THE COURT OF APPEALS CRACKS OPEN THE SMALL DOOR TO MORE WHISTLEBLOWER CLAIMS UNDER THE NEW YORK LABOR LAW

Tricia Sherno*

I. INTRODUCTION

Private sector employees who report actual or suspected violations of law—or “whistleblowers”—are now entitled to strengthened and expanded legal protections in many jurisdictions. Congress passed significant legislation that protects various types of whistleblowers, including anti-retaliation provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act. Many states, including California and New Jersey, enacted comprehensive whistleblower laws to protect employees. New York is not among these jurisdictions.

Although New York was one of the first states to adopt a whistleblower protection statute in the early 1980s, which was groundbreaking at the time, it has been slow to update the law. In 1984, New York enacted section 740 of the New York Labor Law, which protects private employees who disclose or threaten to disclose “an activity, policy or practice of the employer that is in violation of law, rule or regulation.” The statute is limited to whistleblowing activities related to “a substantial and specific

* Tricia Sherno is an associate at the law firm of Debevoise & Plimpton LLP where she focuses her practice on employment litigation.


3 See CAL. LAB. CODE § 1102.5 (West 2014); N.J. STAT. ANN. § 34:19-7 (West 2014).

4 N.Y. LAB. LAW § 740.2(a) (McKinney 2014).
danger to the public health or safety” or health care fraud. White-collar crimes are not “placed on the same plane as threats to public health or safety.” As a result, New York’s whistleblower statute is inapplicable in most cases.

Both the New York legislature and courts have largely resisted efforts by policy makers and litigants to expand the scope of section 740 of the New York Labor Law. However, most recently, the Court of Appeals considered the whistleblower statute in Webb-Weber v. Community Action for Human Services, Inc. In that case, the court specifically overruled longstanding appellate division precedent by holding that an employee filing a retaliation claim under section 740 is not required to plead the specific law, rule, or regulation that was allegedly violated by the employer. The court’s decision, although narrow, lowers the pleading burden making it easier for some employee whistleblowers to state a cause of action and withstand an employer’s motion to dismiss.

This article will explain the development of private sector whistleblower protections in New York. Part II will provide a brief overview of the New York whistleblower statute and its history. Part III will describe the statutory language and scope of section 740. Part IV will discuss the Court of Appeals decision in Webb-Weber v. Community Action for Human Services, Inc. Finally, Part V will discuss recent legislative efforts to extend further whistleblower and anti-retaliation protections to employees in New York.

II. THE ORIGINS OF NEW YORK’S WHISTLEBLOWER STATUTE

New York’s whistleblower statute was enacted in 1984 following the New York Court of Appeals’ important and widely cited decision in Murphy v. American Home Products Corp. In that case, the

---

5 Id.
7 Jyotin Hamid & Christine Ford, Court of Appeals Emphatically Reaffirms New York’s At-Will Employment Doctrine, 77 ALB. L. REV. 47, 47, 57 (2013/2014); see also Remba v. Fed’n Emp’t & Guidance Serv., 149 A.D.2d 131,134–35, 545 N.Y.S.2d 140, 142 (App. Div. 1st Dep’t 1989) (applying a narrow view to the specific statutory exception, and placing burden on legislature—not the courts—to expand this exception).
9 Id. at 453, 15 N.E.3d at 1174, 992 N.Y.S.2d at 165.
10 See id. at 453–54, 15 N.E.3d at 1175, 992 N.Y.S.2d at 166.
court reaffirmed the common law doctrine of “at-will” employment, which has been closely adhered to in New York since 1895. The “at-will” employment doctrine is the simple presumption that absent statutory or contractual restrictions, the employment relationship may be terminated at any time and for any reason by either an employer or an employee. Whistleblower and other forms of anti-retaliation statutes are primary examples of statutory restrictions on the at-will doctrine.

In Murphy, plaintiff, Joseph Murphy, was employed as assistant treasurer by defendant, American Home Products, before his employment was terminated. Murphy was in many ways a classic whistleblower. Murphy, an at-will employee, claimed that he was fired from his twenty-year employment with American Home Products for his disclosure of “accounting improprieties” to senior management and because of his age. Murphy alleged that he uncovered accounting manipulations of at least $50 million resulting in inflated bonuses to management and that the company retaliated against him for his refusal to engage in the purported fraud. He further alleged that he was fired in a humiliating manner once he disclosed the issues to the defendant’s officers and directors.

