Whistleblower Litigation
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> testimony of medical or psychiatric experts is not strictly necessary. However, damages must be supported by evidence of the physical or mental consequences caused by the adverse employment actions proven by the employee. . . . Complainant has testified that she suffered from depression and loss of self-esteem during and following her employment and constructive discharge from Respondent. Although no medical evidence has been presented in support, Complainant's son testified in confirmation of Complainant's emotional distress and depression with the resulting effects on both the family and their economic situation. [Three additional witnesses] all confirmed the Complainant's distress over what the undersigned has found to be unlawful discriminatory employment actions while in Respondent's employ. Accordingly, I find Complainant's testimony regarding her emotional pain and suffering, mental anguish, embarrassment, and humiliation to be generally credible. In line with awards made in similar cases, I hereby award Complainant the sum of $75,000.00 as non-economic compensatory damages.

Brown v. Lockheed Martin Corp., 2008-SOX-00049, 54–55 (ALJ Jan. 1, 2010) (internal citations omitted).

The Brown case is important both because the ARB upheld an award of compensatory damages under SOX and because it upheld such an award that the ALJ had made without testimony from medical of psychiatric professionals, but rather based only on the testimony of the plaintiff, her coworkers, and her son.

The Brown decision is consistent with OSHA's position that "compensation for mental distress due to the adverse action, and out-of pocket costs of treatment by a mental health professional and medication related to mental distress" are recoverable as compensatory damages. OSHA Manual at 6-2.

II. THE DODD-FRANK ACT

On July 15, 2010, Congress enacted a massive overhaul of the nation's financial regulatory system. President Barack Obama signed the bill into law on July 21, 2010. Congress designed the Wall Street Reform and Consumer Protection Act – popularly known as the Dodd-Frank Act –to address some of the root causes of the collapse of the financial sector in 2008. As part of its comprehensive program to ensure corporate accountability and compliance, the Dodd-Frank Act strengthened and created numerous whistleblower protections. As noted in Section I above, Congress expanded the whistleblower protection provision of the Sarbanes-Oxley Act ("SOX 806") by extending the statute of limitations, clarifying the scope of coverage and right to a private civil action, and ensuring that the protections of SOX 806 were non-waivable by employees in most cases. The Dodd-Frank Act also created a Securities and Exchange Commission ("SEC") whistleblower incentive program, as well as a Commodity Futures Trading

Commission ("CFTC") whistleblower incentive program, both of which reward those who provide information to the government on securities violations by giving whistleblowers a share of any money the government recovers. It also created a specific whistleblower-protection program for those who work in the financial industry to encourage them to come forward with information related to fraudulent conduct in the sale and marketing of consumer financial products or services. As detailed below, the Dodd-Frank Act also strengthened the False Claims Act and created new whistleblower protections and incentive programs to reward individuals who report violations of the law that result in monetary sanctions against the offending party.

A. Commodity Futures Trading Commission Whistleblower Incentive Program

Section 748 of the Dodd-Frank Act amends the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, to create an incentive program for whistleblowers who provide original information to the CFTC that results in the imposition of monetary sanctions greater than $1 million. The statutory language establishing this incentive program is as follows:

> In any **covered judicial or administrative action**, or **related action**, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an **award** or awards to 1 or more **whistleblowers** who voluntarily provided **original information** to the Commission that led to the **successful enforcement** of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

Section 748 states that the whistleblower's financial reward for the provision of such original information shall be not less than 10 percent and not more than 30 percent of the total collected monetary sanctions from the offending party. The CFTC maintains discretion in determining the size of the whistleblower's financial reward. In crafting this reward, the CFTC will consider the significance of the information provided, the extent of the whistleblower's assistance, the programmatic interests of the SEC, and any other relevant factor that the CFTC establishes by subsequent rule or regulation.

The Dodd-Frank Act further defines these bolded CFTC Whistleblower Program terms as follows:

- **Covered judicial or administrative action:** Any judicial or administrative action brought by the CFTC under the Commodity Exchange Act that results in **monetary sanctions** in excess of $1,000,000.

