

***Wadler v. Bio-Rad Labs* Ruling Counters ‘Violation of Rules’ Argument Trend In Whistleblower Case**

By Mitchell B. Goldberg

INTRODUCTION

In its recent opinion in *Wadler v. Bio-Rad Laboratories, Inc.*, 916 F.3d 1176 (9th Cir. 2019), the United States Court of Appeals for the Ninth Circuit provided important guidance for determining whether provisions of the Foreign Corrupt Practices Act (FCPA) can be considered “any rule or regulation of the Securities and Exchange Commission,” upon which an employee can base a retaliation claim under §806 of the Sarbanes-Oxley Act (SOX)¹.

CASE SUMMARY

In *Wadler*, the plaintiff, Sanford Wadler, former general counsel for the defendant, Bio-Rad, delivered a memo to the Audit Committee of Bio-Rad’s Board of Directors in which he alleged potential violations of the FCPA’s anti-bribery and books-and-records provisions in Bio-Rad’s sales practices in China. Wadler recommended that the company report the suspicions to the government and to the company’s auditors. The chairperson of the Audit Committee told Bio-Rad’s CEO about the memo. Bio-Rad’s CEO expressed concern to the company’s head of HR that Wadler “had been acting a little bizarre lately” and that he might “want to put him on administrative leave.”

Notwithstanding, Bio-Rad hired outside counsel to conduct an investigation. Though the results of the investigation found “no evidence to date of any violation—or attempted violation—of the FCPA,” Wadler was fired. Eventually, Bio-Rad paid the government \$55 million to resolve an investigation into FCPA issues in Vietnam, Thailand, and Russia. Nothing was paid regarding FCPA issues in China.

¹ §806 of SOX prohibits publicly traded companies from retaliating against an employee who lawfully reports “any conduct which the employee reasonably believes constitutes a violation of [statutory provisions dealing with mail fraud, wire fraud, bank fraud, or securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders” 18 U.S.C. § 1514A(a)(1).

In response to his firing, Wadler brought suit seeking compensatory and punitive damages against Bio-Rad, its board of directors, and its CEO, alleging wrongful termination and whistleblower retaliation claims, including under SOX. After trial, the judge instructed the jury as to what constitutes “protected activity” for purposes of SOX. Specifically, the trial court instructed the jury that statutory provisions of the FCPA constitute “rules and regulations” of the SEC for purposes of whether a whistleblower engaged in protected activity under §806 of SOX. Ultimately, the jury awarded Wadler \$10.92 million in compensatory and punitive damages. Following the denial of post-trial motions seeking a new trial, Bio-Rad appealed, *inter alia*², the SOX claim.

In its opinion, the United States Court of Appeals for the Ninth Circuit found that the statutory provisions of FCPA, including the anti-bribery and books-and-records provisions cited in the jury instructions, are not “rules and regulations” of the SEC and that the trial court erred in instructing the jury otherwise. Accordingly, reporting on violations of those provisions would not be considered as protected activity under SOX. In addition to addressing other issues on appeal, the Ninth Circuit vacated the SOX verdict against Bio-Rad and its CEO and remanded it to the district court to consider whether a new trial was warranted in light of the opinion.

Notably, the Ninth Circuit did not order a verdict in Bio-Rad’s favor. This was because the SEC does have regulations governing books-and-records and because, given the evidence, a properly instructed jury could find retaliation took place relating to Wadler’s report to the board’s Audit Committee.

KEY TAKE-AWAYS

Frequently SROs and regulators have argued that violations of statutes constitute violations of SEC rules. The Ninth Circuit Court of Appeals reversal of the SOX verdict in *Wadler* runs counter to that trend, and may provide ammunition to firms responding to actions asserting such violations.

Separately, the *Wadler* case highlights the risk that corporate board members could face by becoming defendants in cases, including whistleblower/retaliation cases. To effectively minimize this risk, corporations need to adopt strong corporate governance practices to prevent misconduct, seek to modify their whistleblower and employment policies to conform to legal and industry standards, and develop robust human resources departments to address employment issues.

² Bio-Rad also appealed a verdict against it on a *Tameny* claim. Ultimately, the Ninth Circuit affirmed that verdict.

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