Proskauer

Top 10 Whistleblowing and Retaliation Events of 2022

Law360 on **January 2, 2023**

2022 saw highly impactful whistleblower and retaliation events primarily resulting from an active U.S. Securities and Exchange Commission, an aggressive approach taken by the Occupational Safety and Health Administration, and consequential decisions from federal and state courts around the country.

Here are the Top 10 whistleblowing and retaliation events of 2022.

10. A former Uber executive gave the media a trove of sensitive company files.

On July 11, 2022, The Guardian reported that Mark MacGann, a career lobbyist and former Uber executive, had given the media more than 124,000 company files in an attempt to expose alleged wrongdoing at Uber.

MacGann reportedly showed Guardian reporters two suitcases containing laptops, hard drives, iPhones and bundles of paper — including company presentations, briefing notes, security reports, emails and private messages— and encouraged the Guardian to conduct a global investigation into Uber's alleged conduct.

The leaked files reportedly related to Uber's efforts to expand its business globally to 40 countries between 2013 and 2017.

The Guardian reported that MacGann believed Uber violated laws in dozens of countries and misled the public, foreign governments and officials about the benefits provided to drivers by the company's gig-economy model, as part of an aggressive campaign to expand the company's presence into new markets.

According to MacGann, Uber violated local laws and regulations governing the traditional taxi market, and worked to stifle legislation aimed at protecting drivers and providing them with certain benefits.

Coming from a senior executive with broad political connections, MacGann's report garnered substantial attention. His conduct underscores the reality that anyone, no matter how high up they are in a company's hierarchy, can be a whistleblower — even years after they leave the company.

It is also important to consider a company's potential recourse when a former employee hands its confidential documents to the media, as opposed to a government agency like the SEC.

This event also serves as a reminder of the need for companies to take effective measures to safeguard confidential information and to retrieve it and ensure copies are destroyed when an employee departs.

9. The SEC adopted whistleblower-friendly amendments to the whistleblower program rules.

On Feb. 10, 2022, the SEC announced two proposed amendments to the rules governing its whistleblower program after SEC Chair Gary Gensler committed to revise rules that could have discouraged whistleblower tips.

Gensler explained that "[t]hese amendments, if adopted, would help ensure that whistleblowers are both incentivized and appropriately rewarded for their efforts in reporting potential violations of the law to the Commission."

Gensler also said that the first proposed rule change was "designed to ensure that a whistleblower is not disadvantaged by another whistleblower program that would not give them as high an award as the SEC would offer," and that under the second proposed change, "the SEC could consider the dollar amounts of potential awards only to increase the whistleblower's award."

On Aug. 26, 2022, the SEC announced that it had adopted the proposed amendments. The first amendment allows whistleblowers who would have been eligible for an award under another whistleblower program that would not give them as high an award as under the SEC's program to receive an award from the SEC.

Under the previous version of the final rule adopted on Sept. 23, 2020, whistleblowers were not eligible for awards under the SEC's whistleblower program if the SEC determined that some other award program more appropriately applied.

The second amendment affirmed the SEC's authority to consider the dollar amount of a potential award for the limited purpose of increasing an award, but not to lower an award. Under the previous version of the rule, the SEC retained discretion to make downward adjustments to award amounts in excess of $5 million.

Considered in context, it is important to note that, according to the SEC's annual report, issued on Nov. 15, 2022, the SEC received 12,322 whistleblower tips in fiscal year 2022, which was the record for the most tips received in any year since the SEC established its program in 2011.

The recent amendments to the program rules will likely accelerate this trend and result in larger payouts.

8. A Florida court narrowly construed protected activity under the False Claims Act.

On March 29, 2022, in Swartz v. Interventional Rehabilitation of South Florida Inc. the U.S. District Court for the Southern District of Florida held that to engage in protected conduct under the False Claims Act, a plaintiff must specifically suspect that their employer has made a false claim for a payment to the federal government; vague suspicions are not enough.[1]

The plaintiff, a physician who worked for a pain management practice, sued his former employer for retaliation under both the federal FCA and the Florida Whistleblower Act. The plaintiff alleged that he was discharged after he sent four emails raising concerns about the employer's policy on recording medical information.

