

Teacher's Manual
Developing Professional Skills: Workplace Law
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Chapter 4: Whistleblowers

Problem: Financial advisory firm seeks advice about an employee's potential whistleblower retaliation claim

Legal Rule(s): Statutory whistleblower protection

Skill(s): Preliminary research and analysis

Assignment: Research and analyze statutory elements and client facts

Practice Norm(s): Case analysis

Professionalism Concept(s): R. 1.1: competence; R. 1.13: organizational representation

Optional extension assignment: Draft memo to file

Legal Rules

Whistleblower Protections

State whistleblower protection statutes serve various public policy goals. By protecting whistleblowers, we encourage employees to be law-abiding citizens. Such policy removes employees from the untenable position of having to violate the law or lose their jobs. Protecting whistleblowers protects the safety and welfare of the public by removing a disincentive of reporting illegal activities in employment settings.

Along with statutory whistleblower protections, Taylor Kingsley's problem also implicates other potential causes of action. (See Point to Consider 3). Most obviously, a public policy tort can be discussed in class, which provides for the employer to be held legally accountable when an employee is discharged for a reason or in a manner that contravenes some clearly defined and fundamental public policy. Second, if Taylor Kingsley is a woman, gender discrimination may be implicated, especially if she is the only female in the firm and being treated differently from her male counterparts.

In analyzing the problem's whistleblower claim, students can research and analyze the statute in their jurisdiction, or teachers can assign a particular jurisdiction. If teachers do not wish students to engage in the research process, teachers can provide a copy of the statute the teacher wants the students to analyze. If there is not a whistleblower statute in the students' jurisdiction, California Labor Code §1102.5 is an example whistleblower statute that provides a representative statutory model. (Another representative model is the New Jersey Conscientious Employee Protection Act, N.J.S.A. §§ 34:19-1 – 34:19-8.)

In California, the whistleblower statute prohibits an employer from retaliating against an employee who discloses information to a government or law enforcement

agency, “where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.” Cal. Lab. Code § 1102.5(a).

Generally, to establish a prima facie case of whistleblower retaliation, a plaintiff must show: (1) she engaged in a protected activity; (2) her employer subjected her to an adverse employment action; and (3) there is a causal link between the two.

Protected Activity

First, a plaintiff must show that she engaged in a protected activity. A plaintiff engages in protected activity when the employee has reasonable cause to believe that the information discloses a violation of state or federal statute or regulation. Accordingly, the whistleblower statute requires that the plaintiff disclose what she has reasonable cause to believe is a violation of a state or federal statute; she does not have to prove that an actual violation occurred.

Here, Taylor Kingsley states that she complained to Brett Bosworth that his handling of the Smart-Tek IPO was “unethical.” Taylor had previously told Brett that the “talk” among the firm’s investors was negative and asked Brett if the firm should postpone the offering. Brett responded to Taylor by telling Taylor to be more “aggressive” and “talk it up.” Brett also said that the other investors “owed him one” and Taylor should get them on the book “for now.” Taylor asked Brett if what he meant by that was that Taylor should fabricate the list of investors interested in the offering, even though the investors were decidedly *not* interested. Brett seemingly applied in the affirmative when he told Taylor in response to “grow a pair” and that if Taylor could not build the book, Brett would.

Students are not asked to research whether the above exchange represents a violation of securities law. The teacher can discuss with the students that misrepresenting interest in a stock offering likely is a SEC violation. Deceitful practices violate SEC Rule 106-5, codified in 17 C.F.R. § 240.10b-5:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means of instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- a. To employ any device, scheme, or artifice to defraud,
- b. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements

made, in light of the circumstances under which they were made, not misleading, or

- c. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Here, Taylor confronted Brett directly about his questionable directives and told him that such a directive was unethical. She then disclosed to her employer, through her Employee Complaint Form, that she believes Brett's request would violate the SEC rule. These clear communications to her employer likely meets the first prong of the whistleblower statute.

Adverse Employment Action

The second prong requires the plaintiff to show that the employee suffered an adverse action at the hands of the employer. Typically, courts look to whether the adverse employment action is one that "materially affects the terms, conditions, or privileges of employment." The materiality test often includes a spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job or opportunity for advancement. Courts will look at the totality of circumstances to see if the cumulative effect of the employer's actions are sufficiently adverse.

Here, Taylor complains that she was taken off the Smart-Tek account by Brett, which she had worked on since its inception and had an ownership interest in its success. Being taken off that major account can have material effects, including a negative performance evaluation, less compensation (given her compensation likely includes bonuses for successful launchings), and less opportunity for promotion. Moreover, Taylor complains that she was forced to relocate to a basement office the day after her complaints about Brett's behavior. While an office move in and of itself might not be sufficiently adverse, taken in conjunction with her being removed from the account, a court likely will find such behavior meets the adverse action prong.

