

## Eighth Circuit Joins in Lowering the Bar for SOX Whistleblower Retaliation Claims

---

June 20, 2016

---

PRACTICES Labor and Employment

---

In *Beacom v. Oracle America, Inc.*, No. 15-1729, 2016 WL 3144730 (8th Cir. June 6, 2016), the Eighth Circuit joined the Second, Third, and Sixth Circuits in lowering the bar for employees to proceed with whistleblower retaliation claims brought under the Sarbanes-Oxley Act. This less stringent standard requires employees to prove that a reasonable person in the same factual circumstances, with the same training and experience, would believe that the employer violated a federal law protecting shareholders from fraud. Despite adopting the lower standard, the Court in *Beacom* upheld the district court's granting of summary judgment to Oracle, concluding that the whistleblower's belief that Oracle was violating one of the specified laws was objectively unreasonable.

Sarbanes-Oxley (SOX) prohibits a publicly-traded company from terminating an employee in retaliation for informing a supervisor of conduct which the employee "reasonably believes" violates: the Mail Fraud, Wire Fraud, Bank Fraud, or Securities Fraud statutes in Title 18 of the U.S. Code; any Securities and Exchange Commission rule or regulation; or another federal law concerning fraud against shareholders. 18 U.S.C. § 1514A(a)(1)(C). To proceed with such a retaliation claim, an employee must prove—by a preponderance of the evidence—that (1) he engaged in protected activity; (2) his employer knew he engaged in protected activity; (3) he suffered an adverse employment action; and (4) the protected activity contributed in the adverse action. Then, the burden shifts to the employer to prove—by clear and convincing evidence—that it would have taken the same adverse action even if the employee had not engaged in the protected activity.

To prove he engaged in protected activity, an employee must reasonably believe that the employer's conduct violated one of the laws protecting shareholders specified by SOX, and that belief must be objectively reasonable. In 2006, the Department of Labor Administrative Review Board (ARB), the administrative adjudicator of SOX whistleblower claims, required an employee's complaint to "definitely and specially" relate to one of the specified laws. However, in 2011, the ARB replaced that standard with the less stringent *Sylvester* standard: the employee must simply prove that a reasonable person in the same factual circumstances, with the same training and experience, would believe that the employer violated one of the specified laws. Since then, no court of appeals has rejected the *Sylvester* standard, and prior to *Beacom*, the Second, Third, and Sixth—citing *Chevron* deference—have explicitly adopted it (while the Fourth and Tenth have contemplated it).

Notwithstanding the lower bar, in *Beacom*, the Court upheld the district court's granting of summary judgment dismissing the whistleblower's SOX retaliation claim. Vincent Beacom, who was a Vice-President in Oracle's Retail Global Business Unit Americas division ("RGBU Americas"), communicated concerns to his supervisor and to HR in early 2012 that his supervisor's quarterly sales forecasts were inaccurately high, resulting in harm to shareholders. In March 2012, Oracle terminated Beacom for poor performance and insubordination. Beacom then sued Oracle, alleging that it violated SOX by terminating him in retaliation for reporting the sales forecasts.

Applying the *Sylvester* standard, the Eighth Circuit held that a reasonable person in Beacom's position, with the same training and experience, would not have believed Oracle was violating one of the specified laws protecting shareholders. The Court reasoned that RGPU Americas missed its projections by no more than \$10 million—a "minor discrepancy" in view of Oracle's \$31 billion in annual revenue. And, as a salesperson and shareholder, Beacom would understand the predictive nature of revenue projections. Accordingly, the Court concluded that Beacom's reporting of the sales forecasts was not a protected activity in connection with his retaliation claim.

For additional information, please contact one of the Haynes Boone lawyers listed below.