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WHISTLEBLOWING

Florida court reverses dismissal of whistleblower lawsuit

by Tom Harper
Law Offices of G. Thomas Harper, LLC

A three-judge panel of the 2nd District Court of Appeals (DCA) recently reversed the dismissal of the claims of Sean Kearns, a former employee of Charlotte Honda in Port Charlotte. During trial, Circuit Judge George Richards granted Charlotte Honda's motion to dismiss the case. The trial ended abruptly, and the jury was dismissed. However, Kearns appealed, and the appeals court reversed the judge's decision on February 11. Read on to learn why.

Background

Kearns was hired as a Web administrator by Charlotte Honda in 2006. In 2008, he began receiving cross-training so he could work in other areas of the dealership, including sales and finance.

At trial, Kearns testified about participating in the sale of a vehicle to a nurse. He testified that the buyer's occupation was listed on the loan application. Based on his experience, he questioned her listed salary. When he asked whether she could prove her income, she said no. According to Kearns, the buyer said, "That's what they put on there." That led Kearns to tell dealership manager Gene Chavez that he would not participate in the transaction since it was fraudulent. Kearns testified that Chavez stated, "You will deliver it. I'm tired of your attitude."

In August 2009, Kearns called the dealership's owner in Kentucky and complained that the dealership was engaging in bank and warranty fraud. The owner told Kearns to talk to Jean Brown, the attorney for Charlotte Honda's parent corporation. Kearns told Brown about "misleading paperwork" the dealership was providing to banks. Kearns' comments concerned Brown. She called him back and said she would travel from Kentucky to Florida to meet with him.

Brown traveled to Florida with the company's comptroller, Tracy Stefanik. They met Kearns at a restaurant on September 8, 2009. Kearns complained about a practice known as "power booking," in which the dealership made fraudulent representations to banks regarding optional features on cars that were sold. By representing that cars had extra features, Charlotte Honda led banks to believe the cars were worth more than they really were. The higher value would in turn lead banks to loan more money to buyers. That gave buyers larger loans and the ability to make purchases from the dealership.

After the meeting at the restaurant, Kearns, Brown, and Stefanik went to the dealership. Brown and Stefanik asked Kearns to "keep it quiet" and not tell anyone that they were in town to investigate. That afternoon, Brown

AGENCY ACTION

EEOC launches antiharassment task force. New Equal Employment Opportunity Commission (EEOC) Chair Jenny R. Yang announced in January that she is establishing a task force to convene experts from the employer community, workers' advocates, HR experts, academics, and others in an effort to identify effective strategies to prevent and remedy harassment in the workplace. Harassment is alleged in approximately 30 percent of all charges filed with the EEOC, according to an agency statement.

OFCCP posts FAQs on veteran self-identification. The Office of Federal Contract Compliance Programs (OFCCP) has released two new FAQ documents regarding the new VETS-4212 reporting form and the rule requiring federal contractors to invite voluntary self-identification of protected veteran status under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). One FAQ addresses whether contractors must continue to invite self-identification of protected veteran status by category at the postoffer stage, while the other FAQ addresses contractors' ability to choose to continue to invite self-identification of protected veteran status by category. The FAQs are available at www.dol.gov/ofccp/regs/compliance/faqs/VEVRAA_faq.htm.

DOL investing $11 million in fight against child and forced labor. The U.S. Department of Labor's (DOL) Bureau of International Labor Affairs has announced $11 million in grants to determine the most effective tools for eliminating child labor and forced labor. The bureau says an estimated 215 million children are engaged in child labor, and there are nearly 21 million victims of forced labor worldwide. The grants include $10 million for 14 impact evaluations, a scientific evaluation technique that seeks to identify what changes or outcomes might be directly attributed to a particular intervention, according to the DOL. An additional $1 million will be used to develop a toolkit to guide the department's partners in efforts to address child labor as they design their monitoring practices.

