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Labor, Employment & Benefits

Employee Complaint of "Unallowable" Activities Satisfies Whistleblower Act

William Fanslow worked in the Information Technology Department of Chicago Manufacturing Center, a contractor for the National Institute of Standards and Technology. As part of his job, Fanslow recommended purchasing a customer relations management system known as VAULT, which the company bought and implemented. However, the system proved problematic and Fanslow was criticized for the choice. At that time, a CMC vice-president offered a business plan for his own system, a for-profit dot-com spin-off that would provide web based products to CMC's manufacturing clients. The system would allow the vice-president to make a profit from CMC by selling products to his own company. Concerned that the system created "unallowable" costs under CMC's non-profit funding structure, Fanslow reported the issue to an NIST official and also raised his concerns with CMC executives. Later, Fanslow received a negative performance evaluation and was terminated. Fanslow sued CMC under the False Claims Act and the Illinois whistleblower laws. The trial court dismissed the lawsuit, finding that Fanslow could not properly be labeled a "whistleblower" because he did not give proper notice of his complaint and did not include in his complaint information sufficient to identify it as protected by whistleblower laws. Fanslow appealed.

In Fanslow v. Chicago Manufacturing Center, Inc. (9/20/04), the U.S. Court of Appeals for the Seventh Circuit reversed the trial court and reinstated Fanslow's claim. The appeals court rejected the trial court's conclusion that Fanslow failed to qualify as a whistleblower because he did not use the terms "illegal, fraudulent, or false" when lodging a complaint that his employer was misusing government funds. Mentioning illegality is only required from employees whose job it is to identify potential fraud, the appeals court explained. Because Fanslow was an IT employee who was responsible for purchasing equipment, not reporting or monitoring potential fraud, his use of the term "unallowable" was enough notice that he was threatening to go to authorities to report potential wrongdoing. Further, although Fanslow had not presented sufficient information to prove fraud, he presented sufficient information to conclude that he might later be able to do so. "Congress intended to protect employees from retaliation while they are collecting information about a possible fraud, before they put all the pieces of the puzzle together," the appeals court stated.

Employee Not Required To Identify Specific Breach to Proceed in Sarbanes-Oxley Claim

Judy Collins worked as a marketing director for Beazer Homes USA, in Jacksonville, Florida. Shortly after her hire, Collins and her boss had a disagreement regarding the company's use of an advertising agency that Collins soon replaced. Collins, however, believed that her boss continued to use the advertising company covertly. Collins reported the conflict to a Beazer vice-president, alleging that marketing costs were not being categorized properly. Collins brought several additional complaints to Beazer officials regarding the quality of the division's products, the use of the advertising agency she disfavored, various accounting practices, as well as conflicts with other employees. Prior to the conclusion of her 90-day probationary period, Beazer fired Collins due to her inability to get along with her colleagues. Collins sued Beazer, alleging that Beazer retaliated against her in violation of the Sarbanes-Oxley Act and Florida state law for reporting violations of internal accounting controls. Beazer requested that the court dismiss the lawsuit based on its assertion that Collins had not engaged in activity protected by the Sarbanes-Oxley Act.

In Collins v. Beazer Homes USA Inc. (9/2/04), the U.S. District Court for Georgia denied Beazer's request and ruled that Collins could proceed with her claim. The court rejected Beazer's contention that Collins' complaints were not protected because they were too vague. Although Collins' complaints about violations of internal accounting controls were less specific than those brought by an Enron employee, resulting in the enactment of the Sarbanes-Oxley Act, the court found that Congress did not intend to limit the protection of the SAO whistleblower law by requiring complainants to identify specifically the code section that they believe was being violated. Further, the court found, Beazer officials realized that Collin's complaints raised serious allegations, which they investigated. Although Beazer ultimately determined the allegations lacked merit, Collins was not required to show an actual violation of the law, only that she "reasonably believed" that a law had been violated, the court concluded.

