

SEC Whistleblower Has Dodd-Frank Claim Dismissed but SOX Claim Survives

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A federal district court recently dismissed a plaintiff's claim of whistleblower retaliation under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") while allowing the plaintiff's whistleblower retaliation claim under the Sarbanes-Oxley Act of 2002 ("SOX") to continue. In [*Jones v. SouthPeak*](#), the U.S. District Court for the Eastern District of Virginia ruled on March 19, 2013, that Andrew Gail Jones had not alleged facts sufficient to form a claim of retaliation under Dodd-Frank. However, the Court rejected two separate arguments brought by the defendants for why Jones' SOX claim should be rejected, and allowed the case to proceed on those grounds.

Jones was employed as the chief financial officer ("CFO") of SouthPeak Interactive Corp. when, in May 2009, she became aware of a discrepancy in SouthPeak's financial reporting, in which Terry Phillips, the company's Chairman of the Board, advanced \$307,400 of his personal funds to enable the stocking of the company's inventory, but did not report this liability in the company's financial statements. Jones made numerous attempts to report the activity internally between June and August of 2009, and finally, on August 12, 2009, filed a complaint with the [Securities and Exchange Commission](#) ("SEC") reporting the company. Just two days later, Jones was terminated.

Jones filed a complaint with the Occupational Safety and Health Administration ("OSHA") of the Department of Labor ("DOL") on October 5, 2009, and on July 23, 2010, after no action on OSHA's part, notified the agency of her intent to remove the case to district court. Jones then filed her complaint alleging [whistleblower retaliation under SOX](#) and Dodd-Frank with the district court on June 18, 2012, almost three years after her alleged retaliation.

The company advanced two theories upon which the district court should dismiss Jones' SOX claim, and one theory upon which it should dismiss Jones' [Dodd-Frank claim](#): (1) Jones failed to exhaust her administrative requirements as to Phillips and SouthPeak's chief executive officer ("CEO"), Melanie Mroz, prior to filing suit; (2) Jones failed to file her complaint within the two-year statute of limitations applicable to fraud claims; and (3) Dodd-Frank should not apply retroactively to retaliation that occurred prior to the passage of the lawsuit. The Court addressed each in turn.

The Court first found that Jones had satisfied the administrative requirement to notify OSHA of the potential parties to the lawsuit by listing them in a paragraph entitled "The names and addresses of the company(s) and person(s) who are alleged to have violated the Act (who the complaint is being filed against)." OSHA then failed to notify the individual defendants that Jones had filed an OSHA complaint against them, but the Court did not find the defendants' lack of notice dispositive. Instead, the Court found that "the key question was not whether the defendant was placed on notice that he had allegedly violated the law, rather the OSHA complaint must serve to put OSHA on notice that it was required to investigate the defendants' actions." The Court further noted that it would "simply be wrong to impute to Jones, OSHA's incompetence."

The Court next rejected the defendants' argument that Jones had failed to file within what they stated should be a two-year statute of limitations. Defendants argued that the statute of limitations should

be derived from 28 U.S.C. § 1658(b), which governs private rights of action involving claims of fraud. The Court found, however, that other courts had restricted the application of the statute of limitations from § 1658(b) to claims that required “proof of fraudulent intent. This requirement does not exist in SOX retaliation claims, which require a plaintiff only to show that she communicated her subjective and objectively reasonable belief that was occurring. Accordingly, the Court found that the two-year statute of limitations provided by 28 U.S.C. § 1658(b) does not apply to SOX whistleblower retaliation claims. Instead, the four-year statute of limitations set forth in 28 U.S.C. § 1658(a) governs.

Finally, the Court dismissed Jones’ Dodd-Frank claim, finding that the Dodd-Frank anti-retaliation provision should not apply retroactively. The Court first noted that courts apply a “robust presumption against statutory retroactivity.” The Court then turned to the inclusion in Dodd-Frank of a provision allowing for retroactivity for violations of securities laws that occurred prior to the passage of the bill. The Court noted that rather than this serving as evidence that the anti-retaliation provision should be applied retroactively, the provision actually “appears to cut against Jones’ argument, because the statutory text limits the retroactivity to violations of the provisions of the securities laws, and not retaliations for reporting them . . . courts have generally been willing to infer an intention not to apply a statutory provision retroactively where other provisions in the same statute have been made explicitly retroactive.” Accordingly, the Court dismissed Jones’ Dodd-Frank claim on the basis that the retaliation alleged occurred prior to the passage of Dodd-Frank.