Blacklisting a Former Employee in Retaliation for Post-Employment Protected Activity Can Create SOX Exposure: *Kshetrapal v. Dish Network, LLC*

By Peter J. Pizzi

Two financial crises ago, Congress determined to expand whistleblower protections for those who report financial fraud and related misconduct. The result became Section 1514A of the Sarbanes-Oxley Act of 2002 ("SOX"). Recently, the Honorable Paul A. Crotty of the Southern District of New York had occasion to explore the contours of SOX whistleblower protection. In *Kshetrapal v. Dish Network, LLC*,[1] Judge Crotty became the first federal judge to hold that a former employee who engages in post-employment protected activity may bring a whistleblower retaliation claim under the statute.[2] According to Judge Crotty's analysis, SOX protections extend to an individual who discloses evidence of financial wrongdoing by his employer months or years *after* the employer-employee relationship ends and who, thereafter, suffers retaliation.[3]

1. Background

Tarun Kshetrapal was employed by Dish Network LLC ("Dish") from March 2007 through November 2008 as the Associate Director of South Asian Marketing.[4] According to the complaint, in spring 2008, Kshetrapal began to suspect that Dreamakers, a marketing agency retained by Dish, was billing Dish for work that Dreamakers had performed incorrectly or had not performed at all.[5] Kshetrapal shared his suspicions with his supervisors, but they allegedly ignored Kshetrapal's concerns.[6] Unknown to Kshetrapal at the time,[7] his supervisors allegedly were among the Dish executives who approved Dreamakers' fraudulent invoices and granted Dreamakers exclusivity over South Asian programming in exchange for gifts that included a new Mercedes Benz, Rolex watches, thousands of dollars to spend in Atlantic City, spa treatments, Broadway show tickets, limousine rides, airline tickets, luxury hotel accommodations, and discounted gift cards.[8]

Determined to confirm whether his suspicions were correct, Kshetrapal performed his own investigation,[9] but the complaint alleges he was reprimanded for probing into Dreamakers' activities.[10] Thereafter, Kshetrapal refused to sign off on Dreamakers invoices that he believed to be fraudulent.[11] Upon learning about Kshetrapal's actions, Dreamakers' CEO allegedly demanded that a Dish executive fire Kshetrapal.[12] When the executive refused to fire Kshetrapal, Dreamakers' CEO threatened to expose that executive's acceptance of a bribe from Dreamakers.[13] The Dish executive then allegedly reported her acceptance of a "steeply discounted Mercedes" from Dreamakers to Dish's Senior Vice President of Programming, who began an internal investigation into the matter.[14]

Dish's investigation allegedly revealed fraudulent invoicing, corroborating Kshetrapal's findings, and exposed alleged bribery of Dish executives.[15] In October 2008, Dish ended its relationship with Dreamakers and discharged several senior executives involved in the scandal.[16] Despite Kshetrapal's full cooperation with Dish's investigation, the complaint alleges that Kshetrapal was forced to resign "without justification" in November 2008.[17]

Following Dish's termination of its business relationship with Dreamakers, Dreamakers filed a breach of contract claim in December 2008.[18] In response, Dish filed counterclaims against Dreamakers for fraudulent invoicing and bribery.[19] In the course of the litigation, Dish's counsel allegedly sought to represent Kshetrapal repeatedly at his deposition.[20] The complaint alleges Dish's counsel assured Kshetrapal that Dish would not retaliate against him for testifying truthfully at his deposition by interfering with his current employment.[21] Following Dish's assurances, Kshetrapal was deposed on behalf of Dish and testified extensively about the fraudulent invoicing, the bribery, and the complicity of his former supervisors.[22]

Contrary to Dish's assurances,[23] the complaint alleges that Dish's management proceeded to blacklist Kshetrapal.[24] In 2009, Dish discontinued business with SAA VN, LLC ("SAA VN"), a Bollywood music streaming service, upon learning that SAA VN employed Kshetrapal.[25] The following year, according to Kshetrapal's pleadings, Dish pressured Nimbus Communications Limited to rescind an employment offer to Kshetrapal for an executive position by threatening to pull its business[26] and providing a negative reference about Kshetrapal in violation of Dish's neutral reference policy.[27] Thereafter, in 2011, Dish allegedly informed SAA VN that it was unwilling do business with SAA VN because SAA VN continued to employ Kshetrapal, alluding to Kshetrapal's "prior unethical business conduct."[28]

Following Dish's repeated interferences with Kshetrapal's subsequent employment, Kshetrapal filed suit against Dish under Section 1514A of SOX's whistleblower retaliation statute, among other claims.[29]

2. Expansive Whistleblower Protection Under Sarbanes-Oxley

The issue in Kshetrapal's case was whether his post-termination deposition testimony qualified as protected activity under SOX.[30] The analysis hinged on whether

