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Seventh Circuit Affirms Grant of Summary Judgment on Terminated CEO's SOX And DFA Claims

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Last week, the Seventh Circuit Court of Appeals held that a terminated CEO's complaints about his board of directors' managerial decisions did not qualify as protected whistleblowing under the Sarbanes-Oxley Act of 2002 ("SOX") nor under the Dodd-Frank Act of 2010 ("DFA"). *Verfuerth v. Orion Energy Sys., Inc.*, No. 16-3502, 2018 WL 359814 (7th Cir. Jan. 11, 2018).

Background. Plaintiff was the founder and former CEO of a company that specializes in energy-efficient lighting. In November 2012, following a series of disputes between Plaintiff and the company's board of directors, Plaintiff was terminated for incurable cause. A year and a half after his termination, Plaintiff brought a lawsuit that alleged that he was retaliated against, in violation of SOX and DFA, for his complaints to various board members about the company's business practices. Practices about which Plaintiff alleged to have complained included attorney over-billing, intellectual property disputes, conflicts of interest, and violations of internal company protocol. The Company moved for summary judgment, arguing in part that Plaintiff's complaints did not qualify as whistleblowing entitled to protection from adverse employment actions.

Rulings. Chief Judge Griesbach granted the Company's Motion for Summary Judgment on Plaintiff's SOX and DFA claims. Chief Judge Griesbach held (1) that SOX protects complaints about securities fraud, not "run-of-the-mill corporate problems," which is what he believed Plaintiff raised here, and (2) that Plaintiff's complaints to various board members about what he thought they should be doing did not amount to whistleblowing, because "[s]imply telling a person he might be committing fraud is not whistleblowing" and "airing concerns is not whistleblowing." *Verfuerth v. Orion Energy Sys., Inc.*, No. 14-CV-352, 2016 WL 4507317 (E.D. Wis. Aug. 25, 2016).

The Seventh Circuit Court of Appeals agreed, holding that "[a]n executive who advises board members to disclose a fact that the board already knows about has not 'provide[d] information' about fraud. At most, he has provided an opinion." *Verfuerth* No. 16-3502, 2018 WL 359814 at *4. The Court emphasized that nothing in SOX, or any other federal statute, prevents a company from firing its executives over differences of opinion.

Moreover, the Court averred that the Plaintiff's theory of liability rested on "feet of clay." The Court reasoned that Plaintiff, as the CEO during the relevant period, bore ultimate responsibility for disclosing material information to the Securities and Exchange Commission ("SEC"). Thus, if the company's failure to disclose the complained-of conduct amounted to securities fraud, then Plaintiff participated in the fraud by filing reports with the SEC that made no mention of these issues. And SOX, according to the Court, does not prohibit a company from firing an executive "who confesses *his own* fraudulent conduct." *Id*.

The Seventh Circuit did not engage with the intricacies of DFA, because it found Plaintiff's DFA theory to be entirely derivative of his SOX theory, which it rejected.

Implications. The Seventh Circuit made clear that SOX does not extend to a company's internal policy disagreements or to the provision of advice about securities disclosures.

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