Failure to Timely Reinstate Employee Following Return from Medical Leave Violates FMLA

Lori Hoge was a production worker at Honda's manufacturing plant when she injured her back in a car accident. When she returned to work, Honda transferred Hoge to a different assembly line to accommodate her physical restrictions. Thereafter, Hoge took a one-month leave of absence to undergo unrelated surgery. After Hoge obtained a medical release from her doctor, she immediately came to the plant expecting to return to work. Honda informed her that no positions were available at that time. Approximately one month following her medical release to return to work, Honda placed Hoge in a job on a different assembly line. Honda said the delay in returning Hoge to work was caused by not knowing when Hoge would return, the need to find an equivalent job that Hoge could perform given her medical restrictions, and changes made to the production process during Hoge's absence. Hoge sued, claiming Honda violated the Family and Medical Leave Act by failing to return her to work immediately upon receiving notice of her ability to do so.

In Hoge v. Honda of America Manufacturing, Inc. (9/16/04), the U.S. Court of Appeals for the Sixth Circuit ruled that Honda violated the FMLA by not reinstating Hoge after she was medically released from leave. The appeals court rejected Honda's argument that the FMLA's requirement of job restoration upon return from leave requires an employer to return an employee "within a reasonable time after the employee is able to return." The court concluded that the FMLA's requirement of job restoration is unambiguous and that "if Congress had intended to permit employers to restore employees within a reasonable time after their need for FMLA leave had ended, it would have so stated." Job restoration is required once the employer has notice of the employee's ability to return to work. In Hoge's case, the appeals court determined that, even if Honda did not have reasonable notice of Hoge's intent to return to work on the day she appeared at the plant, it should have reinstated Hoge within two business days following her return.

Iranian Guidance Counselor Terminated after September 11 Can Challenge Firing under Title VII

Foad Afshar, a native of Iran, worked as a guidance director for Pinkerton Academy. As recently as the summer before September 11, 2001 Afshar received positive performance evaluations and was offered a promotion. After September 11, Afshar claims he was not included in the school's handling of the tragedy and an assistant headmaster required him to provide proof of a valid "green card." On September 18, three counselors complained that Afshar made two inappropriate comments during a parent meeting and that he was "autocratic, dishonest, and demeaning." On September 26, a counselor complained of harassment, but the school investigated and was unable to substantiate the complaint. In early 2002, the school decided not to renew Afshar's employment contract, citing "issues with management skills, issues dealing with parents, and problems with staff which are not all [Afshar's] fault." Afshar sued Pinkerton Academy under Title VII, claiming discrimination on the basis of his national origin and on a misperception that he was Muslim.

In Afshar v. Pinkerton Academy (9/7/04), the U.S. District Court for New Hampshire denied Pinkerton's request for dismissal. Although the court found that Pinkerton's original reasons for not renewing Afshar's contract provided legitimate non-discriminatory reasons for its employment decisions, the school later offered new reasons that now suggested pretext. The court also found that the timing of the complaints about Afshar, in contrast to its praise of him earlier in 2001, raised credibility issues. "Further, to the extent that Pinkerton argues that its decision to terminate Afshar was necessary to resolve unrest in the department, even if the unrest was unfounded and due in part to discriminatory animus, that would not be a legitimate basis for terminating him," the court

stated.

Some Sleep Time May Not Be Compensable, Says U.S. Department of Labor

The U.S. Department of Labor's Wage and Hour Division recently revised its position on the compensability of sleep time for certain group home employees. Previously, the DOL took the position that sleep time must be compensated under the Fair Labor Standards Act if the employee is required to remain on the employer's premises. In a recently released Wage and Hour Division Opinion Letter (7/24/04), the DOL revised its position and concluded that sleep time does not necessarily have to be compensated, provided employees who permanently reside at group homes have periods of complete freedom outside of sleep time that are sufficient to engage in normal, private pursuits. The group home employer who submitted the issue to the DOL described an arrangement where employees live on the premises on a permanent basis to provide care and support to group home residents. Under the facts outlined by the employer, the DOL concluded that any reasonable agreement reached between the employer and its employees to exclude sleep time may be permissible, provided the employees reside on the premises permanently, are completely free to leave the premises for their own purposes during all non-duty time other than sleep time, are paid for all time called to duty during sleep time, are paid for all sleep time if it is interrupted for duty calls to the extent that the employee is unable to get five hours of sleep, typically work some hours during non-sleep time, and are paid for all work performed during non-sleep time.