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Defending Against SOX Whistleblower Retaliation Claims

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Law360, New York (May 10, 2017, 11:55 AM EDT) -- With the dramatic increase in employee whistleblower activity in recent years, it is not surprising that there has been a corresponding uptick in whistleblower retaliation claims. For example, the U.S. Department of Labor's Occupational Safety and Health Administration has reported a 45 percent increase in claims filed with the agency between 2010 and 2016 under the 22 federal whistleblower protection statutes it enforces.[1] Many of these claims undoubtedly have been raised by employees who genuinely and reasonably believed their employer engaged in improper financial practices, fraud or other unlawful conduct. But far too many retaliation cases are initiated by marginal employees who have manufactured bogus whistleblower claims to preempt legitimate performance management, freeze their employer's normal human resources processes, and cast a shadow on any disciplinary action directed their way.

This creates both a challenge and an opportunity for employers defending against retaliation claims brought under the Sarbanes-Oxley Act.[2] Most employers build their defense around the argument that there was a legitimate, nonretaliatory basis for any adverse employment action taken against the whistleblower. Under SOX, this means proving through clear and convincing evidence that the same adverse employment action would have been taken in the absence of any whistleblower activity.[3] That can be a difficult standard to meet, particularly when the whistleblower activity and the adverse employment action are in close proximity.

An alternative approach that is sometimes overlooked is to take on the issue of the whistleblower's reasonable belief of unlawful conduct by the employer. To prevail on a retaliation claim, a SOX whistleblower bears the burden of proving that (1) he subjectively believed the conduct on which he "blew the whistle" was a violation of an enumerated provision of Section 806 of SOX, applicable law; and (2) his belief was objectively reasonable "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[4] If handled properly, this issue can serve as the linchpin of a case-long strategy — informing early motion

practice, depositions and other discovery. When coupled with the traditional nonretaliatory reason defense described above, attacking the whistleblower's reasonable belief can bolster the employer's chances of prevailing on summary judgment or at trial.

Application of the "Reasonable Belief" Standard

Courts and OSHA administrative law judges have not hesitated to dismiss SOX whistleblower retaliation claims that are based on vague, conclusory allegations or are otherwise deficient. In Nielsen v. Aecom Technology Corp., 762 F.3d 214, 216 (2d Cir. 2014), the Second Circuit affirmed the dismissal of SOX retaliation claims where the whistleblower plaintiff pleaded only that he "reasonably believed that defendants were committing fraud upon [their] shareholders and would likely continue violating the United States mail and wire fraud statutes by using telephone lines and emails in furtherance of the fraud." Finding this "conclusory statement" insufficient, the Second Circuit held that the plaintiff failed to "plausibly allege objective reasonableness" in that (1) he did not claim that he believed the defendants were engaged in a "scheme to steal money or property," as required to constitute mail or wire fraud; and (2) the subject of his shareholder fraud claim — that "a single employee failed properly to review fire safety designs" — was too "trivial" to constitute protected activity.

Similarly, a plaintiff's lack of adequate information to support his professed belief of unlawful employer conduct — and failure to seek such supporting information — can doom a SOX retaliation claim. In Feldman v. Law Enforcement Associates Corp., 955 F. Supp. 2d 528, 551 (E.D.N.C. 2013), the court granted summary judgment and dismissed SOX retaliation claims based on a report of alleged insider trading because "[plaintiffs] had very little information on which to make the insider trading allegation." The court examined the information known to the plaintiffs — "a snapshot in time of who owned [the] shares" in question — and found it "said nothing about why the owners bought shares, the price they paid, how long they had held the shares, or whether they intended to sell the shares." The court concluded that the plaintiffs "did not try to obtain any additional information before making their report," despite their available evidence having been "extremely thin." Given this "paucity of information," the court held that the plaintiffs "lacked [the] objectively reasonable basis" necessary to establish a SOX claim.[5]

This same lack of knowledge led to a summary judgment victory for the employer in Safarian v. American DG Energy Inc., No. 10-6082(AT), 2014 (D.N.J. April 29, 2014), aff'd in relevant part, 622 F. App'x 149, 152-53 (3d Cir. July 21, 2015). The plaintiff in that case blew the whistle on alleged "overbilling, improper construction and the failure to obtain proper permits to the defendant's employees." The court rejected the plaintiff's conclusory assertion that such activity could "result in misstatement of accounting records" to shareholders or "fraudulent tax submissions," observing that the plaintiff was "an engineer who ha[d] no involvement with the company's account or taxation practices" and who failed to "examine, produce, submit or approve [the defendant's] accounting reports or tax submissions." Given the plaintiff's lack of "knowledge of the actual accounting for the allegedly improper billing procedures," the court concluded that the plaintiff's professed belief of a violation was not objectively reasonable.[6]

