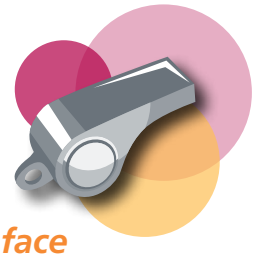
SEYFARTH SHAW LLP
ATTORNEYS

Workplace Whistleblower



Perspectives on whistleblower situations that employers frequently face

Over The Line: When Good Whistleblowers Go Bad

Hypothetical, based upon a real fact pattern: What should an employer do when a whistleblower suddenly becomes rude, distracting and generally disruptive? Imagine that a good employee who is an integral part of a government audit raises legitimate questions about the quality of a Company product. But during the investigation, the employee becomes disruptive in the workplace, acting out in rude and distracting ways. What steps can the employer take against the employee?

What should the Company do?

Plenty. As is often the case with workplace whistleblower issues, the anti-discrimination laws provide useful guidance. Courts have consistently ruled that "violating the employer's rules or disrupting the workplace" will not be tolerated or protected by Title VII. Title VII does not give an employee "unlimited license" to engage in inappropriate conduct. *See Horchstadt v. Worcester Found. For Experimental Biology Inc.*, 545 F.2d 222, 231-233 (1st Cir.1976). Nor does it insulate or immunize an employee from discipline for violating the employer's rules or for disrupting the workplace. *See, e.g., Evans v. Kansas City, Mo. School Dist.*, 65 F.3d 98, 100 (8th Cir.1995); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir.1989)

This is true even if the employee's misconduct arises from the whistleblowing complaint itself. In other words, anti-retaliation laws do not protect over-the-line conduct even if it can be characterized as part of employees' whistleblowing activities. For example, in *Matima v. Celli*, 228 F.3d 68, 81(2d Cir. 2000), the Second Circuit held that an employee failed to make out a retaliation claim where he "repeatedly confronted and antagonized his supervisors in inappropriate contexts in a way that was designed to force the company's hand or make it pay a price in reduced productivity, focus and morale." In *Garret v. Mobil Oil Corp.* 531 F.2d. 892, 895-96 (8th Cir.1976), the Eighth Circuit upheld a finding against an employee who was terminated for repeatedly and disruptively complaining of racial discrimination without following the company's complaint procedures, including at one point barging into an office to confront senior managers: "Certainly an employer can fire a worker who refuses to obey reasonable regulations, leaves the work area without permission, and barges in on conferences and meetings of managerial personnel." *Id.* at 895. These and other cases make clear that under Title VII, even when a complaint of discrimination is involved, an employer may take action against an employee to preserve a workplace that is free of disruption and conducive to work.

Aggressive, rude, and insulting behavior is not protected activity under anti-retaliation and whistleblower laws. Even one such instance can provide a legitimate reason to terminate an employee. For example, in *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir.1999), a deaf employee requested that his employer buy a telecommunications device that would enable him to make business and personal telephone calls. *Id.* at 1134. An owner of the business approached the employee and told him that the company would not buy the device. *Id.* The employee became visibly upset and shouted "you're selfish, you're selfish," at the owner in front of his co-workers, slammed his desk drawer, and made a rude remark about the owner's recent purchase of a new automobile. *Id.* The company fired him for his insubordination. The court held that although the request for the device was a protected communication, the insulting and angry outbursts were not: "the ADA

confers no right to be rude." *Id.* at 1136; *see also Combites v. SimonDelivers, Inc.*, No. 04-CV-4571 (JRT/AJB), 2005 WL 3054597, at *3 (D. Minn. Nov. 14, 2005) ("Even if plaintiff had engaged in protected conduct under the Whistleblower Act, the Whistleblower Act 'confers no right to be rude,' to act unprofessionally, or to yell at one's supervisor in front of a co-worker.") (quoting *Kiel*, 169 F.3d at 1136).

There are several things an employer should keep in mind before taking adverse action against a disruptive whistleblower. First, it must be the employee's conduct that is causing the disruption, not the response of his or her co-workers or supervisors to otherwise legitimate whistleblowing. For example, in *Jennings v. Tinley Park Community Consolidated School District*, 796 F.2d 962 (7th Cir. 1986), an employee who was the principal author of a "salary study" was discharged after presenting the study to the Board of Education as a means of opposing alleged pay discrimination. Her supervisor was upset that he was not provided with a copy of the study before it was provided to the Board, and discharged her a few weeks later because her conduct created a situation that was "antagonistic to the close, confidential working relationship which is necessary in this office." *Id.* at 964. The Seventh Circuit sided with the employee, holding that any disruption in the office was the result of the supervisor's changed attitude and conduct toward the employee -- who had continued to perform her job competently -- and not the employee's conduct. *Id.* at 968.

Second, the employee's conduct must actually be disruptive of the employer's legitimate workplace goals. For example, the Ninth Circuit has held that a nurse did not impede the employer-hospital's legitimate goals when she publicly complained about alleged mistreatment of African-American patients. *Wrighten v. Metro. Hosps., Inc.*, 726 F.2d 1346, 1355-56 (9th Cir. 1984) (holding that plaintiff "did not impede" the hospital's goals by advocating for good patient care, nor did she "abuse her duty as a nurse by advocating the needs of her patients").

Third, in order to support this defense, the employer should be careful to document the employee's disruptive activities, as well as the employer's efforts to warn or advise the employee to direct his otherwise legitimate concerns in a non-disruptive manner. All such documentation should be complete and timely so that it is contemporaneous with any adverse action taken against the employee. The employer should also adopt strict notice, review, and approval procedures that should be followed before any adverse action is taken against an employee that has reported any corporate fraud or wrongdoing. Finally, corporate policies should reflect the requirement of maintaining an orderly and non-disruptive workplace, as well as clear guidelines about how whistleblower complaints should be handled, including strict protections against retaliation.

In sum, a legitimate whistleblower does not have a license to engage in rude or disruptive activities where those activities would not otherwise be tolerated by the employer. However, employers must understand that these situations create great potential for claims of retaliation. Accordingly, when faced with this situation, employers should carefully document the disruptive activity and ensure that the employee has, to the extent practicable, been counseled and given the opportunity to correct their behavior before taking adverse employment actions.

By: *Cliff Fonstein* and *Matthew Gagnon*

Cliff Fonstein is a partner in Seyfarth's New York office and *Matthew Gagnon* is an associate in the firm's Chicago office. If you would like further information or to submit a question regarding this post please contact the Whistleblower Team at *ask-whistleblower@seyfarth.com*.