Shaw, Marven, And Snowden: Huffing And Puffing, And Blowing The Whistle

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Long before Edward Snowden, there was Samuel Shaw and Richard Marven. Shaw and Marven were Revolutionary War naval officers and, in 1777, they accused—or blew the whistle on—Commodore Esek Hopkins, then Commander-in-Chief of the Continental Navy, for torturing British prisoners of war. Shaw and Marven were promptly dismissed from the Continental Navy and, thereafter, were sued by Hopkins. The Continental Congress, outraged by the case, enacted the first whistleblower protection law on July 30, 1778. The law proscribed:

> That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or other misdemeanors committed by any officers or person in the service of these states, which may come to their knowledge.[2]

Fast forward more than two hundred years, and nearly every state, along with the federal government, has enacted some form of "whistleblower" legislation. Maryland's two whistleblower statutes protect executive branch employees and state contractors from retaliation if they report internal misconduct or illegal activity.[3] Federal legislation is broader, protecting public and private employees in a variety of jobs and industries.[4]

In addition to providing private causes of action to employees who face retaliation for revealing misconduct, some of the statutes include financial incentives to encourage whistleblowing. For example, the Securities and Exchange Commission's Office of the Whistleblower paid whistleblowers over $14 million in 2013 for their efforts in exposing fraud within the nation's financial sector.[5] One former UBS employee received $104 million from the IRS for providing information that revealed UBS's efforts to help Americans evade tax obligations through Swiss bank accounts.[6] If the Department of Justice prevails in its lawsuit against the United States Investigations Services LLC, ("USIS")—a company that performs background checks for the U.S. government—a former USIS employee is in line to receive a portion of any settlement between the parties, because he alerted the government of potential fraud in a False Claims Act filed in 2011.[7]

I. What is a Whistleblower?

But what is a whistleblower? A whistleblower is generally defined as "[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency."[8] This definition, however, understates the complexities of determining who is and who is not a whistleblower. In practice, whether someone qualifies as a whistleblower is a function of the applicable statute, which characterizes differently elements such as "employee," "wrongdoing," and to whom the person must report the wrongdoing. While federal and Maryland laws may differ in their scope and application, they are similar in their goal: the protection of an "employee" who makes a "protected disclosure" and is subject to adverse "personnel action" as a consequence.

II. What Did You Say and Who Did You Tell?

Maryland's two whistleblower statutes protect similar disclosures by executive branch employees and employees of state contractors.[9] Under Maryland law, these employees are protected from employer retaliation for disclosing information that evidences "(1) an abuse of authority, gross mismanagement, or gross waste of money; (2) a substantial and specific danger to public health and safety; or (3) a violation of law."[10] While Maryland does

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[2]*Journals of the Continental Congress, 1774–1789*, Volume XI, at 732 (Worthington Chauncey Ford ed., 1908).

[3]MD. CODE ANN., STATE PERS. & PENS. § 5-305 (Supp. 2014) (protecting state employees); MD. CODE ANN., STATE FIN. & PROC. § 11-303 (2008) (protecting employees of state procurement contractors).

[4]*See, e.g.*, Dodd-Frank Act, 7 U.S.C. § 26 (2012); Department of Defense Authorization Act of 1987, 10 U.S.C. § 2409 (2013); Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109 (2012).

[5]U.S. SEC. & EXCH. COMM'N, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1 (2013), *available at* http://www.sec.gov/about/offices/owb/annual-report-2013.pdf.

[6]David Kocieniewski, *Whistle-Blower Awarded $104 Million by I.R.S.*, N.Y. TIMES (Sept. 11, 2012), http://www.nytimes.com/2012/09/12/business/whistle-blower-awarded-104-million-by-irs.html?_r=0.

[7]Joe Schneider, *Security Firm Sued for Fraud by U.S. Over Background Checks*, BLOOMBERG (Jan. 23, 2014), http://www.businessweek.com/news/2014-01-23/security-firm-sued-for-fraud-by-u-dot-s-dot-over-background-checks#p1.

[8]BLACK'S LAW DICTIONARY (9th ed. 2009).

[9]MD. CODE ANN., STATE PERS. & PENS. § 5-305 (Supp. 2014); MD. CODE ANN., STATE FIN. & PROC. § 11-303 (2008).

[10]MD. CODE ANN., STATE PERS. & PENS. § 5-305 (Supp. 2014) (protecting state employees from reprisal); MD. CODE ANN., STATE FIN. & PROC. § 11-303 (2008) (protecting contractors, as well, should they object or refuse to participate in activities in violation of law).

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not recognize a specific whistleblower statute for private at-will employees, this does not mean it is open season on these employees by private employers. Private employers must be wary of conduct that may violate public policy, such as firing an employee in retaliation for exposing illegal discriminatory practices, violations of occupational safety and health regulations, or criminal activity.[11]

Under federal law, protected disclosures vary depending on the statute, and typically relate to information concerning industry regulations.[12] For example, under Sarbanes Oxley Act of 2002, employers are prohibited from retaliating against employees who disclose information that exposes a violation of SEC regulations. The False Claims Act protects employees who disclose information they reasonably believe relates to conduct that defrauds, or attempts to defraud, the government.[13] The Whistleblower Protection Act, which protects federal employees from reprisals, mirrors Maryland's statutory protections for state employees.[14]

Under both Maryland and federal law, to whom an employee discloses information is relevant to whether the employee is protected from retaliation. To qualify as protected communication, the reporting employee must demonstrate intent to raise the issue with a higher authority, somebody in the position to correct the alleged wrongdoing.[15] In *Department of Natural Resources v. Heller*, the Court of Appeals of Maryland upheld an administrative ruling finding that this test was not satisfied by a DNR employee who disclosed alleged wrongdoing to his immediate supervisors.[16] In *Heller*, the alleged illegal conduct was carried out by persons in positions of authority greater than that of the employee's supervisors.[17] Accordingly, the court found that a reasonable person could have concluded that the supervisors were not in a position to correct the wrongdoing.[18]

But what if an employee reports the misconduct to a superior who is in a position to take appropriate action?