EEOC back at full capacity. Charlotte A. Burrows was sworn in on January 13 as commissioner of the EEOC, bringing the commission to its full five-member capacity. Burrows fills the slot created when former Chair Jacqueline Berrien's term ended last summer. Burrows joins Chair Jenny R. Yang and Commissioners Constance Barker, Chai Feldblum, and Victoria Lipnic. Before her EEOC appointment, Burrows served as associate deputy attorney general at the U.S. Department of Justice (DOJ). ✤

and Stefanik told Kearns that their review of the dealership's files did not support his claims. He explained that he had observed about 25 fraudulent sales, and he offered to go to the file room and photograph the documents with his phone. Brown declined Kearns' offer, saying she wanted "to keep the investigation quiet."

The next day, Kearns arrived at work and was told that John Hamill, Charlotte Honda's general manager, wanted to meet with him. During the meeting, Hamill told Kearns that "his services were no longer needed at the dealership," and Kearns was immediately escorted off the premises. At trial, Hamill testified that the parent corporation's owner had instructed him to "fire [Kearns'] ass now." Hamill also stated that the owner referred to Kearns as a "troublemaker."

Florida has both a public and a private whistleblower law. Since Kearns worked in the private sector, he sued Charlotte Honda under the private-sector whistleblower law. A key provision of the law states, "An employer may not take any retaliatory personnel action against an employee because the employee has . . . objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." The trial court determined that Kearns failed to establish an actual violation of law and dismissed the case. Kearns appealed.

Appeals court's decision

In reviewing the trial judge's decision to dismiss the case, the 2nd DCA noted that several Florida cases have held that an employee must have only a good-faith, objectively reasonable belief that his employer's actions were illegal. However, the appeals court did not accept the reasoning in those cases. Instead, the court found that Kearns' whistleblower claim required him to prove that he objected to or refused to participate in a "violation of a law, rule, or regulation."

But the appeals court still disagreed with the trial judge's decision. The appeals court found that Kearns presented enough evidence—when viewed in the light most favorable to him—to establish an actual violation of the law. According to the court, "Kearns' testimony regarding the practice of power booking provided sufficient evidence of a violation of [Florida laws] Section 817.03." That law states:

> Any person who shall make or cause to be made any false statement, in writing, relating to his or her financial condition, assets or liabilities, or relating to the financial condition, assets or liabilities of any firm or corporation in which such person has a financial interest, or for whom he or she is acting, with a fraudulent intent of obtaining credit, goods, money or other property, and shall by such false statement obtain credit, goods, money or other property, shall be guilty of a misdemeanor of the first degree.

The 2nd DCA reviewed the testimony and concluded that Kearns presented evidence that the dealership counseled loan applicants to provide false income and vehicle information and

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ASK ANDY

FMLA eligibility pitfalls: 'You worked here when?'

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Q *I am the newly hired HR director for a company. Two months ago, I hired a shift manager. Last week, she requested Family and Medical Leave Act (FMLA) leave to care for her seriously ill husband. I denied her request because I did not think she met the FMLA's 12-month employment requirement. I just learned that she previously worked for the company for three years (before I began working for the company). Is the employee eligible for FMLA leave because of her previous employment with the company?*

A Your question highlights a problem many newly hired HR professionals face, particularly at companies that do not maintain electronic records reflecting employees' previous service. The shift manager may be eligible for FMLA leave because of her previous employment with the company, even though you hired her just two months ago.

You are correct that an employee is not eligible for FMLA leave unless she has been employed by the company (1) for at least 12 months and (2) for at least 1,250 hours during the 12-month period immediately preceding the commencement of leave. Under certain circumstances, however, an employee's previous employment with a company must be taken into consideration when assessing the 12-month/1,250-hour eligibility requirements.

