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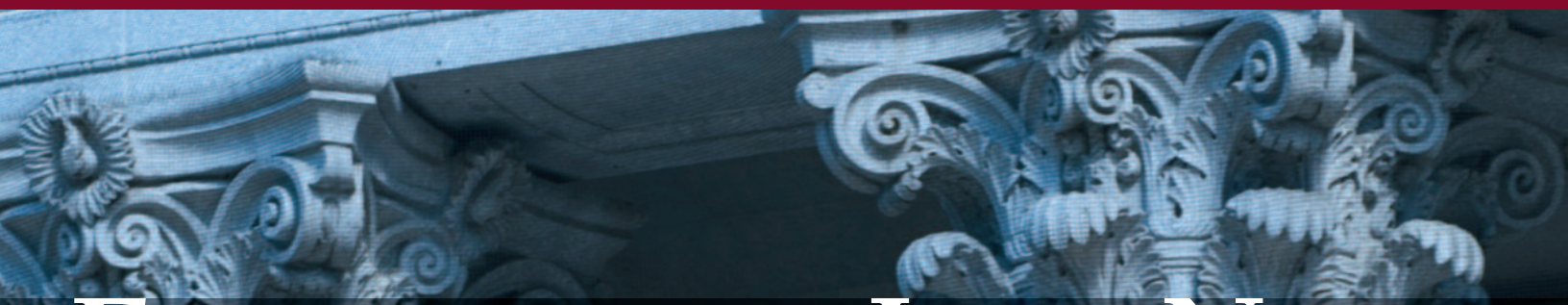

EMPLOYMENT LAW NEWS

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Employment Law Practice Group

If you have any questions or comments about this Newsletter, please feel free to contact any of the attorneys in our Litigation Group listed below via telephone at (212) 574-1200 or via e-mail generally by typing in the attorney's last name @sewkis.com.

Partners:
M. William Munno
Michael J. McNamara
Mark D. Kotwick
Anne C. Patin

Associates:
Jennifer J. Pearson
Julia C. Spivack
Benay L. Josselson

SEWARD & KISSEL LLP

One Battery Park Plaza, NY, NY 10004
Tel: 212 574 1200 | Fax: 212 480 8421
sknyc@sewkis.com
www.sewkis.com

Second Circuit Clarifies Burden-Shifting Standard for Sarbanes-Oxley Whistleblower Cases

- *Summary:* In its March 5, 2013 opinion in *Bechtel v. Administrative Review Board,* the United States Court of Appeals for the Second Circuit clarified the burden-shifting standard used to evaluate whistleblower retaliation claims under Section 806 of the Sarbanes-Oxley Act ("SOX"). This important decision, which we review below, should streamline whistleblower cases going forward.

Full article on page 2.

New York City Passes Legislation Prohibiting Employers from Discriminating Against the Unemployed

- *Summary:* On March 13, 2013, the New York City Council overrode Mayor Bloomberg's veto and passed a bill amending the New York City Human Rights Law to include the unemployed as a protected class. This new law will take effect on June 11, 2013, and applies to all New York City employers with four (4) or more employees.

Full article on page 3.

New York City Council Passes Bill Requiring Paid Sick Leave

On May 8, 2013, the New York City Council passed legislation requiring employers (depending on their size) to provide paid sick leave to their employees. Since 2010, the proposed law had been the subject of often contentious debate among legislators, labor unions, business owners and New York City Mayor Michael Bloomberg. In light of New York City's still-recovering economy, the bill is not scheduled to take effect until April 1, 2014. Effective as of that date, New York City based employers with twenty (20) or more employees will be required to provide employees with five (5) paid sick days per year. Effective October 1, 2015, the law is to be expanded to cover New York City based employers with fifteen (15) or more employees. Employers with fewer than the requisite number of employees will be required to provide employees with five (5) unpaid sick days per year. Mayor Bloomberg has vowed to veto the bill, maintaining that requiring employers to provide paid sick leave will hurt small businesses and stifle job creation. However, at present, there seems to be enough support on the City Council to override the veto and City Council Speaker Christine C. Quinn has vowed to do so. We will continue to monitor any developments regarding this legislation.

