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One Minute Memo®

Fourth Circuit Opens The Door To Repetitious Litigation Of Sarbanes-Oxley Whistleblower Claims

The U.S. Court of Appeals for the Fourth Circuit recently ruled in *Stone v. Instrumentation Laboratory Co.* that an employee could pursue a whistleblower claim *de novo* under the Sarbanes-Oxley Act (SOX) in a federal district court where a final decision was not reached within 180 days of the filing of the administrative complaint even where an administrative law judge (ALJ) already adjudicated the claim. Case Nos. 08 CV 1970, 08 CV 2196, 2009 WL 5173765 (4th Cir. Dec. 31, 2009).

In *Stone*, the plaintiff, a Director of National Accounts, claimed he was discharged for "blowing the whistle" on alleged discrepancies regarding tracking, reporting, and payment of certain administrative fees. On June 19, 2006, the plaintiff filed a SOX complaint with the Occupational Safety and Health Administration. On January 3, 2007—more than 180 days after the complaint was filed—OSHA issued preliminary findings, which the plaintiff appealed to an ALJ. On September 6, 2007, the ALJ granted the defendant's motion for summary decision. The plaintiff then petitioned the Administrative Review Board (ARB) for review, and the ARB set a briefing schedule on October 1, 2007. On November 8, 2007, the plaintiff filed a notice with the ARB expressing his intention to bring a *de novo* action in federal district court.

The U.S. District Court for the District of Maryland granted the defendant's motion to dismiss the complaint on claim preclusion principles, finding the ALJ's ruling was a final decision on the merits. The Fourth Circuit, however, ruled in the plaintiff's favor, relying on SOX's language providing that a *de novo* review may be sought in a federal district court if the Secretary of Labor has not issued a final decision within 180 days of the filing of the administrative complaint. 18 U.S.C. § 1514A(b)(1). In so ruling, the Fourth Circuit noted that an ALJ's ruling may be challenged through a petition for review with the ARB, and the ARB's acceptance of the petition renders the ALJ's decision "inoperative" unless and until the ARB adopts it. The Fourth Circuit added that the ALJ's decision becomes a final order if the ARB does not accept the petition for review.

Notably, the Fourth Circuit considered the Secretary's employer-friendly comments to the applicable regulations. Those comments recognize that it would unnecessarily waste resources for complainants to be permitted to pursue duplicative litigation where a party has had a full opportunity to litigate a claim. Still, the Fourth Circuit concluded that permitting the plaintiff to pursue a *de novo* action after an ALJ has adjudicated his or claim would not engender an "absurd" result justifying a departure from SOX's text.

The *Stone* decision, which is the first federal appellate decision to directly address these issues, poses a risk of heightening the number of SOX cases filed in district courts, as plaintiffs may not hesitate to roll the dice by pursuing a claim in a new forum *de novo* upon receiving unfavorable results through Department of Labor proceedings. On the other hand, the practical reality is that plaintiffs often pursue claims in federal district courts after the 180-day time-frame has lapsed. Likewise, the *Stone* decision could compel the Secretary of Labor to render final decisions more swiftly.

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