Courts will also consider a whistleblower's education, experience, and relevant background to assess whether there was a reasonable belief of unlawful employer conduct. For example, in Harkness v. C-Bass Diamond LLC, No. 08-231 (CCB), 2010 (D.Md. March 16, 2010), the court granted summary judgment to the employer where the whistleblower, a lawyer with 20 years of experience, "had the resources available" but failed to conduct any "legal research to ascertain the applicability of various laws" relating to the conduct she claimed was a violation of SOX. And in Gunn v. Unisys Corp., ALJ No. 13-SOX-00022 (ALJ Jan. 4, 2016), an ALJ rejected the complainant's claims of unlawful employer conduct as not objectively reasonable. The ALJ reasoned that the complainant was "highly educated, with a bachelor's degree and some graduate work in business management" with "many years of experience in corporate positions" and "human resources experiences" along with a "college degree … in human resources management," yet he did not "marshal and consider objective evidence" before making an internal complaint of unlawful conduct by his employer. His failure to do so, in favor of "ma[king] accusations unsupported by any evidence other than his own suppositions," led the ALJ to conclude that his actions did "not … constitute a basis for a reasonable belief that enumerated conduct [under SOX] occurred."[7]

Most recently, the Eighth Circuit in Beacom v. Oracle America Inc., 825 F.3d 376 (8th Cir. June 2016), rejected SOX retaliation claims by the employer's vice president of sales, who alleged that he was terminated because he complained about his manager's allegedly inaccurate revenue projections. The Eighth Circuit noted that, given the plaintiff's status as a "salesperson and shareholder," he should understand "the predictive nature of revenue projections" and that the amount by which sales actually fell short of those projections was "a minor discrepancy to a company that annually generates billions of dollars." Accordingly, the Eighth Circuit affirmed the district court's decision granting summary judgment to the employer, holding that the plaintiff's "belief that [his employer] was defrauding its investors was objectively unreasonable."[8]

A whistleblower's failure to timely raise concerns through internal reporting channels may demonstrate that she lacked even a subjective belief that the conduct at issue was a SOX-covered violation. In Taylor v. Fannie Mae, 65 F. Supp. 3d 121, 125-26 (D. D.C. 2014), the court reached just that conclusion where the plaintiff "had at least three possible avenues for reporting his concerns" but "did not do so until after his termination," despite having "knowledge of these reporting devices and their importance" in his capacity as an "operational risk professional." While the plaintiff did meet with his managers to discuss the data on which his SOX claim hinged, the court found that meeting insufficient to establish that the plaintiff believed what he was claiming because (1) the plaintiff's next-level manager — not the plaintiff — scheduled the meeting; (2) the plaintiff did not "go beyond his assigned job duties to inform or assist in the investigation"; and (3) the plaintiff failed to rebut his employer's assertion that his "main purpose" in meeting with his managers was to be "cleared of doing anything wrong." On these facts, the court found that the plaintiff "ha[d] not demonstrated that he 'actually believed' the conduct complained of constituted a violation of SOX."[9]

Strategies For Rebutting A Whistleblower Plaintiff's "Reasonable Belief"

As the above-described decisions demonstrate, attacking a whistleblower's assertions of "reasonable

belief" can be an effective strategy for an employer litigating a SOX retaliation claim. In assessing whether to pursue this defense, employers should take the following steps.

Consider filing a motion to dismiss: As the Nielsen decision demonstrates, courts may grant a motion to dismiss if the whistleblower's allegations lack sufficient specificity. Claims that allege only conclusory, vague or trivial facts constituting the "reasonable belief" element should be tested with a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or its OSHA ALJ equivalent, 29 C.F.R. § 18.70(c). On the other hand, such a motion can be counter-productive if the plaintiff has articulated a set of reasonably specific facts to support the "reasonable belief" element. Being too aggressive at this stage can result in a terse order denying the motion to dismiss with language that can hamstring later efforts to obtain summary judgment.

Investigate and focus discovery on the whistleblower's background, education and training, and establish what information he had when he blew the whistle: The Feldman and Safarian district court decisions demonstrate that a SOX retaliation claim can be dismissed on summary judgment if the whistleblower lacks sufficient knowledge or information necessary to establish that his belief that the employer engaged in unlawful conduct is objectively reasonable. And the courts will impose a higher threshold of "objective reasonableness" on a plaintiff who has significant background experience, education or training as to legal, compliance, regulatory or other matters directly relevant to his whistleblowing claims.