Federal regulations state that the 12-month period does not have to consist of consecutive months of service. In fact, a period of employment prior to a break in the employment relationship of up to seven years must be counted when determining whether an employee has been employed for 12 months. In your case, the employee meets the 12-month employment requirement if she (1) has not had a break in service longer than seven years and (2) worked for the company for at least 10 months during her previous period of service. So, if the employee's break was shorter than seven years, then she may be eligible for leave. When her previous employment with the company is added to her recent two months of service, it gives her the requisite 12 months.

There are even circumstances in which a period of service preceding a break in employment longer than seven years must be counted. Those circumstances include (1) a break in employment caused by an employee's exercise of "uniformed service" leave under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and (2) a written contract (or collective bargaining agreement) between the company and the employee stating the company's intent to rehire the employee after a break in service (e.g., when an employee takes a break to go back to school or raise children).

Ask applicants to list any prior employment with the company on your employment application. Then, if you end up hiring an individual who has already worked for the company, make a note in her personnel file in a place that will catch the attention of anybody assessing her eligibility for FMLA leave.

This issue is not limited to the assessment of the 12-month employment requirement. You also must look at the 1,250-hour requirement. When assessing FMLA eligibility for an employee who is "reaching back" several years to meet the 12-month employment requirement, you may have difficulty determining how many hours the employee worked during the relevant 12-month period, depending on your record-keeping practices. If you're dealing with an employee who you know always worked on a full-time basis and did not take extended periods of leave, it may be reasonable to assume she satisfies the 1,250-hour requirement. In other situations, the determination may not be so clear-cut (e.g., if you're dealing with an exempt employee for whom time records were not maintained). In those situations, it is often helpful to start the analysis by simply asking the employee to tell you about her work schedule during the 12-month period.

Andy Rodman is a shareholder and director in the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com or call 305-789-3256. Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

WORKPLACE TRENDS

Survey shows employees willing to switch jobs if they don't get a raise. The Glassdoor U.S. Employment Confidence Survey released in January shows that 35% of employees report they will look for a new job if they don't receive a pay raise in the next 12 months. Those results come as employee optimism in the job market reaches a new six-year high, with 48% of employees (including those self-employed) reporting confidence that they can find a job matching their current experience and compensation levels in the next six months. Forty-three percent of employees reported expectations of a pay raise in the next 12 months. Half of those looking to receive raises expect their 2015 raise to be between 3% and 5%.

Report shows sharp increase in tech job cuts. A semiannual report from global outplacement firm Challenger, Gray & Christmas, Inc., shows that while the number of overall job cuts declined in 2014 to the lowest level since 1997, planned workforce reductions in the technology sector rose to the largest year-end total since 2009. Tech employers announced a total of 100,757 job cuts in 2014. That was up 77% from 56,918 in 2013, according to the report. The heaviest tech sector downsizing occurred in the computer industry, where employers announced plans to cut payrolls by 59,523, a 69% increase from the 35,136 job cuts by those firms in 2013. Overall, the tech sector was responsible for 21% of the 483,171 total job cuts announced in 2014. It is the first time tech sector job cuts have exceeded 100,000 since 2009, when they reached 174,629.

Poll shows most would move to new country for dream job. An international poll from Monster reveals that more than half of workers (55%) are willing to relocate to a new country to pursue their dream job, and 32% would go so far as to move to the other side of the world. Monster asked visitors to its website "How far would you be willing to relocate for your dream job?" and received over 5,400 responses. Nearly half of the American respondents said they would leave the country for the right job.

