# SOX Win Shows Strong Need For Whistleblower Protections

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The U.S. Department of Labor recently awarded $1.9 million in damages to a Sarbanes-Oxley whistleblower in a decision that clarifies several key aspects of SOX whistleblower protection and underscores the importance of providing strong protection to corporate whistleblowers.

On Nov. 9, 2016, Administrative Law Judge Christopher Larsen ruled in Becker v. Community Health Systems Inc., that the Rockwood Clinic violated SOX by constructively discharging Gregg Becker, Rockwood's CFO, for his refusal to lower his projection of the company's losses by $8 million. Rockwood is part of Division IV of a subsidiary of a subsidiary of respondent Community Health Systems Inc. (CHSI), a Tennessee-based corporation that comprises a massive group of hospital and clinic operators.

As CFO of Rockwood, Becker was responsible for projecting the clinic's earnings before interest, taxes, depreciation and amortization for 2012 and then applying that projection to Rockwood's strategic business plan. In October 2011, Becker projected an EBITDA of negative $12.8 million for 2012.

Three weeks after Becker made his projection, a Division IV financial manager directed him, via email, to change the projection to negative $4 million. The email did not include any information about where the negative-$4 million figure came from — and Becker's review of Rockwood's actual operating results through August 2011 revealed that the clinic could not reasonably meet that projection. So Becker alerted Rockwood CEO Dr. Craig Whiting that Division IV's demand was impossible.

Then, the harassment began.

That same month, Debra Herrin, director of financial operations for division IV, was sent to Rockwood's office to "improve" Becker's projection. Through November and December 2011, Herrin and others in Division IV corresponded daily with Becker, demanding that he change his work and even changing it themselves. Becker refused their demands and reversed their changes.

Division IV thereafter sent Becker hundreds of emails demanding immediate responses, questioning his "critical thinking, work ethic and reading skills," and accusing him of failing to justify his incorrect results. Herrin's supervisor, Stephanie Moore, emailed Becker in November 2011: "*Your critical thinking skills are extremely concerning to me.* Thanks!" (emphasis in original). A few days later, Maria Caruso, also from Division IV, emailed Becker CHSI's "preliminary budget trended income statement" for Rockwood and stated: "NR AND EBITDA MUST TIE TO YOUR TARGETS. *NO EXCEPTIONS!!!!!!*" (emphasis in original).

The deluge of emails also pressured Becker to wrap up the "project" quickly because it had "taken too long." In mid-November 2011, Moore emailed Becker that "every day this drags on becomes a bigger black eye to you and your staff. Thanks!" And when Becker submitted spreadsheets with the negative-$12.8 million projected EBITDA, Division IV replied that "[t]hese are not the numbers we want to see."

Becker refused to bend to his colleagues' whim, so they undermined him. Without notice, someone changed Becker's EBITDA projection to negative $5.2 million in a presentation that he was to give to CHSI and Rockwood in mid-December 2011. During a break in that meeting, Moore took Becker to her office and admonished that if he did not project an EBITDA of negative $4 million, then his job would be in jeopardy. She then took Becker to Herrin's office, where Herrin stated that she was "building a file" on Becker and that he would be fired if he did not provide the negative-$4 million projection.

Moore emailed Becker, that same month, that "projections continue to be a huge weakness for you and Rockwood clinic." Less than two weeks later, Moore and Herrin stuffed Becker's file with ten memoranda related to Becker's projections and then forwarded those memoranda to Whiting so he would resolve "things" with Becker. Whiting subsequently demanded that Becker insert into his spreadsheets an EBITDA projection of negative $5.2 million, along with $1.2 million in "to be determined" profit, resulting in a negative-$4 million EBITDA. Becker refused; he explained to Whiting that such a projection was unrealistic. Whiting nevertheless continued to make the same demand, driving Becker to walk out of multiple meetings.

Then came the negative performance reviews. In mid-January 2012, Whiting reviewed Becker's work as "unacceptable" and put him on a performance improvement plan (PIP). Becker's negative performance review parroted Division IV's memoranda, stating that Becker took too long to complete reports, that his reports included errors that required multiple revisions, and that his analytical capabilities were deficient. Becker was ordered to put the negative-$4 million EBITDA projection into the strategic business plan spreadsheet within one week, or else be fired.

Following Becker's conversations with several other company officials, Whiting revoked Becker's PIP and negative performance review at the end of January 2012. He told Becker that his performance issues would be revisited later, and that in the meantime Gary Singer, a "special project CFO" for CHSI, would assist and train Becker.

