

The Evolution Of SOX: A Powerful Remedy For Retaliation

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The Fourth Circuit's May 20, 2016, decision in *Deltek Inc. v. U.S. Department of Labor* provides important guidance on key aspects of the Sarbanes-Oxley Act whistleblower protection, including (1) the broad scope of protected conduct; (2) the favorable causation standard for SOX whistleblowers; (3) the onerous burden an employer must meet to prove an after-acquired evidence defense; and (4) the wide range of remedies available under SOX, including front pay. While *Deltek* is unpublished and includes a spirited dissenting opinion, it is consistent with a recent trend of federal appellate and U.S. Department of Labor Administrative Review Board decisions broadly construing SOX, and it is a good gauge of the direction of SOX whistleblower litigation.

Background

In October 2008, Dinah Gunther started working at Deltek as a financial analyst in its IT department. The position was a significant career opportunity for Gunther because she lacked a college degree and had worked for other companies as an executive assistant and workflow manager. Deltek offered a tuition reimbursement program, and Gunther planned to use that program to obtain a college degree.

Almost from the start of her employment, Gunther was concerned about the lack of clear procedure and supporting documentation for billing disputes between Deltek and [Verizon](#). She became convinced that Deltek employees were subjecting Verizon to baseless billing disputes to hide a shortfall in the telecommunications budget and thereby conceal the IT Department's true financial condition.

Gunther's concerns were based in part on her discussion with Chris Reynolds, a project manager who was responsible for managing the billing relationship between Deltek and Verizon. Reynolds shared Gunther's concern that Deltek was raising unjustified billing disputes with Verizon.

After Gunther reported her concerns to her immediate supervisor, she encountered hostility and negative changes to her work status. In April 2009, Gunther raised her concerns about the allegedly fraudulent billing practices in a letter to Deltek's general counsel that she copied to the U.S. Securities and Exchange Commission. The GC met with Gunther, investigated her concerns, and ultimately found no improper activity. During the GC's meeting with Gunther, he asked her to gather information about her concerns.

Soon after her meeting with the GC, Gunther saw co-workers shredding documents and felt that she needed to preserve evidence supporting her disclosures. Accordingly, she emailed some company documents to her personal email account.

Gunther became increasingly troubled by what she perceived as mistreatment and informed Deltek's vice president of human resources that she was experiencing stress and medical issues

that were affecting her work. Deltek offered Gunther paid leave, and she accepted the offer, contingent upon Gunther having the discretion to return to work with 24 hours' notice to HR. Shortly after her leave commenced, Gunther filed a SOX complaint with the Occupational Safety and Health Administration.

During the paid leave, Gunther's counsel attempted to negotiate a settlement of her claims, but the parties could not agree on terms. Gunther received a Consolidated Omnibus Budget Reconciliation Act notice from Deltek and became concerned that her job was in jeopardy. On a Saturday, Gunther sent an email to the vice president of HR informing Deltek that she would be returning to work on Monday. When Gunther came to work on Monday, she met with the vice president of HR and a Deltek attorney, who assured Gunther that she still had her job but that she could not yet return to work.

Gunther left the meeting and proceeded to the parking lot, where her husband was holding a video camera. Gunther's husband interviewed her about the meeting, and the vice president of HR saw the interview from her office. The next day, Deltek terminated Gunther's employment supposedly because Gunther was disruptive and confrontational when she returned to work from her paid leave and because Gunther's videotaped interview was disruptive and blocked employees from entering the building.

Following an investigation, OSHA did not find a violation of SOX. Gunther appealed OSHA's findings and prevailed after a 12-day hearing on the merits. The ARB affirmed the administrative law judge's decision, and Deltek appealed to the Fourth Circuit.

SOX Protected Conduct

Deltek argued that any subjective belief Gunther may have had was not objectively reasonable because Gunther lacked the education and experience to determine whether her division was engaging in fraud by contesting Verizon's invoices. The court held that objective reasonableness focuses on the particular "factual circumstances" of the putative whistleblower, which includes what the whistleblower learns from co-workers. Here, Gunther's co-worker Reynolds, who had extensive experience with Verizon invoicing, agreed with her that Deltek was raising a number of unjustified billing disputes. Deltek underscores the importance of whistleblowers proffering testimony from co-workers substantiating the whistleblower's disclosures.

