

You Can't Do That To Me, I'm A Whistleblower!

Billie Pirner Garde

Clifford & Garde  
**1707 L Street, N.W., Suite 500**  
**Washington, D.C. 20036**  
**(202) 289-8990**  
[www.cliffordgarde.com](http://www.cliffordgarde.com)

***“Once to every man and nation comes the moment to decide; in the strife of truth and falsehood for the good or evil side.***

***Then it is the brave man chooses, while the coward stands aside.....”***

Anonymous

Litigating whistleblower claims provides some of the most exhilarating and frustrating experiences that any trial lawyer may face. Clients have taken action to protect the public from unknown dangers and risks, and have paid for it with their jobs – and often their careers. However, the psychological damage to a whistleblower and his or her family as a result of the experience is often much higher than the loss of income. Providing representation invariably extends from the courtroom to the kitchen table.

My advice for handling clients during this life changing catastrophe is to help them understand that their life will never be the same; they will have different friends, changed values, a future much different from their previous plans. In the beginning of the litigation process, you often become their closest friend and the only person in their life who truly is willing to listen to the intimate details of what happened and understand the unfairness and inequity of the result. In the end, it is often difficult for the whistleblower to let go of the case and, generally, they will never let go of the cause.

The moment an employee decides to speak up and do what is right, is the same moment that their life and the lives of their loved ones are turned upside down. During this trying time, the more choices a whistleblower has, the more chances they have to find justice. Representing whistleblowers is truly a privilege, an opportunity to utilize the skill of your craft on behalf of ethical employees who have sacrificed their careers for the rest of us.

Managing the behaviors and performance of employees who are raising safety or retaliation concerns, objecting to management decisions about how work should be done, or pushing the public alarm button, can be a minefield for the uninformed manager. While “whistleblowing” does not provide an employee with a protective shield against legitimate personnel actions, it does raise the bar and require employers to ensure that their actions are not retaliation, nor could be perceived as retaliation by other employees.

What follows is some practical advice with handling the litigation of whistleblower claims:

## 1. The Choice of Forum

As a general rule, state courts are a better fora for whistleblower retaliation claims because juries are sympathetic to such claims. Many jurors can readily relate to being the subject of an abusive working environment. But whistleblowers often portray themselves as White Knights and therefore fall harder in the eyes of a jury when the inevitable skeletons in the closet emerge, thereby undermining the good faith motive of the whistleblower.

One of the most underutilized weapons in a whistleblower's arsenal is filing a claim with the United States Department of Labor. A DOL complaint is usually overlooked by attorneys who are used to filing state actions, but it provides an interesting and viable alternative to a state claim for their client.

In federal whistleblower cases, the motive of the whistleblower is generally irrelevant. *Dias-Robainas v. Florida Power & Light*, 92-ERA-10 (Sec'y Jan. 19, 1996). Thus, DOL ALJs are less inclined to make emotional decisions in reaction to the employer's efforts to undermine your client's motive for engaging in protected activities or the employer's efforts to prove that your client had a less than perfect performance history.

The whistleblower statutes administered by the OALJ generally do not preempt state common law actions for wrongful discharge in violation of public policy. *English v. General Electric Co.*, 496 U.S. 72 (1990); although some states require employees to elect a remedy and preclude state claims where the remedy under federal law is adequate. *See, e.g., Masters v. Daniel Intern. Corp.*, 917 F.2d 455, 457 (10th Cir. 1990) (barring state claim for retaliatory discharge because the Energy Reorganization Act provided an adequate remedy).

More than thirty-eight states have adopted statutory whistleblower protections, though most of these statutes protect only employees in the public sector. *See, e.g., D.C. Whistleblower Protection Act*, 1 D.C. Code §§ 615.52, 615.53. Some states have enacted robust whistleblower protection for employees in the private sector. *See, e.g., New Jersey's Conscientious Employee Protection Act*, N.J.S.A. § 34:19-5 and California Labor Code sections 1102.5 (b), 1102.6, 1102.7 and 1102.8.

Most states recognize some form of a public policy exception to the employment-at-will doctrine under common law. *See, e.g., Carl v. Children's Hospital*, 702 A.2d 159 (D.C. App. 1997). Some of these exceptions, however, are often so narrow as to be unhelpful. *See, e.g., Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex.1985) (recognizing a narrow exception prohibiting an employer from discharging an employee for the sole reason that the employee refused to perform an illegal act that carried criminal penalties). Note that the whistleblower provisions of the Sarbanes-Oxley Act of 2002

(Sarbanes-Oxley) may strengthen this common law protection. Employees can point to Sections 806 and 1007 of Sarbanes-Oxley as a public policy prohibiting retaliation for revealing violations of federal law.

