

ALERTS

New York Court Finds Implied Private Right of Action in Nonprofit Revitalization Act’s ‘Whistleblower Policy’

November 17, 2016

On Oct. 24, 2016, a New York court ruled that the state’s Not-for-Profit Corporation Law (“N-PCL”), as amended by the Nonprofit Revitalization Act of 2013 (the “Act”), contains an implied private right of action for failing to protect whistleblowers from retaliation. The Supreme Court, Kings County rejected the notion that the Act’s “Whistleblower Policy” requirement only permits the attorney general or the board of directors to file suit and ruled that the Act implies a private right of action.[1]

Della Pietra v. Poly Prep

While employed by Poly Prep Country Day School (“Poly Prep”), an employee, Lisa Della Pietra, reported to the school’s headmaster and several board members that her supervisor engaged in misconduct while on a school-funded vacation with students and alumni. The alleged misconduct involved sexual contact with prostitutes and alcohol consumption. Della Pietra alleged that the headmaster disclosed her identity and, as a result, she was “harassed, bullied, and intimidated” by her supervisor. Della Pietra claims she was subsequently terminated from Poly Prep shortly after reporting the retaliatory conduct to the headmaster. Della Pietra sued the school for mental anguish and humiliation due in part to Poly Prep’s failure to maintain and distribute a whistleblower protection policy.

The court applied the three-part test set out by the New York Court of Appeals in *Burns Jackson v. Lindner*, 59 N.Y.2d 314 (1983), ruling that the legislature intended for the Act to encompass a private right of action. Under this test, a court considers: “(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme.”[2] The Court rejected Poly Prep’s motion to dismiss, finding that Della Pietra was within the class of people the law was intended to help and permitting her suit would promote the legislative purpose of protecting whistleblowers. The Court granted the remainder of Poly Prep’s motion to dismiss, however, dismissing Della Pietra’s claims for breach of contract and defamation, and rejecting her argument of an implied contract of employment, finding that she could not rebut the presumption of an employment-at-will relationship.

Nonprofit Revitalization Act

As we have previously notified you,[3] New York’s legislature reformed the N-PCL in 2013, its first major modification in over 40 years. The Act requires not-for-profit organizations with 20 or more employees and an annual revenue of more than \$1 million to adopt a policy protecting whistleblowers from retaliation. Section 715-b mandates that the “Whistleblower Policy” include: (1) procedures for reporting violations and suspected violations of laws or policies, including procedures for preserving the confidentiality of reported information; (2) a designated employee, officer or director tasked with administering the policy and reporting to the audit committee or other committee of independent directors or if no such committees exist, to the board; and (3) a requirement that copies of the policy be provided to employees, officers, directors and volunteers. The purpose of the “Whistleblower Policy” is to protect employees, who, in good faith, report misconduct, from adverse employment consequences.[4] In 2015, Governor Cuomo signed into law amendments to the Act. Section 715-b(b)(3) offers guidance and provides that the distribution requirement of the “Whistleblower Policy” may be satisfied by posting it on the organization’s website or at the organization’s office in a conspicuous location accessible to volunteers and employees.

Recommended Actions

All New York not-for-profit organizations, including nonprofit education institutions, should review the Act and its amendments in light of this new development. All not-for-profit organizations are encouraged to update their whistleblower protection policies and ensure that the policies are comprehensive and properly distributed. Additionally, this judicially recognized implied right of action might be extended to apply to other parts of the N-PCL which do not explicitly recognize a private right of action, such as the new conflict of interest requirements set forth by the Act.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] *Della Pietra v. Poly Prep*, 506586/2015 (N.Y. Sup. Ct. Oct. 24, 2016) (decision and order of the court granting in part and denying in part motion to dismiss).

[2] *Sheehy v. Big Flats Community Day*, 73 NY.2d 629, 633 (1989).

[3] See our previous *Alerts*: "The Nonprofit Revitalization Act of 2013" and "The Nonprofit Revitalization Act of 2013 Takes Effect on July 1, 2014."

[4] See N.Y. Not-for-Profit Corp. Law §715-b(a).

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