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Whistleblower Policies Could Create Contractual Rights

Law360, New York (March 27, 2015, 4:23 PM ET) -- Owing to a recent victory for workers' rights, employers might begin to reconsider their longtime affection for internal policies that profess a company's commitment to protecting whistleblowers from retaliation. In the halcyon days, those policies made for good corporate public relations and often prompted employees to tip off management to lurking issues, but effectively functioned, in the eyes of many whistleblower advocates, as toothless promises to workers of otherwise unenforceable rights. Worse still, for many employees, internal reports to internal compliance offices far too often incited retaliation against them.



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If a recent victory for the whistleblower in a case before the U.S. District Court for the District of Columbia is any indication of a shift in the law, companies with such policies could increasingly find themselves defending lawsuits brought by at-will employees for breaches of implied contractual duties, should those workers come to believe that their employers have not kept their end of the anti-retaliation bargain.

On March 18, 2015, in *Leyden v. American Accreditation Healthcare Commission*, U.S. District Judge Christopher R. Cooper held that Christine Leyden, the former chief accreditation officer of the American Accreditation Healthcare Commission, stated claims for breach of implied contract, breach of the implied covenant of good faith and fair dealing and promissory estoppel when she was allegedly fired for reporting the self-dealing activities of two leading Utilization Review Accreditation Commission board members. Judge Cooper found that the URAC's internal corporate policies — which assured employees that the URAC would not retaliate against them for blowing the whistle on improper activities and which provided for internal employee grievance procedures — supplied the basis for the plaintiff's implied contractual and quasi-contractual rights.

Judge Cooper's ruling will allow Leyden to proceed against the URAC on her contractual and promissory estoppel claims and will arguably entitle her to discovery into the underlying board members' alleged misdeeds. This outcome might provide the URAC with a stronger incentive to settle the parties' dispute, which otherwise would have been absent had Judge Cooper held to the contrary and found that the URAC's whistleblower policies were not worth the paper they were printed on. Employers would be well-advised to re-examine their corporate policies and treatment of whistleblowers, lest those policies expose the company to lawsuits for breaches of contract with the sort of burdensome discovery that often accompanies the litigation of whistleblower retaliation claims.

Headquartered in the District of Columbia, the URAC is one of the premier organizations offering accreditation and certification programs to managed health care plans, health care providers and pharmacies. URAC accreditation is a valuable commodity to these health care companies, as more than 40 states, the District of Columbia and the federal government deem URAC accreditation sufficient to satisfy the eligibility requirements of various health care regulations, including those for participation in the Affordable Care Act insurance exchanges.

Leyden joined the URAC in 2000 and rose through the ranks to serve as the organization's chief accreditation officer, where she reported to the CEO and oversaw the URAC's accreditation programs and standards. Leyden contends in her lawsuit that she began raising concerns internally to the CEO about the alleged misconduct of two leading URAC board members shortly before her termination in January 2013. Specifically, she alleges that the URAC board chairperson, who was a high-ranking executive with UnitedHealth Group Inc., had sought improper access to business and financial information submitted to the URAC by managed care companies and had attempted to improperly influence the URAC's accreditation of UnitedHealth. Leyden further claims that she objected to the URAC vice chairperson's involvement in negotiations over a potential contract between the URAC and the vice chairperson's company to provide accreditation services. Leyden told the CEO that the alleged misdeeds of these board leaders violated the organization's conflict of interest policy and compromised the independence of the URAC accreditation decisions. According to Leyden's complaint, the URAC responded to her reports of misconduct by terminating her employment.

Leyden brought suit against the URAC and challenged her discharge on a number of legal theories, claiming, *inter alia*, that the organization's termination of her employment both breached her implied contract with the URAC to be free from retaliation and breached the covenant of good faith and fair dealing inherent to that implied contract.^[1] Because she was an at-will employee, Leyden could not rely on a written employment agreement for the genesis of such contractual rights. She instead pointed to the URAC's whistleblower and employee grievance policies as supplying the requisite contractual obligations between herself and the URAC.