State common law whistleblower protections generally offer two critical advantages over administrative federal whistleblower protections:

- the right to a jury trial; and
- the opportunity for punitive damages (although punitive damages are generally not available against public sector employers).

When filing an action under state law, consider other possible claims, including:

- defamation;
- breach of contract based on personnel policies set forth in an employee handbook;
- promissory estoppel;
- breach of covenant of good faith and fair dealing;
- intentional interference with contract;
- intentional infliction of emotional distress; and/or
- negligent hiring or supervision.

## 2. The DOL Complaint

Although the written complaint is informal and can be supplemented in interviews with the OSHA investigator, to avoid dismissal the complaint should provide specific information on the elements of the claim. Therefore, the complaint should clearly:

- identify the legally protected activity that your client engaged in;
- identify the adverse action that your client has been, or continues to be, subjected to;<sup>1</sup>
- identify the perpetrators of the retaliatory action and explain how they became aware of the protected activity; and
- explain what the causal connection is between the protected activity and the adverse action.

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<sup>1</sup> Note that the Fifth Circuit recently held that the *Faragher/Ellerth* defense applies in hostile work environment claims brought under Section 211 of the Energy Reorganization Act. *See Williams v. Mason*, No. 03-60028 (5th Cir. July 15, 2004). Accordingly, you should be prepared to rebut the *Faragher/Ellerth* defense at trial. If an employer refuses to disclose the report of its investigation during discovery, it may be barred from asserting the *Faragher/Ellerth* defense.

**PRACTICE TIP: Have your client read every sentence of his complaint and verify every fact as accurate, complete and not exaggerated. Defense counsel will go through the complaint, line by line, in the plaintiff's deposition and any inaccuracy or exaggeration will be used to try to demonstrate your client's willingness to embellish the truth as evidence against his credibility.**

The complaint should also clearly identify the parties being sued and the relationship of the parties as employee and employer. Federal whistleblower statutes require the complainant to demonstrate that she is a covered "employee." The DOL construes "employee" status broadly. An employer may be liable for its contractor's adverse action against an employee in situations where it acted as an employer with regard to the employee of the contractor. *See, e.g., Stephenson v. National Aeronautics & Space Administration*, 94-TSC-5 (ARB Apr. 7, 1997); *Hill v. TVA*, Case Nos. 87-ERA-23 & 24 (Sec'y May 24, 1989). Therefore, consider bringing an action against both the direct employer and the company that hired the contractor.

Under Section 806 of Sarbanes-Oxley, the individual managers or supervisors as well as the employer are liable for discrimination. 29 C.F.R. § 1980.101. Depending on the factual circumstances and the controlling statute, consider naming the decision-makers who were responsible for retaliating against your client as defendants.

Remember that filing a whistleblower complaint with the DOL is a distinct protected activity. If the employer retaliates against your client for filing a complaint with the DOL, you should amend the complaint.

### **3. OSHA Investigation**

As a practical matter, the OSHA investigation is only as good as the investigator. Since OSHA does not have subpoena authority, the investigation is based only on voluntary cooperation, with no consequence for failure to disclose information. Therefore, it takes a good investigator to work within these limitations and actually capture more than the posturing of a party.

Nonetheless, the investigation is an important part of the process with opportunities to resolve the case and to learn important information about the situation that your client may not have known. Cooperate and communicate with the investigator, periodically check on the status of the investigation, and provide whatever evidence, research or information that can help your client. Find out what defenses the employer is asserting and provide documentation to the investigator showing that these defenses are pretextual.

Try to obtain the employer's position statement from the OSHA investigator. As soon as the investigation is completed, file a Freedom of Information Act (FOIA) request for the investigative file, including the position statement. Respondents often over-reach in their

initial statements to the DOL investigator, or withhold critical information. Seek to obtain notes, documents, and interview statements, and appeal agency decisions to withhold information under FOIA.

#### 4. **Settlement Judge Program (DOL Mediation)**

If there is a good possibility of settlement, this mediation program can save substantial costs for all parties. The program works well if parties truly want a resolution. If a settlement appears unlikely or your client is determined to seek public vindication, do not waste time with this mediation program. Once the case has been assigned to an ALJ, your focus should be on obtaining through discovery what you need to prove your case.

The mediation program is also helpful if your client has unrealistic expectations about damages or evidence in that she will hear an ALJ's often candid assessment of her case. In order to be successful, be candid with the ALJ about weaknesses and your best evidence.