Report finds more Americans with disabilities employed. A new report shows job growth for Americans with disabilities for three consecutive months at the end of 2014. The National Trends in Disability Employment—Monthly Update from the Kessler Foundation and the University of New Hampshire's Institute on Disability also reports on innovative programs helping students with disabilities move from school to work. A report from the U.S. Bureau of Labor Statistics (BLS) released on January 9 shows the labor force participation rate increased from 29.1% in December 2013 to 31.7% in December 2014 for working-age people with disabilities. ✤

continued from pg. 2

aided applicants in submitting false information to financial institutions. The court believed that testimony was enough for a jury to conclude that Kearns refused to participate in conduct that violated Florida law. Also, the court found that the timing of Kearns' complaint, the meetings with Brown and Stefanik, and his discharge made it possible for a jury to conclude that there was a causal connection between his complaint and his termination. *Kearns v. Farmer Acquisition Company d/b/a Charlotte Honda,* Case No. 2D12—6388, FL 2nd DCA, February 11, 2015.

Bottom line

The court's decision means that if Kearns presents the same evidence at the new trial, his case will likely be decided by a jury. This decision helps employers by confirming that an employee has the burden of proving that his employer actually violated the law (or an administrative rule or regulation).

Also, this case is noteworthy for HR managers conducting investigations into alleged wrongdoing by company officials. Florida's private-sector whistleblower law applies when an employee provides information to "any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer." Often, HR should play the role of employee advocate. As an investigator, be cautious about quickly dismissing claims of unlawful practices.

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HEALTHCARE REFORM

For the ACA, the time is nigh

The time is here for employers with 100 or more full-time employees (or full-time "equivalents") to "play or pay" under the Affordable Care Act (ACA). Effective January 1, 2015, "applicable large employers" must offer affordable minimum-value healthcare coverage to at least 70% (95% beginning in 2016) of their full-time employees (minus up to 80 full-time employees in 2015 and 30 thereafter) and their applicable dependents or be subject to an annual penalty of $2,000 per each full-time employee who receives a premium tax credit or "subsidy" through a healthcare exchange or marketplace.

What's required?

As of January 1, if an applicable large employer offers healthcare coverage to at least 70% of its full-time employees and their applicable dependents but the coverage is not deemed "affordable" or does not provide "minimum value," then the employer may be assessed an annual penalty of up to $3,000, calculated on a monthly basis, for each full-time employee who receives a premium tax credit or subsidy through a healthcare exchange or marketplace. Coverage is considered affordable if an employee's share of the premium doesn't cost him more than 9.5% of his annual household income. Most employers are choosing

to use employees' W-2 wages for the affordability test, which is considered a safe harbor.

A plan is considered to provide minimum value if it covers at least 60% of the total allowed cost of benefits that are expected to be incurred under the plan. The U.S. Department of Health and Human Services (HHS) and the IRS have produced a minimum-value calculator, which may be accessed at http://cciio.cms.gov/resources/regulations/index.html.

The ACA requirements will become effective January 1, 2016, for employers with 50 to 99 full-time employees (or full-time equivalents).

Who's covered?

Many employers are still working diligently to identify who qualifies as a full-time employee for purposes of the requirement to offer coverage. Under the ACA, a "full-time employee" is any employee who performs an average of 30 or more hours of service per week. Employers may choose to determine full-time status using the "month-to-month" method or the "look-back" method, which employs a predetermined three- to 12-month standard measurement period. For midsize employers whose obligations will be effective in 2016 (i.e., companies with 50 to 99 employees), now is the time to choose a method for determining full-time employee status.

Most employers are choosing to use employees' W-2 wages for the affordability test.

A covered employer doesn't have to offer coverage to part-time employees, even if they were counted in determining its size. It's important to document the method used to determine the status of all employees, including those who work "variable hours." If a newly hired employee is reasonably expected to work full-time (an average of 30 hours or more per week), then she must be offered health insurance coverage within three months (90 days) of her hire date. Similar rules apply to employees who are transferred or have another change in status that could affect their work hours.

Some transitional relief is available for noncalendar year plans. Eligible plans may be able to delay implementation of the affordable and minimum-value requirements until the beginning of their plan year in 2015; however, *all* eligible full-time employees must be offered coverage beginning on January 1, 2015, or penalties may result.

What else?

