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Do We Need #consent?

Navigating Legal Issues In the Twittersphere

By Jesse M. Brody and Suemyra A. Shah

In today's digital age where consumers rely heavily on social media for news and entertainment, it has become increasingly common for companies to join the conversation on popular platforms such as Twitter, Facebook and Instagram. Whether through live tweeting to followers during a nationally televised sporting event or awards show, hosting a "Twitter Party" led by bloggers and influencers, or simply maintaining a brand presence as an advertising channel, marketers have found that authentic and meaningful engagement with consumers on Twitter can have a lasting impact.

While numerous companies now maintain an active presence on Twitter, the extent to which brands can lawfully interact with other Twitter users for advertising and similar commercial purposes is still not yet clearly defined and, consequently, the legal risk associated with each tweet is not always properly weighed before a promotional social media campaign is launched. It is tempting to assume that, because a tweet is so fleeting, it is unnecessary to jump through the typical legal hoops to clear the content before it is posted on Twitter. But

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With All Due Deference

Following the ARB's Lead in Defining Protected Activity Under SOX

By Tom Harrington and R. Scott Oswald

In the courtroom, a business transaction, or on a ball field, a loss can also be a victory. Such is the case for employees in the matter of *Nielsen v. AECOM Technology*, decided by the Second Circuit Court of Appeals in August 2014. Employment law practitioners eagerly awaited the court's decision on the appropriate standard for evaluating whether a plaintiff engaged in protected activity under the Sarbanes-Oxley Act's (SOX) whistleblower protection provisions. The court found against the plaintiff, an employee of AECOM Technology, but in doing so, became the latest circuit to hold that employees need not "definitively and specifically" identify a particular securities law or category of fraud in order to be protected from retaliation. This is a significant victory for employees.

In this article, we provide a brief history of how the "definitively and specifically" standard came to be, how the tide began to turn against the application of this standard, and what this means for practitioners and employees who blow the whistle on securities fraud.

Sarbanes-Oxley's Anti-Retaliation Provision

Enacted in July 2002, Section 1514A of the Sarbanes-Oxley Act protects employees, consultants, and contractors of publically traded companies who provide information regarding conduct that they "reasonably believe" violates certain specified security laws. *See* 18 U.S.C. § 1341, §1343, § 1344, and § 1348. It also protects an individual from retaliation when he provides information about company wrongdoing that violates "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." *See* 18 U.S.C. § 1514A.

To make out a *prima facie* case of retaliation under SOX, an employee must demonstrate that: 1) she engaged in protected activity; 2) the employer knew or suspected that the employee engaged in the protected activity; 3) the employee

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suffered an adverse personnel action; and 4) the circumstances were sufficient to raise an inference that the protected activity contributed to the adverse personnel action. This formulation is followed by the Eleventh Circuit. *See, e.g., Johnson v. Stein Mart, Inc.*, 440 F. App'x 795, 800 (11th Cir. 2011). Most circuits follow the same or similar framework for an employee to establish a *prima facie* case of retaliation. Once an employee makes such a showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the same personnel action absent the employee's protected activity. *See, e.g., Welch v. Chao,* 536 F.3d 269, 275 (4th Cir. 2008).

The Role of the ARB in SOX Litigation and the Concept of Administrative Deference

Though this article focuses on how courts evaluate the first prong of the plaintiff's *prima facie* burden (whether the employee engaged in protected activity), an overview of how SOX claims are litigated and of the concept of administrative deference is necessary to understand the significance of recent circuit court developments regarding protected activity.

An employee who alleges retaliation under SOX must first file a complaint with the Occupational Safety and Health Administration (OSHA). *See* 18 U.S.C.A. § 1514A(b)(1). After 180 days or if the OSHA investigator issues his findings, the employee has the right to either file in U.S. District Court or proceed administratively before the Department of Labor's (DOL) Office of Administrative Law Judges (OALJ). From there, the employee has the right to appeal a decision from the OALJ to the DOL's Administrative Review Board (ARB). It should be noted that a complainant may abandon the administrative review process in favor of bringing a claim in district court if the ARB "has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant." 18 U.S.C. § 1514A(b)(1)(B).

Importantly, Congress delegated to the Secretary of Labor the responsibility for adjudicating claims brought under § 1514A. *See* 18 U.S.C. § 1514A(b). The ARB, the highest appellate authority within the DOL, "has been delegated the authority to act for the Secretary and issue final decisions" with regard to whistleblower complaints arising under § 1514A. See 29 C.F.R. § 1980.110(a).

