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Texas District Court Dismisses SOX Whistleblower Claim for Lack of Employer-Employee Relationship

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On June 12, 2020, the U.S. District Court for the Southern District of Texas granted a motion to dismiss in favor of the defendant in a SOX whistleblower retaliation case, finding that the alleged whistleblower – a contractor and advisory board member of the defendant – was not an employee of the defendant, as required by SOX. *Moody v. American National Insurance Co.*, No. 3:19-cv-00206 (S.D. Tex. June 12, 2020).

Background

Plaintiff brought suit against the American National Insurance Company ("ANICO") after he was allegedly retaliated against for complaining about the company's purported SEC violations and bringing a related shareholder-derivative suit. Specifically, Plaintiff claimed that he experienced retaliation when ANICO: (1) removed him from his position as an advisory board member, (2) canceled contracts with his insurance company, and (3) announced the termination of an office-space lease in one of his company's buildings.

ANICO filed a motion to dismiss, arguing that Plaintiff is not an employee, and therefore, not within the class of persons that SOX protects. In response, Plaintiff argued that as "an Advisory Director of ANICO … [and] an insurance agent selling insurance for and on behalf of ANICO as a contractor," he is a covered employee under SOX. Plaintiff relied on the U.S. Supreme Court's decision in *Lawson v. FMR* (2014) (discussed here), which extended the class of people protected by SOX to include not only those employed by the public company itself, but also potentially employees of contractors and subcontractors who perform work for the pubic company. According to Plaintiff, *Lawson* held that SOX protects a public company's contractors and agents – and that he was therefore protected from retaliation under the statute.

Ruling

The court sided with ANICO, holding that "retaliation plaintiffs must be employees of the defendant they sue, whether that defendant-employer is the public company itself or one of its contractors." In other words, according to the court, the employer-employee relationship is an "essential element" of a retaliation claim.

Because Plaintiff never asserted that he had an employment relationship with ANICO, he cannot state a SOX retaliation claim against the company. Without further factual support of an employer-employee relationship, it is not enough that Plaintiff claimed that he is the "functional equivalent of an employee" in his role as "an agent, contractor, or subcontractor of ANICO." Plaintiff's service as an advisory board member was also found insufficient to give rise to an employer-employee relationship. Despite the fact that a corporate director is not disqualified from becoming an employee of the corporation, according to the court, "it is 'hornbook law' that a corporate director is not, simply by virtue of his position, an employee."

Implications

Although *Lawson* greatly expanded the potential universe of companies covered by SOX's whistleblower provision, this case is a reminder that there are meaningful limitations to its reach – including the requirement that an employer-employee relationship exist in order for a whistleblower to state a claim under the statute.

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