

# Employment Law Briefing



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# SOX and suits

## *Whistleblower provisions at issue in retaliatory termination case*

**T**he Sarbanes-Oxley Act (SOX) includes whistleblower provisions to protect employees who report potential employer fraud. In *Van Asdale v. International Game Technology*, the U.S. Court of Appeals for the Ninth Circuit examined the substantive requirements necessary to establish a claim under these provisions.

### Game on

Shawn and Lena Van Asdale were hired as associate general counsel for International Game Technology (IGT) in January 2001. Following promotions, both reported directly to IGT's General Counsel, first Sara Beth Brown and, later, David Johnson.

That same year, IGT began merger negotiations with Anchor Gaming. Before Anchor's merger with IGT, Anchor competitor Bally Gaming initiated advertisements for a new "Monte Carlo" slot machine featuring a "bonus wheel." Anchor asserted that the Monte Carlo machine infringed on Anchor's "wheel" patent, a valuable part of Anchor's holdings. Bally argued that the wheel patent was invalidated by a prior patent — specifically, Bally's vintage 1970s Monte Carlo machine.

In August 2003, after Anchor and IGT had merged, the U.S. Patent and Trademark Office issued IGT a new patent for Anchor's wheel concept (essentially renewing the previous wheel patent). In anticipation of pending litigation against Bally, IGT's outside litigation counsel sent Shawn Van Asdale written materials that Bally had provided to Anchor's counsel before the merger.



These materials included a description of the "Australian Flyer" — an Australian version of the Monte Carlo machine. Van Asdale and IGT's outside counsel agreed that the Australian Flyer effectively invalidated IGT's 2003 wheel patent and undermined IGT's claims against Bally. If the wheel patent was invalid, the benefits of the merger may have been overvalued.

### Concerns expressed

Van Asdale spoke with IGT General Counsel Brown and expressed his concern that the Australian Flyer hadn't been disclosed to IGT before the merger and his suspicion that Anchor had been aware of the Australian Flyer.

Van Asdale also brought the issue to the attention of Rich Pennington, IGT's Vice President of Product Development. In November, Johnson replaced Brown as IGT's general counsel. On Nov. 10, Van Asdale received an exceptional performance review and, on Nov. 24, both Shawn and Lena Van Asdale met with Johnson and expressed concern over the patent's validity.

In February 2004, Shawn Van Asdale was terminated — allegedly for poor performance. Johnson claimed that he had no intention of terminating Lena Van Asdale but, within weeks of Shawn Van Asdale's termination, Johnson received complaints "that [Lena Van Asdale] had become extremely difficult and extremely unfriendly" and had twice requested access to allegedly sensitive information. Johnson terminated Lena Van Asdale shortly thereafter.

### Lawsuit filed

The Van Asdales filed a lawsuit claiming retaliatory termination and citing the SOX whistleblower provisions. The district court granted IGT's motion for summary judgment, and the Van Asdales appealed. To establish a prima facie case under such an appeal, an employee must meet a four-prong test showing that:

1. **He or she engaged in protected activity or conduct.** To constitute protected activity under SOX, an employee's communications must "definitively and specifically" relate to conduct that the employee reasonably believes constitutes mail fraud, wire fraud, bank fraud or securities fraud or that violates any rule or regulation of the Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders.

The appeals court found that Shawn Van Asdale's conversations with Brown and Pennington satisfied this "definitively and specifically" standard. Brown testified that it was her impression after the meeting that Van Asdale believed IGT had been misled regarding Anchor's value before the merger. Pennington conceded Van Asdale may have suggested that the omission was intentional. While both Brown and Pennington didn't believe Van Asdale used the specific words "fraud" or "Sarbanes-Oxley," the appeals court concluded that, to trigger protection, an employee need not cite a code section he or she believes was violated.

Although Johnson maintained that his November 2003 meeting with both Shawn and Lena Van Asdale involved discussions of a potential fraud on the Patent Office defense in pending litigation, Shawn Van Asdale contended that the potential shareholder fraud was discussed. The appeals court noted that this factual dispute couldn't be decided on summary judgment and, therefore, concluded that the Van Asdales had established the first prong of establishing a prima facie case.

**2. The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity.** The appeals court explained that, though the second prong's language was ambiguous, Brown, Johnson and Pennington undisputedly all had supervisory authority over the Van Asdales. Therefore, the court concluded that the Van Asdales had established the second prong.

**3. The employee suffered an unfavorable personnel action.** Here IGT conceded that the Van Asdales had established an adverse personnel action.

