It is no secret that whistleblower complaints are on the rise.

According to the SEC Office of the Whistleblower's (OWB) recently released annual report, during the 2013 fiscal year, OWB received more than 3,200 whistleblower complaints, tips, and referrals—up from 3,001 in 2012 and just 334 in 2011 (the year OWB was created). Similarly, in fiscal year 2013, DOJ saw a record 752 qui tam complaints filed under the False Claims Act (FCA) whistleblower provision. Whistleblower awards are also on the rise. In fiscal year 2013, the DOJ recovered $3.8 billion in settlements and judgments based on the FCA. More than three quarters of the DOJ's recovery—$2.9 billion—was related to whistleblower lawsuits, with whistleblowers receiving $345 million of the recovery. In September 2013, the SEC OWB paid more than $14 million to a single whistleblower. The SEC OWB also recently announced that it paid an additional $150,000 to the recipient of the first whistleblower award, for a total of more than $200,000. But not all whistleblowers

receive large payouts, and many face retaliation for their actions. A recent Fourth Circuit decision makes the relatively light burden of proving retaliation more difficult. And an upcoming decision by the Second Circuit could affirm the lower court's limitations on who can recover whistleblower awards. In *Feldman et al. v. Law Enforcement Associates Corp.*, the Fourth Circuit recently upheld the lower court's decision finding that a whistleblower had not shown that he was fired in violation of whistleblower protections. Paul Feldman, the former president of Law Enforcement Associates Corp., was fired by the company's outside directors in 2009, approximately 20 months after he reported possible export violations under Sarbanes-Oxley. The district court dismissed Feldman's claims, holding that Feldman did not present enough evidence demonstrating that he was fired in retaliation for whistleblowing activities under Sarbanes-Oxley. The Fourth Circuit agreed that Feldman need not show that his protected whistleblowing activities were a significant cause of his termination. But the Fourth Circuit went on to hold that Feldman failed to satisfy even this "light burden" to demonstrate retaliation. The Fourth Circuit considered such factors as the temporal gap of 20 months between Feldman's protected whistleblowing activity and firing, as well as that the fact that acrimony between Feldman and the outside directors started two months before Feldman's first protected activity. In another recent whistleblower case, *Bussing v. Legent Clearing LLC et al.*, the U.S. District Court for the District of Nebraska held that a former employee, Julie Bussing, qualified as a whisteblower under Dodd-Frank even though she never made a report to government authorities. After FINRA began investigating her company, Bussing informed management of potential FINRA violations. Shortly after reporting to management, Bussing was fired. Although Bussing never reported to SEC, the district court held that the anti-retaliation whistleblower provision "applies to disclosures that are completely unrelated to any tip to the SEC." The court noted, however, that Bussing is precluded from recovering a bounty reward because she never provided a tip to the SEC. In what could be another hurdle to whistleblowers attempting to prove retaliation, the Second Circuit heard argument on June 16 to consider consider the extent of the anti-retaliation provisions in Sarbanes-Oxley and Dodd-Frank in a case in which the SEC filed an amicus brief on behalf of the employee, arguing that whistleblowers are entitled to protection whether the whistleblower reports to their employer or to the SEC (an issue the lower court discussed, but did not decide). Stay tuned for more developments in the booming and busting world of whistleblowers.

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