Second Circuit Clarifies Burden-Shifting Standard for Sarbanes-Oxley Whistleblower Cases

J. Scott Bechtel was hired in 2001 by Competitive Technologies, Inc. ("CTI"), a publicly held company, to serve as vice president of technology commercialization. U.S. App. Lexis 4539, at *3. In June 2002, CTI hired a new President and CEO. *Id*. Not long thereafter, Bechtel made a report to CTI's general counsel that he believed the CEO had not complied with certain legal requirements. *Id.* In December 2002 and March 2003, Bechtel was asked to serve on a committee to review CTI's financial transactions and make recommendations concerning disclosure requirements under SOX. *Id*. at *4. Bechtel believed certain transactions needed to be disclosed and refused to sign certain disclosure forms, but the other members of the committee disagreed. *Id*.

In May 2003, after CTI had suffered net operating losses for three consecutive years, the CEO proposed, and CTI's board approved a plan to reduce operating costs by laying off certain personnel, including Bechtel. *Id.* On June 30, 2003, Bechtel was fired. *Id*.

In September 2003, Bechtel filed a SOX whistleblower complaint before the Occupational Safety and Health Administration ("OSHA"), the administrative agency charged with investigating SOX whistleblower complaints, alleging that CTI illegally retaliated against him because he refused to sign the SOX disclosure forms. In 2005, after an investigation, OSHA concluded there was reasonable cause to believe that CTI had violated SOX and ordered CTI to reinstate Bechtel and pay him backpay and compensatory damages. *Id*. CTI objected to OSHA's findings and requested a hearing before an Administrative Law Judge ("ALJ"). After a hearing in October 2005, the ALJ dismissed Bechtel's complaint. Bechtel appealed the decision to the Administrative Review Board ("ARB") which remanded the case to the ALJ after determining that the ALJ applied the wrong legal standard to consider Bechtel's claims under SOX. *Id.* at *5. On remand, the ALJ again dismissed the complaint in a decision dated January 30, 2009. On September 30, 2011, the ARB affirmed the ALJ's decision. Bechtel then appealed the ARB's ruling to the Second Circuit.

Burdens of Proof in SOX Whistleblower Claims

Until *Bechtel*, the Second Circuit had not previously described the elements and burdens of proof for cases under SOX, though several other Circuit courts had. U.S. App. Lexis 4539, at *8. The Court clarified that the relevant burdens of proof for whistleblower retaliation claims under SOX are contained in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") as set forth in 49 U.S.C. §42121(b) and in the Code of Federal Regulations at 29 C.F.R. §§1980.100-115. The Court then adopted the description of the applicable burden of proof articulated by the Seventh Circuit in *Harp v. Charter Commc'ns, Inc.,* 558 F.3d 722 (7th Cir. 2009):

> To prevail under [SOX], an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. If the employee establishe[s] these four elements, the employer may avoid liability if it can prove by 'clear and convincing evidence' that it 'would have taken the same unfavorable personnel action in the absence of that protected behavior.'

Id. (quoting *Harp*, 558 F.3d at 723).

The ALJ's Error Was Immaterial

Bechtel's argument on appeal was that, even on remand, the ALJ persisted in applying the wrong legal standard and the ARB, thus, erroneously affirmed the ALJ's second decision. *Id*. at 8. The Court acknowledged that, while the ALJ initially had correctly articulated the burden shifting framework for a SOX claim, the ALJ went on to erroneously set forth an alternative burden-shifting scheme. U.S. App. Lexis 4539, at *14. Specifically, the ALJ had stated that, until the employee meets his or her burden of proof, the employer need only articulate a legitimate business reason for its action, and if it does so, the employee may prevail by proving by a preponderance of the evidence that the articulated business reason is a pretext for discrimination. *Id.* at *15. If the employee proves pretext, the employer may avoid liability by showing, by clear and convincing evidence that it had a non-discriminatory reason for the adverse employment action. *Id*.

