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WHISTLEBLOWER LAW ALERT

U.S. Court of Appeals confirms circuit split on whether whistleblower laws require intent to retaliate

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Several federal whistleblower laws contain a peculiar burden of proof provision. Under these laws, a plaintiff who believes he has been retaliated against needs only to prove that his protected whistleblowing was a “contributing factor” in the adverse personnel action. Even when a plaintiff makes that showing, the defendant can avoid liability by presenting clear and convincing evidence that the same adverse action would have been taken absent the protected activity.

Our January 10, 2017, client advisory discussed recent decisions by two different federal appellate courts that addressed the burden of proof issue. The Seventh Circuit held that the plaintiff's "contributing factor" burden requires evidence of a causal connection. This showing is not satisfied if the plaintiff merely establishes that protected activity was one event in a chain leading to the adverse action. The Fourth Circuit focused on the defendant's burden of proof and held that, where the whistleblowing reveals the plaintiff's own misconduct, the defendant does not have to prove that it would have learned of the misconduct absent the protected activity.

The Eighth Circuit issued two opinions on this issue last week. As background, that Court in a 2014 decision interpreting the Federal Railroad Safety Act whistleblower provision had held that “the contributing factor that an employee must prove is intentional retaliation prompted by the employee’s protected activity." That holding aligns with the Seventh Circuit's determination that contributing factor requires a causal showing; the adverse action had to be "because of" the whistleblowing in some way.

In one of the two newly decided cases, the trial court had instructed the jury that it did not need to find that the railroad had a retaliatory motive for disciplining a worker who reported a minor eye injury. The appellate court remanded the case for a new trial because that jury instruction was incorrect. Blackorby v. BNSF Ry. Co., No. 15-3192.

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In the other case, a worker who hurt his foot, and reported the injury, was disciplined for violating a policy that required workers to be alert, attentive, and careful. The Eighth Circuit affirmed summary judgment for the railroad, holding that the worker needed to demonstrate "more than a mere factual connection between his injury report and his discipline" and concluding that the record contained no evidence that the company intentionally retaliated against him because he filed the injury report. Among other things, the court observed that the worker initially did not even want to file a report, but was pressured by his management to do so. Heim v. BNSF Ry. Co., No. 15-3532.

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The Court declined to overrule its 2014 decision, reasoning that that decision remains binding. However, in one of the recent cases, the Court indicated that the worker was free to argue that the 2014 decision should be overruled by filing a petition for rehearing en banc.

While the legal issue sounds rather doctrinaire, the way in which a court interprets the term “contributing factor” will be outcome determinative in many cases. A requirement that there must be a showing of intentional retaliation, as in these new Eighth Circuit decisions, will eliminate employer liability in a wide range of cases. In contrast, a rule that employers are liable simply because whistleblowing occurred somewhere in the chain of events leading to an adverse action will effectively inhibit employers from disciplining workers for obviously legitimate reasons, such as a railway worker’s failure to follow safety policies.

Please let us know if you have any questions about this development.