Proskauer

Top 10 Whistleblowing and Retaliation Events of 2023

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2023 was another groundbreaking year for whistleblower litigation and bounty awards.

The U.S. Securities and Exchange Commission shattered records by issuing a $279 million award and continued to actively enforce the rules designed to protect whistleblowers against retaliation.

Meanwhile, the U.S. Commodity Futures Trading Commission saw record engagement with its own whistleblower program.

And at the same time, federal and state courts around the country continued to issue noteworthy decisions under various whistleblower laws.

Here are the top 10 most significant whistleblower and retaliation developments of 2023.

10. A California court held that a Sarbanes-Oxley Act whistleblower claim is a securities claim for insurance purposes.

On June 20, in Skye Bioscience Inc. v. PartnerRe Ireland Insurance DAC, the U.S. District Court for the Central District of California held that a SOX whistleblower claim is a securities claim for purposes of insurance coverage.

Section 806 of SOX provides a cause of action for employees who face alleged retaliation because of certain lawful whistleblowing activity relating to, among other things, suspected violations of the securities laws.

Insurers have generally concluded that policies covering securities claims do not extend to whistleblower retaliation claims because such claims focus on the employment relationship, provide for traditional employment remedies such as reinstatement and back pay and are administered by the Occupational Safety and Health Administration.

However, the Skye Bioscience decision may cause insurers to reconsider.

There, the plaintiff sued her former employer, alleging the company discharged her after she reported alleged securities law violations in violation of the SOX whistleblower protections. The company then sought coverage from its insurer under a policy that covered securities claims.

The court denied the insurer's motion to dismiss, holding that the company plausibly alleged that the whistleblower lawsuit was covered by the policy.

The court explained that "a claim under § 1514A is a specific kind of employee action that is uniquely tied to securities laws and regulations."

This decision suggests that, at least in certain contexts, SOX's whistleblower provision can be viewed as a securities law and thus falls within the scope of insurance coverage for securities law claims.

Notably, this interpretation departs from that increasingly adopted in cases analyzing whether a SOX whistleblower claim is domestic or extraterritorial in nature, where courts have concluded that a SOX whistleblower claim focuses on regulating employment relationships.

9. A Massachusetts court held that engaging in protected activity does not shield an employee from the consequences of their insubordination.

On Nov. 13, in Morgan-Lee v. Therapy Resources Management LLC, the U.S. District Court for the District of Massachusetts concluded that the plaintiff failed to prove she was discharged because she engaged in protected activity and not because of her insubordinate conduct.

The plaintiff alleged she was discharged after she raised concerns about billing discrepancies indicative of potential misconduct or fraud that would fall within the whistleblower protections of the False Claims Act.

Following a bench trial, the court issued a judgment in favor of the employer, finding that the plaintiff was discharged because of her multiple unapproved absences and refusal to provide specifics about the purported fraudulent activity, even though auditing the company's billing practices was part of her job.

The court held that notwithstanding the plaintiff's protected activity, the evidence showed that her discharge was the culmination of an escalating pattern of her unprofessional and insubordinate conduct, rather than any retaliatory animus.

This decision confirms that employees may not use their protected activity as a shield to protect them from the consequences of their workplace misconduct.

8. The U.S. Supreme Court made it easier for the U.S. Department of Justice to dismiss qui tam whistleblower lawsuits under the FCA.

In Polansky v. Executive Health Resources Inc., the U.S. Supreme Court ruled in June that the U.S. Department of Justice has broad authority to intervene and move to voluntarily dismiss whistleblower claims brought under the qui tam provisions of the FCA. This authority exists even when the government previously allowed the whistleblower claim to proceed. [1]

Here, the petitioner was a doctor who worked for a company that helped hospitals bill for Medicare-covered services.

He filed a qui tam action against his employer in 2012, alleging it was helping its clients cheat the government. After years in litigation, the government determined that pursuing the suit further had become too burdensome.

The high court held in an 8-1 opinion that the government could seek voluntary dismissal under Rule 41(a) of the Federal Rules of Civil Procedure as long as it first intervened in the case.

The Supreme Court noted that the low bar for voluntary dismissal will be readily satisfied so long as the government "offers a reasonable argument for why the burdens of continued litigation outweigh its benefits."

This decision may encourage the government to increasingly step into qui tam lawsuits and seek dismissal where appropriate, notwithstanding relators' objections.

