

# Connecticut Law Tribune

October 15, 2012

An ALM Publication

## Ruling Benefits Whistleblowers

CONN. JUDGE GIVES EMPLOYEES LEEWAY  
IN REPORTING PROBLEMS UNDER DODD-FRANK

By JAY STAPLETON

In 2009, the vice president of human resources for a Norwalk high-tech manufacturing company began to feel uncomfortable about the status of the pension program he was responsible for overseeing.

Worried that Trans-Lux Corp.'s pension fund was underfunded, and that a missed contribution was not reported to the federal government, Richard Kramer was also concerned that there were supposed to be three executives on the company's pension committee, but there were only two. When Kramer, a Weston resident who had been with the company for 18 years, voiced these concerns to his bosses, he got nowhere. So he alerted the federal government. As a result, Kramer claims, he was fired last year. Shortly afterward, he filed an employment retaliation claim in U.S. District Court in Connecticut.

Now, a recent decision in that case is being heralded by legal experts as expanding a key provision of the Dodd-Frank Act, the law passed by Congress in the wake of the economic meltdown that set out channels for reporting corporate wrongdoing. The law, among other things, provided protections — and potential rewards — for whistleblowers that report corporate malfeasance.

The decision by U.S. District Judge Stefan Underhill in Bridgeport serves to relax the requirements on what a whistleblower must do to report possible wrongdoing.

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Trans-Lux Corp. had tried to have Kramer's anti-retaliation lawsuit thrown out on procedural grounds because Kramer did not make his complaint through formal channels — a link on the Securities and Exchange Commission web site.



**William Kelleher, of Robinson & Cole, said a recent federal court decision in Connecticut 'flagged a lot of issues that companies may run into when you don't properly address whistleblower complaints.'**

Nor did he cite a specific violation of a regulation or law. But the judge found Kramer's written communications — a faxed letter to the SEC, and e-mails to his bosses — and the potential problems they highlighted were ample to establish him as whistleblower.

"The language of the e-mails and letters in which Kramer raised his concerns demonstrates that he may have reasonably believed Trans-Lux to be committing violations of SEC rules or regulations," Underhill wrote in his order, which denied the motion to dismiss but did not decide the merits of the case. "Therefore, Kramer has alleged sufficient facts to support a Dodd-Frank whistleblower claim based on his internal and external communications."

Awards in Dodd-Frank whistleblower cases have so far been slow to come by. In August, with some fanfare, the SEC announced its first



**George O'Brien, of Littler Mendelson, said employers must take particular care when terminating someone who may later qualify as a whistleblower.**

award, \$50,000, to an individual who helped stop a multi-million dollar fraud.

### Legislative Intent

Pullman & Comley partner Dan Schwartz, who wrote about the decision on his Connecticut Employment Law Blog, said the decision likely means that more people will be protected from corporate retaliation under Dodd-Frank, potentially leading to more whistleblower claims. "Here, in general terms, the court said that anyone who really talks about a securities violation to the SEC may be protected," Schwartz said. In getting there, the judge weighed the legislative intent of Dodd-Frank, which is essentially to encourage reports of wrongdoing.

"Here, the employer was arguing that in order to be a whistleblower, it has to be a very particular type of complaint," said Schwartz. "And the court

said no, to read it that narrowly would be against the notion that we want to encourage this behavior. We want to encourage employees to shout about wrongdoing.”

Trans-Lux designs, sells and installs LED large-screen displays, such as those in sports stadiums and at stock exchanges. Revenues in 2011 were just under \$24 million, according to its web site.

**‘Trans-Lux’s interpretation would dramatically narrow the available protections available to potential whistleblowers,’ Judge Underhill wrote. ‘Such a reading is inconsistent with the goal of the Dodd-Frank Act, which was to improve the accountability of the financial system.’**

In internal e-mails that were part of the case file, Kramer described to his fellow executives his growing concerns about adhering to rules dealing with disclosing the financial health of Trans-Lux’s retirement plan. Much of his worrying was prompted by increased questions asked of him by the Pension Benefit Guarantee Corp. (PBGC), which insures pension plans. The federal agency had been monitoring the Trans-Lux pension fund following a corporate restructuring plan. One question PBGC began asking was why the company was holding onto underperforming bonds in its pension fund.

