

UPDATE: Second Circuit Vacates Preliminary Injunction Reinstating Whistleblowing Executive Under Sarbanes-Oxley Act

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In May 2005, a Jenner & Block Client Advisory reported that an administrative law judge in the Department of Labor ("DOL") entered a preliminary order that a Connecticut company, Competitive Technologies, Inc. ("CTI"), reinstate two top executives who were allegedly fired for complaining of corporate fraud in violation of the Sarbanes-Oxley Act. When CTI refused to reinstate the executives, one of the executives filed suit in federal court seeking a preliminary injunction requiring CTI to comply with the reinstatement remedy in the preliminary order. The district court issued the requested injunction. CTI appealed, asserting that (1) the court lacked jurisdiction to enforce the preliminary order; and (2) even if the court had such jurisdiction, the DOL's investigation of the executive's complaint violated CTI's constitutional right to due process.

On May 1, 2006, a split panel of the United States Court of Appeals for the Second Circuit vacated the preliminary injunction, and ordered the district court to dismiss the action. *Bechtal v. Competitive*

Technologies, Inc., No. 05-2404-CV, – F.3d – (2d Cir. May 1, 2006). One of the Second Circuit panel judges concluded that the district court lacked power to enforce the order to reinstate the executive because it was just a preliminary order. A concurring Second Circuit panel judge agreed with the order vacating the preliminary injunction and ordering dismissal of the case, but on different grounds. The second justice found it unnecessary to answer the difficult question of whether the district court had authority to enforce a preliminary order of reinstatement under Sarbanes-Oxley. Instead, the concurring judge determined that the government's disclosures to CTI during its investigation of the executives' allegations did not satisfy constitutional due process requirements. A third justice dissented, and would have enforced the preliminary reinstatement order.

The Second Circuit noted that the Secretary of Labor had not issued a final order as of the date of the opinion. When the DOL issues a final order, this case could find itself on appeal once again.

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