A Timely Analysis of Legal Developments

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Seven years after the passage of the Sarbanes-Oxley Act, a decision by the U.S. Court of Appeals for the Ninth Circuit finally offers some guidance to employers regarding the elements of a Sarbanes-Oxley whistleblower claim.

Ninth Circuit Issues Its First Ruling Setting Forth the Elements for Sarbanes-Oxley Whistleblower Claims

By Patrick H. Hicks and Deborah L. Westbrook

The Sarbanes-Oxley Act of 2002,[1] ("Sarbanes-Oxley" or "SOX") protects employees of publicly traded companies from retaliation for providing information related to possible acts of fraud against shareholders. In *Van Asdale v. International Game Technology*, No. 07-16597 (9th Cir. 2009), the U.S. Court of Appeals for the Ninth Circuit, addressing for the first time the substantive elements of a SOX whistleblower claim, ruled that employees do not have to prove that actual shareholder fraud has occurred to maintain such a suit. Rather, plaintiffs need only establish that they had an actual and objectively reasonable *belief* that shareholder fraud occurred. In addition, the Ninth Circuit held that concerns about the potential disclosure of attorney-client privileged information would not bar in-house attorneys from asserting SOX whistleblower claims. While the ruling is ultimately a conservative one that closely tracks the existing case law and regulations, it is an important decision for the Ninth Circuit.

Factual & Procedural Background

International Game Technology (IGT) is a publicly traded, Nevada-based company specializing in computerized gaming machines and similar products. Plaintiffs Shawn and Lena Van Asdale (husband and wife) began working at IGT in 2001 as Associate General Counsels. Although the two were subsequently promoted within the company, their employment was terminated in early 2004 following a change in corporate management. IGT maintains that Shawn Van Asdale was terminated for poor job performance and that his wife, Lena, was terminated shortly thereafter for breaching protocol in what appeared to be an attempt to access sensitive information for her husband.

In December 2004, the Van Asdales filed suit against IGT in the United States District Court for the District of Nevada, seeking relief under the whistleblower protection provisions of Sarbanes-Oxley and a number of state laws. In support of their SOX whistleblower claims, the Van Asdales alleged that they had been terminated for

reporting possible shareholder fraud in connection with IGT's 2001 acquisition of Anchor Gaming. After discovery, IGT moved for summary judgment and on June 13, 2007, the district court issued a published decision granting IGT's motion.[2] On August 13, 2009, the Ninth Circuit unanimously reversed the district court's grant of summary judgment.

The Ninth Circuit's Analysis

Before addressing the merits of plaintiffs' SOX whistleblower claim, the Ninth Circuit discussed the implications of the Van Asdales' status as former in-house counsel, and the extent to which they could be permitted to rely on attorney-client communications to support their claims against their former client and employer. IGT took the position that the Van Asdales could not proceed with their SOX whistleblower claims because: (1) as Illinois attorneys subject to the Illinois Rules of Professional Conduct, the Van Asdales were prohibited from asserting any retaliatory discharge claim,[3] and (2) regardless of Illinois law, the Van Asdales could not maintain their SOX claim without revealing attorney-client privileged information.

The Ninth Circuit dismissed both arguments. Responding to IGT's claim that the Illinois's Rules of Professional Conduct precluded plaintiffs' SOX whistleblower lawsuit, the Ninth Circuit distinguished the case relied on by IGT and found that it applied only to retaliatory discharge claims arising under Illinois law and that it would not apply to similar claims arising under federal laws like Sarbanes-Oxley.

The Ninth Circuit also rejected IGT's argument that the Van Asdales' SOX complaint should be dismissed because it would require the disclosure of attorney-client privileged information. Relying on decisions of the Third and Fifth Circuits construing other federal whistleblower laws,[4] the Ninth Circuit held that "confidentiality concerns alone do not warrant dismissal of the Van Asdales' claims." The court of appeals further pointed out that the language of Sarbanes-Oxley authorizes any "person" alleging discrimination based upon protected conduct to bring a SOX claim and that the section did not expressly exclude "in house counsel" from coverage. Although the Ninth Circuit clearly held that it would not *dismiss* a SOX complaint that required the disclosure of attorney-client privileged information, the court of appeals indicated that it might support the use of other "equitable measures" such as entering protective orders limiting the disclosure of attorney-client confidences.

