A Timely Analysis of Legal Developments

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No Longer Black and White, Is the "Definitively and Specifically" Standard Now Grey?

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While the Department of Labor's Administrative Review Board (ARB) and the majority of federal courts once agreed that, in order to engage in "protected activity" under the Sarbanes-Oxley Act (SOX), a whistleblower must describe conduct that "definitively and specifically" relates to one of the categories of unlawful acts set forth in the statute, a new trend shows the ARB and courts on divergent paths. Two recent court decisions show support for the "definitively and specifically" standard first described by the ARB in 2004, but subsequently abandoned by the ARB in 2011. The federal court decisions should be encouraging to employers, and we will continue to monitor this issue as its travels between the courts and the administrative agency.

Until 2011, both the ARB and federal courts employed the "definitively and specifically" standard for whistleblower claims. This standard requires that, to be protected under SOX, the whistleblower must allege "definitively and specifically" in a complaint that individuals at a publicly-traded entity had violated one of the categories of unlawful acts set forth in 18 U.S.C. section 1514A. The ARB's 2011 decision in *Sylvester v. Parexel, L.L.C.*1 abandoned the "definitely and specifically" standard that had applied since the ARB decided *Platone v. FLYi, Inc.* in 2004. In *Sylvester* and subsequent cases, the ARB has tried to push federal courts to relax the standard for protected activity to make it easier for employees to maintain SOX claims.

Two recent decisions suggest that federal courts might not be as willing to move as the ARB would like. More cases are percolating through federal courts, and the issue of which body gets to interpret SOX and other federal statutes will no doubt be the subject of many of these decisions.

For the time being, employers can be encouraged by two recent federal court cases holding that employee activities were not protected under SOX. The two cases — *Riddle v First Tennessee Bank*, No. 11-6277 (6th Cir. Aug. 31, 2012), and *Nielsen v. AECOM Tech. Corp.*, No. 12-cv-05163 (S.D.N.Y. Dec. 11, 2012) — illustrate the widening gap between the courts and the ARB on what constitutes "protected activity."

In *Riddle v. First Tennessee Bank*, the plaintiff was a corporate security investigator charged with investigating events that might cause financial loss, including events that involved employee wrongdoing. In late 2008, he disagreed with his supervisor's decision in an investigation and told his supervisor he was going to further investigate and report his concerns. As the court noted, the plaintiff did not investigate further. He did not: conduct additional interviews; attempt to meet with the company's legal department, CEO, or president; call the ethics hotline; contact the federal government; or file a report internally.

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The plaintiff was terminated a few months later for consistently failing to use good judgment. He alleged his discharge was due to concerns he voiced regarding the supervisor's handling of the investigation. The plaintiff alleged that he received conflicting explanations for his termination. He brought claims under the Tennessee Public Protection Act, the Bank Bribery Act, and SOX.

The Sixth Circuit Court of Appeals articulated the plaintiff's burden under SOX: "an employee's complaint must 'definitively and specifically relate' to one of the six enumerated categories found in 18 U.S.C. § 1514A." The court held that the only way the plaintiff's claim could be viable would be if it could be deemed to fall within the "catch-all" shareholder fraud provision of 18 U.S.C. section 1514A(a)(1). The court found that the Bank Bribery Act did not implicate fraud against shareholders and that the plaintiff had "failed to present any evidence proving that it was [the defendant's] intent to defraud the shareholders."

With respect to his termination, the court noted that the plaintiff repeatedly exhibited a lack of judgment, noting the company had received complaints about his performance, and he had received a written warning that referenced termination. In this context, the court held that "[a]bsent intentional discrimination, [it] cannot sit as a 'super personnel department[] to second guess an employer's facially legitimate business decisions.'"

In an analysis similar to that typically applied in Title VII retaliation claim, the court determined that the plaintiff lacked evidence sufficient to overcome the employer's legitimate, nondiscriminatory reason for terminating him. This analysis is a rejection of recent ARB decisions that have placed a substantial burden on an employer to establish the legitimate reasons for termination by clear and convincing evidence.

The second case, *Nielson v. AECOM Tech. Corp.*, was decided on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). While the case has since been appealed to the Second Circuit, the decision is still of interest. In *Nielson*, the plaintiff alleged his supervisor permitted more than 20 safety designs to be approved without undergoing the required review process. The plaintiff met with a regional director to discuss his concerns. Both the plaintiff and regional director worked for a subsidiary of the defendant parent company. No one at the parent company was privy to the meeting or its substance.

Shortly after this meeting, the subsidiary, without the parent company's knowledge, terminated the plaintiff. No one from the parent company participated in the decision to terminate. The plaintiff contacted the assistant general counsel for the parent company and requested an independent investigation. The parent company investigated and concluded that the subsidiary had justifiably terminated the plaintiff and that no wrongdoing had occurred.

The court focused on the plaintiff's alleged "protected activity," *i.e.*, reporting his supervisor's approval of safety designs. The court held that, to constitute "protected activity," "the employee's communications must definitively and specifically relate to one of the listed categories of fraud or securities violations in 18 U.S.C. § 1514A(a)(1)."2

The court rejected the plaintiff's argument that reporting his supervisor's approval of designs constituted "protected activity." The court held that, in order to meet his burden, the plaintiff needed to, at a minimum, approximate the basic elements of a claim of securities fraud, and he must show that he reasonably believed that his report constituted a violation of the mail and wire fraud statutes. The court found that the plaintiff's allegation of his "reasonable belief" that mail and wire fraud had occurred was "not plausible." The complaint was dismissed.

These two federal court decisions are in contrast with recent decisions by the ARB that have tried to expand the scope of protected activity through administrative adjudication. Employers should monitor the standards used to define protected activity under SOX as the ARB and federal courts take divergent paths. While the ARB standard has softened in a manner favorable to the whistleblower, federal courts have maintained a heavier burden. This trend can be a game-changer for employers as they navigate whistleblower claims — whether in front of the ARB or in federal court. It is no longer prudent for employers to approach all whistleblower claims in a similar manner, and they should adjust their strategy accordingly depending on the forum.

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