

**WHISTLEBLOWER UPDATE:
Expanded State and Federal Legal Protection of Employees¹
Employment Law Seminar**

By Leslie Bottomly

March 17, 2011

Whistleblowing has come a long way from its purported origin as the act of an English bobby, upon becoming aware of the commission of a crime, sounding his whistle to alert other officers and the public within the zone of danger.² In its modern form, we associate whistleblowing with Enron, Worldcom, and other high profile instances of employees who called attention to their employer's violation of legal or ethical rules. These instances typically came to light after large scale corporate failures or an employee's lawsuit for wrongful termination, having been fired after publicizing the employer's wrongdoing.

I. INTRODUCTION

It is helpful to examine a range of whistleblowing cases in order to recognize fact patterns that may arise in your workplace. A sampling of recent whistleblowing cases includes the following scenarios:

- A nurse with almost 20 years of service complains that other hospital employees are improperly taking photos of sedated patients and posting the photos on Facebook, in violation of the Health Insurance Portability and Accountability Act's ("HIPAA") privacy provisions. Shortly thereafter, she is fired. She sues for \$15 million, under a variety of retaliation, discrimination and whistleblowing theories.³
- A Human Resources Manager provides notice that she is applying for a medical leave of absence for work-related stress. She is terminated the next day. According to the complaint "[p]rior to her termination, Plaintiff had reported to her manager that she objected to being required to advise employees of their

¹ This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

² Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 548 (2004) (citing *Dahl v. Combined Ins. Co.*, 621 NW2d 163, 167 (SD 2001)).

³ See <http://www.setexasrecord.com/news/232304-nurse-accuses-hospital-employees-of-posting-photos-of-sedated-patients#>.

family leave rights in contravention of law * * * * Defendants terminated Plaintiff in substantial part because she had reported in good faith what she believed to be a violation of law.”⁴

- A former nurse in a Portland healthcare facility files a complaint for retaliation and whistleblowing, alleging she was fired after reporting violations of law pertaining to patient care. Her termination immediately preceded a state survey of the facility. She requests \$650,000 in damages.⁵
- An Operations Manager claims he was terminated in part because “he reported internally in good faith information he believed was evidence of a violation of a state or federal law, rule or regulation, “ apparently based upon reporting building code and permit violations and/or false certifications, although he also alleges opposing sex discrimination in the workplace. He asks for \$1,200,000 in damages.⁶
- An employee of Portland hamburger joint talks to the U.S. Department of Labor regarding the restaurant’s profit-sharing plan. BOLI separately penalizes the restaurant \$22,000 for failing to properly pay the employee and another former worker. Restaurant files a defamation suit against the employee based upon her comments to the U.S. DOL. The lawsuit is dismissed under Oregon’s anti-SLAPP (“Strategic Lawsuit Against Public Participation”) law,⁷ and the restaurant is ordered to pay \$16,000 in legal defense costs.⁸
- A nurse files a claim for retaliation because she is fired shortly after informing her supervisor that she is going to prepare a written report of violations involving (among other things) fraudulent billing, refusal to accept uninsured patients, and unlawful discharge of patients. The employer says she was fired for poor performance. Before leaving employment, the nurse downloads contents of her work computer to obtain evidence of alleged Medicare fraud. The employer sues the employee, seeking to retrieve its records. The court states that the employer “* * * cannot shield itself from liability for alleged misconduct by claiming that the records are confidential and cannot be disclosed. Indeed, the disclosure of

⁴ *McMahon v. T-Mobile USA, Inc.*, 2011 WL 135078 (Or Cir) (Trial Pleading). This case raises issues previously discussed in the Ten Issues from 2010 Employment Roundtable in *Whistleblowing – When Reporting Violations is Part of the Job*,

<http://www.aterwynne.com/files/Ten%20HR%20Issues%202010.pdf>.

⁵ *Summers v. Extendicare Homes, Inc.*, 2011 WL 51730 (Or Cir) (Trial Pleading).

⁶ *Wilson v. The Quikrete Companies, Inc.*, 2010 WL 5550489 (Or Cir) (Trial Pleading).

