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***When the cops blow the whistle:  
New cases provide large whistleblower  
awards for general counsel,  
human resource directors***

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## WHEN THE COPS BLOW THE WHISTLE: NEW CASES PROVIDE LARGE WHISTLEBLOWER AWARDS FOR GENERAL COUNSEL, HUMAN RESOURCE DIRECTORS

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In the first Quarter of 2017 there were three multi-million dollar retaliation verdicts/settlements involving a General Counsel, Chief Legal Officer or HR Director as the plaintiff.

- In *Wadler v. Bio-Rad Laboratories, et al*, case no. 3:15-cv-02356, U.S. N.D. Cal., February 6, 2017, the company's general counsel, who alleged he was fired for reporting a violation of the Foreign Corrupt Practices Act, was awarded \$11 million after a three week jury trial.
- In *Michele Coyle v. Regents of the University of California*, case no. RIC-1503362 (Superior Court of California), February 8, 2017, the university's chief compliance counsel, who alleged she complained about gender discrimination and was retaliated against for complaining, was awarded \$2.5 million by a jury.
- On April 20, 2017, the American Dental Association settled two Charges of Discrimination filed with the EEOC on behalf of the Association's former chief compliance counsel and human resource director, for \$1.95 million, <https://www.eeoc.gov/eeoc/newsroom/release/4-20-17.cfm>, April 20, 2017. Both the chief legal counsel and the human resource director alleged they were discharged in retaliation for complaining about potential violations of Title VII, ADEA and ADA violations to the Association's Board of Directors.

This is an interesting development especially since these are the very people who are generally entrusted with developing corporate policies and assuring compliance. Courts and many different agencies make it clear that these high level executives may be considered to be engaged in protected activity and thus protected from retaliation even though they are directly involved in monitoring the company's EEO or other policies.

The *EEOC Enforcement Guidance on Retaliation and Related Issues*, effective August 2016, <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>, is instructive on this issue. The *Enforcement Guidance* explicitly provides in part:

In the Commission's view, all employees who engage in opposition activity are protected from retaliation, even if they are managers, human resources personnel, or other EEO advisors.

The statutory purpose of the opposition clause is promoted by protecting all communications about potential EEO violations by the very officials most likely to discover, investigate, and report them; otherwise, there would be a disincentive for them to do so.

The *Enforcement Guidance* recognizes that these individuals are not automatically protected and identifies the requirements:

A managerial employee with a duty to report or investigate discrimination still must satisfy the same requirements as any other employee alleging retaliation under the opposition clause—meeting the definition of “opposition,” using a manner of opposition that is reasonable, and having a reasonable good faith belief that the opposed practice is unlawful (or would be if repeated), as well as proving a materially adverse action, the requisite causation, and liability.

The *Enforcement Guidance* provides the following as examples of “Opposition”:

Protected opposition includes actions such as: complaining or threatening to complain about alleged discrimination against oneself or others; providing information in an employer's internal investigation of an EEO matter; refusing to obey an order reasonably believed to be discriminatory; advising an employer on EEO compliance; resisting sexual advances or intervening to protect others; passive resistance (allowing others to express opposition); and requesting reasonable accommodation for disability or religion.

EXAMPLE 7—“*Advising an employer on EEO compliance*”—specifically provides:

XYZ Corp.'s human resources manager came to believe that the company was improperly denying certain requested reasonable accommodations to which individuals with disabilities were entitled under the ADA. Shortly after she reported this to supervisory management, her employment was terminated. Even though her reports to supervisors fell within the ambit of her managerial duties, her reports of unlawful company actions were protected opposition. Protected activity includes EEO complaints by managers, human resources staff, and EEO advisors—even when those complaints happen to grow out of the individual's job duties—provided the complaint meets all the other relevant requirements for protected activity.

Many would argue the above is too broad and is just another example of the EEOC attempting to preemptively make law. Others would suggest it is an example of the EEOC attempting in a proactive fashion, to identify who is protected and how they are protected. Nevertheless, since courts have not completely resolved the issue of what activity is deemed to be opposition activity, and since there are many different statutes providing protection each with different requirements for someone to be considered to be engaged in protected activity, companies are wise to take note of these examples when they are reviewing employment actions. This applies to all levels of the employment hierarchy, including those at the very top of an organization.

In each of the above three cases generating the multi million dollar awards, the company argued that there was a legitimate reason for its actions. Query whether the company's position would have been bolstered had it conducted an investigation before the company took adverse action? Query also and more importantly, whether had the company conducted an independent investigation, it would have been able to discover that there were problems and would have been able to correct these problems? An independent investigation may help to refute the causal connection between the protected activity and the adverse employment action.



The EEOC appears again to attempt in a proactive fashion, to provide guidance on the complaint and review process. On January 10, 2017, the EEOC submitted for public input and comment, *PROPOSED Enforcement Guidance on Unlawful Harassment*, and extended the time for public input until March 21, 2017 <https://www.regulations.gov/docket?D=EEOC-2016-0009>. After reviewing the public input, the Commission will consider appropriate revisions to the proposed guidance before finalizing it. If historic time frames for the process hold true, we might expect the EEOC to promulgate new guidelines by late August, 2017.

The EEOC *Proposed Guidance* provides in part:

***Effective and Accessible Harassment Complaint System***

An effective harassment complaint system welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged victims, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation.

For example, an effective harassment complaint system:

- Is fully resourced, enabling the organization to respond promptly, thoroughly, and effectively to complaints;
- Is translated into all languages commonly used by employees;
- Provides multiple avenues of complaint, if possible;
- Provides prompt, thorough, and neutral investigations;
- Protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements;
- Includes processes to determine whether alleged victims, individuals who report harassment, witnesses, and other relevant individuals are subjected to retaliation, and imposes sanctions on individuals responsible for retaliation;
- Includes processes to ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for harassment; and
- Includes processes to convey the resolution of the complaint to the complainant and the alleged harasser and also, where appropriate, the preventative and corrective action taken as a result.

While managing whistleblower issues involving the company's General Counsel, HR Director or other highly placed executives presents some unusual features—they may be privy to the company's most sensitive information and be charged with managing effective compliance—the EEOC's guidance and the three cited cases all suggest that, in the end, these individuals enjoy the same whistleblower protections in the organization and an effective complaint system, including a prompt, thorough and impartial, investigation may help the company 1) make correct employment decisions regarding the whistleblower, 2) review and correct any alleged improper actions, and 3) help protect the company in the event of whistleblower litigation. ■

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