

CORPORATE WHISTLEBLOWER NEWS

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IN THE NEWS

LEGISLATION PASSED BY HOUSE INCLUDES NEW SECURITIES FRAUD WHISTLEBLOWER PROTECTION

The House of Representatives last month passed the Wall Street Reform and Consumer Protection Act of 2009, touted as "comprehensive legislation to overhaul regulations in the financial sector." Among other things, the bill significantly expands whistleblower protections in the securities fraud arena. For example, the bill provides a whistleblower bounty of up to 30% of the amount of monetary sanctions resulting from SEC enforcement actions. The bill also has a new whistleblower provision that prohibits any employer -- not just publicly traded companies, as is the case under Section 806 of the Sarbanes-Oxley Act (SOX) -- from retaliating against an employee, contractor or agent who provides information to or assists the SEC. Claims under this new provision may be brought directly in federal court, and the limitations period for filing a complaint may be as long as 10 years. Other legislation introduced in the House would amend Section 806 to expand that provision to include not just publicly traded companies but also "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company." Senate action, of course, would be required for the advancement of new whistleblower protections.

NEW MEMBERS APPOINTED TO DOL'S ADMINISTRATIVE REVIEW BOARD

Secretary of Labor Hilda Solis has appointed two new members to the DOL's Administrative Review Board (ARB), which issues the final decisions of the DOL in cases arising under many federal whistleblower protection laws. Solis named Paul Igasaki as the new Chairman of the ARB. Igasaki served as a Commissioner and Acting Vice Chair of the EEOC during the Clinton Administration. He is primarily known for his advocacy of legal and civil rights of Asian Pacific Americans and has also served as National Co-Chair of the Democratic National Committee's National Lawyers' Council. The other appointee, E. Cooper Brown, previously served a two-year term on the ARB as an appointee of the Clinton Administration. Member Transue has stepped down from the Board although Member Beyer remains.

FRENCH COURT INVALIDATES CODE OF CONDUCT WHISTLEBLOWING PROCEDURE

The French Supreme Court, the *Cour de cassation*, recently ruled that whistleblower procedures included in a Code of Business Conduct in compliance with SOX were overly broad. In a December 8, 2009 ruling, the court invalidated the procedures in Dassault Systèmes' Code of Conduct. The Court held that the provisions were overly broad because they were not limited to complaints about finance, accounting, banking and anti-corruption but also encompassed

Employers in safety-sensitive industries may be interested in two workforce publications designed to promote effective resolution of employee safety concerns. ***Safety Conscious Work Environment: The Practical Guide for Leaders*** identifies key ways in which supervisors, managers, and site executives can foster a work environment that encourages employees to participate in raising and resolving concerns. ***Safety Conscious Work Environment: Practical Pointers for the Individual Contributor*** advises non-supervisory workers, including contract workers, how they can contribute to the desired work environment. [More information.](#)

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ABOUT CW NEWS

As part of its labor and employment law and litigation practices, Conner & Winters, LLP has unparalleled, nationwide experience representing management in "whistleblower" cases in state and federal courts and in the U.S. Department of Labor, as well as in counseling and advising clients on proactive workplace measures that can both enhance a culture of

whistleblowing relating to actions that could harm the vital interests of Dassault or the integrity of an individual employee. The court also decided that the procedures lacked sufficient information on French legal protections relating to whistleblowing, including the right of an individual named as the subject of a whistleblower complaint to be properly notified of the nature of the complaint, and the right of persons identified in a complaint to access and rectify a complaint.

INTERNATIONAL GROUP PROMOTES EXPANSIVE WHISTLEBLOWER PROTECTION STANDARDS

Transparency International – a coalition claiming status as an assembly of international experts in whistleblower protections – recently developed a list of standards for legal protections known as [Draft Recommended Principles for Whistleblower Legislation](#). While heralded by the group's members as "best practices" for whistleblower laws, the principles developed by the coalition constitute a wish list of liberal provisions that strongly favor employee interests. The principles include: elimination of any requirement of an employment relationship between the company accused of wrongdoing and the whistleblower; protection of "attempted" whistleblowing; granting whistleblowers immunity from defamation and similar claims, as well as criminal liability; and the invalidation of any private agreements that require arbitration or other efficiencies.