The employer maintained that it made the termination decision before the plaintiff sent the emails, once it had received several complaints from other employees that he had engaged in unprofessional behavior.

The court granted summary judgment in the employer's favor. In analyzing the plaintiff's claims, the court noted that a plaintiff must suspect that their employer made false claims to the federal government, and a claim would be insufficient if the employee only suspected fraud or misuse of federal funds.

The court found that none of the plaintiff's emails referenced any submission of false claims for payment to the federal government, and it thus concluded that he did not engage in protected activity under the FCA.

This decision underscores the arguably narrow scope of protected activity under the FCA, and thus should inure to the benefit of defendants defending against such claims.

7. The First Circuit ruled that the Foreign Corrupt Practices Act is not a rule or regulation under the Sarbanes-Oxley Act's whistleblower protection provision.

On July 13, 2022, in Baker v. Smith & Wesson Brands Inc., the U.S. Court of Appeals for the First Circuit reversed a denial of summary judgment, holding that protected activity under SOX is limited to reporting violations of any rule or regulation of the SEC, but does not extend to reports about violations of the Foreign Corrupt Practices Act.[2]

The plaintiff, who was hired by the company at a manufacturing facility, was placed on administrative leave and discharged in 2014. Four years later, the plaintiff filed a complaint against the company, alleging it retaliated against him in violation of SOX for reporting allegedly illegal conduct by company employees.

The company moved for summary judgment, arguing that the plaintiff failed to show he engaged in protected activity. The plaintiff responded that he reasonably believed the reported conduct violated Title 15 of the U.S. Code, Section 78m(b)(2), (5) of the FCPA, and that the FCPA is a rule or regulation of the SEC, and thus falls under the protected activity provision of SOX.

The district court agreed with the plaintiff and denied the company's motion for summary judgment.

On appeal, the First Circuit rejected the district court's interpretation of the "any rule or regulation of the SEC" provision in SOX, finding that the statute's plain text makes clear that the FCPA is not a rule or regulation of the SEC.

Section 806 of SOX limits protections of whistleblower claims to violations of (1) Sections 1341, 1343, 1344, or 1348; (2) any rule or regulation of the SEC; or (3) any provision of federal law relating to fraud against shareholders.

Relying on the U.S. Court of Appeals for the Ninth Circuit's 2019 reasoning in Wadler v. Bio- Rad Laboratories Inc., that there is a difference between the meaning of "rule or regulation" and "law," the First Circuit agreed that a "law" encompasses statutes like the FCPA, whereas a "rule or regulation" does not.

The First Circuit further determined that the inclusion of "of the SEC" in Section 806 makes clear that the phrase "any rule or regulation" does not include federal statutes because the

SEC does not possess the authority to enact statutes.

Finally, the court ruled that "of" does not mean "relating to," as the plaintiff argued, because "relating to" appears in the next provision of Section 806 — "any provision of federal law relating to fraud against shareholders" — and thus demonstrates Congress' intent to use "of" in the context of "any rule or regulation of the SEC."

The First Circuit's narrow reading of what constitutes an SEC rule or regulation will make it more challenging for plaintiffs to show they engaged in protected activity under SOX.

6. The Ninth Circuit broadly interpreted the California Whistleblower Protection Act.

On Oct. 20, 2022, in Killgore v. Specpro Professional Services LLC, the U.S. Court of Appeals for the Ninth Circuit reversed in part a grant of summary judgment in favor of an employer, finding that the U.S. District Court for the Northern District of

California misapplied California law in holding that the plaintiff's disclosures to his supervisor and third-party contractor did not constitute protected activity under the California Whistleblower Protection Act.[3]

The plaintiff worked as a consultant for a firm retained by the U.S. Army Reserve to conduct an independent environmental assessment, pursuant to the National Environmental Policy Act, in connection with a proposal to modify the use of certain helicopter landing sites.

The plaintiff alleged that he was discharged after he raised concerns to his supervisor and to the project leader at the Reserve that he was being required to prepare the environmental assessment in a manner that violated a requirement of NEPA.

