



# Workplace Whistleblower

*Perspectives on whistleblower situations that employers frequently face*

## I'm the best candidate for this job, but you should know that I'm also a whistleblower.

*By Erin Wetty*

**Hypothetical, based upon a real fact pattern:** A potential new employee reports during his interview that he was fired from his last job for being a whistleblower. Is it okay not to hire him for this reason?

### What should the Company do?

There is little case law covering whether a prospective employee is entitled to protection for reporting during an interview that he was fired from a previous job for being a whistleblower. However, in the ever expanding world of whistleblowers, it is foreseeable that a prospective employee might make this claim and, under the right circumstances, that a court might find that to be protected activity. Accordingly, we would recommend that if you decide not to hire a potential employee, make sure that the reason for your decision is something other than his or her prior whistleblowing. There are dozens of federal laws that protect whistleblowers, not to mention additional state and local laws that forbid whistleblower retaliation. Because of the multitude of potential laws at play, the wisest course is to avoid any perception of whistleblower retaliation, even if technically your actions may be legal under certain laws.

There is some authority for the position that a prospective employee is not covered by some whistleblower statutes. For example, the Sarbanes-Oxley Act ("SOX") states that no company may discriminate or retaliate "against an *employee* in the terms and conditions of employment because" she provided information that she believes constitutes a violation of section 1341, 1343, 144, or 1348, any rule or regulation of the SEC, or any federal law relating to shareholder fraud. SOX, however, does not define who an "employee" is or whether the Act covers prospective employees. In a similar vein, the Fourth Circuit Court of Appeals has recently held that because the Fair Labor Standards Act ("FLSA") only allows actions "by employees against their employers," the FLSA "does not authorize prospective employees to bring retaliation claims against prospective employers" who decided not to hire them for blowing the whistle on FLSA violations at their prior employer.

In contrast to the Fourth Circuit, the Department of Labor's Administrative Review Board overturned a summary decision order where the complainant alleged that the respondent refused to hire him because he had previously blown the whistle. In *Hasan v. Enercon Services, Inc.* (ARB No. 10-061 July 28, 2011), the DOL considered

whether the complainant's claim was viable under the Energy Reorganization Act of 1978 ("ERA") and concluded that it was. (The decision is available at [here](#).) The Tribunal held that genuine issues of material facts existed regarding whether the applicant's prior protected activity was a contributing factor in the employer's decision not to hire him and, thus, summary decision was inappropriate.

Despite the Fourth Circuit's ruling and even though certain federal laws that prohibit whistleblowing, such as SOX, do not define "employee," it is too risky to make a decision not to hire a qualified individual because of prior whistleblowing, especially in light of the DOL's decision in *Hasan*. A good plaintiffs' attorney will assert creative arguments, driving up litigation costs, and look for potential arguments under other state, local, or federal laws, such as Title VII, which many courts have found does protect an individual from retaliation for engaging in protected activity at a former employer. The better course is to determine whether this individual is the best candidate for the position, putting aside any thought of the prior whistleblowing. For instance, does another candidate have more relevant or more recent work experience; did another candidate provide more well-thought out responses during the interview; or does another candidate have particular skills that are required or useful for the position (*i.e.* a computer science degree or proficiency in another language)? Be sure that whatever your reason is for selecting another candidate, it is documented and is something that a reasonable employer would rely on in making a hiring decision.

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