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Ruling Increases Protections for Whistleblowers

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Protections for employees who allege misconduct at their companies just got a lot broader.

A recent decision by the Department of Labor's Administrative Review Board substantially increases the anti-retaliation measures for whistleblower protections under the Sarbanes-Oxley Act, dealing a legal blow to companies that face such claims.

In *Menendez v. Halliburton*, the Review Board ruled in September in favor of a former employee of Halliburton over allegations that the oilfield services giant retaliated against him in violation of SOX whistleblower provisions after he raised concerns about potentially improper accounting practices. Unlike other whistleblower allegations of its kind, however, the employee in this case did not suffer any tangible employment consequences.


Pearlman

"What the board did was articulate a new standard for what constitutes an adverse employment action under Sarbanes-Oxley," says Steve Pearlman, a partner with law firm Seyfarth Shaw. "It's a troubling case that has really opened the floodgates way too far."

Other corporate attorneys are equally troubled by the decision. The board is "stretching to provide employee protection under Sarbanes-Oxley," says Martha Zackin, of counsel in the employment, labor, and benefits section of law firm Mintz Levin.

The case stems from a confidential complaint that Anthony Menendez, the former director of technical accounting research and training at Halliburton, filed with the Securities and Exchange Commission and the company's audit committee regarding questionable revenue recognition practices. Both complaints implicated Mark McCollum, Halliburton's chief accounting officer, whom Menendez directly reported to, and KPMG, Halliburton's external auditor.

Upon receiving Menendez's e-mail complaint from the audit committee, Halliburton's general counsel additionally informed several managers by e-mail that the SEC also "opened an inquiry into the allegations of Mr. Menendez." Several of Menendez's direct coworkers in the finance and accounting department also received the e-mail. The SEC directed Halliburton to suspend its normal document retention policy so that any related files would not be destroyed.

After the SEC notified Halliburton that it would not be taking any enforcement action, Menendez filed a complaint alleging retaliation under Section 806 of SOX accusing Halliburton of breaching his confidentiality. Under Section 806, no company "may discharge, demote, suspend, threaten, harass, or in any other manner

discriminate against an employee." According to the retaliation complaint, Menendez offered his resignation immediately after he found out about the breach of confidentiality and remained out of the office for the remainder of the week on prescheduled leave.

The underlying question raised by the case is, "If you make a confidential complaint and get outed, can you sue for that?" asks Pearlman. "This case is the first that squarely addresses that question, and the answer is 'yes.'"

"Right now, the tripwire is very low for employers," Pearlman adds. "That means employers need to be a lot more careful when they are dealing with whistleblower situations."

The basis for Menendez's allegations is that, after his confidentiality was breached, his work environment became so unbearable that he was forced to resign, due to the isolation he felt by his coworkers. He also claimed he was demoted because he was told he no longer would report directly to the chief accounting officer, but rather a lower-level employee.

An administrative law judge dismissed the complaint, finding that Menendez failed to demonstrate that Halliburton had taken any retaliatory adverse employment action against him under Section 806.

On appeal, however, the Board disagreed. Adopting the standard set in its 2010 decision in *Williams v. American Airlines*, the Review Board concluded that the term adverse action "refers to unfavorable employment actions that are more than trivial."

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"This language *explicitly* proscribes non-tangible activity, which evinces a congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers," the board said in its ruling. Citing this standard, the board concluded that Halliburton's breach of confidentiality alone constituted an adverse action.

Many employment law experts are left scratching their heads at the board's reasoning. "Where do you draw the line? You draw the line on whether something is 'trivial,' but what does that mean?" asks Pearlman. "Trivial is such an amorphous concept, and for that to be the centerpiece of your doctrine is less than helpful."


Zackin

Critics of the decision argue that Menendez really could not have suffered an adverse employment action because he already planned to be out of the office during the SEC investigation, meaning he would not be subjected to hostility from co-workers. Furthermore, he was not fired; he chose to resign. "I think the position would have been a lot stronger had he been in the workplace and the isolation continued," says Zackin.

The board's decision in *Menendez* is a substantial departure from its previous standard in which it often depended on the Title VII anti-retaliation protections established by the U.S. Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*. That case looked at whether material consequences would have dissuaded an employee from reporting a violation.

AFTER THE FALL

In the excerpt below from *Anthony Menendez v. Halliburton, Inc.*, the Court analyzes the DoL's Administrative Law Judge's determinations in Menendez's "isolation, removal of duties, and demotion as

indicia of harm rather than independent adverse actions" and offers its own opinion:

The [Department of Labor Administrative Law Judge (ALJ)] separately addressed and analyzed Menendez's allegations and evidence of isolation, removal of duties, and demotion and found that none constituted adverse action … the ALJ appeared to apply overly strict standards to these allegations of adverse action, including requiring "tangible job consequences," "long-term impact," and "material change in working conditions." Nevertheless, the ALJ's conclusions were supported by sufficient evidence, and we do not disturb them. However, we view the events that Menendez experienced after his identity as a whistleblower was revealed from a different perspective.

