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Ninth Circuit Holds that SOX Whistleblower Provisions Do Not Protect Leaks to the Media

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In *Tides v. The Boeing Co.*, No. 10-35238, 2011 WL 1651245 (9th Cir. May 3, 2011), the United States Court of Appeals for the Ninth Circuit held that the whistleblower provisions of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A(a)(1), do not protect employees of publicly traded companies who disclose information to the media. Instead, the Court held, SOX protects employees only if they disclose certain types of information to the three groups identified in the statute: (1) federal regulatory and law enforcement agencies, (2) Congress and (3) employee supervisors. This case sets parameters for what is and what is not protected whistleblower activity under SOX for which an employee can receive damages under the law.

Tides was brought by two former employees of Boeing Company ("Boeing" or the "Company") who worked at Boeing's information technology SOX audit team. This team was responsible for helping the Company comply with SOX's requirement to assess annually the effectiveness of Boeing's internal controls and procedures for financial reporting. Plaintiffs allegedly believed that Boeing managers fostered a hostile work environment, pressuring them to rate the Company's internal controls as "effective" despite problems with these controls. Plaintiffs allegedly communicated their concerns to a reporter from the *Seattle Post-Intelligencer* despite knowing about Boeing's policy restricting the release of Company information to the media. Using this information, the *Post-Intelligencer* published an article, "Computer Security Faults Put Boeing at Risk," on July 17, 2007.

Prior to the publication of the article, Boeing began suspecting that several employees were releasing Company information to the media and began monitoring plaintiffs' work computers and email accounts. After the publication of the article, Boeing's human resources personnel interviewed each plaintiff separately. They both admitted to providing the *Post-Intelligencer* reporter Company documents and information about Boeing's SOX audit practices. At the completion of the internal investigation, plaintiffs were terminated for disclosing Boeing's information to non-Boeing persons without following appropriate procedures and failing to refer the news media's inquiries to the Company's communications department in violation of Company policies.

After their termination of employment, plaintiffs filed SOX whistleblower complaints that were consolidated in court. Under SOX, employees of publicly traded companies are protected from discrimination in the terms and conditions of their employment when they take certain steps to report conduct that they reasonably believe constitutes certain types of fraud or securities violations. Employees who file a successful SOX whistleblower lawsuit may receive reinstatement, back pay with interest and special damages (such as attorneys' fees).

Boeing moved for summary judgment dismissing the case, arguing (among other things) that the SOX whistleblower provisions did not protect employees from disclosures to the media. The United States District Court for the Western District of Washington granted Boeing's motion and dismissed the case with prejudice. Plaintiffs appealed.

The Ninth Circuit affirmed. The Court held that the plain language of the statute covers only disclosures made to federal regulatory and law enforcement agencies, Congress and employee supervisors. The protections do not cover disclosures made to the media. The Court rejected plaintiffs' argument that media disclosures should be covered because such reports might ultimately cause information to be communicated to the appropriate governmental authorities. Had

Congress wanted to protect reports to the media, the Court reasoned, it would have listed the media in the statute or more broadly protected "any disclosure" of specified information, as it did with the Whistleblower Protection Act, 5 U.S.C. § 2302. Although a review of legislative history was not necessary because of the unambiguous language of SOX, the Court noted that this history supported its conclusions.

The conclusions reached by the Ninth Circuit reinforce employers' right to control their information from disclosure to non-governmental entities. However, employers should be cautious in their dealings with employees who complain about or disclose potential SOX violations, even if the SOX whistleblower provisions do not protect an employee's particular communication. For example, recent legal trends (not addressed in *Tides*) suggest that employers (before they monitor their employees' computer activities) should have policies in place communicating that the company has a right to access its technology systems and that employees do not have a right of privacy in these systems. Boeing's monitoring of plaintiffs' computers and email accounts, which revealed the activities that led to their termination, directly implicates these privacy issues. Companies should have robust policies protecting their data and managing employees' representations to the media, but application of these policies must be careful in light of countervailing rights and considerations.

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