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The Ninth Circuit Allows Corporate Counsel to Bring SOX Whistleblower Claims; Belief that Investigation Required Satisfies the Statute

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In its first decision interpreting the whistleblower provisions of SOX, the Ninth Circuit broadened the scope of protected conduct. Although other circuits have required a would-be whistleblower to prove she had a reasonable belief that the law had been violated, the Ninth Circuit held that the whistleblower need only believe an **investigation** is required. Moreover, the Ninth Circuit held that the fact that the whistleblower was an in-house attorney—who may need to disclose privileged communications to make her case—did not preclude such claims.

Employers in the Ninth Circuit should act with care when disciplining or terminating an employee who has sought an internal investigation, even when that employee is the company's lawyer.

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In *Van Asdalev. International Game Technology*, No. 07-16597, 2009 U.S. App. LEXIS 18037 (Aug. 13, 2009), the Ninth Circuit held that:

- An in-house counsel's claim of retaliatory discharge need not be dismissed because of privilege or professional responsibility concerns;
- The holding by the Department of Labor that the statute's protections only extend to whistleblowing about the specific kinds of wrongdoing enumerated in the statute was reasonable;
- An employee's subjective belief that the possibility of fraud should be investigated—rather than a belief that a fraud actually occurred—is sufficient to meet the statute's "subjective belief" standard; and
- A subjective belief that a fraud was perpetrated can be objectively reasonable even if it is mistaken.

The Ninth Circuit reversed the district court's grant of summary judgment to defendant and remanded the case for further proceedings.

Plaintiffs Shawn and Lena Van Asdale, a married couple, were both in-house counsel at International Game Technology ("IGT") during the negotiation and consummation of a merger. After the merger closed, Mr.Van Asdale became aware of information that he thought impacted the value of the target and that he believed had been withheld during merger negotiations. Accordingly, Mr.Van Asdale allegedly raised the specter of shareholder fraud and was terminated a few months later. Mrs.Van Asdale was terminated a few weeks after her husband's termination.

Sarbanes-Oxley prohibits publicly-traded companies from terminating an employee for providing information that the employee reasonably believes indicates mail, wire, bank, securities, or shareholder fraud, or a violation of an SEC rule or regulation. 18 U.S.C. §1514A(a)(1).

In-House Counsel May Bring Retaliatory Discharge Claims. The Van Asdales were in-house attorneys licensed in Illinois. Defendant argued that the Van Asdales were barred from bringing their claims under Illinois law as in-house counsel and under federal law because the adjudication of the claims would necessarily reveal privileged information. The Ninth Circuit disagreed.

The Ninth Circuit rejected application of Illinois law prohibiting in-house counsel from maintaining a tort of retaliatory discharge, finding that "federal courts in Illinois have uniformly declined to apply [the state-law-based prohibition] to claims based on federal law." *Int'l Game Tech.*, 2009 U.S. App. LEXIS 18037, at *11.

The Ninth Circuit also held that the potential for revealing privileged information in the prosecution of the suit did not justify precluding the suit. The court followed *Willyv. Administrative Review Board*, 423 F.3d 483 (5th Cir. 2005) and *Kachmarv. SunGard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997), finding that "confidentiality concerns alone do not warrant dismissal of the Van Asdales' claims." *Int'l Game Tech.*, 2009 U.S. App. LEXIS 18037, at *13-14. The Ninth Circuit found that the district court should be able to limit testimony and use equitable measures so as to minimize the disclosure of privileged information. *Id*. This ruling expands *Willy* from disputes before administrative law judges to those in federal court.

Magic Words Unnecessary to Trigger Protection. Sarbanes-Oxley prohibits adverse employment actions on the basis of an employee having "provide[d] information . . . regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1). The Ninth Circuit deferred to a previous interpretation of the statute by the DOL limiting the statute to those enumerated types of wrongdoing. *Int'l Game Tech.*, 2009 U.S. App. LEXIS 18037, at *18.

Applying this interpretation of what constitutes protected activity, the Ninth Circuit held that it was not necessary to find that Mr.Van Asdale specifically used the words "fraud on shareholders" or similar language in order to trigger protection. Rather, if Mr.Van Asdale's "statements . . . reported conduct that definitively and specifically related to shareholder fraud," that was sufficient. *Id.* at *19-20. "An employee need not cite a code section he believes was violated to trigger the protections of § 1514A." *Id.* at *19 (internal quotations omitted).

Mere Belief that Investigation Needed Is Sufficient. For the Sarbanes-Oxley whistleblower protection to apply, an employee must subjectively believe that the employer violated one of the statute's enumerated provisions, and that belief must also be objectively reasonable. *Id.* at *29.

In this case, Mrs.Van Asdale could not even say that she had a subjective belief that a fraud had occurred. Rather, she merely believed that the possibility of fraud should be investigated. The court found this belief to be sufficient, reasoning that "[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." *Id.*

This permissive standard for the "subjective belief" requirement under Sarbanes-Oxley considerably expands the range of protected activity—and thus the number of cases that can be brought.

Fraud Need Not Have Actually Occurred. A belief that a fraud has occurred may be objectively reasonable regardless of whether it is correct. For purposes of denying summary judgment to defendant,

the Ninth Circuit found the Van Asdales' subjective belief that shareholder fraud might have occurred to be objectively reasonable. The court specifically noted that it was not suggesting that the wrongdoing actually occurred, and that the Van Asdales' claim did not depend on a fraud having actually occurred. *Id.* at *32.