Despite the allegedly egregious circumstances surrounding Murphy’s discharge, the Court of Appeals determined that Murphy failed to state a claim under New York law. The court noted: “[U]nder New York law as it now stands, absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer’s right at any time to terminate an employment at will remains unimpaired.” The court also stated that the creation of a cause of action involving “wrongful” or “abusive” termination “is best left to the Legislature.” The court acknowledged in a footnote that various forms of whistleblower legislation were proposed in the New

---

12 Id. at 300–02, 448 N.E.2d at 89–90, 461 N.Y.S.2d at 235–36; Martin v. N.Y. Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895) (setting forth the rule that contracts of employment are generally at-will and may be terminated by either party at any time).
13 Murphy, 58 N.Y.2d at 300, 448 N.E.2d at 89, 461 N.Y.S.2d at 235.
14 Id. at 297, 448 N.E.2d at 87, 461 N.Y.S.2d at 233.
15 Id. at 297–98, 448 N.E.2d at 87, 461 N.Y.S.2d at 233.
16 Id. at 298, 448 N.E.2d at 87, 461 N.Y.S.2d at 233.
17 Id.
18 Id. at 305, 448 N.E.2d at 92, 461 N.Y.S.2d at 238.
19 Id. at 305, 448 N.E.2d at 91, 461 N.Y.S.2d at 237.
20 Id. at 301–02, 448 N.E.2d at 89–90, 461 N.Y.S.2d at 235–36.
York Senate and Assembly beginning in 1981, but were not passed.\textsuperscript{21}

Indeed, the New York legislature began exploring whistleblower legislation in the early 1980s in response to increased media attention on whistleblowers and public safety “catastrophes.”\textsuperscript{22} The New York legislature considered a similar statute that was enacted in Michigan in 1981 in response to incidents in the state involving the “catastrophic accidental poisoning of [livestock]” and “a chemical plant in the state that was venting toxic vapors into the atmosphere.”\textsuperscript{23} In both cases, employees were aware of the matters and were forced to make the difficult choice between blowing the whistle and keeping their jobs.\textsuperscript{24} The legislature noted that similar incidents had occurred in New York.\textsuperscript{25}

Not surprisingly, the primary opponents to legislative efforts to adopt whistleblower measures were business groups such as the New York Chamber of Commerce and Industry.\textsuperscript{26} That group in particular believed the legislation “would open employers to false and malicious accusations” and “actually invites disgruntled employees to seek redress in the news media.”\textsuperscript{27} On the other hand, labor unions and employee advocacy groups widely supported the legislation.\textsuperscript{28}

It was in this context that section 740 was signed into law on August 1, 1984, as a compromise after three successive efforts to pass a whistleblower protection statute failed to gain support in

\textsuperscript{21} Id. at 302 n.1, 448 N.E.2d at 90 n.1, 461 N.Y.S.2d at 236 n.1 (“In fact, legislation has been proposed but not adopted which would protect employees who have been terminated for taking actions which benefit the general public or society in general (e.g., 1981 NY Assembly Bill A 2566), for disclosure of violations of law or regulation which pose a substantial and impending danger to public health or safety (e.g., 1982 NY Senate-Assembly Bill S 9566, A 12451), or for disclosure of certain illegal or hazardous activities of their employers (e.g., 1983 NY Senate Bill S 1153).”)

\textsuperscript{22} Assemb. Memorandum in Support of Legis., Assemb. 2126 (on file with author).

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id.


\textsuperscript{27} Id.

1981, 1982 and 1983. The bill’s Senate sponsor, James J. Lack, was quoted in the New York Times stating that “he believed the bill would be ‘the broadest whistle-blower measure in the country.’”

Yet, even policy makers and key government officials and supporters of the law acknowledged the legislation’s shortcomings. Many of the labor unions and other proponents of the law noted its deficiencies when expressing their support. The Assembly Memorandum in Support of the bill acknowledged: “The bill is narrow in scope. It limits an employer’s discretion only when the law is being broken or the public health or safety is endangered.”