#### 5. **Discovery**

The discovery time frame in a proceeding before the OALJ is generally much shorter than discovery in federal court. Therefore, as soon as the case is assigned to an ALJ, you should be ready to file document requests and interrogatories, and notice depositions.

As soon as the complaint is filed, if not beforehand, send the employer's counsel a preservation of evidence letter. Many companies routinely delete e-mails pursuant to document destruction policies. Once an employer is on notice of a claim, the employer must halt destruction of documents related to that claim or risk sanctions for spoliation of evidence.

**PRACTICE TIP: If you do not get full answers to discovery responses, promptly draft letters to opposing counsel identifying the deficiencies, and file motions to compel if informal requests for complete responses fail. Do not wait to read the discovery responses until the day before you take depositions! It will be too late to compel the critical documents withheld to be helpful in the depositions.**

Document all communications and agreements concerning discovery in some form of written communications, whether by e-mail or letter. It may seem overly formal in the early days of good working relationships with opposing counsel, but as the discovery process becomes more complicated, relationships will be strained, and the written confirmation of your agreements will be crucial to bring discovery to a close and/or to prevail in motions to compel.

Remember, the main goal in discovery is to establish the true motive for the retaliatory adverse action. Without being overly burdensome, take the depositions of all the witnesses you can afford to – each deposition is a window of opportunity to learn

something about what really happened. The information is always valuable to putting the puzzle together.

Areas to explore in discovery include:

Obtain all relevant policies and procedures, including the employer's progressive discipline policy, and determine whether the employer failed to follow its procedures. Where your client was subject to an adverse action for violating a particular policy or work rule, ascertain whether the employer meted out similar discipline against other employees who violated the same policy or work rule.

Discover the entire history of the concern that complainant raised. Find out whether the employer experienced past problems with this issue, such as enforcement action by a regulatory agency or previous litigation.

Identify facts that would lead an ALJ to impute knowledge of the protected activity to the management officials involved in the decision to take the adverse action. For example, discover facts proving that the supervisor to whom the employee raised a concern had input in the manager's decision to take the adverse action.

Discover whether the manager who took the adverse action retaliated against other employees who raised concerns.

Determine whether your client's coworkers are reluctant to raise concerns for fear of reprisal. The determination of a "chilling effect" is critical information for understanding the dynamics of the case and framing the appropriate remedy.

Obtain the personnel file of the manager or supervisor who retaliated against your client.

Obtain all internal investigative files. Most companies have an internal ombudsman or an employee concerns program which perform investigations of safety concerns and complaints of retaliation. These reports often contain very helpful information.

Your client's deposition:

Your client must be well-prepared to explain in detail her concerns and the efforts she undertook to raise those concerns. While going through the chain of command is not required, it is an important line of inquiry to be prepared for. In addition, your client should be prepared to explain all alleged performance problems, including performance problems at prior jobs. Employers often subpoena the complainant's personnel file from prior employers.

Prior to the deposition, evaluate whether the employer can establish the deliberate misconduct defense. Many of the whistleblower statutes deprive complainant of protection where she engaged in a deliberate violation of a safety regulation. *See, e.g.*, 49 U.S.C. § 42121(e) (“Subsection (a) shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction . . . deliberately causes a violation of any requirement relating to air carrier safety under this subtitle or any other law of the United States.”) The employer will likely try to establish the elements of this defense during the deposition and then move for summary decision. Your client should be prepared to address questions about this defense.

Electronic discovery is about more than just e-mails. Other examples of electronic discovery include:

Security logs showing when particular employees entered and exited particular facilities. These logs can cast doubt on a witness’ claim that she was in a particular location at a particular time.

Electronic properties of documents and other metadata. This might show that a document supporting the employee’s termination was altered after the employee was terminated.

Messages sent from Blackberry devices or other PDAs.

Electronic calendars.

### Informal Discovery

Interview employees, but check the relevant state “no-contact” rule, which vary widely. In some jurisdictions, such as D.C., an attorney can contact employees who cannot bind the employer as long as the attorney discloses the fact that she represents a party asserting a claim against the employer. D.C. Rule of Professional Responsibility 4.2.

Obtain through FOIA documents related to any investigation conducted by a federal or state regulatory agency of the concerns raised by your client. Often, these will be admissible. *See, e.g., Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 93-ERA-24 at 4 (Dep. Sec’y Feb. 14, 1996) (holding that NRC investigative report was admissible as a relevant public document).

Research the employer’s main witnesses. For example, has this witness’ conduct been challenged in other employment discrimination lawsuits?

## **6. Hearing Before ALJ**

Use the prehearing submission and/or prehearing conference to eliminate or at least narrow objections to the admissibility of documents. Also, determine before the hearing whether the employer will not stipulate to the authenticity of the documents you plan to offer in evidence.

