



WHISTLEBLOWING



The Law of Retaliatory Discharge

Second Edition

2008 Cumulative Supplement

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condition of the company was not misrepresented because the cash inflows were reflected elsewhere. Because the objective element of the reasonable belief test may be decided as a matter of law, the ALJ was found to have erred in its interpretation of the objective belief element. Accordingly, the ARB dismissed the complaint on appeal, a result that was affirmed by the Fourth Circuit.

An employee may not speculate about future violations, but rather must provide information about a violation he reasonably believes is occurring in the present, or has occurred in the past. In *Livingston v. Wyeth*,¹³³ an employee expressed concern about possible misrepresentations to the FDA. The employee's concerns rested on various assumptions and the occurrence of a number of events in the future, such as the assumption that a new system would not be implemented by a specified date, that the company would fail to develop a plan to cover any compliance gaps, and that the company would misrepresent or conceal the true status of the program. The Fourth Circuit reasoned that "the statute requires [the complainant] to have held a reasonable belief" that a violation "has happened" or is "in progress."¹³⁴ The court affirmed summary judgment for the employer because a reasonable belief premised on speculative future contingencies is not sufficient to qualify an employee's conduct as protected activity.¹³⁵

Similarly, the ARB has noted that "the [Act] does not require that an employee provide information about an actual violation of Section 1341 to be protected. Rather, the employee only has to show that he reasonably believed that there was a violation."¹³⁶ "Speculation or a mere possibility that shareholders would be defrauded... does not satisfy the reasonable belief requirement."¹³⁷ Even if the complainant's speculative violation does in fact occur, this "does not retroactively" protect the complainant's activity.¹³⁸

Insider trading can form the basis for a reasonable belief about a violation of the enumerated categories of protected activity. In *Jefferys v. Goodrich Corp.*,¹³⁹ the complainant wrote a letter to the com-

¹³³520 F.3d 344, 353-54 (4th Cir. 2008).

¹³⁴*Id.* at 352.

¹³⁵*Id.*

¹³⁶*Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066 (ARB Sept. 28, 2007).

¹³⁷*Reed v. MCI, Inc.*, ARB No. 06-126, at 5 (ARB Apr. 30, 2008); *see also* *Joy v. Robbins & Meyers, Inc.*, 2007-SOX-74, at 8 (ALJ Jan. 30 2008) (a complainant's belief about possible violations of federal export laws due to lack of an export compliance program was not a reasonable belief).

¹³⁸ARB No. 05-066, at 11 (ARB Sept. 28, 2007).

¹³⁹2007-SOX-75 (ALJ May 09, 2008).



pany's ethics officer documenting three incidents suggesting that two corporate officers who signed quarterly letters were engaging in insider trading. In the first incident, one corporate officer told the complainant that he had been able to make money by trading in the company's stock. Later, the complainant overheard that same corporate officer discussing trading company stock with another employee. Finally, a different corporate officer told the complainant that he had been able to achieve ten percent returns by buying and selling company stock at the right times. The ALJ found that the complainant engaged in protected activity because he provided sufficient evidence that he reasonably believed that insider trading violations had occurred at the company.¹⁴⁰

The reasonableness of a complainant's belief may be validated by his employer's response to the whistleblowing. In *Johnson v. Stein Mart, Inc.*,¹⁴¹ the complainant protested against his employer's practice of collecting markdown allowances from vendors and its method of accounting for inventory, both of which could cause inaccuracies on financial statements. The company investigated the employee's complaints but found no wrongdoing. The court found that the employer's decision to launch an internal investigation demonstrated that the employee's beliefs were reasonable. Thus, the court concluded that the employee engaged in protected activity.¹⁴²

An employee who has an objectively reasonable belief is not required to eliminate all other possible non-fraudulent explanations for possible fraud stemming from non-disclosure of information. In *Van Asdale v. International Game Technology*,¹⁴³ an attorney for the company believed that non-disclosure of critical information in a merger could be fraud against the company's shareholders. The company argued that the plaintiff "could not, as a matter of law, have an objectively reasonable belief unless they ruled out other non-fraudulent explanations for the non-disclosure."¹⁴⁴ The court rejected this theory, stating that neither the statute nor case law imposes such a requirement.¹⁴⁵

The Fifth Circuit has also noted that "an employee's reasonable but mistaken belief that an employer engaged in conduct that

¹⁴⁰*Id.* at 9.

¹⁴¹2007 U.S. Dist. LEXIS 44579 (M.D. Fla. June 20, 2007).

¹⁴²*Id.* at *4.

¹⁴³498 F. Supp. 2d 1321, 1330-31 (D. Nev. 2007).

¹⁴⁴*Id.* at 1333.

¹⁴⁵*Id.*

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