

Second Circuit Clarifies Burdens of Proof in Sarbanes-Oxley Whistleblower Cases

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On March 5, 2013, the Second Circuit of the U.S. Court of Appeals issued its opinion in *Bechtel v. Administrative Review Bd., U.S. Dept. of Labor and Competitive Technologies, Inc.*, Docket No. 11-4918-ag.

The Bechtel litigation arose from a factual scenario where the plaintiff worked at the employer as a vice president of technology commercialization. During the midst of sustaining net operating losses for three consecutive years, the employer hired a new president and CEO. The plaintiff told the employer's general counsel that he suspected that the new president and CEO of violating certain legal requirements. The Court remarked that it remained unclear whether such suspicions relied on any reasonable grounds. This clash was followed by plaintiff serving on a financial transactions committee where he asserted that the company had to make certain disclosures under the Sarbanes-Oxley Act. The other committee members disagreed. The plaintiff then refused to sign certain disclosure forms.

In response to its continuing financial challenges, the company took action to reduce its personnel, and as part of its reduction of personnel, discharged the plaintiff. The plaintiff contested his discharge and claimed a violation of the whistleblower provision of the Sarbanes-Oxley Act under 18 U.S.C. sec. 1514A. He filed a complaint with the Occupational Safety and Health Administration (OSHA), an agency within the U.S. Department of Labor, alleging that the employer unlawfully retaliated against him in response to his refusal to sign the company's Sarbanes-Oxley disclosure forms. What followed were complex substantive hearings and procedural challenges that resulted in the case going through the administrative hearing and review process twice before it arrived in front of the Court of Appeals.

The primary reason for the extended proceedings arose from the administrative law judge not applying the correct formulation of the proof burdens borne by the respective parties in a Sarbanes-Oxley whistleblower case. The Court of Appeals began its legal analysis by noting the elements an employee must establish by a preponderance of the evidence. Those elements include that:

(1) [plaintiff employee] engaged in protected activity;

- (2) the employer knew that [employee] engaged in the protected activity;
- (3)[employee] suffered an unfavorable personnel action; and
- (4) the protected activity was a contributing factor in the unfavorable action.

If the employee shows the four cited elements, the employer avoids liability if it has “clear and convincing evidence” that it would have taken the same adverse personnel action, here discharging the plaintiff, in the absence of the alleged protected activity. The Court of Appeals read the work of the administrative law judge as imposing a second burden-shifting framework not supported by the governing statutory provisions or regulations. Nevertheless, the Administrative Review Board corrected the error the administrative law judge committed. The Administrative Review Board focused on the lack of evidence that the plaintiff’s protected activity formed a contributing factor in his discharge.

The Second Circuit also rejected the plaintiff’s other arguments on appeal. The administrative law judge had considered the evidence regarding the timing of the discharge, and therefore did not prevent the plaintiff from trying to prove his case by inference. The plaintiff’s failure to raise his loss of status as an officer as part of his claim barred any consideration of that argument on appeal. Moreover, the plaintiff’s failure to amend his complaint to include a post-employment “blacklisting” claim, or to refer to it in the administrative record, also doomed that argument. Finally, the Second Circuit found no merit to the claim that the administrative law judge wrongly denied the plaintiff’s motion to compel discovery from the employer, and found no basis for taking judicial notice of allegations in a pleading from a separate proceeding against the employer’s president. The plaintiff failed to show any abuse of discretion or arbitrary or capricious act required for a reversal.

The employer in *Bechtel* prevailed by showing a lack of connection between the discharge of the plaintiff, which occurred due to the employer’s dire economic circumstances, and the plaintiff employee’s protected activity of refusing to sign the employer company’s Sarbanes-Oxley disclosures forms. While this case involves the unique legal framework and circumstances of the Sarbanes-Oxley Act, the opinion highlights the potential need for an employer to substantiate a lawful basis for terminating a senior corporate manager or officer that bears no connection to the other duties that person may perform for the employer.

For more information read *Bechtel v. U.S. Dept of Labor, Admin. Rev. Bd.*, No. 11-4918 (2nd Cir., Mar. 5, 2013).

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