COVID-19 Whistleblower Lawsuits Continue to Target Healthcare Employers, Revealing Risks of Hasty Decision Making

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Fisher Phillips' COVID-19 Employment Litigation Tracker continues to report that the healthcare industry is the hardest hit by COVID-19 employment litigation. As of the beginning of June, more than one in five of every pandemic-related lawsuit filed across the country had been filed against healthcare employers: 540 out of just over 2,400 cases, or 22.5% of all claims filed. And of those hundreds of claims, whistleblower retaliation lawsuits are among the most common type brought against healthcare employers. A series of recent lawsuits illustrates this trend and reminds healthcare employers, once again, to carefully navigate personnel decisions involving a complaining employee.

Continuing Trend of Whistleblower Retaliation Lawsuits

The following three cases starkly demonstrate the dangers that healthcare employers face when it comes to whistleblowing concerns.

- In *London v. DPSP Healthcare LLC*, Juanita London was employed as a licensed practical nurse and administrator for long-term care facilities in the State of New Jersey. She alleges that she complained to the owner that it was not following federal and state rules requiring all long-term care facilities to conduct COVID-19 testing on a weekly basis. On November 5, 2020, she tested positive for COVID-19 and took a leave from work until returning on November 18. Upon her return, Ms. London said she once again spoke to the owner of the facility and asked when they would comply with the state testing rules. The owner allegedly became visibility upset, restricted Ms. London's access to only one of the facilities and, on December 2, fired Ms. London for the alleged reason that they were "not getting along." Ms. London filed suit under the New Jersey whistleblower law that protects employees from retaliation based on them objecting to something that they reasonably believed violated the law.
- In *Curtiss v. Artesia General Hospital et. al.*, Scott Curtiss was employed with the hospital as the director of information technology, reporting to the chief technology officer (CTO). In the months leading up to the pandemic, he claimed that he raised concerns about asbestos and the workplace air quality with both the CEO and CTO. Curtiss claims he never got an adequate response to his concerns. In March 2020, when the pandemic took off, he says he protested to the CTO about working in-person at the hospital and raised concerns about adequate testing and

personal protective equipment, and questioned the need to work in-person under those circumstances. In May 2020, he complained to the New Mexico Environment Department Occupational Health and Safety Bureau (OHBS) about similar concerns. Curtiss alleges that on June 11, after the hospital received notice of the complaint to OHSB, the CTO told him and a co-worker that they would be fired if they continued to complain. The next day he was put on administrative leave and a few weeks later was fired. Curtiss' complaint alleges that he was fired in violation of New Mexico's public policies. It remains to be seen what the hospital's stated reason is for the termination.

- In *Avery v. March, Inc. of Manchester*, Bernice Avery was employed as a supportive instructor with a supportive living program located in the State of Connecticut. Like the above plaintiffs, Ms. Avery claims she made both internal and external complaints about unsafe working conditions, including failing to provide proper and adequate personal protective equipment to curb the spread of COVID-19. Like the others, she claims she was fired within one month of making the complaints in violation of Connecticut's whistleblower laws. Again, her complaint does not detail the reason for her termination of employment other than it was without just cause.

These three cases all follow a similar pattern and are illustrative of the continuing trend of COVID-19 whistleblower retaliation complaints filed against healthcare employers. They are a reminder to healthcare employers to work with their internal or external legal team when managing personnel who have engaged in whistleblower activities.

Risk Analysis Involving Whistleblowers

If you have a known whistleblower on your hands – whether relating to COVID-19 or not – an additional risk analysis should proceed prior to termination. This analysis should include carefully reviewing the following:

- **Timing**: When did the whistleblower first object to the alleged unlawful practice or complain about it? Focus on the temporal proximity between the protected complaint and adverse employment action. For example, if the conduct leading to the reason for termination took place prior to the complaint, then it will be more difficult for a whistleblower to prove their case. Timing is not everything – but it is important.
- **Reason for Termination**: Have other non-whistleblowers recently been terminated for the same reason or is there some objective basis to measure the seriousness of the conduct leading to the reason for termination? The reason for the termination should be consistent with prior practice and supported by the facts. In *London v. DPSP Healthcare Limited Liability Company*, the plaintiff alleged the supervisor's reason for termination was due to them "not getting along." If true, this reason may tend to support the plaintiff's case that she ruffled the company's feathers after she engaged in whistleblowing activity.
- **Company's Policies and Practices**: Do the company's policies encourage reporting of the complaint at issue and is there a track record investigating such complaints? Evidence of a

robust culture of encouraging and appropriately responding to such complaints can help reduce the strength of a retaliation complaint. It is important that the policy and practice allows for multiple channels for reporting safety and quality concerns.

- **Company's Response to Complaint**: Was there an investigation into the complaint? It is important to confirm whether the company followed its own policies and practices with respect to the individual at issue. Inconsistency in following them can lead to an accusation of pretext and retaliatory motive.

Retaliation cases against healthcare employers will continue. Performing a deliberate risk analysis with internal or external legal counsel will not eliminate these claims but should reduce the risk and headache that they bring.

We will keep you updated on any further developments in these or similar cases filed elsewhere the country. For further information about COVID-19-related litigation being filed across the country, you can visit our COVID-19 Employment Litigation Tracker.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the author of this Insight, or any member of our Healthcare Practice Group.

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