Kshetrapal was an "employee" for purposes of the SOX statute.[31]

a. *Robinson v. Shell Oil Company*

The Supreme Court's ruling in *Robinson v. Shell Oil Company*[32] influenced Judge Crotty's decision to adopt an expansive interpretation of the term "employee" under SOX.[33] In *Robinson*, the Supreme Court considered whether the term "employees," as used in Section 704(a) of Title VII of the Civil Rights Act of 1964, included former employees.[34] Robinson claimed that Shell Oil Co. ("Shell") had discharged him because of his race.[35] Robinson filed a charge with the EEOC, and while the charge was pending, he applied for a position with another company.[36] Robinson claimed that Shell gave a negative reference to the potential employer in retaliation for the pending EEOC charge, and he filed suit under Section 704(a), alleging retaliatory discrimination.[37]

Section 704(a) makes it unlawful "'for an employer to discriminate against any of his employees or applicants for employment'" who have engaged in Title VII protected activity or who have assisted others in doing so.[38] Justice Thomas, writing for a unanimous Court, concluded that the term "employees," as used in Section 704(a), was ambiguous as to whether it included former employees.[39] First, the Court found Section 704(a) lacks a "temporal qualifier" indicating whether the statute protects only individuals "still employed at the time of the retaliation."[40] Second, the Court found Title VII's definition of "employee" also "lacks any temporal qualifier" and could equally refer to current or past employees.[41] Third, the Court found that a number of other Title VII provisions "use the term 'employees' to mean something more inclusive or different from 'current employees.'"[42] For example, the Court noted that one of Title VII's statutory remedies is reinstatement, which necessarily applies to former employees.[43] The Court further found that, while some sections of Title VII use the term "employee" to refer "unambiguously to a current employee," the term does not carry the same meaning in every section or context of Title VII.[44] As a result, the Court concluded the term "employees" as used in Section 704(a) is necessarily ambiguous, and that an inquiry into the broader context of the statute was required to resolve the ambiguity.[45]

The Supreme Court found the inclusion of former employees within Section 704(a)'s scope consistent with the broader context of Title VII and with Section 704(a)'s primary purpose of "maintaining unfettered access" to Title VII's remedial mechanisms.[46] First, the Court noted, several sections of Title VII "plainly contemplate that former employees will make use of the remedial mechanisms of Title VII."[47] Furthermore, the Court found it "far more consistent to include former employees within the scope" of Section 704(a)'s protection because the statute "expressly protects employees from retaliation for filing a charge," and a charge alleging unlawful discharge would "necessarily be brought by a former employee."[48] Second, the Court found that excluding former employees from the scope of Section 704(a) would undermine Title VII's effectiveness "by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims."[49] Accordingly, the Supreme Court held that former employees are included within the scope of the term "employees" for purposes of Section 704(a)'s protection.[50]

b. *Kshetrapal v. Dish Network, LLC*

The *Robinson* Court's reasoning guided Judge Crotty's analysis of whether Kshetrapal was an "employee" for purposes of the SOX statute and, therefore, had engaged in protected activity during his post-termination deposition.[51]

Under Section 1514A of the SOX statute, an employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act" that an employee performs in reporting corporate fraud.[52] To bring a successful SOX whistleblower retaliation claim, 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; (4) the protected activity was a contributing factor in the unfavorable action.'"[53]

Dish argued that the scope of Kshetrapal's SOX claim was limited to his protected activities while employed.[54] The Court, however, disagreed with Dish's reading of the statute.[55] Looking to "the language and purpose of the SOX statute,"[56] the Court found that Section 1514A extends protection from whistleblower retaliation to former employees.[57] On its face, the provision covers an employee engaged in protected activity during the term of employment.[58] The term "employee," however, is not defined within SOX nor does Section 1514A contain a "temporal qualifier" indicating whether "employee" only refers to current employees.[59] Therefore, like the *Robinson* Court found in analyzing Section 704(a) of Title VII, the *Kshetrapal* Court found the term "employee" ambiguous as used in Section 1514A of SOX.[60] Importantly, as in *Robinson*, the Court noted that reinstatement is one of the remedies set forth in Section 1514A, leading to the inference that "employee" as used in Section 1514 includes former employees.[61]

Finding Section 1514A ambiguous, the Court relied on sources outside the statute for guidance.[62] First, the Court looked to the Department of Labor ("DOL") regulations and administrative decisions to determine whether the term "employee" includes former employees.[63] The Court found that the DOL regulations implementing Section 1514A "define 'employee' to include 'an individual presently *or formerly* working for a covered person.'"[64]

Additionally, the Court relied on a recent Administrative Review Board ("ARB") that held "an employee's post-termination whistleblowing c[ould] constitute protected activity under SOX."[65] The Court noted that, while the proper level deference to DOL regulations and administrative decisions is unclear,[66] courts have afforded *Skidmore* deference to such regulations and administrative decisions.[67]

Next, the Court looked to the legislative purpose of SOX.[68] The Court found that interpreting the term "employee" expansively to include former employees supported SOX's intended purpose of combating "'what Congress identified as a corporate culture, supported by law, that discourages employees from reporting fraudulent behavior not only to the proper authorities… but even internally.'"[69] Moreover, the Court found its interpretation of "employee" consistent with a recent Supreme Court decision holding "the term 'employee' should be interpreted expansively in the context of Section 1514A."[70] The Court explained that limiting the term "employee" to current employees "would discourage employees from exposing fraudulent activities of their former employers for fear of retaliation in the form of blacklisting or interference with subsequent employment."[71]