The plaintiff filed suit in Santa Clara County Superior Court alleging various claims, including claims of unlawful retaliation and wrongful termination under the California Whistleblower Protection Act, California Labor Code Section 1120.5(b).

After the case was removed to federal court, the U.S. District Court for the Northern District of California granted summary judgment in favor of the plaintiff's former employer.

The district court held that any complaints the plaintiff made to his supervisor did not constitute protected activity because California law only protected disclosures to a person who both had (1) authority over the employee; and (2) authority to correct the alleged violation or noncompliance, and his supervisor lacked the power to correct the Reserve's alleged noncompliance.

On appeal, the Ninth Circuit reversed in part, holding that the plaintiff raised a genuine dispute of material fact over whether he was discharged for disclosing what he believed to be noncompliance with federal law, even if his supervisor lacked authority to correct the issue.

In its decision, the Ninth Circuit predict[ed] that the California Supreme Court would hold that section 1102.5(b) prohibits employers from retaliating against employees who disclose potential wrongdoing to any one of several enumerated avenues: government or law enforcement agencies, a person with authority over the employee, other employees with authority to investigate, discover, or correct the violation or noncompliance, or any public body conducting an investigation, hearing, or inquiry.

This broad view of the scope of the California Whistleblower Protection provides a challenge for employers in whistleblower retaliation cases both at the summary judgment and trial phases of a case.

5. The Tenth Circuit affirmed a $1 million jury award to a whistleblower.

On July 10, 2022, in Casias v. Raytheon Co., the U.S. Court of Appeals for the Tenth Circuit affirmed a $1 million jury award to a former employee who claimed he was demoted in retaliation for reporting his supervisor instructed him to falsify test results.[4]

The plaintiff worked as an engineer for Raytheon and oversaw independent testing of a GPS project designed for the U.S. Air Force. The plaintiff alleged that his supervisor instructed him to change certain data to make the project look more successful.

After notifying leadership, the plaintiff alleged that he was reassigned from his testing role, where he managed dozens of employees, to a minor role where he only managed two employees.

The plaintiff left his employer and took a job with a lower salary and benefits, and eventually brought claims under the Defense Contractor Whistleblower Protection Act.

The jury awarded the plaintiff $1 million in noneconomic damages.

On appeal, the Tenth Circuit affirmed the damages award, finding that the plaintiff presented enough evidence for a reasonable jury to find:

- That he suffered an adverse employment action from his job reassignment that resulted in a change of responsibilities and a decrease in reputation and job prospects;
- That his supervisor retaliated against him; and
- That the damages awarded by the jury were not excessive given that the act of falsifying information used by the U.S. military could have far-reaching repercussions.

This substantial jury verdict, which was upheld on appeal, highlights the risk employers can face in litigating a whistleblower retaliation lawsuit before a jury.

4. OSHA ordered reinstatement and payment of over $800,000 for purported SOX violations.

On Oct. 7, 2022, OSHA — the first line of investigation and enforcement of SOX whistleblower claims at the U.S. Department of Labor — announced that it had ordered ExxonMobil Corp. to rehire two scientists who were allegedly fired in retaliation for leaking their concerns to the media about improper conduct. OSHA also awarded the former employees over $800,000 in back-pay, interest and compensatory damages.

The complainants raised concerns about a financial disclosure allegedly containing inflated production estimates and valuations to the company's human resources department. The Wall Street Journal contacted the company about an article it intended to write about the complainants' concerns regarding the allegedly misleading statements.

The complainants filed a complaint with OSHA claiming they were discharged in violation of SOX's whistleblower retaliation protection provision. OSHA determined that the complainants had access to the data shared with the WSJ and that the company subsequently discharged them.

OSHA's harsh order vividly illustrates the agency's aggressive approach in enforcing SOX's whistleblower retaliation provision.

Notably, despite this award, the company has an argument that complaints to the media are not protected under SOX.

3. The SEC renewed its focus on enforcing the do-not-impede rule.

In 2022, the SEC reinvigorated its focus on enforcing Rule 21F-17, known as the do-not-impede rule.

