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## *Sarbanes-Oxley: Five Years Later*

# Trailblazer's Plight Could Deter Future Whistle-Blowers



**Harry Cendrowski**

In August 2002, the Sarbanes-Oxley Act (SOX) was enacted in response to the wave of scandals that stunned the U.S. corporate environment. Five years later, we take a closer look at the whistle-blower protections set forth by two sections of the act (302, which provides a confidential communication channel for employees, and 806, which prohibits retaliatory actions taken against whistle-blowers) and their affect on the state of reporting and the protection of whistle-blowers. These two vital sections of SOX are intended to encourage ethical employees to provide information about potential corporate misconduct without the fear of backlash, the same fear that prevented employees from speaking out against prior corporate disasters.

In late 2002, Cardinal Bancshares CFO David Welch became the first person to garner protection under the whistle-blower provision of SOX after an administrative law judge recommended that his former employer reinstate Welch as CFO and award him back pay for the time he was

laid off. The judge's ruling was an important victory not only for Welch, but also for both companies and investors concerned with corporate malfeasance. According to Welch, he was fired for refusing to endorse the bank's financial statements due to questions surrounding Cardinal's accounting policies and internal controls. The bank refutes Welch's accusations, claiming Welch was fired after he declined to meet with the company's external auditor and company attorney unless his personal lawyer was also present.

Over the next five years, Cardinal would repeatedly deny Welch's reinstatement and back pay, maintaining the judge's recommendation was not an order as defined by the Department of Labor. Recently, Cardinal's steadfastness was rewarded when the Department of Labor's Review Board declined to uphold the preceding judge's recommendation, instead siding with Cardinal.

Welch sought protection under SOX after filing complaints based on three offenses allegedly committed by Cardinal. The Board rejected these complaints, stating the activities were not protected under SOX because they did not relate to the federal securities laws. Welch's numerous rounds of appeals ultimately resulted in a Board decision in favor of Cardinal.

In the more than five years since his struggle began, Welch has lost much more than just his case; the ordeal has been taxing for an unemployed man battling against literally a bank vault. Nearly bankrupt himself, Welch maintains he has been unable to land a position despite pursuing numerous opportunities in finance and accounting. He believes this is because of his reputation as a whistle-blower. In an interview with CFO Magazine Welch says, "I have had numerous interviews that went very well. Then, when

prospective employers began to check references, it was the end. The bank told them I was a whistle-blower. Prospective employers assumed I am not to be trusted. I have a black eye in the accounting and banking industry."

Recently, Welch became a professor at Franklin University, fittingly teaching courses in forensic accounting and ethics. Despite losing nearly everything he once had, Welch remains a staunch advocate of fraud deterrence and claims he would do it all again if given a second chance.

The impact of this case reaches far beyond David Welch's personal struggle. Employees in similar positions might now choose to remain silent, weary of enduring the same woes that plagued Welch. Notwithstanding the legal appositeness of the Review Board's ruling, the impact of Welch's case could severely discourage these future whistle-blowers, thus weakening the impact of SOX legislation.

According to CFO.com, of the nearly 1,000 complaints filed under SOX, not one whistle-blower has survived the appeals process to win the case. The question remains: Who will be willing to come forward now? Will others be willing to risk paying as high a price as Welch?

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