GOVERNMENT SEIZES CAR OF COMPANY PRESIDENT AFTER FAILURE TO COMPLY WITH OSHA WHISTLEBLOWER ORDER

The DOL some time ago filed a complaint in federal court under the OSHA whistleblower protection law against Brocon Petroleum. The suit alleged that the company fired an employee because it believed the employee had called OSHA and instigated an inspection. The DOL and Brocon entered into a consent judgment under which Brocon agreed to pay \$7,500 in back wages to the employee -- but Brocon never paid up. As a result, U.S. marshals and DOL agents seized a vehicle from Brocon's president, Richard Kohler. According to the Administrator of OSHA's regional office in New York, the action "should send a clear message that there will be consequences for retaliating against employees who engage in activities protected by law."

RECENT DECISIONS

Court Holds that Settlement Provisions Contravened Public Policy

When Head filed a *qui tam* claim under the False Claims Act (FCA) against his former employer, Kane Company, Kane filed counterclaims against Head. Head moved to strike the counterclaims, arguing they were contrary to public policy because counterclaims could discourage whistleblowers from coming forward. The federal court dismissed some but not all of the counterclaims on that basis. In particular, the court dismissed Kane's counterclaim that Head violated the non-disparagement provision of a separation agreement he and the company entered when he submitted an email from the company's CFO with his complaint. Kane argued that Head should not have kept the email following his termination. According to the court: "Enforcing a private agreement that requires a *qui tam* plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate" the FCA. The court also dismissed a counterclaim for indemnification based on the separation agreement on the ground that "liability for violations of the FCA may not be shifted" to the employee. *Head ex rel. U.S. v. Kane Co.*, No. 05-317 (D.D.C.).

Appeals Court Holds that Complainants Have the Right to Start SOX Whistleblower Cases from Scratch in Federal Court

SOX Section 806 requires complainants to file retaliation complaints initially with the DOL but permits the complainant to refile the complaint in federal court if the DOL does not issue a final order within 180 days. Because the DOL never fully adjudicates cases within 180 days, almost every SOX complainant will have the opportunity to refile in federal court. The U.S. Court of Appeals for the Fourth Circuit recently answered an important question that arises from this procedural scheme: is a ruling issued by an Administrative Law Judge (ALJ) in a SOX case – which is a recommended, but not final, decision – binding if the complainant refiles in federal court? The employee, Stone, had sued Instrument Laboratory Co (ILC), but the ALJ granted summary decision in ILC's favor. Stone appealed to the ARB, but then refiled the complaint in federal court before the ARB issued a final order. ILC argued that the ALJ's ruling was binding in

compliance and minimize the risk of whistleblower claims. *Corporate Whistleblower News* builds on our experience in this field and summarizes important developments regarding the interpretation and implementation of federal whistleblower protection statutes. This material is designed for corporate executives, in-house legal staff, compliance officers and staff, senior managers, and Human Resources and Labor Relations professionals.

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the federal case under the res judicata doctrine. Pointing to the language of Section 806, Stone argued that the federal case is a “de novo” proceeding, and de novo means that any prior decision must be disregarded. The Court sided with Stone, focusing on what it viewed as the plain language of the law. “[E]ven if the 180-day statutory period [giving exclusive jurisdiction to the DOL] is arguably both overly aggressive and not the most efficient use of administrative and judicial resources, Stone was entitled to de novo review.” The ruling is a controversial one – effectively holding that DOL proceedings are meaningless if the respondent prevails in a hearing, because the complainant may simply refile the case in court. Notably, the statute only gives the complainant – and not the respondent – the right to remove the case to court, and arguments may be made about the constitutionality of such a provision. *Stone v. Instrument Laboratory Co.*, No. 08-1970 (4th Cir.).

ARB Rejects Company’s Effort to Admit Complainant’s Post-Trial Criminal Conviction into the Record

After an ALJ ruled that Owen Trucking fired a driver for engaging in a protected refusal to work, in violation of the whistleblower provision of the Surface Transportation Assistance Act (STAA), the company appealed to the ARB and attempted to introduce evidence that the driver was convicted in a criminal case after the trial record closed. According to Owen Trucking, the driver was convicted of six felony counts to distribute a controlled substance and conspiracy to do the same, and that evidence was material to the case because it related to the driver’s credibility – upon which the ALJ had heavily relied. The ARB rejected the evidence on the ground that only evidence that existed at the time of the trial is admissible. *Shields v. James E. Owen Trucking*, ARB No. 08-021.

