



## Labor & Employment ADVISORY ■

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### District Court Finds No Right to Jury Trial for Dodd-Frank Whistleblower Retaliation Plaintiffs

On an issue of apparent first impression nationwide, Judge J. Owen Forrester of the U.S. District Court for the Northern District of Georgia ruled on November 12 that whistleblower plaintiffs bringing claims under the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C.A. § 78u-6, et. seq., are not entitled to a jury trial to determine damages awards. The ruling also affirmed that punitive damages are not available for whistleblower retaliation claimants under the Act.

In the case *Pruett v. BlueLinx Holdings Inc.*, a former BlueLinx compliance manager brought suit under the anti-retaliation provisions of the Act, which provide that an employer may not “discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against” an employee who provides certain types of information to the U.S. Securities and Exchange Commission (SEC) regarding violations of the securities laws.<sup>1</sup> The plaintiff alleged that he had been terminated after communicating with the Public Company Accounting Oversight Board and the SEC, and sought punitive damages, as well as a jury trial, in his complaint.

Under the Dodd-Frank whistleblower protection, successful plaintiffs are limited to the following remedies:

- (i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;
- (ii) two times the amount of back pay otherwise owed to the individual, with interest; and
- (iii) compensation for litigation costs, expert witness fees and reasonable attorneys’ fees.<sup>2</sup>

In the first part of the ruling, then, the court agreed with BlueLinx that under the clear and plain language of the Act, punitive damages are not available to the plaintiff, and struck his claim for such damages from the complaint.

Moving on to the jury trial issue, the court noted that the Dodd-Frank whistleblower protections are similar, but not identical, to those provided for in the Sarbanes-Oxley Act (SOX). Prior to being amended by Dodd-Frank, the right to a jury trial under SOX had been the subject of much debate in the courts, with a majority determining that no

<sup>1</sup> 15 U.S.C.A. § 78u-6(h)(1)(A).

<sup>2</sup> 15 U.S.C.A. § 78u-6(h)(1)(C).

such right exists.<sup>3</sup> The SOX remedies, however, were amended by Dodd-Frank to explicitly provide a jury right to whistleblower plaintiffs.<sup>4</sup> However, the new whistleblower protections enacted under Dodd-Frank remained silent on the point, seemingly indicating an intent on the part of Congress to exclude such a right for whistleblowers bringing claims under the new law rather than under SOX. As noted by Judge Forrester, while “Congress enlarged the scope of individuals potentially protected in the Dodd-Frank Act, it did not specify in Dodd-Frank that a jury trial was available despite being aware of the legal controversy surrounding whether a jury trial was available under Sarbanes-Oxley and amending that legislation to specify a right for a jury trial.” Nonetheless, because the statute was silent, the court proceeded to a traditional Seventh Amendment analysis of the issue.<sup>5</sup>

After determining that the whistleblower claims at issue were analogous to traditional wrongful discharge claims at common law, the court moved on to the second, more significant part of the Seventh Amendment inquiry—whether the remedies provided for under the Dodd-Frank provisions are legal or equitable in nature. In the latter case, no jury right is available under the Seventh Amendment. Equitable remedies are those intended simply to make the employee “whole,” and thus reinstatement and back pay are generally considered equitable in nature.<sup>6</sup> However, the plaintiff argued that the doubling of back-pay for awards under Dodd-Frank amounted to compensatory, liquidated or punitive-type damages, and thus, such claims must be considered by a jury. Agreeing with BlueLinx, however, Judge Forrester ruled that “the automatic doubling is a calculation that lacks the discretion generally associated with monetary damages awarded by a jury.” Therefore, the court held, the Dodd-Frank whistleblower retaliation law does not provide plaintiffs with the right to a jury trial.

The case is significant because it appears to be the first time a U.S. District Court has addressed the issue of a jury trial under the relatively new whistleblower retaliation provisions of the Dodd-Frank Act. At least for now, employers can take comfort in the precedent this case sets that damage awards for successful whistleblower retaliation plaintiffs should be determined by a judge and not subjected to a far more unpredictable and potentially more pro-employee determination by a jury. It remains to be seen how other courts may come down on the issue.

The case is *Pruett v. BlueLinx Holdings, Inc.*, case number 1:13-cv-02607, in the U.S. District Court for the Northern District of Georgia.

BlueLinx is represented in the case by Bob Riordan and Brooks Suttle of Alston & Bird LLP.

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<sup>3</sup> See *Jones v. Home Fed. Bank*, No. CV09-336-CWD, 2010 WL 255856, at \*7-8 (D. Idaho Jan. 14, 2010) (citing cases addressing the right to a jury trial for SOX whistleblower plaintiffs and deciding to follow “the majority of cases that have . . . held that no right to a jury trial exists.”).

<sup>4</sup> See 18 U.S.C.A. §1514A(b)(2)(E).

<sup>5</sup> The Seventh Amendment grants the right to a jury trial for suits at common law where the value in controversy exceeds \$20, and this has been interpreted by the courts to apply only to common law actions that existed in 1791 (or their modern analogues), and to extend to all suits where legal, as opposed to equitable, rights are involved. See, e.g., *Stewart v. KHD Deutz of America Corp.*, 75 F.3d 1522, 1525 (11th Cir. 1996).

<sup>6</sup> See, e.g., *West v. Gibson*, 527 U.S. 212, 217 (1999).

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