

WHAT TO KNOW IF THE WHISTLES BLOW

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You're facing a tight deadline and now you're a week behind. Was it the weather? No, it's sunny and dry. Was it a delay in transporting materials? No, the materials were delivered this morning. So why are you just looking at your jobsite? You've got a whistleblower in your midst. Before you get worked up, remember that the law encourages whistleblowing.

Whistleblowing in General

Often an employment relationship is one of at-will employment. Under an at-will employment relationship, an employer may fire an employee-at-will for any reason or no reason at all. But an employer's seemingly broad discretion to hire and fire as they please is limited by a few exceptions. One such exception is the protection afforded to whistleblowers, which are employees that report employer misconduct.

The reason for this protection is clear. The employer's interests must be counterbalanced by the interests of employees in earning a living and the community's interest in seeing its laws carried out. Understanding why the policy is in place has implications for understanding what type of protections it will offer your employees.

In Illinois, employees are protected not only by federal whistleblower laws, but also by Illinois law. Specifically, Illinois offers employees protection under the common law retaliatory discharge tort as well as the statutory Whistleblower Act.

Illinois Whistleblower Act

The Illinois Whistleblower Act protects disclosures which the employee reasonably believes disclose a violation of State or Federal law, rule or regulation.

The Act protects employees in a number of ways. *First*, it prohibits employers from adopting and enforcing policies that prevent employees from making protected disclosures to government or law enforcement agencies. *Second*, the Act prohibits employers from retaliating against employees for making protected disclosures. *Third*, it prohibits an employer from retaliating against an employee for refusing to participate in an activity which would violate State or Federal law, rule or regulation.

A determination of whether an employee is protected by the Whistleblower Act depends on more than just the *type* of communication that is protected (i.e. communications which the employee reasonably believes will

disclose a violation of State or Federal law, rule or regulation). It also depends on to *whom* the communication is made and *where* the communication is made. This is a major difference between the Whistleblower Act and the common law.

Under the Whistleblower Act, the employee is only protected if he or she discloses information either (a) to a *government or law enforcement agency* or (b) in a *proceeding*, such as in a court or administrative hearing or before a legislative commission or committee. Other disclosures or complaints, even when made to a supervisor, are not protected. In the federal system, both the Northern and Southern districts of Illinois have addressed this issue and have concluded that disclosures made to someone other than those named by the Act are not afforded Whistleblower protection. Accordingly, obtaining a dismissal of a claim brought under the Act can be relatively easy just by virtue of who received the communication.

An employer that violates the Act may be held civilly and criminally liable, as a violation of the Act is considered a Class A misdemeanor.

Common Law Retaliatory Discharge Hangs in the Balance

For nearly 30 years, Illinois courts have recognized the common law tort of retaliatory discharge in the context of whistle blowing. When the Whistleblower Act became effective in 2004, it was already well established that a claim for retaliatory discharge could be brought by an employee who had blown

the whistle on his or her employer's misdeeds.

This Whistleblower Act appears to have created a rift between the federal courts and the state courts regarding whether retaliatory discharge actions can be brought for whistleblowing. Federal courts have acknowledged that the Whistleblower Act codifies the common law tort of retaliatory discharge as it applies to whistleblowers. Federal courts (particularly in the Northern District) have taken this one step further and held that the Whistleblower act does away with the common law tort of retaliatory discharge for whistle blowing.

From the employer's standpoint, this represents a legal windfall because it greatly limits the type of actions that can be brought against the employer. Under this approach, the Act does away with the common law, which allowed employees to bring actions for retaliation even if the disclosure was made to someone other than a government or law enforcement agency. In addition to doing away with the more protective common law, the Act only allows for recovery where the employee makes a disclosure to a government or law enforcement agency or in a proceeding. This is bad news for employees because disclosures or statements made to the employer are not protected.

The First District Appellate Court of Illinois, which consists solely of Cook County, did not go so far as to say that the Whistleblower Act did away with the common law. Instead, the court made it clear that it believed the federal

approach is wrong and that the Whistleblower Act does not do away with common law recovery tort of retaliatory discharge for whistleblower activity. Therefore, in state court actions brought in the First District, a plaintiff is given two bites at the apple. If their claim does not fit neatly within the requirements of the Act, they can bring the action under the common law of retaliatory discharge.

Until the Illinois Supreme Court resolves the question of whether the Whistleblower Act disposes of the common law claim, *litigants should be aware of the possibility that a five minute walk from one courthouse to the other can make the difference between winning and losing.*

The Basics of Common Law Retaliatory Discharge

Employers should remember that, until the issue of ‘whether the common law action has been done away with’ is resolved, it may be possible to be sued under the common law tort of retaliatory discharge for whistleblowing.

In Illinois, a plaintiff claiming retaliatory discharge must show that (1) he or she has been *discharged*, (2) the discharge was in *retaliation* for his or her activities; and (3) the discharge clearly goes against *public policy* – what is right and just and what affects the citizens of the State collectively.

In Illinois, only a few public policies override employment at will. One of which is the fundamental principle that a person is responsible to

report and refrain from engaging in illegal activity – whistleblowing. For twenty five years, courts have recognized whistleblowing as a public policy deserving of protection.

The common law tort claim of retaliatory discharge is both more forgiving and less forgiving as to employers. It is *less* forgiving towards employers because more is included in the type of employee activity that is protected. For example, unlike the Whistleblower Act, the common law recognizes that an employee who reports illegal conduct to his or her supervisor is still serving the public policy of enforcing the law and is therefore protected from discharge.

A retaliatory discharge cause of action is *more* forgiving with regard to employers because it places less restrictions on an employer’s conduct – specifically, it only applies to *actual* discharges. The Illinois Supreme Court has held that a claim for retaliatory discharge does not include retaliatory demotions, suspensions or any other circumstance in which an employee suffers a loss of employment status or income or both, but is not terminated from his or her employment all together. While the question has not yet been addressed by a court, the Whistleblower Act seems to be broader in that it applies to retaliation generally, not just termination.

Clients and their attorneys should also be aware of the nature of the claim. A claim based on situations of retaliatory conduct that do not amount to termination of employment should

probably be brought pursuant to the common law tort of retaliatory discharge – which at least one state appellate court, but no federal courts, have held to still be a valid law from which a suit may be filed.

Practical Considerations

While, under the Whistleblower Act, an employer is not precluded from taking action against their employees for making disclosures only to supervisors, employers probably will not be best served by taking advantage of this law. This is not the most practical approach because shutting the door to your employees will create no alternative but to go directly to the authorities. Furthermore, from a risk management perspective, employers should be aware that state law is unresolved as to whether the Whistleblower Act preempts the common law. Therefore, they may find themselves to be an unwilling participant in the final determination of the question.