Some plaintiffs may even exaggerate or brag about their level of sophistication when questioned in a deposition. This approach can be particularly effective if (1) the plaintiff could have obtained additional information germane to his allegations but simply chose not to do so, instead "blowing the whistle" with incomplete or partial information; (2) the plaintiff's timing in reporting any "violation" is suspect — for example, if the plaintiff did not raise any concern until after receiving disciplinary action; and/or (3) the plaintiff's extensive training and experience suggests that an objectively reasonable person (in the plaintiff's position and with the same background) would not have reached the same erroneous conclusions as the plaintiff. Some specific questions to raise in pursuing this information include:

- What did the plaintiff's job responsibilities entail and what was the basis for reaching the conclusions he professes?

- Was the plaintiff trained (either by his employer or in previous employment) regarding issues relating to the alleged violation?

- Did the plaintiff conduct any independent factual investigation or legal research regarding the alleged violation? For example, if the alleged violation involves a certain customer or client deal, did the plaintiff review or request to review any agreements or other documents relating to that deal? In deposition, lead the plaintiff through all of the avenues and sources from which he could have obtained additional information.

- When did the plaintiff first raise the alleged violation (and how does that align with the plaintiff's disciplinary history)?

- When did the plaintiff first contact a lawyer about his claim or the alleged violation?

Consider retaining an expert to attack the underlying basis for the plaintiff's allegedly "reasonable" belief: While an expert would likely be precluded from testifying as to the ultimate issue (i.e., whether a certain plaintiff's belief is "reasonable" or not), she can still provide value by explaining what kind of conduct should or should not raise a "red flag" to a comparable individual in the plaintiff's situation. Both ALJs and district court judges have allowed this kind of expert testimony, particularly where the record establishes that the plaintiff himself is well-trained and experienced in the substantive area about which he has blown the whistle.[10]

If the facts support the argument, emphasize other management employees' conclusions that no violation occurred: In both decisions granting and denying summary judgment, the courts often look to views espoused by other members of management to assess whether the plaintiff's belief that his employer engaged in unlawful conduct was "objectively reasonable." An employer should muster, present and emphasize all available record evidence and testimony tending to show that the issue about which the plaintiff blew the whistle was, in fact, no cause for concern nor a legal violation of any kind. The greater the weight of available evidence showing that the plaintiff's belief was mistaken, the greater the likelihood a court will find the plaintiff's belief was not "objectively reasonable."

Do not forget to challenge the plaintiff's subjective belief — especially if he delayed reporting concerns or chose not to use available avenues for complaints: Did the plaintiff actually believe that the employer's conduct was unlawful, or did he come to that "conclusion" only when or it was clear he was going to be disciplined or terminated by the employer for some legitimate reason? While the threshold for establishing the plaintiff's subjective belief seems low — did the plaintiff really believe his own allegations — there are nevertheless multiple summary judgment decisions where the plaintiff failed to make even that minimal showing. If the plaintiff inexplicably chose not to report his professed concerns using the employer's internal reporting channels or delayed significantly in making any such report, the employer should hammer that point home in arguing that the plaintiff did not actually believe that his employer did anything wrong in the first place.

Conclusion

Given the ever-increasing flood of whistleblower retaliation complaints, employers must be prepared to rebut the plaintiff's allegations on all fronts in order to put forth the best defense possible. Challenging the whistleblower's professed "reasonable belief" — both from an objective and a subjective standpoint — should always be considered at the outset of any litigation or agency proceedings as a possible part of an effective defense.

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[1] See OSHA Whistleblower Protection Program Statistics, Whistleblower Investigation Data FY 2006-FY2016, available at https://www.whistleblowers.gov/3DCharts.

[2] Although the focus of this article is on SOX retaliation claims, the strategy we describe can be similarly effective in defending against retaliation claims brought under the Dodd-Frank Act, Title VII, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and state whistleblower and anti-discrimination statutes.

[3] The employer also can prevail if the whistleblower fails to prove as part of the prima facie case that the protected activity was a contributing factor to the adverse employment action.

