

# 4th Circuit Vacates ARB SOX Whistleblower Decision for Lack of Protected Activity

**Proskauer Whistleblower Defense** on July 19, 2019

On June 13, 2019, the Fourth Circuit overturned the ARB's decision in favor of a complainant, ruling that the plaintiff had not engaged in protected activity under the SOX whistleblower protection provision by complaining of a company's use of a mandatory arbitration policy that allegedly was overly broad. [Northrop Grumman Systems Corp. v. U.S. Dep't of Labor, No. 17-cv-1811](#). In so ruling, the court recognized important limits on the scope of protected activity under this statute.

## Background

Plaintiff worked in the company's Information Systems business sector testing software related to emergency safety systems. She allegedly sent several emails to company executives reporting what she believed were unlawful practices related to the company's mandatory arbitration policy which she believed was incorporated into a Conflict of Interest form that employees were required to sign. Plaintiff's employment was terminated effective May 17, 2011, due to a reduction-in-force.

Following her termination, Plaintiff filed a complaint with OSHA, which dismissed her claim, and she appealed to the OALJ. An ALJ found in her favor, holding in relevant part that she engaged in protected activity when she complained to company executives that the company's Conflict of Interest form incorporated a mandatory arbitration policy she believed violated SOX, which prohibits mandatory arbitration policies. The company appealed to the ARB, which upheld the ALJ's findings, and then appealed to the Fourth Circuit.

## Ruling

The Fourth Circuit vacated the ARB's order and remanded the case to the ALJ with instructions to dismiss Plaintiff's complaint and enter judgment in favor of Northrup. The court concluded that Plaintiff did not engage in protected activity under SOX because her complaints about the company's arbitration policy bore no relation to any of the six enumerated categories of misconduct entitling employees to whistleblower protection under SOX (*i.e.*, mail fraud, wire fraud, bank fraud, securities fraud, any SEC rule or regulation or any federal law relating to fraud against shareholders). The Court further concluded that even if Plaintiff's report had related to one of those types of misconduct, she lacked an objectively reasonable belief that the company's Conflict of Interest form contained an unlawfully broad arbitration policy because (1) the form contained no reference to the arbitration policy, and (2) the arbitration policy explicitly carved out claims "to which an agreement to arbitration . . . is prohibited by law."

## Implications

This decision clarifies important limits on the scope of protected activity under Section 806 of SOX, confirming SOX does not extend whistleblower protection to complaints about any form of purportedly improper conduct. It underscores that complaints which are unrelated to one of the six categories of misconduct specified in SOX will not qualify as protected activity under SOX.

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