CONNOLLY GALLAGHER LLP

January 2018

Whether Employees Complaining Internally to Employers Have Protection from Retaliation (a/k/a "Whistleblower Protection")

By Timothy M. Holly

A case pending before the U.S. Supreme Court may have profound implications for both employers and employees. On Tuesday, November 28, 2017, the Court heard oral argument in the matter of *Digital Realty Trust Inc. v. Somers*. The written decision (not yet available) will provide an answer to the question of whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have reported internally with their employer but who have not reported alleged misconduct to the Securities and Exchange Commission ("SEC") and thus fall outside the act's definition of "whistleblower."

The issue might be less significant in Delaware than elsewhere due to the Delaware Whistleblowers' Protection Act, which specifically protects employees who complain internally to employers or to their supervisors – including in ways that overlap with protections afforded by federal law. But remedies can be different under federal law. Thus, the issue is certainly worthy of consideration everywhere.

Furthermore, this case may be important far beyond the confines of the legal framework surrounding Dodd-Frank and the financial industry because it touches on a broader, similar question about other types of retaliation, which can apply to employers within and outside the financial industry. Indeed, the opinion in the *Somers* case might give important clues about how the United States Supreme Court might treat other anti-retaliation provisions that are even more commonly at issue in employment situations – regardless of whether the business has anything to do with securities. Indeed, this case might even stimulate litigation to push to issue lingering, similar questions that arise under other statutes – such as the Fair Labor Standards Act ("FLSA), which also has an anti-retaliation provision; and wish is discussed in greater detail below.

The question at issue in the *Somers* case is essentially whether an employee's complaint internal to an employer (rather than outside of the company – *e.g.*, to the SEC and/or the Occupational Safety and Health Administration, which can have jurisdiction over many retaliation claims) is protected such that retaliation (*e.g.*, termination of employment or other adverse employment-related consequences) is illegal under the relevant statute. Many informed employers and employees might believe that internal activity is protected (perhaps premised on

Exchange Act Release No. 34-75592, 80 Fed. Reg. 47,829 (Aug. 10, 2015)). But that conclusion *might* not hold to be true.

In sum, courts have inconsistently held whether internal disclosures are protected under Section 922 of Dodd-Frank, 15 U.S.C. § 78u-6(h). Under § 78u-6(a)(6), the term "whistleblower" means "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission" (emphasis added). The anti-retaliation provision in Section 922, defines protected conduct as lawful actions taken by a whistleblower:

> **(i)** in providing information to the Commission in accordance with this section;
>
> **(ii)** in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> **(iii)** in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. [§§] 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A). Thus, the definition of "whistleblower" appears to require a disclosure to the SEC.

However, some believe the law provides for claims relating to internal complaints due to a "catch-all" provision in § 78u-6(h)(1)(A)(iii), which encompasses conduct protected by Section 806 of The Sarbanes-Oxley Act, including internal disclosures made to supervisory personnel irrespective of whether those disclosures are made to the SEC. This dispute sets the stage for the *Somers* case, for which we await a ruling.

More broadly than the issue pending before the Supreme Court, as most employers and employees know, many different statutes provide employees with a private right of action for retaliation for engaging in activity protected by the applicable statute. However, many assume that a complaint internal at an employer (as opposed to external to an administrative agency) is or is not protected. Many may not be aware that the answer is not as clear as often believed.

Internal complaints with respect to certain kinds of employer conduct are expressly protected under applicable law. For example, Title VII (a law prohibiting, for example, race and sex discrimination) indisputably protects employees from retaliation when they, in good faith, make internal complaints about discrimination. Specifically, Title VII states in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he [the employee] has opposed any practice

> made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (1994). The "has opposed any practice" language does not specify protection only for opposition articulated to an administrative agency. Thus, internal, opposition activity is protected, making retaliation caused by such activity unlawful. Of course, the issue of the meaning of "cause" in retaliation statutes presents its own interesting discussion (as to which the Supreme Court recently weighed in); but that is a matter for another place.

Other anti-retaliation provisions are not as clear as Title VII regarding the question of whether internal complaints are protected. Section 510 of ERISA provides as follows:

> "It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act."

29 U.S.C. § 1140. The Third Circuit has held that this language requires that any giving of information is protected only if it is done in any "inquiry or proceeding" of the nature stated in the statute; and thus an internal complaint made voluntarily by the employee (not in response to a request for information from the employer) is not protected. *See Edwards v. A.H. Cornell and Son, Inc.*, 610 F.3d 217 (3d Cir. 2010).

Under the Fair Labor Standards Act, covered employees are protected from retaliation when they have "filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). The Third Circuit has noted that this provision does not explicitly state the level of formality required. *See Edwards v. A.H. Cornell and Son, Inc.*, 610 F.3d 217, 224-225 (3d Cir. 2010). While at least arguably inferring that internal complaints would be viewed as protected by the FLSA, the Third Circuit stopped short of so holding and noted that a circuit split existed on the issue of whether Section 15(a)(3) of the FLSA protects internal complaints.