Thirty years ago, the Supreme Court decided the case of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In that case, the Court established what has come to be known as "*Chevron* deference." The *Chevron* Court wrote, "If the choice [of an agency to which Congress has delegated adjudicative authority] represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id*. at 845. In essence, the Supreme Court acknowledged that an agency's decisions regarding "the meaning or reach of a statute" should be afforded significant deference when the relevant provisions of that statute are at issue in court.

A similar principle was recognized almost 50 years earlier in *Skidmore v. Swift & Co.*, 323 U.S. 134,

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139 (1944) (establishing so-called *Skidmore* deference). In that case, the Supreme Court opined that "the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. … The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect." The combined lesson of *Skidmore* and *Chevron* is that courts need to seriously consider, and generally defer to, guidance from agencies entrusted to interpret various statutes.

Platone v. Flyi: An Antiquated Notion of 'Protected Activity'

As referenced at the outset, there was a time when plaintiffs had to meet a high burden to establish that they engaged in protected activity under SOX. In 2006, the ARB decided *In The Matter Of: Stacy M. Platone v. Flyi, Inc.*, 2006 WL 3246910 (U.S. Dept. of Labor SAROX). Stacy Platone was a Manager of Labor Relations for Atlantic Coast Airlines Holdings (ACA) who filed a motion to amend the caption to reflect its new name, "Flyi, Inc." During her employment, she sent several e-mails to her supervisors disclosing concerns about the seemingly improper manner in which ACA was billing one of its customers, the Air Line Pilots Association (ALPA). Platone testified that she told one of her supervisors she "thought it was illegal … what some of the pilots were doing" and that [the pilots] were cheating … the company [out] of money. … " *Platone*, 2006 WL 3246910 at 11.

Though what Platone described in her e-mails and conversations was a scheme whereby ACA billed ALPA for services that it should not have billed, she never specifically alleged that her employer was engaging in fraud. ACA terminated Platone's employment shortly after her disclosures.

The ARB noted that Platone never "definitively and specifically" alleged that ACA was engaged in fraud under SOX. The Board, relying heavily on prior decisions dealing with the Energy Reorganization Act, 42 U.S.C.A. § 5851, wrote, "[T]he employee's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1). Thus, for example, an employee's disclosure that the company is materially misstating its financial condition to investors is entitled to protection under the Act." *Platone*, 2006 WL 3246910 at 8.

According to the Board, Platone did not engage in protected conduct because her allegations did not specifically describe how ACA shareholders were being harmed by the company's conduct. Moreover, the Board found that Platone's disclosures were not protected because they did "not even approximate any of the basic elements of a claim of securities fraud — a material misrepresentation (or omission), scienter, a connection with the purchase, or sale of a security, reliance, economic loss and loss causation." *Id*. at 11. Basically, the ARB required Platone to specifically disclose that the company's conduct was defrauding shareholders and demanded that Platone identify in her disclosures how that conduct satisfied each of the elements of a securities fraud claim.

For the next five years, the ARB's decision in *Platone*, which severely restricted the scope of protected conduct, was precedent in the ARB and, under *Chevron*, afforded deference in federal courts. *See Harvey v. Home Depot USA, Inc.*, ARB Case No. 04–114, 2006 WL 3246905, at *11 (ARB June 2, 2006) ("[A]n employee's complaint must be directly related to the listed categories. … "). *See also Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008).

Turning the Tide: An Employee's 'Reasonable Belief'

In 2011, the ARB significantly departed from the requirements of Platone's "definitively and specifically" test. In *In the Matter of: Kathy J. Sylvester and Theresa Neuschafer v. Paraxel Int'l, LLC*, ARB Case No. 07-123, 2011 WL 2165854 (May 25, 2011), the Board announced that the standard from *Platone* "has evolved into an inappropriate test," and shifted its focus to whether the complainant had a reasonable belief that the company had engaged in securities fraud and away from "whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities." *Id*. at 12. In abrogating the ARB's decision from *Platone*, the *Parexel* Board noted that relying on the "definitive and specific" standard was contrary to "the plain language of the SOX whistleblower protection provision, which protects 'all good faith and reasonable reporting of fraud.'" *Id*. (internal citations omitted).

The *Parexel* Board further discussed the impropriety of requiring that a complainant establish the elements of criminal fraud in order to prevail on a retaliation claim under SOX. *Id*. ("[R]equiring a complainant to prove or approximate the specific elements of a securities law violation contradicts the statute's requirement that an employee have a reasonable belief of a violation of the enumerated statutes."). The ARB concluded that requiring a plaintiff to make such a showing was in clear conflict with the requirement that the employee need only make a disclosure related to a reasonable belief of securities fraud.