ARB Holds that Reporting a Problem Is Not Protected Activity Where the Report Is a Form of Compliance

Fabre, a driver for Werner Enterprises, alleged that he was fired in violation of the STAA because he made reports from his vehicle that his Qualcomm device – a satellite communication system used for tracking information – was faulty. The ARB considered whether reporting a faulty communication device constituted protected activity. The ARB noted that operating a vehicle with a faulty Qualcomm device is not a violation of regulations unless the driver fails to use a “paper back-up,” so having a faulty electronic device is not, standing alone, an actual violation of regulations. The ARB also concluded that Fabre did not have a reasonable belief that operating his vehicle with a faulty device violated regulations. The regulations state that drivers “are required to note any failure of automatic on-board recording devices” and to prepare handwritten records reconstructing their hours of service. The ARB held: “Like the ALJ, we find that Fabre’s notification to Werner that his Qualcomm device had failed was not a notification of a violation, but rather was an integral part of compliance with the regulations.” *Fabre v. Werner Enterprises*, ARB No. 09-026.

Court Addresses Admissibility of *Qui Tam* Proceedings in Retaliation Case

In an FCA whistleblower retaliation case, both parties filed motions concerning the admissibility of evidence about the original *qui tam* action that the plaintiff, Thompson, filed against his employer, Quorum Health Resources. Quorum wanted to tell the jury that the federal government declined to intervene in Thompson’s original *qui tam* case. The court ruled that the evidence was inadmissible because the prejudicial effect of introducing the government’s decision not to intervene outweighed any probative value. Quorum sought to prevent Thompson from introducing evidence that the company had settled a separate *qui tam* action in 2001, where the settlement included commitments by Quorum under a corporate integrity agreement. The court ruled that “specific reference to the 2001 *qui tam* settlement may be highly prejudicial” to Quorum and confusing to the jury. However, the probative value to Thompson of the corporate integrity agreement – including the fact that the agreement provided enhanced penalties in the event of future wrongdoing – outweighed any prejudice to Quorum. The court permitted Thompson to “only inquire as to the corporate integrity agreement and its enhanced penalties” and could “not refer to the origin of the agreement, the fact that it was a *qui tam* settlement, or the facts of the 2001 case.” *Thompson v. Quorum Health Resources*, No. 1:06-CV-168 (W.D. Ky.).

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INDUSTRY BRIEFS

Aviation

An ALJ ordered an airline to pay for post-traumatic stress caused by an AIR21 violation.

Luder, a pilot for Continental Airlines, and his co-pilot were scheduled to fly from Miami to Houston. The co-pilot was told by the deplaning crew that they had flown through turbulence; however, the deplaning crew did not log the turbulence and in fact continued on with a subsequent flight, which took them to Miami. When the co-pilot relayed this statement to Luder, he requested that plane be inspected. Luder allegedly was told that “you don’t write airplanes up on hearsay.” Luder refused to fly without an inspection, wrote a log entry about turbulence himself, and the flight was delayed for 37 minutes. After an investigation into these events, Continental briefly suspended Luder and gave him a “warning letter.” An ALJ found Luder’s actions were protected activity and Continental’s actions were “materially adverse” and retaliatory, despite Continental’s position that the punishment was based on Luder’s “inappropriate” and “unprofessional behavior” in arguing with maintenance. Luder presented expert evidence that after this incident, he suffered from disabling post-traumatic stress disorder (PTSD), depression, and anxiety, causing him to fail flight simulator training and being unable to fly. The ALJ ordered Continental to pay Luder his monthly salary plus interest commencing when he ceased to fly because of the PTSD, to the present and continuing until Luder has sufficiently recovered to continue flying. *Luder v. Continental Airlines*, ALJ No. 2008-AIR-09.

Energy

The NRC issued a Confirmatory Order to Tennessee Valley Authority resolving whistleblower retaliation allegations.

In reports issued earlier in 2009, the NRC’s Office of Investigations concluded that TVA management engaged in two instances of retaliation against workers who raised nuclear safety concerns. The agency concluded that TVA retaliated against a contracted Senior Assessor in TVA’s Nuclear Assurance organization in connection with the restart project for TVA’s Brown’s Ferry Nuclear plant because the assessor raised concerns regarding the independence of his manager. The agency likewise found that TVA retaliated against a maintenance mechanic employed by TVA at the plant for raising concerns regarding TVA’s compliance with its Fitness for Duty program. Through the NRC’s alternative dispute resolution process, TVA and the NRC reached an agreement resolving those matters, reflected in a Confirmatory Order. The Order requires TVA to take a variety of steps to minimize the risk of retaliation, including conducting independent safety culture assessments and implementing a process to review proposed employment actions to ensure that such actions are not being taken in violation of whistleblower protections. The Order also notes many steps that TVA had already taken to address the instances of retaliation, such as distributing brochures on Safety Conscious Work Environment.