Clearly the breach of Menendez's confidentiality adversely affected the conditions of his employment. Following the revelation of his identity to his co-workers, which Menendez characterized as "the worst day of my life," he was subjected to a harmful chain of events. Evidence of record strongly suggests that the exposure of Menendez's identity led inexorably to the circumstances and events that followed, including the isolation and loss of professional opportunities and advancement. We view these conditions as fallout, inextricably connected to the disclosure of Menendez's identity, from which the *degree* of adversity or harm associated with the breach may be measured. Of course, exposure of a whistleblower's identity does not always result in untoward consequences, much less compensable harm. But this is not such a case. Indeed, the facts of this case exemplify the very reason why Congress mandated that publically traded firms set up confidential avenues to report wrongdoing.

Immediately after Menendez was "outed," his life on the job changed for the worse. People avoided him and normal, every day contact with his colleagues was all but shut down. No one came by his office, no one engaged him in conversation, few people called or e-mailed him, and he was excluded from decision making. Youngblood and Geer no longer consulted with him and KPMG auditors refused to meet with him. Menendez's job description required him to work closely with the external auditors, and his inability to do so necessarily represented a diminution in his authority and responsibility. John Christopher of KPMG, whom he had considered a close friend, told Menendez he would not even set foot in his office. The testimony of [James Paquette, accountant who reported to Menendez] and Christopher substantiated this dramatic change in Menendez's working conditions.

The ALJ largely attributed the problems Menendez faced following the breach—his sense of isolation and the loss of job opportunities—to his voluntary absence from the office. But this absence was itself a manifestation of the harm the breach of his confidentiality produced. Menendez left the office shortly after McCollum disclosed his name in an e-mail to the F&A Group. Not surprisingly, he reacted to the foreseeable hostility of his colleagues by absenting himself from the office. When he returned to the office, he encountered both personal and professional hostility. A month after he was exposed as having reported alleged misconduct to the SEC and the audit committee, Menendez requested paid administrative leave because of "the current environment and circumstances involving the SEC investigation." His request for leave, and the resultant absence from the office, further marginalized Menendez, setting the stage for diminution of his authority, responsibility, and opportunity for professional advancement.

The events that began following the breach of his confidentiality and ended with his resignation ostensibly harmed Menendez. Although these events may not individually constitute actionable "adverse action" under SOX Section 806, they may nevertheless constitute indicia of harm and a measure of the damages to which Menendez may be entitled should the ALJ conclude, upon remand, that his protected activity was a "contributing factor" to the breach of Menendez's confidentiality and the resultant harm.

Source: *Anthony Menendez v. Halliburton, Inc.*

The clarification, the board said, is intended to resolve inconsistencies caused by substantial differences in

statutory language between the Title VII provisions and the SOX anti-retaliation provisions. While *Burlington Northern* gives some helpful interpretive guidance for the analysis of adverse acts under SOX, the takeaway for companies is that "the protections that are available for employees in Sarbanes-Oxley that deal with retaliation are broader than they are for employees in the Title VII context," says Rebecca Shanlever, a partner with Troutman Sanders.

Privacy Breach?

The second question the board addressed was whether Menendez's right to confidentiality was a "term and condition" of employment. "Before this case came out, there was no answer to that question," explains Pearlman.

On this question, the board found that, yes, Menendez's right to confidentiality was a "term and condition" of employment that Halliburton denied him and, thus, constituted an adverse employment action. Section 301 of SOX requires publicly traded companies to establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting matters.

The board held that a whistleblower need only show that the protected activity was a contributing factor in the employer's decision to take the adverse action. "Requiring the whistleblower to prove the employer harbored a retaliatory or discriminatory motive is not a necessary element in determining causation, because it would impose a higher evidentiary standard than what Congress has put forth in the statute," the decision stated.

The practical lesson for other companies, no matter the type of employee complaint, is to "limit the disclosure of the information regarding the complaint to a need-to-know basis," says Shanlever. In Halliburton's case, the problem could have been avoided if the company had just sent out a litigation hold notice, notifying relevant employees of what documents needed to be preserved, and who to contact, she says.


Shanlever

Legal experts are also advising companies to review their internal reporting functions. "It may be a good time for companies to look back at their own internal complaint procedures," Shanlever adds.

"To the extent they have a policy to maintain confidentiality, they should abide by that," agrees Zackin. "It doesn't seem like that is what happened here."

The board has remanded the case back to the administrative law judge for a determination of causation issues to determine whether Halliburton would have still disclosed Menendez's name in the absence of the protected activity.