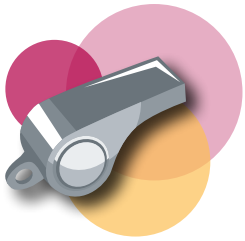
SEYFARTH SHAW



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Where Do Warning Letters Fall on the Scale of Adverse Action?…Somewhere Beyond a Glaring Stare and Before Termination?

By Meagan Newman

Hypothetical, based upon a real fact pattern: Henry engages in protected whistleblower activity--often. He even refers to himself as "Henry the Whistleblower" in his company email signature. The company has been careful to conduct thorough investigations of his numerous and varied complaints with discretion, despite Henry's frequently obtrusive behavior. Though he is somehow managing to complete his assigned job responsibilities, Henry is frequently late or absent from work. He tells co-workers that he is working from home on a blog about the company's illegal activities. While the company has a flexible policy regarding remote work, the policy also states that employees are generally expected to be present and working in the office from 9am to 5pm. Arrangements for remote work may be made, subject to supervisor approval. Henry's supervisor frequently grants employees permission to work from home. Henry sometimes asks permission to do so, but not every time. His supervisor has not yet denied a request to work remotely from Henry. Henry's behavior—both in his self-proclaimed whistleblower role and his frequent lateness and absenteeism—is causing a morale issue in his department. The company is drafting a warning letter to Henry regarding this attendance, but wonders if this will be considered an adverse action and invite a claim from Henry. **Is a warning letter considered adverse action in the whistleblower context?**

What should the Company do?

Though the title of this post implies a scale, the reality is that questions about adverse action are binary. Something either is or is not adverse action. Most of the time, it is the question of whether the complainant has engaged in protected activity that poses the material question. However, sometimes the question of whether or not the company's actions were truly and materially "adverse" under the law is the pertinent question. Termination, demotion, denial of vacation or a reduction in scheduled hours are clear adverse, and therefore potentially actionable, actions in the employment law context. Warning letters and other similar actions that do not immediately result in a change in pay or employment terms are more difficult to parse out in the context of whistleblower cases. Fortunately, the Administrative Review Board has given us some guidance. In *Melton v. Yellow Transportation, Inc.*, ARB. No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the Board split on the issue of whether a warning letter constituted adverse action under the whistleblower protection provision of the STAA. The majority, however, concluded that it did not and held that the *Burlington Northern* "materially adverse" test (which applies to Title VII retaliation claims) also applied to the retaliation statutes adjudicated by the Department of Labor. This means that whistleblower claims under SOX, OSHA, environmental statutes, and even the Affordable Care Act are governed by the *Burlington Northern* "materially adverse" standard. It applies to whistleblower claims as follows:

"Burlington Northern held that for the employer action to be deemed 'materially adverse,' it must be such that 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.' For purposes of retaliation statutes that the Labor Department adjudicates, the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity. According to the Court, a 'reasonable worker' is a 'reasonable person in the plaintiff's position.'" FN *Melton v. Yellow Transportation*, USDOL/OALJ Reporter at 19-20 (footnotes omitted).

In Melton, the plaintiff was a tractor-trailer driver who complained that he was issued a warning letter in which he was admonished not to use fatigue as a subterfuge to avoid work in retaliation for his refusal to drive due to anticipatory fatigue. He had previously refused a work assignment on the basis that while he was not currently tired, he knew that he "was going to be too fatigued to make the run." The ARB evaluated the warning letter under the Burlington Northern standard and found that while the letter constituted corrective action it was not discipline. Moreover, it did not affect his pay, terms or privileges of employment and, therefore, would not dissuade a reasonable employee from refusing to drive because of fatigue. *Id.* at 24.

A few years after the *Melton* case, the ARB considered whether the *Burlington Northern* standard controls in a SOX Section 806 whistleblower complaint. The court *found* that the Burlington Northern standard "serves as a helpful guide" but the analysis should not stop there. The language of Section 806 is more expansive than Title VII, thus adverse action under Section 806 is not limited to economic or employment-related actions. In this post-*Melton* SOX case, the adverse action in question was the employer's alleged breach of the complainant's confidentiality with respect to his internal audit complaint—a "document retention" email was circulated to a control group, including the complainant, that named complainant as person who had initiated an SEC inquiry. There were no direct economic consequences to the complainant.

Now, back to Henry and the warning letter his employer wishes to send him. Henry's protected activity implicates a number of different whistleblower protection statutes that are administered and adjudicated by the DOL. Applying the *Burlington Northern* test alone, it seems that an ALJ would be unlikely to find that a letter warning Henry not to work remotely without permission constitutes a qualifying adverse action. If, however, there are other employees who routinely abuse the remote work policy and do not seek permission and those employees have never received such a letter—or if the warning letter were made public in such a way that it shamed Henry so much that a reasonable worker would be dissuaded from engaging in protected activity, the outcome would likely be different.

It is also important to keep in mind that whistleblower claims may be brought under any number of state whistleblower laws and/or common law theories. The burdens of proof will vary depending upon the nature of the claim and reviewing court. Still, even where an action is deemed to be adverse under the applicable standard, so long as the employer can prove that the action was independent of any alleged protected activity and was not motivated by such activity, the employer will have a good defense.

We will save for another time the question of what to do when Henry makes the request to work remotely because he is going to be interviewed on the local news--his blog posts about the company's alleged activities, of course, went viral.

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