Kramer communicated his concerns to members of the company’s board of directors, saying it was his responsibility to act in the best interest of plan participants. “When we have inside knowledge of the company’s financial situation and yet continue to hold onto these bonds,” Kramer wrote, “the PBGC is going to ask if we are really looking out for the best interests of the Plan’s participants.”

He continued: “I’ve voiced my concern about this many times, especially in light of the company’s worsening financial condition. But no steps have been taken.”

He also worried that the company had not disclosed to the government that it had instituted a salary freeze, which he said was required. When Kramer’s concerns were rebuffed, according to his complaint, he contacted the SEC. He filed a lawsuit against the company in 2011, claiming he was stripped of his responsibilities and wrongfully fired.

### **Securities Violation**

Trans-Lux was represented by attorney Sarah

Baskin of the Hartford office of Jackson Lewis. The company took the position that Kramer did not make his complaint to the SEC by e-mail or on an online form the agency had created after the passage of Dodd-Frank. Further, the defense argued, Kramer did not specifically mention in his communication to the agency that Trans-Lux had violated securities laws.

The legal team for Kramer, which was led by Nicholas Woodfield of the Employment Law Group in Washington D.C., and included Nina Therese Pirrotti, of Garrison Levin-Epstein Chimes & Richardson in New Haven, argued that neither the online forms nor the specific mention of violations were key components of Dodd-Frank.

Put simply, they stated in court briefs, the law protects “individuals that provide information about conduct.” They said the whistleblower protection provision does not require a statement of specific law violation, as long as the employee “reasonably believes” that an SEC rule or federal fraud statute has been violated.

The judge, in weighing the statute and case law, agreed with that standard. Underhill wrote that he based his ruling on the fact that Kramer had notified his employers and the SEC about his concerns with the company’s pension plan, and not on how he made those complaints.

“Trans-Lux’s interpretation would dramatically narrow the available protections available to potential whistleblowers,” Underhill wrote. “Such a reading is inconsistent with the goal of the Dodd-Frank Act, which was to improve the accountability and transparency of the financial system.”

### **Fair Warning**

The ruling is likely to have an impact on attorneys that represent corporate clients in employment matters and others who handle SEC compliance issues. Some said they expect there to be many more complaints filed because of the ruling.

“Companies need to be vigilant in how they handle these whistleblower complaints,” said William Kelleher, a Robinson & Cole partner whose practice

includes business litigation, white-collar defense and corporate compliance. “I’m looking at the case from the standpoint of a lawyer who defends companies when they are faced with compliance issues that they encounter.”

Kelleher said the decision certainly highlights some of the risks companies face when responding to whistleblower complaints. With that in mind, he said, the facts of the TransLux case suggest the defendants may not have handled Kramer’s complaint in the optimal way.

“This flagged a lot of issues that companies may run into when you don’t properly address whistleblower complaints,” Kelleher said. “This shows you have to take whistleblower complaints seriously. It sounds like, according to [Kramer’s] allegations, that he didn’t get the desired results from his board of directors, and then he went to the SEC.”

George O’Brien Jr., a shareholder with Littler Mendelson in New Haven, expects rulings that expand Dodd-Frank’s retaliation protections to lead to an increase in whistleblower lawsuits, given that the law allows fired employees to collect two times their annual salary, plus court costs. If reports of substantial wrongdoing lead to fines being levied against the company, the whistleblower could collect bounty payments as well.

“This development should give employers even more incentive to exercise care in handling employee complaints,” O’Brien said. “And to make sure there are legitimate, documented reasons for the discipline of anyone who may qualify as a whistleblower.”

Nick Zaino, chair of the Labor and Employment section of the Connecticut Bar Association, agrees that the ruling emphasizes the need for employers to make sure they have in place robust internal complaint procedures that encourage employees to report suspected wrongdoing internally. “Company investigators, both internal and external, must be trained on how to respond to these complaints, including how to conduct unbiased, prompt and thorough investigations,” he said.

If an employee complaint leads to a need for corrective action, he said, “companies should not hesitate to do so.” ■