

Is Protection of Whistle-Blowers Under the Sarbanes-Oxley Act Now Unleashed on Private Companies?

IN MANY RESPECTS, past is prologue. Perhaps foreseeing today's economic turmoil and public outrage, in late 2001 and early 2002 Congress faced a rising crisis in investor confidence: Revelations of mass corporate fraud were threatening to destroy investors' faith in U.S. financial markets and jeopardize the stability of those markets and the economy. Seven years later, corporate fraud is an even greater concern; it has been found in the mortgage industry, the banking industry, the financial services industry, the health care industry, and beyond. And, of course, the public remains concerned about the stability of domestic and global markets.

To address those public concerns seven years ago, Congress passed the Sarbanes-Oxley Act of 2002. In passing the act, Congress understood that, because an unprecedented portion of the American public was investing in these companies and depending on their honesty, the laws must encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies. Congress recognized the critical role that whistle-blowers play and noted that "often, in complex fraud prosecutions ... insiders are the only firsthand witnesses to the fraud." Thus, it is not surprising that protecting whistle-blowers was a significant component of Congress' effort to combat corporate fraud.

Among the act's various provisions that created new regulations and reporting requirements, expanded corporate oversight, and imposed new criminal liability for public companies, the Sarbanes-Oxley Act also included a provision that protects whistle-blowers. Section 806 (18 U.S.C. § 1514A) imposes significant civil penalties on employers who retaliate against company insiders who report corporate fraud. Essentially, the act protects employees from retaliation or discrimination for blowing the whistle about conduct that may defraud shareholders. *Getman v. Southwest Sec. Inc.*, 2003-SOX-8 at 1 (Feb. 2, 2004). Whether the

allegation is wire fraud, mail fraud, bank fraud, or securities fraud, the key is that the whistle must be blown about alleged fraud against shareholders.

Because Congress and the act focus on risk to shareholders and § 806 specifically protects employees who report violations of law "relating to fraud against shareholders," it is reasonable to ask if that section applies only to publicly traded companies and exempts private companies from liability. According to a recent decision made by the Department of Labor's Administrative Review Board (ARB), the answer to both questions is no. Some private companies may be covered by § 806 and, therefore, be held liable for retaliation against those who report incidents of corporate fraud.

In *Kalkunte v. DVI Financial Services Inc.*, the Administrative Review Board concluded that a private company could be held liable under § 806 for retaliating against an employee of a public company. ARB Case Nos. 05-139 & 05-140 (Feb. 27, 2009). Kalkunte, a lawyer for DVI, discovered alleged financial improprieties and reported them to members of the audit committee of DVI's board of directors in mid-August 2003. Later that month, DVI filed for bankruptcy under Chapter 11. On Sept. 18, 2003, a little more than a month after first reporting the alleged impropriety, Kalkunte was terminated. What is important in this case is that she was terminated by AP Services, a consulting firm that DVI had hired.

In response to the complaint that Kalkunte had filed with the Department of Labor, AP Services argued, among other things, that it was not liable under § 806, because it was not a publicly traded company. The administrative law judge who first decided the matter disagreed with AP Services, determining that § 806 did, in fact, encompass AP Services. Reviewing that decision on appeal, the Administrative Review Board agreed with the judge's ruling.

According to the ARB, in addition to holding employees of publicly traded companies liable, § 806 also imposes liability on "any officer, employee, contractor, subcontractor, or agent" of the publicly held company. 18 U.S.C. § 1514A(a). And the implementing regulations provide that "no company or company representative may discharge ... or in any other manner discriminate against any employee" and that a "company representative" includes "any officer, employee, contractor, subcontractor, or agent of a company." 29 C.F.R. § 1801.102. Examining the statutory language and regulations, the

ARB had no trouble extending § 806 of the Sarbanes-Oxley Act to AP Services. Because the consulting firm “was a contractor, subcontractor or agent of DVI,” AP Services was subject to § 806 and, if a claim was proved on its substantive merits, could be held liable.

