

Legal Alert: Federal Court Rejects Fired Employee's Sarbanes-Oxley "Whistleblower" Claim

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Because the Sarbanes-Oxley Act (SOX) is still fairly new, federal courts are just now being asked to decide what kinds of activities will be considered "protected" for purposes of triggering a whistleblower claim under the statute. A Michigan district court managed to duck the issue recently when it held that, even assuming the former employee had satisfied the "protected activity" requirement, he had failed to establish a causal connection between those activities and his termination. *See Sussberg v. K-Mart Holding Corp.*, 2006 WL 3313766 (E.D. Mich. Nov. 17, 2006).

SOX Whistleblower Protection

Employees of publicly traded companies who believe they have been subjected to retaliation because they engaged in "protected" whistleblower activity may assert a claim under the Sarbanes-Oxley whistleblower provision. SOX prohibits employer retaliation against an employee who provides information or assists in an investigation regarding conduct that the employee reasonably believes constitutes a violation of federal laws and regulations relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1). The burden is on the employee to demonstrate that the protected activity was a contributing factor to the adverse employment action.

SOX complaints are filed first with the U.S. Department of Labor, which has issued varying interpretations of what constitutes a protected activity. *See, e.g., Getman v. Southwest Securities, Inc.*, ARB Case No. 04-059, 2005 WL 1827748 (July 29, 2005) (employee did not engage in protected activity by refusing to raise stock rating under pressure from employer); *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (Dec. 9, 2004) (finding protected activity where employee participated in investigation into theft of company property); *Reddy v. Medquist, Inc.*, 2004-SOX-35 (June 10, 2004) (employee did not engage in protected activity by reporting employer's alleged manipulation of transcription line counts).

If the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint with the DOL, the plaintiff may remove the case to federal district court. To date, few district courts have addressed the issue of what does, or does not, constitute protected activity under SOX. *See, e.g., Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365 (N.D.

Ga. 2004) (holding that issue of fact existed as to whether employee engaged in protected activity by reporting company overpayments to advertising agency alleged to be part of kickback scheme); *Fraser v. Fiduciary Trust Co. Int'l*, 417 F. Supp. 2d 310 (S.D.N.Y. 2006) (bank vice-president adequately pled that his notice to company president regarding decision to sell bonds in certain accounts and not others constituted protected activity); *Bishop v. PCS Admin. (USA), Inc.*, No. 05-C-5683, 2006 WL 1460032 (N.D. Ill. May 23, 2006) (employee's complaints regarding sufficiency of corporate compliance and ethics program did not relate to threatened fraud against shareholders and was not protected activity). There are no federal appellate court opinions on this issue.

The Sussberg Decision

Plaintiff Sussberg worked as a buyer for K-Mart. After nearly six years at K-Mart, Sussberg sent an anonymous letter to K-Mart President, Julian Day, alleging that his supervisor was accepting kickbacks from vendors. K-Mart investigated. Before the investigation was completed, the supervisor was terminated for reasons unrelated to the kickback allegations.

After the supervisor's termination, Sussberg's job performance came under criticism on several occasions. When Sussberg was warned by K-Mart management that his performance needed to improve, Sussberg asked his supervisors if the warning was a response to his complaints regarding his previous supervisor. By that time, his previous supervisor had been gone for five months. After additional performance deficiencies, Sussberg was terminated.

Sussberg filed a Sarbanes-Oxley complaint with the U.S. Department of Labor and then, after 180 days had passed without a final decision from the Secretary of Labor, he removed his case to federal district court. Because the court based its decision on the employee's failure to prove a causal connection between his termination and the activities he claimed were protected, the court did not delve into the meaning of "protected activity" and how that element of a SOX whistleblower claim may be satisfied. Touching only briefly on the issue, the *Sussberg* court opined that the employee was not engaging in protected activity when he told his current supervisors that he had informed management that a previous boss was receiving kickbacks from vendors. Specifically, the court concluded that the employee's comments about his role in the earlier investigation could not be related to protecting shareholders from fraud because his previous boss had been fired for unrelated reasons five months before the remarks were made.

Employer Response

As employees make increasing use of the SOX whistleblower provisions, employers are finding it useful to implement the same kind of reporting and investigation procedures that they

use in connection with employee complaints of age, race, or gender discrimination. Typically, these 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 discipline anyone determined to have retaliated against a complaining employee.

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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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