The Attorney General of New York stated that although the bill did not protect all whistleblower employees, it was “a critical first step.” The Attorney General further urged that the “defect in the bill be cured by future legislation.”

Although the New York State legislature has tried on numerous occasions, it has not implemented a cure in the thirty years since section 740 was enacted. The version of section 740 that is in effect today has remained essentially unchanged.

### III. A CLOSER LOOK AT THE NARROW SCOPE OF NEW YORK LABOR LAW SECTION 740

Although section 740 of the New York Labor Law was enacted in the wake of the New York Court of Appeals’ decision in Murphy, the statute does not protect whistleblowers like the plaintiff Murphy...
who disclosed alleged accounting fraud. Instead, section 740 prohibits both public and private employers from taking any “retaliatory personnel action” against employees who engage in a limited set of protected whistleblower activities involving actual violations of law that create “a substantial and specific danger to the public health or safety.” “Retaliatory personnel action” is defined by the statute as “the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.”

An employee is generally afforded statutory protections and the right to reinstatement, back pay and other equitable relief if the employee:

(a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud;

(b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or

(c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

The statute does not protect an employee who first discloses the activity in question to a public body without making the disclosure to the employer and “afford[ing] such employer a reasonable opportunity to correct such activity, policy or practice.”

The statute also contains other pro-employer provisions. It grants courts the discretion to award costs and attorneys’ fees to employers if employees’ claims are frivolous or brought “without basis in law or in fact.” In addition, the statute contains a mandatory waiver provision that requires employees bringing claims under section 740 to irrevocably waive all other claims they

37 N.Y. LAB. LAW § 740.2(a).
38 Id. § 740.2(a).
39 Id. § 740.2.
40 Id. § 740.3.
41 Id. § 740.6.
Whistleblower Claims

may have against the employer based on the same facts.\textsuperscript{42} Lastly, section 740 expressly provides employers the ability to assert a defense “that the personnel action was predicated upon grounds other than the employee’s exercise of any rights protected by this section.”\textsuperscript{43}

New York courts have clarified and confirmed the limited reach of the New York whistleblower statute. The New York Court of Appeals held in its 1996 decision, \textit{Bordell v. General Electric Co.},\textsuperscript{44} that to qualify for protection under section 740, an employee must establish an \textit{actual} violation of a law, rule or regulation.\textsuperscript{45} An employee’s belief that there is a violation of law, even if the employee’s belief is in good faith and reasonable, cannot support a claim under section 740 as a matter of law.\textsuperscript{46}

In \textit{Bordell}, the plaintiff, Frank Bordell, was employed by General Electric Company as a health physicist at a power plant.\textsuperscript{47} He reported to management that several employees may have been exposed to high radiation levels.\textsuperscript{48} He subsequently reported the concern to the Department of Energy, and was suspended and then fired approximately one month after contacting the government.\textsuperscript{49} The Court of Appeals upheld the dismissal of plaintiff’s case despite Bordell’s reasonable and good faith belief that a law that clearly impacted public safety had been violated.\textsuperscript{50} The court reasoned that “the language and legislative history of Labor Law [section] 740 militate in favor of a construction of that section requiring proof of an actual violation of law to sustain a cause of action . . . .”\textsuperscript{51} This standard places an even greater burden on whistleblowers seeking the protection of the statute.

In addition, New York courts have set a high bar for the type of substantial and specific dangers that may trigger statutory protection. The Appellate Division, Third Department, stated that section 740 “clearly envisions a certain quantum of dangerous activity before its remedies are implicated.”\textsuperscript{52} For instance, cases

\textsuperscript{42} Id. § 740.7.  \\
\textsuperscript{43} Id. § 740.4(c).  \\
\textsuperscript{45} Id. at 871, 667 N.E.2d at 922, 644 N.Y.S.2d at 913.  \\
\textsuperscript{46} Id.  \\
\textsuperscript{47} Id. at 870, 667 N.E.2d at 922, 644 N.Y.S.2d at 912.  \\
\textsuperscript{48} Id.  \\
\textsuperscript{49} Id.  \\
\textsuperscript{50} Id. at 871, 667 N.E.2d at 922, 644 N.Y.S.2d at 913.  \\
\textsuperscript{51} Id.  \\
are routinely dismissed when the alleged actual violation of law involved only creates a substantial danger to a specific group of individuals rather than the general public.  