[4] Sylvester v. Parexel Int'l LLC, ARB No. 07-123, 2011 WL 2165854, at *11-12 (ARB May 25, 2011). See also Beacom v. Oracle America Inc., 825 F.3d 376, 380 (8th Cir. 2016); Rhinehimer v. U.S. Bancorp Investments Inc., 787 F.3d 797, 811 (6th Cir. 2015); Nielsen v. Aecom Technology Corp., 762 F.3d 214, 221 (2d Cir. 2014); Villanueva v. U.S. Dep't of Labor, 743 F.3d 103, 109 (5th Cir. 2014); Wiest v. Lynch, 710 F.3d 121, 131 (3d Cir. 2013); Taylor v. Fannie Mae, 65 F. Supp. 3d 121, 125-26 (D.D.C. Aug. 25, 2014); Stewart v. Doral Fin. Corp., 997 F. Supp. 2d 129, 136 (D.P.R. 2014);. Erhart v. Bofi Holding Inc., No. 15-2287(BAS), 2016 WL 5369470, at *9-10 (S.D.Cal. Sept. 26, 2016).

[5] On appeal, the Fourth Circuit did not address this aspect of the district court's holding, instead affirming summary judgment on the alternate ground that the plaintiff failed to demonstrate that his alleged protected activity was a contributing factor in his termination. Feldman v. Law Enforcement Assocs. Corp., 752 F.3d 339, 348-50 (4th Cir. 2014).

[6] Safarian, 2014 WL 1744989, at *4-5.

[7] Gunn, ALJ No. 13-SOX-00022, at 47, 51. See also Westawski v. Merck & Co., No. 14-3239(WB), 2016 WL 6082633, at *10-12 (E.D.Pa. Oct. 18, 2016) (appeal pending) (granting summary judgment where

plaintiff failed to show "a reasonable person with her training and experience would believe that [defendant's alleged conduct] could rise to the level of" mail, wire or shareholder fraud, in that plaintiff's professed belief "betrays a misunderstanding of industry practice" and thus was not objectively reasonable for "a person with the [p]laintiff's training and experience").

[8] Beacom, 825 F.3d at 378-79, 380-81.

[9] Taylor, 65 F. Supp. 3d at 125-26; see also Gale v. U.S. Dep't of Labor, 384 F. App'x 926, 930 (11th Cir. 2010) (finding no subjectively reasonable belief where plaintiff admitted he "did not actually believe that [defendant's] activities were illegal or fraudulent"); Verfuerth v. Orion Energy Systems Inc., No. 14-352 (WCG), 2016 WL 4507317, at *9-10 (E.D.Wis. Aug. 25, 2016) (appeal pending) (granting summary judgment where, inter alia, plaintiff — defendant's former CEO — could not establish his subjective belief that defendant's annual and quarterly reports were inaccurate given that plaintiff himself had certified such reports).

[10] See Sharkey v. J.P. Morgan Chase & Co., 978 F. Supp. 2d 250, 253-54 (S.D.N.Y. 2013) (allowing accounting expert to testify, in SOX case involving purported accounting violations, regarding the "type of transactions which might be subject to concern as an accountant" and thereby identify what kind of "conduct included 'red flags' of possible fraud and/or money laundering in the financial industry"); Lee v. Pitney Bowes Inc., ALJ No. 06-SOX-00005, 2006 WL 3246816, at *2 (ALJ Jan. 13, 2006) (expert testimony may be allowed "on general industry practices" and "the 'conventional wisdom' or 'commonly accepted' interpretation of what the law proscribes" as possibly relevant to "help the court determine whether complainant's beliefs were objectively reasonable"); Leznik v. Nektar Therapeutics Inc., ALJ No. 06-SOX-00093, 2007 WL 5596626, at *7 (ALJ Nov. 16, 2007) (expert testimony may be allowed that "may help a fact finder … assess the objective reasonableness of [plaintiff's] beliefs" and "may explain circumstances that generally amount to actual violations" of enumerated statutes or laws regarding shareholder fraud); cf. Livingston v. Wyeth Inc., 03-00919(PTS), 2006 WL 2129794, at *6 (M.D.N.C. July 28, 2006) (striking expert witness testimony as to "whether it was objectively reasonable for [plaintiff] to believe that the company was about to engage in conduct that represented shareholder fraud," finding that while experts' "summaries of FDA regulatory practices … and securities law … may be helpful," their "application of law to the facts of this case on an ultimately legal question is not"); Grant v. Dominion East Ohio Gas, ALJ No. 04-SOX-00063, 2005 WL 6185928, at *34-36 (ALJ March 10, 2005) (disregarding accounting expert testimony regarding "what facts, if true, would amount to an actual accounting fraud violation" because expert had no firsthand knowledge of the facts of the case and because testimony "did not assist the trier of fact in determining" whether complainant, "given his experience and training," reasonably believed accounting fraud to be taking place).