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Preserving Some "Bite": The Fourth Circuit Approves Summary Judgment for Employer in a SOX Retaliation Case

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As we have discussed in earlier posts, the recent trend in court decisions under the Sarbanes-Oxley Act (SOX) has been to lighten the burden on complainants and to expand the universe of cases that proceed to decisions on the merits. Consequently, the direction has been away from victories for employers on summary judgment motions, which the U.S. Department of Labor's Administrative Review Board (ARB) has indicated it disfavors strongly. The Fourth Circuit Court of Appeals, however, has taken a narrower view, and found that entry of summary judgment is correct in cases where a complainant's proof is lacking.

To survive summary judgment on a SOX retaliation claim, a plaintiff must show by a preponderance of the evidence that,

> he or she engaged in protected activity;
> the employer knew that the plaintiff engaged in such activity;
> he or she suffered an unfavorable employment action; and
> the protected activity was a "contributing factor" in that action.

Assuming that the first three factors are satisfied, a plaintiff's causation hurdle is typically easy to satisfy. A "contributing factor" is any factor or combination of factors that tends to influence the employer to undertake an adverse employment action against the whistleblowing employee. There is no requirement for the protected activity to be a significant, major, or motivating factor in any subsequent personnel decision.

The leniency of this causation standard has left many publicly-traded companies to wonder under what circumstances—if any—protected activity would not be deemed a contributing factor to the adverse employment decision. On May 12, 2014, the Fourth Circuit, in *Feldman v. Law Enforcement Associates Corporation*, No. 13-1849 (May 12, 2014), went a long way toward answering that question, reminding us all that, while lenient, the causation standard applicable to SOX retaliation claims is not "toothless," but in fact can bite a plaintiff who has insufficient proof. The *Feldman* court held that an employee's termination *at some point after* filing a known SOX complaint is not automatically dispositive of the issue of causation. Rather, an in-depth review of the timeline of events, as well as the facts underlying the long-standing relationship of the parties, is essential to a proper decision. The court homed in on three core facts which, taken together, necessitated a summary judgment ruling in favor of the employer.

First, the lapse of time between the protected activity and the adverse employment action is important. In *Feldman*, the plaintiff, a former president and member of the employer's board of directors, was not discharged until 20 months after he complained to the U.S. Department of Commerce. The Fourth Circuit further noted that even a 10-month time lapse could preclude proof of the required causative link.

Second, the existence of mutual animosity *before* the protected activity can also weigh against a finding of causation. In *Feldman*, the parties' relationship began to sour more than two months before the plaintiff filed a complaint. A history of antagonism that predates the protected activity tends to negate a plaintiff's argument that the protected activity was a contributing factor to his or her termination. This is especially true when, as in *Feldman*, there is no evidence that the protected activity further soured the relationship.

Third, an employee's detrimental action towards the company after engaging in protected activity can be a significant intervening event that breaks a chain of causation. In *Feldman*, the plaintiff's termination came only one month after he, while still serving in his role as president and board member, encouraged shareholders to sue the company over a contract dispute and personally wrote a letter to other board members threatening that they would be sued if they refuse to resign. Those activities constituted a legitimate intervening event and further eroded the plaintiff's causation argument.

The Fourth Circuit's detailed review of the foregoing factual evidence relating to the plaintiff's termination clearly establishes that the causation standard for a SOX retaliation claim is indeed not "toothless"—and neither is the risk to plaintiffs of summary judgment when the facts proving causation are weak. It remains to be seen whether the ARB will follow the Fourth Circuit's lead. Moving forward, it is essential that employers be in a position to articulate and demonstrate, by solid evidence, both the facts precluding proof of causation and the non-retaliatory reason for the decision to take adverse action against a complaining employee.

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