- **Monetary Sanctions**: these sanctions include any monies, including penalties, disgorgement, restitution, and interest ordered to be paid, as well as any monies deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the

Sarbanes Oxley Act of 2002 as a result of such action or any settlement of such action.

- **Whistleblower**: any individual (or individuals acting jointly) who provides information relating to a violation of the Commodity Exchange Act in a manner established by rule or regulation of the CFTC.

- **Original Information** is information that is:

  (A) derived from the independent knowledge or analysis of a whistleblower;

  (B) not known to the CFTC from any other source, unless the whistleblower is the original source of the information; and

  (C) not exclusively derived from an allegation made in a (1) judicial or administrative hearing, in a (2) governmental report, hearing, audit, or investigation, or (3) from the news media, unl**ess** the whistleblower is a source of the information.

  Additionally, original information triggers the CFTC whistleblower program so long as the original information was submitted to the CFTC after the date of enactment of the Dodd-Frank Act.

  Moreover, awards issued pursuant to the CFTC Whistleblower Program are available to whistleblowers who provided timely original information to the CFTC even where the violation of the Commodities Exchange Act (or its implementing rules and regulations) occurred prior to the enactment of the Dodd-Frank Act.

- **Successful enforcement**: Successful enforcement includes any settlement of covered actions.

As stated above, the CFTC whistleblower's award shall be not less than 10 percent and not more than 30 percent of the total monetary sanctions that have been collected as imposed via the covered action or related actions. The determination of this award rests within the discretion of the CFTC. The Dodd-Frank Act lists certain criteria that should guide the CFTC's discretion. These criteria include: (1) the significance of the CFTC whistleblower's information to the success of the covered judicial or administrative action against the wrongdoer; (2) the degree of the CFTC whistleblower's assistance (as well as the assistance of the whistleblower's legal representative); (3) the CFTC's programmatic interest in deterring violations of the Commodity Exchange Act (and its implementing regulations); and (4) additional relevant factors as established by a rule or regulation of the CFTC.

The Dodd-Frank Act envisions numerous scenarios in which an individual's employment precludes that person from eligibility as a CFTC whistleblower. These scenarios include any individual who is or was at the time of acquiring the original information submitted to the CFTC a members/officer/employee of the following: Appropriate regulatory agency; the Department of Justice; a registered entity; a registered futures association; a self-regulatory organization under Securities Exchange Act (e.g., Financial Industry Regulatory Authority [FINRA]); or a law enforcement organization.

The Dodd-Frank Act also disallows awards to any whistleblower convicted of a criminal violation related to the covered judicial/administrative action that produced the award. Whistleblowers are not eligible for awards where the whistleblower submits information to the CFTC that is based on facts underlying the covered action previously submitted by another whistleblower. Finally, the Dodd-Frank Act prohibits awards to any whistleblower who fails to submit information to the CFTC in such a form as required by CFTC rule or regulation.

The Dodd-Frank Act permits a whistleblower to be represented by counsel when making a claim for an award under the CFTC Whistleblower Program. Additionally, the whistleblower may initially remain anonymous and act through his or her counsel, provided that the whistleblower eventually discloses his or her identity to the CFTC prior to the payment of the award.

Unlike Section 922 of the Dodd-Frank Act (the SEC Whistleblower Program), Section 748 permits CFTC whistleblowers to appeal any award determination of the CFTC. The whistleblower-appellant must file an appeal with the appropriate Circuit Court of Appeals not more than 30 days after the CFTC issues its award determination.

Section 748 of the Dodd-Frank Act also creates a private right of action for CFTC whistleblowers who experience adverse personnel actions on account of protected activity. This anti-retaliation protection provision protects whistleblowers who provide information to the CFTC in accordance with the above-described CFTC whistleblower program, or whistleblowers who assists in any CFTC investigation or judicial/administrative action that is based upon or related to the whistleblower's provision of information.