"Contributing Factor" Causation

On appeal, Deltek asserted that Gunther failed to prove a causal nexus between her protected disclosures (the 2009 letter complaint and 2009 OSHA complaint) and the termination of her employment. Noting that "contributing factor" causation is a "broad and forgiving" standard that can be satisfied by showing that protected conduct "tended to affect [her] termination in at least some way," the court held that Gunther met this burden through evidence of pretext and temporal proximity.

Deltek contended that it terminated Gunther's employment not for her whistleblowing activity, but instead as a result of her disruptive and confrontational conduct when she unilaterally

decided to return to work. But Gunther recorded the meeting with HR on the day she returned to work, and the tape revealed that she was calm and polite. Because proof of pretext is a form of circumstantial evidence probative of intentional discrimination, Gunther established causation.

Significantly, Deltek also holds that Gunther established causation through evidence of temporal proximity. Though six months lapsed from Gunther's April 2009 complaint until the termination of her employment, the termination occurred as soon as settlement negotiations ended. Citing its 2003 decision in *King v. Rumsfeld*, a Title VII case, the court held that an extended period of time between protected activity and adverse action may demonstrate causation where the adverse action occurred at "the natural decision point."

Proving an After-Acquired Evidence Defense

In nearly every whistleblower case that I have litigated, the employer has asserted an after-acquired evidence defense. Whenever a whistleblower asserts a retaliation claim, the defense playbook seems to require an employer to perform a forensic analysis of the whistleblower's work computer, including every email the whistleblower ever drafted, to try to identify a violation of a company policy that would ostensibly cut off the whistleblower's damages. The Deltek court's detailed analysis of the after-acquired evidence defense suggests that the substantial resources parties and fact-finders devote to litigating the after-acquired defense in SOX cases are almost always wasted.

Deltek asserted that Gunther was not entitled to damages because Deltek discovered soon after terminating her employment that (1) she had emailed documents related to her disclosures to her personal email account; (2) she secretly recorded some business meetings; and (3) she sent instant messages to a co-worker disparaging other employees, including Gunther's supervisor.

The ALJ rejected the after-acquired evidence defense based on the alleged theft of company documents because (1) Gunther reasonably believed that there was a risk that co-workers were destroying documents (she had witnessed co-workers shredding documents); (2) the documents that she forwarded to her personal email account were directly related to her SOX complaint (rather than an indiscriminate misappropriation of company documents); and (3) Gunther felt that she was gathering documents at the request of the GC, who had asked her to provide support for her April 2009 complaint.

As for the surreptitious tape recordings, the ALJ rejected the after-acquired evidence defense because Deltek failed to cite a policy prohibiting employees from tape recording meetings, and Gunther made the recordings to further her case. Indeed, some of the recordings established that Deltek's reasons for terminating Gunther were pretext. The ALJ also found that Gunther's instant messages were "trivial in nature" and so "petty" that Deltek could not show that an employee would have been terminated on that ground alone.

On appeal, the Fourth Circuit deferred to the ALJ's finding, noting that all Deltek had offered to support an after-acquired evidence defense was its policies and the GC's "self-serving testimony that a violation of such policies would have led to termination." To successfully establish the defense, Deltek had to proffer evidence of similar circumstances under which Deltek had fired

employees or otherwise enforced these policies.

Though the Fourth Circuit is not expressly endorsing “self-help discovery,” Deltek suggests that an employer is unlikely to establish an after-acquired evidence defense based on a whistleblower retaining documents that are directly relevant to the whistleblower’s protected disclosures. And to establish an after-acquired evidence defense, an employer must show that it has terminated employees for engaging in the substantially similar misconduct.

Though the Fourth Circuit did not address this issue on appeal, the ALJ held that Gunther sending documents to her personal email account in furtherance of her whistleblowing was protected conduct under SOX pursuant to the ARB’s decision in *Vannoy v. [Celanese Corp.](#)*, ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011).

Front Pay

In addition to awarding Gunther approximately three and a half years of back pay (lost wages and benefits from the date of the termination of her employment through the date of the hearing), the ALJ awarded Gunther four years of front pay. The ALJ found that Gunther worked in administrative positions prior to working at Deltek and had been unable to obtain a finance position before and after her tenure at Deltek because she lacked a college degree. As Gunther was unlikely to find a comparable financial analyst position without a degree, the ALJ concluded that Gunther would need four years of front pay to account for the time Gunter would need to obtain a college degree, especially in the absence of the tuition-reimbursement benefits that Gunther was receiving when she worked at Deltek.

