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October 2011

Massachusetts Superior Court Finds No Common-Law Whistleblower Protection for Complaining of Generalized Workplace Concerns

By Greg Keating and Roberta Ruiz

In a noteworthy decision under the Massachusetts at-will doctrine, the Superior Court of Massachusetts ruled on August 12, 2011, in *Nelson v. Anika Therapeutics, Inc.*, that internal complaints raising generalized concerns about company policy and potential safety threats did not fall within the public policy exception of the right to fire at-will employees in Massachusetts.

The *Nelson* decision is noteworthy because it reinforces employers' right to terminate an employee for almost any reason or for no reason at all and makes clear that the exception to the at-will doctrine is a very narrow one. Significantly, the decision also reminds employers that Massachusetts law does not provide a generalized common-law whistleblower protection for private employees.

The Facts

Anika is a medical device company regulated by the federal Food and Drug Administration (FDA) that develops and commercializes therapeutic products for tissue protection, healing and repair. The plaintiff began her employment in 1997 as an analytical chemist in the Quality Control (QC) department. The company promoted her throughout the years, including in 2007, when she became the QC manager. In that role, she was responsible for ensuring compliance by the QC department with the company's standard operating procedures, FDA regulations, and good manufacturing and documentation practices. She was also responsible for developing staff budgets, monitoring equipment and supply expenditures, and managing personnel in the QC department. The plaintiff was an at-will employee throughout her tenure.

In March 2008, the FDA conducted a routine inspection of the company, raising questions about its compliance with certain regulations and citing specific concerns about the QC department. In July 2008, the FDA sent the company a "Warning Letter," stating that failure to act promptly to correct the identified problems might result in civil action by the FDA or a money penalty. As a result, the company terminated the employee's direct supervisor, who the company believed was responsible for the deficiencies.

In early 2009, the employee's new supervisor gave her a negative performance review, identifying observed deficiencies and a lack of progress, and demoted her. When the FDA re-inspected the company and flagged ongoing compliance deficiencies and a failure to address laboratory anomalies in a manner consistent with the company's standard operating procedures, the

employee acknowledged during an internal meeting with supervisors that she had not completed required documentation. As a result, the company terminated her employment.

The employee sued, alleging wrongful termination and claiming that she was entitled to common-law whistleblower protection. She claimed that she was fired for raising internal safety-related complaints, including lack of resources and staff, which, she alleged, was negatively affecting the safety of company products and drugs.

The Court's Decision

In Nelson, the court considered whether an alleged retaliatory firing would violate public policy. First, the court noted that the exception to the at-will doctrine in Massachusetts is a narrow one, limited to circumstances where the discharge is for reasons that violate clearly established public policy. The court provided examples of employee conduct that are protected by a well-defined public policy, including: asserting a legally guaranteed right (*e.g.*, filing a worker's compensation claim); doing what the law requires (*e.g.*, serving on a jury); refusing to do that which the law forbids (e.g., committing perjury); assisting in an ongoing governmental investigation into illegal conduct of an employer; and making a good faith complaint within the company about perceived violations by the company or its employees of the criminal law. The court emphasized that "[t]he distinction of importance is between a discharge for an employee's internal complaint about company policies or the violation of company rules, for which liability may not be imposed, and an internal complaint made about alleged violation of the criminal law for which [. . .] liability may be imposed."

In holding that the employee's "[g]eneralized concerns that activities of the employer could, possibly, result in alleged harm to health or safety [were] insufficient" to trigger the exception to the at-will doctrine, the court noted that the public policy exception does not protect all employee acts that may be "appropriate [or] socially desirable." Moreover, the court noted that a potential threat to public health or safety must not be too remote or speculative.

The court granted summary judgment for the employer, finding that the employee's alleged internal complaints did not rise to a level warranting public policy protection recognized in Massachusetts. The court found that her alleged reporting of departures from company policy arising from inadequate staff, which, she claimed, might possibly allow unsafe products to be sold, posed a very remote threat to public safety. This is especially true, the court opined, in the context of a quality control manager, whose job is to ensure compliance with company standard operating procedures. In other words, the employee was merely doing her job in raising her concerns internally, and that did not give rise to common-law whistleblower protection. If the reverse were true, the court reasoned, the public policy exception would swallow the at-will employment doctrine and insulate every quality control or compliance manager from termination. The public policy exception to the at-will employment rule in Massachusetts is simply not that broad.

Import of the Superior Court's Ruling

While the court's reinforcing of the state at-will doctrine is meaningful, whistleblowing retaliation claims are an ongoing challenge for employers. Employers should remain cautious of such claims, as the outcomes of retaliation cases tend to be very fact driven, with most disputes going to a jury. To protect against these claims, we recommend that employers develop and implement strong anti-retaliation policies and job descriptions and policies emphasizing the reporting duties of employees in quality control and compliance positions.

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