Here are some additional obligations employers should be aware of:

- **Retaliation and whistleblower protection.** The ACA prohibits an employer from taking an adverse employment action against an employee for, among other things, receiving a subsidy to purchase coverage from a public healthcare exchange.
- **Breaks for nursing mothers.** The ACA amended the Fair Labor Standards Act (FLSA) to require employers to provide reasonable break time and a suitable location for a nonexempt employee to express breast milk for her nursing child. This provision has been effective since March 23, 2010.
- **Cap on health FSAs.** Employee contributions to flexible spending accounts (FSAs) are capped at $2,550 per year for 2015.
- **Transitional Reinsurance Program fees.** The Transitional Reinsurance Program fee provides funding to assist health insurers with the additional costs associated with insuring high-risk individuals in the individual marketplace. The fee of $63 per covered life per year ($5.25 a month) applies to major medical plans. For self-funded plans, the plan sponsor is ultimately responsible for the fee. The first payment was due January 15, 2015, and the second payment is due November 15, 2015.
- **PCORI fee.** Employers sponsoring self-funded plans must pay the applicable fee for each covered life per year under the health plan to help fund the Patient Centered Outcomes Research Institute (PCORI). The fee is $2.08 for each covered life for plan years ending on or after October 1, multiplied by the average number of covered lives under the policy. The first payment for most plans is due by July 31 of the year immediately following the last day of the plan year.
- **W-2 reporting.** Employers that generate 250 or more W-2s must report the cost of employer-sponsored healthcare coverage on their employees' W-2s.
- **HPID registration.** The requirement that health insurance plans register for a Health Plan Identifier (HPID) number has been delayed pending further guidance.

More court wrangling

As employers navigate through these and other ACA requirements, changes, and delays, one issue looms large in the background. We alerted you in September 2014 that two federal appeals courts had issued contradictory rulings with regard to the availability of subsidies under the ACA. In *Halbig v. Burwell,* the U.S. Court of Appeals for the District of Columbia Circuit ruled that the ACA authorizes the availability of tax credits or subsidies only to individuals who buy insurance through exchanges "established by the states." Just a few hours later, the 4th Circuit ruled in *King v. Burwell* that regulations issued by the IRS properly interpreted

UNION ACTIVITY

2014 union membership down slightly. The U.S. Bureau of Labor Statistics (BLS) reported in January that the 2014 union membership rate—the percent of wage and salary workers who were members of unions—was 11.1%, down two-tenths of a percentage point from 2013. The number of wage and salary workers belonging to unions, at 14.6 million, was little different from 2013. In 1983, the first year for which comparable union data are available, the union membership rate was 20.1%, and there were 17.7 million union workers. Public-sector workers had a union membership rate (35.7%) more than five times higher than that of private-sector workers (6.6%). Workers in education, training, and library occupations and in protective service occupations had the highest unionization rate, at 35.3% for each occupation group. Men had a higher union membership rate (11.7%) than women (10.5%) in 2014. Black workers were more likely to be union members than were white, Asian, or Hispanic workers.

Right-to-work group seeks communications on VW union campaign. On January 15, the National Right to Work Foundation filed a Freedom of Information Act (FOIA) request with the U.S. Department of Labor (DOL) to uncover any communication between the DOL and two German labor organizations regarding the ongoing unionization campaign at Volkswagen's (VW) facilities in Chattanooga, Tennessee. The right-to-work group assisted several workers the group claims were subjected to coercive card-check unionization tactics and pressure from management and union organizers during the United Auto Workers (UAW) campaign to unionize the plant. The group also says it helped several VW workers file a federal suit challenging the company's assistance to UAW officials during the campaign as an illegal exchange of "thing[s] of value" under the Labor Management Relations Act (LMRA).