*When an adverse employment action directly follows a protected activity, causation can be inferred from timing alone.*

**4. The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.** The appeals court noted that the Van Asdales hadn't put forth any direct evidence that their protected activity was a contributing factor to their termination. The court explained, however, that, when an adverse employment action directly follows a protected activity, causation can be inferred from timing alone — both Shawn and Lena Van Asdale were removed from their positions within weeks of their alleged protected conduct.

#### Similar treatment

Although SOX is relatively recent, this case demonstrates that claims under its whistleblower provisions will be treated similarly to retaliation claims under other statutes. Employers must be prepared to document their reasons for adverse personnel actions in these situations. ♦

## A case in contrast

Despite the outcome in *Van Asdale v. International Game Technology* (see main article), employers can raise valid defenses to Sarbanes-Oxley Act (SOX) whistleblower retaliation claims. Case in contrast: *Fraser v. Fiduciary Trust Company International, et al.*

Before being terminated in May 2003, Fiduciary Vice President Gregory Fraser twice expressed concerns about fraud to his superiors. First, in February 2002, he drafted an e-mail addressing Fiduciary's involvement in WorldCom bonds but was instructed not to send it. Fraser sent the e-mail in May 2002, but WorldCom had already filed for bankruptcy. Second, in February 2003, Fraser advised his supervisor that an internal document implied Fiduciary managed United Nations pension fund accounts, which technically wasn't true and may have overstated Fiduciary's assets.

The U.S. District Court for the Southern District of New York explained that the e-mail constituted a general inquiry regarding a business decision rather than a specific complaint of fraud and that the length of time between Fraser's drafting of the e-mail and when he actually sent it cast doubt on Fraser's subjective belief that anything improper was done. Fraser's concern about the United Nations accounts merely raised questions about the document but never expressed a specific concern of illegality. Therefore, the court granted Fiduciary's motion for summary judgment.

# Reduction in force or age-based discrimination?

**W**hen a reduction in force (RIF) affects an employee in a protected class, it's not unusual for a discrimination claim to arise. The U.S. Court of Appeals for the Seventh Circuit looked at just such a claim in *Martino v. MCI Communications Services, Inc.*

## Mergers and terminations

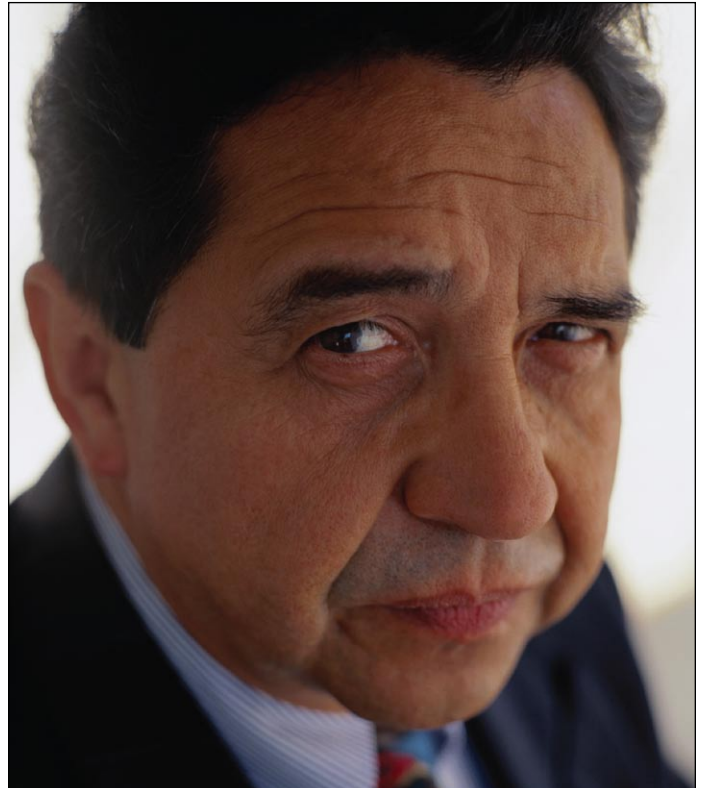
In February 2005, MCI Communications Services hired 54-year-old Guy Martino as business solutions consultant (BSC) in its IT department.

That summer, MCI began negotiations for a deal with British Petroleum. Martino's supervisor on the deal found that, among other things, Martino "did not do an adequate job in assisting the core sales team." Steve Rumstein, the director of Martino's department, agreed. Yet, despite Martino's poor performance, MCI closed the BP deal and Martino received a large commission.

Following MCI's merger with Verizon in January 2006, Verizon did a "redundancy analysis" to identify duplicative positions, which led to a RIF. In addition, MCI was advised that, when Verizon took over, BSCs would receive credit and commissions only for the sale of managed services (where Martino had experienced only limited success), and they would be expected to take a more active role in the sales process.

