

Employment Law Daily Wrap Up, WHISTLEBLOWERS—SDNY: Amended complaint, with facts not before OSHA, no bar to federal court's jurisdiction in financial exec's SOX suit over reporting client wrongdoing, (Aug. 22, 2011)

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A former executive's amended complaint against J.P. Morgan Chase & Co (JPMC), which contained more detailed factual allegations regarding alleged SOX whistleblower violations than were contained in the executive's initial complaint, did not deprive a federal court in New York of jurisdiction where the executive's claims were timely presented in her OSHA complaint (*Sharkey v JP Morgan Chase & Co*, August 19, 2011, Sweet, R). Moreover, the executive's allegations that she had a reasonable belief that a client was engaged in one or more violations of the SOX enumerated categories of misconduct, that she complained to her employer about each of these, and that JPMC knew about her protected activity were sufficient to survive JPMC's motion to dismiss.

Background. Believing that one of her assigned clients was engaging in fraud, money laundering, mail fraud, bank fraud, and/or federal securities laws violations, the executive allegedly reported her concerns to JPMC on multiple occasions by way of emails, telephone calls, telephone conferences, and in-person meetings. On October 22, 2009, she filed a timely complaint with OSHA against JPMC and several managers individually, alleging violations of SOX. On April 12, 2010, OSHA issued its findings and preliminary order dismissing her complaint. The executive then filed a complaint in federal court. The court held that the executive engaged in a protected activity under SOX when reporting with respect to a third party, but that the illegal activity reported was not adequately alleged in the original complaint.

Granted leave to amend, the executive filed an amended complaint. JPMC moved to dismiss, arguing that the court lacked jurisdiction because the amended complaint contained new allegations that were not contained in the OSHA complaint. In addition, JPMC argued that the amended complaint failed to state with any level of specificity what exactly the executive allegedly reported to her supervisors that constituted whistleblowing and further that she failed to allege that JPMC knew or should have known that she engaged in protected activity because she failed to disclose which purported communications or disclosures constituted the alleged whistleblowing.

Jurisdiction. The court first addressed the defendants' argument that new factual allegations set forth in the amended complaint deprived it of jurisdiction because the facts were not contained in the executive's OSHA complaint. According to the court, the appropriate inquiry under SOX is not whether every fact forming the basis for the belief that gave rise to a plaintiff's protected activity was previously administratively pled, but whether each separate and distinct claim was pled.

In addition, the court found that the defendants failed to cite to any authority holding that jurisdiction is improper over allegations amplifying the factual basis for an employee's belief that illegal conduct was occurring in a SOX case. A refusal by it to consider the facts alleged in the amended complaint would be inappropriate, the court stated, as "no particular form of complaint" is required to trigger a claim before OSHA and heightened pleading standards do not apply to SOX claims filed there. "Accordingly, where Plaintiff's claims, including specific adverse employment actions, protected activity, and the general nature of the facts that formed Plaintiff's belief in violations of the enumerated statutes giving rise to the protected activity, were timely presented in her OSHA Complaint, and where more specific allegations naturally originating from those assertions have been alleged in the AC in direct response to this Court's decision to grant Plaintiff leave to do so, the entirety of the AC is appropriately subject to the jurisdiction of this court."

SOX claim. Addressing the defendants' argument that the executive failed to allege which statute she believed the client violated, the court noted that in order to state a SOX whistleblower claim, a plaintiff does not need to cite a particular statute that he or she believes was violated. Rather the plaintiff must provide information that

he or she reasonably believes constitutes a violation of any SEC rule or regulation or federal law relating to fraud against shareholders. In assessing the reasonableness of a plaintiff's belief, courts look to the "basis of knowledge available to a reasonable person in the circumstances with the employee's training and experience." Here, the court stated, the executive alleged a myriad of allegations that when taken together prevent a finding that her belief that the client was engaged in violations of the enumerated SOX statutes was unreasonable. Thus, the executive adequately pled that she formed a reasonable belief that the client was engaged in one or more violations of the enumerated SOX categories of misconduct.

The court also rejected the defendants' argument that the complaint did not specify which of the allegations were conveyed to the executive's supervisors or when, finding that the executive properly pled that she engaged in protected conduct when she repeatedly reported her concerns regarding the client's illegal activity to the individual defendants and JPMC's risk and compliance team. "By alleging that she communicated these concerns to Defendants, [the executive] properly asserts that she informed J.P. Morgan and the Individual Defendants of the suspected fraudulent and illegal activity perpetrated by the Suspect Client against the Company. This was protected activity under SOX."

Finally, the court found that the executive did not fail to allege that JPMC knew or should have known that she engaged in protected activity, noting that the amended complaint alleged how, when, and to whom the executive reported her concerns of fraudulent and illegal activity on the client's part. Accordingly, the court stated, the executive adequately alleged conduct she reported to defendants and that defendants had knowledge of her protected activity.

The case number is 10 Civ. 3824.

Douglas H. Wigdor (Thompson Wigdor & Gilly LLP) for Plaintiff. Michael D. Schissel (Arnold & Porter LLP) for Defendants.

Cases: Whistleblowers WhiteCollarCrime NewYorkNews