



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Employee Makes Fabricated Ombudsman Hotline Report. Can He Be Disciplined?

By Jim Curtis and Meagan Newman

Hypothetical, based upon a real fact pattern: An employee who recently received a poor annual review made a call to the ombudsman hotline to report alleged violations of law. Though the hotline is supposed to be anonymous, he included his name and telephone number and asked to be involved in the investigation. Through the course of the investigation it becomes clear that the employee's complaint is unfounded and was likely completely fabricated by the employee.

What should the Company do?

It is very common these days for employers to have an ombudsman hotline for employees to use to raise workplace concerns that the employee is not comfortable raising directly with his supervisor or other management personnel. Most employers also allow for "anonymous" reporting through the hotline. This allows employees to raise legitimate issues without fear of retaliation. The twist in the above scenario is that the employee has included his name and contact information along with his hotline report and affirmatively asked to be involved in the investigation. By doing this, the employee appears to have waived any expectation that his hotline report would be anonymous.

Confidentiality remains important in whistleblower investigations—even where the complaint is not anonymous.

Before divulging the employee's name or otherwise directly involving the employee in the investigation, the investigator should follow up with the employee and remind him that he has the right to submit anonymous reports and confirm that the employee does not wish to remain anonymous. Assuming that the employee confirms that he does not wish to remain anonymous, then the investigation can proceed without concern for the disclosure of the complainant's identity. Still, concerns regarding the confidentiality and objectivity of the investigation remain. Generally speaking, the complainant's identity should only be disclosed or discussed to the extent it is necessary in the course of the internal investigation. Where interviews take place with the persons alleged to have been involved in wrongdoing, the identity of the complainant does not necessarily need to be disclosed. Further, though the complainant has expressed a desire to remain involved in the investigation, the company should consider carefully the extent to which it needs to or should involve the complainant in interviews or other aspects of the investigation. The employee's involvement may be unnecessary. Further, as the number of people who know the complainant's identity grows, so does the circle of potential retaliators.

Intentionally misleading or lying about alleged wrongdoing is, in most instances, not protected activity.

When it becomes clear that the employee's complaint is unfounded and possibly fabricated, it is appropriate to close out the initial investigation, document that there is no merit to the complaint and re focus the investigation on the complaining employee in an attempt to determine why the employee made the unfounded report. There may be underlying, legitimate concerns regarding the workplace environment that are driving the complainant's actions. The company should take appropriate steps to determine whether such underlying issues are at play. Ultimately, while the law and company procedure allow for anonymous ombudsman reports, employees do not have the right to fabricate alleged violations of the law by co-employees. In fact, the employee may be subject to criminal liability where the company has taken steps to notify the appropriate authorities and the employee has been misleading or lying to those authorities. Moreover, the employee may face civil liability for his actions.

Most of the laws concerning whistleblower discrimination require that the whistleblower raise alleged violations of specific types of wrongdoing or violations of law. Moreover, there is an underlying requirement that the employee makes the complaint in good faith. See *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2165854 at *15-16 (ARB May 25, 2011)(requiring an actual belief in the unlawfulness of the employer's action and that the belief be objectively reasonable). Fabricating a complaint is the antithesis of good faith. Even where the complaint is not intentionally fabricated, complainants still must be able to articulate with specificity the covered wrongdoing in order to gain the protection of the applicable whistleblower statute. See *Sharkey v. J.P. Morgan Chase & Co.*, No. 10-cv-3824 (S.D.N.Y. Dec. 12, 2013)(finding no protected activity under SOX where complainant merely felt "uncomfortable" with her employer's business practices and could not describe any conduct fitting within the six enumerated categories of wrongdoing under Section 806 of SOX).

Whistleblowers are not immune to discipline, yet any discipline must be carefully considered and documented.

Depending upon the reason the employee made the unfounded report, the employer may take disciplinary action as appropriate. However, the employer should tread very lightly in this area and only take action where it is clearly demonstrated that the report was intentionally fabricated. For example, if the erroneous report was arguably a matter of confusion, it would not be appropriate to take disciplinary action. However, if it is discovered that the employee had more sinister motives in making the report (e.g. to get back at his boss for the poor annual review), then discipline may be entirely appropriate. However, before issuing any discipline the employer must remember that because the investigation started with an ombudsman complaint (whether anonymous or not), there is always the real potential for a whistleblower retaliation claim if the employee is disciplined. The employer should also understand that disciplining an employee who made an ombudsman report may have the effect of chilling other employees from making legitimate ombudsman reports, thereby undermining the entire system. Accordingly, the employer must carefully document the non discriminatory basis for the discipline. Further, the employer should take steps to prevent the fact that the employee has been disciplined and the reason for the discipline, from becoming public knowledge.

Jim Curtis is a partner and co-chair of Seyfarth's Whistleblower Team. *Meagan Newman* is a partner in Seyfarth'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.

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