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Florida Court Broadly Reads Reasonableness Standard in SOX Whistleblower Case

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Congress has passed numerous whistleblower protection laws to shield company insiders and others who act in the public interest from retaliation as a means to encourage them to report and attempt to prevent illegal activity. To invoke these whistleblower protection laws, employees must prove that they engaged in "protected activity" covered by the law. While many employees experience retaliation at work for trying to do the right thing, it is not always clear whether their conduct meets the standard of protected activity.

For instance, the Sarbanes-Oxley Act of 2002 (SOX) protects employees of publicly traded companies from retaliation if they complain to their company or to the Securities Exchange Commission (SEC) about conduct that they "reasonably believe" constitutes a violation of any SEC rule or regulation, or any other federal law relating to fraud against shareholders. The Dodd-Frank Wall Street Reform Act of 2010 provides further protection for employees who engage in activity protected under SOX.[1] In a quintessential SOX retaliation case, an employee is fired for complaining about actual misrepresentations in the company's publicly reported financial statements, and there is little question he has engaged in protected activity. In other cases, the employee's concerns are much less clear cut.

Given the wide scope of the SEC's rules and regulations, and the vagueness of the "reasonably believes" standard, an employee experiencing retaliation for complaining about company misconduct cannot be blamed for not knowing whether he or she qualifies for protection under these laws.

A recent case decided by the United States District Court for the Southern District of Florida shows the fact-specific nature of this determination and demonstrates that courts and would-be whistleblowers can use broad readings of these general standards to protect employees in atypical situations.

Thomas v. Tyco International Management Co., LLC

Carolina Thomas, the plaintiff in *Thomas v. Tyco International Management Co., LLC*, complained that an applicant for a new manager position at Tyco had made false claims in her resume and was untrained in the generally accepted accounting principles used in the United States. Despite Thomas's protests, Tyco hired the candidate.

Thomas believed that the presence of this unqualified employee, in conjunction with an unreliable company process that was supposed to ensure that the company's publicly reported financial data matched its internal numbers, created a real risk that the company might publicly misstate its financials. Thomas filed a complaint about these issues with the company's ombudsman and began to lose work responsibilities shortly thereafter.

Thomas then filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), which referred her complaint to the SEC. Thomas worked closely with the SEC until she was terminated based on a false allegation that she had improperly accessed the records of another employee in violation of company policy. Thomas then dismissed her OSHA complaint so she could file a lawsuit in federal court, alleging unlawful retaliation in violation of SOX, Dodd-Frank, and a state whistleblower protection law.

Tyco sought to have Thomas' lawsuit dismissed, arguing that Thomas' complaints about the employee's lack of credentials were not protected activity under SOX, citing precedent that held that complaints about questionable personnel decisions fall outside of the scope of SOX. The court distinguished the precedent, reasoning that Thomas' belief that an unqualified employee might compromise the company's internal control over financial reporting was not "unreasonable" as a matter of law.

Tyco further argued that Thomas' complaints about unreliable processes were not protected activity because Thomas could not identify any instance in which the processes caused an actual misstatement of financial information that would violate SEC rules. Although the court agreed that Thomas had not identified any actual misstatement of financial information, the court held that Thomas was not required to prove an actual violation of law, but only that she reasonably believed there was a violation. Furthermore, the court noted that Tyco's failure to investigate Thomas' internal complaints created a "reasonable inference" it violated its legal duties to evaluate any changes in its internal controls. The court noted that the reasonable belief standard does not require the employee to prove an actual violation of law, or even that she had a reasonable belief regarding each element of a legal violation. Rather, the standard is based on the "totality of the circumstances known (or reasonably albeit mistakenly perceived) by the employee at the time of the complaint, analyzed in light of the employee's training and experience." Thus, Thomas' belief that an unqualified employee and unreliable process might compromise the integrity of Tyco's reported financial information was enough to state a claim under SOX.

Impact of *Thomas*

The *Thomas* case is important because even if Thomas ultimately loses on some other ground, the court's holdings that her conduct met the reasonable belief standard as a matter of law reflect important guidelines for interpreting this statutory standard. The court's decision shows how a broad reading of the "reasonably believes" standard can protect many employees of publicly traded companies who complain about bad company practices. Thomas' complaints about poor hiring decisions and faulty internal processes that might cause a future misrepresentation are a far cry from complaints about demonstrable misrepresentations that are clearly protected activity. However, the ambiguity in the "reasonably believes" standard and the weighty public policy encouraging employees to speak up about misconduct provides the potential for sympathetic courts to create far more expansive whistleblower protections than a company or employee might expect.

Given the uncertainty in the scope of the protection offered by SOX and other whistleblower protection statutes that use the "reasonably believes" standard, employees should not make assumptions about whether or not their complaints might be protected. Employees facing or fearing retaliation for complaining about their employer's bad practices should consult with an experienced whistleblower attorney to determine whether they are protected by whistleblower laws.

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[1] There is a disagreement among the federal courts about whether Dodd-Frank's definition of protected activity only protects employees who report to the SEC, or whether it, like SOX, protects employees who report to their employers. The United States Supreme Court is currently reviewing a case that will likely decide this important issue.