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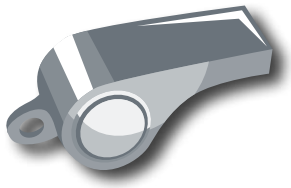
Whistleblower Team Management Alert



Top 10 Whistleblower Decisions of 2012

10. Know Your Place - No Extraterritorial Reach for Dodd-Frank

Asadi v. G.E. Energy (USA), LLC, No. 4:12-cv-345, 2012 U.S. Dist. LEXIS 89746 (S.D. Tex. June 28, 2012)

Plaintiff filed a lawsuit under the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), alleging that the company terminated him after he informed his supervisors that the company had potentially violated the Foreign Corrupt Practices Act ("FCPA"). The Amended Complaint confirmed that the majority of events giving rise to the suit occurred in a foreign country.

Although the court initially discussed whether Plaintiff's internal complaints qualified him as a "whistleblower" under the statute, it declined to decide the issue, instead determining that the ultimate dispositive question was "whether Dodd-Frank's Anti-Retaliation provision applies extraterritorially." In deciding that it does not, the court relied heavily on the U.S. Supreme Court's 2010 decision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), which reaffirmed the "longstanding principle" that Congress' legislation does not apply outside the United States "unless a contrary intent appears." Because the language of Dodd-Frank's anti-retaliation provision is silent regarding whether it applies extraterritorially, the court applied the "presumption that the Provision does not govern conduct outside the United States." This conclusion, the court found, was reinforced by Section 929P(b) of Dodd-Frank, which gives district courts extraterritorial jurisdiction only over certain enforcement actions brought by the SEC or the United States. Under *Morrison*, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." The language of Section 929P(b), according to the court, "strengthens the conclusion that the Anti-Retaliation Provision does not apply extraterritorially." Despite Plaintiff's argument that he was covered by the statute because his termination notice was sent to him from the United States, and contained references to his "at-will" employment under U.S. law, the court found that mere reference to U.S. law is "insufficient to extend the territorial reach of the Anti-Retaliation Provision."

9. Wait Your Turn - Denial of Reinstatement Not Immediately Reviewable

Prioleau v. Sikorsky Aircraft Corp., ARB No. 12-098, 2010-SOX-003 (ARB Aug. 30, 2012)

The Complainant filed an action against his former employer alleging that the company violated Sarbanes Oxley's ("SOX") employee protection provision when it discharged him because he made a protected report. The Administrative Law Judge ("ALJ") granted the company's motion for summary judgment, finding that Complainant had not engaged in protected activity. On appeal, the Administrative Review Board ("ARB") found that Complainant had proffered sufficient evidence to generate a material issue of fact and remanded to the ALJ.

On remand, the Complainant moved for preliminary reinstatement, which the ALJ denied. Complainant then petitioned the ARB for interlocutory review of the ALJ's denial. The ARB declined to grant review of the interlocutory petition, noting that typically, it only accepts appeals when a matter has been fully and finally adjudicated before an ALJ except in certain circumstances. The ARB thus determined that the Complainant's request was a "premature request for reinstatement based on a misunderstanding of the significance of the ARB's Final Decision and Order of Remand."

8. Honesty Is the Best Policy - Positive Performance Review Creates Genuine Issue of Fact

Barker v. UBS AG, No. 3:09-cv-2084, 2012 WL 2361211 (D. Conn. May 22, 2012)

After the company discharged Plaintiff in a large-scale employee reduction, Plaintiff filed suit alleging that she was terminated in violation of SOX whistleblower protections. On the company's motion for summary judgment, the court held that material issues of fact existed with respect to whether Plaintiff engaged in protected activity and whether senior management was aware of that activity at the time of her termination.

