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Supreme Court Continues to Advance Broad View of Whistleblower Protections

By Anthony de Sam Lazaro and Holly Robbins

Various whistleblower laws protect employees who "lawfully" disclose confidential information in good faith to bring to light illicit or illegal activity. Generally, therefore, employees do not receive whistleblower protections when they obtain or disclose the information illegally. A recent U.S. Supreme Court case however, demonstrates an exception to that rule. In *Department of Homeland Security v. MacLean*, the Court held that an air marshal who disclosed confidential information in direct violation of Transportation Security Administration (TSA) regulations was entitled to whistleblower protection. Specifically, the Court held that the exemption in the Federal Whistleblower Protection Act (WPA) excluding disclosures "specifically prohibited by law" from receiving protection does *not* apply to disclosures prohibited solely by agency regulations or by statutes that authorize agencies to promulgate regulations. Instead, under the WPA, in order to be excluded from protection, a disclosure must be prohibited by the specific text of a statute. Although the ruling applies only to federal employees, the Court's analysis may shed some light on its view of whistleblower protections generally.

Background

The case involved an air marshal who made unauthorized disclosures concerning reductions in air marshal deployment patterns that, in his view, jeopardized security. The TSA fired him on the basis that TSA regulations prohibited such disclosures because it was "Sensitive Security Information." The air marshal challenged the termination of his employment on the grounds that he reasonably believed the leaked information disclosed "a substantial and specific danger to public health or safety" and thus was protected under the WPA. 5 U.S.C. § 2302(b)(8)(A). The government argued not that the air marshal was wrong on the merits of his case, but rather that his disclosure was carved out of the WPA's protection, which exempts from protection disclosures that are "specifically prohibited by law." Specifically, the TSA argued that the air marshal was not entitled to protection because TSA regulations prohibited the unauthorized disclosure of "[s]pecific details of aviation security measures . . . [such as] information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 CFR §1520.7(j). Alternatively, the government argued, the disclosure was prohibited by the Aviation and Transportation Security Act (ATSA), which authorized the TSA to promulgate the regulation that barred the disclosure.

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Decision

The Supreme Court rejected the government's argument that TSA regulations prohibiting the air marshal's disclosure satisfied the WPA's "by law" exemption. The decision turned on the fact that the WPA's exemption applied to disclosures "specifically prohibited by law" rather than disclosures "specifically prohibited by **law**, **rule**, **or regulation**," a phrase used elsewhere within the WPA. Because Congress had applied broader protection to other actions, the Court reasoned, the exclusion of "rules and regulations" from the WPA's exemption indicated that Congress intended to exclude them from the exemption. The Court also rejected the argument that the authorization of the ATSA exempted the disclosures, holding, "[t]his statute does not prohibit anything. On the contrary, it authorizes something."

Implications

Although ostensibly a narrow ruling affecting only federal employees, *MacLean* continues the trend of expanding whistleblower protections generally. The Supreme Court has taken a broad view of whistleblower protections over the last decade. A recent example of the Court's expansive view of whistleblower protections is *Lawson v. FMR, LLC*, 571 U.S. ____, 134 S. Ct. 1158 (2014), in which the Court held generally that the Sarbanes-Oxley Act's (SOX) whistleblower protections apply to contractors of publicly traded companies. Notably, in *MacLean*, where the Court was forced to acknowledge legitimate and grave concerns relating to terrorism and national security, the Court nevertheless came down in favor of the intent and "purpose of the whistleblower statute", and left it to Congress to move to protect the interests of national security.

As for general application to private employers, it is worth noting that most whistleblower protections apply the broader language distinguished by the Court in *MacLean*. The whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, for example, prohibit retaliation for lawful disclosures protected by "law, rule, or regulation subject to the jurisdiction of the [Securities and Exchange] Commission." Although Dodd-Frank excludes from whistleblower protection employees who obtain the information they disclose via *criminal* means, that exception does not extend to information obtained in violation of civil laws. An employee who obtains and discloses information by violating a protective order, for example, could still be a whistleblower under Dodd-Frank.

The question of just how far an employee can go in taking confidential information in brazen violation of employer rules or regulations is worth watching, as *MacLean's* preference for broad employee protection differs from other recent decisions. In *Tides v. The Boeing Co.*, 644 F. 3d 809 (9th. Cir. 2011), the Ninth Circuit held that an employee's leak to the media was not protected under SOX's whistleblower provision because SOX protected internal complaints and disclosures to federal agencies or Congress, but not to the media. Similarly, the New Jersey Supreme Court recently held that the qualified privilege for a whistleblower employee taking employer documents to support an employment discrimination suit does not apply to a criminal indictment. *Quinlan v. Curtiss Wright Corp.*, 52 A.3d 209 (N.J. 2010). The U.S. Supreme Court's clear support for the "purpose and intent" of whistleblower laws signals that employers should be wary of relying too heavily on such protections.

Recommendations for Employers

To help protect themselves against the continued expansion of whistleblower protection, employers should work with knowledgeable counsel to take the following critical measures:

- Update and strengthen anti-retaliation policies and procedures to encourage employees to use internal complaint procedures so that employees may be more likely to attempt to resolve a concern internally before taking it directly to the government.
- Ensure that supervisors at every level are trained in the employer's anti-retaliation policies. Employers need to make sure that their managers understand how employee workplace complaints may be interpreted as whistleblower complaints and that minor workplace decisions could create a basis for a whistleblower case. If employees fear coming forward internally, they may be more likely to take concerns directly to the government.
- Ensure a clear process is in place to manage internal reports. Research has shown that few reports of misconduct are made through dedicated helpline systems. Unless the supervisors and managers who receive the majority of such reports properly escalate those reports, the company will be unable to act to rectify the problem.

- Develop an investigation protocol, and use it. Effective and lawful investigations are key to defending against a retaliation or discrimination suit. A well-designed investigation system will ensure that the important legal and compliance issues are identified, tracked and properly resolved.
- Ensure that compliance concerns, risk areas and cultural commitments to ethics and integrity are properly addressed by the employer's Code of Conduct. Companies should ensure these policies and principles are communicated and implemented at all levels. Employees who fear retaliation or distrust their managers are unlikely to report misconduct internally. Employers should foster a workplace where employees feel comfortable raising potentially unlawful or unethical conduct.
- Secure confidential information and limit its dissemination to those who have a need to know. An employee who, in good faith, misinterprets information for which he or she may not have the full context or full understanding, may become a whistleblower.

Holly Robbins is a Shareholder, and Anthony de Sam Lazaro is an Associate, in the Minneapolis office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Robbins at hrobbins@littler.com, or Mr. de Sam Lazaro at adslazaro@littler.com.