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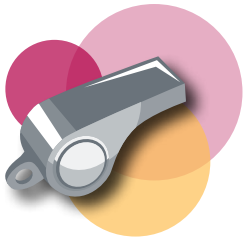

Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

"But I'm a Whistleblower!": Is an Employee Who Takes Confidential Documents Invincible?

By Christopher Robertson

Hypothetical, based upon a real fact pattern: Employee believes she has witnessed improper activities at her employer and begins preparing a *qui tam* whistleblower complaint alleging False Claims Act violations to file under seal. During the course of preparing the complaint, employee removes highly confidential electronic and original documents from her workplace, copying entire folders of sensitive corporate and personal information and downloading substantial electronic files from the company's secure network. After the complaint is unsealed, the employer learns of the significant theft of information in violation of multiple agreements signed by the employee at the time of hiring. Those agreements prohibit the removal of confidential information and require its return when the employee leaves the company. The employee claims that the removal of this information is protected because it was in furtherance of her whistleblowing activity.

What should the Company do?

The company has a number of options in this situation. First, it may seek to obtain an injunction from the court prohibiting the disclosure of the confidential information and requiring the return of the documents that had been previously removed. For example, in *Zahodnick v. IBM Corp.*, 135 F.3d 911, 915 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit upheld an injunction issued by the district court prohibiting the disclosure of confidential information and requiring the plaintiff to return that information.

> As to Lockheed's counterclaim for breach of confidentiality, the record discloses that Zahodnick signed two nondisclosure agreements. In these agreements, Zahodnick agreed not to disclose confidential information to anyone outside of IBM and to return all IBM property to IBM when he left IBM's employment. Zahodnick retained confidential materials belonging to IBM after termination of his employment and forwarded those documents to his counsel without IBM's consent. Under such circumstances, the district court did not err either in enjoining Zahodnick from disclosing Lockheed's confidential materials to third parties or in ordering Zahodnick to return all confidential materials to Lockheed. Accordingly, we affirm the district court's order.

The company can also file a counterclaim for independent damages, as long as such claims are not in the nature of indemnification or contribution. That is, they should not be styled as a set-off of the whistleblower claims, but rather an independent claim for damages based on the violation of the employee agreements not tied to the qui tam claims. This was the case in *United States ex rel. Madden v. General Dynamics Corp.,* 4 F.3d 827 (9th Cir. 1993), where the United States Court of Appeals for the Ninth Circuit reversed the district court's dismissal of General Dynamics' counterclaim for damages,

holding that "[c]ounterclaims for independent damages are distinguishable, however, because they are not dependent on a *qui tam* defendant's liability." Although monetizing "independent" damages may be a challenge, the claim is viable.

Likewise, the United States Court of Appeals for the Ninth Circuit has rejected the concept of "blanket" protection for whistleblowers for violation of confidentiality agreements and misappropriation of confidential documents. In *Cafasso v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047 (9th Cir. 2011), the employee removed vast amounts of confidential information from the company, including attorney-client privileged communications, trade secrets, internal research and development information, sensitive government information and documents under a secrecy order. The employee claimed that "public policy" should allow for the removal of this information by a whistleblower. The Ninth Circuit disagreed, holding that "[t]he need to facilitate valid claims does not justify the wholesale stripping of a company's confidential documents." In so holding, the court affirmed the district court's grant of summary judgment to General Dynamics on its counterclaim against the employee.

Because an injunction is often the first and best option, a company that learns of the removal of information in violation of its confidentiality agreements with employee should not sit on its rights. It should demand that no information be disclosed to third parties and all confidential documents returned. If the demand is rejected, it should take action to protect itself. Waiting after knowledge could negatively impact the ability to obtain an injunction. If quantifiable, the company can also seek independent damages.

What are the risks to the employee?

Until recently, an employee removing confidential information likely correctly believed that the worst that could happen is she would be enjoined from using or disclosing the information or required to return it. A recent decision in New Jersey, however, has potentially increased the stakes for employees. In *State v. Saavedra*, 2013 WL 6763248 (N.J. App. Dec. 24, 2013), a public sector employee took highly confidential original documents from the North Bergen Board of Education. These documents included sensitive personal information, such as individual financial and medical information regarding individual students. The employee asserted that the criminal indictment against her for the removal of this information was required to be dismissed because the information was taken in furtherance of her claims under the New Jersey whistleblower law. The appellate court disagreed and upheld the indictment, refusing to "categorically insulate" employees from criminal theft and official misconduct statutes if they take documents, even as a whistleblower.

Although a company often feels helpless to stop the removal of information by whistleblowers either cooperating with the government or building their own claims, and the trend has been to not punish employees cooperating with the government, a company is not without recourse. Judicial avenues are available, and in the most egregious cases, possibly even criminal prosecution. Having clear confidentiality policies signed by the employee, however, is critical.

Christopher Robertson is a partner and co-chair of Seyfarth's Whistleblower Team. If you would like further information or to submit a question regarding this post please contact the Whistleblower Team at *ask-whistleblower@seyfarth.com*.