Plaintiff alleged that she discovered what she believed to be reporting discrepancies and reported them to her supervisor, who forbade her from discussing her findings with co-workers or anyone outside of her department. Plaintiff was then passed over for projects and removed from the promotion consideration list. In denying the company's motion for summary judgment, the court held that a reasonable jury could find that Plaintiff's concerns regarding inaccurate reporting created a reasonable belief that the company violated federal law, and accordingly rose to the level of protected conduct. Though the company argued that, given Plaintiff's education and training, she should have known that the discrepancies she uncovered were immaterial to the company's shareholders, the court cited the lack of a materiality requirement in Section 1514A in finding sufficient evidence to prove activity was protected. Finally, the court concluded that the company did not show by clear and convincing evidence that it would have terminated Plaintiff absent any protected activity, noting that the company had praised her in performance evaluations.

Barker follows the recent trend of providing SOX plaintiffs more latitude to establish protected activity. Even where the alleged wrongdoing appears immaterial to shareholders, courts may still find that issues of fact exist sufficient to withstand summary judgment. The case also shows that a manager's decision to soften the blow of a negative performance review may undermine the ability to take action later.

7. Don't Reach - SOX "Protected Activity" Limited to Six Specific Categories

Riddle v. First Tennessee Bank, N.A., No. 11-cv-6277, 2012 WL 3799231 (6th Cir., Aug. 31, 2012)

Plaintiff filed a SOX whistleblower claim asserting that he had been terminated for reporting improper use of gift cards by another company employee, which he claimed amounted to bank fraud because the offending employee was fraudulently obtaining and using bank funds; he further alleged that the practice violated the Bank Bribery Act. The company maintained that the gift cards were not improper and that Plaintiff was terminated for poor performance and lack of good judgment.

On appeal from the district court's grant of summary judgment in the company's favor, the Sixth Circuit noted that in order to receive SOX whistleblower protection, an employee's complaint must "definitively and specifically relate to one of the six enumerated categories found in 18 U.S.C. § 1514A." The Court found that the use of gift cards was a common practice in the bank's wealth management group and that the use of the cards lacked fraudulent intent, and therefore could not form the basis of a SOX claim. Likewise, the Court found that Plaintiff's claim based upon the Bank Bribery Act could not support a SOX claim, because the Bank Bribery Act was not within one of the six enumerated categories and, in any event, the Bank Bribery Act does not amount to fraud against shareholders. Accordingly, the district court's grant of summary judgment in the company's favor was affirmed.

6. Live in the Present, Remember the Past - Dodd-Frank Amendment to SOX Coverage for Subsidiaries Retroactive

Leshinsky v. Telvent GIT, S.A., No. 10-cv-4511, 2012 U.S. Dist. LEXIS 94758 (S.D.N.Y. July 9, 2012)

In this case, the Southern District of New York determined that the Dodd-Frank amendments to SOX covering private subsidiaries is retroactive. Plaintiff was employed by a non-public subsidiary of the company, a NASDAQ-listed corporation.

After the subsidiary terminated Plaintiff in 2008, Plaintiff filed suit under Section 806 of SOX against the company, alleging that he was retaliated against for engaging in protected activity by objecting to fraud in a bid for a contract with the New York Metropolitan Transportation Authority.

Prior to 2010, Section 806 protected "employees of public companies." In July 2010, Dodd-Frank Section 929A was passed, which amended Section 806 to protect employees of non-public subsidiaries or affiliates "whose financial information is included in the consolidated financial statements of such [public] company." Because Plaintiff was terminated prior to the enactment of Dodd-Frank, the defendants moved to dismiss his claims, arguing that at the time of the termination, SOX only covered employees of publicly traded companies and not their non-public subsidiaries.

In denying the defendants' motion to dismiss, the court concluded that Dodd-Frank Section 929A should apply retroactively to protect employees of non-public subsidiaries of public parent companies because Section 929A was a "mere clarification" of protections which already existed in SOX Section 806. Despite the defendants' argument that federal courts have consistently held that SOX only applies to an employee of a nonpublic subsidiary if the employee can prove the relationship between the entities, and the defendants' citation to numerous decisions that declined to apply other Dodd-Frank provisions retroactively, the court stated that "[n]one of [the cases cited by defendants] deals with retroactive application of Section 929A of Dodd-Frank to the interpretation of Section 806 of Sarbanes-Oxley. More broadly, these decisions do not address whether an amendment under Dodd-Frank operates retroactively because it is a clarification of the original statute."

