



BALCH & BINGHAM LLP

Alabama • Georgia • Mississippi • Washington, D.C.

LABOR AND EMPLOYMENT BULLETIN

June 13, 2006

DEPARTMENT OF LABOR REVIEW BOARD ISSUES SIGNIFICANT RULING ON SOX RETALIATION

In its first significant ruling on whistleblower retaliation claims under the Sarbanes-Oxley (“SOX”) Act, the Department of Labor’s Administrative Review Board overturned an administrative law judge (“ALJ”) decision by broadly interpreting SOX. The decision, which reinstated the claim of a vice president of a subsidiary of a publicly held Texas company, provides important guidance on several previously-unsettled issues.

In *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB Case No. 04-149 (May 31, 2006), the ALJ had dismissed the case in part because Klopfenstein worked for a privately owned subsidiary and did not name the publicly traded holding company as a defendant. The Board held that it was sufficient for Klopfenstein to sue at least one respondent who is covered under the Act as an “officer, employee, contractor, subcontractor, or agent” of such a company. The Board then clarified that the privately-owned subsidiary could be sued as an “agent” of a publicly-traded company. Unlike most traditional employment law claims, the Board also allowed claims against the individual officers involved in the termination decision to go forward.

Another significant ruling by the Board involved the definition of “protected activity” under SOX. The Board disagreed with the arguments of the ALJ and the defendant, that activity is protected only when the complainant is the first to raise the issue, or when the communications relate to published information, or when the complainant believes he is reporting an actual “fraud.” Instead, the Board ruled that “SOX protection applies to the



provision of information regarding not just fraud,” but also information relating to any “violation of . . . any rule or regulation of the Securities and Exchange Commission.”

The Board then clarified the employee’s burden of proof with regard to retaliatory intent. According to the Board, the discharged employee is required to show only that his whistleblowing activity was “a contributing factor” in the decision to terminate his employment. The Board rejected the employer’s arguments that the whistleblowing activity must have been the “primary,” “predominant,” or even a “significant” factor.

The Board’s decision could make it easier for employees to prevail in SOX whistleblower claims, and could provide support for suing additional defendants who were merely acting as “agents” for a publicly traded corporation. Because of this, employers should treat complaints of accounting irregularities seriously, and should make sure that they are aware of the SOX whistleblower protection provisions.

Please feel free to contact us for further information on how to prevent and defend SOX retaliation claims.

LEARN MORE

About SOX Whistleblower Claims,
and much more, at Balch &
Bingham’s **2006 Labor and
Employment Seminars:**
Birmingham, AL: September 28-29
Biloxi, MS: October 26-27



L A B O R A N D E M P L O Y M E N T C O N T A C T S

BIRMINGHAM, AL

Leslie M. Allen
205.226.3484
lallen@balch.com

David R. Boyd
205.226.3485
dboyd@balch.com

Aaron L. Dettling
205.226.8723
adettling@balch.com

Douglas B. Kauffman
205.226.8758
dkauffman@balch.com

Lisa J. Sharp
205.226.8714
lsharp@balch.com

M. Jefferson Starling, III
205.226.3406
jstarling@balch.com

Christopher T. Terrell
205.226.8734
cterrell@balch.com

HUNTSVILLE, AL

David B. Block
256.512.0105
dblock@balch.com

JACKSON, MS

R. Pepper Crutcher, Jr.
601.965.8158
pcrutcher@balch.com

Armin J. Moeller, Jr.
601.965.8156
amoeller@balch.com

David M. Thomas, II
601.965.8157
dthomas@balch.com

E. Russell Turner
601.965.8159
rturner@balch.com

ATLANTA, GA

T. Joshua R. Archer
404.962.3556
jarcher@balch.com

Michelle Rothenberg-Williams
404.962.5349
mrothenberg-williams@balch.com

MONTGOMERY, AL

David R. Boyd
334.269.3132
dboyd@balch.com

W. Pete Cobb, II
334.269.3128
pcobb@balch.com

Charles B. Paterson
334.269.3143
cpateroso@balch.com

John G. Smith
334.269.3150
jgsmith@balch.com

Dorman Walker
334.269.3138
dwalker@balch.com

The Labor & Employment Bulletin is published as an informational resource for clients and friends of Balch & Bingham, LLP. It does not contain legal advice, and is not a solicitation to perform legal services. No representation is made that the quality of legal services performed by Balch & Bingham LLP is greater than the quality of legal services performed by other lawyers. Design, logo, and content © 2006, Balch & Bingham LLP.

