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ARB Affirms Dismissal of SOX Whistleblower Claim Against Non-Public Companies

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

The ARB recently affirmed the dismissal of a whistleblower retaliation claim under Section 806 of SOX, holding an employer is not a "contractor" covered by SOX simply because it was a party to a contract with a publicly traded company. *Griffo v. Book Dog Books, LLC, Robert William Holdings, LLC & Robert William Mgmt., LLC*, ARB Case No. 2018-0029 (May 2, 2019).

Background

Respondents are private companies in the business of selling and renting text books. They entered into contracts to sell and rent books through a publicly traded retailer. They also entered into contracts to maintain accounts and a line of credit with a publicly traded financial institution. Complainant was the CFO of Respondent Book Dogs Books. He allegedly complained about financial and inventory inconsistencies at Book Dog Books and, shortly thereafter, his employment was terminated. He filed a complaint with OSHA claiming his discharge constituted retaliation in violation of SOX's whistleblower protection provision. After OSHA dismissed his complaint, an ALJ granted Respondents' motion for summary judgment, holding they were not covered employers under SOX because they were not publicly traded and Complainant did not provide any services to a public company. Complainant appealed to the ARB.

Ruling

The ARB affirmed the ALJ's decision, finding Respondents' relationships with the two public companies were insufficient to render them covered "contractors" under SOX. The ARB explained that, following the U.S. Supreme Court's decision in *Lawson v. FMR* (2014) (discussed here)—which extended SOX's whistleblower protection to employees of a publicly traded company's contractors and subcontractors—courts considering the meaning of "contractor" under SOX have held that an employer is not a covered "contractor" simply because it has entered into a contract with a publicly traded company. The ARB ruled that "at a minimum, a 'contractor' under [SOX's whistleblower provision] must actually perform a service for a publicly traded company." The ARB concluded that since Respondents were only customers of the public companies, and did not provide any services to them, they were not covered by SOX.

Implications

This decision reflects the ARB's recognition of basic and necessary limitations on the U.S. Supreme Court's decision in *Lawson*.

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