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Tenth Circuit Adopts a Broad View of What Constitutes Protected Activity Under Sarbanes-Oxley

By Darren Nadel and Katherine Dix

In a recent decision,[1] the Tenth Circuit approved the Department Of Labor Administrative Review Board's broad view that Sarbanes-Oxley protects employees of publicly traded companies who blow the whistle on numerous types of fraud, even if that fraud in no way relates to shareholders. The opinion also takes an expansive view of what constitutes an "adverse action" under Sarbanes-Oxley.

Sarbanes-Oxley Whistleblower Complaints—a Refresher

Section 806 of Sarbanes-Oxley prohibits retaliation against employees of public traded companies who report certain types of fraud:

No [publicly traded] company . . . , or any officer [or] employee . . . of such company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of . . . [18 U.S.C. §§] 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, when the information or assistance is provided to or the investigation is conducted by—
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> . . . .
>
> (C) a person with supervisory authority over the employee. . . .[2]

To establish a *prima facie* case of whistleblower retaliation under Sarbanes-Oxley, a complainant must show: (1) she engaged in protected activity or conduct; (2) the employer knew of her protected activity; (3) she suffered an unfavorable personnel action; and (4) her protected activity was a contributing factor in the unfavorable personnel action.[3]

1 *Lockheed Martin Corp. v. Admin.* Review Bd., 2013 U.S. App. LEXIS 11159, *16-17 (10th Cir. June 4, 2013).

2 18 U.S.C. § 1514A.

3 18 U.S.C. §1514A(b)(2)(C); 49 U.S.C. §42121(b)(2)(C)(B)(I); 29 C.F.R. §1980.109(a), *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009).

Factual and Procedural Background

Andrea Brown worked for her employer (the Company) as the Director of Communications in Colorado Springs, Colorado. She reported directly to, among others, Vice President of Communications Wendy Owen.

In May 2006, Brown began having difficulty obtaining responses from Owen on work-related matters. She discussed the problem with a co-worker, who happened to run the Company's military pen pals program. The co-worker told Brown that Owen had developed sexual relationships with several of the soldiers in the program and purchased items for the soldiers with Company money. Brown became concerned that Owen's actions were fraudulent and illegal. She also became concerned that, because Owen's misuse of Company funds might ultimately be charged back to the government, her behavior could lead to failure of government audits and affect the Company's future contracts and stock price.

Brown raised her concerns to the Company's Vice President of Human Resources. The Vice President of Human Resources then submitted an anonymous ethics complaint, but identified Brown as a person with knowledge. Almost immediately, the pen pal program was discontinued.

In December 2006, Owens called Brown to find out who had reported her and allegedly said she lost her bonus as a result of the complaint. During the conversation, Brown stated that she told the Vice President of Human Resources "a few things" but was not sure whether the comments resulted in the ethics complaint.

Over the next year, Brown experienced a significant change in her supervisors' behavior towards her. Specifically, Brown received lower performance ratings than before and several supervisors told her that there would be a reduction in force and her position may be impacted. Owen apparently went so far as to tell Brown that her current position was posted on the internet and to get her resume together. Owen's boss, in turn, told Brown not to apply for the position that had been posted (and that Brown had held for five years) because she was not qualified. Her new supervisor, the individual who received her prior position, moved Brown from her office into the visitor's office, which also doubled as a storage room. Then, in January 2008, Brown's supervisor told her he was moving her to a cubicle. When Brown protested that as a Level 5 employee with a leadership position (L-Code) she was entitled to an office, her new supervisor stated he was in the process of removing her L-Code. Brown then had a breakdown, went on medical leave, and later quit, claiming constructive discharge.

Brown filed a complaint with OSHA alleging violations of Sarbanes-Oxley and ultimately had a hearing before an Administrative Law Judge (ALJ). The ALJ found that (1) Brown reasonably believed that Owen committed mail or wire fraud (since the chargebacks for Owen's inappropriate expenses could ultimately be sent to the government through the mail or by electronic means) and (2) Brown communicated that belief "definitely and specifically" to the Company. The ALJ also determined that Brown "fail[ed] to establish protected activity under a general shareholder fraud theory on the basis of loss of shareholder value." The ALJ awarded reinstatement, back pay, medical expenses, and non-economic compensatory damages in the amount of $75,000.

The Company appealed to the Administrative Review Board of the Department of Labor, which affirmed. The Company then appealed to the United States Court of Appeals for the Tenth Circuit, which also affirmed.

SOX Protects Whistleblowers who Report Conduct Unrelated to Fraud Against Shareholders

On appeal, the Company challenged whether Brown had engaged in protected activity under Sarbanes-Oxley. The Company argued that Sarbanes-Oxley only protects employees who complain about mail or wire fraud if the mail or wire fraud ultimately "relat[es] to fraud against shareholders" and, therefore, the ALJ's determination that Brown failed to establish shareholder fraud was fatal to her claim.

The Tenth Circuit disagreed and explained:

The plain, unambiguous text of § 1514A(a)(1) establishes six categories of employer conduct against which an employee is protected from retaliation for reporting: violations of 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), § 1344 (bank fraud), § 1348 (securities fraud), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. [The Company's] reading of the statute would render [the legislature's] enumeration in § 1514A(a)(1) wholly superfluous.[4]

4 *Lockheed Martin Corp.*, 2013 U.S. App. LEXIS at *16-17.