IV. THE COURT OF APPEALS ONCE AGAIN CONSIDERS SECTION 740 IN WEBB-WEBER

Most recently, in early 2014, the New York Court of Appeals considered New York’s whistleblower statute in Webb-Weber v. Community Action for Human Services, Inc. The court overruled First and Second Department precedent by holding that a plaintiff employee is not required to identify the specific law, rule or regulation allegedly violated by his or her employer in pleading a claim under section 740.

In that case, the plaintiff, Wendy Webb-Weber, was the former chief operating officer of defendant, Community Action for Human Services, Inc. (Community Action), a non-profit organization in the Bronx, New York that provides services to mentally and physically disabled individuals. Community Action terminated Webb-Weber’s employment in 2009. Webb-Weber claimed that Community Action terminated her employment because she complained about certain Community Action practices. Webb-Weber filed suit in the Supreme Court of the State of New York, Bronx County, alleging violations of section 740 and 741 of the New York Labor Law, among other causes of action.

Specifically, Webb-Weber alleged in her complaint that she notified Community Action’s chief executive officer about a variety of problems, including the falsification of patient medication and treatment records, fire safety violations, mistreatment of residents, and deficient facilities. Webb-Weber subsequently reported the issues to public bodies when Community Action did not address the

---

55 Id. at 451, 15 N.E.3d at 1173, 992 N.Y.S.2d at 164.
56 Id.
57 Id.
issues, and the organization was sanctioned. However, nowhere in her otherwise detailed complaint did Webb-Weber identify any specific laws or regulations that were allegedly violated by Community Action. Community Action therefore moved to dismiss for failure to state a cause of action while Webb-Weber cross-moved for leave to amend the complaint.

The trial court partially granted Community Action’s motion to dismiss, but permitted the section 740 and 741 claims to survive. The trial court stated, “[w]hile plaintiff does not recite the specific rules, regulations and laws she claims were violated by defendants, given a liberal construction and affording plaintiff the benefit of every possible favorable inference, the allegations in the complaint are sufficient . . .” On appeal, the Appellate Division, First Department, disagreed with the trial court and reversed and dismissed the complaint precisely because it did not identify the particular law, rule, or regulation that the defendant allegedly violated. The First Department cited the longstanding appellate court precedent setting forth this pleading rule.

Webb-Weber subsequently abandoned her section 741 claim and appealed the First Department’s decision to dismiss the section 740 claim to the Court of Appeals. Webb-Weber argued that plaintiffs should not be obligated to cite the specific “law, rule or regulation” in a complaint just as the plaintiff is not required to cite the actual law, rule, or regulation being violated when initially blowing the whistle to the employer and the government. The Court of Appeals agreed and reversed the Appellate Division, and reinstated Webb-Weber’s cause of action under section 740. The court held: “for pleading purposes, the complaint need not specify the actual law, rule or regulation violated, although it must identify the particular activities, policies or practices in which the employer

---

60 Id. at 453, 15 N.E.3d at 1174–75, 992 N.Y.S.2d at 165–66.
61 See id. at 452, 15 N.E.3d at 1173, 992 N.Y.S.2d at 164.
63 Id. at *1, *5.
64 Id. at *4–5.
68 Id. at 452, 15 N.E.3d at 1174, 992 N.Y.S.2d at 165.
69 Id. at 454, 15 N.E.3d at 1175, 992 N.Y.S.2d at 166.
allegedly engaged, so that the complaint provides the employer with notice of the alleged complained-of conduct.”70 The Court of Appeals based its decision on the plain language of section 740, which does not expressly impose any requirement that the specific law, rule, or regulation be identified.71 The court also afforded “plaintiff’s complaint a liberal construction” as is required.72

The Court of Appeals decision in Webb-Weber is relatively narrow. The court noted that defendants can use discovery devices or request a bill of particulars to force a plaintiff to identify the particular laws, rules, and regulations allegedly violated.73 The court also reaffirmed its prior decision in Bordell, in which the court held that a plaintiff ultimately “has the burden of proving that an actual violation occurred, as opposed to merely establishing . . . a reasonable belief that a violation occurred.”74

