonable minds could disagree on this issue”
 - Where the plaintiff is a licensed CPA, “the objective reasonableness of [plaintiff]’s belief must be evaluated from the perspective of an accounting expert”

Protected Conduct Duty Speech

- Duty Speech Doctrine

- ERA

- *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984) – QC control inspectors vital to the regulatory scheme for nuclear plants and could not be discharged whenever “they do their jobs too well.”

Protected Conduct Duty Speech

■ SOX

- *Deremer v. Gulf Coast*, 2006-SOX-2 (ALJ June 29, 2007)
 - The Act contains no language excluding one's job duties from protected activity. . . one's job duties may broadly encompass reporting of illegal conduct, for which retaliation results. Therefore, restricting protected activity to place one's job duties beyond the reach of the Act would be contrary to Congressional intent.
- *Leznik v. Nektar Therapeutics, Inc.*, 2006-SOX-93 (ALJ Nov. 16, 2007)

Protected Conduct Duty Speech

- False Claims Act

- Employee tasked with the internal investigation of fraud against the government must clearly put the employer on notice that a qui tam suit is a reasonable possibility. *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861 (4th Cir. 1999)

Issuance and Enforcement of Injunctions

- STAA, AIR21 and SOX authorize pre-hearing preliminary reinstatement
- *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006)
 - SOX does not confer jurisdiction on federal court to enforce preliminary order of reinstatement

Issuance and Enforcement of Injunctions

- *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987)
 - minimal due process is satisfied where a DOL reinstatement order provides respondent:
 - notice of the employee's allegations;
 - notice of the substance of the evidence;
 - opportunity to submit a written response; and
 - opportunity to present statements from rebuttal witnesses.

Interaction with State Tort Claims and Anti-discrimination laws

- DOL Whistleblower Protection Statutes generally do not preempt state actions
 - English v. General Electric Co., 496 U.S. 72 (1990).
 - Some states require employees to elect a remedy and preclude state claims where the remedy under federal law is adequate. *See Masters v. Daniel Intern. Corp.*, 917 F.2d 455, 457 (10th Cir. 1990)
 - 18 U.S.C. § 1514A(d) (“Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law”)

Interaction with State Tort Claims and Anti-discrimination laws

- Collateral Estoppel (only applies where DOL issued final order)
- Alleging numerous unlawful motives can confuse the jury
- Exhaustion of administrative remedies is generally required. But see *Romaneck v. Deutsche Asset Mgmt.*, No. C05-2473 (N.D. Cal. Aug. 17, 2006) ("common law tort claim for wrongful termination based on a particular statute need not comply with that statute's administrative remedies.")

Future Developments

- Amending the Whistleblower Protection Act of 1989
 - H.R. 985 and S. 274
 - Protections will also apply to employees of government contractors
- CPSC Whistleblower Provision (S. 2045)
 - Protects disclosures to employer, federal government or a state attorney general relating to any violation of, or any act or omission the employee reasonably believes violates, consumer product safety laws or regulations

Future Developments

- False Claims Act Correction Act
 - S. 2041 and H.R. 4854
 - Approved by Senate Judiciary Committee in early April 2008
- Private Sector Whistleblower Protection Streamlining Act of 2007 (H.R. 4047)