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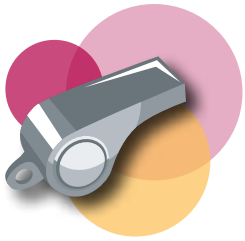

Workplace Whistleblower

Revisiting 'Protected Activity' Under SOX and Dodd-Frank - The Collapse of the 'Definitive and Specific' Standard

By Christopher F. Robertson and Shola Omojokun

Our Whistleblower Team continues to monitor the legal standard for pleading and establishing "protected activity" under the Sarbanes–Oxley Act ("SOX") and the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). As we have previously reported, most federal courts have adopted the United States Department of Labor's Administrative Review Board's ("Board") 2011 loosening of the definition of "protected activity" covered by SOX in *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042 (ARB May 23, 2011), which abrogated its prior decision in *Platone v. FLYi, Inc.*, ARB Case No. 04-154 (ARB Sept. 29, 2006) establishing the requirement that whistleblowing activity must "specifically and definitively" relate to the listed categories of fraud or securities violations.

The Sarbanes–Oxley Act makes it illegal for publicly traded companies to retaliate against employees who report suspected fraud, or who assist in fraud investigations or enforcement proceedings. 18 U.S.C. § 1514A. In 2010, Dodd-Frank created a private right of action allowing employees who believe they have been victims of retaliation under Section 1514A to file suit directly in federal court. 15 U.S.C. §§ 78u–6(h)(1)(A)(iii) and (B)(i). Thus, in those Circuits that have allowed for standing under Dodd-Frank beyond those that report suspected activity to the SEC, the pleading and evidentiary requirements for Section 1514A apply equally to Dodd-Frank retaliation claims.

Employees alleging a violation of Section 1514A must establish a *prima facie* case that (1) they engaged in protected activity; (2) their employer knew or suspected, either actually or constructively, that they engaged in the protected activity; (3) they suffered an unfavorable personnel or employment action; and (4) the protected activity was a contributing factor in the unfavorable action. Thus, what conduct constitutes "protected activity" remains a watershed issue in most cases.

Legal Standard for "Protected Activity" Under Section 1514A

To proceed on a SOX or Dodd-Frank retaliation claim, plaintiffs must first plead (and eventually demonstrate) that they engaged in "protected activity." As defined in SOX, "protected activity" includes "any lawful act done by the employee" to provide information to a supervisor or the Securities and Exchange Commission regarding:

> any conduct which the employee *reasonably believes* constitutes a violation of Section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders[.]

18 U.S.C. § 1514A(a)(1) (emphasis added). In interpreting this statutory language, the Board in *Platone* concluded that the employee's communications must *definitively* and *specifically* relate to the listed categories of fraud or securities violations

under Section 1514A(a)(1). Because the amounts at issue in *Platone* were immaterial (i.e. less than $1,500), the claim was dismissed. Numerous appellate courts followed this reasoning in the ensuing years, including the First, Second, Fourth, Fifth and Ninth Circuits. Certain courts explicitly based their decision to adopt this standard on deference to the ARB.

In a series of decisions beginning in 2011, the Board gradually expanded the scope of anti-retaliation protections available under SOX and redefined "protected activity." Specifically, in Sylvester, the Board abandoned the "definitive and specific" standard and replaced it with a "reasonable belief" standard. To properly plead or demonstrate "protected activity," the Board concluded that plaintiffs need only plead or show that they reported conduct *reasonably believed* to constitute a violation of federal law. Although this standard still appears to require that the employee's belief be both subjectively and objectively reasonable, few decisions since *Sylvester* have been able to articulate exactly where the line should be drawn, and in certain cases the concept of "objective" reasonableness seems to have been effectively overridden, at least at the motion to dismiss stage.

Following the Board's decision in *Sylvester*, every Circuit Court of Appeals that has examined this issue either explicitly deferred to the Board -- holding that the "reasonable belief" standard governs all inquiries under Section 1514 -- or indicated their tacit approval of this new standard. As noted in July 2015 by the Sixth Circuit in *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 808 (6th Cir. 2015), "[f]ederal courts have recognized that Sylvester casts substantial doubt on the continuing validity of the 'definitively and specifically' standard." Later in its opinion, in attempting to articulate why the ARB's change of heart was consistent with the statute, the Sixth Circuit noted that the reasoning in *Platone* would potentially leave an employee "unprotected from reprisal" because she did not have access to information "sufficient to form an objectively reasonable belief." As such, the Court concluded that the issue of reasonable belief "is necessarily fact-dependent, varying with the circumstances of the case." 787 F.3d at 811. In particular, "an employee need not establish the reasonableness of his or her belief as to each element of the violation. Instead, the reasonableness of the employee's belief will depend on the totality of the circumstances known (or reasonably albeit mistakenly perceived) by the employee at the time of the complaint, analyzed in light of the employee's training and experience." *Id.* at 812. Based on this standard, the Sixth Circuit concluded that the subject employee easily established protected activity.

What Does This Mean For Employers?

In light of the ever-loosening and fact-specific inquiry into what constitutes "protected activity," employers need to be increasingly aware that previously potentially dispositive issues -- such as whether (i) a complaint concerns a matter that the employer contends is "clearly unrelated" to fraud or securities violations or (ii) a complaint is "clearly immaterial" -- may no longer be subject to resolution on a motion to dismiss or even summary judgment. In light of the fact-specific inquiry being implemented by OSHA, the ARB and the federal courts, it is critical for employers to be vigilant in defining exactly the nature and scope and details of an employee complaint at the time it is made, as well as the employee's training and experience related to that complaint. Only a well-established record at the inception of the complaint will provide the best chance of successfully limiting the employee's ability to later expand those allegations to create a subjective and objective reasonable belief, and thus provide the basis for a summary dismissal of the complaint.

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