

# Fifth Circuit Affirms Summary Judgment on SOX Whistleblower Claim

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On February 15, 2019, the Fifth Circuit affirmed the grant of summary judgment in favor of Andeavor Corporation f/k/a Tesoro Corporation on a SOX whistleblower claim, concluding that the plaintiff lacked an objectively reasonable belief that the company was misreporting its revenue to the SEC. [Wallace v. Andeavor Corp.](#), No. 17-cv-50927.

## Background

Plaintiff, a Vice President of Pricing and Commercial Analysis, was a sub-certifier of the company's financial statements. He was tasked with investigating the company's financial performance in various industry segments, and purportedly concluded that it improperly booked taxes as revenues in certain internal reporting channels. On February 8, 2010, he reported his concerns to his supervisor. Yet, shortly thereafter, he certified that he knew of no reason why the company's 2009 10-K could not be certified. That 10-K, which was filed on March 1, 2010, included a statement disclosing that certain taxes were included in both the "Revenues" and "Costs of Sales and Operating Expenses." Also, on March 12, 2010, Plaintiff certified that he was unaware of any "business or financial transaction that may not have been properly authorized negotiated or recorded" for 2009.

While Plaintiff was investigating the company's internal profitability and accounting for taxes, the human resources department determined that he had been creating a hostile work environment, and his employment was terminated. His termination occurred on March 12, 2010, the same day he provided the above-referenced certification. Plaintiff filed suit in the Western District of Texas under Section 806 of SOX, claiming he was discharged in retaliation for reporting the company's alleged practice of booking sales taxes as revenues, which he claims was not properly disclosed in SEC filings. The district court granted summary judgment in the company's favor, concluding that the decision to terminate the plaintiff's employment was not prohibited retaliation and that the plaintiff did not have an objectively reasonable belief that the company had misreported its revenue to the SEC.

## **Ruling**

The Fifth Circuit focused on whether Plaintiff had an objectively reasonable belief that the company was misreporting revenue. In ruling on this issue, it noted that Plaintiff had extensive business experience, including with the company's accounting systems, and had expertise in SEC financial reporting practices. It concluded that in light of his position as a sub-certifier with accounting oversight experience, he should have investigated to ensure the reasonableness of his conclusion that the public disclosures contained a reporting violation. According to the court, had he conducted a limited investigation, he would have determined that the company had properly disclosed its treatment of certain taxes as revenue in the 10K that was filed with the SEC. Thus, the court concluded, he lacked an objectively reasonable belief that the company had violated the law.

## **Implications**

As we previously reported ([here](#) and [here](#)), and as set out in the ARB's seminal holding in [Welch v. Cardinal Bankshares Corp.](#), ARB Case No. 05-064 (May 31, 2007), the "reasonable belief" standard looks beyond a plaintiff's purported subjective belief of wrongdoing to whether that belief is objectively reasonable based on the expertise and background of the complainant. This decision holds experienced professionals bringing SOX whistleblower claims to a higher standard and considers whether they conducted reasonable investigations in determining whether they held an objectively reasonable belief that unlawful conduct occurred.

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**Related Professionals**

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- **Steven J. Pearlman**  
Partner
- **Lloyd B. Chinn**  
Partner
- **Edward C. Young**  
Senior Counsel