Ninth Circuit Reinstates Sarbanes-Oxley Lawsuit Brought by In-House Corporate Lawyers

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Two former in-house corporate attorneys were entitled to a trial of their claims brought under the Sarbanes-Oxley Act ("SOX") that they were fired because of complaints about fraud against the company's shareholders, the U.S. Court of Appeals for the Ninth Circuit (in San Francisco) has held. In deciding its first case under the whistleblower provision of SOX, *Van Asdale v. International Game Tech., et al.*, the Ninth Circuit reversed summary judgment in favor of the defendants and held that the plaintiffs had raised a genuine issue of material fact as to whether they wrongfully were discharged. The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

A key provision of SOX prohibits *publicly traded* companies from "discriminat[ing] against an employee in the terms and conditions of employment" for "provid[ing] information…regarding any conduct which the employee reasonably believes constitutes a violation of Section 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud) or 1378 (securities fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders."

In *Van Asdale*, the concerns allegedly raised were related to merger discussions. The plaintiffs alleged that at the time a corporate merger was being contemplated, representatives of the target company failed to disclose the existence of a letter from counsel that potentially invalidated a key patent and, thus, would have negated much of the reason for the merger.

Before addressing the merits, the Ninth Circuit held that SOX did not prevent attorneys from proceeding with their own claims even if it meant disclosing attorney-client privileged information. The Court noted that SOX authorized any "person" to file a complaint alleging retaliation. Strictly construing the statute, the Court concluded nothing indicated that in-house attorneys were not protected from retaliation. Further, the Court said the trial court could utilize the "equitable measures at its disposal" to minimize the possibility of harmful disclosures of privileged communication.

The Court then addressed the merits of the SOX claim, finding that plaintiffs' version of events was sufficient to raise the issue of potential shareholder fraud in connection with the merger, thereby implicating SOX protection. Endorsing the Labor Department's Administrative Review Board's standard, the Court found that to obtain SOX protection against retaliation, an employee's complaint or communication must "definitively and specifically" relate to one of the

categories of fraud identified in SOX. The Court did not find the absence of the words "fraud" or "fraud on shareholders" in the plaintiffs' conversations with management significant. Assuming discussions occurred, the conversations as alleged "definitively and specifically" related to shareholder fraud, and "that is all that Section 1514A requires," the Ninth Circuit held. It also held that the plaintiffs need not prove the existence of fraud. Rather, the Court required only that plaintiffs truly believed there should be an investigation into potential fraud, holding, "Requiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress's goal of encouraging disclosure."

Publicly traded companies should use caution when taking adverse action against an employee who has raised concerns about conduct that even arguably constitutes potential fraud. The mere suggestion that fraudulent activity may have occurred is likely to implicate SOX protection from retaliation. Non-publicly traded companies also should be concerned, as *Van Asdale* may lead courts to interpret state whistleblower statutes to afford greater protections to employees who raise concerns about statutorily-protected conduct.

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