GT GreenbergTraurig

Labor & Employment | Alert

May 2016

The ARB Potentially Broadens Protected Activity Under Sarbanes-Oxley

Just when employers thought that the anti-retaliation provision of the Sarbanes-Oxley Act of 2002 (SOX), 15 U.S.C. § 1514A, already covered a broad range of protected conduct, the Department of Labor's Administrative Review Board (ARB), the appellate body that reviews Administrative Law Judge (ALJ) decisions, potentially broadened the scope of conduct that is protected from retaliation under SOX's anti-retaliation provision.

In *Timothy C. Dietz v. Cypress Semiconductor Corp.*, ARB 15-107 (Mar. 30, 2016) the ARB affirmed an ALJ ruling that awarded a former program manager for Cypress more than $250,000 in back pay and benefits under the SOX anti-retaliation provision, 15 U.S.C. § 1514A, finding protected activity where the employee raised state law violations that could demonstrate fraudulent conduct.

Background

In 2012, Complainant Timothy Dietz (Dietz) worked for Ramtron International Corporation (Ramtron). In September 2012, Cypress acquired Ramtron and ultimately hired Dietz as a program manager. Cypress required certain employees to participate in a Design Bonus Plan (Bonus Plan). Dietz was not subject to the plan, but many of the former Ramtron employees, including those who worked under Dietz's supervision at Cypress in Colorado, were subject to it.

Under the Bonus Plan, Cypress deducted 10 percent of participants' salaries. These deductions were mandatory. At the end of each calendar quarter, Cypress calculated the employees' "bonus" and some employees received less than the amount that was deducted from their compensation. Payouts were based on team performance and not individual performance. Cypress communicated this plan to the former Ramtron employees via a website, email, and video conferencing. None of the former Ramtron employees were notified about the Bonus Plan prior to taking their jobs with Cypress.

On April 12, 2013, former Ramtron employees that worked under Dietz complained to him about the Bonus Plan. That day, Dietz sent an email to a senior vice president at Cypress explaining that Dietz believed that the Bonus Plan violated

California and Colorado state wage and hour law. In the email, Dietz invoked Cypress' whistleblower policy and cited the specific state statutes that he believed were being violated. He never mentioned, however, fraud or any enumerated statutes in SOX's anti-retaliation provision.

Ten days later, in response to Dietz's April 12 email, Cypress' legal counsel held a teleconference with Dietz. During the teleconference, the attorneys asserted that they had a legal opinion confirming the legality of the Bonus Plan. Notably, at the hearing in front of the ALJ, Cypress did not have a written legal opinion about the Bonus Plan. Dietz complained about the legality of the Bonus Plan and the fact that Cypress did not inform the former Ramtron employees about the deductions in the Bonus Plan when they provided the employees with their Cypress offer letters.

Shortly after this meeting, Dietz alleged that he suffered a series of adverse employment actions that were aimed at making his job more difficult. He also received reprimands regarding his performance even though he had previously received excellent performance reviews. On June 4, 2013, Dietz received a formal disciplinary memorandum from the same Senior Vice President who Dietz initially emailed about the Bonus Plan. The following day, Dietz drafted a response to the disciplinary memorandum and asserted in it that he was being retaliated for his whistleblower complaint regarding the Bonus Plan. He also stated that he was resigning his employment on or before July 1, 2013. Dietz ultimately tendered his resignation June 7, 2013.

The ARB Upholds The ALJ's Ruling That Dietz Engaged In Protected Activity Under SOX

The ARB affirmed an ALJ's judgment in favor of Dietz and monetary award of $250,000. Importantly, the ARB found that Dietz engaged in protected activity under SOX's anti-retaliation provision, 15 U.S.C. § 1514A, because he had a reasonable belief that Cypress committed mail or wire fraud because it misrepresented facts about its Bonus Plan to its employees via email, a website, and interstate video conferencing technology.