The Court went on to hold that Kshetrapal's post-termination deposition was protected activity under SOX,[72] because a contrary holding would subvert the purpose of SOX to "encourage whistleblowing."[73] For the above reasons, the Court held that SOX whistleblower protection covers former employees, and that a former employee's post-termination deposition testimony is protected activity under SOX.[74]

3. Conclusion

Following the *Kshetrapal* decision, a terminated employee who reports corporate fraud after being discharged may still bring a retaliation claim under SOX. Typically, a whistleblower retaliation claim arises in the context of a former employee challenging her discharge after reporting corporate fraud during the term of her employment. Kshetrapal's case is unique in that his protected activity is his deposition testimony taken *after* his employment, and he is challenging Dish's actions subsequent to that post-employment deposition (i.e. allegedly refusing to do business with Kshetrapal's employer, giving negative references in violation of Dish's neutral reference policy, and interfering with an employment offer).[75] Compared to a typical whistleblower retaliation claim, there is arguably less of a nexus among Kshetrapal's employment by Dish, his protected activity, and Dish's alleged retaliation. Consequently, Judge Crotty's decision is a noteworthy expansion of SOX whistleblower protection in that a former employee disclosing financial irregularities long after the employer-employee relationship has ended is now protected under SOX from retaliation.

Endnotes

1. *Kshetrapal v. Dish Network, LLC*, No. 14-cv-3527 (PAC), 2015 U.S. Dist. LEXIS 24573 (S.D.N.Y. Feb. 27, 2015).
2. *See id.* at *6-13.
3. *See id.*
4. *Id.* at *2.
5. *Id*.
6. *Id.* at *2-3.
7. Compl. at 15, *Kshetrapal v. Dish Network, LLC*, (S.D.N.Y. filed May 16, 2014) (No. 14-cv-3527 (PAC)) [hereinafter Kshetrapal Compl.].
8. *Id*. at 1-2.
9. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *3.
10. *Id*.; *see also* Kshetrapal Compl., *supra* note 7, at 14.
11. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *3.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id.* at *3-4; Kshetrapal Compl., *supra* note 7, at 16.
17. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *4; Kshetrapal Compl., *supra* note 7, at 16.
18. *Id*.
19. *Id*.
20. Kshetrapal Compl., *supra* note 7, at 17.
21. *Id*.
22. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *4.
23. Kshetrapal Compl., *supra* note 7, at 17.
24. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *4-6.
25. *Id*. at *4-5; Kshetrapal Compl., *supra* note 7, at 18.
26. Kshetrapal Compl., *supra* note 7, at 19.
27. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *5; Kshetrapal Compl., *supra* note 7, at 20.
28. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *5; Kshetrapal Compl., *supra* note 7, at 21.
29. Kshetrapal Compl., *supra* note 7, at 23-25; *see also Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *6-13.
30. *See Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *6-13.
31. *See id*.
32. 519 U.S. 337 (1997).
33. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *9 n.3.
34. *Robinson*, 519 U.S. at 339.
35. *Id*.
36. *Id*.
37. *Id*. at 339-40.
38. *Id*. at 339 (quoting 42 U.S.C § 2000e-3 (1972)).
39. *Id*. at 341.
40. *Id*.
41. *Id*. at 342.
42. *Id*.
43. *Id*.
44. *Id*. at 343.
45. *Id*. at 343-44.
46. *See id*. at 345-46.

47. *Id*. at 345.
48. *Id*. (internal quotations omitted).
49. *Id*. at 346.
50. *Id*.
51. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *6-13.
52. 18 U.S.C. §1514A(a) (2010); *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *6.
53. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *6-7 (quoting *Bechtel v. Admin. Review Bd*., 710 F.3d 443, 447 (2d Cir. 2013)).
54. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *7.
55. *Id*.
56. *Id.*
57. *See id.* at *12.
58. *See id*. at *7-8.
59. *Id.* at *8.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*. (quoting 29 C.F.R. 1980.101).
65. *Id*. (citing *Levi v. Anheuser Busch Inbev*, 2014 DOLSOX LEXIS 42, at *5 (ARB July 24, 2014)).
66. *Id*. at *8 n.2 (citing *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1186-87 (2014) (Sotomayor, J. dissenting)).
67. *Id*. (citing *Lawson*, 134 S. Ct. at 1174).
68. *Id*. at *9.
69. *Id*. (quoting *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 446 (2d Cir. 2013)).
70. *Id*. at *9 n.3 (citing *Lawson*, 134 S. Ct. at 1176 (holding Section 1514A's whistleblower protection extends to the employees of private contractors and subcontractors)).
71. *Id*. at *12-13.
72. *Id*. at *12.
73. *Id*. at *13 (quoting *Lawson*, 134 S. Ct. at 1170).
74. *See id* at *12-13.
75. *See id.* at *4-6.

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