Section 748's anti-retaliation protection provision permits a non-federal government employee to bring an action against the employer in federal district court. Federal government employees must bring the action pursuant to Section 1221 of Title 5 of the U.S. Code. Whistleblowers must bring the action no later than two years after the date of the adverse personnel action occurs**.** A successful whistleblower is entitled to reinstatement, backpay and interest, compensation for special damages, litigation costs, expert witness fees, and reasonable attorneys' fees.

B. Securities and Exchange Commission (SEC) Whistleblower Incentive Program and Anti-Retaliation Provisions

Section 922 of the Dodd-Frank Act amends the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, to create a new federal program by which the Securities and Exchange Commission ("SEC") will reward whistleblowers who voluntarily provide original information to the SEC regarding securities violations that result in the imposition of monetary sanctions greater than $1 million.

The provisions of Section 922 are a near mirror to the provisions of Section 748's CFTC Whistleblower Incentive Program described above. Section 922 states that the whistleblower's financial reward for the provision of such original information shall be not less than 10 percent and not more than 30 percent of the total collected monetary sanctions from the offending party. As is the case with the CFTC, the SEC maintains discretion in determining the size of the whistleblower's financial reward. In crafting this reward, the SEC will consider the significance of the information provided, the extent of the whistleblower's assistance, the programmatic interests of the SEC, and any other relevant factor that the SEC establishes by subsequent rule or regulation. However, unlike the CFTC Whistleblower Incentive Program, SEC Whistleblowers have no right to appeal the SEC whistleblower award to federal court.

Section 922 specifically forbids awards to whistleblowers who were employees of an "appropriate regulatory agency," the Department of Justice, a self-regulatory organization, the Public Company Accounting Oversight Board, or a law enforcement organization. Section 922 also prohibits financial rewards to whistleblowers who are convicted of a criminal violation related to the judicial or administrative action for which the whistleblower provided information, individuals who gain the original information by auditing financial statements as required under the securities laws and individuals who fail to submit information to the SEC as required by an SEC rule.

In addition to creating the federal program to encourage the reporting of securities violations, § 922 protects employees against retaliation when these employees provide information about their employer to the SEC in accordance with the program, or when these employees initiate, testify or assist in any investigation related to the program, or make required disclosures under SOX, the Securities Exchange Act of 1934, and any other law, rule, or regulation under the jurisdiction of the SEC. The Act creates a private right of action that may be filed in federal court.

The remedies available to an aggrieved whistleblower vary slightly from the remedies available to the CFTC whistleblower. Under Section 922, whistleblower's remedies under this new provision include reinstatement, double back pay with interest, attorneys' fees, and the reimbursement of other related litigation expenses.

C. Whistleblower Protections for Financial Services Employees

Section 1057 of the Dodd-Frank Act creates a new private cause of action for financial services industry employees who experience retaliation for disclosing information regarding an employer's fraudulent or unlawful conduct related to the provision of a consumer financial product or service.

1. Covered Employers and Employees

Section 1057 covers employers who engage in the offering or provision of a consumer financial product or service. This applies to a wide array of employers, including organizations that extend credit or service or broker loans, provide financial advisory services to consumers regarding proprietary financial products, provide real estate settlement services or perform property appraisals, or analyze, collect, maintain, or provide consumer report information in connection with any decision related to the offering or provision of a consumer financial product or service. The scope of coverage also encompasses affiliates who provide a related material service to the employer, including the design, maintenance, and/or operation of the financial product or service, or for the processing of related transactions. Covered services and employment included property appraisals, financial advisory services, credit counseling, credit rating, real estate settlement, and loan underwriting. Covered Employees include any individual who performs tasks related to the offering/provision of a consumer financial product or service.