In 2011, the United States Supreme Court was called upon to decide whether FLSA protects oral as well as written complaints of violation of the Act. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011). The Court (Justice Kagan took no part in the consideration or decision of the case) held that oral complaints are protected. However, the majority did not address the issue of whether internal complaints are protected because (although it was raised in the case below) it was not made in response to the petition for certiorari. Thus, the majority held that the issue remained an open question.

For the issue of whether internal complaints are protected, one must read the dissenting opinion by Justice Scalia, which was joined for the most part by Justice Thomas. The dissent was not moved by the majority's feelings that the issue should remain an open question and explained that the majority opinion adopted a test for "filed any complaint" that assumes a "yes" answer to the question—and that "makes no sense otherwise." Although the EEOC has set forth the position that intracompany complaints constitute "fil[ing] any complaint" within the meaning of § 215(a)(3) in the compliance manual it issues to field offices (2 *EEOC Compliance Manual* § 8–II(B) & 8–II(B) n. 12 (2006)), the dissent rejected that view (giving it no deference), finding it lacking the "power to persuade."

In finding that "§ 215(a)(3) does not cover complaints to the employer at all," the dissent acknowledged that the Supreme Court "has sometimes sanctioned a 'living Constitution'" but stated that "it has never approved a living United States Code." *Id.* at 17, 22. The dissent stated that "[t]he plain meaning of the critical phrase and the context in which appears make clear that the retaliation provision contemplates an official grievance filed with a court or an agency, not oral complaints—or even formal, written complaints—from an employee to an employer."

Justice Scalia noted that, in isolation, the word "complaint" could cover an intra-company complaint, because "complaint" "often has an expansive meaning, connoting any '[e]xpression of grief, regret, pain ... or resentment.'" *Id.* at 18-19 (quoting Webster's New International Dictionary 546 (2d ed.1934) (hereinafter Webster's). However, the dissent noted that, at the time the FLSA was passed (and still today) the word when used in a legal context has borne a specialized meaning: "[a] formal allegation or charge against a party, made or presented to the appropriate court or officer." *Id.* (also citing Cambridge Dictionary of American English 172 (2000) ("a formal statement to a government authority that you have a legal cause to complain about the way you have been treated"); 3 Oxford English Dictionary 608 (2d ed.1989) ("[a] statement or injury or grievance laid before a court or judicial authority ... for purposes of prosecution or of redress")).

Relying on that "plain meaning" of the word "complaint" (as well as other textual clues in the statute), which the dissent found to be "clear in light of its context," the dissent found there to be no need to rely on abstractions of congressional purpose. However, the law is not settled as it pertains to the FLSA retaliation. Indeed, courts have disagreed with the *Kasten* dissent and have ruled that the FLSA protects internal complaints. *See e.g., Greathouse v. JHS Sec. Inc.*, 784 F.3d 105 (2nd Cir. 2015). One might reasonably expect that this issue under the FLSA will eventually either be resolved through legislation or by the Supreme Court.

Perhaps the pending decision in the *Somers* case will stimulate evolution on that legal issue. In any event, although that pending United States Supreme Court decision will not likely definitively answer questions regarding statutes other than the Dodd-Frank Act, it will be instructive to observe how the Court addresses these issues under its present composition. For one thing, Justice Scalia (the author of the dissent in *Edwards v. A.H. Cornell and Son, Inc.*) is

no longer on the bench. Also, Justice Kagan was (unlike in the E*dwards* case) active at oral argument in the case, as was Justice Gorsuch.

At oral argument, Justice Kagan observed the law as written was "quite odd." Justice Kagain opined that "[a] typical anti-retaliation provision, you would think, [would say] if I report internally and I'm fired for it, then I get my protection." Justice Kagain said, "It's odd. It's peculiar. It's probably not what Congress meant. But what makes it the kind of thing where we can just say we're going to ignore it?" In response to an argument about what Congress meant to do (*i.e.,* to extend protection afforded to employees who file complaints with the Labor Department to those who complain internally), Justice Gorsuch stated, "We don't follow what they are trying to do. We follow what they do."

As employers and employees wait to see what the Supreme Court has to say in the *Somers* case, now might be a good time for employers and employees to reflect on if, when, and how they believe protection from retaliation exists under a variety of statutes – and modify behavior with care (based on a more informed understanding of the law).

Just to be clear . . . not every act of "retaliation" is unlawful; nor is everything that feels like a "hostile work environment" actionable. Those words have specific (albeit perhaps arguable) legal meaning. That much is clear. But obviously other issues remain (at least for now) much less clear. At least some more clarity is on its way.

Tim Holly is a partner and co-chair of Connolly Gallagher LLP labor & employment group. He currently serves on the Delaware State Chamber of Commerce's Employer Advocacy and Education Committee. You can contact Tim directly at (302) 252-4217 or email tholly@connollyallagher.com.