In June 2006, the RIF took place. Rumstein was asked to submit a list of IT department staff least likely to contribute to the company moving forward. He considered each employee's:

- Geographical coverage (some areas were staffed better than others),
- "Demonstrated ability" to sell the complete product line (with a particular emphasis on managed hosting services),
- Credibility with core sales teams, and
- "Actual sales performance."



Rumstein submitted a list consisting of Martino and five others, ranging in age from 35 to 45, to Ed Franklin, the Vice President of IT Services. And, in July 2006, MCI terminated Martino.

## Direct method

Martino filed a lawsuit, in which he alleged that he had been subject to age discrimination in violation of the Age Discrimination in Employment Act (ADEA). The district court granted MCI's motion for summary judgment, and Martino appealed.

A plaintiff suing under the ADEA may show discrimination directly or indirectly. The court of appeals noted that, in either case, the bottom line is whether the plaintiff has proved intentional discrimination.

Martino first attempted to use the direct method, which required him to offer direct or circumstantial evidence that Verizon's decision to terminate was motivated by age.

Martino contended that his immediate supervisor, Bob Gross, sometimes called him “old timer.”

The court of appeals noted that, because Gross wasn’t a decision maker, these comments were relevant only if Gross had “singular influence” over the decision maker. But, the court explained, even if Gross were prejudiced, there were still two layers of bias-free analysis by Rumstein and Franklin that led to Martino’s termination.

### Indirect method

Martino next attempted to use the indirect method, which required that he establish a prima facie case by proving that: 1) he was a member of a protected class, 2) his performance met the company’s legitimate expectations, 3) despite his performance, he was subject to an adverse employment action, and 4) the company treated similarly situated employees under 40 more favorably. The court of appeals found that Martino couldn’t meet the second or fourth prong.

Although Martino had played a limited role in the BP deal, the court explained, even there his supervisors found that he hadn’t taken an active role in the process. Moreover, Martino’s value to the company was waning because of Verizon’s changes.

Finally, the court noted that a number of younger BSCs had been let go along with Martino and that, while some younger BSCs had been retained, Martino was the sole BSC who had lost the confidence of the core sales teams. Therefore, the court of appeals affirmed summary judgment for MCI.

### RIF tips

In this case, the employer was able to meet this burden because it had thoroughly analyzed the merits and deficiencies of those who were under consideration for the reduction and was able to support its process through objective and quantitative evidence — key tips for any company considering a RIF. ♦

## Imputing ugly staff conduct to the employer

**W**hen can ugly staff conduct toward a fellow employee become imputable to the employer itself? So went the question before the U.S. Court of Appeals for the Fourth Circuit in *EEOC v. Central Wholesalers, Inc.*

### Moving into trouble

Tonya Medley began working for Central in 2002. In September 2004, she moved to the company’s Inside Sales department, where she was one of only two women and was the only African-American woman.

At that office, Medley’s co-workers routinely referred to women in sexually and racially derogatory terms. In addition, one co-worker watched pornography on his computer. Consistent with Central’s antiharassment policy, Medley initially informed her co-workers that she found their conduct and language objectionable. When this failed, Medley complained to her supervisor, Lynette Wright.

Although Wright spoke to Medley’s co-workers, the profanity worsened and the pornography watching continued. When someone else complained, the employee’s Internet was temporarily removed until the company concluded that he hadn’t visited any pornographic Web sites. When the employee got his Internet back, he started watching pornography at his desk again (either over the Internet or otherwise).

*The plaintiff’s co-workers routinely referred to women in sexually and racially derogatory terms.*

Medley then complained to Drew Denicoff, Central’s president, about the profanity and pornography. Denicoff met with the employee and told him that viewing pornography at work wouldn’t be tolerated. The employee denied ever doing

so, and Denicoff believed him. Denicoff also walked around the office looking for offensive materials but found nothing.

### Getting worse

Ten days later, Medley e-mailed Denicoff to complain about a Playboy calendar on the employee's desk. Denicoff visited the office but didn't find the calendar and heard no profanity.

The next day, following a meeting with Medley, Denicoff again walked through the office, but this time he found the Playboy calendar. Denicoff directed the employee to remove it and stop cursing. Denicoff also held an all-employee meeting to reiterate Central's policy prohibiting profanity and racial or sexual slurs.

About three weeks later, the employee placed a screwdriver in a Halloween decoration in a sexually suggestive manner. Wright removed the screwdriver, but the employee put it back. Wright chastised him for this conduct and, thereafter, the employee resigned.

On Nov. 10, Medley went to Central's locksmith to inquire about a customer's lock. The locksmith indicated that he didn't know anything about the lock and, when Medley asked him if he was sure, he yelled at her using, among other things, racial slurs.

