

## **WHISTLEBLOWERS: SAVIOR OR THIEF?**

**By Alexandra Pearsall<sup>1</sup>**

### **Introduction**

The term “whistleblower” refers to an informant who exposes misconduct or alleged dishonest or illegal activity occurring in an organization to the public or those in positions of authority. Legislation at both the state and federal levels encourages whistleblowing because whistleblowers are in a unique position to expose illegal acts against the government. However, legal issues may potentially arise when it comes time to gather all the necessary evidence to file a whistleblower case. The requirement that a complaint be accompanied by all supporting evidence almost encourages illegal behavior. This requirement frequently inspires whistleblowers to “steal” evidence of the employer’s wrongdoing from the employer. Stealing documents from an employer is likely a violation of company policy that can lead to termination and may be independently illegal. Therefore, the issue comes down to whether an employee who is stealing documents in pursuit of potential whistleblowing activity should be immunized from termination or legal action.

Whistleblower protection statutes are important because they encourage employers and employees to be law-abiding citizens by exposing illegal activity within the business and holding the business accountable for these actions.<sup>2</sup> However, some employees may not be whistleblowers simply to advance public interest. Rather, some may be in it for the cash payout. In those instances, employees would be effectively stealing documents, under the guise of gathering necessary confidential information in order to file a whistleblower suit.

Take the False Claims Act (“FCA”), for example. The FCA is a federal statute that creates a civil cause of action against any person who defrauds the government.<sup>3</sup> The FCA also

creates a civil cause of action against any person who knowingly makes a false statement for the purpose of concealing or avoiding an obligation to pay money to the government.<sup>4</sup> When the action itself is brought by a private party on behalf of the government, the action is referenced as a “qui tam” suit and the private plaintiffs are named “relators.”<sup>5</sup> The issue that arises is the financial incentive for employees to bring suits.<sup>6</sup> If the suit is successful, a relator stands to gain between 15 and 25 percent of the amount recovered by the government through the *qui tam* action.<sup>7</sup> And if the government declines to intervene in the action, the relator’s share increases to 25 to 30 percent.<sup>8</sup> Due to this, the FCA unintentionally encourages relators “to take any and all possible measures to ensure a favorable verdict.”<sup>9</sup>

In response, some relators in FCA suits have engaged in “self-help discovery”, whereby “evidence is gathered unilaterally by the relator, outside the context of civil discovery and in anticipation of litigation.”<sup>10</sup> Self-help is particularly troublesome because if the relator is a current or former employee suing his or her employer, the relator may be violating his or her confidentiality agreement or employment policies forbidding access to documents unrelated to the employee’s specific responsibilities or use of documents for means other than the scope of employment.<sup>11</sup> This situation gives rise to a contractual counterclaim against the employer for breach of agreement.<sup>12</sup>

Self-help is also troublesome due to the heightened pleading requirements for fraud. At the pleading stage, a complaint alleging violations of the FCA must satisfy the Federal Rules of Civil Procedure (“FRCP”) 8(a)(2) and 9(b).<sup>13</sup> Under FRCP 8(a)(2), the complaint must provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint “cannot merely recite the elements of a cause of action but must contain factual allegations sufficient to raise the right to relief above the speculative level.”<sup>14</sup> Second, FRCP

9(b)'s heightened pleading standard requires a party to "state with particularity the circumstances constituting fraud or mistake." Finally, the particularity requirement of Rule 9(b) is satisfied if the complaint alleges "facts as to time, place, and substance of the defendant's alleged fraud, specifically the details of the defendants' allegedly fraudulent acts, when they occurred, and who engaged in them."<sup>15</sup> This heightened pleading requirement essentially requires employees to invasively purloin confidential documents in preparation for a whistleblower suit because without these documents, the whistleblower action may fail.