The organization's whistleblower policy invited URAC employees "to report allegations of known or suspected improper activities," which the policy defined to include questionable accounting, fraud and a catchall category including "malfeasance" and "gross misconduct." Most importantly to Judge Cooper's analysis, the URAC whistleblower policy includes an anti-retaliation provision affirming the organization's commitment to protecting employees from reprisal: "No URAC employee who in good faith reports any improper activities in accordance with this policy shall suffer, and shall be protected from threats of harassment, retaliation, discharge or other types of discrimination."

Leyden claimed that the organization's internal policies created an implied contract between herself and the URAC that she be protected from retaliation, which the organization breached when it allegedly retaliated against her for reporting the board members' improper activities to the CEO. The URAC contended in its motion to dismiss that the policies did not apply to Leyden and did not create any contractual rights. Indeed, the organization expressly disclaimed the creation of any such rights in its employee handbook's "at-will" disclaimer, which warned URAC employees that the handbook was "not a contract of employment, and does not confer any contractual rights, either express or implied, between URAC and you." The URAC argued that this disclaimer was fatal to Leyden's contract-based claims, as the URAC had placed her on unequivocal notice that the organization's policies were aspirational and did not actually obligate the URAC to do anything to protect whistleblowers.

The parties' opposing positions set the stage for the conflict confronting Judge Cooper: How

can an employer urge its workforce to blow the whistle on misconduct and promise them safe passage via its written policies and yet suffer no legal consequences for allegedly breaching its stated commitment to protecting whistleblowers? While such anti-retaliation and whistleblower policies are common in the for-profit and nonprofit sectors, an employer's motive for adopting such policies is open to debate. The less cynical camp views such policies as reflective of estimable corporate values, whereby an entity memorializes its good faith commitment to protect employees who raise concerns about issues that could harm the company's long-term interests. The more skeptical camp would submit that the unscrupulous employer uses such policies as a devious bait-and-switch, luring its employees to raise concerns internally while simultaneously stripping the policies of any binding legal effect through express disclaimers of contractual rights. Viewed through the latter lens, the transaction becomes a decidedly one-sided exchange: The employer increases the odds that an employee will bring lurking trouble to management's attention before an explosive issue becomes known to regulators or the general public, safe in the knowledge that its invocation of "legalese" disclaimers will ensure that the very whistleblower policies that encouraged the disclosures will not limit the employer's options for disposing of the whistleblower. Even if the employer chooses the path of restraint and does not fire the employee outright, the individual who voices their concerns to management is nevertheless "outed" as someone willing to shine a light on corporate misdeeds. Equipped with this information, management might come to view that employee's continued presence as a liability and grow disinclined to trust that person with increased levels of access and responsibility.

Judge Cooper ultimately sided with Leyden's view of the law and rejected the employer's attempts to "have its cake and eat it too." In reaching this conclusion, he built on a line of case law in the District of Columbia that treats personnel manuals and employee handbooks as potentially creating implied employment contracts and duties of good faith and fair dealing, the latter of which require that neither party do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the implied contract. Judge Cooper found that Leyden's verbal complaints to the CEO about the board members' misconduct implicated the whistleblower protections in the URAC policy. He also rejected the organization's arguments that Leyden should have made her complaints in writing to secure whistleblower protections, noting that the policies merely encouraged but did not require that complaints be submitted in writing. Most importantly, Judge Cooper held that the at-will disclaimer in the URAC's handbook was "rationally at odds" with the organization's whistleblower policy and "therefore does not serve to retract URAC's commitment to protect employees from retaliation for reporting suspected improper activity." Judge Cooper closed his analysis with the common-sense observation that "[a]ny other conclusion would render the whistleblower policy meaningless. Having made the promise, URAC cannot now argue it was not bound to honor it."

