Company Defeats Alleged Whistleblower Bringing Claim Under Obscure Whistleblowing Law

Nathan Read
nread@mwlaw.com
(479) 464.5663

Devin Bates
dbates@mwlaw.com
(501) 688.8864

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Companies generally know that certain whistleblowing activities are protected. But this protection is not absolute, and not everything that employees think is whistleblowing actually meets the legal definition necessary for protection. Deciding what is protected activity and what is not can be a very tricky business. First, an employer must identify if there is a law, rule, or regulation which speaks to the particular type of alleged whistleblowing. This can be challenging given the many laws which apply to certain employers and cover certain actions. And second, once the potentially relevant protection is identified, the employer must decide whether the employee's particular actions fall under the law, rule, or regulation at issue. In a recent case from the U.S. Court of Appeals for the Eighth Circuit, a 14 page final opinion including a dissent shows how reasonable minds can differ about whether particular whistleblower protections apply. This blog post will discuss the recent legal case, drawing out lessons for employers that are put into the unenviable position of deciding whether alleged whistleblowing is protected.

Train Decision Makers on Potentially Applicable Whistleblower Laws. There are dozens of whistleblower protection laws employers must consider. For example, OSHA alone administers the employee "whistleblower" protection provisions of twenty-two statutes. There are federal whistleblower statutes protecting healthcare whistleblowers, corporate whistleblowers, financial services whistleblowers, trucking whistleblowers, environmental whistleblowers, and many more. Additionally, there are state whistleblowing laws. One federal whistleblower statute, the Moving Ahead for Progress in the 21st Century Act (MAP-21), was at issue in the Eighth Circuit case discussed here. By training managers and supervisors on the panoply of possibly relevant whistleblower laws, companies can equip their people to spot potential issues when they arise.

Develop Internal Complaint Procedures. By establishing internal complaint procedures, employers can ensure that employees bring potential whistleblowing issues to the attention of management for resolution. Ideally this keeps grievances inside the company and allows an employer the opportunity to diffuse the escalation of complaints into litigation. It appears the company at issue in the recent Eighth Circuit case had effective procedures in place, because the employee reported concerns about false reports (or fraud as he refers to it in his complaint) to his supervisor, the shift leaders, and the general area manager. The company investigated these reports and escalated them to the appropriate decision makers.

Cases Won and Lost in the Details. Litigating the applicability of whistleblower statutes is complex and requires skilled lawyering. This case ended up turning on what the Eighth Circuit referred to as a "fine distinction" between "a report about a process and a report about the process's result." However, the

Eighth Circuit concluded that the whistleblower's information amounted to a report that if a defect was identified - one of the two quality control systems at issue may not show the defect. "[The Whistleblower] identified a potential risk caused by errors in the reporting system, but not information about processes that created defects." This all hinged on a specific interpretation of language buried in the statute. And while two federal judges at the Eighth Circuit adopted the aforementioned interpretation, a dissenting judge reached the exact opposite conclusion, writing that the statute "does not define the phrase 'relating to.'" The dissenting judge wrote that "the phrase "relating to" is not a strict, severely limiting term" and so that judge would have found the activity at issue here to be covered whistleblowing activity.

This all underscores that a careful reading of whistleblower statutes by employment lawyers is critical. Employment lawyers counsel employers to avoid litigation. But should litigation arise, employment lawyers challenge whistleblowing claims both procedurally and substantively, and collect the evidence needed to make complex legal arguments both at trial and on appeal. Such attention to detail often makes the difference between victory and defeat.

Case reference: *Barcomb v. General Motors, LLC*, No. 19-1870 (8th Cir. Oct. 15, 2020).

The Mitchell Williams Employment and Labor team of lawyers advises employers on Whistleblower laws, claims and procedures. Contact Attorney Nate Read at nread@mwlaw.com or Attorney Devin Bates at dbates@mwlaw.com for more information.