In-House Counsel as Whistleblowers under SOX

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Section 806 of the Sarbanes-Oxley Act (18 USC §1514A) expressly authorizes any "person" alleging discrimination based on protected conduct to file a complaint with the Secretary of Labor and, thereafter, to bring suit in an appropriate district court. There is no exception for lawyers or in-house counsel.

Recently, the Ninth Circuit tackled this issue in the case of *Van Asdale v. International Game Technology*.

Shawn and Lena Van Asdale were in-house counsel for IGT. As part of the merger of IGT with another company, the Van Asdales raised some issues regarding the validity of a valuable patent owned by IGT. They thought the patent issue should be disclosed in connection with the merger. Their bosses thought otherwise and fired them instead.The Van Asdales sued, asserting a whistleblower claim under the SOX because they were terminated for reporting possible shareholder fraud in connection with that merger.

What About Legal Ethics Restrictions?

IGT argued that the Van Asdales were prohibited from filing suit because of their ethical obligations as Illinois-licensed attorneys. There is some Illinois law that "in-house counsel do not have a claim under the tort of retaliatory discharge." *Balla v. Gambro, Inc.*, 584 N.E. 2d 104 (Ill. 1991). However, this case is based on federal law, not Illinois law. So the court rejected that argument.

What About Attorney-Client Privilege?

The Van Asdale's case is based on a conversation the two had with their boss regarding a pending litigation matter involving the company. To bring the case, they have to disclose information subject to the attorney-client privilege.

The Court looked at Section 806 of the Sarbanes-Oxley Act (18 USC §1514A) which expressly authorizes any "person" alleging discrimination based on protected conduct to file a complaint. Since there is no exception, in-house counsel should not be prevented from bringing a claim. There are ways to protect information. The trial court should "use the many 'equitable measures at its disposal' to minimize the possibility of harmful disclosures, not to dismiss the suit altogether."

What About the Substance of the SOX Claim?

Beyond the attorney-client privilege in the case, there was also a disagreement of the standards for the claim under the whistleblower protections of SOX.

The plaintiffs only needed to show that they *reasonably believed* that there *might* have

been fraud and were fired for suggesting further inquiry. Section 1514A prohibits discriminating against an employee for "provid[ing] information . . . regarding any conduct which the employee reasonably believes constitutes a violation of" a listed law. So an employee "must have (1) a subjective belief that the conduct being reported violated a listed law, and (2) this belief must be objectively reasonable."

References:

- *Van Asdale v. International Game Technology* opinion hosted on JD Supra
- Recent Court Decision Clarifies Whistleblower Law by Melissa Klein Aguilar for Compliance Week
- Ninth Circuit Determines The Standard for Whistleblower Claims Under SOX by Mandana Massoumi and Joel O'Malley for Dorsey & Whitney LLP
- Ninth Circuit Lowers the Bar for Sarbanes-Oxley Attorney Whistleblower Claims (.pdf) from Morgan Lewis

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