Title VII does not encompass fraud; however, Title VII does include an Anti-Retaliation Clause,<sup>16</sup> 42 U.S.C. § 2000e-3(a), which forbids an employer from discriminating against any of his or her employees "because [the employee] has opposed any practice made an unlawful employment practice by [Title VII] [the so-called 'opposition clause'], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII] [the so-called 'participation clause']."<sup>17</sup> In other words, Title VII's Anti-Retaliation Clause protects employees and applicants from retaliation by an employer when an employee opposes a discriminatory policy or participates in a discrimination suit.<sup>18</sup> Title VII also protects applicants and employees from discrimination based on race, color, religion, sex, or national origin in the workplace.<sup>19</sup>

However, employers have become concerned with employee loyalty due to Title VII whistleblowers.<sup>20</sup> In response, employers have developed confidentiality policies and by 1994, the courts "tended to withhold Title VII anti-retaliation protection from employees who opposed an employer's discriminatory actions and, in doing so, breached employer confidentiality policies."<sup>21</sup> This was a time when courts valued employer's rights over those of employees.<sup>22</sup> However, courts recently have begun protecting some employee breaches of confidentiality,

which has caused uncertainty in the law and difficulty understanding what circumstances would justify an employee's breach.<sup>23</sup>

Courts are faced with a very serious issue—whether employees essentially stealing in order to gather these confidential documents should be immunized from termination or legal action. After all, the purpose of whistleblower protection statutes is to encourage private citizens who are aware of illegal activity to expose this activity. Yet individuals looking for a big payday face courts with the task of balancing this exposure while simultaneously preventing opportunistic suits. In order to resolve this issue, the Supreme Court of the United States should take up the issue and adopt the Reasonableness Test, which was adopted in response to the problem of self-help discovery in an FCA claim.<sup>24</sup> Under the Reasonableness Test, a relator would need to explain “why removal of the documents was reasonably necessary to pursue an FCA claim.”<sup>25</sup> This test protects the employers from corporate espionage and protects employees from dismissal of claims.

### **The Reasonableness Test**

The whistleblower provisions in the FCA and Title VII are sound public policy because both give a voice to employees who may be in a unique position to expose illegality within the business. In the FCA and Title VII contexts, employee protections have strengthened private individuals' incentive to bring suits, such as creating an anti-retaliation cause of action for employees, which allows employees to sue if they were retaliated against for any lawful act in furtherance of their FCA or Title VII claim, even if the claim itself was unsuccessful.<sup>26</sup> These protections ensure that employees will not be intimidated from bringing legitimate claims, which in turn ensures effective investigations. This is good public policy, especially in situations where whistleblowers are the sole method, by which illegal business practices may be exposed.

We see the complex interplay between protecting employees from discriminatory work environments and the need to protect companies from corporate espionage in *Niswander v. Cincinnati Ins. Co.*<sup>27</sup> The *Niswander* court addressed “the scope of protection that should be afforded to employees who disseminate confidential documents in violation of their employer’s privacy policy in the context of employment-related litigation.”<sup>28</sup> In this case, the defendant’s employer’s confidentiality policies involved an employee’s promise not to share information deemed confidential by an employer.<sup>29</sup> If the employee were to breach these confidentiality policies, he or she could be fired.<sup>30</sup> The *Niswander* court recognized that “in certain circumstances, employees may breach the confidentiality policy for legitimate reasons.”<sup>31</sup>

First, the court must determine whether the conduct is considered participation in the lawsuit or opposition to perceived retaliation.<sup>32</sup> In *Niswander*, the plaintiff argued that her conduct was participatory because she produced documents related to her claims for discrimination in response to discovery requests.<sup>33</sup> However, the documents offered were neither directly nor indirectly relevant to her discrimination claims.<sup>34</sup> Therefore, the court viewed this as an intentional and unnecessary dissemination of documents that were irrelevant to her discrimination claim.<sup>35</sup> The Court then noted that its analysis would have been different if the documents had reasonably supported plaintiff’s claim of gender-based pay discrimination.<sup>36</sup> Yet since the documents in no way supported this claim, the delivery of documents to plaintiff’s attorneys did not qualify as protected participation in the lawsuit.<sup>37</sup>

Second, the court must determine under what circumstances the delivery of confidential documents in violation of company policy is considered protected activity under Title VII’s oppositional clause.<sup>38</sup> In *Niswander*, the key issue was whether, as a matter of law, the plaintiff’s delivery of the confidential documents was a protected activity.<sup>39</sup> This determination requires

the courts to balance competing interests, between “the employer’s recognized, legitimate need to maintain an orderly workplace and to protect confidential business and client information, and the equally compelling need of employees to be properly safeguarded against retaliatory actions.”<sup>40</sup> The Sixth Circuit addressed these competing interests:

Allowing too much protection to employees for disclosing confidential information may perversely incentivize behavior that ought not be tolerated in the workplace—namely, the surreptitious theft of confidential documents as potential future ammunition should the employee eventually feel wronged by her employer. On the other hand, inadequate protection to employees might provide employers with a legally sanctioned reason to terminate an employee in retaliation for engaging in activity that Title VII and related statutes are designed to protect.<sup>41</sup>

The crucial question under this balancing test is “whether the employee’s dissemination of confidential documents was reasonable under the circumstances.”<sup>42</sup> This type of analysis is consistent with the concept that oppositional activity must be reasonable in order to receive protection under Title VII and other similar statutes.<sup>43</sup>

This balancing test is applicable regardless of whether the employee’s actions arise under the opposition clause or the participation clause.<sup>44</sup> In *Niswander*, the employee’s actions were not considered participatory.<sup>45</sup> However, there will be situations where the dissemination of confidential documents will be considered participatory.<sup>46</sup> Under this balancing test, the protections typically afforded to an employee based on his or her participating in the Title VII action “may lead a court to conclude that the delivery of confidential documents by a participant in such a lawsuit would qualify as protected activity, although the same action by someone who is simply opposing discrimination would not.”<sup>47</sup>

The *Niswander* court noted that the analysis of a participation claim does not, in general, require a finding of reasonableness.<sup>48</sup> However, when there is confidential information at stake,

a reasonableness requirement is appropriate.<sup>49</sup> Therefore, a showing of reasonableness when confidential documents are disseminated outside of the discovery structure provides adequate protections for both employees and employers.<sup>50</sup> The *Niswander* court found that the following factors were relevant in determining whether the actual delivery of the confidential documents were reasonable:

(1) how the documents were obtained, (2) to whom the documents were produced, (3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct, (4) why the documents were produced, including whether the production was in direct response to a discovery request, (5) the scope of the employer's privacy policy, and (6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.<sup>51</sup>

These factors consider both the employer's "legitimate and substantial interest in keeping its personnel records and agency documents confidential," and yet protect the employee's need to copy and disseminate these documents to legal authorities in order to pursue a whistleblower action.<sup>52</sup>

In *Niswander*, the court used the six-factor test to find that "the [d]efendant's interest in ensuring compliance with its policies of privacy and the law, and maintaining the confidentiality of its clients' personal information outweighs [p]laintiff's interest in preserving what she considered to be evidence of unlawful retaliation on the part of [d]efendant."<sup>53</sup> The only two factors that slightly weighed in the plaintiff's favor were: (1) the documents were obtained in good faith and (2) the documents were sent to her attorney.<sup>54</sup> Had the plaintiff come across the documents innocently, the first factor would weigh more in her favor.<sup>55</sup> But rather than innocently stumbling upon this evidence, the plaintiff specifically searched through the company's confidential documents that she had in her home office in order to uncover evidence of retaliation.<sup>56</sup> Therefore, though she acted in good faith, courts generally require this type of

behavior to be more innocent.<sup>57</sup> Second, courts allow whistleblowers to provide documents to their attorneys, rather than, say, a fellow employee because an attorney can be entrusted with the duty to protect these confidential documents from being disseminated illegally.<sup>58</sup> Therefore, the second factor was generally satisfied.

As for the rest of the factors, the court pointed out that the plaintiff could have simply taken notes of the incidents felt to be discriminatory rather than violating the employer's policy by stealing confidential documents and giving them to her attorney.<sup>59</sup> The fact that there were alternative, legal ways for *Niswander* to provide this information to her employees is what swayed the court to deem her conduct unreasonable and therefore not protected.<sup>60</sup> Therefore, even though the plaintiff was able to satisfy the first two factors of the six-factor test, she failed to satisfy the rest of the factors, thus the balance of interests between employer and employee shifted toward protecting the employer in this case.<sup>61</sup>

*Niswander's* six-factor analysis is the most effective and fair analysis of whistleblower cases. It considers all relevant aspects of the claim and fairly balances both employee and employer interests by looking at whether the employee's actions were reasonable under the circumstances. In *Niswander*, the plaintiff was correctly denied protection because she acted in a way that was unreasonable and thus the balance between the employer's and employee's interests tipped in favor of the employer. Though the six-factor test requires significant analysis, it is the best test for taking into account the totality of the circumstances in order to understand whose interests are most in need of protection. Therefore, the six-factor analysis encourages equitable outcomes and should be adopted by the Supreme Court.