Private companies, therefore, cannot turn a blind eye to § 806 or otherwise assume that they are exempt simply because of their private nature. AP Services, after all, was a private company retained to provide consultation regarding a bankruptcy reorganization. In today’s economic environment, there may be many such dealings between public and private companies as well as many other scenarios in which private companies work for public companies or with them. In these circumstances, given the profound conclusion reached by the Department of Labor’s Administrative

Review Board, private companies doing business with publicly traded companies would do well to familiarize themselves with § 806 of the Sarbanes-Oxley Act and act accordingly if they want to avoid potential civil and criminal liability. **TFL**

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been mailed, Tjoflat, the U.S. Marshal’s Office, and the FBI worked feverishly through the night to contact the remaining members of the Eleventh Circuit.

The following Monday, three additional bombs were received in offices in the Southeast: one at the Eleventh Circuit’s clerk’s office in Atlanta, another at the NAACP office in Jacksonville, and a third at a lawyer’s office in Savannah (that exploded and killed the lawyer). Members of the Eleventh Circuit also began to receive threatening letters bragging about the murder of Judge Vance. The bombs and letters resulted in numerous federal agencies and state prosecutors descending on the Southeast to investigate the crimes.

Judge Tjoflat threw himself into the fray. He quickly implemented security measures to protect the courthouse and its occupants and realized that the various investigators needed a coordinator and leader. He asked then U.S. Attorney General Richard Thornburgh to appoint the best federal prosecutor in the United States to the case, and former FBI Deputy Director Louis Freeh was assigned. Freeh and Tjoflat worked closely together to resolve the case. The perpetrator, Leroy Moody, was eventually caught and convicted. As Freeh observed with respect to the important role Judge Tjoflat played in handling the affair, “Judge Tjoflat was as fine an investigator as he was a jurist. His insights, logical analysis and pure ‘gut’ instinct manifested itself and proved him to be one of the most competent investigators I have ever observed. ... [I]t was [Tjoflat] who took charge of the crisis management and led the Eleventh Circuit, as well as the entire legal community, with the utmost courage, dignity and resolve. It was great demonstration of true leadership and grace under pressure.”

Judge Tjoflat’s entire tenure on the Eleventh Circuit hasn’t been quite as hectic or strenuous as the events surrounding Judge Vance’s assassination, but Tjoflat is no less committed to his job after all these years. As pointed out by Judge Larry Edmondson, Judge Tjoflat’s colleague and former chief judge, “Judge Tjoflat

has been a federal judge for 40 years but still maintains an extraordinary interest in and enthusiasm for the law and the cases that come before him. His high energy is legendary. He provides an excellent example to other judges.”

Judge Tjoflat also sets a marvelous example for his law clerks, which now number 146 in total. He invariably works on weekends and works longer hours than his clerks do. He also spends countless hours teaching clerks to dig into cases. The teaching never stops. One lesson all clerks learn quickly is the necessity of employing what former clerk and current Middle District of Florida Judge Corrigan calls “fierce independence of thought and decision-making.” Judge Tjoflat also exhorts clerks to assess cases without any prejudice about how a case should come about. As Judge Corrigan explains, “The thing I carried with me from Judge Tjoflat the most, and which has benefited me as lawyer and judge, is the absolute requirement that you never pre-judge a legal problem. You must always start with basics and work your way up, and by doing so you eventually arrive at a considered decision.”

It doesn’t take long for Judge Tjoflat’s clerks to realize how fortunate they are to work for the judge. He clearly cares for his clerks, regularly inviting them to his home and eating lunch daily with them at one of his favorite spots. According to Peter Dearing, a former clerk and current Florida circuit judge, Judge Tjoflat treats “all of his clerks as if they were part of his family.” The care shown for his clerks has also been noted by Katherine Bartlett, the former dean of Duke University Law School: “[Judge Tjoflat] is well known ... as the judge who takes extraordinary interest in his clerks—interest in the development of their careers, in their moral compass and professional values, and in what they have to give back to their communities.” Thus it is not surprising that Judge Tjoflat’s former clerks have collected a set of funds to endow the

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Gerald Bard Tjoflat scholarship at Duke Law School, the first of which was awarded in 2008.