It bears mentioning that Judge Cooper did not rely exclusively on the URAC's whistleblower policy in reaching this conclusion. He also identified the URAC's grievance policy as independently conferring implied contractual and quasi-contractual rights on Leyden. According to Judge Cooper, that policy encourages URAC employees to raise complaints or suggestions concerning their work conditions, and, like the whistleblower policy, contained an anti-retaliation provision promising that "[n]o employee will be penalized, formally or informally, for voicing a complaint with URAC in a reasonable, professional manner." Judge Cooper concluded that "because the 'at-will' disclaimer contradicts the grievance policy, it does not prohibit Leyden from seeking to enforce URAC's promise not to penalize employees for lodging reasonable complaints."

Judge Cooper parted ways with Leyden and sided with the URAC in his consideration of the organization's request that he dismiss her tort-based cause of action for wrongful discharge in violation of public policy. Leyden contended that she had stated a legally sufficient wrongful discharge claim because her termination implicated a "serious public concern." Leyden further argued that she had exposed the URAC board members' misconduct in an

attempt to protect the integrity of the organization's quasi-public mission, including the URAC's role in accrediting the health care plans offered to the public on the ACA's exchanges. Emphasizing the "very narrow" scope of the District of Columbia's wrongful discharge tort, Judge Cooper found Leyden's argument too attenuated to survive the URAC's motion to dismiss. He noted that the ACA does not set standards of conduct for accreditation or embody a specific public policy prohibiting the URAC board members from engaging in the sort of conduct that Leyden alleges to have occurred. So too with the federal contracting regulations identified by Leyden, which prohibit retaliation against employees who expose conflicts of interest in connection with government contracts, and with the criminal statutes that prohibit conflicts on the part of government employees. Judge Cooper also noted that the URAC was neither a government contractor nor a federal agency and that he knew of no federal or local anti-retaliation law or regulation that would prohibit the discharge "of a private sector employee for raising concerns about board conduct under the circumstances presented here." He concluded that Leyden had not established the "close fit" required by the District of Columbia Court of Appeals for recognition of a new public policy exception to at-will employment, and thus granted the URAC's motion to dismiss Leyden's wrongful discharge claim.

Counsel advising employees and employers in the District of Columbia should remain mindful of Judge Cooper's decision and the line of precedent on which it is based when assessing the viability of potential causes of action in circumstances like those implicated by Leyden's case.

Lawyers who represent employees should determine whether the client's employer promulgated internal whistleblower policies and employee grievance procedures, as those policies could form the basis for implied contractual rights and give rise to claims for breach of implied contract, breach of the implied covenant of good faith and fair dealing and promissory estoppel. Such claims could be advantageous in situations where an at-will employee complains about managerial fraud or improper activities but fails to engage in the sort of unambiguous disclosure activity protected by a particular whistleblower statute. Given the right circumstances, plaintiffs' counsel could prosecute such contract claims as fallback positions where it is anticipated that opposing counsel will argue that the plaintiff failed to engage in protected activity within the meaning of whistleblower jurisprudence. This could be an especially attractive avenue for plaintiffs who find themselves stymied by the past triumphs of management counsel that have successfully narrowed the scope of protected activity under numerous whistleblower statutes.

For their part, management counsel should re-examine the exposure created by a company's whistleblower and anti-retaliation policies, even where express disclaimers warn employees that the policies do not create express or implied contractual rights. Employers must decide if the benefits of those policies outweigh the specter of lawsuits for breach of implied contractual duties, the proof of which will in certain respects mirror that of whistleblower claims. At the same time, employers in other jurisdictions can maintain a certain degree of confidence that their jurists will not join Judge Cooper and his District of Columbia colleagues. This is because a fair number of courts hold that corporate anti-retaliation policies do not create contractual rights, as they instead constitute mere unilateral expressions of corporate policy for which the employer and employee have not bargained. Under that reading of the law, any benefits conferred on employees by such policies are mere gratuities from the employer to the company's workforce, and at-will workers seeking to challenge retaliatory discharges on contractual bases must look elsewhere for viable causes of action.

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[1] Leyden also alleged that the URAC discriminated against her on the basis of her gender and retaliated against her for opposing gender discrimination at the organization. Judge Cooper denied the URAC's motion to dismiss Leyden's discrimination and retaliation claims, finding that she had plead such causes of action with requisite legal sufficiency.

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