Insight

IN-DEPTH DISCUSSION

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Sixth Circuit Changes Course on Proof Required to Show Protected Whistleblower Activity Under SOX

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The Sarbanes-Oxley Act (SOX) provides anti-retaliation protection to whistleblowers who engage in "protected activity." To engage in protected activity under SOX, the whistleblower must provide information to the Securities and Exchange Commission (SEC) or another law enforcement agency, to Congress or one of its members, or to a "person with supervisory authority" over the whistleblower. The information must pertain to "any conduct" which the whistleblower "reasonably believes" constitutes a violation of at least one of six federal fraud laws enumerated under SOX. These laws are:

- 18 U.S.C. § 1348 (securities fraud);
- 18 U.S.C. § 1341 (frauds and swindles by mail);
- 18 U.S.C. § 1348 (wire, radio or television fraud);
- 18 U.S.C. § 1348 (bank fraud);
- any rule or regulation of the SEC; or
- any provision of federal law relating to fraud against shareholders.

Until 2011, the Department of Labor's Administrative Review Board (ARB) and a majority of federal circuit courts of appeal applied a "definitively and specifically" proof requirement to the whistleblower's requisite "reasonable belief" that one of SOX's six predicate federal laws had been violated. Essentially, the ARB and these courts required the whistleblower's complaint to definitively and specifically relate to an approximation of the basic elements of a violation of at least one of SOX's predicate federal fraud laws.

In May 2011, however, the ARB adopted a lesser proof standard to allow whistleblowers to garner protected activity under SOX. In *Sylvester v. Parexel Int'l LLC*, the ARB, sitting *en banc*, expressly rejected the "definitively and specifically" complaint requirement. Instead, the ARB in *Sylvester* held that a whistleblower need not prove a violation of SOX's predicate laws but merely have "a reasonable belief of a violation of the enumerated statutes." The ARB in *Sylvester* further refined the "reasonable belief" standard to include "a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable" based on the circumstances including the training and experience of the whistleblower.

Since *Sylvester*, both the Second and Third Circuits have given deference to the ARB's ruling and have rejected the "definitely and specifically" standard. In *Rhinehimer v. US Bancorp Investments, Inc.*, the U.S. Court of Appeals for the Sixth Circuit has now joined this emerging trend. In doing so, the court expressly rejected its own previously unpublished 2012 opinion in *Riddle v. First Tenn. Bank, Nat'l Ass'n*, in which the court had applied the "definitively and specifically" standard.

The whistleblower in *Rhinehimer* is a certified financial planner who had been employed with the defendant for 11 years as a financial advisor. While he was on medical leave, he complained orally and in an email to his supervisors about his disagreement with a co-worker's investments for one of the whistleblower's long-time clients. The whistleblower accused the co-worker of being "untrained, uneducated, irresponsible and careless."

According to the court's opinion, when the whistleblower returned from leave, he was disciplined for the unprofessional language contained in his email. Based on his job performance, he was subsequently put on a performance improvement plan, and later terminated when he failed to meet the plan's goals.

Following a five-day jury trial, the jury returned a verdict in the whistleblower's favor and awarded him damages for economic losses and emotional damages. On appeal, the defendant argued that the whistleblower had failed to present sufficient evidence at trial that he had engaged in protected activity as defined in SOX. The defendant argued that the whistleblower's evidence failed to meet the "definitely and specifically" standard.

The Sixth Circuit disagreed. First, the court found that providing information to a supervisor regarding suspected unsuitability fraud in violation of SEC rules qualified as protected activity under SOX "so long as the reasonable belief requirement is met." The court then adopted and applied the lesser protected activity standard in *Sylvester* and concluded that the evidence at trial was more than sufficient to sustain the jury's verdict that the whistleblower possessed an objectively reasonable belief that the co-worker's conduct constituted unsuitably fraud and, therefore, the whistleblower had engaged in protected activity under SOX before he was terminated.

Thus, the Sixth Circuit now joins the Second and Third Circuits in deferring to the ARB's ruling in *Sylvester* and adopting the simpler rule that a whistleblower can sustain a complaint based on protected activity under SOX by showing only that the whistleblower reasonably believed the conduct complained of constituted a violation of one of SOX's enumerated federal fraud laws. In these federal circuits, the SOX whistleblower is not required to make a rigidly segmented factual showing as to each of the legally defined elements of the suspected fraud. Whether other federal trial and appellate courts will follow suit remains to be seen.