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SOX Retaliation Case Dismissed— Not Sufficiently Related to Shareholder Fraud

On August 20, 2007, a federal judge in the Southern District of New York dismissed a Sarbanes-Oxley Act retaliation claim against Wyeth Pharmaceuticals Inc., holding that the disclosures made by the former worker in the suit were not sufficiently related to shareholder fraud to be considered protected activities. *Portes v. Wyeth Pharmaceuticals, Inc.*, 2007 U.S. Dist. LEXIS 60824 (S.D.N.Y. Aug. 20, 2007).

Fernando Portes, a former employee, alleged that Wyeth retaliated against him by firing him after he voiced concerns about the company's lack of compliance with a consent decree. At the heart of the case was Wyeth's 2000 consent decree with the U.S. Food and Drug Administration. The consent decree was entered into after the company allegedly failed to comply with regulations involving good manufacturing practices for producing pharmaceutical and biological products. To satisfy the consent decree, Wyeth implemented a Sustainable Compliance Initiative ("SCI"). In 2003, Wyeth hired Portes as Principal Project Manager of the SCI Department at its Pearl River facility and, in 2004, Portes was charged with implementing standards for vaccine testing.

In the lawsuit, Portes claimed he discovered problems with the head of the SCI Department, leading him to believe Wyeth's lab operations violated the consent decree and federal and European Union regulations. Portes informed Wyeth's Director of Quality of his concerns that the head of his department incorrectly certified standard operating procedures and was not qualified to supervise the standards implementation. Portes said that he could correct the problems, but needed additional time to do so. According to Portes, Wyeth retaliated against him by trying to impede his efforts to correct the problems, berating him for criticizing his department head, and ignoring his requests to extend his deadlines for fixing the problems.

Portes was subsequently pressured to resign for allegedly missing deadlines in implementing SCI standards and was placed on a performance improvement plan when he refused to quit. Portes complained that other SCI managers who missed deadlines were not placed on the same plans and asked that the plan be rescinded. Portes proceeded to make additional complaints at Wyeth, alleging the company was violating regulations relating to manufacturing and complaining of "whistleblower retaliation." Wyeth terminated the employment of Portes in 2005. Portes filed a Sarbanes-Oxley Act ("SOX") whistleblower complaint with the Occupational Safety and Health Administration ("OSHA"). Portes alleged Wyeth continued to harass him after his employment termination and further claimed Wyeth's response to his OSHA complaint contained false allegations regarding his work performance.

Wyeth challenged Portes' claim by maintaining he could not show he was engaged in protected activity in that none of his reports were sufficiently related to securities fraud. The Court agreed and dismissed his SOX retaliation claim, finding that SOX is intended to protect employees who report activity they believe is a violation of a SEC rule or regulation or any provision of federal law that relates to securities fraud against shareholders. The Court found Portes' disclosures to personnel at Wyeth were concerned exclusively with violations of regulations governing the manufacture of pharmaceuticals—not potential unfairness to investors. In dismissing his claim, the judge also noted no inference that Portes was concerned with shareholder fraud could have been derived from his job responsibilities or the nature of his work.

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