Under most of the whistleblower statutes administered by the DOL, formal rules of evidence do not apply. *See, e.g.*, 29 C.F.R. § 24.5(e). (“Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied.”). Find out early in the process whether the ALJ you have been assigned to follows the federal rules, or has a developed evidentiary set of rules and procedures unique to them.

## **7. Burden of Proof**

Under most whistleblower statutes, the burden of proof is favorable to employees. In contrast to Title VII’s “motivating factor” test, complainant must demonstrate only that protected activity was a “contributing factor” in the employer’s decision to take the challenged adverse action.

Most importantly, under most federal statutes, once the complainant has demonstrated that protected activity was a contributing factor in the decision to take the adverse action, the respondent must demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant’s protected conduct. This is a very high standard to meet and complainant’s counsel should fully understand how respondent will meet that burden.

## **8. Damages**

Advise your client early on to keep a detailed log of job-seeking efforts and results. The employer will likely argue that your client failed to mitigate her damages. Be prepared to show all letters requesting work and e-mails demonstrating your client’s effort to find work. Be sure that your client’s information is consistent with similar information that has to be submitted to a state unemployment office.

Punitive damages are available only under the employees protection provisions of the Safe Drinking Water Act, 42 U.S.C. § 300j-9, and the Toxic Substances Control Act, 15 U.S.C. § 2622.

A prevailing party is entitled to attorney’s fees. Keep contemporaneous and detailed records of your time and be prepared to justify every entry.

## 9. Settlements

As in all litigation, most of the DOL cases eventually end in a settlement. Employers naturally want to settle all potential claims from a particular claimant, but there are some unique restrictions on DOL settlements that challenge settlement discussions – particularly when counsel is unfamiliar with the DOL process.

First, safety concerns and continued protected activity are not “for sale” under the DOL process. No matter how much the company may simply want a price to make the matter “go away,” the DOL will not approve a settlement that seeks to silence the employee. Therefore, make sure that a settlement agreement does not contain a “gag” provision and instead acknowledges the right of the employee to continue to engage in protected conduct. *See Connecticut Light & Power Company v. Secretary, U.S. Dep't of Labor*, 1996 U.S. App. LEXIS 12583, at \*15 (2d Cir. May 31, 1996).

Second, in order to make sure that the settlement is fair and equitable, the amount of attorney’s fees and expenses that the client will have to pay has to be included in the settlement. *See Guity v. Tennessee Valley Authority*, 90-ERA-10 (ARB Aug. 28, 1996); 90-ERA-10 (ALJ Aug. 15, 1996); OALJ Memorandum: Disclosure of Dollar Amount of Payments and Attorneys' Fees; Possible Side Agreements (September 9, 1996). So, what is usually a private matter of distribution between the attorney and the client has to be disclosed in the settlement agreement.

Finally, limit a release of claims to only those claims for which the ALJ has jurisdiction. *See Gault v. Carpenter Tech. Corp*, 2003-SOX-21 (ALJ Sept. 3, 2003) (ALJ lacks authority to approve provisions of settlement agreement releasing claims under other statutes).

### **Other Strategic Considerations:**

#### **10. Initiating Administrative/Law Enforcement Investigations**

Federal agencies have jurisdiction over the substantive violations revealed by the whistleblower, and often have provisions, policies, and in some cases, statutes prohibiting retaliation for raising concerns.

For example, both the DOL and the Nuclear Regulatory Commission enforce Section 211 of the Energy Reorganization Act (ERA), which prohibits retaliation against workers in the nuclear industry who raise nuclear safety concerns. When a worker in the nuclear industry files a complaint under Section 211 of the ERA with OSHA, the complaint is forwarded to the NRC. The NRC's Office of Investigations undertakes a separate investigation of the complaint of retaliation. The NRC's role in enforcing Section 211 is to ensure that NRC licensees maintain a safety conscious work environment, an environment in which employees feel free to raise issues in which workers in the nuclear industry are able to raise concerns to both their own management and to the NRC without fear of reprisal. *"Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation,"* 61 Fed Reg. 24336 (May 14, 1996).

The NRC is especially concerned with the "chilling effect" of retaliation, *i.e.*, the potential for retaliatory employment actions to dissuade employees from raising safety issues. If the NRC finds that a licensee has violated 10 C.F.R. § 50.7 (the NRC's rules implementing Section 211 of the ERA), the NRC will take enforcement against the licensee, including the imposition of civil penalties and/or suspension of the license. The NRC may also take enforcement action against the manager or supervisor who deliberately engaged in the retaliatory act. Although the NRC does not provide a remedy for the complainant, it is critical to be fully engaged in the NRC process to strengthen your client's DOL suit. A finding by a federal agency like the NRC that your client was the subject of retaliation is strategically valuable, although its evidentiary weight depends on the ALJ.