⁷ ORS 31.150.

⁸ Brent Hunsberger, *Judge orders Stanich’s to pay \$16,000 of ex-worker’s legal costs* (Feb. 21, 2011), http://www.oregonlive.com/business/index.ssf/2011/02/judge_orders_stanichs_to_pay_e.html.

confidential health care information is not a violation of the [Act] if done by a whistleblower in good faith.”⁹

- A police officer files a lawsuit following reassignment allegedly as a result of his reporting concerns regarding the behavior of his sergeant.¹⁰ Officer expressed belief that sergeant was stressed from involvement in the aftermath of the high-profile death of James P. Chasse, Jr. Officer reported his concerns to the media. His supervisor states “[s]ometimes there are people that complain about things, and are complaining because of their own self interest, and it has nothing to do with the credibility of the complaint * * * When somebody’s not meeting your expectations and performance, you have to hold them accountable.”¹¹

There have been laws on the books for a number of years protecting whistleblowers, but such laws typically were limited to specific industries (healthcare workers reporting risks to patients, for example) or to certain sectors (protecting only public employees, for example), or limited to reports made to specific agencies, or with regard to particular types of legal violations (crimes or accounting fraud by publicly traded companies).

Following Enron and similar cases, lawmakers sought to encourage whistleblowing by protecting employees from losing their jobs, demotion, or other forms of retaliation at the hands of employers that would rather dismiss the employees than correct the purported wrongdoing. As a result, today there are a wide variety of federal and state laws protecting whistleblowers. It usually takes a few years after legislation is enacted for employees and plaintiff’s attorneys to become educated about the expanded rights and protections. Because these laws were enacted in the last few years, we are just starting to see a higher volume of whistleblowing lawsuits.

II. OREGON’S WHISTLEBLOWER PROTECTIONS RECENTLY EXPANDED

The Oregon legislature’s amendments to the whistleblower laws applicable to private employees,¹² which became effective on January 1, 2010, expanded the protections afforded to Oregon employees.¹³

Criminal or Civil Action. ORS 659A.230 prohibits employers from discriminating or retaliating against an employee who, “in good faith, reports criminal activity by any person, cooperates with a law enforcement agency conducting a criminal investigation, causes a

⁹ *Westlake Surgical, L.P. v. Turner* (Tex App 2009), http://scholar.google.com/scholar_case?case=14961997988590488791&hl=en&as_sdt=2&as_vis=1&oi=scholar.

¹⁰ Maxine Bernstein, *Portland Officer Tom Brennan’s lawsuit claims he was ‘exiled’ to warehouse after raising concerns about sergeant*, http://www.oregonlive.com/portland/index.ssf/2010/05/portland_officer_tom_brennan_f.html (linking to copies of e-mails).

¹¹ Maxine Bernstein, *Portland officer files whistleblower complaint* (Jan. 29, 2010), http://www.oregonlive.com/portland/index.ssf/2010/01/portland_officer_files_whistle.html.

¹² This portion of the materials is based on Shemia Fagan’s *Whistleblowing*, Employment Law Seminar (Ater Wynne LLP Sept. 16, 2010).

¹³ ORS 659A.199. *See also* OAR 839-010-0100. Such broad protection was previously afforded only to public sector employees under ORS 659A.203.

complaint¹⁴ to be filed against any person, brings a civil proceeding against an employer, or testifies at a civil proceeding or criminal trial.”¹⁵ The legislature recently expanded the scope of ORS 659A.230 to include employees whom the employer *believes* has reported criminal activity.¹⁶ This means that employees are protected even if they have not actually reported or become aware of criminal activity, so long as the employer believes the employee has reported it. In addition, employees who “caused criminal charges to be brought against any person” are now protected from retaliation, even if the employee is not the person who initiated the criminal charges.¹⁷

Violation of Law, Rule or Regulation. ORS 659A.199 states:

It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that *the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation.*¹⁸

