A Tale Of 2 Circ. Court Whistleblower Cases

Law360, New York (December 05, 2014, 11:57 AM ET) --

In mid-November, within a week of each other, two federal courts of appeals issued significant decisions affecting whistleblowers, but to very differing effects. In the first, the Fifth Circuit confirmed that a public “outing” of a whistleblower in the workplace can constitute an adverse action under the Sarbanes-Oxley Act and that SOX provides for emotional distress and reputational harm damages. In the second, the Sixth Circuit denied protection under the Energy Reorganization Act and the False Claims Act to whistleblowers who were retaliated against when applying for a job based on their prior whistleblowing. While these decisions involve different whistleblower statutes, they both have broader ramifications for whistleblower law, since both decisions are applicable to a wide range of whistleblower claims.

Halliburton v. ARB

In Halliburton Co. v. Administrative Review Board, No. 13-60323, — F. 3d — (5th Cir. Nov. 12, 2014), the Fifth Circuit relied on established legal precedent to expand whistleblower protections in a manner that will likely have ramifications outside of just the SOX context. The plaintiff, Anthony Menendez, blew the whistle about the questionable accounting practices of his employer, Halliburton, both internally up through the board of directors, and externally to the U.S. Securities and Exchange Commission. Upon learning that the SEC was investigating the same practices that Menendez had raised, Halliburton’s general counsel sent an email to his supervisor, stating “the SEC has opened an inquiry into the allegations of Mr. Menendez.” That same day, the plaintiff’s supervisor forwarded the email identifying Menendez as the whistleblower to Menendez and to 15 members of his work group.

Publicly outed as a whistleblower, Menendez’s colleagues began ostracizing him. Unable to cope with such a difficult working environment, Menendez requested that he be placed on administrative leave, which Halliburton granted. Menendez eventually resigned after finding alternative employment.

Upholding the decision by the U.S. Department of Labor’s Administrative Review Board, the Fifth Circuit held that the “outing” of the plaintiff as a whistleblower by his supervisor was a material adverse action (i.e., an actionable adverse action). In reaching this conclusion, the Fifth Circuit applied the retaliation standard articulated by the U.S. Supreme Court in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), and adopted by the Fifth Circuit in its earlier SOX decision Allen v. Administrative Review Board, 514 F.3d468 (5th Cir. 2008).
Reiterating the Burlington Northern standard, that a material adverse action was “an action harmful enough that it well might have dissuaded a reasonable worker from engaging in statutorily protected whistleblowing,” the Fifth Circuit concluded that a public “outing” met that standard. The court reasoned that the “undesirable consequences” of a public “outing” were multiple and interrelated: first, it served as a warning against whistleblowing and implied approval of the ostracism of the whistleblower; second, as happened to Menendez, it had the “inevitable” result of ostracism; and third, it could result in a deprivation of opportunities for future advancement in an environment where collaboration is necessary for success.

Halliburton also continues the wave of decisions confirming that SOX and FCA whistleblowers have a right to compensatory damages, which is vital for whistleblowers who have suffered adverse actions that are nonmonetary. Halliburton challenged the ARB’s damages award, asserting that compensatory damages (e.g., emotional distress and reputational harm damages) were not available under SOX. The Fifth Circuit declined to follow the unpublished district court decision that Halliburton urged. Instead, it followed the Tenth Circuit’s decision in Lockheed Martin Corp. v. Administrative Review Board, 717 F.3d 1121 (10th Cir. 2013), by holding that noneconomic damages are available under SOX. In so doing, it provided a comprehensive, well-reasoned justification for its holding, which focused on the statutory language that affords “all relief necessary to make the employee whole,” as well as Seventh and Eighth Circuit decisions holding that compensatory damages are available under the FCA, a statute with analogous remedies.

While the Fifth Circuit’s decision in Halliburton was specifically about SOX, it is likely to be applied to a larger swath of whistleblower causes of action. Many whistleblower claims, whether based on statute or common law, apply the retaliation standard articulated in Burlington Northern. Thus, the Fifth Circuit’s holding that “outing” a whistleblower is a materially adverse action will be powerful precedent for plaintiffs in any retaliation case that applies the Burlington Northern standard. While the Supreme Court in Burlington Northern clearly articulated that retaliation did not have to take the form of monetary loss, [1] employers continue to frequently argue that only actions that cause direct monetary loss, such as terminations, demotions and unpaid suspensions, are materially adverse actions. Halliburton serves as an important reminder that, under Burlington Northern, courts are to examine the full context of an act to determine if it might dissuade a reasonable worker from engaging in protected activity.

Additionally, the Fifth Circuit’s holding that SOX provides for compensatory damages relied in part on two other federal court of appeals cases interpreting analogous language from the FCA. Halliburton, therefore, continues the clear trend holding that compensatory damages are available in both SOX and FCA cases. The availability of these damages is vital for whistleblowers who bring cases based on being “threatened” or “harassed,” adverse actions that are both explicitly prohibited under both SOX and the FCA. Without nonmonetary damages, these protections would be meaningless, since there would be no financial recourse for plaintiffs in those cases.