On appeal, Deltek vigorously contested the front pay award, contending that four years of front pay is unduly speculative. Noting that “some speculation about future earnings [was] necessary,” the court agreed with the ALJ’s finding that it would take Gunther four years to find comparable work. The court concluded that the ALJ and ARB “made the reasonable choice to assume that Gunther would have continued to earn the same salary and benefits at Deltek had she not been unlawfully terminated.”

Trends in SOX Whistleblower Litigation

Deltek is consistent with cases during the past few years that have progressively strengthened and broadened SOX’s whistleblower protection. As such, Deltek is notable for its contribution to SOX’s evolution into a powerful remedy for retaliation. For approximately the first decade after SOX was enacted, Section 806 was weakened by ARB and federal court decisions imposing hurdles on whistleblowers that were contrary to the plain meaning and intent of the statute.

In particular, federal courts adopted the ARB’s Platone decision requiring SOX whistleblowers to prove that their disclosures relate “definitively and specifically” to one of the six enumerated categories found in Section 806 and approximate the basic elements of the kind of fraud or violation alleged. Under Platone, SOX whistleblower protection was limited to employees familiar with the intricacies of federal securities law, and employers were able to obtain summary judgment where the whistleblower’s disclosure lacked the requisite specificity or failed

to identify an actual violation of a securities law.

But in recent years, Section 806 of SOX has become a potent remedy to combat whistleblower retaliation. This is due to several developments, including:

- In a seminal 2011 decision in *Sylvester v. Parexel*, the ARB reversed *Platone* and set forth a generous standard for SOX protected conduct that is consistent with the plain meaning of the statute. And nearly every federal appellate court that has addressed the scope of SOX protected conduct post-2011 has adopted or deferred to *Sylvester*. Post-*Sylvester*, fewer SOX cases are being dismissed on summary judgment.
- In 2010, Congress amended Section 806 of SOX by (1) exempting SOX claims from mandatory arbitration; (2) clarifying that SOX claims removed to federal court can be tried before a jury; (3) protecting employees of subsidiaries of publicly traded companies “whose financial information is included in the consolidated financial statements of [a publicly] traded company;” and (4) increasing the statute of limitations to 180 days.
- In 2014, the U.S. Supreme Court held in *Lawson v. FMR* that SOX protects employees of publicly traded companies’ contractors and subcontractors.
- Though SOX does not authorize an award of punitive damages, recent jury verdicts have highlighted the potential of uncapped “special damages” (damages for emotional distress and reputational harm) to compensate whistleblowers for noneconomic damages. For example, in 2014, a California jury awarded \$6 million to Catherine Zulfer in her SOX whistleblower retaliation against Playboy. Zulfer alleged that her employment was terminated in retaliation for raising concerns about accruing discretionary executive bonuses without board approval.
- OSHA has revamped its whistleblower protection program and stepped up its enforcement of SOX. Whereas a few years ago OSHA’s investigations were fairly cursory and rarely resulted in merit findings, OSHA is now conducting more thorough investigations and issuing more merit findings.

Arguably, the weakening of SOX in its infancy contributed to the financial crisis because corporate whistleblowers lacked an adequate remedy to combat retaliation and therefore were deterred from making internal disclosures. Fortunately, *Deltek* and other recent SOX decisions indicate that SOX is a potent remedy and that retaliation against a whistleblower can be quite expensive for a company. The fortification of SOX whistleblower protection will likely benefit companies and their shareholders by enabling whistleblowers to disclose fraud early on, thereby giving companies an opportunity to take appropriate corrective action.

Upshot for Whistleblowers

In conclusion, *Deltek* provides important guidance on SOX whistleblower protection. Consistent with an ongoing trend, the case makes clear that SOX’s anti-retaliation provision offers broad protection, legal standards favorable to whistleblowers, and strong remedies. *Deltek* offers the following guidance for whistleblowers:

1. To establish the objective reasonableness of a protected disclosure, obtain affidavits from co-workers who shared the whistleblower's concerns.
2. Though proving pretext is not required to establish causation, pretext can be strong circumstantial evidence of retaliation.
3. Gathering documents to support an SOX claim can be risky (and will likely be detected by the employer). But doing so can also be protected under SOX, especially where the whistleblower is legitimately concerned about the destruction of evidence and where the whistleblower gathers only documents that she identified while performing her ordinary job duties and that directly relate to her disclosures.
4. To obtain front pay, it is useful to establish a record of the termination's impact on the whistleblower's career and the obstacles that the whistleblower faces in finding comparable employment.

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