Paraxel's Reasonable Belief Test Is Adopted by the Circuits

Following *Paraxel*, most practitioners anticipated a circuit split regarding adoption of the Board's "reasonable belief" test in evaluating protected activity under SOX. As noted, court decisions from 2006 to 2011 generally required a plaintiff to meet a heightened standard of protected activity, and a significant amount of circuit precedent had developed in the five years following *Platone*. It was unclear

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which circuits would defer to the ARB's new interpretation of Section 806 and which would instead adhere to circuit precedent following *Platone*. Many practitioners expected that the anticipated circuit split would soon lead to intervention by the Supreme Court.

Fortunately for whistleblowers, this circuit split has not occurred. The *Platone* dominoes began to fall in March 2013 with the Third Circuit's decision in *Wiest v. Lynch*, 710 F.3d 121, 130 (3d Cir. 2013), in which the court held that "the ARB's rejection of *Platone's* "definitive and specific" standard is entitled to *Chevron* deference." Only three months later, the Tenth Circuit followed in the Third Circuit's footsteps, finding that "[t]his court affords deference to the Board's interpretation of [SOX] as expressed in formal adjudications under *Chevron*." *See Lockheed Martin Corp. v. Admin. Review Bd.*, U.S. Dep't of Labor, 717 F.3d 1121, 1131 (10th Cir. 2013).

In February 2014, the Fifth Circuit joined the Tenth and Third, finding that "the critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law." *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 109 (5th Cir. 2014); *see also Feldman v. Law Enforcement Assoc. Corp.*, 752 F.3d 339, 345 (4th Cir. 2014) (embracing the ARB's "reasonable belief" standard as set forth in *Parexel*). In August 2014, the Second Circuit decided the case of *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214 (2d Cir. 2014) adopting the ARB's "reasonable belief" standard but finding that plaintiff was not objectively reasonable in believing that the complained-of conduct constituted shareholder fraud. In so doing, the court became the fifth and most recent circuit to adopt the ARB's "reasonable belief" standard for evaluating whether an employee has engaged in protected activity.

Concluding Thoughts: A Warning to Employers

With this new decision, *Nielsen v. AECOM Technology Corp.*, a circuit split looks increasingly unlikely. As circuit and district courts continue to align themselves with the ARB's "reasonable belief" test, wise employers should expect that the era of easy dismissals in SOX retaliation cases for lack of protected activity is at an end. As a result of the demise of *Platone's* overly restrictive standard, contesting employees' retaliation claims at the Department of Labor and in federal courts has become a risky and expensive proposition. Many more cases will be thoroughly investigated or reach discovery. Moreover, in in the wake of the Supreme Court's 2013 *Lawson* decision, more employees and employers are now covered by the whistleblower provisions of SOX.

In this new judicial environment, companies should take extra care to treat whistleblower claims with respect, and avoid even the appearance of retaliation against employees who raise concerns about actual or potential wrongdoing. Employers can no longer expect to get a SOX retaliation complaint dismissed because the whistleblower never "definitively and specifically" cited the laws supposedly being broken. Instead, employers should now expect that any whistleblower with good-faith concerns will have access to a public tribunal and an adjudication that presents substantial risk to the company's money, time, and reputation.

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informed decision as to how to "value" those provisions. For instance, many companies fight aggressively and endlessly over using "their" language in indemnification, arbitration, choice of law and other similar provisions. At a minimum, the negotiations over using "their" language slows down the sales process, uses more legal resources, negatively impacts the customer experience and sometimes prevent a sale from occurring at all. But, if a company could determine with enough data that, for instance, the indemnification provision was only invoked in 1% of all contracts and the total indemnification obligations at issue was less than, say, $10 million, it could make a more informed decision as to whether it is worth fighting over and, if so, how "giving" on the issue might be addressed through pricing adjustments.

Squires: As Legal Analytics makes its way into more unstructured data sets, I see more of a premium being placed not only on connecting the dots, but on knowing where else to look. In other words, analytics itself can hint at information that, if knowable, would help lawyers shift from just solving clients' puzzles to solving their mysteries. I don't think we are that far off.

Byrd: If you believe that the legal system exists to provide justice and that the system includes all disputes and transactions, then using Legal Analytics to improve the outcomes of those disputes and transactions will, over time, increase justice. And that's a very good thing.

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