Finally, the Ninth Circuit addressed the merits of the Van Asdales' SOX whistleblower claims. Because *Van Asdale* is the first Ninth Circuit case interpreting whistleblower claims under Sarbanes-Oxley, the court relied heavily on language from the Act itself, the Department of Labor's regulations, and decisions from other federal appellate courts construing the elements of a *prima facie* SOX claim. As indicated in Van Asdale, to state a prima facie claim under Sarbanes-Oxley, a plaintiff must establish the following:

> (a) '[t]he employee engaged in a protected activity or conduct'; (b) '[t]he named person knew or suspected, actually or constructively, that the employee engaged in the protected activity'; (c) '[t]he employee suffered an unfavorable personnel action'; and (d) '[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

The Ninth Circuit indicated that the protected activity must "'definitively and specifically' relate to [one] of the listed categories of fraud or securities violations" under Sarbanes-Oxley. However, employees are not required to use magic words like "stock fraud" or "fraud on shareholders" or even reference "Sarbanes-Oxley" during communications with their employer in order to engage in protected activity under SOX. In addition, the Ninth Circuit followed the First, Fourth, Fifth, and Seventh Circuits in ruling that an employee need not prove actual shareholder fraud in order to state a claim under SOX.

Rather, an employee must have "a subjective belief that the conduct being reported violated a listed law," and the "belief must be objectively reasonable."

According to *Van Asdale*, the employee's belief will be considered "objectively reasonable" if the complaining employee's theory of shareholder fraud "approximate[s] the basic elements of a claim of securities fraud." As under Title VII, temporal proximity between the protected activity and the "unfavorable personnel action" can establish the element of causation under Sarbanes-Oxley. After an

employee establishes a *prima facie* claim under SOX, the burden shifts to the employer to show by "clear and convincing evidence" that it would have taken the same adverse action in the absence of plaintiff's activity.

After setting forth the applicable law, the Ninth Circuit found that there were genuine issues of material fact that precluded a grant of summary judgment in favor of IGT. The court was careful to point out that it was not suggesting that any shareholder fraud had *actually* taken place in this case; rather, the court found that there was a question of fact about whether the Van Asdales actually and "reasonably believed that there might have been fraud" in connection with the merger with Anchor Gaming in 2001. Viewing the evidence in the light most favorable to the Van Asdales, the court found that they could establish a *prima facie* SOX whistleblower claim and reversed the district court's grant of summary judgment on those claims.

Impact of *Van Asdale*

The *Van Asdale* decision provides employers in the Ninth Circuit with concrete guidance regarding the elements of a *prima facie* SOX whistleblower claim. Although it was the first such decision to come out of the Ninth Circuit, the court's analysis of Sarbanes-Oxley was consistent with both the regulations and legal precedent from other circuits. The *Van Asdale* case is also noteworthy because it is the first decision to address the right of in-house counsel to use attorney-client privileged information to support a whistleblower claim under Sarbanes-Oxley. Again, the court's refusal to dismiss the Van Asdale's complaint on attorney-client privilege grounds was consistent with prior decisions construing other federal laws such as Title VII and the whistleblower provisions of various environmental statutes including the Clean Air Act.

Patrick H. Hicks is the founding Shareholder of Littler Mendelson's Las Vegas and Reno offices. Deborah L. Westbrook is an Associate in Littler Mendelson's Las Vegas office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Hicks at phicks@littler.com, or Ms. Westbrook at dwestbrook@littler.com.

1 18 U.S.C. §1514A.

2 *Van Asdale v. Int'l Game Tech*., 498 F. Supp. 2d 1321 (D. Nev. 2007).

3 See *Balla v. Gambro, Inc*., 584 N.E.2d 104 (Ill. 1991) (holding, under Illinois law, that "in-house counsel do not have a claim under the tort of retaliatory discharge").

4 See *Willy v. Administrative Review Board*, 423 F.3d 483 (5th Cir. 2005) (rejecting notion "that the attorney-client privilege is a per se bar to retaliation claims under the federal whistleblower statutes" in the context of environmental whistleblower laws); *see also Kachmar v. SunGard Data Sys., Inc*., 109 F.3d 173 (3d Cir. 1997) (holding that a former in-house attorney could maintain a Title VII suit for retaliatory discharge).