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LABOR AND EMPLOYMENT NOTES
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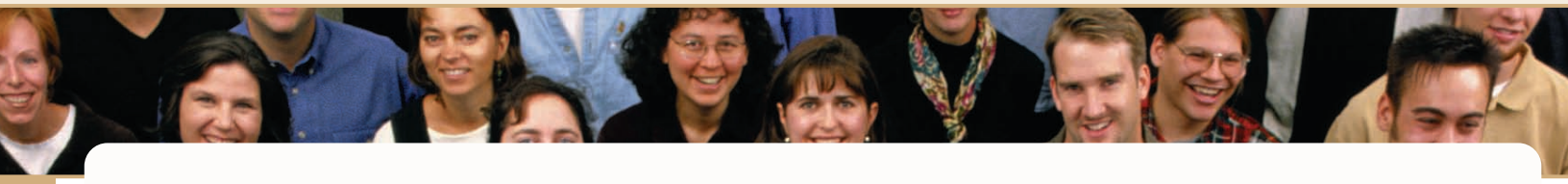

Fifth Circuit Issues First Opinion Regarding A Sarbanes-Oxley Whistleblower Complaint

On January 22, 2008, in *Allen v. Administrative Review Bd.*, ____ F.3d ____, 2008 WL 171588 (5th Cir. 2008), the United States Court of Appeals for the Fifth Circuit (the federal appellate court circuit that includes Louisiana, Mississippi, and Texas) issued its first ruling addressing the employee whistleblower protections provided by the Sarbanes-Oxley Act ("SOX"). In the *Allen* ruling, the Fifth Circuit interpreted the scope of "protected activity" under SOX narrowly. Hopefully, this trend will continue and this new whistleblower protection for employees of publicly-traded companies will not be unreasonably broadened by the courts.

Under SOX, an employee of a publicly-traded company has a private cause of action if he or she is retaliated against for engaging in certain protected activity. Retaliation under SOX includes to discharge, demote, suspend, threaten, harass, or discriminate in any other manner against an employee with regard to the terms and conditions of employment because he or she engaged in "protected activity." To be considered "protected activity" under SOX, the employee's complaint must definitively and specifically relate to one of six enumerated categories found in SOX: (1) mail fraud; (2) wire fraud; (3) bank fraud; (4) securities fraud; (5) any rule or regulation of the SEC; or (6) any provision of federal law relating to fraud against shareholders.

In *Allen*, the plaintiffs alleged their terminations in a company-wide reduction-in-force were retaliation for engaging in protected activity under SOX. Specifically, the plaintiffs alleged the following protected activity: (1) expressing concern to supervisors that the employer was not complying with an SEC Staff Accounting Bulletin; and (2) complaining about the employer's erroneous interest calculations for customers and untimely refunds and billing problems related to the same. In order to satisfy the "protected activity" requirement of the statute, the employee need only show that he or she had a "reasonable belief" the employer was engaged in an unlawful employment practice, not that an actual violation occurred.

An administrative law judge held a six-day hearing and determined that plaintiffs did not have a reasonable basis for believing that the subject-matter of any of their whistleblowing involved potential violations of the laws for which SOX provides whistleblower protection. An administrative appellate board reviewed these findings and affirmed. The Fifth Circuit then affirmed and held the plaintiffs lacked a reasonable belief that they were reporting violations of law.

In reaching its decision, the Fifth Circuit held the plaintiff who expressed concern about the SEC Staff Accounting Bulletin could not have reasonably believed that she was reporting a violation of a law covered by SOX because that plaintiff was an accountant who should have known that an SEC Staff Accounting Bulletin was not an SEC rule or regulation and did not carry with it the force of law. Regarding the employee complaints about interest calcula-

tions, untimely refunds, and billing problems, the plaintiffs argued SOX applied because the company intentionally refused to disclose the problem to their shareholders. The Fifth Circuit rejected the argument this rendered the plaintiffs' complaints "protected" because it only alleged a violation of some unidentified law relating to fraud against shareholders and not one of the laws enumerated under SOX.

In conclusion, the *Allen* decision is promising for employers who are publicly-traded companies. It indicates that the Fifth Circuit will likely interpret the scope of "protected activity" under SOX narrowly and not extend broad protections to a large class of employees of publicly-traded companies. Hopefully, this approach will discourage employees who have adverse actions taken against them for legitimate business reasons from bringing frivolous whistleblower suits under SOX.

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2008 Kean Miller Labor & Employment Law Update

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