Health Care

An employee’s failure to report suspected fraud was a legitimate reason for termination.

In the above-discussed case of *Thompson v. Quorum Health Resources*, Thompson claimed that his termination violated the whistleblower protections of the FCA. Prior to his termination, Thompson had worked for Quorum – a hospital management services company – as a hospital CEO. He suspected that Quorum was making decisions normally reserved to the hospital’s board of directors, including selecting vendors that would benefit Quorum at the hospital’s expense. Over time, he collected documents and ultimately filed a *qui tam* action against Quorum under seal. Later, in response to an accountant’s questionnaire, Thompson reported that he had suspicions of fraud. Previously, however, Thompson had failed to report the suspected fraud in any forms he signed pursuant to the company’s Code of Conduct. Quorum thereafter fired Thompson. In addressing motions for summary judgment in the whistleblower case, the court concluded that Quorum presented a legitimate business reason for the termination: Quorum “had specific policies in place to deal with suspicions by employees of fraud and other violations of the law,” and Thompson withheld information when he annually signed the acknowledgment forms. Nonetheless, the court ruled that the case should proceed to trial because Thompson presented evidence that the legitimate reason for firing Thompson may not have been the actual reason. Among other facts that could suggest retaliation, the court observed that Thompson alleged that an auditor called him a “whistleblower.”

The HIPAA whistleblower provision did not permit an auditor's disclosure of protected health information. After Monarch Fire Protection District engaged Freedom to audit its health plan, Freedom shared a portion of its report that contained HIPAA-protected health information with counsel for the union that represented Monarch's employees. The attorney shared the information with law enforcement, which led to grand jury proceedings and a subpoena to Freedom for its documents, with which Freedom complied. Monarch sued Freedom for improperly disclosing protected health information. Freedom claimed that its disclosures to the attorney were permissible because Monarch would not be liable for the disclosures under HIPAA's whistleblower provision, which permit an employer or employee to disclose information to its attorney. The court disagreed with Freedom, reasoning that the HIPAA whistleblower provision does not cover a situation where a third-party (neither employer nor employee) discloses protected information to the attorney for employees. Thus, the whistleblower provision did not permit Freedom to disclose information to the union's attorney. *Monarch Fire Protection Dist. v. Freedom Consulting & Auditing*, No. 4:08cv01424 (E.D. Mo.).

Trucking and Transportation

A driver's termination violated the STAA whistleblower protections. In the Owen Trucking case discussed in the Recent Decisions section above, the ARB affirmed the ALJ's decision in favor of the complainant, Shields. Shields had refused to pick up a load for delivery because the delivery requirements would have caused him to violate hours of service limits. The driving assignment could not have been completed in less than 11 hours "even under optimal conditions," according to the ARB, and Shields had not had a sufficient break between deliveries that would permit the assignment. The ARB also held that Owen Trucking fired Shields for his refusal: although Shields had a history of late deliveries, Owen Trucking failed to show he would have been fired for that, and an Owen Manager testified that Shields' work refusal was the "last straw" in a series of performance problems. Because the protected activity contributed to the adverse action, and Owen Trucking did not show it would have fired Shields nonetheless, the ARB ordered that Shields be reinstated. The ARB also held that Shields was entitled to backpay not just until the time of trial, but continuing until Owen Trucking makes a bona fide offer of reinstatement to Shields. *Shields v. James E. Owen Trucking*, ARB No. 08-021.

Attorney's securities law experience precludes showing that she had an "objectively reasonable belief" of SOX violations. Zinn was a former securities attorney who reviewed contracts for American Commercial Lines (ACL), a marine transportation and manufacturing company. Zinn claimed she was fired in retaliation for reporting SEC violations within the company. She claimed that she informed ACL that (a) some of its contracted vendors were using unlicensed ship pilots and should have been reported under the "risk factor" section of the Form 10-K, and (b) the company was required, but failed, to file a Form 8-K in connection with the employment of new General Counsel. The ALJ held that neither constituted an SEC violation and that although Zinn may subjectively have believed ACL committed SEC violations, that belief that was not "objectively reasonable." The record showed she had extensive experience in securities law, and the ALJ found that her belief was not objectively reasonable for someone with her experience. The ALJ found a lack of a protected activity and dismissed Zinn's complaint. *Zinn v American Commercial Lines*, ALJ No. 2009-SOX-25.

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