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# 4th Circ. Reminds Whistleblowers Of Their Role And Rights

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Law360, New York (February 10, 2015, 11:37 AM ET) -- In Jones v. SouthPeak Interactive Corp. of Delaware, et al., the Fourth Circuit became the third federal circuit court to hold that emotional distress damages are available to successful claimants under the anti-retaliation provision of the Sarbanes-Oxley Act. The case was brought by Andrea Gail Jones, SouthPeak's former chief financial officer, who alleged the publicly traded company terminated her for raising concerns about its failure to report a debt it incurred in filings with the U.S. Securities and Exchange Commission.

Jones alleged that in February 2009, SouthPeak CEO Melanie Mroz and the company's chairman, Terry Phillips, decided to purchase from Nintendo Co. Ltd. 50,400 units of a computer game, "'My Baby OS." Because SouthPeak lacked sufficient funds to pay for the units, Phillips informed Mroz that he would be willing to advance the requisite payment for the units from his personal funds. Mroz agreed and Phillips wired Nintendo approximately $300,000 in payment for the units. However, the company did not record this advance on its books as a liability and endeavored to keep the source of the funds for the inventory secret from its employees. In its subsequent 10-Q financial report to the SEC, SouthPeak reflected the sales of the newly acquired inventory, but did not reflect its cost or the company's resultant liabilities. In doing so, the company intentionally overstated its profit to the SEC and to current and prospective investors by over $300,000.

When Jones learned of the fraud from a co-worker, she confronted Phillips, who confirmed the source of the funds. Shortly thereafter, Jones notified David Buckel, chairman of the SouthPeak Audit Committee, of the advance and her belief that the failure to report the liability constituted a violation of financial reporting laws. Jones repeatedly voiced her concerns over the next two months to multiple parties at SouthPeak and its auditors in an attempt to force the company to correct the overstated profits it had reported on its prior 10-Q. Finally, after over two months of having her internal attempts to resolve the problem stymied, Jones notified the SEC's Division of Enforcement of the company's fraudulent reporting. Just two days later, Mroz and Phillips' assistant, Karen Josephsen, informed Jones that SouthPeak was terminating her employment. One month after Jones' termination, SouthPeak issued a revised 10-Q acknowledging Phillips' advance and acknowledging material weaknesses in the company's internal controls.

Jones further alleged that Mroz and Phillips were individually liable for their roles in her termination, including for causing her emotional distress through their unlawful retaliation.

At trial, Jones testified that she was the "bread winner" in her family, and her termination caused her family to question where the money would come from to care for her four children, ranging in age from four to 11 years old. After her termination, job interviews for new positions were often handicapped by questions about why she had been terminated. It took her 23 months to secure a new job, during which time she and her husband had to support their large family through unemployment benefits. Jones' husband testified that years after her termination, he continued to wake up to the sound of her crying.

After a three-day trial, the jury returned a verdict for Jones, finding that SouthPeak retaliated against her because of her whistleblowing, in violation of Section 1514A of SOX. The jury awarded her $593,000 in back pay and found the two individual defendants, Mroz and Phillips, liable for $178,500 apiece in compensatory emotional distress damages. The court reclassified the award against SouthPeak, instead holding the company responsible for $470,000 in back pay and $123,000 in compensatory damages, and reduced the emotional distress awards against the individual defendants to $50,000 apiece. Finally, the court awarded the plaintiff just over $354,000 in attorneys' fees.

SouthPeak appealed, arguing that the district court had erred when it: (1) questioned the jury's initial verdict and accepted an "inherently inconsistent" final verdict; (2) improperly calculated and allocated the award of attorneys' fees; (3) refused to dismiss Jones' complaint for failing to timely notify the individual defendants; and (4) upheld the jury's award of emotional distress damages or, in the alternative, failed to sufficiently lower that award. While the court's analysis of these topics unrelated to SOX is interesting, this article focuses on the Fourth Circuit's decision to affirm the district court's holding that emotional distress damages are available to successful claimants under SOX.

