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Third Circuit Adopts New Broader Standard for Defining Protected Activity for Whistleblowers

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The roller coaster continues for how to define *protected activity* under the Sarbanes Oxley Act (SOX). In a recent decision that signifies a major setback for employers, the United States Court of Appeals for the Third Circuit became the first Court of Appeals to adopt the Department of Labor's Administrative Review Board's (ARB) 2011 decision in *Sylvester v. Parexel, L.L.C.*, a decision that dramatically broadened the scope of protected activity under SOX.

Background

Prior to *Sylvester*, the ARB followed the standard set forth in *Platone v. FLYi, Inc. Platone* held that in order to engage in "protected activity" under SOX, a whistleblower bears a heavy burden by describing conduct that "definitively and specifically" relates to one of the six categories of unlawful acts set forth in the statute. However, the ARB abandoned the *Platone* standard in its May 2011 decision in *Sylvester*. The ARB held that would-be whistleblowers claiming retaliation need not identify fraud with specificity to be engaged in protected activity but may engage in protected activity simply by making general complaints.

While the *Sylvester* decision significantly expanded the scope of protected activity under SOX, it had nevertheless not been adopted by the federal courts. In fact, recent decisions in the Sixth Circuit[1] and in the Southern District of New York[2] have held the "definitively and specifically" standard still applies. Now, the Third Circuit in *Wiest v. Tyco Elec. Corp.*[3] has become the first federal court to adopt the broader standard of "protected activity" announced in *Sylvester*.

In *Wiest*, accountant Jeffrey Wiest brought an action under SOX against his employer, Tyco, alleging he was terminated in retaliation for reporting alleged violations of company policy and sound accounting practices. In 2008, Wiest refused to process a payment request and sent an email to his supervisor expressing his belief that the costs for a particular event were inappropriately charged entirely as advertising. Tyco proceeded with the event and, in response to Wiest's suggestions, made changes to the way the expenses were treated. Wiest continued to raise similar concerns regarding other expense submissions and accounting issues. Wiest alleged that Tyco became frustrated with his persistence in following proper accounting procedures and as a result, began to investigate him for incorrectly reporting a particular receipt, having a relationship

1 *Riddle v. First Tennessee Bank*, No. 11-6277 (6th Cir. Aug. 31, 2012).

2 *Nielsen v. AECOM Tech. Corp.*, No. 12-cv-05163 (S.D.N.Y. Dec. 11, 2012).

3 No. 11-4257 (3d Cir. Mar. 19, 2013).

with a co-worker, and making sexually-oriented comments to co-workers. Wiest was terminated in April 2010. The district court threw out the case finding that Wiest did not allege in his complaint that his engagement in protected activity was "definitively and specifically" related to the protected categories of SOX. The Third Circuit, however, reversed the district court's dismissal of Wiest's SOX claim.

The Third Circuit's Decision

The court held that the "definitively and specifically" standard conflicts with section 806 of SOX, which prohibits retaliation against employees for reporting information that they "reasonably believe" violates SOX. Citing its former decision in *Passaic Valley*,[4] the court noted that if the whistleblower provision was to accomplish the goals of the statute, then "employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute." Referencing the legislative history of section 806, the court held that an employee must establish not only a subjective, good faith belief that his or her employer violated a provision listed in SOX, but also that his or her belief was objectively reasonable. The *Weist* decision is significant because the Third Circuit—which includes Pennsylvania, Delaware, and New Jersey—is the first Court of Appeals to address and adopt the less burdensome *Sylvester* standard.

The dissent objected to this approach as overly broad because it failed to take into account the statutory requirement that the whistleblower complaint relate to one of the six categories of federal law. The dissent also stated that this standard opens the door for complaints that merely allege wrongdoing without also showing that the violation is even covered by section 806.

Chevron Deference

The *Wiest* decision is also significant because the Third Circuit is the first court to hold that the ARB's flip-flop from *Platone* to *Sylvester* is entitled to *Chevron*[5] deference. In *Chevron*, the U.S. Supreme Court held that courts should defer to agency interpretations of their statutes unless they are unreasonable. Generally, when "the court determines Congress has not directly addressed the precise question at issue... the question for the court is whether the agency's answer is based on a permissible construction of the statue."[6] The Third Circuit found that the ARB had thoroughly explained its decision to reverse course and abandon the "definitively and specifically" standard in *Sylvester* because it was too stringent. Therefore, the ARB was entitled to deference in its decision to overrule *Sylvester*, notwithstanding that it was a reversal of prior ARB case law.

The dissent opposed this about-face and contended that the court had adopted an internally inconsistent test in *Wiest*.

In contrast to the Third Circuit, other circuit courts have adopted the "definitively and specifically" standard.[7] Given the widening split in authority, it appears this roller coaster ride may be destined for the U.S. Supreme Court.

Implications For Employers

This decision is troubling for employers because it sets a low bar for whistleblowing employees. If an employee can articulate a belief that his or her employer is doing anything that might be construed in hindsight as a violation of one of the categories of law in section 806, then the employee can obtain substantial protection from ordinary discipline or termination of employment.

In the wake of *Wiest*, the best offense is a strong defense. Employers in the Third Circuit should review and evaluate their complaint and investigations procedures and protocols to ensure that they are prepared to address any complaints. Employers should also be vigilant in responding to employees who complain about alleged company wrongdoing or policy violations. Finally, employers should strongly consider implementing whistleblowing and retaliation training, not only for managers but also for senior executives and members of their board of directors.

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4 *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993).

5 *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

6 *See id.* at 843.

7 *Day v. Staples*, 555 F.3d 42 (1st Cir. 2009); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009).