USW makes illegal trade practices claims. The United Steelworkers (USW) and four U.S. paper manufacturers announced in January that they have filed antidumping petitions against what they call unfairly priced imports of certain types of uncoated paper in sheets from China, Indonesia, Brazil, Portugal, and Australia. They also filed countervailing duty petitions against subsidized imports from China and Indonesia with the U.S. Department of Commerce and the U.S. International Trade Commission. The four manufacturers are Domtar Corporation, Packaging Corporation of America, Finch Paper LLC, and P.H. Glatfelter Company. The petitions ask the agencies to impose duties to offset the dumping of certain uncoated paper from all five countries and to offset the subsidies on imports from China and Indonesia. ✤

the ACA to allow individuals to purchase subsidized health insurance coverage through the federal marketplace.

The U.S. Supreme Court has agreed to review *King v. Burwell* to address the following question: "Whether the IRS may permissibly promulgate regulations to extend tax credit subsidies to coverage purchased through exchanges established by the federal government under Section 1321 of the [ACA]." A decision is expected to be handed down mid-2015.

If the Supreme Court rules that the IRS regulations extending tax credits to individuals who purchase insurance through the federal marketplace, rather than just those who buy it through a state exchange, were not permissible, the employer mandate may be rendered meaningless. For now, employers must proceed "full steam ahead" with their ACA obligations as they currently stand. ✤

AGE BIAS

EEOC charges Seasons 52 with age discrimination

by Tom Harper
Law Offices of G. Thomas Harper, LLC

The latest Florida employer to land in the sights of the Equal Employment Opportunity Commission (EEOC) is Orlando-based Darden Restaurants and its Seasons 52 subsidiaries in 10 Florida locations. On February 12, the EEOC filed a class action lawsuit against Seasons 52 and its parent corporations, including Darden, in Miami federal court.

No 'old white guys'

The suit alleges that Seasons 52 opened 35 restaurants nationwide and used a management team to assist local managers in conducting interviews and screening job candidates. According to the allegations, which have been strongly denied by Seasons 52, the company developed "standard operating procedures" that resulted in denying employment to older applicants. According to the EEOC, hiring officials told unsuccessful applicants in a protected age group that they were "too experienced." Hiring officials stated, "We are looking for people with less experience," "We are not looking for old white guys," "We are looking for 'fresh' employees," and Seasons 52 wanted a "youthful" image. The EEOC claims:

> A sampling of defendants' hiring data across restaurant locations nationwide shows that defendants' hiring of applicants for both FOH (front of the house) and BOH (back of the house) positions in the protected age group (age 40 and older) is well below the expected hiring of applicants in the protected age group based on applications submitted and/or local census data, and the disparity is statistically significant for FOH and/or BOH positions.

One of the applicants, Anthony Scornavacca, 52, applied for a server position before the Coral Gables restaurant opened. He claims that during an interview, he was told that he would

not be offered a job because of his shift availability, but younger applicants who had similar or less-favorable shift availability were hired.

Hugo Alfaro, 49, claims he applied for a position at the Coral Gables restaurant and was told he would be contacted for training. When no one called, he went to the restaurant to inquire why. He claims that he was then asked his age. When he asked if he should "check back" about the job, he was told there was "no need to do so." *EEOC v. Darden Restaurants et al.*, Case Number 1:15-cv-20561-JLK (February 12, 2015, So. Dist., Florida, Miami Division).

Bottom line

Make sure that employees who interview applicants have been trained on Florida's protected classes and topics to avoid. Also, monitor which applicants are hired to make sure hiring decisions mirror the applicant pool.

Tom Harper is board-certified in labor and employment law. He is also a Florida Supreme Court Circuit civil and appellate mediator and a panel member of the American Arbitration Association. ✤

WHISTLEBLOWERS

Supreme Court says federal regs not 'law' under whistleblower statute

It's generally safe to assume that most of us support the protection of whistleblowers. After all, if a business or government entity engages in illegal activity, endangers public safety, or wastes public resources, most of us would prefer to know—or have the appropriate officials know so the problem can be resolved. Even if the whistleblower discloses information that is confidential or otherwise protected, we still typically believe it is best to have those details come to light.

