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## Sarbanes-Oxley Whistleblower Wins Reinstatement and Monetary Damages

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A whistleblower was recently awarded reinstatement and substantial monetary damages in the first successful claim prosecuted against an employer for retaliation under the Sarbanes-Oxley Act of 2002 (*Welch v. Cardinal Bankshares*, 2003-SOX-15 [ALJ Order of Feb. 15, 2005]). This email alert summarizes the nature and magnitude of the damages awarded and highlights the need for companies to carefully handle matters involving whistleblowers.

Over a year ago, a Department of Labor administrative law judge (ALJ) ruled that a small bank had terminated its whistleblower CFO in part because he had complained that the bank's president was overriding internal financial controls and appeared to be engaged in insider trading. Although the CFO's allegations were never proven, he was protected under the Act because the ALJ found that the CFO reasonably believed the veracity of his allegations, which is all that is required by the Act. After a year of unsuccessful interlocutory appeals by the employer and a hearing on damages, the ALJ ruled on February 15, 2005, that the bank must reinstate the CFO to his job, despite hostility toward him by the bank's CEO and board of directors, and despite the fact that an "innocent" replacement had already been hired to fill the job. This is an unusual result, as courts are generally more likely in employment retaliation cases to award the economic equivalent of reinstatement, rather than actual reinstatement.

"[A]lthough [the whistleblower] will be required to report to a CEO and board of directors who have been openly critical of [him] since this litigation was initiated, that circumstance is not sufficiently 'unusual' in the context of a Sarbanes-Oxley whistleblower case to warrant denying him reinstatement," ALJ Stephen L. Purcell ruled in his final order in the case. "Indeed, doing so would send a clear message to other corporate officers that the Act, which was passed by Congress for the express purpose of encouraging employees to disclose conduct which they reasonably believe to be unlawful, does not apply to them."

In addition, the whistleblower received substantial monetary damages. These included special damages such as the cost of conducting a job search, the cost of health insurance premiums and even the cost of travel between his home and a subsequent job that was farther away than the bank. He also received the more traditional damages of back pay, attorneys' fees and costs. The bank has

announced that it plans to appeal the ALJ's order.

This most recent order reinforces the importance of implementing effective non-retaliation policies and obtaining expert advice in handling employee complaints of corporate wrongdoing so as to avoid even the appearance of retaliation. It also stresses the importance of providing employees with prompt and documented performance feedback before claims arise, so that employers can take appropriate disciplinary action without the fear that it may be misconstrued as retaliation. For questions or assistance in reviewing existing non-retaliation policies, planning for how to handle any future employee complaints of corporate wrongdoing or handling a current complaint by an alleged whistleblower, contact any of the authors listed above.

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## *Authors*



**Steven F. Cherry**

PARTNER

✉ [steven.cherry@wilmerhale.com](mailto:steven.cherry@wilmerhale.com)

☎ +1 202 663 6321

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**Thomas W. White**

RETIRED PARTNER

☎ +1 202 663 6000