

Eleventh Circuit Sustains Award To Employer In Whistleblower Case

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In a warning to plaintiffs' counsel who seek emotional distress damages for alleged whistleblower retaliation under Florida law, the Eleventh Circuit in *., 750 F.3d 1253* (11th Cir. May 6, 2014) has created a Hobson's choice: forcing plaintiff-employees either to forego potential emotional distress damages available under state law or risk paying prevailing party attorneys' fees and costs to the defendant.

Plaintiff Leslie Smith sued her former employer and its owners for retaliation under Section 806 of **SOX and the Florida Whistle-Blower Act (“FWA”)**. While SOX contains an employee prevailing party provision and no specific emotional distress remedy, the WFA authorizes a court to award fees and costs to the prevailing party and provides for emotional distress damages. Because Smith could not establish a case under either statute, the district court granted her former employer summary judgment; and, after summary judgment was upheld on appeal, the district court awarded prevailing party attorneys’ fees to Smith’s former employer under the FWA.

The question on appeal was whether a prevailing party employer may recover attorneys’ fees when SOX does not authorize an award of fees to a prevailing party defendant. In affirming the attorneys’ fees award, the Eleventh Circuit rejected the employee’s arguments that: (i) SOX and the FWA were in conflict; and, (ii) therefore, the latter was preempted. In so doing, the Eleventh Circuit concluded that there was no conflict because SOX “neither authorizes a defendant to recover attorneys’ fees nor prevents a defendant from recovering fees that are elsewhere authorized.” Therefore, SOX’s attorney fee provision did not preempt the FWA provision.

Although the Eleventh Circuit noted that an employee’s attorneys’ fee risk can be eliminated by foregoing an FWA claim, the Court did not comment on the fact that there was a consequence for the elimination of the risk. Some courts have not allowed for the recovery of emotional distress damages under SOX because emotional distress is not included within the list of recoverable compensatory damages under SOX. Thus, in Florida, the employee’s leverage of seeking uncapped emotional distress damages under the FWA is something employees will need to forego if they are risk adverse to paying attorneys’ fees if their case is deemed meritless.

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