KATZ, MARSHALL & BANKS, LLP

Eight Whistleblower Law Terms You Need to Know

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February 19, 2016

Here at Katz, Marshall & Banks, we often talk to prospective clients who aren't sure whether the facts of their case constitute an actionable claim of whistleblower retaliation. The question often boils down to this: I know what occurred to me was *wrong*, but was it *illegal*? An understanding of the essential terms surrounding whistleblower retaliation law goes a long way towards providing an answer to this question. This article will set forth some of the most important terms and phrases in whistleblower law so that you can better understand the strength of your whistleblower claim. Here is the list of terms we will discuss.

1. Whistleblower
2. Protected Activity
3. Adverse Action
4. Contributing Factor
5. OSHA
6. Administrative Exhaustion
7. Remedies
8. Qui Tam

1. Whistleblower

Any discussion of important whistleblower terminology has to start with the critical term: "whistleblower." Many people in America have a narrow definition of the term whistleblower, often revolving around one person: Edward Snowden.

Whether your impression of Edward Snowden is positive or negative, it is important to understand that the term "whistleblower" encompasses not just national defense whistleblowers like him, but a wide range of actors in both the public and private sectors. Broadly, the term "whistleblower" can be defined as someone who speaks out against perceived wrongdoing. Our representations focus primarily around two types of whistleblowers:

1. Employees who are retaliated against as a result of reporting ethical or legal violations internally. These whistleblowers will be the primary focus of this article.
2. Individuals, typically but not always employees or other insiders, who report activities that constitute fraud against the government or violate laws protecting shareholders. Government whistleblower programs provide monetary rewards to whistleblowers like these whose reports leads to enforcement actions against the culpable actors. Retaliation is not a necessary component of these types of whistleblower claims. Indeed, many whistleblowers can proceed anonymously while still obtaining monetary rewards.

What this means is that when we and other whistleblower lawyers use the term "whistleblower," we don't just mean Edward Snowden, and we don't even just mean the person that reports securities violations to the U.S. Securities and Exchange Commission (SEC). We also mean the flight attendants that refuse to fly in the face of what they deem to be a serious security threat; or the health services worker who complains to management that her company is providing patients with unnecessary therapy just to obtain higher reimbursements from Medicare. Even something as innocuous as a train

conductor reporting a strange smell while working has been held sufficient to warrant whistleblower protections under the Federal Railroad Safety Act.

2. Protected Activity

Broadly speaking, "protected activity" refers to the act of reporting, opposing, or refusing to engage in violations of laws, rules or regulations. However, not all opposition to activity that seems "wrong" entitles an individual to whistleblower protections. There is no sweeping federal statute that protects workers from retaliation for reporting illegal or unethical activity. Instead, federal lawmakers have created a patchwork quilt of legislation protecting workers in various industries from retaliation for reporting or refusing to engage in statutory and regulatory violations in those industries. In addition, there are some statutes, such as the False Claims Act, that create forms of "protected activity" that cut across many industries. Finally, there are state laws that serve as catch-alls for protected activity falling between the cracks of federal protections, though these state laws often don't provide the robust protections of those found within the federal whistleblower protection statutes. Thus, in order to determine if your actions constitute "protected activity," you must first identify the legal source of your protections. The "Whistleblower Law" section of our website provides a useful breakdown of the various statutory protections available to whistleblowers who face retaliation.

3. Adverse Action

Under most federal whistleblower protection statutes, an employee does not have a retaliation claim unless she can show that the employer has taken some "adverse action" against her. Most of these statutes, however, provide that for an action to qualify as an "adverse employment action," it need only be "material." This means that the employer's action must be one which would dissuade a reasonable employee in the whistleblower's position from engaging in the protected activity that prompted the adverse employment action. Typical types of adverse action include termination, suspension, demotion, reduction in pay, or something of that nature. However, under many whistleblower protection statutes, it may be enough that the employee's supervisor has begun to mistreat her in some way; for instance, threatening discipline, changing an employee's performance rating, micromanagement or harassment, or other non-trivial acts that may dissuade an employee from speaking out against wrongdoing.

4. Contributing factor

The term "contributing factor" relates to the burden a whistleblower must meet in order to prove her case. To prevail, a whistleblower must show some causal relationship between her protected activity (e.g., reporting a violation of the law) and the adverse action taken against her (e.g., a termination). Different whistleblower protection statutes require a whistleblower to prove differing degrees of causal connection. Title VII claims, for instance, are governed under a "but-for" standard of causation, which the Supreme Court in *University of Texas Southwestern Medical Ctr. v. Nassar* held "requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Other statutes, including many of the environmental whistleblower protection statutes, require an employee to show that her protected activity was a "motivating factor" in the employer's adverse action against her.

Many of the newer federal whistleblower protection statutes, however, require only that an employee show that her protected activity was a "contributing factor" in the adverse employment action she suffered. In *Araujo v. New Jersey Transit Rail Operations, Inc.*, the Third Circuit Court of Appeals explained the standard as "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision." In other words, to prove causation under whistleblower protection statutes like the Sarbanes-Oxley Act (SOX) or the aviation whistleblower protection statute

known as “AIR21,” an employee need not show that her protected activity was the primary or even a significant factor in the employer’s decision to subject her to an adverse employment action – only that her protected activity had *some* effect on the outcome of the decision.

