



## In-"Credible": Tenth Circuit Opinion Highlights Importance of Winning the Credibility Battle Early in Whistleblower Litigation

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### I. INTRODUCTION

On June 4, 2013, the Tenth Circuit Court of Appeals affirmed a ruling of the Administrative Review Board ("ARB" or "Board") finding that Lockheed Martin Corporation ("Lockheed") violated the Sarbanes-Oxley Act ("SOX") by constructively discharging an employee after she complained that her supervisor used company funds to engage in sexual affairs with soldiers she met through a company pen pal program.<sup>[1]</sup> *Lockheed Martin Corp. v. Administrative Review Board*, No. 11-9524, 2013 U.S. App. LEXIS 11159 (10<sup>th</sup> Cir. June 4, 2013). Although the Tenth Circuit's decision is significant for several reasons, not the least of which is the court's deference to the Board's broad interpretation of SOX's whistleblower provision<sup>[2]</sup>, the most important takeaway for employers may be the paramount importance of the fact-finding function of the Administrative Law Judge ("ALJ"). *Lockheed* teaches that in a whistleblower retaliation hearing, case presentation is everything.

#### Background

The complainant, Andrea Brown, was employed by Lockheed as Director of Communications for the company's technical operations subsidiary. She reported to both the president of the subsidiary in Denver and to the corporate Vice President of Communications, Wendy Owen. Owen also supervised Tina Colditz's work as project manager Lockheed's pen pal program, which was established to boost the morale of soldiers deployed in Iraq. In May 2006, Colditz had a discussion with Brown regarding Owen's admitted financial problems during which Colditz confided that Owen was writing sexually explicit form letters to, and had several sexual affairs with, soldiers she met through the pen pal program, had purchased a laptop computer for one soldier, had rented limousines and stayed at an expensive resort with another, and had asked Colditz to complain to a General about an officer who sent Owen an email telling her not to contact him again because he was happily married. Colditz told Brown that she thought Owen's conduct at the very least violated Lockheed's conflict of interest policy, and Colditz expressed concern that Owen was submitting falsified expense reports characterizing her romantic expenses as business expenses that would be passed on to a federal client. Afterward, Brown confided to the human resources director in Denver that she had concerns about Owen's conduct, which caused the director to file an anonymous ethics complaint against Owen. Brown also reported her concerns to the president of the subsidiary, who assured her that he would take action. After she reported Owen, Brown began to come under criticism by management, received less than satisfactory

performance reviews, and had her director title and supervisory responsibilities removed. In addition, Lockheed moved Brown's desk to a storage room for office supplies, files, and canned food donations.

On January 25, 2008, Brown filed a SOX whistleblower complaint with the Occupational Safety and Health Administration ("OSHA")<sup>[3]</sup> alleging that Lockheed had retaliated against her for reporting Owen for suspected fraud. Shortly thereafter, she amended her complaint to add a claim of constructive discharge. OSHA dismissed Brown's complaint in May 2008, based on the finding that her reports were not subject to SOX protection. Brown filed timely objections and requested a hearing *de novo* before an ALJ. Prior to the hearing, Brown's counsel conducted videotaped depositions of the key Lockheed officials and supervisors involved in the case. At the hearing, Brown's case-in-chief was presented through live testimony and deposition testimony and more than sixty (60) exhibits. Lockheed presented no live testimony, and rested its case after offering the video-taped deposition testimony of the subsidiary president for whom Brown worked and of the man who replaced Brown as Director of Communications in Denver.

On January 10, 2010, the ALJ issued a 56-page decision, including over 30 pages of fact findings drawn from the hearing record supporting the ALJ's well-reasoned legal findings. Specifically, the ALJ concluded that Brown proved by a preponderance of the evidence that reporting Owen for suspected mail and wire fraud was a contributing factor in the adverse job actions she suffered. Lockheed objected to the ALJ's findings and petitioned the ARB for review. The ARB affirmed the ALJ's legal finding that Brown's reporting activity was protected by SOX and otherwise upheld the ALJ's legal conclusions as to causation, liability and damages, all of which were grounded in fact and credibility findings that satisfied the substantial evidence standard of review. Lockheed then filed its appeal to the Tenth Circuit.<sup>[4]</sup>

On review, the Tenth Circuit rejected Lockheed's attempt to rewrite the key facts and credibility findings made by the ALJ and affirmed the ARB under the substantial evidence standard of review. The court observed that this standard dictated that the reviewing court must affirm agency fact and legal findings, even when two inconsistent conclusions can be reached from the same evidence. As such, it is difficult to overstate the importance of witness preparation and presentation at the hearing stage.

