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Sanctions Award Strengthens Fight to Protect Confidential Company Records

Proskauer Whistleblower Defense Blog on **October 25, 2017**

On October 18, 2017, a federal district judge in Alaska ordered a former employee to pay nearly $170,000 of his ex-employer's legal fees as sanction for removing nine attorney-client privileged documents prior to his termination. The ruling was based on a decision this summer that the former employee willfully and deliberately disobeyed established norms of litigation conduct when he took, and then used in litigation, the nine privileged documents. In his decision over the summer, however, Judge Holland stopped short of dismissing the former employee's claims, finding monetary sanctions adequate to address the conduct. The decision strengthens a growing body of case law holding that potential whistleblowers may not, in the words of another federal district court judge, "pilfer a wheelbarrow full of an employer's proprietary documents . . . merely because it might help them blow the whistle."[1]

Ben Ferris served as Chief Compliance Officer at Alutiiq, LLC between 2008 and 2014. While employed by the company, Ferris came to believe that subsidiaries of Alutiiq ("Defendants") were misrepresenting their small business status when applying for government contracts through a business development program administered by the Small Business Administration. While still working for the company, Ferris downloaded to an external hard drive documents he believed were relevant to his claims. His cache included nine documents protected by the attorney-client privilege. In 2013, Ferris commenced a sealed qui tam action asserting claims under the False Claims Act. In 2014, after the United States declined to intervene in his case, Ferris' complaint was unsealed. After discovery began in 2015, Ferris disclosed that he had in his possession certain records belonging to his former employer, including the nine privileged documents.

Following demands to destroy the privileged documents and discovery to determine the extent of their misuse, Defendants moved to dismiss Ferris' action as sanction for his abusive litigation tactics. Ferris, in response, argued that public policy protected qui tam whistleblowers who retain confidential documents for purpose of reporting government fraud.

In June, the court ruled that Ferris had willfully violated established norms of litigation. The court held that even if a public policy protection might apply to a whistleblower who removes documents in certain circumstances, it would not apply to ***privileged*** documents removed from employers' possession. However, the court stopped short of dismissing Ferris' claims. Recognizing that Defendants were not prejudiced by the actions of Ferris and his attorneys, that the documents had been used only minimally, and the court's strong preference for cases being resolved on the merits, the court ruled that monetary sanctions could adequately address the misconduct.

Following the court's decision in June, Defendants asked the court to order Ferris to pay almost $400,000 in fees and costs associated with Ferris' possession and retention of the nine privileged documents. The court found this amount, and the time it reflected, excessive and reduced it by more than 50%, ordering Ferris to pay $169,994 in attorney's fees and costs as a sanction for his abusive litigation tactics.

Despite the haircut, Judge Holland's decision should be viewed as a success for employers as it strengthens a growing body of case law holding that employees considering a whistleblower action cannot simply plunder their employers' files looking for documents that might support their claims.

As Ferris argued, and Judge Holland recognized, some courts have seemed willing, at least in certain circumstances, to view a whistleblower's removal of documents as a protected activity. The Ninth Circuit, for example, has recognized that a public policy exception to the typical rule that employers' documents may not be improperly removed may have "some merit" in the case of whistleblowers. *Cafasso v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1062 (9th Cir. 2011). Similarly the District of Columbia district court has held that an action by an employer against a former employee (and current qui tam whistleblower) who has failed to return a company document may frustrate the congressional purpose behind the False Claims Act. *See Head v. Kane Co.*, 668 F. Supp. 2d 146 (D.D.C. 2009. Decisions such as *Head* threaten a certain paralysis among employers who hesitate to act against a thieving employee for fear the employee will claim her termination for stealing records was retaliatory.

More recently, however, courts have seemed more willing to find that being a whistleblower does not give an employee carte blanche to go rifling through the employer's databases looking for potentially relevant evidence. The district of New Jersey, for example, has allowed a company sued by two former employees to proceed with counterclaims alleging that the plaintiffs breached their employee confidentiality agreements by disclosing confidential company records in support of their False Act claims. *U.S. v. Boston Scientific*, No. 2:11-cv-1210 (D.N.J. Sept. 4, 2014). Even the Ninth Circuit, despite recognizing the possibility of a public policy protection, held that it would not apply to the whistleblower in *Cafasso* who, in taking eleven gigabytes of data, committed a "vast and indiscriminate appropriation" of her employer's files 637 F.3d at 1061.

Decisions such as *Ferris*, *Boston Scientific*, and even *Cafallo* give employers options when they discover an employee is removing company documents, even if that employee is a potential (or current) whistleblower. As with any other form of employee misconduct, the employer should undertake an investigation to determine whether the employee has violated company policy and carefully consider the particular facts of the situation and the applicable legal precedent before deciding whether termination is justified and defensible.

[1] *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 697, 702-03 (E.D. Va. 2007).

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