

Ninth Circuit Lowers the Bar for Sarbanes-Oxley Attorney Whistleblower Claims

August 24, 2009

On August 13, the U.S. Court of Appeals for the Ninth Circuit issued a unanimous opinion in *Van Asdale v. International Game Technology* that gives attorneys the green light to maintain their own claims under the whistleblower-protection provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (Sarbanes-Oxley), and provides the Ninth Circuit's first analysis of the substantive requirements necessary to establish such claims.

In this suit, Shawn and Lena Van Asdale, a married couple who previously worked for International Game Technology (IGT) as in-house lawyers, alleged that IGT terminated their employment for reporting possible shareholder fraud in connection with IGT's merger with Anchor Gaming (Anchor). Specifically, the Van Asdales alleged that they expressed concern to IGT's general counsel and IGT's vice president of product development that Anchor may have failed to disclose information about a patent prior to the merger such that the benefits of the merger were overvalued. Shortly after these discussions, IGT terminated the Van Asdales' employment.

On December 1, 2004, the Van Asdales filed a lawsuit in the U.S. District Court for the District of Nevada in which they brought claims of retaliatory discharge in violation of Sarbanes-Oxley along with various state-law claims. The district court granted summary judgment in favor of IGT on the Van Asdales' Sarbanes-Oxley claims and declined to exercise jurisdiction over their pendant state-law claims. In the Ninth Circuit's unanimous decision, the court reversed the district court's summary judgment decision and vacated the district court's dismissal of the Van Asdales' state-law claims.

Attorney-Client Privilege Does Not Bar Attorneys from Maintaining Sarbanes-Oxley Whistleblower Retaliation Claims

The Administrative Process

The Department of Labor (DOL) initially handles the investigation and adjudication of Sarbanes-Oxley whistleblower claims. These administrative proceedings present multiple opportunities for the parties to submit information and documents to the DOL in support of their respective positions. Importantly, the DOL has declared that attorneys may rely upon attorney-client privileged information to support their Sarbanes-Oxley whistleblower claims.

The Ninth Circuit's Decision

This Ninth Circuit decision is yet another court decision supporting the DOL's position that attorney whistleblowers may rely on attorney-client privileged information in support of their claims. Specifically, the Ninth Circuit held that concern about possible disclosure of client confidences does not bar attorneys from asserting Sarbanes-Oxley whistleblower claims. Embracing the analysis of the Third Circuit (*Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997)) and the Fifth Circuit (*Willy v. Administrative Review Board*, 423 F.3d 483 (5th Cir. 2005)), the Ninth Circuit held that "confidentiality concerns alone do not warrant dismissal of [these] claims."

The Ninth Circuit further explained that "[t]o the extent this suit might nonetheless implicate confidentially-related [sic] concerns, we agree with the Third Circuit that the appropriate remedy is for the district court to use the many equitable measures at its disposal to minimize the possibility of harmful disclosures, not dismiss the suit altogether."

Practical Implications

This decision presents significant and problematic implications for employers. Attorney whistleblowers are likely to submit a significant amount of privileged information and documents to the DOL to support their *prima facie* case of whistleblower retaliation (e.g., to establish the reasonableness of their belief that a fraud or securities violation occurred). While the Ninth Circuit explains that a district court may use the "equitable measures at its disposal" to minimize the possibility of harmful disclosures, the Ninth Circuit fails to recognize that similar means are not available at the administrative level.

The DOL's Administrative Review Board and the Secretary of Labor have routinely held that there is no authority that permits the sealing of a record in a whistleblower case because the case file is a government record subject to disclosure under the Freedom of Information Act (FOIA). The DOL has declared that it can only withhold records from disclosure under FOIA if the record qualifies for one of the narrowly construed statutory exemptions. Importantly, the DOL has specifically rejected requests for exclusion from FOIA of attorney-client privileged information that is included in the DOL's case file.

Moreover, the DOL regulations implementing FOIA provide only that *submitters of information* may designate specific information (as opposed to an entire case file) as confidential commercial information and seek to keep that information withheld from disclosure to an FOIA requestor. Therefore, if an attorney whistleblower submits an employer's confidential commercial information to the DOL, it is the attorney whistleblower, not the employer, who will control whether this information will be released into the public domain.