2. Protected Activity

Section 1057 prohibits retaliation for four types of whistleblowing activities. First, Section 1057 protects a covered employee who provides, causes to be provided, or is about to provide or cause to be provided information to the employer, the Consumer Financial Protection Bureau ("Bureau"), or any other state, local, or federal government authority or law enforcement agency, relating to any violation of any provision of Title X of the Dodd-Frank Act or any rule, order, standard or prohibition prescribed or enforced by the Bureau. This type of protected activity includes the employee's provision of information regarding an act or omission that the employee reasonably believes to be a violation of these provisions and rules; testimony in any proceeding resulting from the administration or enforcement of any provision of Title X of the Dodd-Frank Act or any rule, order, standard or prohibition prescribed or enforced by the Bureau. Id.

Second, covered employees are protected under Section 1057 if they testify or will testify in any proceeding resulting from the administration or enforcement of any provision of Title X of the Dodd-Frank Act or any rule, order, standard or prohibition prescribed or enforced by the Bureau. Third, Section 1057 protects covered employees who file or institute any proceeding under any federal consumer financial law.

Finally, the fourth form of protected activity under the Section 1057 protects internal whistleblowers. Section 1057 protects a covered employee if he or she objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be a violation of any law, rule, standard, or prohibition subject to the jurisdiction of, or enforceable, by the Bureau.

It is important to note that Section 1057's anti-retaliation prohibition protects employees or authorized representatives both when that employee/representative acts in the foregoing manners on her own initiative, or instead during the employee's execution of her duties in the normal course of affairs.

3. Prohibited Retaliation

Under Section 1057, covered employers may not "terminate or in any other way discriminate against, or cause to be terminated or discriminated against" covered employees for engaging in protected activity.

4. The Litigation Process

The statute of limitations for the new private cause of action under § 1057 is 180 days. An employee must file their claim with the Occupational Safety Health Administration ("OSHA"). OSHA will then inform the person(s) named in the Complaint of the allegations and provide an opportunity for written response. OSHA will initiate its investigation within 60 days after the filing of the Complaint.

Section 1057 tracks many of the same provisions of the Sarbanes Oxley Act anti-retaliation provisions, where within 60 days of receipt of the complaint, the Secretary of Labor may order relief upon a finding of reasonable cause that retaliation occurred. Furthermore, Section 1057 contains an employee-friendly burden-shifting framework; a complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was "a contributing factor" in the unfavorable action. The employer must then prove by clear and convincing evidence that it would have executed the same adverse employment action even in the absence of the employee's protected activity. Parties may file objections to the Secretary of Labor's written determination no later than 30 days after issuance, and request a hearing.

As is the case with other federal whistleblower protections, both the employee and the employer can appeal OSHA's findings and request a hearing before a Department of Labor ("DOL"). If the DOL fails to issue a final order within 210 days of filing, the employee can remove his or her § 1057 claim to federal court. Either party can then request a trial by jury.

5. Available Remedies

An employee who prevails under an action brought pursuant to Section 1057 is entitled to the following relief: reinstatement or front pay; back pay with interest; compensatory damages; attorneys' fees; and litigation costs, expressly inclusive of expert witness fees.

D. New Cause of Action

Section 922 of the Dodd-Frank Act also created a new cause of action, set forth in Section 21F(h)(1)(A),[9] which allows "whistleblowers" to sue in federal court if their employers retaliated against them because they provided information about their employer to the SEC in accordance with the above-described whistleblower bounty program, initiated, testified, or assisted in any investigation related to the program; or made disclosures "required or protected" under the Sarbanes-Oxley Act, the Securities Exchange Act of 1934, or any other law, rule, or regulation under the jurisdiction of the SEC.

A Dodd-Frank retaliation claim may be filed directly in federal court within three years "after the date when facts material to the right of action are known or reasonably should have been known to the employee" (but subject to a maximum of six years). Section 21F(h)(1)(B)(iii). A whistleblower's remedies include reinstatement, double back pay with interest, attorneys' fees, and the reimbursement of other related litigation expenses. Section 21F(h)(1)(C).