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The Second Circuit rejected this alternative burden shifting scheme, finding that it "has no basis in any relevant law or regulation and is simply incorrect" and noted that the ARB observed as much. *Id*. at *16. The ARB found, however, that Bechtel had failed to prove by a preponderance of the evidence that his protected activity was a contributing factor in the adverse employment action. Thus, because Bechtel failed to state a prima facie claim under both the correct and the incorrect legal standard, the ARB found that the ALJ's error was harmless, and declined to remand the case yet again to the ALJ. *Id*. The Second Circuit affirmed, finding that the ARB's decision was not arbitrary or capricious, or an abuse of discretion.[1] *Id.* at *17

Conclusion

By clarifying the applicable legal standard, the Second Circuit's decision should help streamline the determination of SOX whistleblower claims.

[1] The Court also affirmed Bechtel's appeal of a number of other procedural and substantive issues in the case. *See id*. at *10-13.

New York City Passes Legislation Prohibiting Employers from Discriminating Against the Unemployed

New York City employers should be aware of the changes that have been made by amending the New York City Human Rights Law (N.Y. Admin. Code §§ 8-101-8-131) to include the unemployed as a protected class. This new law will take effect on June 11, 2013, and applies to all New York City employers with four (4) or more employees.

What is Prohibited?

This new law prohibits employers and employment agencies from basing an employment decision with regard to hiring, compensation, or the terms, conditions or privileges of employment on the fact that an applicant is "unemployed." The law defines "unemployed" as: someone who does not have a job, is available for work, and is seeking employment. Employers are also prohibited from publishing a job posting or advertisement which indicates that being currently employed is a requirement or qualification for the position.

What is Allowable?

The new law does not prohibit employers from:

- considering an applicant's unemployment where there is a substantially job-related reason for doing so;
- inquiring about the circumstances surrounding a job applicant's departure from his or her prior position;
- considering any "substantially job-related qualifications" such as a requirement that an applicant have a current and valid professional or occupational license, a minimum level of education or training, or a minimum level of professional or occupational experience when making employment decisions with respect to hiring, compensation or the terms, conditions or privileges of employment;
- limiting a position to internal applicants only; and
- basing the compensation offered on the applicant's level of experience.

Disparate Impact

It is significant that the new law specifically provides for a disparate impact cause of action. Under a disparate impact theory, a person may bring an action claiming that a policy or practice of an employer results in a disparate impact to the detriment of the unemployed *as a group*. The burden of proof then shifts to the employer who must affirmatively prove that the policy or procedure at issue has its basis in a substantially job-related qualification or does not contribute to the disparate impact.

Penalties

An applicant who believes he or she has been discriminated against based on unemployed status can file a complaint in court and seek damages or file a complaint with the New York City Human Rights Commission (the "Commission"). The Commission has the authority to require the employer to hire the applicant, stop any hiring practices that it deems are discriminatory,

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and subject the employer to penalties should the employer fail to comply with the Commission's orders. Additionally, if the Commission finds that an employer has engaged in an unlawful discriminatory practice, it may impose a penalty of up to $125,000. If the employer's discriminatory practice is found to be willful, wanton, or malicious, the penalty can be up to $250,000.

Action Points

Update Policies

All employee handbooks and equal employment opportunity policies should be updated promptly to include a prohibition against discriminating against the unemployed. Employment applications should also be reviewed to ensure that they do not contain questions or wording that could be viewed as discriminatory.

Job Postings

Before publishing any advertisement or positing for an open position, employers should carefully review the language of such posting to be sure there is no language contained therein that would run afoul of this new law. Additionally, employers should advise any outside recruitment agencies that they are working with that they will accept submissions from both currently employed and unemployed applicants.

Training

Employers should be sure that any employees involved in interviewing or recruiting for open positions within its organization are aware of this new law and understand the company's obligations thereunder. Specifically, those responsible for recruiting and/or interviewing should understand what types of inquiries are and are not prohibited.

Conclusion

An employer must ensure that when recruiting for open positions, it is making decisions based on legitimate job-related qualifications. The latest numbers reported by the New York State Department of Labor reflect a 9.1% unemployment rate in New York City. With such a high rate, it is advisable that an employer maintain good records of all applicants so that in the event it is faced with having to defend a claim of unemployment discrimination, it will be able to prove that any hiring decision made was based on substantially job-related concerns.