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In another example of a court's willingness to reign in "unreasonable opposition" under the Sarbanes-Oxley Act, the Ninth Circuit Court of Appeals, in *Tides v. The Boeing Co.*, held that SOX whistleblower provisions do not protect leaks to media organizations.

SOX Protection Does Not Extend to Media Leaks, Ninth Circuit Rules

By Gregory Keating and Sarah Green

The Ninth Circuit Court of Appeals recently held in *Tides v. The Boeing Co.*, No. 10-cv-35238 (May 3, 2011), that the whistleblower provisions of the Sarbanes-Oxley Act (SOX) do not protect leaks of confidential company information to media organizations. This decision is significant to employers, as it is another example of a court's willingness to reign in "unreasonable opposition" and inappropriate conduct in disclosing alleged company fraud.

Background

Plaintiffs Matthew Neumann and Nicholas Tides worked as auditors in Boeing's IT SOX Audit Group. Plaintiffs' responsibilities involved ensuring that Boeing complied with SOX requirements by assessing the effectiveness of its internal controls and procedures for financial reporting. The company staffed the majority of the Audit Group with external contract auditors from PriceWaterhouseCoopers. In addition, Deloitte & Touche performed annual tests to confirm the accuracy of the company's assessments.

Plaintiffs reported to the company that management, fearful that Deloitte & Touche would find a "material weakness" in the company's internal controls, pressured the auditors to rate the controls as "effective" and otherwise created a hostile work environment. Plaintiffs also expressed concern regarding the company's use of contract auditors and the integrity of data related to the company's SOX audit reports.

Thereafter, plaintiffs were approached by Andrea James, a reporter from the *Seattle Post-Intelligencer* who was writing an article about the company's SOX compliance. Although they knew that company policy prohibited the release of company information to the news media, plaintiffs discussed their concerns with James and provided her with internal documents and information allegedly supporting their allegations. James ultimately published the information in an article entitled, "Computer Security Faults put Boeing at Risk."

During the course of the company's internal investigation to locate the source of the leaked information, plaintiffs admitted to speaking with James. The company suspended and ultimately terminated plaintiffs for their violation of company policy. Subsequently,

plaintiffs filed SOX whistleblower complaints with the Occupational Health and Safety Administration (OSHA) alleging that the company retaliated against them in violation of Section 806 of SOX, and pursued their claims before the U.S. District Court for the Western District of Washington. The district court granted summary judgment to the company, holding that SOX did not protect disclosures to the media. Plaintiffs appealed to the Ninth Circuit, which affirmed the district court’s determination.

The Ninth Circuit’s Decision

In analyzing whether “the plaintiffs’ disclosures to the [media] were protected under [Section 806 of SOX],” the Ninth Circuit relied on the statute’s plain language, which prohibits public companies from retaliating against employees who disclose evidence of fraud to: (1) a federal regulatory or law enforcement agency; (2) a member or committee of Congress; or (3) the employee’s supervisor or another individual working for the employer with proper authority. Plaintiffs argued that, because reports to the media may ultimately “cause information to be provided” to the named entities, their conduct should be protected. The court declined “to adopt such a boundless interpretation of the statute” or “read out of the statute the requirement of its words.” Had Congress intended to protect media leaks, the court noted, it could have explicitly done so or protected “any disclosure,” as it did with the more expansive Whistleblowers Protection Act. Moreover, the court observed that the legislative history of Section 806 supported a narrow interpretation of its protections because it revealed an intent to protect disclosures to individuals and entities with the authority to act effectively on the disclosure. As such, the court held that plaintiffs were not entitled to SOX protection for their communications with James, and their terminations were lawful.

Implications for Employers

By issuing the *Tides* decision, the Ninth Circuit joins other courts that have recently displayed a willingness to dismiss whistleblower claims where an employee has divulged confidential information or otherwise acted inappropriately in disclosing alleged employer misconduct.

Moreover, the decision highlights the importance of employer policies that strictly prohibit employee disclosure of confidential company information to outside entities not explicitly included in Section 806. Employers may later rely on such policies to support their decision to discharge an employee who discloses confidential employer information, rather than addressing issues through proper internal channels. In the wake of this decision, employers should consider adopting policies that prohibit disclosures to the media absent employer approval.

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