With regard to the first prong of a SOX whistleblower claim—protected activity—the Tenth Circuit deferred to the ALJ's finding that Ms. Brown reported a reasonable belief that Ms. Owen was fraudulently and illegally diverting company funds for her personal use. Despite the testimony of Lockheed employees that Ms. Brown never used the words "fraud" or "illegal" in reporting Ms. Owen's conduct, the ALJ placed more weight on Ms. Brown's testimony to the contrary. The ALJ's finding was grounded heavily and explicitly on a credibility determination, which the Tenth Circuit declined to take the "extraordinary step" of disturbing.

Likewise, in holding that Ms. Brown suffered an adverse employment action, the Tenth Circuit deferred to the ARB's finding of constructive discharge as supported by the record developed before the ALJ. Although Lockheed argued that Ms. Brown had choices other than resignation and that she decided to resign of her own free will, the Tenth Circuit reasoned that these arguments simply constituted a different view of the evidence. The ARB could have taken that view, but it chose not to. Under the substantial evidence standard of review, Lockheed's arguments were insufficient to overturn the ARB's factual findings.

Finally, in affirming the ARB's finding of causation, the Tenth Circuit similarly deferred to the factual findings below. The ARB concluded that, although the decision-maker responsible for taking adverse employment actions against Ms. Brown did not know of her complaint against Ms. Owen, she was "poisoned" against Ms. Brown by Ms. Owen's biased report of Ms. Brown's professional competence. The Tenth Circuit determined that there was substantial evidence to support the ARB's conclusion. For instance, before the ALJ, Ms. Brown credibly testified that the decision-maker was inexplicably hostile to her from their first encounter. The decision-maker, in turn, testified that she relied

on Ms. Owen's opinion on personnel matters. From this evidence, the ARB drew the inference that Ms. Owen's bias influenced the decision-maker. Although this was not the only inference that the ARB could have drawn from the evidence, the possibility of drawing a different inference from the record is an insufficient basis to disturb the ARB's findings on appeal.

The Tenth Circuit's *Lockheed* decision highlights the importance of building a favorable factual record and winning credibility battles at the ALJ level. Given the low "substantial evidence" standard applied by the ARB in reviewing the ALJ's determinations and by the circuit court in reviewing the ARB's determinations, employers must be prepared to put their best foot forward early in the whistleblower litigation process. The bottom line is that the prospects for overturning the ALJ's factual findings and credibility determinations are slim, and employers need use their best efforts in trying whistleblower claims, even at the ALJ level.

[1] The ARB issues final agency decisions on behalf of the Department of Labor in appeals from recommended findings of fact and conclusions of law issued in administrative hearings conducted before ALJs under a wide range of labor protection, immigration, discrimination and whistleblower laws under DOL jurisdiction.

[2] On appeal, Lockheed argued that the SOX whistleblower provision only protects employees who report possible violations of law related to shareholder fraud. The court categorically rejected Lockheed's narrow interpretation of the scope of whistleblower conduct by applying the plain meaning rule of statutory construction to the SOX whistleblower provision which it read to unambiguously cover complaints of mail or wire fraud whether or not related to shareholder fraud. Alternatively, the Tenth Circuit held that, even if it had found the statute ambiguous, it was required to defer to the agency's construction in the context of a formal adjudication if the agency's interpretation was at all permissible – which the court held that it indisputably was. Just because the current Board interpretation is different from that reflected in prior informal agency opinion letters does not entitle the formal determination under review to less deference.

[3] Pursuant to its authority from Department of Labor, OSHA administers the whistleblower provisions of more than twenty (20) statutes, including SOX.

[4] The ARB's final determination is appealable to the circuit court of appeals.

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## **Related Services**

- Whistleblower Defense