9th Circuit: SOX Whistle-Blower Protection Does Not Cover Media Leaks

5/13/2011 By Zack Learman

An employer did not violate the whistle-blower provision of the Sarbanes-Oxley Act (SOX) when it terminated two employees who disclosed internal company information to the media, according to the 9th U.S. Circuit Court of Appeals.

Nicholas Tides and Matthew Craig Neumann worked as auditors in Boeing's SOX corporate audit group. SOX requires companies to annually assess the effectiveness of their internal controls for financial reporting. The audit group ensured that Boeing complied with this obligation. The group was staffed by 10 Boeing employees and supplemented with roughly 70 contract auditors from an accounting firm. An external auditor was responsible for annually attesting to Boeing's assessments of its internal controls.

In January 2007, tensions were allegedly high in the internal audit group because management suspected that the external auditor was going to declare a "material weakness" in Boeing's internal controls. Tides and Neumann claimed that, as a result, they were pressured by Boeing management to synthesize positive results by rating Boeing's internal controls and procedures as "effective."

In April 2007, a reporter from the *Seattle Post-Intelligencer* contacted Tides and Neumann to speak with them about an article she was writing on Boeing's SOX compliance. After several inquiries, both separately divulged to the reporter their concern over the apparent pressure in the audit group, as well as their belief that the audit system permitted unauthorized users to alter the ratings given to the company's internal controls. At the time, both were aware that Boeing had a policy that restricted the release of company information to the media. The policy required employees to refer "[i]nquiries of any kind from the news media" to the communications department and prohibited the release of company information without the department's prior review.

On July 17, 2007, the *Seattle Post-Intelligencer* published the article, "Computer faults put Boeing at risk," reporting that Boeing failed to "prove it can properly protect its computer systems against manipulation, theft and fraud." The article detailed Boeing's threatening company culture perceived by the employees in SOX compliance, a record of poor internal audit results and an internal allegation that audit results were being manipulated.

Thereafter, Boeing conducted an investigation and interviewed Tides and Neumann. Both admitted to communicating with the news reporter without permission. They were subsequently terminated for violation of Boeing's policy prohibiting disclosure of information to the media without prior company review. They filed separate SOX whistle-blower complaints, which were consolidated. On Feb. 9, 2010, the federal district court granted Boeing's motion for summary judgment, dismissing Tides and Neumann's lawsuit.

On appeal, the court addressed the issue of whether Tides and Neumann engaged in protected activity under SOX. The court outlined that an employee in a SOX whistle-blower lawsuit must provide information to one of three entities to be protected: a federal

regulatory or law enforcement agency; Congress; or a supervisor. Tides and Neumann argued that because the SOX violations were published in the media, the information "may eventually" reach members of Congress or law enforcement and thus they engaged in protected activity.

The court disagreed, declining to afford such an expansive meaning to the statutory language. The court reasoned that Congress intended to protect disclosure only to individuals and entities with the capacity to act effectively on the information provided. The media, the court stated, is not one of these entities and, by the plain language of the act, reporting information to the media is not protected activity.

Tides v. Boeing Co., 9th Cir., No. 10-35238, (May 3, 2011).

Professional Pointer: This case stands as an important limitation to SOX whistle-blower protection but also serves as a reminder that employees often have access to sensitive company information. Media disclosure of such information can be absolutely devastating, adversely affecting a company's reputation and relations with customers, shareholders and other constituents. Accordingly, it is crucial to have an employment policy restricting release of company information to the media.

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Editor's Note: This article should not be construed as legal advice.

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