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June 2011

The Department of Labor's Administrative Review Board recently issued a new Sarbanes-Oxley Act ("SOX") decision that dramatically broadens the scope of protected activity to whistleblowers that make general complaints of corporate fraud, lowering the standard for plaintiffs to establish a SOX case.

New SOX Decision Expands Scope of Protection to General Complaints of Corporate Fraud

By Ken O'Brien and Gregory Keating

On May 25, 2011, the Department of Labor's Administrative Review Board (ARB or "the Board") held that would-be whistleblowers claiming retaliation need not identify fraud with specificity but may engage in protected activity simply by making general complaints. The ruling in *Sylvester v. Parexel International, L.L.C.*, ARB Case No. 07-123 (May 25, 2011) reverses prior authority and dramatically broadens the scope of protected activity under the Sarbanes-Oxley Act ("SOX"). Because the Dodd-Frank Wall Street Reform and Consumer Protection Act expanded the number of companies whose activities are subject to SOX, more companies can expect an even greater number of claims asserted against them under this decision.

Background

Parexel is a publicly-traded company that tests drugs for drug manufacturers and other clients under contract. The company allegedly reported to its shareholders the financial importance of these contracts. One of the plaintiffs alleged that she became aware that portions of test data were false and reported this to several supervisors. The other plaintiff claimed that she witnessed the first plaintiff make these reports. Plaintiffs alleged that after they made these allegations, a supervisor verbally and physically assaulted one of the plaintiffs. A few months later, plaintiffs allegedly made complaints about false reporting on blood samples, claiming that the subsequent "analysis will be flawed and the data corrupt and inaccurate." After making these complaints, plaintiffs claimed, they were harassed and subsequently terminated. One plaintiff claimed she was told she was "not a team player," and the other was told that her "personality did not fit in."

Plaintiffs then filed claims under the whistleblower protection provisions of SOX. They claimed that they had been discharged in retaliation for reporting conduct that "they believed constituted actual or potential mail or wire fraud, and fraud against shareholders." They also claimed that the company's alleged failure to comply with its own internal controls and its subsequent annual reports violated the Securities and Exchange Act and SOX.

The employer attacked the allegations on numerous grounds. The employer argued that plaintiffs' allegations, even if true, were not specifically related to a violation of any of

the provisions of SOX, did not involve shareholder fraud or conduct otherwise adverse to shareholder interests, and did not constitute reasonable concerns about SOX violations. The employer argued that SOX did not “create a generic wrongful termination cause of action for any situation . . . which may ultimately affect shareholders,” and cited precedents holding that “a mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough.”

The Administrative Law Judge (ALJ) agreed that neither plaintiff had alleged that they had engaged in activities protected under SOX and dismissed the complaints.

The ARB’s Decision

In an extremely favorable ruling for employees, the ARB reversed the ALJ’s decision. Among its numerous holdings, the Board determined that an employee need only show that he or she “reasonably believes” that the conduct complained of violated SOX, *not* that a violation has actually occurred. The Board also held that an employee need not wait until a violation has occurred as long as he or she reasonably believes that a violation is likely to happen. Most critically, the Board held that the whistleblower provisions of SOX did not require the plaintiffs to actually complain about fraud on a company’s shareholders, or to refer at all to fraud, or shareholders, or securities, or statements to the SEC or SOX in their claims. The Board specifically and clearly stated that SOX “address[es] not only securities fraud (in the aftermath of financial scandals involving Enron, Worldcom, and Arthur Anderson) but also *corporate fraud generally*.” (Emphasis added.)

Implications for Employers

The Board’s decision likely will be appealed, as it reverses a number of prior rulings by administrative law judges and is arguably inconsistent with decisions issued by the courts of appeal. Pending appellate review, however, employers should consider proceeding cautiously whenever employee complaints about a supervisor’s actions might be viewed as “merely one step in a process leading” to fraud.

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