Section 806 of SOX, codified as 18 U.S.C. Section 1514A, protects employees from retaliation for, inter alia, internally reporting violations of securities laws. The statute provides that a prevailing SOX claimant shall be entitled to "all relief necessary to make the employee whole," and further states that such relief shall include "compensation for *any special damages sustained as a result of the discrimination*, including litigation costs, expert witness fees and reasonable attorney fees." (Emphasis added.) While SouthPeak argued that the three itemized forms of damages were the only types of compensatory relief available under SOX, the Fourth Circuit concluded, we believe correctly, that "the term 'shall include' sets a floor, not a ceiling."

The court recognized that the two federal circuit courts to have considered the question thus far have both held that emotional distress damages are available to successful SOX retaliation claimants. See Halliburton Inc. v. Administrative Review Board, 771 F.3d 254, 266 (5th Cir. 2014); Lockheed Martin Corp. v. Administrative Review Board, 717 F.3d 1121, 1138 (10th Cir. 2013). The court noted that the district court decisions disagreeing with this result primarily did so by analogizing SOX to Title VII prior to its 1991 amendments. The U.S. Supreme Court held in 1992 that pre-1991 Title VII, which provided a successful claimant with "equitable relief as the court deems appropriate," did not provide for "pain and suffering, emotional distress, harm to reputation or other consequential damages."

As the Fifth Circuit reasoned in Halliburton, however, the Section 1514A(c)(1) provision that a plaintiff shall be entitled to "all relief necessary to make the employee whole" was less like Title VII's provision and much more like the anti-retaliation provision of the False Claims Act, which similarly provides that successful plaintiffs are entitled to "all relief necessary to make that [plaintiff] whole." Every federal circuit court to rule on the issue has held that the False Claims Act's anti-retaliation provision does provide for "noneconomic compensatory damages," including damages for emotional distress.

The Fourth Circuit also discussed the public policy reasons for interpreting Section 1514A to provide for emotional distress damages. SOX's anti-retaliation provision provides protections for a wide range of retaliation in addition to termination, including threats and

harassment. In cases where retaliation takes these forms, emotional distress damages may be the only remedy available that would make the claimant whole. Finally, the Fourth Circuit noted that the U.S. Department of Labor, which has been empowered by Congress to enforce the SOX anti-retaliation provision, has consistently upheld the availability of nonpecuniary compensatory damages for successful SOX complainants, and concluded that it should afford deference to the DOL's interpretation.

The DOL's administrative review board recently affirmed the propriety of emotional distress damages in Menendez v. Halliburton Inc. (Administrative Review Board, March 15, 2013), a case brought under SOX. The board's decision in Menendez cited two previous decisions in which the board affirmed awards including such damages and further provided that it "has upheld countless compensatory damage awards under the whistleblower provisions of ERA and AIR 21, upon which Section 806 was modeled." For these reasons, the Fourth Circuit affirmed the district court's ruling and held that emotional distress damages are available to successful claimants under the SOX anti-retaliation provision.

The court's decision in Jones affirms the importance of the availability of such damages in whistleblower retaliation claims. Section 806 of SOX prohibits employers from taking an adverse employment action against an employee because that employee engaged in protected activity, and the DOL has broadly interpreted "adverse action" to include any action that would dissuade a reasonable professional in the employee's position from reporting the activity. Thus, an "adverse employment action" may include termination, demotions, cuts in pay or denial of promotions — actions that directly affect an employee financially — but may also include many different forms of retaliation that do not directly impact an employee's finances, such as harassment, ostracism, marginalization or reassignment, but which cause the employee to suffer emotional distress.

In these cases, the availability of noneconomic damages is critical to allowing the employee to speak up without fear of retaliation, which in turn helps to create an environment in which the public is protected from fraudulent financial reporting. Particularly in light of the current Congress' move to deregulate financial institutions and underfund the regulatory agencies responsible for enforcing existing regulations, it is critical that the courts not waver in broadly interpreting whistleblower protection statutes such as SOX.

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