The court’s ruling in Webb-Weber will make it easier for employees bringing whistleblower claims to survive the pleading stage and proceed to discovery and summary judgment. Employees can be less precise in describing the legal violations at issue, and employers will in most cases have one less argument to make in a pre-answer motion to dismiss. There has already been at least one published decision in which an appellate court permitted a section 740 claim to survive based on the Webb-Weber holding.75 Practically, without further action by the legislature, the court’s decision in Webb-Weber is nearly as big of a step the judiciary can take to broaden the reach of section 740.

V. LEGISLATIVE ATTEMPTS TO UPDATE NEW YORK’S
WHISTLEBLOWER STATUTE

The New York legislature has made numerous attempts to broaden the scope of the state’s whistleblower statute over the

70 Id. at 453, 15 N.E.3d at 1174, 992 N.Y.S.2d at 165.
71 Id. at 452, 15 N.E.3d at 1174, 992 N.Y.S.2d at 165.
72 Id. at 453, 15 N.E.3d at 1175, 992 N.Y.S.2d at 166 (citing Leon v. Martinez, 84 N.Y.2d 83, 87–88, 638 N.E.2d 511, 513, 614 N.Y.S.2d 972, 974 (1994)).
73 Webb-Weber, 23 N.Y.3d at 454, 15 N.E.3d at 1175, 992 N.Y.S.2d at 166.
75 Carillo v. Stony Brook Univ., 119 A.D.3d 508, 509, 987 N.Y.S.2d 868, 869 (App. Div. 2d Dep’t 2014). The court permitted the claim under section 740 to survive when plaintiff alleged that her employment was terminated “after she complained to her superiors about certain conduct which the defendants engaged in or tolerated” and she did not specifically allege the particular law, rule or regulation allegedly violated. Id.
The most significant change to the whistleblower law was implemented in 2002 when the legislature approved the addition of section 741 of the New York Labor Law. Section 741 extends similar protections to both public and private sector employees who “perform[] health care services” and disclose violations of “improper quality of patient care.” Of course, the new provisions of the labor law are similar to the existing protections under section 740 and do not relate whatsoever to white collar crimes.

At present, multiple whistleblower bills are pending in both the New York State Assembly and Senate. Assembly Bill 05696A and Senate Bill 03862, which are identical, appear to have the most traction. Assembly Bill 05696A passed the Assembly on June 20, 2013, and then died in the Senate on January 8, 2014. The same bill once again passed the Assembly on June 17, 2014, and has been referred to the Senate. Senate Bill 03862A was committed to rules in the Senate on June 20, 2014.

These bills, if passed, would overhaul section 740 in three key ways. First, the bills would extend protections to whistleblowers that provide information to a public body regarding an “illegal business activity.” An illegal business activity is not limited to violations that implicate public health. The bills define, “illegal business activity” as “any practice, procedure, action or failure to act by an employer, or an employee or agent of such employer, taken in the course of the employer’s business . . . that is . . . punishable by imprisonment or civil or criminal penalty.” Second, the bills add a good faith requirement that lowers the standard for whistleblowers. Specifically, an employee “who in good faith reasonably believes that an illegal business activity has occurred or will occur . . . will be “protect[ed] against retaliatory . . . action” if

77 N.Y. Lab. Law § 741 (McKinney 2014).
78 See id.; supra notes 5–6 and accompanying text.
81 Id.
he/she discloses employer activity. Finally, the bills would place limitations on the requirement that employees first disclose the illegal activity to the employer and allow the employer an opportunity to cure.

Such sweeping changes to the anti-retaliation provisions of the New York Labor Law would undoubtedly result in increased whistleblower litigation in New York.

VI. CONCLUSION

While New York State’s statutory whistleblower protections do not extend protection against retaliatory actions to most whistleblowers in New York, change may be in the air. Although the legislature has failed to expand section 740 in the past, it is entirely possible that new legislation will be enacted in the near term. In the meantime, at least some New York employees will be entitled to pursue their section 740 claims beyond the pleadings stage thanks to the Court of Appeals’ recent holding in Webb-Weber.

---