MEDIATING IN A CHANGING LANDSCAPE: WHISTLEBLOWER AND RETALIATION CLAIMS

By Deborah Gage Haude, Esq.

Whistleblower and retaliation claims are on the rise. Retaliation claims now comprise 41% of the more than 93,000 discrimination charges filed in 2013, according to a February report from the U.S. Equal Employment Opportunity Commission (EEOC). This is an increase of 28% over 10 years. At the same time, particularly since the enactment of Dodd-Frank in 2010, the number and types of whistleblower claims alleging corporate misconduct, sometimes coupled with discrimination claims, also has proliferated. Dodd-Frank gave claimants the ability to go directly to court, bypassing the administrative claims route, and to seek both enhanced recoveries and rewards. Federal whistleblower law also is shifting, as seen in a series of conflicting lower court rulings and the recent U.S. Supreme Court ruling in *Lawson v. FMR LLC*. All of this makes litigating—and mediating—whistleblower retaliation claims a significant challenge.

There has been so much new law that by the time a case gets to mediation, the landscape may have changed again. This places a premium on updated legal research, awareness of evidence issues and careful consideration of likely future developments. Both mediators and counsel should be prepared to have a more detailed discussion of the law than might be expected in a discrimination case.

The impact of the *Lawson* decision, for example, is not yet fully understood, and the decision itself left open many questions. In its *Lawson* ruing, the Supreme Court expanded the right to seek whistleblower protection under Sarbanes-Oxley to employees of privately held companies that contract or subcontract with public companies. In addition, the court held that those private company employees can bring claims against their private employers. This decision increases not only the number of people who might seek whistleblower protection, but also the uncertainty about what such claims would be worth and how to value them in mediation. Other issues either not yet addressed by the Supreme Court in *Lawson* or in dispute among lower courts include (1) the circumstances under which private company employees may have a claim; (2) the scope of activity protected under Sarbanes-Oxley; (3) whether, as the SEC rules assert, internal as well as external claims are covered by Dodd-Frank; and (4), at least in the District Court for the District of Columbia, whether internal investigation documents are always protected by privilege or work product doctrine.

The legal landscape regarding the drafting of employee contracts is also in flux with respect to both documents that may become evidence in discrimination and whistleblower cases, and agreements that resolve them, which has consequences for mediation. In February 2014, referencing its FY 2013-2016 Strategic Enforcement Plan, the EEOC announced that it had sued CVS in federal court in Chicago because the drugstore chain had conditioned receipt of severance benefits on "an overly broad severance agreement set forth in five pages of small print" that allegedly interfered with employees' right to file charges and/or communicate with the EEOC. At about the same time, the head of the SEC's Office of the Whistleblower announced that his office would actively look for examples of confidentiality, separation and other employee agreements that might impede employees from communicating

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with staff about possible securities violations. Then in May 2014, the EEOC announced that it had sued CollegeAmerica in federal court in Colorado for retaliating against an employee who had filed a charge after signing a form separation and release agreement. Both agencies have focused on non-disparagement clauses as well as release, confidentiality and covenant not to sue language. *EEOC v. CVS* also complains of clauses that require employee cooperation or notification of investigations and stipulate remedies for breaches of the agreement. The EEOC further complained that only CVS' covenant not to sue contained language stating that it was not intended to interfere with the employee's right to participate in a proceeding with appropriate state, federal or local agencies, or from cooperating in an investigation. Whether or not the EEOC is ultimately successful in these suits, this scrutiny requires counsel to carefully consider not only existing company policies, handbooks and agreements, but also the release language, covenants not to sue, confidentiality clauses, non-disparagement and other clauses in the documents prepared as a result of settlements reached in mediation.

The EEOC and SEC are not the only agencies with whistleblower retaliation jurisdiction. As the Supreme Court noted in *Lawson*, the Department of Labor, through OSHA, administers whistleblower protection provisions of some 20 federal statutes. Other federal agencies with oversight of whistleblower protections include the Commodity Futures Trading Commission, Department of Justice and the Department of Defense's Office of the Inspector General. Federal laws such as the False Claims Act and American Reinvestment and Recovery Act also include whistleblower provisions. And with its recent interest in unionized employee use of social media, can the National Labor Relations Board be far behind? States have statutes and common law standards for whistleblower and retaliation claims as well.

The growing number of whistleblower and retaliation claims, coupled with the current pace of legal and regulatory change in this area, makes this area of discrimination dispute mediation a truly evolving field. It is incumbent upon counsel and mediators to remain current on these issues, which will no doubt continue to change. ■

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