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Federal Court Decision Emphasizes Importance of Following Whistleblower Procedures

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The Sarbanes Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 each contain provisions that prohibit employers from retaliating against employees because they blew the whistle on securities fraud. While the acts overlap in some ways, they do not cover all of the same conduct nor share the same processes for bringing a claim under each law. A recent opinion from a federal court of appeals emphasized the differences between the two laws and their processes, serving as a reminder to whistleblowers that an employee seeking to assert rights under either law must follow the procedures as outlined in the appropriate statute.

The Sarbanes Oxley and Dodd-Frank Acts

The Sarbanes Oxley Act, commonly known as SOX, was passed in 2002 in an effort to prevent the financial fraud that had recently been discovered in the operations of certain publicly-traded companies such as Enron, which lost its shareholders a combined $74 billion over four years by artificially inflating profits and hiding debts. To encourage employees to report fraud at their companies, Congress included a provision in the law that prohibits employers from retaliating against employee whistleblowers.

SOX's whistleblower protection provision applies to all publicly-traded companies, as well as their subsidiaries, contractors, and certain other affiliated entities. It protects employees who report concerns about, or participate in an investigation relating to, mail fraud, wire fraud, bank fraud, securities fraud, any violations of other rules passed by the Securities and Exchange Commission (SEC), or any other Federal law that protects shareholders from fraud. Employees are protected if they report their concerns internally to a supervisor or other person at their company who has the power to investigate and stop the fraud, or externally to a federal government agency or to Congress. If the employer fires or otherwise retaliates against the employee whistleblower, the employee can then file a complaint with the Occupational Safety and Health Administration (OSHA), which investigates complaints of whistleblower retaliation under SOX as well as similar claims under twenty-one other laws. A SOX retaliation complaint must be filed within 180 days of the termination or other retaliatory action taken by the employer. If the employee proves that they were retaliated against in violation of SOX, the employer can be required to re-hire the employee, pay all of their lost wages, and reimburse the employee for the costs associated with bringing the retaliation claim.

The Dodd-Frank Wall Street Reform and Consumer Protection Act was passed in 2010 in an attempt to prevent a repeat of the 2008 Great Recession. In part, Dodd-Frank strengthened SOX, for example by expanding the period of time in which a whistleblower could file a retaliation complaint with OSHA from 90 days to the current 180 days. But it also created a new program through which the SEC could give monetary awards to whistleblowers who gave the SEC new information about securities fraud, which the SEC or another government entity then used to prosecute a company and recover monetary sanctions of at least $1 million. Additionally, Dodd-Frank included its own provision that prohibits an employer from retaliating against an employee who blows the whistle under the Act. To qualify as a whistleblower under Dodd-Frank, a person must provide information about securities fraud to the SEC (which is done initially via the Form TCR on the SEC's website). Reporting to another government agency or internally within the company is not sufficient, as the Supreme Court made clear in *Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767 (2018). Dodd-Frank therefore protects a much narrower set of whistleblowers than SOX does. However, those who meet the requirements of Dodd-Frank have greater protections, as they can file a lawsuit directly in court without filing a claim with OSHA or the SEC, have up to six years to file suit, and can receive double the amount they lost in wages, plus reimbursement for all litigation expenses and reinstatement to their former job.

Seventh Circuit Draws Clear Distinctions between the Whistleblower Laws and their Procedures

A federal appeals court opinion recently made it clear that although SOX and Dodd-Frank overlap in some ways, they are distinct laws with distinct procedures that whistleblowers must follow to receive each law's protection. The case, *Xanthopoulos v. U.S. Department of Labor*, involved a whistleblower named Apostolos Xanthopoulos, who alleged that he was fired from his job at Mercer Investment Consulting LLC because he had raised concerns about securities fraud both within the company and to the SEC. Mr. Xanthopoulos filed several Form TCRs with the SEC, both before and after he was fired, to report that Mercer was misleading clients with false investment portfolio ratings. In one Form TCR, which Mr. Xanthopoulos filed less than 180 days after being fired, he included information about the securities fraud as well as a statement that he believed Mercer fired him in retaliation for his whistleblowing. More than 180 days after he was fired, he filed a complaint with OSHA that he had been fired in violation of SOX.

OSHA, and then the Department of Labor's Administrative Review Board (ARB), dismissed Mr. Xanthopoulos' SOX complaint because he had filed it more than 180 days after he was fired. Mr. Xanthopoulos argued that his SOX claim should be saved by equitable tolling. The doctrine of equitable tolling allows a person to continue with their lawsuit or administrative action where they have diligently pursued the claim, but have failed to meet the technical requirements for filing the claim on time. For example, sometimes a plaintiff files a lawsuit within the proscribed time limit, but makes a good faith mistake and files that claim in the wrong court. If the plaintiff does not realize their mistake and file the complaint in the correct court until after the time limit on the claim has passed, the correct court can apply equitable tolling, and proceed as if the original (timely) complaint had been filed in the proper court on the original filing date.

Mr. Xanthopoulos argued that he had filed a complaint of whistleblower retaliation within the

correct time limit for SOX, but in the wrong place—he reported it to the SEC via a Form TCR instead of to OSHA. Therefore, he argued that equitable tolling should apply, and make his later complaint with OSHA timely. The ARB rejected this argument, so Mr. Xanthopoulos appealed his case to the Seventh Circuit Court of Appeals. That court agreed with the ARB that the SOX claim must be dismissed because it was filed with OSHA too late. It said that equitable tolling could not apply, because Mr. Xanthopoulos had not simply filed a SOX retaliation complaint in the right time frame but the wrong forum when he submitted a Form TCR to the SEC; rather he had only filed a form asking the SEC to investigate securities fraud.

Considering the statutory frameworks described above, there are three possible actions a securities fraud whistleblower such as Mr. Xanthopoulos can take. If the whistleblower has been retaliated against in violation of SOX, he can file a complaint with OSHA within 180 days. If the individual has been retaliated against in violation of Dodd-Frank, he can file a lawsuit in federal court within six years of the adverse action. And if the individual wants the SEC to investigate the fraud and grant him a whistleblower award under Dodd-Frank, he must fill out a Form TCR. Mr. Xanthopoulos chose options one and three, but his OSHA complaint about the SOX based retaliation claim was untimely. According to the Seventh Circuit, the fact that Mr. Xanthopoulos stated that he suffered retaliation for his whistleblowing on a Form TCR could not toll the limitations period on his SOX claim because it was filed with the wrong agency (the SEC), and more importantly, on a form meant for enforcing a different law. In other words, although both SOX and Dodd-Frank have anti-retaliation provisions, the Form TCR is designed to initiate investigations into the underlying fraud, not to report retaliation against the whistleblower.

Takeaways for Whistleblowers

The key takeaway for whistleblowers is to make sure to file the proper claim in the proper forum, according to the proper procedure, and within the specified time limits. This article provides only a basic overview of SOX and Dodd-Frank, but you can find out more about the SEC Whistleblower Program here and about Dodd-Frank here. Because the procedures can trip up the unwary whistleblower, it is best to seek expert legal advice to make sure no potential remedies are overlooked.