

The Law at Work: Anatomy of a whistleblower claim

By Dan Eaton

November 21, 2022 | 6:00 AM PT

In its recent ruling in *Killgore v. SpecPro Professional Services LLC*, the U.S. Court of Appeals for the 9th Circuit addressed disclosures protected by California's whistleblower law.

Factual background

Aaron Killgore was a program manager for SpecPro. SpecPro assists government agencies in preparing reports required by the National Environmental Policy Act (NEPA). Killgore worked on SpecPro's contract with the U.S. Army Reserve Command to prepare an environmental assessment of a proposed modification of helicopter landing sites near Conroe, Texas. William Emerson was Killgore's supervisor. The Army Reserve's project chief was Laura Caballero.



(San Diego Union-Tribune)

During SpecPro's investigation, Killgore learned the Army Reserve had been using the Conroe site for helicopter attack training for more than a decade, but found no lease, authorization, or records of any environmental damage related to the prior operations.

Caballero instructed Killgore's team to exclude references to the prior helicopter operations in its report. She considered the prior activity irrelevant because the proposed operation involved helicopter landing, not low-level helicopter hovering missions above the ground as the prior operations had.

Killgore told Caballero and Emerson that he believed excluding the prior operations from the report would violate NEPA's transparency requirements. Caballero had complained to Emerson about Killgore's pushback. When Killgore's team's draft report included oblique references to the past operations, Caballero instructed SpecPro to remove them and complained to Emerson about Killgore's disobedience.

On June 22, 2017, following a meeting Emerson and his boss had with Caballero at which she again complained about Killgore's failure to cooperate, Emerson fired Killgore for failing to meet company and customer expectations. The final environmental assessment was submitted in September 2017.

In May 2018, Killgore sued SpecPro for retaliating against him in violation of the California Whistleblower Protection Act, Cal. Lab. Code § 1102.5. The district court summarily dismissed Killgore's claims. Killgore appealed.

California Whistleblower Protection Act

Section 1102.5(b) prohibits an employer from retaliating against an employee for “disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance ... if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee’s job duties.”

A whistleblowing disclosure is protected even if made to a supervisor without power to correct the alleged violation

The 9th Circuit concluded the statute does not require that the person to whom the disclosure is made both be a supervisor and have the authority to “investigate, discover, or correct” the alleged wrongdoing. “Killgore’s disclosures to Emerson — as a ‘person with authority over the employee’ — provided an independent ground for asserting a whistleblower retaliation claim under section 1102.5(b).”

“A person ‘with authority’ over the whistleblower is in a managerial position with the ability to act on” the disclosure of alleged wrongdoing. Others, such as human resources personnel, who do not supervise the whistleblower may be authorized “to investigate, discover, or correct the violation. ... To combine these two channels of protected disclosure is to artificially circumscribe meaningful ways that potential wrongdoing can be elevated and addressed.”

A whistleblowing disclosure is protected even if disclosure was part of employee’s normal duties and was made to an alleged wrongdoer

The 9th Circuit found the trial court erred in finding Killgore’s disclosures to Caballero were unprotected because those disclosures were part of Killgore’s normal duties and because Caballero was assertedly a wrongdoer in violating NEPA.

The whistleblower law specifically protects whistleblower disclosures made as part of the employee’s job duties.

The Court of Appeals also held that disclosures made to individuals involved in the alleged wrongdoing, at least to those like Caballero who do not supervise or employ the whistleblower, are protected.

The alleged suspected unlawful conduct need not have been committed when the alleged retaliatory firing occurred

SpecPro could not escape liability under the whistleblower law by firing Killgore before the Conroe environmental assessment report was signed, and thus before the alleged violation of law he disclosed had occurred. “Section 1102.5(b) serves to protect actual disclosures as well as retaliation for anticipated whistleblowing activity. SpecPro’s reading of the statute would allow an employer to fire the potential whistleblower before completing the illegal act and thereby escape liability. California law does not limit whistleblower protections in such a manner.”

Lesson

Legal technicalities aside, employers generally should thoroughly investigate any employee disclosures of potential unlawful activity related to their operations, whenever and to whomever those disclosures are made. As the late legendary former GE CEO Jack Welch and his business commentator wife Suzy Welch wrote 10 years ago in Fortune, “While in the vast majority of cases, whistleblowers are, to some degree, crazy, vengeful or both, companies should exhibit a heavy bias toward believing an informant is providing critical information about the company’s operations.”

Dan Eaton is a partner with the San Diego law firm of Seltzer Caplan McMahon Vitek where his practice focuses on defending and advising employers. He also is an instructor at the San Diego State University Fowler College of Business where he teaches classes in business ethics and employment law. He may be reached at eaton@scmv.com. His Twitter handle is [@DanEatonlaw](https://twitter.com/DanEatonlaw).