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THE LAST WORD ON CARDINAL BANCSHARES?

We have followed the Sarbanes-Oxley retaliation claim filed by David Welch, Cardinal Bancshares of Virginia's former CFO, for nearly four years. In a recent decision, the U.S. Fourth Circuit Court of Appeals may have finally closed the door on Welch's case. (*Welch v. Chao*, No. 07-1684, August 5, 2008).

Welch filed an administrative charge under Sarbanes-Oxley's anti-retaliation provisions after he was fired for complaining about Cardinal Bancshares' accounting practices. Specifically, he had challenged the characterization of two previously written-off loans as income in financial statements prepared by outside accountants and submitted to the SEC. Initially, Welch's claim was dismissed, but on appeal to an Administrative Law Judge (ALJ), the dismissal was reversed, and Welch was awarded back pay, attorneys' fees and reinstatement. A further appeal to the Administrative Review Board (ARB) resulted in the ALJ's decision being overturned. Welch's appeal finally found its way to the federal appeals court which has now confirmed the ARB's finding as a matter of law that none of Welch's communications to his superiors at the bank constituted protected activity under the Sarbanes-Oxley Act.

The key was whether Welch had communicated information which he reasonably believed at that time constituted a violation of federal mail, wire, bank, or securities fraud statutes, or "any provision of Federal law relating to fraud against shareholders." Although Welch did not have to cite a specific statute, his communications did have to "definitively and specifically" relate to one of the federal statutes listed in Sarbanes-Oxley. Linking his communications to particular federal statutes at the appeals stage was too late to avert dismissal.

Practice Pointers

- This decision is in line with the majority of reported cases under Sarbanes-Oxley's anti-retaliation provisions in narrowly construing the protection offered to employees
- However, employment retaliation claims are increasing, and are expensive and time-consuming to fight. Make sure that the dismissal of any bank officer is thoroughly discussed with the Board, whose authorization should be noted in the minutes
- Take whistleblower complaints seriously, and investigate claims of financial irregularities promptly and objectively.