Although the ARB correctly noted that an "allegation of a violation of state wage laws is, by itself, insufficient to constitute protected activity under SOX's whistleblower provision without some allegation of a knowing misrepresentation or concealment of a material fact," the ARB still concluded that the employee engaged in protected activity. The ARB explained that Dietz reasonably believed that the employer "concealed material facts about the bonus plan from some of [the employees] . . . . possibly inducing them to take jobs at Cypress without understanding that their true base salary was effectively less than what they believed." The employee's reasonable belief that the employer misrepresented facts about the Bonus Plan triggered, according to the ARB, one of SOX's enumerated statutes (wire fraud) because the communication was made via email, a website, and a video conference.

Notably, the ARB assumed that because Dietz believed Cypress communicated the alleged misrepresentations about the Bonus Plan to employees, Dietz must have reasonably believed that Cypress used mail and wire communication to execute the communication and allegedly fraudulent scheme. What is more, the ARB explained that "mail and wire fraud statutes can be triggered when the connection between the alleged fraud and the use of the mails or wires might seem tenuous."

Key Takeaway

Although ARB decisions are not binding on federal district courts, *Dietz v. Cypress Semiconductor Corp.*, ARB 15-107 (ARB Mar. 30, 2016) employers should certainly take note. Indeed, the decision potentially broadens the type of conduct that is shielded from retaliation under SOX's anti-retaliation provision to include state law violations which a complainant or plaintiff believes also constitutes actionable fraud and is communicated via email.

Taken to its logical extreme, this decision could support a basis for an ALJ or district court to find that an employee engaged in protected activity if he or she reasonably believed that an employer has violated *any* law and misrepresents facts related to their conduct via email. Accordingly, *Dietz* may move SOX one-step closer to a federal anti-fraud statute.

Separately, the *Dietz* decision is a stark reminder to employers to take all employee complaints seriously regardless of topic and that SOX's anti-retaliation may well reach far beyond its intended purpose. Employers should consider

reminding managers and supervisors to treat employees that assert complaints the same as all other employees regarding all working conditions. Employers are encouraged to contact labor and employment counsel as soon as they believe that an employee has engaged in protected activity under SOX or any anti-retaliation statute.

This *GT Alert* was prepared by **Adam Roseman**. Questions about this information can be directed to:

> Adam Roseman | +1 215.988.7826 | rosemana@gtlaw.com
> Any member of Greenberg Traurig's Labor & Employment Group
> Or, your Greenberg Traurig Attorney

Albany
+1 518.689.1400

Amsterdam
+ 31 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Berlin¬
+49 (0) 30 700 171 100

Berlin-GT Restructuring¯
+49 (0) 30 700 171 100

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

Chicago
+1 312.456.8400

Dallas
+1 214.665.3600

Delaware
+1 302.661.7000

Denver
+1 303.572.6500

Fort Lauderdale
+1 954.765.0500

Houston
+1 713.374.3500

Las Vegas
+1 702.792.3773

London*
+44 (0)203 349 8700

Los Angeles
+1 310.586.7700

Mexico City+
+52 55 5029.0000

Miami
+1 305.579.0500

New Jersey
+1 973.360.7900

New York
+1 212.801.9200

Northern Virginia
+1 703.749.1300

Orange County
+1 949.732.6500

Orlando
+1 407.420.1000

Philadelphia
+1 215.988.7800

Phoenix
+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2.369.1000

Shanghai
+86 (0) 21.6391.6633

Silicon Valley
+1 650.328.8500

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+972 (0) 3.636.6000

Tokyo¤
+81 (0)3 4510 2200

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

Westchester County
+1 914.286.2900

West Palm Beach
+1 561.650.7900

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ¬Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ¯ Berlin - GT Restructuring is operated by Köhler-Ma Geiser Partnerschaft Rechtsanwälte, Insolvenzverwalter. *Operates as Greenberg Traurig Maher LLP. **Greenberg Traurig is not responsible for any legal or other services rendered by attorneys employed by the strategic alliance firms. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¤Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2016 Greenberg Traurig, LLP. All rights reserved.*