

ARB Denies Equitable Tolling of 180-Day Statute of Limitations Under SOX

Proskauer Whistleblower Defense Blog on **August 5, 2020**

On June 29, 2020, the Administrative Review Board (“ARB”) upheld the dismissal of a whistleblower retaliation complaint under Section 806 of the Sarbanes-Oxley Act (“SOX”) for failure to file within the 180-day statutory deadline. [Xanthopoulos v. Marsh & McLennan Companies, Inc.](#), ARB Case No. 2019-0045 (June 29, 2020).

Background

Complainant was an employee of Mercer Investment Consulting, an operating company owned by Marsh & McLennan Companies. Complainant was fired on October 3, 2017, and though he made several filings with the SEC, he did not file his complaint with OSHA until 350 days later on September 18, 2018. As a result, OSHA dismissed the complaint as untimely, and the Administrative Law Judge (“ALJ”) agreed, holding that Complainant’s claims did not merit equitable tolling of the 180-day statute of limitations under SOX. Complainant petitioned the ARB for review.

Ruling

The ARB noted that there are four situations in which equitable tolling of the SOX statute of limitations is appropriate: 1) when the defendant has actively misled the plaintiff with respect to the cause of action; 2) the plaintiff has in some extraordinary way been prevented from asserting his rights; 3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum; and 4) the employer’s acts or omissions have lulled the complainant into forgoing prompt action to vindicate his rights.

Complainant argued that his SEC filings were actually SOX claims filed in the wrong forum, due to his mistaken belief that the SEC would investigate his retaliation claims. According to Complainant, he was not aware until August 2018 that the SEC was not responsible for investigating his allegations of retaliation.

The ARB rejected these arguments. In his SEC filings, though Complainant stated that his termination was retaliatory, he did not seek employment-based remedies such as reinstatement, back pay or other damages associated with his termination. Instead, his only mention of monetary relief was in seeking an award under the SEC’s Whistleblower Program, which rewards individuals with a percentage of any money collected due to a SEC enforcement action based on information they provide. Thus, the ARB found that based on Complainant’s filings, his complaints were concerned more with potential harms to the investing public than those resulting from his termination.

In addition, Complainant stated in his SEC filings that he would “keep the SEC posted of [his] legal actions” regarding “this possible case of sexual harassment, wrongful termination, and/or illegal retaliation under the whistleblower protection of the Dodd-Frank Act.” The ARB found that these statements demonstrated that Complainant was aware that the SEC’s investigation was separate and would not cover any employment-related claim under SOX. Furthermore, Complainant admitted to discussing his situation with a member of a civil rights organization he was a part of, who advised him that he should file a claim regarding his discharge with OSHA. Thus, the ARB concluded, “it is clear that Complainant did not mistakenly file a SOX whistleblower claim with the SEC, but deliberately filed with the SEC a non-SOX claim for the purpose of remedying Respondent’s wrongful conduct that he complained of and seeking a whistleblower award.”

Implications

This decision reinforces that the 180-day statute of limitations for SOX whistleblower retaliation claims is strictly construed and equitable tolling of this deadline will only be granted in narrow circumstances.

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