Even though the statute by its terms provides the new cause of action only to "whistleblowers," which Section 21F(a)(6) of the Act defines as individuals who provide information to the SEC, a federal district court has recently concluded that the protection in 21F(h)(1)(A)(iii) for individuals whose disclosures are "required or protected" under SOX extends to employees who have reported internally but not reported their information to the SEC. See Egan v. TradingScreen, Inc. (Egan I), No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011). Egan I also held that an employee who provides information to someone who then passes it on to the SEC can be considered a "whistleblower" under the statute. Id. at *8-9. On a motion to dismiss the plaintiff's amended complaint, however, the Court held that the plaintiff had failed to provide specific allegations that his reports had been passed on to the SEC by internal investigators at the company, and thus the plaintiff was not a "whistleblower" and had not engaged in protected activity under the statute. See Egan v. TradingScreen Inc. (Egan II), No. 10-cv-08282, 2011 WL 4344067, at *2-4 (S.D.N.Y. Sept. 12, 2011). This decision is potentially far-reaching as it would allow plaintiffs who have engaged in protected activity under

[9] Section 922 of the Dodd-Frank Act amended the Securities Exchange Act of 1934 to add Section 21F, which establishes the whistleblower award program. Citations herein are to the Exchange Act, in accordance with the practice of the Securities and Exchange Commission ("SEC"). These rules also appear at 17 C.F.R. pt. 240 and 249 (2012).

Section 806 of SOX to circumvent the administrative scheme outlined in SOX and take their claims directly to federal court, and to do so with the benefit of a longer statute of limitations (180 days under SOX versus three years for claims filed in court under the Dodd-Frank Act, Section 21F(h)(1)(B)(iii)(bb)).

III. CONSUMER PRODUCTS SAFETY WHISTLEBLOWER PROTECTIONS

In the wake of scandals over lead paint found in toys and other recalls in the last few years, Congress passed the "Consumer Products Safety Reform Act of 2008," a broad set of amendments to the Consumer Products Safety Act. The Act was signed into law and became effective on August 14, 2008. Section 219 of the Act, which has been unofficially codified as 15 U.S.C.A. § 2087, provides for new whistleblower protections.

A. Protected Activity

This statute provides a civil remedy to employees of manufacturers, private labelers, distributors, or retailers of consumer products who allege that they were retaliated against because they provided information about, or participated in an investigation relating to, what they reasonably believed to be violations of consumer safety laws enforced by the United States Consumer Product Safety Commission ("the Commission"). 15 U.S.C.A. § 2087(a).

B. Consumer Product Safety Laws

Under the new Act, an employee has to have a reasonable belief that his or her employer violated consumer product safety laws. The Consumer Products Safety Act ("CPSA"), 15 U.S.C. §§ 2051-2084, created consumer product safety laws and established the Commission, which is charged with protecting the public from unreasonable risks of serious injury or death from consumer products. The CPSA defines the term "consumer product" as any article, or component part thereof, produced or distributed for: (1) sale to a consumer for use in or around a permanent or temporary household, school, or in recreation, and (2) for the personal use in or around a permanent or temporary household, school, or in recreation. 15 U.S.C. § 2052. While the Commission has jurisdiction over more than 15,000 different products under this definition, the CPSA excludes products from the Commission's jurisdiction whose regulation expressly lies in another federal agency's jurisdiction, for example food, cosmetics, medical devices, tobacco products, firearms and ammunition, motor vehicles, pesticides, aircrafts, and boats. Id.

Under the CPSA, the Commission has power to develop safety standards and pursue recalls for consumer products that present unreasonable or substantial risks of injury or death to consumers. 15 U.S.C. §§ 2056 and 2061. The Commission also has the power to ban a product if there is no feasible alternative. 15 U.S.C. § 2057. While the Commission's jurisdiction is very broad, the CPSA (with some exceptions) leaves it up to the Commission to determine precisely what to regulate and/or how to regulate it. 15 U.S.C. § 2056. As such, not all dangers to