Jane Doe was a sales associate for Fictitious IT Solutions, a firm with State contracts. Jane, a 15-year employee, complained to her company's regional manager that her immediate supervisor frequently altered time logs to inflate monthly billing. These time logs were submitted to the State for payment. Following Jane's disclosure, the regional manager fired her. The regional manager cited Jane's past problems with her supervisor as reason for her termination and suggested Jane's accusations relating to the time logs were an attempt to get her supervisor fired. Consequently, the regional manager never investigated Jane's claim.

Here, Jane likely has a cause of action. Whistleblower retaliation claims, like discrimination retaliation claims, are not premised on whether the alleged reported wrongdoing actually occurred.[19] Rather, Maryland and federal courts rely on an objective test to determine liability—whether "a reasonable person would believe the disclosure" exposed wrongdoing or criminal misconduct covered under the statute.[20] The objective test is a fact-specific inquiry; therefore, an individual's length of employment impacts whether the belief was reasonable.[21] For example, if an employer is investigating a potential protected disclosure by a tenured employee, the employee's experience and knowledge of the law regarding the alleged violation is a consideration for determining whether the employee's belief was reasonable.[22]

III. What did the Employer know and when did it know it?

Even if the information disclosed satisfies the "protected disclosure" test, an employee seeking whistleblower protection must clear another hurdle. Under both Maryland and federal law, an employee must establish a causal connection between the protected disclosure and the adverse employment action.[23] In fact, an employer's knowledge that the

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[11] *Wholey v. Sears Roebuck*, 370 Md. 38, 43 (2002) ("We conclude that a clear public policy mandate exists in the State of Maryland which protects employees from a termination based upon the reporting of suspected criminal activities to the appropriate law enforcement authorities. While we recognize such an exception, the petitioner's actions, in this case, i.e. the investigation of suspected criminal activity of a store manager and reporting of that suspicion to his supervisors, do not qualify for this exception.").

[12] Sarbanes Oxley Act of 2002, 18 U.S.C. § 1514A(a)(1) (2013).

[13] False Claims Act, 31 U.S.C. § 3730(h) (2012).

[14] Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8) (2013); 5 U.S.C. § 1221 (2013) (providing a private cause of action for violation of § 2302(b)(8)).

[15] Dep't. of Natural Res. v. Heller, 391 Md. 148, 170 (2006).

[16] *Id.* at 176.

[17] *Id.* at 173.

[18] *Id.*

[19] *See Lawson v. Bowie State Univ.*, 421 Md. 245, 260 (2011) (citing Ward v. Dep't of the Army, 67 M.S.P.R. 482, 488 (M.S.P.B. 1995)) (noting that if an employee had to wait for actual wrongdoing or criminal behavior to occur before reporting it, the employee could possibly incur responsibility).

[20] *Id.* at 260.

[21] *Id.* at 261 (citation omitted).

[22] *See Haley v. Dep't of Treasury*, 977 F.2d 553, 556–57 (Fed. Cir. 1992). In *Haley*, the Federal Circuit affirmed an Administrative Law Judge's findings that the employee was not protected under the Whistleblower Protection Act. The court explained that given the employee's "extensive experience" within his field of work, he could not have formed a reasonable belief that his employer's actions violated the law. Id. at 557.

[23] *Heller*, 391 Md. at 170–71 (citation omitted) (describing this test as common to all actions for retaliation).

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employee made a protected disclosure is an essential element of this prong.[24] If an employee can demonstrate by a "preponderance of the evidence that the protected disclosure was a 'contributing factor'" to the employer's adverse employment action, the burden of proof shifts to the employer.[25] Under this circumstance, an employer will generally escape liability only if it can show it would have taken the same action regardless of the employee's protected disclosure.[26] Similar to discrimination and sexual harassment claims, courts focus on the timing. At issue will be the nexus between the employer's knowledge of the protected disclosure and the complained of personnel decision—the greater the time, the less likely a causal relationship exists between the employee's disclosure and the employer's conduct.[27]

IV. What can you do about it?

Corporate counsel can assist their employer-companies in minimizing liability under whistleblower protection statutes in several ways. Corporate counsel should encourage their employers to adopt a reporting policy that both invites the reporting of suspected wrongdoing and maximizes the protection of those reporting the conduct. In addition, corporate counsel, when notified of a potential protected disclosure, should ensure that the claim is thoroughly investigated. Depending on the circumstances, it may be advisable to hire outside counsel to conduct the investigation. When conducting an investigation, bear in mind that the law does not require altruistic motives on the part of the disclosing employee. Indeed, as discussed, these employees may be motivated by financial gain, spite, or other unpleasant reasons and, nevertheless, firing or demoting an employee based on these motivations is no defense to a whistleblower retaliation action.[28]

By creating and nurturing an atmosphere that encourages internal reporting, corporate counsel may eliminate, or at least minimize, conditions that cause employees to air a company's dirty laundry in public.

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[24] *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998).

[25] *Heller*, 391 Md. at 171.

[26] *Id.*

[27] *Id.* at 174–75.

[28] *Lawson*, 421 Md. at 262.