5. Be Specific - Complainant Must Plead Specific Adverse Action

Lewis v. Walt Disney World, ARB No. 10-106, 2010-SOX-027 (ARB Jan. 27, 2012).

Complainant complained that his former employer lied to a governmental agency about using asbestos-containing materials, which he alleged constituted a fraud against shareholders. Complainant, however, did not clearly identify the adverse action taken against him by the company. Affirming dismissal of the claim, the ARB noted that there was a vague reference to the fact that Complainant "stopped working" for the company sometime in 2007, but it was unclear whether he resigned or was discharged. The ARB, citing *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039,-42; slip op. at 9 (May 25, 2011), noted that proving an adverse action is an essential element of a SOX whistleblower claim, and accordingly, it is the employee's burden to assert and ultimately prove the adverse action taken by the employer, which burden Complainant failed to sustain.

In addition to failing to prove any adverse action taken by the company, Complainant failed to timely file his whistleblower claims. Complainant filed his SOX whistleblower claims in 2008, at which time there was a 90-day limitations period. In 2010, this limitations period was expanded to 180-days. Relying on Eleventh Circuit precedent, the ARB reasoned that the amended SOX whistleblower limitations period did not revive Complainant's claims on which the previous statute of limitations had run.

4. No Takebacks - Settlement Agreement Cannot Be Overturned

Gonzales v. J.C. Penney Corp., ARB No. 10-148, 2010-SOX-045 (ARB Sept. 28, 2012)

Complainant filed a SOX whistleblower action against her employer claiming she experienced retaliation after she complained about her supervisor. Complainant and her employer entered into a settlement agreement. OSHA approved a redacted settlement agreement that deleted the financial component of the settlement. Complainant subsequently sought to rescind the agreement, claiming she had been pressured to enter into the settlement by her attorneys and had received bad legal advice. The ALJ rejected her arguments, and Complainant appealed that decision to the ARB.

The ARB upheld the ruling of the ALJ, finding it was well within the ALJ's discretion to refuse to void the settlement agreement on the basis of a claim of inadequate legal representation. The ARB also questioned whether OSHA could have properly approved the settlement without learning the amount to be paid by the employer, but determined that that issue had been resolved, as the ALJ had reviewed an unredacted copy of the settlement agreement.

3. Mind Your Own Business - No Evidence That Supervisors Knew of Protected Activity

Boyd v. Accuray, Inc., No. 11-cv-01644 (N.D. Cal. June 4, 2012)

Plaintiff filed a complaint against the company asserting a variety of claims, including a False Claims Act ("FCA") claim and a SOX claim. Plaintiff alleged that he had been terminated after he had made several complaints to the company, including complaints that the company's documentation process for upgraded products to be shipped overseas was misleading and represented a safety issue, and that the company listed defective inventory on its books resulting in improperly inflated assets.

With respect to Plaintiff's FCA claim, the court noted that Plaintiff failed to produce evidence that he had engaged in conduct protected by the FCA, because the FCA only protects employees who in good faith believe that the employer is committing fraud against the government, whereas the evidence suggested that Plaintiff's stated concerns related to patient safety. Similarly, the court determined that there was no evidence that the Plaintiff had informed the company that he was investigating customs fraud or other fraud against the government, as he later characterized his complaints, but rather that any complaints he made to the company suggested he was concerned only with safety issues. Accordingly, the court granted the company's motion for summary judgment on the FCA claim.

Addressing Plaintiff's SOX claim, the court acknowledged that it was undisputed that Plaintiff had made a complaint to the SEC that the company was inaccurately reporting its assets, but noted that the company's decision to terminate Plaintiff for insubordination and performance issues occurred prior to the date Plaintiff complained to the SEC. Moreover, the court observed that Plaintiff had failed to show that anyone with supervisory authority over him "knew or suspected, actually or constructively," that the Plaintiff had complained to the SEC, and this failure doomed the SOX claim. Like the FCA claim, the court thus granted summary judgment in the company's favor.

