

Federal Court Allows SOX Whistleblower Claim To Proceed But Dismisses Dodd-Frank Claim

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On October 2, 2018, the U.S. District Court for the Western District of Pennsylvania federal court denied a Rule 12(b)(6) motion to dismiss a SOX whistleblower retaliation claim, reasoning that Plaintiff sufficiently alleged that he engaged in protected activity and that his protected activity was a contributing factor in his termination. But it dismissed the Dodd-Frank whistleblower claim because Plaintiff only provided information to the SEC after his employment was terminated. [*Wutherich v. Rice Energy Inc.*](#), No. 18-cv-200.

Background

Plaintiff worked for Defendant as Director of Completions. He alleged his employment was terminated in order to conceal a report he made to the Chief Operating Officer and President that he believed the Vice President, who was an owner of a company that provided services to Defendant (Silver Creek), “was self-dealing due to his interest in Silver Creek and making bad business decisions as a result. [And] . . . that the selection of Silver Creek constituted a securities violation.” Plaintiff also reported to the same Vice President that Defendant’s 10-k filings with the SEC allegedly failed to list known “theft of trade secrets as one of its liability risks,” and that he believed the failure to disclose was a securities violation. Plaintiff reported these alleged violations to the SEC after his employment was terminated. Following the termination of his employment, Plaintiff filed suit alleging he was retaliated against for engaging in protected activity in violation of the SOX and Dodd-Frank whistleblower protection provisions.

Ruling

Defendant moved to dismiss both whistleblower retaliation claims pursuant to Rule 12(b)(6). With respect to the SOX claim, it argued that Plaintiff did not engage in protected activity and even if he did, he did not allege that the management officials involved in the decision to terminate his employment were aware of his protected activity. In a conclusory fashion, the court found that at this early stage in litigation the Plaintiff had alleged sufficient facts to “support an inference that his communication to [the Vice President] and others in management reflected a reasonable belief that Defendant’s conduct constituted a securities violation and thus was protected activity under [SOX].” Likewise, the court found that Plaintiff alleged “circumstances sufficient to raise an inference that Plaintiffs protected activity was a contributing factor in his termination.” However, the court dismissed the Dodd-Frank claim, ruling that “[b]ecause Plaintiff did not provide information to the [SEC] before his termination, he did not qualify as a whistleblower at the time of the alleged retaliation and is therefore ineligible to seek relief.”

Implications

This is the second district court case in the Third Circuit applying *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018), to alleged Dodd-Frank whistleblowers that report violations to the SEC after their employment is terminated.

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