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California Jury Finds That Bio-Rad Violated The Whistleblower Protections Of The Sarbanes-Oxley Act By Terminating Its General Counsel

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On February 6, 2017, a federal jury in San Francisco, California found that Bio-Rad Laboratories, Inc., a life sciences and clinical diagnostics company, violated the Sarbanes-Oxley Act's whistleblower protections. The violation stemmed from Bio-Rad's decision to terminate its former General Counsel, Sanford Wadler, after he internally reported potential Foreign Corrupt Practices Act ("FCPA") violations to the company's audit committee. *See Wadler v. BioRad Laboratories, Inc. et al.*, No 3:15-cv-2356 Final Verdict Form.

In 2010, Bio-Rad self-disclosed potential FCPA violations it had uncovered to the Securities and Exchange Commission (the "SEC") and Department of Justice ("DOJ"). Four years later, Bio-Rad paid $55.1 million in disgorgement and penalties to the SEC and DOJ in order to settle alleged violations of the FCPA related to this self-disclosure; specifically regarding sales of medical diagnostic and life science equipment to government customers in Russia, Vietnam, and Thailand. In the context of reviewing these alleged FCPA violations, Bio-Rad engaged a law firm to investigate whether the company's China sales team also violated the FCPA. The law firm concluded that the China sales team had not violated the FCPA. However, Wadler still believed Bio-Rad's China sales team potentially violated the FCPA by removing standard anti-corruption language from its distribution contracts, failing to preserve necessary sales records, and giving away items for free, suggesting kickbacks for business opportunities. Wadler reported his suspicions to Bio-Rad's audit committee in February 2013. A subsequent investigation by the same law firm uncovered no evidence of improper payments related to Bio-Rad's China sales. Wadler was terminated in June 2013, about four months after he made his disclosure to the audit committee. Wadler subsequently sued Bio-Rad, alleging wrongful termination and retaliation under the Sarbanes-Oxley Act, among other claims.

The Sarbanes-Oxley Act prohibits regulated companies from discharging, demoting, or discriminating against employees for taking certain lawful actions related to investigations of possible violations of certain laws, rules, or regulations, and enables aggrieved employees to take legal actions for perceived violations of this statute. *See* 18 U.S.C. 1514A. Additionally, section 205.3 of Title 17 of the Code of Federal Regulations requires attorneys who represent public companies and practice before the SEC to report evidence of certain violations of law to the chief legal officer, or, in certain circumstances, the board of directors of the company or a committee of the board. At trial, Wadler relied on the timing of his termination (which followed on the heels of his self-reporting) as well as a falsified negative performance review, which Wadler claimed was generated to "cover up" the company's real reasons for terminating him. Although the review was dated April 2013, metadata showed that it was not created until July of 2013, more than one month after Wadler was terminated. For its part, the company argued that Wadler was hostile and erratic, that his actions were calculated to protect his job, and that Wadler misunderstood the company's business in China, which could have been remedied if Wadler had discussed his concerns with his colleagues.

Following trial, the jury concluded that Wadler's upward reporting of alleged FCPA violations to the audit committee was protected whistleblower activity under the Sarbanes-Oxley Act and that Bio-Rad would not have terminated Wadler had he not reported his suspicions. The jury awarded Wadler $2.96 million in lost wages and stock options

and $5 million in punitive damages.

This verdict illustrates a practical application of the protections of whistleblower statutes and the rights of internal counsel when elevating alleged FCPA or other violations within a company. Regulated companies should take great care and caution when considering disciplinary or termination action against any employee who recently has engaged in protected whistleblower activity. As recent newsletters have recounted, the SEC has devoted considerable energy to enforcing whistleblower-related statutes against companies who employ policies that are perceived to chill employee rights, and private plaintiffs are equally diligent in challenging employer actions in this regard. The risk of punitive damages is very real as this jury verdict highlights.

CATEGORIES: Whistleblower, Regulatory Enforcement Matters