2. It's Not Over Until It's Over - Final Notice Means "Final" Notice

Poli v. Jacobs Engineering Group, Inc., ARB No. 11-051, 2011-SOX-027 (ARB Aug. 31, 2012)

In this case, the ARB was faced with the issue of timeliness of a SOX complaint, and specifically, the question of when an employee is informed of an adverse employment action, such that the then 90-day (now 180-day) time for filing a SOX complaint with OSHA begins to run. While the ARB has long stated that the limitations period begins to run when the employee receives "final, definitive and unequivocal notice of an adverse employment decision," this case demonstrates that application of that standard is not always clear.

Complainant was employed by a government contractor and was put on "company convenience leave" on October 25, 2009, a year after reporting his belief that there were issues with the billing practices of the company's subcontractor. At the time he was placed on leave, the company told him that "every reasonable effort" would be made to place him in the same job he had or an equivalent position after the leave ended, but that it could not guarantee Complainant a position. On January 5, 2010, Complainant was told that there was no position for him and that his employment was terminated. Complainant filed his SOX claim within 90 days of being informed that his employment was terminated, but not within 90 days of being placed on leave.

The ALJ had found the complaint untimely, relying on a Fourth Circuit Court of Appeals case, *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1998), which held that the statute of limitations was triggered by an employee being given notice of a 90-day temporary assignment, and that if she could not find a permanent job with the employer during that time period, her employment would be terminated.. The ARB, however, distinguished that case, because unlike the notice received by the plaintiff in *English*, the letter received by Complainant in October of 2009 suggested that the leave was based on a lack of billable work, not disciplinary action, and because the letter stated that the company would make every reasonable effort to return Complainant to his former position. Accordingly, the ARB found that the letter received by Complainant lacked "the same degree of finality" as the notice provided to the plaintiff in *English*, and determined that the statute of limitations began to run when Complainant received definitive notice in January of 2010 that his employment was terminated.

1. Embrace Your Differences - Separate Investment Adviser Not a Covered Employer

Lawson v. FMR LLC, 670 F.3d 61 (1st Cir. 2012)

The First Circuit narrowly interpreted Section 806 of SOX to hold that its whistleblower protections do not extend to employees of contractors or subcontractors of a public company. The defendant employers were subsidiaries of various private management companies who provided advisory and/or management services by contract to company mutual funds, investment companies registered with the SEC.

The District of Massachusetts had denied Defendants' Rule 12(b)(6) motions to dismiss asserting that Plaintiffs were not covered employees under Section 806. The First Circuit reversed, holding that only the employees of public companies are covered. It stressed that Section 806 provides that no public company "or any officer, employee, contractor, subcontractor, or agent of such company," may retaliate against an employee for engaging in protected activity (18 U.S.C. § 1514A(a)), and that the foregoing language refers to the individuals who are prohibited from retaliating, "not to who is a covered employee."

The First Circuit noted that elsewhere in SOX, Congress specifically addressed investment companies and investment advisers, and was explicit as to when it intended coverage and when it did not (*e.g.*, 15 U.S.C. § 7263, exempting investment companies registered under section 8 of the Investment Company Act from certain SOX provisions). The court also found notable distinctions between Section 806 and the language of the Aviation Investment and Reform Act (AIR 21) and other whistleblower protection statutes which explicitly extend coverage to employees of contractors to entities regulated by those statutes.

This case may very well make the list in 2013, as well. Writ of certiorari is still pending before the Supreme Court, and on October 9, 2012 the Solicitor General was invited to file a brief expressing the views of the United States. The Department of Labor and SEC submitted *amicus* briefs to the First Circuit favoring Plaintiffs' interpretation of the scope of Section 806. However, the First Circuit's decision noted that the Supreme Court has admonished lower courts not to give securities laws a scope greater than that allowed by their text.

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