In analyzing the statutory elements, students should identify additional facts that would help the inquiry, including her compensation structure (whether it includes bonuses) and promotion policies, as well as comparator information for office moves.

Causation

The last element requires plaintiffs to prove a causal link between the protected activity and adverse employment action. Typically, causation may be inferred from circumstantial evidence, including the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.

Here, Taylor alleges that she was taken off the Smart-Tek account a few days after telling Brett that his handling of the account was unethical. When Brett took Taylor off the account, Brett told Taylor that she shouldn't "worry her pretty little head" about building the book anymore. Given the timing of Taylor's removal from the account and Brett's derogatory remarks, causation may be inferred. Additionally, the office relocation occurred one day after this encounter, and Taylor reports that an office move of this sort "has never happened before." Such evidence is also likely to support an inference of a causal link between Taylor's protected activities and PCM's adverse actions.

Practice Norms

Statutory Interpretation and Analysis

Statutory interpretation is the process of determining the meaning of the terms of a statute. Statutory analysis means determining how statutes apply to a given situation including what effect they may have on a particular client. Students should be primed to read statutes carefully for: (1) Elements or factors; (2) Words that indicate whether the rule is Mandatory, Prohibitory, or Discretionary; (3) Result that occurs after evaluating the elements or factors; and (4) Explicit exceptions to the rule.

In interpreting statutory text, lawyers analyze: (1) The text itself; (2) The Legislature's intent; (3) Policy; (4) Agency interpretation; and (5) Court decisions and commentators. If time permits, teachers can also discuss canons of construction with students, including: plain meaning (courts must apply words within their ordinary meaning); ambiguity (only if the terms are ambiguous may courts go beyond the plain meaning and consider the purpose of the legislation); ejusdem generis (interpreting general words that follow specific enumerations narrowly, treating them as modifying or adding to the specific provisions rather than as broadening the scope of the specific provisions); and expressio unius (if the statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded).

In analyzing statutes for clients, lawyers go through the following steps:

1. Determine how the language of the statute, and the facts of any cases interpreting the statute, support your clients' position.
2. Determine how the language of the statute, and the facts of cases, support your opponent's position.
3. Determine how the policies of the statute, and policies of cases, support your clients' position.
4. Determine how the policies and cases support your opponent's position.

5. Evaluate the strength of your client's position.

Students engage in these analytical steps and communicate this work in the included Statutory Elements Chart form.

Analyzing the Case Prior to Counseling

The problem asks the students to engage in the above analysis prior to meeting with Montgomery, PCM's authorized constituent. Students should also recognize that engaging in the statutory research and analysis is a critical step in analyzing the client's case. Such research and analysis should occur before counseling the client about the firm's options regarding Taylor's employment with the firm. Such analysis will help the lawyer identify what additional facts are needed from the client, as well as potentially problematic elements for the employer.

Professional Ethics

In the Points to Consider, question number four asks the students whether lawyers without expertise in securities law must inform themselves on the substance of Taylor's underlying complaint. This question touches on a lawyer's competency.

Question five asks students that if they conclude that Bosworth's conduct does violate securities law, what ethical obligation, if any, exists as the lawyer for the organization.

1. Model Rule 1.1: Competence

In determining the lawyer's obligation to be knowledgeable about securities law, students must analyze the ethic rule regarding competency.

Model Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The official comments to Rule 1.1 suggest that while special skills may be required for complex legal issues, general proficiency is often sufficient. Lawyers must have the ability to conduct appropriate research and prepare, or form an association with a lawyer established in a particular field, to demonstrate competency.

In this case, an employment lawyer is not expected to be knowledgeable about securities law; however, the lawyer is expected to be able to research and analyze the tangential issue in securities law. The relevant SEC rule is not difficult to research and an employment lawyer is likely to surmise that the SEC would have rules about fraud and deceit.

2. Model Rule 1.13: Organization as Client

Model Rule 1.3(a): A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Representing an organization presents the potential problem of identifying the actual client because while organizations may be legal persons, they can only act through their designated official (such as directors, employees, or shareholders). Rule 1.13 provides that the lawyer's client is the organization itself, separate from the individuals who may hire the lawyer. The comments to Rule 1.13 state that decisions of the organization's constituents should be respected unless the lawyer knows the organization will be substantially injured due to a breach of legal obligation to the organization or a violation of law. Serious violations could call for the lawyer to ask for reconsideration, appeal the decision to a higher authority within the organization, or resign as counsel.

Here, Point to Consider Five asks that if the lawyer determines there was a violation of securities law, what is the lawyer's obligations as a lawyer for the organization. Students should be encouraged to think through their obligation to PCM, who is potentially exposed to liability through Bosworth's actions, and how they would communicate with the designated official, Vice President Montgomery, who initially contacted the firm about the present issue.

Add-on Exercise

Professors can build on this student assignment by having the students draft a memorandum to file filling out the analysis. Such a typical office memorandum more fully communicates the analysis of the statute and client problem.