

In Funke v. Federal Express Corp., DOL Administrative Review Board interprets SOX whistleblower protection provisions broadly.

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On July 8, 2011 the Department of Labor Administrative Review Board (ARB) issued yet another important decision broadly construing the legal protections afforded to whistleblowers under the Sarbanes-Oxley Act ("SOX"). In [Funke v. FedEx Corp.](#), ARB Case No. 09-004 (July 8, 2011), the ARB once again expanding the scope of protected activity under SOX to provide legal protection for whistleblowers who complain to law enforcement authorities about conduct made unlawful under SOX - in this case potential mail fraud.

At issue on appeal before the ARB was whether the Complainant, a FedEx courier, engaged in protected activity under SOX when she alerted local law enforcement that a FedEx customer was using FedEx as a conduit for suspected mail fraud. The Complainant, Heidi Funke, alleged that FedEx violated the whistleblower protection provisions of SOX by suspending her in retaliation for alerting local law enforcement that FedEx customers were using its services to engage in suspected mail fraud. Prior to her whistleblowing activity, Funke, who had worked at FedEx for over 15 years, had maintained an exemplary employment record.

Ms. Funke alleged in her complaint that after she made a series of reports to her dispatcher about suspicious packages as she had been trained to do by FedEx. After the dispatcher refused to report her concerns to the fraud or security department of FedEx, Ms. Funke went to the local sheriff's office and informed them of her suspicions. FedEx subsequently chastised Ms. Funke for reporting her suspicions to law enforcement and placed her on suspension. Her supervisor then informed her that "FedEx's policy, written or not, prohibited her from notifying law enforcement regarding suspected illegalities encountered in the course of her duties. ARB decision at 5. Subsequently, FedEx officials told Ms. Funke that informing law enforcement about FedEx's operations "opened FedEx up to civil and criminal liability" and that the issue was being addressed at the "highest levels of security, human resources, and legal" which all "wanted to fire her for going to law enforcement." Id.

On January 16, 2007, Ms. Funke then filed a SOX complaint with the Occupational Safety and Health Administration ("OSHA") alleging that FedEx suspended her without pay in relation for reporting mail fraud concerns. OSHA dismissed her complaint concluding that reports of mail fraud allegedly perpetrated by a third-party are not protected under SOX. Ms. Funke then requested a hearing before an Administrative Law Judge who ultimately dismissed her complaint on the ground that she failed to prove that she had engaged in protected activity when she reported that a third party was using FedEx for suspected mail fraud. Id. at 5-6.

In a ground-breaking decision, the ARB concluded that reports of third-party conduct, which an employee reasonably believes constitutes a violation of the laws listed under SOX, constitutes protected activity. Not only did the ARB expand the scope of parties a whistleblower can safely report about, it also expanded the scope of parties that a whistleblower can report to. FedEx argued that Funke's reports to dispatchers were not protected by SOX because her reports to dispatchers were to

non-management officials, and because her reports to the county sheriff's office were to local rather than to federal officials. The ARB rejected the former defense, finding that SOX protects employees who report misconduct not only to supervisors but also to "such other person working for the employer who has the authority to investigate, discover, or terminate misconduct." 18 U.S.C.A. Sec. 1514A (a)(1)(c). The ARB also rejected the latter defense on grounds that Sec. 1514 A is unclear as to whether it covers only reports to federal authorities, because, despite its language, it was the clear intent of the statute was to protect all such reports, and not to exclude reports to local officials. The ARB further reasoned that Funke's prior awareness of an investigation of the matter by local officials in which federal officials became involved constituted a reasonable belief that federal officials would eventually be involved.

The ARB further refuted the reasoning of a lower Administrative Law Judge that Funke's complaint was not protected because SOX requires the misconduct complained of to be ongoing, rather than forthcoming. The ARB cited another recent ARB decision -- [Sylvester v. Paraxel Int'l](#) -- in which it held that "disclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen. ARB decision at 11. Such a belief must be grounded in facts known to an employee, but an employee need not wait until a law has actually been broken to register a concern." (Read more about [Sylvester](#) here.)

According to [Debra S. Katz](#), who specializes in the representation of SOX whistleblowers, "the Funke decision is just the latest in a string of very important decisions issued by the ARB strengthening the protections afforded to whistleblowers and therefore protecting the investing public." Katz, who is a partner at Katz, Marshall & Banks, LLP, notes that "the ARB appointed by the Obama Administration has in a short period of time restored the legal protections Congress provided to employees of publicly traded companies under this vital whistleblower protection law."