

April 2, 2015

## Whistleblowing in Tennessee: Does It Matter Who Hears the Whistle?

By Christopher Anderson and Roger Scruggs

A whistleblower claims he was fired because he complained about wrongful conduct, and sues for retaliation. For the claim to survive, does it matter who hears the whistleblower's whistle? The Tennessee Supreme Court has answered this question with an emphatic "yes." In *Charles Haynes v. Formac Stables, Inc.*,<sup>1</sup> the court dismissed a whistleblower's claim because he complained *only to the person who committed the illegal conduct*. The court held that in order for the whistleblower to state a valid retaliation claim, he must reveal the illegal conduct to someone other than the alleged wrongdoer.

### Background

The plaintiff worked as a horse groom for a stable in Tennessee. While on the job, he was kicked in the head by a horse. Hoping to get medical treatment, the plaintiff told the defendant stable's owner about the injury and asked to leave work. The stable owner refused—but agreed to allow the stable's veterinarian to seal the wound with horse sutures. The plaintiff, fearing the loss of his job, accepted the equine medical treatment.

Over the next several months, the plaintiff complained frequently to the stable owner about recurring headaches that, he believed, were caused by the inappropriate medical care he received from the veterinarian. Allegedly tiring of the complaints, the stable owner fired the plaintiff. The plaintiff filed a lawsuit for retaliatory discharge under Tennessee common law and the Tennessee Public Protection Act, alleging he was fired for refusing to remain silent about an illegal activity.<sup>2</sup>

### Arguments

The defendant argued the plaintiff was not entitled to whistleblower protection because he complained only to the person who actually committed the illegal act. By failing to go beyond the person responsible for the illegal conduct, the defendant argued, the plaintiff was merely pursuing his private interests rather than advancing any public interest in exposing the employer.

---

1 No. W2013-00535-SC-R11-CV (Tenn., Mar. 27, 2015).

2 Effective July 1, 2014, Tennessee eliminated the common law cause of action for retaliatory discharge based upon either an employee's refusal to participate in, or remain silent about, illegal activities. Significantly, now the exclusive cause of action is provided for under the Tennessee Public Protection Act, in which plaintiffs have a higher burden of proof under the new law: they must prove their termination was based "solely" upon the whistleblowing rather than the old common law standard that the whistleblowing was a "substantial factor" in the termination. See T.C.A. § 50-1-304(3)(b).

In response, the plaintiff argued that denying whistleblower protection to those who complain only to wrongdoers would encourage employers to falsely claim they participated in illegal activity as a means of avoiding liability. It would also incentivize employees to lodge complaints outside their organizations, which would deprive employers of the first and best opportunity to take corrective action.

## Court's Analysis

The court sided with the employer and held that the public policy underlying whistleblower protection requires the employee to "bring to light" illegal or unsafe practices. If the employee merely reports illegal activity to the wrongdoer, the employee fails to blow the whistle in a meaningful manner and advance the public's interest in exposing illegal activity. Thus, the court held, the plaintiff failed to state a claim.

## Takeaway

With the Tennessee Legislature's changes to the Tennessee Public Protection Act last year and the court's opinion in this case, plaintiffs have a steeper hill to climb to establish retaliation under Tennessee law. Internal reporting may no longer be protected activity, depending on the size of the organization or, as in this case, the authority of the wrongdoer as the highest officer in the company. An employee may, in order to have a whistleblower claim, have to report the alleged wrongdoing *outside* of the organization.<sup>3</sup>

[J. Christopher Anderson](#) is a Shareholder, and [Roger Scruggs](#) is an Associate, in Littler's Nashville office. If you would like further information, please contact your Littler attorney at 1.888.Littler, [info@littler.com](mailto:info@littler.com), Mr. Anderson at [chrisanderson@littler.com](mailto:chrisanderson@littler.com), or Mr. Scruggs at [rscruggs@littler.com](mailto:rscruggs@littler.com).

---

<sup>3</sup> It is important to remember the distinction between an employee who refuses to participate in illegal activity and one who refuses to remain silent about illegal activity. Only the latter requires an employee to report the illegal conduct. There is no reporting requirement necessary when an employee simply refuses to participate in illegal activity.