Moreover, the Tenth Circuit held the Administrative Review Board's interpretation of Sarbanes-Oxley, as expressed in its formal adjudication of Brown's claim, must be afforded *Chevron*[5] deference. Because the Board relied on a permissible construction of the statute, the Tenth Circuit held that an employee's complaint of mail or wire fraud need not specifically relate to shareholder fraud.

The Company next argued that Brown could not reasonably believe that Owen's actions constituted mail or wire fraud because there was no evidence that Owen acted with a specific intent to defraud. The Tenth Circuit again disagreed because intent can be inferred from whether a defendant profited or converted money to his own use.[6] Here, Brown's allegations amounted to a claim that Owen had converted company money to her own use. As such, the Tenth Circuit determined that Brown had established protected activity.

Job Uncertainty Can Lead to a Constructive Discharge

The court next evaluated whether Brown experienced an adverse action; namely, a constructive discharge.[7] In Colorado, constructive discharge occurs when:

[A]n employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign. The plaintiff's burden is substantial. The standard is objective: the employer's subjective intent and the employee's subjective views on the situation are irrelevant. Whether a constructive discharge occurred is a question of fact.[8]

The Tenth Circuit held that numerous facts were indicative of constructive discharge here, including: Brown's receipt of lower performance ratings, losing her office, and having her leadership responsibilities stripped after she complained to the Vice President of Human Resources. The Court noted, however, that the "[m]ost important[]" factor here was that "Brown was told she would be one of two employees considered for a layoff and kept in a constant state of uncertainty as to whether she would continue to have a job and, if so, what her job would be." As such, a reasonable person in Brown's shoes would determine the working conditions were so intolerable that she was forced to resign.

The Contributing Factor Requirement is "Broad And Forgiving"

The Court next evaluated whether Brown established her complaint was a "contributing factor" in her constructive discharge. The Court found that this inquiry is intended to be "broad and forgiving," noting that the Board has defined a "contributing factor" as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[9]

The Tenth Circuit also held that temporal proximity alone may establish this standard.[10] Here, the Board's determination that Brown suffered adverse employment actions shortly after the conclusion of the investigation into Owen satisfied this element.

The Company argued, however, that a significant amount of time passed between Brown's complaint and her constructive discharge. The Tenth Circuit disagreed, holding the relevant time period was not when the constructive discharge occurred, but when the conduct leading up to the discharge began.

The appellate court further found that the Board's finding that Owen "poisoned" Brown's other supervisors using the "cat's paw" theory of liability was supported by substantial evidence under the facts of the case.

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5 *Chevron U.S.C., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *Chevron* deference is the highest level of deference accorded to agency interpretations of statutes, and generally requires that the agency's interpretation must be upheld so long as the agency's interpretation of the statute is one possible permissible reading of the statute.

6 *Lockheed Martin Corp.*, 2013 U.S. App. LEXIS at * 24 (citing United States v. Prows, 118 F.3d 686, 692 (10th Cir. 1997)).

7 The Tenth Circuit assumed, for purposes of the appeal, that constructive discharge was an essential element of Brown's case. The court noted in a footnote, however, that "such a showing is not required in all claims of retaliation under the Act." *Lockheed Martin Corp.*, 2013 U.S. App. LEXIS at * 24-25, fn. 9.

8 *Strickland v. United Parcel Service, Inc.*, 555 F.3d 1224, 1228 (10th Cir. 2009) (quotation and citations omitted).

9 *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, No. 04-149, 2006 DOLSOX LEXIS 59, 2006 WL 3246904, at *13 (Admin. Rev. Bd. May 31, 2006).

10 *Lockheed Martin Corp.*, 2013 U.S. App. LEXIS at *34.

Successful Plaintiffs May Obtain Emotional Distress Damages under Sarbanes-Oxley

The Tenth Circuit last evaluated whether the Board properly awarded Brown $75,000 of non-economic compensatory damages for her emotional pain and suffering, mental anguish, embarrassment, and humiliation under 18 U.S.C. §1514A(c):

> (1) In general. An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.
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> (2) Compensatory damages. Relief for any action under paragraph (1) shall include—
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> (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
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> (B) the amount of back pay, with interest; and
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> (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

The appellate court noted that while 18 U.S.C. §1514A(c) does not explicitly allow emotional distress damages, the phrase "shall include" indicates the relief is not intended to be exhaustive. Moreover, the provision stating that a prevailing employee "shall be entitled to all relief necessary to make the employee whole" supports the reading that emotional distress damages are permitted.

Practical Considerations

In light of the Tenth Circuit's ruling, employers should:

- Take a broader view of what constitutes protected activity under Sarbanes-Oxley, including activities that do not relate to shareholder fraud or impact stock price.
- Train human resources professionals to spot the Tenth Circuit's expanded view on what constitutes protected activity.
- Train or retrain managers on what constitutes retaliation under Sarbanes-Oxley.
- Recognize the risk of failing to comply with Sarbanes-Oxley, including a risk of emotional damage awards.

Darren Nadel is a Shareholder and Katherine Dix is an Associate in Littler Mendelson's Denver office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Nadel at dnadel@littler.com, or Ms. Dix at kdix@littler.com.