Rule 21F-17 prohibits:

> [A]ny action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement ... with respect to such communications.[5]

Between April 2015 and Jan. 2017, the SEC brought numerous actions to enforce this rule based on claims that employers limited current or former employees' ability to communicate with the SEC or obtain bounty awards in various ways.

After a significant decline in SEC Rule 21F-17 enforcement actions under the Trump administration, the Biden-era SEC has signaled that it intends to renew its scrutiny of compliance with, and enforcement of, Rule 21F-17.

In the Matter of Hansen; SEC v. Rogas

On April 12, 2022, the SEC announced that it had settled charges against an executive for allegedly violating Rule 21F-17.

The SEC found that David Hansen, co-founder and chief information officer of NS8 Inc., with Adam Rogas, co-founder and CEO, allegedly took steps to remove an employee's information technology systems after the employee raised concerns internally that the company was overstating its number of paying customers, including that the information used to formulate external communications to potential and existing investors allegedly was false.

The CIO also allegedly used the company's administrative account to access the employee's company computer and obtain his passwords to his email and social media accounts. The company then discharged the employee.

The SEC concluded that in restricting the employee's access to the company's IT systems and in monitoring his online activities, the CIO substantially interfered with the employee's ability to communicate with the SEC about his concerns in violation of Rule 21F-17.

Hansen was ordered to cease and desist from committing or causing any future violations of Rule 21F-17, and to pay a monetary penalty of $97,523.

Significantly, moreover, on Nov. 22, 2022, the SEC filed an amended complaint against Rogas — who had previously been charged with defrauding investors by falsely claiming millions of dollars in revenue for the company — to add claims for impeding communications with the SEC and whistleblower retaliation.

According to the amended complaint, the CEO impeded the employee from communicating directly with the SEC about possible securities laws violations by "cutting off the Employee's access to [the company's] IT systems and precluding the Employee from entering [the company's] office building," and retaliated against the employee by discharging him.

Notably, the SEC's position in these actions that the steps the respondents took to protect confidential information and trade secrets could potentially give rise to liability under Rule 21F-17 could be read as an expansion of the scope of the rule, and could compromise employers' much-needed efforts to protect sensitive, private information from potentially damaging disclosures.

The Case of Brink's

On June 22, 2022, the SEC announced that it had settled charges against The Brink's Co. for requiring employees to sign confidentiality agreements as part of their onboarding process that prohibited them from divulging confidential information about the company, including financial or business information, to any third party without the prior written authorization of a company executive officer.

The SEC found that by requiring current and former employees to notify the company prior to disclosing any financial or business information to third parties — and purportedly threatening them with liquidated damages and legal fees if they failed to do so — the company impeded potential whistleblowers by forcing them to either identify themselves to the company as whistleblowers or potentially pay $75,000 and the company's legal fees.

The company was assessed a monetary penalty of $400,000, and undertook to include language in its confidentiality agreements going forward making clear that employees were free "to file a charge or complaint with the Securities and Exchange Commission, or any other federal, state, or local governmental regulatory or law enforcement agency."

The SEC's renewed focus on enforcement of 21F-17 in 2022, and apparent expansion of its view of the scope of the rule, is a wake-up call for employers, in-house employment counsel, and compliance and HR professionals to reexamine their confidentiality policies, agreements and practices with an eye toward minimizing the risk that they could be construed to impede individuals from blowing the whistle for or communicating with the SEC.

2. The Second Circuit ruled that SOX whistleblower claims require retaliatory intent, overturning a nearly $1 million jury award.

On Aug. 5, 2022, in Murray v. UBS Securities LLC, the U.S. Court of Appeals for the Second Circuit overturned a nearly $1 million jury award granted to a former employee.[6]

The plaintiff worked as a strategist in the commercial mortgage-backed securities business at the company, where one of his job duties was to certify that his reports were independently produced and accurately reflected his own views.

According to the plaintiff, two employees on the trading desk pressured him to skew his research and publish reports that supported their business strategies.

The plaintiff alleged that he was discharged for voicing his complaints about the employees' pressure, and brought claims under SOX's whistleblower protection provision.