As Becker was aware, project CFOs were used to ease the transition from one CFO to the next. After Singer arrived, Becker noticed a decrease in correspondence from Division IV and occasionally found Whiting engaged in meetings in which Becker typically would have participated. When Becker exhausted all internal mechanisms to avoid signing off on a false projection of EBITDA, Becker was left with no choice other than to resign on Feb. 20, 2012.

Rockwood's actual EBITDA for 2012 ended up being negative $13.731 million.

**Refusing to Fudge the Numbers is Protected Under SOX**

Becker's refusal to sign off on the negative-$4 million EBITDA was protected activity under SOX because he reasonably believed that doing so would constitute criminal fraud.

***Subjective Belief***

Becker subjectively believed, and so testified, that he was being ordered to violate SOX. Becker was never able to justify the negative-$4 million EBITDA projection and told Whiting that it was "impossible." He repeatedly submitted his negative-$12.8million projection and refused to alter it, even when his employment was directly threatened. And he sent multiple emails indicating his belief that respondents' demands would require him to violate SOX.

Respondents argued that Becker did not manifest this subjective belief because he submitted the negative-$4 million EBITDA projection seven times. As evidence, respondents offered spreadsheets. The court rejected this argument because respondents' continual badgering of Becker indicated that they didn't believe the negative-$4 million figure represented his final submission. Moreover, the spreadsheets they offered were incomplete, and Becker never defended the lower projection or produced any work product that supported it.

***Reasonableness***

Becker's belief was reasonable, the ALJ found, because "any experienced CFO" would have felt similar under the circumstances.

Becker is an experienced CFO. He holds an MBA. and a Masters of Health Services Administration, and he joined Rockwood after serving for 15 years as a CFO with the Veterans' Administration. His skepticism was therefore "eminently reasonable" when respondents demanded that he replace his EBITDA projection with one that was vastly lower, despite the facts that nobody could demonstrate a flaw in Becker's analysis and that no evidence suggested that respondents' projection was reasonable. Becker repeatedly attempted, unsuccessfully, to figure out where the negative-$4 million figure came from. He repeatedly asked, but the respondents refused to divulge how they calculated it.

The respondents claimed that they assured Becker that the projection was for internal use only, and their expert witness testified that a reasonable CFO would have believed them. The respondents' conduct, however, indicated otherwise. Becker told Whiting that the negative-$4 million EBITDA was impossible to meet, but the respondents took no meaningful action in response to his concerns. Becker was told repeatedly that the projection was "meaningless," yet the respondents continuously pressured him to sign off on it. Moreover, the ALJ observed that the final projections of CHSI's subsidiaries were to be uploaded to a corporate folder that is shared with CHSI, meaning the respondents could use those projections for anything. And if CHSI were not relying on the EBITDA projections of its subsidiaries, the ALJ reasoned, then it would be pointless for CHSI to demand that its subsidiaries alter their EBITDA projections.

Becker's expert witness supported the ALJ's conclusion. Considering the pressure that the respondents put on Becker to upload an inexplicably low figure, he testified, it was reasonable for Becker to believe that CHSI would use the negative-$4 million EBITDA projection for purposes violative of SOX.

**No "Magic Words" Required to Put Employer on Notice of Protected Activity**

Becker's explaining his refusal to submit the negative-$4 million projected EBITDA was sufficient to put the respondents on notice of his protected activity. As the ALJ explained, "[t]he employee need not use the terms 'fraud,' 'fraud on shareholders,' or 'stock fraud' as long as he identifies the employer's conduct of concern."

The respondents argued that Becker's refusal was "unspecified and unexplained," and therefore did not put them on notice. The ALJ dismissed this argument, noting that Becker did all that was required: identify the conduct of concern. And he did so at least three times to Whiting. In October 2011, Becker told Whiting that he couldn't justify the negative-$4 million figure. In December 2011, Becker again told Whiting that he could not sign off on the negative-$4 million figure and that he felt his job was in jeopardy for refusing to do so. Finally, in January 2012, Becker told Whiting before, during, and after a meeting with Division IV President Bill Hussey that he could not accept the negative $4 million projected EBITDA.

While the respondents contended that Becker didn't use the term "fraud" or "misrepresentation" in those communications, the ALJ found that they were nonetheless sufficient to put the respondents on notice because "there is no magic word to trigger SOX whistleblower protection." But, for good measure, the ALJ found that Becker explicitly raised fraud and misrepresentation in a Jan.15, 2012, email to Whiting in which he explained that he was being pressured to use the negative-$4 million projected EBITDA, which he believed would be a criminal offense.