According to the implementing regulation, the report will be protected if it is made “to anyone.”¹⁹ This new law expands whistleblower protection to include not only reported criminal activity, but to “violations of the law or health and safety dangers.”²⁰ Examples may include “exposing a lack of required breaks or lunches, drinking onsite, or reporting unfair trade practices and violations of consumer protection laws.”²¹

Providing yet another layer of complexity, Oregon’s statutory retaliation claims and the usual common law claims, such as a wrongful discharge in violation of public policy, and federal laws may also protect whistleblowers under some circumstances.²²

A Plaintiff’s Basic Burden:

To state a claim under ORS 659A.199 or ORS 659A.230 (the whistleblower statutes), a plaintiff must show that: (1) she was engaging in a protected activity; (2) she suffered an adverse

¹⁴ A “complaint,” as it is used here, is not to be confused with a civil complaint. A criminal complaint must be endorsed by the district attorney and serves to commence and prosecute a criminal charge against a person. See ORS 131.005(3).

¹⁵ ORS 659A.230(1).

¹⁶ OAR 839-010-0100(2).

¹⁷ OAR 839-010-0100(2)(c).

¹⁸ ORS 659A.199 (emphasis added).

¹⁹ OAR 839-010-0100(1).

²⁰ www.oregon.gov/BOLI/TA/T_FAQ_Whistleblowing.shtml.

²¹ *Id.*

²² See generally, David Aron, “Internal” Business Practices?: *The Limits of Whistleblower Protection for Employees Who Oppose or Expose Fraud in the Private Sector*, 25 ABA J. Empl. Law 277 (2010) (discussing available federal and multi-state provisions permitting whistleblower claims); *Banaitis v. Mitsubishi Bank Ltd.*, 129 Or App 371, 879 P2d 1288 (1994) (whistleblowing employee wins wrongful discharge claim based upon a refusal to disclose a customer’s confidential banking information because disclosure “was against bank policy, against the law and unethical.”)

employment decision; and (3) there was a casual link between the plaintiff's protected activity and the adverse employment decision suffered.²³ Since there is a lack of published opinions on ORS 659A.199 in particular, in analyzing the statute, we look at the law interpreting similar statutes for guidance.

- Protected Activity

Protected activity under the whistleblower statutes occurs when an employee "in good faith, reports criminal activity by any person, cooperates with a law enforcement agency conducting a criminal investigation, causes a complaint to be filed against any person, brings a civil proceeding against an employer, or testifies at a civil proceeding or criminal trial"²⁴ or "in good faith reports information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."²⁵

- What Constitutes "Reporting"?

A common question is whether internal reporting is sufficient to qualify as a "report." Recently, an Oregon court considered this issue under ORS 659A.230, finding that the distinction between internal and external reporting is not important.²⁶ Rather, "reporting" contemplates some action that is "intended to result in a criminal or civil proceeding."²⁷ While external reports are more likely to meet this criteria, protection for whistleblowers is not limited to those who report externally if an employee's internal report is "intended to result in a criminal or civil proceeding."

In *Ransom v. HBE Corp.*,²⁸ plaintiff communicated to his foreman and co-workers that a sudden emission of asbestos on the site created a dangerous condition. The court held that he had not "reported" within the meaning of ORS 659A.230, because there was no evidence that the plaintiff's internal comments were intended to or likely to result in notifying law enforcement of the allegedly unsafe condition.²⁹

Similarly, in *Roche v. La Cie, Ltd.*,³⁰ the employee discussed the criminal activity at issue with the Human Resource Coordinator, as opposed to the senior management with whom he was accustomed to dealing. Neither of the persons with whom the employee had a conversation "were in a position to initiate criminal or civil proceedings against their global parent company or their superiors." The employee did not ask that his concerns be reported to the employer's executive management team or board of directors, and never attempted to contact law enforcement or a government agency about his concerns. Based on these facts, the court found

²³ *Haguewood v. Columbia Basin Elec. Co-op, Inc.*, 2010 WL 234890 *2 (D Or 2010) (citing *Trent v. Valley Elec. Ass'n, Inc.*), 41 F3d 524, 526 (9th Cir 1994).