Medley complained to Wright and then left for the day. When she got home, she e-mailed Wright and Denicoff again complaining about the comments. The locksmith was given a verbal reprimand and sent to anger management training. But, because Medley never returned to work, Denicoff didn't believe any further action was necessary.

*The EEOC needed to show that the employer knew about the harassment but didn't "respond with remedial action 'reasonably calculated to end the harassment.'"*

### Filing charges

Medley filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), which then initiated this action. The district court granted Central's motion for summary judgment, and the EEOC appealed.



To establish a prima facie case of discrimination, the EEOC must show that the harassment is: 1) unwelcome, 2) based on the employee's gender or race, 3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and 4) imputable to the employer.

The appeals court found that there was no question as to the first three elements. Thus, the key issue was whether the conduct was imputable to Central. To establish this, the EEOC needed to show that Central knew about the harassment but didn't "respond with remedial action 'reasonably calculated to end the harassment.'"

The appeals court noted that Central had made some efforts to end the harassment. Central had a policy in place against discrimination, harassment and retaliation. And Denicoff visited the office and held meetings with the key players.

Yet, the appeals court concluded, a jury might find that Central could have done more. It could have, for instance, issued written reprimands, demoted or suspended the primary offenders, or reduced their pay. Therefore, the appeals court reversed the district court's grant of summary judgment.

### Covering all bases

As this case shows, employers can't take a laissez-faire attitude toward employee harassment. You must cover all your bases or risk a court reaching a conclusion like the one here. ♦

# Ignorance isn't bliss for employer in FMLA lawsuit

The Family and Medical Leave Act (FMLA) was passed into law to, among other things, allow employees to take unpaid leave when facing a serious health crisis. But when a supervisor is ignorant of the protections FMLA provides, it can lead to a lawsuit. That's what occurred in *DeFreitas v. Horizon Investment Management Corp.*

## The circumstances

Nydia DeFreitas was hired by Horizon, a property management company, in June 2004. She received stellar performance reviews and was promoted to manage multiple properties. In May 2005, DeFreitas took maternity leave. When she returned that summer, another company offered her a job at a higher salary. To retain her, Horizon offered her a raise.



In November, DeFreitas informed her supervisor, Mr. Terry, that she'd need six weeks of leave for a hysterectomy. DeFreitas had surgery on Feb. 15, 2006. DeFreitas and Terry remained in contact during her leave, with DeFreitas even doing some work. In March, DeFreitas informed Terry that she'd need the full six weeks of leave. Terry told her not to worry and to get better.

The next day Terry sent DeFreitas an e-mail terminating her employment. The termination didn't comply with Horizon's Manual of Operations, which permits firing without warning only for egregious behavior and emphasized the need for documenting poor performance.

## The lawsuit

DeFreitas filed a lawsuit alleging that Horizon had violated her FMLA rights. The trial court granted Horizon's motion for summary judgment, and DeFreitas appealed.

Generally, an employer can defend an FMLA claim by showing that "the dismissal would have occurred regardless of the employee's request for or taking of FMLA leave." Horizon offered evidence that DeFreitas' performance hadn't been "up to snuff" and she'd had personality conflicts with her staff.

Yet the U.S. Court of Appeals for the Tenth Circuit noted that, while there was plenty of evidence that DeFreitas had been a valued employee, there was no documentation of her alleged poor performance. Nor was there any evidence that Horizon executives were concerned about her job competency.

Also, despite the testimony regarding DeFreitas' allegedly abusive attitude, the court found it strange that Terry would fire DeFreitas without first asking for her version of the events. The timing was particularly suggestive: DeFreitas' termination occurred just one day after she'd told Terry that she'd need to take the full six weeks off.

Finally, the appeals court concluded that one could reasonably believe that an employer ignorant of the FMLA — as Terry admitted he was before DeFreitas complained of her firing — would engage in the very practice the FMLA was enacted to prevent. The appeals court stated that this was supported by the fact that Terry later told DeFreitas' prospective employer that her departure was due to "illness."

Therefore, the appeals court reversed the summary judgment in favor of Horizon and remanded it for further proceedings.

## The lesson

The lesson of this case: Consult with labor counsel before terminating ill or disabled employees. Horizon could have avoided this lawsuit if Terry had had any sensitivity to the company's potential FMLA liability. ♦

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Mr. Monastersky represents public and private employers in state and federal courts in all phases of employment litigation. He also advises employers on avoidance of litigation through counseling and training in the workplace. A member of the ABA, the Connecticut Bar Association, and the Defense Research Institute, Mr. Monastersky is admitted to practice in Connecticut and the United States District Court, District of Connecticut and the United States Court of Appeal for the Second Circuit. He holds a BA cum laude from Tufts University and a JD cum laude from Boston College.

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