

# UPDATE: California Federal Court Permits Former Bank Internal Auditor's Whistleblower Claims to Proceed



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A California federal court—in *Erhart v. Bofl Holding, Inc.*, 2017 U.S. Dist. LEXIS 14755, Case No. 15-cv-02287 (S.D. Cal. Sept. 11, 2017)—recently denied Bofl Federal Bank's ("Bofl's") motion to dismiss the Sarbanes-Oxley whistleblower claims plead in their former internal auditor Charles Erhart's amended complaint. The court also denied Bofl's motion as to Erhart's defamation claim, allowing it to proceed, but dismissed Erhart's claims for (i) violation of the Confidentiality of Medical Information Act ("CMIA"); (ii) intentional infliction of emotional distress; and (iii) breach of the implied covenant of good faith and fair dealing.

## **Prior Rulings**

We [posted about this case](#) in March, shortly after the court denied (in part) Bofl's motion for summary judgment. In response to Erhart's complaint, BoFI had filed counterclaims alleging, among other things, breach of a confidentiality agreement predicated on Erhart's self-help appropriation of his employer's documents, and subsequent disclosure of that information to the government and press. Erhart's affirmative defenses were premised on the assertion that his actions constituted

protected activity pursuant to various whistleblower statutes. Bofl moved for summary judgement on Erhart's affirmative defenses. But the court sided with Erhart and ruled, among other things, that a confidentiality agreement was not applicable to communications with the government, and that an employee may be able to engage in limited self-help to the extent necessary to support their allegations.

## **Whistleblower Claims Sufficiently Alleged**

Bofl's motion to dismiss Erhart's amended complaint was pending at the time of that earlier decision regarding Erhart's affirmative defenses. Earlier this month, the court issued its decision denying in part and granting in part Bofl's motion to dismiss. The court applied the same "reasonable belief" standard that had been recognized by the Ninth Circuit in [Rocheleau v. Microsemi Corp., Inc.](#), 680 F. App'x 533, 535 n.2 (9th Cir. 2017) to analyze the whistleblower claims. The court found that Erhart properly alleged he engaged in protected activity by meeting both the subjective and objective components of the reasonable belief standard: that he reasonably believes that the conduct complained of is a violation of the laws enumerated in 18 U.S.C. § 1514A. The court also held he met the other whistleblower pleading requirements by alleging that Bofl knew or suspected that he engaged in the protected activity, that he suffered an adverse action, and that the protected activity was a contributing factor in the adverse action.

## **Erhart's Other Claims Are Dismissed**

The court granted Bofl's motion to dismiss certain of Erhart's claims. First, Erhart had not alleged that Bofl received medical information as required under the CMIA, so his claim for violation of CMIA was dismissed. Second, Erhart failed to plead sufficient facts to overcome the presumption, created by California Labor Code Section 2922, that his employment was at-will, so his claim for breach of the implied covenant was also dismissed. Finally, Erhart's emotional distress claim was barred by the exclusive remedy rule (providing that the California's Workers' Compensation Act is the sole remedy for such claims). Erhart's emotional distress claim did not fall within any exception to the rule. There can be an exception to the exclusive remedy rule if the employer's conduct exceeds the risks inherent in the employment relationship. But the California Supreme Court, in *Shoemaker v. Myers*, 52 Cal. 3d 1, 18 (1990), held whistleblower retaliation is a risk inherent in the employment relationship. The court held that "[t]he kinds of conduct at issue (e.g., discipline or criticism) are a normal part of the employment relationship. Even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the by workers' compensation exclusivity provisions." *Id.* at 25.

## **Outlook**

The outcome of Erhart's whistleblower claims remains to be determined, as this case will now proceed towards trial. As to Bofl's disclosure-related counterclaims, it will be interesting to see whether Erhart can meet his burden of showing that his self-help appropriation should be protected. The court ruled that to make such a showing he must establish that such appropriation was limited to the documents necessary to support his whistleblower claims. We will provide updates as the case moves forward.

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