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Tenth Circuit Ruling May Broaden Reach of SOX Anti-Retaliation Whistleblower Provisions

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The Administrative Review Board of the Department of Labor concluded that Lockheed Martin had violated Section 806 of the Sarbanes-Oxley Act after an employee alleged that the company retaliated against her for reporting suspicions that a supervisor was improperly using corporate assets. The company then appealed to the Court of Appeals for the Tenth Circuit.

The whistleblower protection provision of Section 806 provides that employees of public companies must not suffer retaliation for reporting conduct that they believe constitute mail fraud, wire fraud, bank fraud, securities fraud, any violation of SEC rules or any provision of federal law relating to fraud against shareholders. The Review Board established that the Lockheed employee reasonably believed that her supervisor had committed mail or wire fraud and communicated that belief to the company. The company argued that there was no fraud against shareholders, which it claimed was a necessary element of the violation in question in order to seek protection under Section 806. The Court disagreed.

The Court determined that the statute provides whistleblower protection for reporting any of six categories of employer conduct, and rejected the notion that the statutory language regarding “relating to fraud against shareholders” modifies each of the enumerated activities. The Court decided that since the other provisions are all clearly elements of federal law, the company’s reading of the statute would render their enumeration superfluous. Therefore, in this case, the employee did not need to allege that the violation also constituted a fraud against shareholders.

The company also argued that the Review Board’s interpretation did not warrant deference by the Court because it reflects a change in the agency’s previously expressed position. The Court held, however, that since the Review Board’s interpretation is based on a permissible construction of the statute, deference is appropriate and an employee complaint need not specifically relate to shareholder fraud to be protected.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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