7. The CFTC received a record number of whistleblower tips and award applications.

In October, the CFTC released its statutorily mandated annual report, detailing the status of its whistleblower program for the 2023 fiscal year. [2]

The CFTC reported that its whistleblower program received a record number of tips — a total of 1,530. Over 900 of the tips involved allegations of fraudulent solicitation and misappropriation of crypto and digital assets.

The whistleblower program also received 301 award applications — a record number — in FY 2023, nearly double the number of award applications received in FY 2022.

The report stated that this increase is likely due to the CFTC's issuance in 2021 of a remarkable $200 million award to a single whistleblower — at the time the largest whistleblower bounty award ever granted under the Dodd-Frank Act.

The CTFC continued to issue multi-million-dollar awards in 2023, including separate awards in the amounts of $15 million and $18 million. As a result, it would not be surprising to see a continued increase in the number of tips and award applications submitted to the CFTC's whistleblower program.

6. A New Jersey court held it lacked jurisdiction to enforce preliminary reinstatement orders under SOX.

On April 19, in Gulden v. Exxon Mobil Corp., the U.S. District Court for the District of New Jersey upheld the defendant-employer's motion to dismiss a complaint seeking court enforcement of a preliminary reinstatement order issued by OSHA, holding that the court lacked jurisdiction to enforce such orders.

Last year, OSHA ordered the company to rehire two scientists who were allegedly fired in retaliation for leaking their concerns to the media about improper conduct and awarded the former employees over $800,000 in back pay, interest and compensatory damages.

After OSHA's order was issued, the company filed a timely objection and proceeded through the administrative appeals process. In response, the scientists filed suit in federal court to enforce the order. The company moved to dismiss.

The court granted the motion to dismiss, holding that the plain language of SOX only allowed district courts to enforce final judgments, and not preliminary orders.

The court also noted that the U.S. Court of Appeals for the Second Circuit, the only circuit court to have addressed this issue, held that district courts lack jurisdiction in these situations. The plaintiffs have appealed.

Although OSHA has taken an aggressive approach to enforcing SOX's whistleblower retaliation provision, including through the issuance of preliminary reinstatement orders, this decision demonstrates that such orders may lack sharp teeth as former employees lack a mechanism to force compliance.

Again, the plaintiffs have appealed, and it remains to be seen whether the Third Circuit will join the Second Circuit or create a circuit split.

5. OSHA implemented a pilot program to streamline the complaint intake process.

On Feb. 17, OSHA implemented a new pilot program that aims to streamline the whistleblower complaint intake process.

OSHA proposed this initiative in response to a rising number of whistleblower complaints filed in recent years.

Under the new program, OSHA will administratively close a complaint if it facially: (1) is not covered by an OSHA-administered whistleblower statute; (2) is untimely filed and equitable tolling does not appear to apply; or (3) only alleges safety or compliance issues but does not allege retaliation or other prohibited activity.

Upon closure, OSHA will send a letter to the complainant alerting them of the closure, and, when necessary, include a reference to the proper agency to which the complaint should have been sent.

The apparent need for this program highlights the proliferation of whistleblower complaints in recent years.

4. The California Supreme Court held that California's whistleblower statute prohibits retaliation for a report of unlawful activity even if already known to the employer.

On May 22, in Garcia-Brower v. Kolla's Inc., the California Supreme Court held that an employee who makes a whistleblower complaint to their employer may bring a retaliation claim under California Labor Code, Section 1102.5(b), even if the subject of the complaint was already known to the employer.

The opinion reverses previous California case law, which had held that an employee's whistleblower complaint regarding an alleged violation was not protected if the subject of the complaint was already known to the employer.

The court's analysis focused on the meaning of the word "disclosure" in the statute.

While the trial and appellate courts believed that a disclosure required "the revelation of something new, or at least believed by the discloser to be new, to the person or agency to whom the disclosure is made," the court instead held that the statute included protection for disclosures made to "another employee who has the authority to investigate … or correct the violation," without regard to whether the recipient already knew of the violation.

California employers should be mindful of the expansive definition of protected activity under California's whistleblower statute and ensure that a complainant is not retaliated against even where the subject of the complaint is already known to the employer.

