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Connecticut Supreme Court Expands Protection for Would-Be Whistleblowers

By Ada Dolph, Robert T. Szyba, and Meredith-Anne Berger

Connecticut whistleblowers were handed a siren to sound the alarm on employers this week. In interpreting the state constitution in *Trusz v. UBS Realty Investors, LLC*, SC 19323 (Conn. Sup. Ct., official release Oct. 13, 2015), the Connecticut Supreme Court found whistleblower rights to be broader than those afforded by the United States Constitution's First Amendment. With respect to free speech, the Court found that the Connecticut constitution "protects employee speech in the public workplace on the widest possible range of topics, as long as the speech does not undermine the employer's legitimate interest in maintaining discipline, harmony, and efficiency in the workplace."

The plaintiff, Richard Trusz, was the head of UBS Realty's valuation unit and a managing director of UBS Realty. He oversaw the process that led to valuation of properties in UBS Realty's privately-owned real estate investment portfolio. Trusz suspected errors as a result of insufficient staffing and resources dedicated toward the valuation process and reported it to UBS management in 2008, adding that the errors should be disclosed and a portion of collected fees should be refunded to investors. Trusz also alleged that UBS Realty was breaching its fiduciary duty to investors. The allegations prompted an internal investigation at UBS, which even retained a third party auditor to investigate some of the claims. The investigation revealed the existence of errors in valuation, but the auditor found the errors were not material and did not warrant notifying investors. Trusz disagreed with UBS's conclusions, and alleged violations of UBS's fiduciary, legal, and ethical obligations to its investors.

Trusz then filed charges with state and federal administrative agencies, alleging disability discrimination and retaliation for reporting the valuation errors. The retaliation claim was founded upon various alleged adverse employment actions leading up to the plaintiff's termination in August of 2008, which later formed the basis of his complaint in federal court. Trusz filed suit under § 31-51q of the Connecticut Code, as well as the state constitution. Section 31-51q protects employees from discipline by employers for exercising their rights to freedom of speech pursuant to the state and federal constitutions so long as the speech does not interfere "substantially or materially" with the job. The law also provides for punitive damages, costs, and attorneys' fees.

Defendants moved for summary judgment, asking the court to decide that no material dispute of fact exists with respect to the plaintiff's claim under § 31-51q. On plaintiff's request, the District Court certified a question of state law to the Connecticut Supreme Court to determine to what extent the statute applies to private employers.

The Connecticut Supreme Court conducted a thorough analysis of federal and state decisions on the interplay between an employee's right to free speech and an employer's prerogative to discipline employees, both in public and private fora. The Court, seeking to define the limits of employee speech for both public and private employers, followed the U.S. Supreme Court's precedent in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) and *Connick v. Myers*, 461 U.S. 138, 142 (1983), rather than the narrow limits of the more recent *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which limited free speech protections specifically for public employees. The court found the free speech provisions of the Connecticut constitution gave greater protection to employees' speech than the First Amendment of the federal constitution and was able to distinguish *Garcetti* on that basis.

The Court disagreed with all of the defendants' arguments, rejecting their contention that private employers "have the right to control their employees' job related speech." The court took the opposite tack, holding internal whistleblowing should be protected from employer discipline "to the greatest extent possible, consistent with the legitimate interests of the employer." This standard would also remove the incentive to raise concerns about employers publicly in lieu of using internal compliance structures already in place, which, the court pointed out, would actually seek to preserve employers' privacy rather than threaten it.

Following *Trusz*, the District of Connecticut will take the first shot at applying the Connecticut Supreme Court's analysis in deciding UBS's pending motion for summary judgment.

The broader implication for private employers in Connecticut is that going forward, employees who raise concerns internally about "matters of public concern" involving the employer—that is, anything that may implicate an employer's "official dishonesty, other serious wrongdoing, or threats to health and safety,"—will likely be broadly construed to include any public pronouncement or action whatsoever. And any employee who falls into this category will be protected from retaliation. The breadth of this definition and its broad application thus creates new traps for employers, and arms Connecticut's employees with newfound ammunition.

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