Duke Law School is one of Judge Tjoflat's passions. He is a founding member of Duke Law School's board of directors and is regarded as the board's most active "life member"; he drives eight hours each way for two meetings each year. He has been awarded Duke's Charles S. Murphy Award, which is presented to an alumnus "whose devotion to the common welfare is manifested in public service or in dedication to education." He also has been instrumental in creating "Duke's Blueprint for Leadership and Professional Development." As explained by Katherine Bartlett, "To a significant extent it is because of Judge Tjoflat's tireless advocacy and advice that Duke Law School ... has developed an extraordinary culture of community and professionalism that reaches into every area of the [s]chool."

There are two other community endeavors that are particularly blessed by Judge Tjoflat's tremendous energy. The first is the Episcopal Diocese of Florida. As the Right Reverend Samuel Johnson Howard stated in praise of Tjoflat: "There have been many, many occasions in which Judge Tjoflat has encouraged and counseled me through key events in the life of this diocese. He has spent a lot of hours assisting me. Tjoflat has been loyal and faithful to his church and God." In recognition of his decades of services rendered to the Episcopal Church, in 2008, Judge Tjoflat was awarded the Bishop's Cross Award, the highest honor given for service and dedication to the Episcopal Diocese of Florida.

A second community organization that particularly benefits from the judge's involvement is the Boy Scouts of America. From 1975 through 1984 and again in 2000–2001, Judge Tjoflat was president of the North Florida Council of the Boy Scouts of America. He believes strongly that the Boy Scouts' values transfer program is fundamental to the positive development of young men as well as the prevention of delinquency among them. It is therefore no coincidence that Jack Sears, the head of the Boy Scouts' North Florida Council, considers Judge Tjoflat to be "North Florida's greatest champion for boy scouting." As Sears explained in extolling Judge Tjoflat, "he has worked tirelessly to create partnerships and to attract resources to increase the number of young people involved in scouting."

There are numerous other areas in which Judge Tjoflat has provided hugely significant contributions to society, certainly justifying his selection in 1996 as a rare recipient of the prestigious Fordham-Stein Prize, which is given to individuals "whose work exemplifies outstanding standards of professional conduct, promotes the advancement of justice, and brings credit to the profession by emphasizing in the public mind the contributions of lawyers to our society and to our democratic system of government." To name a few of Tjoflat's additional contributions:



Judge Tjoflat enjoying lunch with his clerks.

- From 1973 to 1987, Tjoflat was a member and, beginning in 1978, the chairman of the Judicial Conference of the United States Committee on the Administration of the Probation System, which oversees the performance of the nation's probation and parole officers and communicates to Congress—through testimony before the House and Senate Committees on the Judiciary—the views of the federal courts on matters of crime and punishment.
- From 1975 to 1987, Tjoflat was a member of the Advisory Corrections Council of the United States, which is charged with overseeing the operation of the federal prison system.
- In 1980 and 1985, Tjoflat served as a member of the U.S. delegation to the Sixth and Seventh United Nations Congresses for the Prevention of Crime and Treatment of Offenders.

Also noteworthy, and no less significant, is Tjoflat's hand in building approximately 17 federal courthouses in the Southeast, including the beautiful federal building and courthouse in Jacksonville.

Judge Tjoflat turned 80 this year. His first wife, Sarah, passed away from cancer in 1997, and—whether because of good genes, annual access to a new crop of young clerks, or his marvelous second wife, Marcia Parker (a prominent real estate attorney)—Tjoflat is still going strong. Indeed, he has not lost an iota of his lively exuberance, which for many friends and colleagues makes Tjoflat, in the words of Judge Edmondson, "truly a character and fun to know." Or, as longtime colleague and former Eleventh Circuit Chief Judge Lanier Anderson observes, "Anybody who has met [Judge Tjoflat] just loves him." **TFL**

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