On standing up and speaking out: Whistleblowers

A primer on protections for those who take on corporate America or City Hall

By Samuel Rudolph

Whistleblowing activity has been reported as early as the time of King David. Nathan the Prophet impugned King David for his wrongdoings in taking Uriah's wife, Bathsheba, after causing Uriah's death by the sword. Relating the parable of the rich man who took a baby ewe from a poor kinsman to feed a wayfarer, Nathan identifies King David himself as the rich man – taking from the poor and giving to a visitor.

Today, it doesn't take a prophet to stand up and speak out on the wrongdoings of powerful persons, including those in the workplace. Whistleblowing employees can and often do report a variety of wrongs in suspected violation of the law: on safety issues, fraud, concealment and a variety of other unlawful business practices. These are courageous people, among today's working "profiles in courage" in both white and blue collar jobs – in business as well as government.

Whistleblowers object, and sometimes refuse, to go along with what they see as unsafe or illegal business practices. Both in the private and public sectors, whistleblower employees are driven by conscience and suspicion of wrongdoing. They see it as incumbent on themselves to disclose violations of all kinds: discrimination, safety issues, fraud and deception, other violations of the law. And in so doing, they put their reputations, their careers and their livelihood on the line.

David vs. Goliath

What must we know as employment lawyers, in our advocacy on behalf of these brave and gutsy people? In undertaking their representation, we often assume an uphill battle on an uneven playing field – a David and Goliath situation. These clients are often viewed as complainers and trouble-makers – rabble-rousers bent on stirring up trouble in the organization. They rely on the protections of the law, protections against retaliation for exercising their legal rights: rights to oppose, to complain or refuse to acquiesce to unlawful activities.

Whistleblowers see broader issues in a bigger picture: issues rising above and beyond the assigned duties and responsibilities of their position. They're driven to disclose their suspicions – violations of the law, of health and safety standards, discrimination and retaliation in the workplace. True enough, they aren't lawyers for the most part, to determine whether a particular violation has occurred. But they aren't required to be lawyers in the workplace; that's our job. Instead, they are held to a standard of disclosure based on reasonable suspicion and good faith.

Employees who complain or otherwise oppose discrimination are protected under both the California Fair Employment and Housing Act [FEHA, Gov. Code, § 129200 et seq.] and Title VII of the Civil Rights Act of 1964.

Whistleblower protection

In the areas of banking, trading and investment, Congress continues to extend whistleblower protection for the disclosure of violations within the securities industry, through the Sarbanes Oxley Act and other laws. Soon after President Obama took office, Congress enacted the "stimulus" legislation, including explicit provisions affording protection to whistleblowers who report fraudulent activity or the abuse of public funds.

In California, we're blessed with some of the strongest labor & employment laws to be found anywhere in the nation, if not the world. In statutes and case law, employees at all levels are protected against retaliation for disclosing unsafe or unlawful activities. Our Legislature has mandated that the Fair Employment and Housing Act [the "FEHA"] be "construed liberally for the accomplishment of its purposes."(Gov. Code, § 12993(a).) This means protection for *all* employees who disclose wrongs they reasonably suspect to be violations of the law.

Whistleblowing fact patterns give rise to *both* statutory and common law causes of action. Liability can arise from adverse actions of any kind, taken in violation of statute or public policy, with a retaliatory motive. The retaliation must implicate a fundamental public policy, as embodied in the Constitution, in a statute or a regulation. Those policies, delineated in statute or regulation, create a basis for an employee's right to sue for wrongful discharge. The employee must, reasonably and in good faith, disclose, oppose or refuse to acquiesce in what s/he suspects to be a violation of the law. This may include a workplace hazard or safety issue, as protected activity under Labor Code section 6310, an unlawful business practice under Business and Professions Code section 12400 et seq. or any other perceived violation of policy embodied in statute or regulation. Labor Code section 1102.5 broadly protects employees who oppose, complain about or refuse to acquiesce in suspected violations of the law.

Sometimes known as *Tameny* Claims [after *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167,169], a wrongful termination in violation of public policy may arise out of an adverse employment action taken against an employee who reports a suspected violation. As noted, the policy must be embodied in a statute, a regulation or the Constitution. Further, *Tameny* claims are based upon violations of *fundamental* public policy. These work to the benefit of the public rather than private interests. An alleged violation must be "tethered to" such a public policy. (*Green v. Ralee Eng. Co., supra,* 19 Cal.4th at 80*; Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1095.*)*

Some examples of fundamental public policies include those prohibiting (1) Employment discrimination under the FEHA; (2) Adverse employment actions for exercising rights under the FMLA; (3) Retaliation for refusal to sign non-compete covenants, (4) Retaliation for discussing wages with coworkers; (5) Reprisals for reporting on the misappropriation of public funds and (6) any adverse action for reporting suspected violations of the California Labor Code and the Government Code.

To get the protections under the California Whistleblower Act, employees must act on "reasonably based suspicions of illegal activity." (*Green v. Ralee Eng. Co.* (1998) 19 Cal.4th 66, 87.) Such a reasonable basis arises out of good faith based upon a reasonable interpretation of the law. But whistleblowers are not expected to be lawyers.

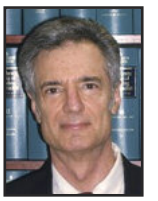
In California, liability for whistleblowing retaliation is determined in view of *all* admissible evidence – the "totality of the circumstances." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1047.) This contrasts with often confusing decisions in the federal courts, often excluding "stray remarks" made outside of the decision-making context. The categorical exclusion of otherwise relevant evidence, as isolated or "stray remarks," was recently rejected in a decision regarding age discrimination. (*Reid v. Google* (2010) 50 Cal.4th 512.)

Employment lawyers representing whistleblower employees practice in a lofty domain. Their clients are employees who take it upon themselves to stand up against suspected violations of the law. These are conscientious individuals, acting on the dictates of a moral compass going beyond the particulars of their assigned duties and responsibilities. Trusting to their suspicions, they speak up in good faith often risking their reputations, their careers and livelihoods.

Whistleblower protections touch on vital public interests. These cases arise out of concerns shared by all of society – going well beyond the narrow confines of job and compensation. Unlike personal injury or contract disputes, whistleblower-retaliation cases implicate core public policies and fundamental public well-being. These cases are truly matters of *public* interest. They bear directly upon those rights, those benefits and protections that work to the well-being of society at large. They go to the core and the spirit of the laws – to vital values, to rights and duties embodied in statute, in regulation, in our state and federal constitutions.

Whistleblower clients are notable for their courage to stand up and speak out against wrongdoing in the workplace. As with Nathan the Prophet, who confronted King David with his wrongdoings, so do our clients cry out against wrongdoing – in the workplace, in the corporate offices and beyond. These cases resonate well beyond the individual plaintiff. Today, all of us fall victim to the wrongs these courageous people seek to correct.

And in their standing up and speaking out, whistleblowing employees compel all of us to look at the bigger picture, to a moral compass beyond corporate profit and self-interest. These are the blue collar, the white collar, the public servants, the working people at all levels who dare to stand up and speak out for integrity of government, for corporate responsibility and accountability in both the public and the private sectors. They deserve only our best efforts as advocates in defense of their cause.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