## Conclusion



The Reasonableness Test from *Niswander* is the most efficient and just analysis to resolve this issue in whistleblower cases because under this test, the whistleblower would need to explain why the removal of documents was reasonably necessary to pursue their claim. This test is applicable to both FCA and Title VII claims because it protects the employers from corporate espionage and protects employees from dismissal of claims. Therefore, an employee cannot be entirely immunized from being sued by their employer for theft. Instead, a fair balancing test must take place whereby the employee's actions are evaluated in comparison to his or her employer's interests. For these reasons, the Supreme Court should take up this issue and resolve the courts' splits by adopting a uniform Reasonableness test.

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<sup>2</sup> See, e.g., Claudia G. Catalano, *What Constitutes Activity of Employee Protected Under State Whistleblower Protection Statute Covering Employee's "Report," "Disclosure," "Notification," or the Like of Wrongdoing*, 10 A.L.R. 6th 531 (2006).

<sup>3</sup> *The False Claims Act: A Primer*, U.S. Dept. of Justice, [http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf) (last visited Apr. 12, 2015, 8:32 AM).

<sup>4</sup> 31 U.S. Code § 3729.

<sup>5</sup> *The False Claims Act: A Primer*, *supra* note 3.

<sup>6</sup> Stephen M. Payne, *Let's Be Reasonable: Controlling Self-Help Discovery in False Claims Act Suits*, CHI. L. REV. 1297 (2014).

<sup>7</sup> *The False Claims Act: A Primer*, *supra* note 3.

<sup>8</sup> *Id.*

<sup>9</sup> Payne, *supra* note 6, at 1297.

<sup>10</sup> *Id.* at 1298.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> U.S. ex rel., *Lucas Matheny v. Medco Health Solutions, Inc.*, 671 F.3d 1217 (11th Cir. 2012).

<sup>14</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

<sup>15</sup> *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1324 (11th Cir. 2009).

<sup>16</sup> See generally Nicholas M. Strohmayer, *Drawing the Line: Niswander's Balance Between Employer Confidentiality Interests and Employee Title VII Anti-Retaliation Rights*, IOWA L. REV. 1037 (2010).

<sup>17</sup> *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 719-20 (6th Cir. 2008).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1040.

<sup>20</sup> *Id.* at 1039.

<sup>21</sup> *Id.*

<sup>22</sup> *Niswander*, 529 F.3d at 1039.

<sup>23</sup> *Id.*

<sup>24</sup> *Cafasso v. General Dynamics C4 Systems, Inc.* 637 F.3d 1047 (9th Cir. 2011).

<sup>25</sup> *Id.*

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<sup>26</sup> Payne, *supra* note 6, at 1301.

<sup>27</sup> Niswander, 529 F.3d at 714.

<sup>28</sup> *Id.* at 716.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Niswander, 529 F.3d at 721

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 722.

<sup>37</sup> *Id.* (“...concluding that Niswander’s conduct here is protected participation in the *Rochlin* lawsuit would provide employees with near-immunity for their actions in connection with antidiscrimination lawsuits, protecting them from disciplinary action even when they knowingly provide irrelevant, confidential information solely to jog their memory regarding instances of alleged retaliation.”).

<sup>38</sup> Niswander, 529 F.3d at 722.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 725.

<sup>43</sup> Niswander, 529 F.3d at 725.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 726.

<sup>48</sup> *Id.*

<sup>49</sup> Niswander, 529 F.3d at 726.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Niswander, 529 F.3d at 727.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Niswander, 529 F.3d at 727.

<sup>61</sup> *Id.*