**Vander Boegh v. EnergySolutions**

In sharp contrast to Halliburton, the Sixth Circuit’s decision in Vander Boegh v. EnergySolutions Inc., 536 Fed.Appx. 522 (6th Cir. 2014), has limited legal protections to whistleblowers who suffer retaliation when applying for jobs.

Vander Boegh involved retaliation claims brought under the ERA, FCA and four other environmental whistleblower statutes. Starting in 2006, the defendant, EnergySolutions, took over as a subcontractor in charge of waste management services at a government-owned plant where the plaintiff, Gary Vander Boegh, had served as landfill manager since 1992. As landfill manager, Vander Boegh had repeatedly engaged in protected activity by reporting several environmental violations. When EnergySolutions assumed operation of the
waste management services, Vander Boegh applied to retain his job as Landfill Manager. EnergySolutions chose another applicant for the job.

Upholding the lower court’s decision, the Sixth Circuit held that a job applicant is not protected by the ERA or FCA because the term “employee” does not extend to applicants for employment. According to the Sixth Circuit, it was the first federal court of appeals to consider the question, although at least one other federal court of appeals had assumed, without deciding, that applicants were employees under the ERA. The DOL, the agency tasked by Congress with adjudicating claims under the ERA, however, had long taken the position that job applicants were covered by the ERA.

In reaching its decision, the Sixth Circuit not only disregarded the DOL's longstanding position on this issue, it also ignored the remedial purposes and the policy goals of the two statutes, instead focusing exclusively on a statutory reading of the term “employee.” The Sixth Circuit explained that, since Congress had not defined “employee,” it intended to describe the common law master-servant relationship, which did not include job applicants.

Nowhere in the opinion did the Sixth Circuit examine the effect that its cabined interpretation of “employee” would have on the broader purposes of the statutes at issue. For example, if job applicants are not protected from retaliation, they will be less willing to blow the whistle at their current jobs, knowing that, like Vander Boegh, they might face retaliation when seeking a new job. This is a particularly difficult problem in tight-knit industries, such as nuclear energy, government contracting and finance — the very industries Congress sought to bring to heel by protecting whistleblowers.

In the FCA context specifically, the Sixth Circuit decision is likely to have a dire effect. The identity of FCA relators are almost always publicly disclosed when the qui tam lawsuit is unsealed. It will be a serious disincentive for individuals consider disclosing fraud against the government, if they have no protection against retaliation from future potential employers once it becomes public that they are whistleblowers. At least one result of not protecting job applicants is that less monies would be recovered for the public if potential relators are deterred from filing suit as a result of this ruling.

Additionally, it reduces the likelihood that an employee who has been retaliated against will seek to redress unlawful retaliation since doing so would require public litigation. In this day of instant Internet notoriety, these whistleblowers are too vulnerable to future retaliation to report fraud on the government and other illegal practices without legal protection from being blackballed by future employers.

To justify its refusal to consider the policy implications of its decision, the Sixth Circuit explained that the Supreme Court had abandoned the legal principal that a statute’s remedial purpose should lead to a broad reading of statutory language. However, as shown by the Supreme Court’s recent decision in Lawson v. FMR LLC, 134 S. Ct. 1158 (2014), a recent whistleblower decision, looking at the purpose of the statute is a vital part of a textual analysis. The Sixth Circuit, therefore, should have at least considered the broader policy ramifications of its decision.

The Sixth Circuit’s refusal to consider the bigger picture when considering whether job applicants are included under the term “employee” will likely apply not only to the ERA and FCA, but also to SOX and other many other whistleblower statutes that lack a definition for “employee.” Hopefully, the next federal court of appeals to consider this issue will carefully examine the effect that excluding coverage of job applicants will have on the broader remedial purposes of these whistleblower statutes. If other federal courts of appeal adopt the Sixth Circuit’s view, whistleblower advocates will look to Congress to revise the many whistleblower statutes to include language that expressly states that job applicants are covered. Such a legislative change is unlikely, however, given the current legislative environment, leaving whistleblowers without crucial legal protections.
By Alexis H. Ronickher and Debra S. Katz, Katz Marshall & Banks LLP

Alexis Ronickher is a senior associate in Katz Marshall & Banks' Washington, D.C., office.


The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] For example, the Supreme Court cited two examples of adverse actions that could be material. The first was a schedule change in an employee’s work schedule; the second was exclusion from weekly training lunches.

[2] Based on lack of subject-matter jurisdiction, the court dismissed the claims under the four federal environmental statutes. The court, therefore, declined to analyze the question of whether these four statutes protected job applicants.

[3] In Lawson, the court held that the SOX whistleblower protection includes the employees of a public company’s private contractors and subcontractors. In reaching this holding, the court examined not just the text, but also considered the purpose of the statute — to safeguard investors by protecting whistleblowers — which required the coverage of the employees of contractors, not just the employees of publicly held companies.

All Content © 2003-2014, Portfolio Media, Inc.