²⁴ ORS 659A.230(1).

²⁵ ORS 659A.199.

²⁶ *Roche v. La Cie, Ltd.*, 2009 WL 4825419 (D Or 2009).

²⁷ *Id.*

²⁸ 2003 WL 21949158 *2 (9th Cir 2003).

²⁹ *Id.* at *2.

³⁰ 2009 WL 4825419 (D Or 2009).

that the evidence did not support an inference that the employee intended his conversations about criminal activity to result in a criminal investigation against the employer.³¹

Because ORS 659A.199 does not require that a report be made to a particular individual or agency, it is unclear whether a report “to anyone” will be sufficient to constitute protected activity. Certainly BOLI’s regulation providing that a report “to anyone” is protected will carry some weight with the courts.³² Another question is whether posting a report on a blog or social networking site is protected.

- What Does It Mean to Report “in Good Faith”?

“Good faith” means that the employee “did not act out of malice, spite, jealousy, or personal gain and had reasonable cause in reporting her employer or supervisor’s suspected violation.”³³

Whether the report of suspected criminal activity is later proved to be legitimate or not is irrelevant to whether the employee had a reasonable basis for the suspected violation of the law at the time the report was made.³⁴ The inquiry is focused on whether the employee had the requisite “good faith” at the time he or she made the report.³⁵

In *Huber v. Oregon Dept. of Educ.*,³⁶ plaintiff reported activity he believed was a violation of HIPAA, although, as it turned out, the employer was not subject to HIPAA. The court found that a jury could find that plaintiff reasonably believed that his report disclosed a HIPAA violation, because there was evidence his supervisor had told him the employer *was* subject to HIPAA.³⁷

In *Pullela v. Intel Corp.*,³⁸ the plaintiff alleged that she was retaliated against after she complained about the overly flirtatious conduct of her co-worker and the relationship between her co-worker and her supervisor. The court determined that she presented no evidence that she believed, either subjectively or objectively, that she was being unlawfully discriminated against or harassed as a result of the relationship between her co-worker and a supervisor. The plaintiff’s reports about her co-workers were vague and unclear and she admitted having had no evidence that her co-worker and supervisor were anything other than friends. The court determined that the plaintiff failed to report the conduct either with the subjective “good faith” or objective “reasonable belief” that the conduct would support a viable claim for discrimination.

- Adverse Employment Action

The fact that an employee has engaged in protected activity does not “immunize that employee from those petty slights and minor annoyances that often take place at work and that all employees experience.”³⁹ Rather, to prove an adverse employment action, a plaintiff must show

³¹ *Id.* at *9.

³² OAR 839-010-0100.

³³ *Jensen v. Medley*, 170 OrApp 42, 54 (2000).

³⁴ *Id.* (internal quotations omitted).

³⁵ *Id.*

³⁶ 235 OrApp 230 (2010) (decided under ORS 659A.203, the whistleblower law applicable to public employees).

³⁷ *Id.* at 240.

³⁸ 2010 WL 2942401 (D Or 2010).

³⁹ *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 US 53, 68 (2006).

that the challenged action might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Likewise, the Ninth Circuit Court of Appeals has held that “an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.”⁴⁰

No adverse employment action was found in *Gonzalez v. National R.R. Passenger Corp.* (Amtrak),⁴¹ in which the employee alleged that she was retaliated against after complaining that she was treated differently because of her gender. Later, in response to plaintiff’s complaint about unequal work assignments, her supervisor said, “Here we go again. You are going to call diversity.” The court granted summary judgment for the employer, finding that the supervisor’s comment “did not rise above a petty slight.”⁴²

Conversely, an adverse employment action was found in *Hoffman v. WinCo Holdings, Inc.*,⁴³ where plaintiff alleged that after she complained of racial harassment, the supervisor retaliated against her by using other employees to keep her under surveillance (even while using the restroom) and labeling her a troublemaker. Eventually, plaintiff found the working conditions intolerable and quit. She then sued her employer for, among other claims, retaliation. The court held that a jury could reasonably find that the supervisor’s order of surveillance in the bathroom was motivated by the employee’s report of racist comments and would reasonably deter other employees from complaining.

