

March 22, 2007

## U.S. Department of Labor ALJ Rejects Sarbanes-Oxley Whistleblower Claim

Courts are still deciding which activities will be considered “protected” for purposes of triggering a whistleblower claim under the Sarbanes-Oxley Act (SOX). A recent case in which an administrative law judge for the U.S. Department of Labor rejected a SOX whistleblower claim provides further guidance on which activities are protected by the statute. See *Naomi Williams-Wilson v. NDC Health Corp.*, 2005-SOX-00097 (Jan. 31, 2007).

### SOX Whistleblower Protection

Employees of companies subject to SOX, who believe they may have suffered retaliation because they engaged in “protected” whistleblower activity, may assert a claim under the SOX whistleblower provision. SOX prohibits employer retaliation against an employee who provides information or assists in an investigation regarding conduct that the employee reasonably believes is a violation of the federal laws and regulations listed in the whistleblower provision. See 18 U.S.C. § 1514A(a)(1).

For an employee’s activity to be protected by SOX, the employee must: (1) reasonably believe the company’s conduct violates one of the federal laws and regulations listed in the SOX whistleblower provision; and (2) express concern over the perceived violation. *Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (June 29, 2006). Both the reasonable belief and the express concern requirements must be met to establish “protected activity” under SOX. *Id.* “The reported information must have a certain degree of specificity [and] must state particular concerns, which, at the very least, reasonably identify [the company’s] conduct that the complainant believes to be illegal.” *Bozeman v. Per-Se Technologies*, 456 F. Supp. 2d 1282 (N.D. Ga. 2006).

### The Williams-Wilson Decision

Employee Naomi Williams-Wilson worked as a financial analyst for NDC Health Corp., where her job duties included finding billing errors in customers’ accounts and reporting the errors to management so that they could be corrected. About six months after starting work, Ms. Williams-Wilson filed a complaint with the U.S. Department of Labor, alleging that she was subjected to “general harassment” and was “being forced to quit” for having reported billing discrepancies and other practices made unlawful under SOX. *Naomi Williams-Wilson v. NDC Health Corp.*, 2005-SOX-00097, at \*\*6-7 (Jan. 31, 2007).

After hearing the evidence, the ALJ rejected Williams-Wilson’s SOX whistleblower claim, ruling that she did not prove that she engaged in protected activity. Although Williams-Wilson reported what she considered to be questionable financial actions by NDC, she did not indicate to NDC that she believed these discrepancies violated the federal laws and regulations listed in the SOX whistleblower provision. *Id.* at \*39. This second element was particularly important in this case because reporting financial discrepancies was at the core of Williams-Wilson’s job duties as a financial analyst. *Id.* at \*\*21-22. Unless she informed her employer that she believed the company had defrauded its shareholders or had engaged in other illegal activity prohibited by SOX, the company would have no way of knowing that was her intent. *Id.* at \*39; see also *Fraser v. Fiduciary Trust Co. Int’l*, 417 F. Supp.2d 310, 322-24 (S.D.N.Y. 2006) (to establish protected activity under SOX, an employee must communicate to the employer his belief that the company is in violation of a federal rule or law related to fraud on shareholders).

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1

This decision may be appealed to the U.S. Department of Labor Administrative Review Board and from there to the U.S. Court of Appeals.

## Employer Response

As employees make increasing use of the SOX whistleblower provisions, employers are finding it useful to consider implementing the same kind of reporting and investigation procedures that they use in connection with complaints of age, race, or gender discrimination. Depending upon each employer's particular circumstances, these procedures could include:

- A written policy prohibiting discrimination or retaliation against whistleblowers and delineating the procedures for employees to follow if they believe they have been subjected to discrimination or retaliation
- A specified procedure for reporting alleged corporate misconduct
- A commitment to investigate all complaints of corporate misconduct and to apprise the complaining employee of any resolution
- A commitment to take appropriate action with respect to any retaliation against a complaining employee.



*If you are interested in more information about this development, please feel free to contact any of the attorneys on our Employment Litigation Team, including the following:*

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