But the issue becomes more difficult when that confidential information includes information deemed "sensitive" by the federal government—information that, if delivered to or by the wrong person, could be dangerous in itself. Luckily, the U.S. Supreme Court recently weighed in on this specific issue.

Background

Robert J. MacLean was an air marshal for the Transportation Security Administration (TSA). In 2003, in the course of his employment, he received information that the agency would be cutting costs by eliminating the use of security staff aboard certain long, overnight U.S. flights.

MacLean, who had just received information regarding potential terrorist activity on such flights in a Department of Homeland Security (DHS) briefing, believed this reduction of air marshal coverage compromised public safety. He complained to TSA officials, and when the agency opted to move forward with the cutbacks, he went public with the information. The TSA was forced to abandon the cost-cutting plan after considerable media coverage and congressional outcry.

The cutback information later would be classified as "sensitive security information," the disclosure of which is prohibited by federal regulations. Three years later, when the TSA learned that MacLean was the one who disclosed the information, his employment as an air marshal—and his ability to work in law enforcement—was terminated.

Courts, up to and certainly including the U.S. Supreme Court, consistently rule in favor of whistleblowers.

When is a law not a law?

MacLean appealed his discharge and argued that his disclosure was protected by the federal Whistleblower Protection Act (WPA) and that he couldn't legally be discharged for his actions. The WPA prohibits a federal employer from taking personnel actions against a worker for exposing information that he reasonably believed would prevent a specific danger to public health or safety.

The WPA does have exceptions. Specifically, protection under the Act doesn't extend to disclosures that are prohibited by law. Citing that exception, the federal review board that heard MacLean's appeal pointed out that he wasn't entitled to WPA protection because his disclosure of sensitive security information was prohibited by TSA regulations.

But MacLean argued the exception didn't apply because although his action may have been prohibited, it was prohibited by agency *regulation*, not by a specific law or statute. The Federal Circuit agreed with MacLean's analysis—that the agency regulations don't rise

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to the level of being *law*—and DHS sought review by the U.S. Supreme Court.

Supreme Court's decision

The Supreme Court, in a 7-2 split, sided with MacLean. Chief Justice John Roberts wrote the majority opinion and concluded that violation of TSA regulations isn't enough to deny MacLean protection under the WPA.

In a detailed exercise of statutory interpretation, the Court pointed out that the full phrase "law, rule, or regulation" appears elsewhere in the WPA. Therefore, if Congress had intended the particular section in question to exclude disclosure of information "prohibited by law, rule, or regulation" from whistleblower protection, it would have written the law to do so. Yet in this section, the WPA was specifically drafted to exclude only disclosures that are "prohibited by *law*."

DHS argued that disclosures of sensitive information—and the message sent by a judgment protecting those disclosures as whistleblower activity—would present its own threat to public safety and security. While the Court found those concerns legitimate, Justice Roberts noted that they could and must be addressed by Congress through statute or by the president through an Executive Order.

In other words, if the need to prohibit the disclosure of such information is critical enough to public safety and national security that it should be excluded from protection under the WPA, then such disclosures can and should be prohibited by *law* rather than a set of agency regulations. Otherwise, the Court held, agencies could easily circumvent the protection of the WPA entirely by simply adopting internal regulations prohibiting whistleblowing activities. *DHS v. MacLean.*

Bottom line

Though the reach of the WPA and this opinion will mostly be of interest to government employers, it's important for all employers to be attentive of the growing body of law protecting whistleblowers from retaliation.

Courts, up to and certainly including the U.S. Supreme Court, consistently rule in favor of whistleblowers and are reluctant to discourage or dissuade them from coming forward with knowledge of unethical, illegal, or endangering policies and practices. As a result, all employers—public and private—should be particularly cautious if disciplinary action is or must be taken against an employee who has participated in whistleblowing activity. ✤

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