- Causation

Under the whistleblower statutes, employers cannot retaliate “for the reason that” the employee engaged in protected whistleblowing activity.⁴⁴ The employee bears the burden of proving the causal link between the protected activity and the adverse employment action. The question of causation often is tied up with timing of an adverse action: the closer the adverse action is to the whistleblowing, the more suspect the employer’s motivation.

In *Mougeot v. McLane Foodservice, Inc.*,⁴⁵ an employee was terminated for violating company policies regarding loitering and videotaping after the employee spent five to ten minutes videotaping the cooler/freezer area. Although the employee subsequently claimed that he was videotaping for the purpose of reporting food handling violations, he never informed the supervisor that fired him of this purported whistleblowing activity. The employee’s claim failed because he did not show that the employer was aware of a protected activity upon which to base its termination decision.

- Individual Liability

Under ORS 659A.030(g), individuals can become personally liable if they “aid, abet, incite, compel or coerce” unlawful employment actions. While there are no cases interpreting this

⁴⁰ *Ray v. Henderson*, 217 F3d 1234, 1240-43 (9th Cir 2000).

⁴¹ 2009 WL 854081 (WD Wash 2009).

⁴² *Id.* at 5.

⁴³ 2008 WL 5255902 (D Or 2008).

⁴⁴ ORS 659A.199 and ORS 659A.230.

⁴⁵ 2007 WL 4365755 (D Or 2007).

section in the context of whistleblowing, it is important to be aware that supervisors and coworkers, not just the employer, can be liable to plaintiffs.

- Statute of Limitations

Aggrieved employees must either file an administrative charge or a civil complaint within one year after the occurrence of the alleged unlawful employment practice.⁴⁶

- Damages

An employee who is successful in a civil action may obtain injunctive relief and any other equitable relief that may be appropriate, including reinstatement with or without back pay, plus compensatory and punitive damages, costs, and attorney fees.⁴⁷

III. THE RECENT NATIONAL EXPANSION OF WHISTLEBLOWING LAWS AND INCENTIVES

There is no uniform federal law protecting employees from retaliation for whistleblowing. Rather, Congress tends to add whistleblowing protections to each new regulatory scheme.

- The False Claims Act makes it unlawful for a contractor to retaliate against an employee for complaining about fraud on the federal government, and provides strong financial incentives to whistleblowers.⁴⁸
- The American Recovery and Reinvestment Act §1553 protects whistleblowing in the context of reporting gross mismanagement of stimulus money. Some types of claims may fall within specific protections provided to protect wage violation, safety, environmental, labor or similar whistleblower rights.

⁴⁶ ORS 659A.875(1); 659A.820(2).

⁴⁷ ORS 659A.885(1)-(3).

⁴⁸ See 31 USC §§ 3729-3733 According to a recent article:

The large awards that have been received under the FCA and the dream of a big payday have incentivized employees and plaintiffs lawyers to look for potential causes of action. In the 2009 fiscal year, the Department of Justice recovered more than \$2.4 billion under the FCA, nearly \$2 billion of which came from *qui tam* cases. The total recovered since the FCA was amended and its whistleblower protections were augmented in 1986 now exceeds \$24 billion, with the bulk of those awards coming through whistleblower-initiated claims. Those claims have expanded drastically in recent years, with awards having only crossed the \$10 billion threshold in 2002. Recoveries were at their highest in the 2006 fiscal year, when they exceeded \$3.1 billion.

Robert R. Stauffer and Andrew D. Kennedy, Dodd-Frank Act Promises Large Bounties for Whistleblowers (Aug. 23, 2010)

<http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202470880915>.

