

In an Unpublished Opinion, the Fifth Circuit Affirms a district court opinion rejecting an auditor's SOX Claim but did not raise the burden of proof as some employment defense lawyers have indicated

July 5, 2011

The Fifth Circuit Court of Appeals recent decision in *Hemphill v. Celanese Corporation, Case No. 10-cv-10746 (5th Cir. June 23, 2011) (unpublished)* affirmed an order granting summary judgment in the employer's favor on grounds that the plaintiff's engagement in protected activity was not a contributing factor to terminate his employment, but that even if it was, the defendant had demonstrated that it would have terminated him for other reasons regardless of the protected activity.

According to the Fifth Circuit's recitation of the facts, Jeff Hemphill participated in audits as an internal audit manager for Celanese Corporation which raised issues about whether employees were complying with certain internal policies and legal requirements. After Hemphill reported these concerns to his supervisors, Celanese conducted an investigation which found that some employees were not complying with Celanese's internal policies, but in doing so no laws were being broken. Hemphill claims that his supervisor then told him not to "develop issues," and denied his suggestion to investigate the company's audit committee for violations of SEC rules.

Shortly thereafter, Hemphill is alleged to have inappropriately yelled at his secretary in front of several employees, which prompted an investigation into the matter by human resources employees who were not aware that Hemphill had made the previous compliance complaints. Hemphill denies having done so, but the sheer number of witnesses who described his behavior as "aggressive," "atrocious," "outrageously rude and completely unprofessional," and akin to "a one-sided rant ... [during which he spoke to his secretary] like a dog," persuaded the investigators that his denials were not credible. The investigators unanimously recommended Hemphill's termination for "lying during a formal investigation, harassment of an employee, and creating a negative work environment for the team and those around him." The supervisor, who ultimately terminated Hemphill, was the one who responded to his complaints of compliance violations and was allegedly disinclined to investigate the company's audit committee for SEC rules compliance on Hemphill's suggestion.

Hemphill filed a Sarbanes-Oxley retaliation complaint against Celanese, alleging that he was illegally terminated in retaliation for raising the compliance concerns before the harassment investigation. The U.S. District Court for the Northern District of Texas granted Celanese summary judgment, ruling that Hemphill failed to create a genuine issue of material fact about whether his protected activity contributed to the decision to terminate him. The District Court further ruled that, even if Hemphill had demonstrated a causal link, Celanese had proven that it would have terminated him regardless given the weight of evidence that he had in fact engaged in abusive and threatening behavior towards his secretary. The Fifth Circuit affirmed the grant of summary judgment on both grounds,

finding that Hemphill did not establish a *prima facie* case of Sarbanes-Oxley retaliation, specifically that Hemphill had failed to demonstrate that the protected activity contributed to his termination and that, even if he had, Celanese had demonstrated that it would have terminated him regardless of his engagement in protected activity.

Some management lawyers have incorrectly asserted that this unpublished decision has “strengthened defenses to SOX whistleblower claims,” and that it somehow undercuts the string of recent pro-employee decisions issued by the U.S. Department of Labor’s Administrative Review Board (“ARB”). [Debra S. Katz](#), a partner with Katz, Marshall & Banks, LLP in Washington, D.C. says that “it does no such thing.” According to Ms. Katz, an attorney who specializes in the representation of employees in SOX whistleblower cases, “While management counsel are apparently looking for some good news to report to their clients, the fact of the matter is that the ARB is now faithfully applying the law and is now providing important legal protection to SOX complainants that was sorely lacking prior to President Obama’s appointment of new judges to ARB.”

As Ms. Katz and Michael Filoromo, an Associate with Katz, Marshall & Banks, LLP noted in an article published by EmploymentLaw360 over the course of nearly a decade, the whistleblower protections of SOX Section 806, 18 U.S.C. § 1514A, have been eroded through hundreds of dismissals of complaints by the Occupational Safety and Health Administration (“OSHA”) and adverse decisions by Administrative Law Judges, Administrative Review Boards and the federal courts. The case law interpreting the Act construed the broad provisions of SOX 806 in increasingly narrow ways, chilling the very whistleblowing activity that SOX was intended to encourage. *See, e.g.,* Jennifer Levitz, [Whistleblowers Are Left Dangling: Technicality leads Labor Department to dismiss cases](#), Wall St. J., Sept. 4, 2008, available at <http://online.wsj.com/article/SB122048878500197393.html> (noting that of 1273 SOX complaints filed with OSHA, 841 had been dismissed, and OSHA had found in favor of the complainant just 17 times). In *Sylvester v. Parexel Int’l LLC*, decided on May 25, 2011, the ARB resoundingly reversed this trend, rejecting many of the unfounded standards that had evolved in SOX case law and signaling the restoration of protections for SOX whistleblowers.

According to Ms. Katz, the *Sylvester* decision – not the unpublished decision in *Hemphill v. Celanese Corporation* – breaks new legal ground.