3. The Eleventh Circuit affirmed rejection of a SOX claim for lack of protected activity.

On Sept. 25, in Ronnie v. Office Depot LLC, the U.S. Court of Appeals for the Eleventh Circuit affirmed the Administrative Review Board's rejection of a SOX retaliation claim, holding that the employee did not engage in protected activity because he failed to establish that he had an objectively reasonable belief that the employer engaged in conduct that violated SOX.

The petitioner, a senior financial analyst responsible for ensuring data integrity, reported potential accounting errors to his supervisor that he claimed signaled securities fraud.

After he reported the errors, the petitioner complained to human resources that his supervisor was treating him differently, and he was subsequently discharged.

After OSHA dismissed the petitioner's complaint, an administrative law judge granted summary judgment to the employer on the basis that the petitioner failed to establish an objectively reasonable belief that any of the statutes or rules enumerated in SOX were violated. After the ARB affirmed that decision, the petitioner petitioned the Eleventh Circuit for review.

The court denied the petition, explaining that the key issue was what evidence a SOX plaintiff must present to establish that they reasonably believed their employer violated a rule or regulation identified by SOX.

The court surveyed other federal appellate courts that have addressed this question and followed the Second and Fourth Circuits in adopting a "totality of the circumstances test," which requires a plaintiff to make some showing of scienter, materiality, reliance or loss in order to enjoy SOX protection.

The court cautioned that mere speculation or suspicion is not enough to establish a reasonable belief.

It remains to be seen whether the U.S. Supreme Court will step in to resolve the circuit split on the standard for determining whether an employee has a reasonable belief that their employer violated SOX.

2. The SEC continued its focus on enforcing the do-not-impede rule.

In 2022, the SEC renewed its focus on enforcing Rule 21F-17, which prohibits any action to impede an individual from communicating with the SEC about potential securities law violations.

After a significant decline in enforcement actions during the Trump administration, the Biden-era SEC reinvigorated its scrutiny of compliance with, and enforcement of, Rule 21F- 17.

In 2023, the SEC announced several new enforcement actions, demonstrating its continued commitment to enforcing the do-not-impede rule.

These actions targeted provisions in separation agreements that the SEC alleged discouraged whistleblowers, including a requirement that employees waive their rights to receive monetary whistleblower awards and a requirement that employees affirm that they had not filed any complaints or charges against the employer with any court or governmental agency.

We expect that the SEC will continue its efforts to ensure compliance with Rule 21F-17.

1. The SEC's Office of the Whistleblower had a record-shattering year, issuing multiple nine-figure whistleblower awards.

On Nov. 14, the SEC announced that its 2023 fiscal year broke several previous records, including a record amount of whistleblower tips — 18,000, which was 50% more than the number received in FY 2022 — and a record aggregate amount of whistleblower awards issued in a single year: $600 million.

Most notably, on May 5, the SEC announced an award of nearly $279 million to a whistleblower who provided the SEC with information and assistance that led to the successful enforcement of SEC and related actions.

This enormous award is the largest ever in the history of the whistleblower program and is more than double the previous record $114 million award issued in October 2020.

And, on Aug. 4, the SEC announced a separate award of more than $104 million to a group of seven whistleblowers, which was the program's fourth-largest award and brought the total amount awarded by the SEC to more than $1.6 billion since the inception of the whistleblower program in 2011.

What's next?

The Supreme Court is expected to soon resolve a circuit split on whether the whistleblower protection provisions under SOX require employers to act with retaliatory intent.

Meanwhile, the SEC's Office of the Whistleblower continues to hand out gargantuan awards, which will further incentivize whistleblowers to submit tips. This trend is likely to continue into 2024.

So now more than ever, employers should scrutinize their employment-related policies and agreements to ensure they do not impede individuals from lodging whistleblower reports, revisit and strengthen their whistleblower protection policies and codes of conduct, institute training for employees of all levels, and closely vet employment decisions involving whistleblowers to ensure they are not retaliatory.

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[1] Under the FCA, private parties (called "relators"), can sue on behalf of the These suits are called "qui tam" actions. If a relator is successful, they can receive up to 30% of the total sum recovered. Once a relator files a complaint, the government has 60 days to intervene in the case and then take the lead role in the litigation. Even if the government declines to intervene at first, it can still intervene in the case later as long as it shows good cause to do so.

[2] https://www.whistleblower.gov/sites/whistleblower/files/2023-10/FY23%20Customer%20Protection%20Fund%20Annual%20Report%20to%20Congress.pdf.

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- **Steven J. Pearlman**
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