- The Sarbanes-Oxley Act of 2002 (SOX), which was passed in the aftermath of the Enron and WorldCom scandals, predominantly applies to publicly-traded companies, and contains protections for employees who face retaliation for providing information of what they reasonably believe to be violations of securities laws to appropriate authorities.⁴⁹ More broadly, however, Section 1107 also imposes potential criminal liability against anyone who “knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense.” Section 1107 “is not limited to public companies, nor is it limited to violations related to the Act, financial or accounting issues, or even to matters related to the federal securities laws. These provisions apply to all privately-held companies and should be communicated to human resources managers or others who supervise employees.”⁵⁰
- More recently, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in 2010,⁵¹ which applies not only to public companies, but also to certain of their subsidiaries and affiliates. The Dodd-Frank Act prohibits retaliation by employers against whistleblowers reporting, either internally or to the government, fraud against shareholders or a violation of SEC rules. It also provides employees with a private cause of action in the event that they are discharged or discriminated against by their employers in violation of the Act. In addition, Section 922 of the Dodd-Frank Act provides that the SEC shall pay awards to eligible whistleblowers who voluntarily provide it with original information that leads to a successful enforcement action resulting in monetary sanctions of over \$1 million against the employer. The award amount is required to be between 10 percent and 30 percent of the total monetary sanctions collected in any related case. On November 3, 2010, proposed rules were published with final rules expected no later than April 21, 2011. One of the controversial aspects of the rules is whether employees should be required to first raise their concerns internally to allow the employer an opportunity to resolve the situation, or whether the employee may go straight to the SEC with their report. The SEC apparently is leaning toward not requiring an internal report.⁵²

Many organizations not directly subject to these laws have nonetheless anticipated ever broader whistleblower protections. Accordingly, employers, including many nonprofits, have adopted

⁴⁹ Section 302, 15 USC §7241, mandates that covered corporations establish procedures to allow for confidential reporting of accounting or auditing irregularities. Section 806, 8 USC 1514A, prohibits a such companies from taking retaliatory action against a whistleblower who has brought wrongdoing to the attention of either a supervisor or a regulatory or law enforcement official. Section 1107, 18 USC 1513(e), provides criminal penalties of up to 10 years imprisonment for an individual found to have retaliated against a whistleblower.

⁵⁰ Justin G. Klimko, *The Sarbanes-Oxley Act: Possible impacts on privately held companies* (Michigan Bar Journal May 2004), <http://www.michbar.org/journal/pdf/pdf4article696.pdf>.

⁵¹ http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr517.111.pdf.

⁵² <http://blogs.wsj.com/law/2011/02/01/sympathy-for-the-whistleblower-sec-gcs-comments-pique-interest/>.

principles of corporate governance emerging from the SOX reforms, including elements of suggested whistleblower policies.⁵³

IV. STRATEGIES TO PREVENT LIABILITY FOR WHISTLEBLOWING

In light of broader applicability of Oregon's whistleblower protections, together with expanded federal laws, whistleblowing claims are likely to become much more frequent.

Employers should consider whether to:

- Develop or update a whistleblower policy and internal reporting mechanism (with a confidential and anonymous reporting option).
- Review employee handbooks and policies to remove any language suggesting that employees can be disciplined for reporting illegal activities.
- Train supervisors to be sensitive to employee complaints and report them to Human Resources or management employees responsible for administering company policy.
- Sensitize managers and executives to the liability associated with retaliating against whistleblowers and with the expansive meaning of retaliation.
- Plan for prompt investigations of good-faith complaints from employees of any alleged violation of a state or federal law or regulation or unethical conduct.
- Create a culture that values legal compliance and that welcomes internal reports by employees. Although such reports may be viewed as annoying in the short term, in the long term, this strategy may allow the employer to catch and correct violations before they come to the attention of outside agencies.

⁵³ See generally, GUIDE TO NONPROFIT CORPORATE GOVERNANCE IN THE WAKE OF SARBANES-OXLEY (ABA 2005); BoardSource's paper, *The Sarbanes-Oxley Act and Implications for Nonprofit Organizations*, <http://www.boardsource.org/clientfiles/Sarbanes-Oxley.pdf>. Notably, IRS Form 990 asks whether tax-exempt a organization has a written whistleblower policy.