5. OSHA

OSHA is short for the U.S. Occupational Safety and Health Administration. OSHA is critical for whistleblowers because the OSHA Whistleblower Protection Program is responsible for enforcing the whistleblower provisions of “more than twenty whistleblower statutes protecting employees who report violations of various workplace safety and health, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, and securities laws.”

This wide-ranging list of industries governed by OSHA-administered whistleblower protection statutes is critical and commonly misunderstood. While the common misconception is that OSHA handles only workplace safety issues such as faulty scaffolding and confined spaces, in fact, its Whistleblower Program handles complaints of retaliation in a wide range of industries and fields, from accounting and finance under SOX and the Consumer Financial Protection Act, to maritime safety under the Seaman’s Protection Act.

6. Administrative Exhaustion

After suffering from retaliation, a whistleblower cannot rush immediately to court to file claims against the offending company. OSHA, and other agencies like it, play a critical role in most whistleblower cases because whistleblowers are required to “administratively exhaust” their claims. All of the whistleblower protection statutes enforced by OSHA – which constitute almost all of the federal whistleblower protection statutes in existence – require an employee to first file their retaliation complaint with OSHA *before* filing in court. This begins the “administrative exhaustion” process; the employee must complete all the required administrative steps within agency responsible for enforcing the statute. There are two primary exceptions. Both the False Claims Act and the Dodd-Frank Act allow a whistleblower to file directly in federal court without first submitting an initial complaint to OSHA.

Typically, OSHA will investigate a whistleblower’s claim and either dismiss it or issue an order requiring that the company provide the whistleblower relief, typically in the form of economic damages and/or reinstatement. Both parties then have the opportunity to appeal OSHA’s determination to a Department of Labor administrative law judge (ALJ), who presides over a hearing wherein both sides are permitted to request documents and information from the other and then present evidence to the ALJ. After the ALJ issues his or her determination, the parties are then permitted to appeal that ruling to the DOL’s Administrative Review Board (ARB). Following an ARB determination, whistleblowers are finally entitled to their day in court: ARB determinations are appealable to their local Circuit Court of Appeals. This multi-step process of moving through the Department of Labor is what constitutes “administrative exhaustion.”

One note: many newer whistleblower protection statutes contain what are known as “kick-out” provisions, which provide whistleblowers with the opportunity to “kick out” their case from the Labor Department to federal district court if the DOL has failed to resolve their complaint in a timely fashion. For example, if OSHA has not issued a determination of a whistleblower’s claim under the Federal Railroad Safety Act within 210 days after the whistleblower filed his or her complaint, the whistleblower may remove the complaint from OSHA and bring it directly to court.

7. Remedies

If a whistleblower wins her case, what remedies are available to her? A prevailing whistleblower can typically obtain reinstatement to her former position or monetary damages, or some combination of the two. OSHA, for example, can order reinstatement immediately after the investigation phase. It can also order monetary damages, but monetary awards are generally not enforceable until after the employer has exhausted or abandoned his appeals (ALJ hearing, ARB appeal, and Court of Appeals). Practically speaking, reinstatement is often not desirable by either party. Once matters have progressed to full-on litigation, both sides are frequently interested in going their separate ways and not renewing the already toxic employment relationship. Nevertheless, an order of reinstatement can often spur positive settlement discussions.

With respect to monetary damages, a whistleblower can obtain back pay – the salary, wages and benefits the whistleblower missed out on from the time of the retaliation to the time of the favorable judgment. The whistleblower can also obtain front pay, a somewhat more speculative calculation of lost or impaired compensation going forward. A whistleblower's damages may also include compensatory damages for mental pain and suffering and emotional distress. Punitive damages may be awarded under some, but certainly not all, whistleblower statutes. Finally, nearly all whistleblower statutes provide for attorneys' fees. This means that if the whistleblower prevails, the offending company must pay the attorneys' fees she incurred in pursuing her claim. The inverse does not hold true – if the whistleblower loses, there is no automatic rule requiring her to pay the fees incurred by the other side to defend the action.

8. Qui tam and Whistleblower Incentive Programs

A "qui tam" lawsuit is a lawsuit filed under the False Claims Act (FCA) alleging that some individual or entity – typically, but not always, the plaintiff's employer – is defrauding the federal government. Qui tam is an abbreviation for a Latin phrase meaning, "[he] who sues in this matter for the king as well as for himself." The reason this term is used for FCA actions is that a person who brings a successful qui tam lawsuit can receive 15 to 30 percent of the damages the government recovers from the defendants.

Qui tam lawsuits have had a rollercoaster history in the United States. The FCA was passed in 1863 in the midst of the American Civil War in response to continuing reports of fraud and misappropriation of money designated to be spent towards the war effort. The statute was subsequently gutted in 1943, eliminating the relator's guaranteed bounty and with it the motivation to take the risk of significant harm to one's career that often accompanied blowing the whistle. In 1986, the FCA was amended again to restore the whistleblower "bounty," and the effects have been undeniable. At the time Congress was discussing the 1986 amendments, there was a single qui tam case pending in federal courts. Between October 1987 and September 2014, 9,960 new qui tam lawsuits were filed. Moreover, the Act has served as a model for other whistleblower incentive programs, such as the SEC Whistleblower Program and its sister program at the U.S. Commodity Futures Trading Commission (CFTC). Notably, the FCA also includes an anti-retaliation provision that provides robust protections for whistleblowers who report fraud against the government.