KATZ, MARSHALL & BANKS, LLP

Protected Activity? These Three Whistleblower Retaliation Cases Help Clarify

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Retaliation occurs when an employer takes an adverse action against an individual because she engaged in protected activity. This definition seems simple enough, but employees and employers alike are often left uncertain whether the actions taken by the employee constitute protected activity. Below are some examples to help clarify the meaning of protected activity. These examples demonstrate that, in practice, the definition of protected activity can be varied and complex.

Example 1: How Explicitly Does a Whistleblower Have to Identify Fraud?

An employee, Kathy, worked at a company that conducts clinical evaluations for pharmaceutical companies. Kathy noticed that clinicians at her company were violating the FDA's Good Clinical Practice standards by falsifying data during clinical trials of drugs for major clients. Over the course of two months, Kathy complained to multiple supervisors that she believed the company was not meeting the standards, but the company did not investigate the complaint or take corrective action. Kathy named specific coworkers in her complaints and, soon thereafter, was subjected to retaliation from coworkers and ultimately terminated on the grounds that she was not a "team player."

Did Kathy engage in protected activity? Likely yes.

The facts above were determined to be protected activity by the Department of Labor Administrative Review Board (ARB) in 2011, a major decision that significantly broadened the definition of protected activity under the Sarbanes-Oxley Act (SOX). Before *Sylvester v. Parexel Int'l LLC*, courts required protected activity under SOX to "definitively and specifically" implicate a violation of law. However, the ARB held that even though Kathy Sylvester and her coworker did not definitively and specifically tell their managers that the company was committing fraud against shareholders, their actions followed the language of SOX, which requires only that an employee report conduct she reasonably believes to constitute fraud or a violation of federal securities laws. A number of federal courts have adopted the ARB's standard and rejected the "definitively and specifically relates" requirement. However, if an employee believes that her company is committing fraud, he or she may want to state this explicitly to help ensure that he or she meets even the narrow definition of protected activity.

Example 2: Blowing the Whistle on a Customer

An employee, Heidi, worked for a courier service. Over the course of several deliveries to the same customer, Heidi grew suspicious that the customer was using the service as a conduit for what she suspected was mail fraud. Heidi made a series of reports to her dispatcher about these suspicious packages in accordance with her training. When the dispatcher refused to relay her concerns, she went to local law enforcement. Her employer chastised Heidi for reporting to law enforcement and placed her on suspension, stating that she opened the company to legal liability by reporting its customer.

Is this protected activity? It depends.

When confronted with this fact pattern in *Funke v. FedEx*, the ARB held that Heidi Funke's activity could be protected by SOX, even though she had complained not about the conduct of her employer, FedEx, but about that of a customer of the employer. Select federal courts have made similar holdings, finding that the employee has properly engaged in protected activity when the employee reported his or her concerns to the employer. This was, however, a significant broadening of coverage under SOX and has not been adopted in every region or court. If an employee learns that customers or clients of his or her employer are engaged in illegal conduct, he or she may want to consult with an attorney or review company policy.

Example 3: Employer Accuses Whistleblower of Issuing Threats

An employee learned from her coworker that she was earning a lower salary than many of her male counterparts at her company. The male coworkers performed the same job and/or had similar duties, yet they were vastly out-earning her. The employee told her manager that she had discovered this pay difference and informed the manager that she intended to file a lawsuit under the Equal Pay Act if the manager failed to raise her salary. Three days later, the manager terminated the employee, stating that she had threatened her employer.

Is this protected activity? Likely yes.

Under Title VII of the Civil Rights Act of 1964, opposition to a practice believed to be unlawful discrimination is protected activity. Opposition includes informing an employer that you believe it is engaging in prohibited discrimination as long as your report is based on a reasonable, good-faith belief and the manner of the opposition is reasonable. The U.S. Equal Employment Opportunity Commission (EEOC) and federal courts have reasoned that threatening to file a charge of discrimination or related suit is an example of protected opposition.

In a situation like the one above, the employee warned her employer that it was violating the law and would take action if the employer did not correct its violation. So long as the employee's belief that her employer was paying her less than her male coworkers is reasonable, her report will constitute protected activity. While threatening to file a lawsuit is allowed under Title VII and would also constitute protected activity under several whistleblower laws, physical threats and some types of impulsive conduct are not protected. Ultimately, it's important to keep your cool while reporting illegal conduct or a reasonable belief of illegal conduct, though informing an employer that you may go to the EEOC or the U.S. Occupational Safety and Health Administration (OSHA) is protected.