At the conclusion of trial, the U.S. District Court for the Southern District of New York's instructions to the jury on the elements of a SOX retaliation claim lacked a requirement that the plaintiff prove that the company had a retaliatory intent.

On appeal, the Second Circuit reversed. Relying on the plain meaning of the statutory language and its interpretation of a nearly identical statute, the Second Circuit concluded that retaliatory intent is an element of a section 1514A claim, and that "[t]he district court committed a non-harmless error by failing to instruct the jury accordingly."

The Second Circuit determined that the plain meaning of the statutory language makes clear that retaliatory intent is an element of a Section 1514A claim because the text of the statute prohibits discriminatory actions "because of" whistleblowing, which necessarily requires retaliatory intent — i.e., the employer's adverse action must be motivated by the employee's whistleblowing.

Further, the Second Circuit found that reading retaliatory intent into this provision is consistent with the court's previous interpretation of nearly identical language in the Federal Railroad Safety Act, and that "[w]e generally interpret identical language in different statutes to have the same meaning."

The panel was unconvinced that the erroneous jury instruction did not influence the verdict, and therefore vacated the jury's verdict and remanded to the district court for a new trial.

This decision deepens a circuit split, as the U.S. Court of Appeals for the Fifth Circuit and the Ninth Circuit have read the statute not to require retaliatory intent. It remains to be seen whether the U.S. Supreme Court will resolve this circuit split.

1. A whistleblower received a record-shattering $250 million award.

On Sept. 26, 2022, Biogen Inc. agreed to pay $900 million to settle a lawsuit, U.S. v. Biogen Inc., brought by a former employee relator in the U.S. District Court for the District of Massachusetts under the FCA.[7]

Under the qui tam provisions of the FCA, whistleblowers can sue on the government's behalf as "relators," and are eligible to receive 15% to 25% of any recovery in cases in which the government intervenes and 25%to 30% where the government does not intervene.

The relator was awarded 29.6% of the proceeds from the settlement — a whopping $250 million whistleblower award.

The relator, who started working at the company in 2004 and filed suit when he left in 2012, alleged that the company had engaged in a massive scheme to pay millions of dollars in kickbacks to health care providers to influence them to prescribe three of its multiple sclerosis drugs, and that he was demoted for trying to stop the kickbacks.

The case was scheduled for a jury trial in July 2022, but the parties announced that they had reached a settlement in principle just days before the trial commenced.

This is reported to be the single-highest award ever handed to a single relator, and is significantly larger than the previous record $96 million payout to a single whistleblower under the FCA in 2010.

News of this gargantuan award is likely to incent future whistleblowers, and the attorneys who represent them, to try to replicate this relator's success.

Looking Ahead

From huge whistleblower bounty awards, to the SEC's renewed focus on employer restrictions, to new whistleblower-friendly rules adopted by the SEC, these whistleblowing and retaliation events of 2022 will have a far-reaching impact and signal that much more is to come.

As significant jury verdicts continue to be awarded, it remains clear that employers have a real need to step up measures to prevent retaliation, and encourage employees to bring compliance failures and unlawful or unethical conduct to their attention promptly.

This involves updating whistleblower protection policies and codes of conduct, providing training to employees of all levels, thoroughly and impartially investigating whistleblower complaints, and closely vetting employment decisions to ensure that they are not retaliatory.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Swartz v. Interv. Rehab. of S. Fla., Inc., No. 21-cv-14137 (S.D. Fla. 2022).

[2] Baker v. Smith & Wesson, No. 21-cv-2019 (1st Cir. 2022).

[3] Killgore v. Specpro Pro. Serv., LLC, No. 21-cv-15897 (9th Cir. 2022).

[4] Casias v. Raytheon Co., Nos. 21-cv-1195 and 21-cv-1205 (10th Cir. 2022).

[5] Murray v. UBS Securities LLC, No. 20-cv-4202 (2022). [15] U.S. v. Biogen Inc., No. 12-cv-10601 (D. Mass. 2022).

Reproduced with permission. Originally published January 2023, " Top 10 Whistleblowing And Retaliation Events of 2022," Law360.

Related Professionals

Steven J. Pearlman
Partner