**SOX Prohibits a Broad Range of Retaliatory Adverse Actions**

Becker underscores how critical it is to protect whistleblowers from more than just termination of employment. Savvy employers realize that terminating a whistleblower's employment for refusal to commit accounting fraud could give rise to a claim, so they resort to subtler forms of retaliation designed to force the whistleblower to resign.

Fortunately, SOX proscribes a broad range of retaliatory acts, including demoting, suspending, threatening and harassing a whistleblower. As the Fifth Circuit held in a leading SOX whistleblower case, merely outing a whistleblower to his coworkers is an actionable adverse action because it might dissuade a reasonable employee from engaging in protected whistleblowing. Halliburton Inc. v. Administrative Review Board, 771 F.3d 254, 259–60 (5th Cir. 2014).

Here, the ALJ found that Becker suffered adverse actions when respondents constructively discharged him, circumvented him and subjected him to threats and harassment.

***Constructive Discharge***

The ALJ found that the respondents had constructively discharged Becker because they "unlawfully created working condition[s] so intolerable that a reasonable person in Becker's position would feel forced to resign."

The respondents constantly pressured Becker to blindly comply with their demands, thereby creating an "extremely stressful environment." Respondents at least thrice threatened Becker's job, going so far as to place him on a PIP. Division IV spent hundreds of hours "working with" Becker on his projections, including sending him constant emails, many of which questioned his basic analytical competence. Division IV inundated Becker's file with 10 memoranda in one day, after which Whiting repeatedly put so much pressure on Becker to alter his projection that Becker was compelled to walk out of multiple meetings.

This harassment ongoing, respondents began to circumvent Becker. They brought in Singer to handle Becker's projects, lessened Becker's communications with Division IV, and excluded him from meetings that he typically would have participated in as CFO. Since Singer's typical function was to facilitate the transition from one CFO to the next, Becker believed that he was being replaced. The ALJ concluded that "[a] reasonable person in Becker's position, being ignored, threatened and shut out, would conclude the respondents did not really want a chief financial officer, but a stooge."

When Becker stated that he had "no choice" but to resign, respondents immediately accepted his resignation. The ALJ therefore concluded that respondents constructively discharged Becker on the date of his resignation.

***Circumvention***

Respondents circumvented Becker by bringing in Singer to complete his projects, reducing communications between Becker and Division IV, and excluding Becker from meetings in which he normally would have participated. When Becker told Whiting, via email, that he was concerned that Singer was brought in to replace him, Whiting ignored Becker's concern.

***Threats and Harassment***

The ALJ found that respondents threatened and harassed Becker, both of which actions are specifically enumerated in SOX as forms of discrimination against employees.

First, Division IV's emails to Becker that impugned his reputation and critical thinking skills were part of "an aggressive campaign designed to change Becker's resistance to the negative $4 million EBITDA number." Second, Moore and Herrin padded Becker's file with memoranda to drive Whiting to punish him. Finally, respondents threatened Becker's job at least three times and even placed him on a PIP.

**Sarbanes-Oxley Causation Standard**

Becker also underscores the importance of a favorable causation standard. An employer can find fault in any employee's performance, so SOX whistleblowers would rarely prevail if they had to prove that their whistleblowing was the sole cause of the employer's decision to take an adverse action. Fortunately, a SOX whistleblower can prevail by proving that the protected whistleblowing was a "contributing factor" in the adverse action — i.e., that it tended to affect the outcome of the employer's decision.

Here, Becker proved causation through the following facts: First, he had a strong performance record prior to his refusal to submit the inaccurate EBITDA projection. Second, a company official sent Becker an email coercing him to agree to the inaccurate projection. The email stated: "NR AND EBITDA MUST TIE TO YOUR TARGETS. *NO EXCEPTIONS!!!!!!*" (emphasis in original). Third, when Becker continued his refusal to use the inaccurate projection, his management subjected him to training and close supervision, for the purported purpose of improving Becker's performance, and excluded him for meetings.

**Conclusion**

CHSI's retaliation against Becker caused him to suffer significant economic loss. Absent the strong protections that SOX affords corporate whistleblowers, employees would likely be forced to commit fraud to keep their jobs. As a new Administration devises an agenda designed to combat fraud and corruption, it will be critical to avoid weakening whistleblower protections.

Congress enacted the whistleblower protection provision of SOX, in the wake of Enron, to combat a "corporate code of silence" that "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the [FBI and U.S. Securities and Exchange Commission], but even internally." S. Rep. No. 107-146, at 4–5 (2002). Becker's case is a stark example of the continuing predominance of the corporate code of silence: employees who courageously oppose unlawful practices often suffer swift and severe retaliation. To prevent another financial crisis or widespread accounting fraud, the new administration and Congress should not tinker with SOX whistleblower protection.

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