Since employers have very little control as to what information attorney whistleblowers add to the DOL case file, considerable amounts of privileged and confidential information could be subject to disclosure through an FOIA request. An employer's privileged and confidential information would then be easily accessible to the public, including the press.

In addition, FOIA does not apply to Congress. As a result, all confidential information provided to the DOL is subject, without limitation, to production to Congress. Congress, in turn, may publicly disseminate the information or use the information as a basis for oversight hearings.

Therefore, there is a significant risk that the public availability of privileged and confidential information could be used by attorney whistleblowers to create a public scandal and/or to create an unfair advantage in the litigation and other pending claims.

Ninth Circuit's Analysis of Substantive Elements of Sarbanes-Oxley Whistleblower Claims

The Ninth Circuit's Decision

The Ninth Circuit's opinion also sets the standard for what employees must establish in order to make out a *prima facie* case of retaliation under Sarbanes-Oxley's whistleblower provisions.

The Ninth Circuit explained that the DOL's regulations set forth four required elements of a *prima facie* case: "(a) the employee engaged in a protected activity or conduct; (b) the named person knew or suspected, actually or constructively, that the employee engaged in the protected activity; (c) the employee suffered an unfavorable personnel action; and (d) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." 29 C.F.R. § 1980.104(b)(1)(i)–(iv). The Ninth Circuit then addressed each of these elements.¹

With respect to the first element of the *prima facie* case, the Ninth Circuit explained that employees do not need to cite a code section that they believe was violated. Rather, the employees' communications to their employers need only "definitively and specifically" relate to one of the enumerated categories of fraud or securities violations under Section 1514A. The Ninth Circuit also ruled that employees do not need to prove that actual fraud occurred to succeed on their Sarbanes-Oxley whistleblower retaliation claims, but rather employees only need to show that they reasonably believed that there might have been fraud.

Here, the court found that the Van Asdales had engaged in protected activity. The court reasoned that Shawn's statements to IGT's general counsel and IGT's vice president of product development reported conduct that "definitively and specifically" related to possible shareholder fraud. The court further reasoned that the circumstances in which the Van Asdales found themselves permitted them to form an objectively reasonable belief that Anchor's failure to disclose certain patent-related information to IGT prior to the merger constituted shareholder fraud.

The court also declared that Lena's statement that she "hadn't reached a conclusion" as to whether fraud had occurred did not preclude her from claiming protection under Sarbanes-Oxley. The court reasoned that the context of this statement was Lena's discussion of the need for an investigation and "[r]equiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress's goal of encouraging disclosure."

With respect to the causation element of the *prima facie* case, the Ninth Circuit found that causation could be inferred from the temporal proximity of the protected activity and the adverse employment action. However, the court cautioned against analyzing temporal proximity without regard to its factual setting.

Here, the court found IGT terminated Shawn's employment approximately two and a half months after his meeting with David Johnson, then IGT's general counsel; Johnson acknowledged that he initially intended to terminate Shawn's employment within three days of that meeting; and IGT terminated Lena's employment several weeks after Shawn's employment termination. The court held that this

1. The Ninth Circuit did not address the second and third elements in detail. The court simply explained that the Van Asdales engaged in protected activity during their meetings with individuals who had supervisory authority over the Van Asdales, and IGT did not dispute that the Van Asdales satisfied the "unfavorable personnel action" element.

Washington, D.C.

Amy Conway-Hatcher	202.739.5953	aconway-hatcher@morganlewis.com
Fred F. Fielding	202.739.5560	ffielding@morganlewis.com
Howard M. Radzely	202.739.5996	hradzely@morganlewis.com
Barbara “Biz” Van Gelder	202.739.5256	bvangelder@morganlewis.com

About Morgan Lewis’s Labor and Employment Practice

Morgan Lewis’s Labor and Employment Practice includes more than 300 lawyers and legal professionals and is listed in the highest tier for National Labor and Employment Practice in *Chambers USA 2009*. We represent clients nationwide in a full spectrum of workplace issues, including drafting employment policies and providing guidance with respect to employment-related issues, complex employment litigation, ERISA litigation, wage and hour litigation and compliance, whistleblower claims, labor-management relations, immigration, occupational safety and health matters, and workforce change issues.

About Morgan, Lewis & Bockius LLP

Morgan Lewis is an international law firm with more than 1,400 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered Attorney Advertising in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2009 Morgan, Lewis & Bockius LLP. All Rights Reserved.

