



BALCH & BINGHAM LLP

Alabama • Mississippi • Washington, D.C.

LABOR AND EMPLOYMENT

BULLETIN February 2, 2004

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WHISTLEBLOWER CLAIMS UNDER THE SARBANES-OXLEY ACT

In what appears to be the first successful “whistleblower” claim brought under the Corporate and Criminal Fraud Accountability Act, also known as the Sarbanes-Oxley Act, an Administrative Law Judge (“ALJ”) has ruled that Cardinal Bankshares Corporation wrongfully discharged its former chief financial officer. In August 2002, after the enactment of Sarbanes-Oxley, David Welch refused to certify a quarterly financial statement because of what he perceived as several irregularities in the internal control process. At a board meeting the following September, Cardinal’s president contended that Welch’s allegations were unfounded, and asserted that the allegations reflected Welch’s deteriorating position with the company. Two weeks later Welch was discharged, ostensibly for refusing to meet with an outside auditor without his attorney present.

Welch filed a complaint with the Occupational Safety and Health Administration (“OSHA”), the federal administrative agency charged with investigating whistleblower complaints, contending that he had been discharged for refusing to certify the quarterly financial statement. Sarbanes-Oxley specifically prohibits discriminating or retaliating against whistleblowers. OSHA denied Welch’s complaint, but he appealed that decision to the Department of Labor’s Office of Administrative Law Judges. The ALJ assigned to the case disagreed with OSHA, finding that the short amount of time between Welch’s protected activity (*i.e.*, refusing to certify the quarterly statement) and his discharge created an inference of discrimination. The ALJ further found that the purported reason offered by Cardinal for Welch’s discharge was a pretext to retaliate against him.

Although it is uncertain whether Cardinal will appeal this decision, this case nonetheless highlights the impact of the new Sarbanes-Oxley law, as well as the need for employers to update their discipline procedures and to train their employees in light of the new corporate legal landscape.

The full text of the ALJ’s decision can be found at <http://www.oalj.dol.gov/DMSSearch/CaseDetails.cfm?CaseId=213438>.



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