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Ninth Circuit Affirms $8 million SOX Whistleblower Award

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On February 26, 2019, the Ninth Circuit affirmed $8 million of an $11 million jury award to a former general counsel whistleblower, vacating his Dodd-Frank Act claim, vacating and remanding his Sarbanes-Oxley Act claim, and affirming his California wrongful termination claim. In January 2017, a jury found that defendants Bio-Rad Laboratories, Inc., and its CEO violated the whistleblower provisions of SOX and Dodd-Frank as well as California public policy when they terminated the former general counsel, Sanford Wadler, in retaliation for his internal reports that Bio-Rad had violated the Foreign Corrupt Practices Act (FCPA).

The Dodd-Frank Act Claim

On appeal, the Ninth Circuit dismissed the Dodd-Frank claim in light of *Digital Realty Trust, Inc. v Somers*, 138 S. Ct. 767 (2018), which held that employees who only report violations internally are not protected as "whistleblowers" under the Dodd-Frank Act anti-retaliation provision. Because Wadler had not reported his concerns to the Securities and Exchange Commission (SEC), he could not prevail under the Dodd-Frank anti-retaliation provision. The Court vacated the nearly $3 million in double back pay damages awarded under Dodd-Frank, whittling the initial $11 million award to $8 million.

The Sarbanes-Oxley Act Claim

The court vacated and remanded the SOX claim. The plaintiff had internally reported FCPA violations, which the court held is not explicitly protected under the SOX anti-retaliation provision. Under SOX, employees are protected from retaliation for reporting mail fraud, wire fraud, bank fraud, securities fraud, or "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders…" 18 U.S.C. § 1514A(a)(1). At trial, the instructions given to the jury provided that the relevant provisions of the FCPA were "rules and regulations of the SEC" for purposes of the SOX claim. The Ninth Circuit held, based on the language of the statute, that the FCPA is a "law," which is distinct from a "rule or regulation" as provided in the statute, and therefore the district court erred in the jury instructions.

The Ninth Circuit found, however, that a properly instructed reasonable jury could still find in Wadler's favor, either finding that his internal report suggested "further inquiry" into whether SOX violations occurred, or that Wadler reasonably believed Bio-Rad had engaged in SOX "books and records" violations as part of the alleged FCPA violations. The court thus vacated and remanded the SOX verdict to the district court to consider whether a new trial was warranted. The court also instructed the district court to consider in the first instance whether to allow a "fraud against shareholders" theory if it decided to hold a new trial.

The Wrongful Termination Claim

Notwithstanding the vacatur on the SOX and Dodd-Frank claims, the Ninth Circuit upheld Wadler's

claim for wrongful termination in violation of public policy under California law, also known as a *Tameny* claim. The court noted that a *Tameny* claim must rely on fundamental public policy tethered to a constitutional or statutory provision. Therefore, the claim was not necessarily dependent on the SOX claim where a plaintiff could also make a claim under the FCPA. Here, the court found that Wadler stated a *Tameny* claim based on public policy tied to the FCPA, independent of his SOX claim. According to the court, any error in the jury instructions on the *Tameny* claim was harmless, even though the instructions only referenced protected activity under the Sarbanes-Oxley Act. The *Tameny* instruction told jurors that Wadler had to prove that "a motivating reason for his discharge was engaging in protected activity under SOX." It then referred jurors to the SOX instructions to determine whether the activity was protected; those instructions provided that Wadler had to reasonably believe that one of four listed provisions of the FCPA had been violated. Although these instructions were erroneous for the SOX claim in that the FCPA is not an SEC rule or regulation, the court concluded that the ultimate effect of the *Tameny* jury instructions made the success of the claim dependent on whether Bio-Rad retaliated against Wadler for reporting conduct he reasonably believed violated the FCPA.

On April 8, 2019, the Ninth Circuit rejected Bio-Rad's petition for a panel rehearing or rehearing *en banc*. Bio-Rad had argued that if the court vacated the SOX verdict, it should also vacate the *Tameny* verdict because the jury was instructed that *Tameny* liability was predicated on SOX liability. Vacating the *Tameny* claim would have vacated the $5 million punitive damages award from the remaining $8 million verdict.

Is Reporting FCPA Violations Considered Protected Activity under SOX?

The Ninth Circuit's ruling somewhat narrows the scope of SOX anti-retaliation claims by holding that the FCPA is not an SEC rule or regulation for SOX anti-retaliation purposes. The Ninth Circuit is not the first court to take the position that reporting FCPA violations is not protected activity under SOX. *See, e.g.*, *Prout v. Vladeck*, 316 F. Supp. 3d 784, 804 (S.D.N.Y. 2018); *Meng-Liu Liu v. Siemens*, 978 F. Supp. 2d 325, 330-31 (S.D.N.Y. 2013); *see also In re Gupta*, 2010-SOX-54, 2011 WL 121916, at *5 (Dep't of Labor Jan. 7, 2011). However, the Southern District of New York, as well as the Ninth Circuit in *Wadler*, have indicated that reporting FCPA violations may be protected where the complaints amount to activity that is protected under SOX.

In *Siemens*, the court indicated that reporting a FCPA violation may be protected under SOX where the violation could conceivably fall under fraud against shareholders. 978 F. Supp. 2d at 330. The court in *Prout* followed this reasoning, finding in that case that the plaintiff had plausibly alleged that his reporting of FCPA violations was protected under SOX where the allegations involved violations of SOX reporting requirements and defrauding shareholders. 316 F. Supp. 3d at 804. In *Wadler*, the Ninth Circuit left open the possibility that a jury could find, on the facts, that Wadler's report suggested further inquiry into whether SOX violations occurred and that Wadler reasonably believed Bio-Rad had engaged in SOX violations (books-and-records falsification) as part of its alleged FCPA violations.