If your client has not done so already, she should raise her safety or compliance concerns with the regulatory agency that has jurisdiction over those concerns. For example, an airline mechanic who is terminated for raising concerns about faulty maintenance or violation of an FAA rule should bring those concerns to the FAA. If the agency has an anti-retaliation regulation, any retaliation against your client for her cooperation with law enforcement may result in criminal penalties.

There is a particularly strong anti-retaliation provision in Section 1107 of Sarbanes-Oxley, which provides: "Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both." In contrast to Section 806, Section 1107 applies to all employers. When representing a client in a Section 806 claim, consider bringing your client's concerns about fraud or a violation of an SEC rule to the SEC and/or the DOJ.

For employees of Department of Energy (DOE) contractors, there is an additional forum for raising concerns, although there is only a very narrow set of circumstances which would support pursuing a claim under that provision. The DOE has adopted regulations

that prohibit DOE contractors from retaliating against employees for disclosure of information concerning danger to public or worker health or safety, or substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities. 10 C.F.R. Part 708. Note, however, that once an employee files a claim under federal or state law, including under Section 211 of the Energy Reorganization Act, the employee cannot pursue a remedy under 10 C.F.R. Part 708, unless the complaint filed under federal or state law was dismissed for lack of jurisdiction. 10 C.F.R. § 708.15(a)(1).

**PRACTICE TIP: Federal agency investigations of retaliation complaints present a two-edged sword; while a decision in your client’s favor is tremendously helpful from a strategic standpoint, the reverse is also true; and over-worked OSHA investigators are often unfamiliar with retaliation claims and do not go beyond the surface of the company’s justification for the adverse action. Meet with the OSHA investigator before filing the complaint and, stay involved in the process.**

## 11. Media

Whistleblower issues are of extreme interest to the public – usually the whistleblower raised concerns about protecting public health and safety. Often the media is an integral part of the worker’s strategy to get attention to the concerns before the litigation has even begun – but the filing of a retaliation complaint on behalf of a whistleblower is itself of interest to the public. Become familiar with the relevant media – whether specialty media on the subject matter, the national media, and/or the local press. There are usually national, local and specialist angles to the whistleblower’s story – understand each element and develop a media strategy for your case.

To the extent possible keep key reporters informed of the progress on the case, make your client available to talk to the media, and never exaggerate the facts or evidence. If there is an attempt made by the employer to obtain a “gag order,” fight it. Your client has lost his job to bring forward matters of public concern; do not voluntarily agree to silence her.

Beware of Strategic Lawsuit Against Public Participation (“SLAPP”) suits. Some companies will file a SLAPP suit against someone who is disclosing internal information concerning matters of public concern. Fortunately, more than nineteen states have adopted anti-SLAPP statutes to counter the chilling effect of SLAPP suits and encourage continued participation in matters of public significance. *See, e.g.*, Cal. Civ. Proc. Code § 425.16.

## 12. Alignment with Other Interests

Most issues of concern to internal whistleblowers are also the subject of concern to outside stakeholders – citizen’s groups outside the gates of chemical or nuclear plants, environmentalists, national public interest organizations, etc. When a whistleblower has

been fired it is natural for the worker to seek out and be embraced by the interest groups that share the same concerns. This relationship is usually helpful and healthy – giving the worker an emotional support group and the group some much needed support and factual information to rely upon.

However, it is important to ensure that the interests of the two do not get overly intertwined. The client's interests are usually best served by a prompt settlement of a retaliation claim – the stakeholder groups' interests are usually better served by the client joining the fight for the cause and never settling a case. The interests can be managed, but it takes constant communication and clear understanding between the two entities. For example, the stakeholder group needs to understand that communications will be discoverable in depositions, so that they should not disclose anything to your client that they are not willing to have the company know about.

## CONCLUSION

The public is best served when potential disasters are prevented. The lessons from the tragic loss of both the *Challenger* and the *Columbia*, are only two of the high profile catastrophes that could have been avoided if management had listened to the warnings of its engineers. The laws that protect workers in raising concerns present unique challenges to managers in industries that have the potential to impact public health and safety, and managing those employees' performance and behavior must be done with full recognition that the free flow of information about dangers to the public health and safety, compliance with state and federal rules and regulations, and actions or practices that undermine either cannot be inhibited.