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Both Sides Claim Victory In 5th Circ. SOX Row

By **Ben James**

Law360, New York (February 13, 2014, 8:33 PM ET) -- A Fifth Circuit decision refusing to revive a Sarbanes-Oxley Act whistleblower case brought by a fired worker who reported an alleged scheme to violate Colombian tax law is being hailed by both sides of the bar, with management attorneys touting the court's adherence to SOX's plain language and employee lawyers saying the ruling embraces whistleblower-friendly precedent.

A three-judge panel **declined** to resurrect a SOX claim from former Saybolt de Colombia Limitada employee William Villanueva, who claimed he was denied a pay raise and eventually terminated for blowing the whistle on an alleged tax fraud scheme.

The panel didn't reach what many observers saw as the marquee issue in the case — whether SOX's whistleblower provisions apply extraterritorially — upholding the dismissal of the Colombian national's case on the narrower ground that he didn't satisfy the requirement that a whistleblower report misconduct he or she reasonably believed violated one of six provisions of U.S. law listed in Section 806 of SOX.

Because Villanueva complained about conduct he thought violated Colombian law, he wasn't protected by SOX, the panel held.

"I see this case as an important win for employers," said Michael Delikat, chair of Orrick Herrington & Sutcliffe LLP's employment law practice. "This is a significant case for U.S. multinationals since it clearly holds that the employee's report or complaint has to relate to a violation of the U.S. laws enumerated in SOX. That will close the floodgates of coverage for alleged violations of foreign laws."

BakerHostetler's Dennis Duffy said that from a defense perspective, the Fifth Circuit's analysis was "spot on," and Steven Pearlman, co-head of Proskauer Rose LLP's whistleblowing and retaliation group, called Wednesday's decision a resounding and valuable win.

But according to whistleblower-side lawyers, employers won a battle with the Villanueva case but suffered a setback in the broader war.

"I'm not sure which opinion they're reading," R. Scott Oswald, managing principal of The Employment Law Group, said of management-side lawyers touting the Villanueva decision as a victory.

The Fifth Circuit affirmed the U.S. Department of Labor Administrative Review Board's **decision** to reject Villanueva's retaliation claim, upholding what Delikat called a "rare win" for employers at the ARB, which has drawn criticism for being too employee-friendly under the Obama administration.

But the 11-page appeals court opinion referenced a 2008 Fourth Circuit decision in Welch v.

Chao and a controversial 2011 ARB **decision** known as Sylvester v. Parexel, a move whistleblower lawyers say is significant.

The Fifth Circuit said it agreed the Parexel ruling's conclusion that SOX's whistleblower protections' "critical focus" was on whether a worker reported conduct that he or she reasonably believed amounted to a violation of federal law.

The appeals court also drew from the Welch ruling for the proposition that an employee doesn't have to cite a "code section" that he or she believed to have been violated, but must identify the "specific conduct" that's believed to be illegal.

While the Villanueva decision might look like win for the defense bar at first glance, the fact that it adopted those holdings makes it helpful for SOX plaintiffs, said Jason Zuckerman of Zuckerman Law.

The defense bar has been trying to convince federal courts not to apply the ARB's Sylvester decision and has failed, Zuckerman said.

The Fifth Circuit presumed that Sylvester was the law of the land and embraced the ARB's authority to clarify the scope of protected conduct under SOX, Oswald added.

"This is a major step forward compared to prior Fifth Circuit rulings on the scope of protected conduct under SOX. The current ARB's seminal Sylvester decision has now been adopted by several circuits, which significantly reduces the likelihood that the business community will be able to get this issue before the Supreme Court," Zuckerman said.

But the management-side lawyers said the references to Welch and Sylvester were insignificant. The Fifth Circuit said it agreed only with Sylvester's conclusion that employees had to have a reasonable belief that the conduct they blow the whistle on violated the law, but it didn't tackle the May 2011 ruling's "broader holding" that the conduct doesn't have to definitively and specifically relate to at least one of the laws listed in Section 806, Delikat said.

The Fifth Circuit's reliance on Sylvester for the "vanilla and benign" reasonable belief proposition is a long way from adopting every holding from the May 2011 ruling, Pearlman said.

The vastly divergent interpretations of the Villanueva ruling from each side of the bar underscore the potentially high stakes of whistleblower litigation, as well as the fact that there are unsettled legal questions about SOX, he added.

"The fact that you have sophisticated plaintiffs counsel that are dogmatic in their view and religious in the fervor that they bring to this issue — and diametrically opposed defense counsel — highlights just how hot these cases are, and how SOX contains many areas of jurisprudence that are yet to be fully resolved," Pearlman said.

--Editing by Jeremy Barker and Richard McVay.