

ARB Affirms Dismissal of SOX Whistleblower Claim for Lack of Protected Activity

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On December 17, 2020, the Administrative Review Board (“ARB”) of the U.S. Department of Labor affirmed the dismissal of a former employee’s whistleblower retaliation claim under Section 806 of SOX. The ARB concluded that the Complainant did not engage in protected activity, noting that his complaints regarding a lack of what he characterized as “internal controls” were inadequate. The ARB also concluded that the Respondent showed it would have terminated Complainant’s employment even in the absence of his alleged protected activity. [Thibodeau v. Wal-Mart Stores, Inc.](#), ARB Case No. 2017-0078.

Background

Complainant worked for Respondent as a Senior Estimator, with responsibility for evaluating contractors’ requests for additional payments. When Complainant’s supervisor cancelled the licenses for certain estimating software, he escalated concerns to management because he believed the software was essential for reviewing payment requests. After Complainant successfully negotiated a lower license rate, Respondent renewed the software. Throughout the following several months, Complainant’s supervisors brought numerous performance issues to his attention, issued him three levels of coaching under Respondent’s progressive discipline policy, and notified him that his employment was subject to termination if issues continued. Later that year, Complainant raised concerns that a contractor’s payment request was deficient, resulting in a contentious telephone conversation with the contractor. This incident prompted an automatic third-strike-and-out termination of Complainant’s employment.

Complainant filed a complaint with OSHA claiming that his termination violated SOX’s whistleblower protection provision. After OSHA dismissed the complaint, an ALJ conducted a hearing and similarly dismissed the complaint. Complainant then appealed to the ARB.

Ruling

The ARB affirmed, finding that: (1) Complainant did not engage in protected activity, and (2) Respondent nevertheless would have terminated Complainant's employment in the absence of his alleged protected activity, as evidenced by Complainant's progression through the discipline policy.

Notably, the Complainant argued that reviewing contractors' additional payment requests was a part of the internal controls over financial reporting, and that he therefore engaged in protected activity when he complained about the software license cancellation and reported deficient contractor requests. The ARB ruled, however, that internal operational and managerial controls are distinguishable from internal controls over financial reporting. The ARB concluded that Complainant's payment request reviews are a cost-saving endeavor for Respondent, and thus fall outside the scope of the SEC's rules for internal controls over financial reporting. The ARB further held that, although Complainant subjectively believed the conduct he was reporting constituted a violation of SEC regulations, that belief was not objectively reasonable.

Of significance, the ARB also clarified its position regarding what constitutes "protected activity" under SOX. The ARB previously held in [Sylvester v. Parexel Int'l LLC](#), No. 07-123 (ARB May 25, 2011), that an employee's complaint need not "definitively and specifically" relate to an enumerated legal violation, and that complainants only had to show that they reasonably believed the conduct complained about violated one of the laws enumerated in SOX. Here, the ARB clarified that the standard established in *Sylvester* should not be interpreted to convert SOX into a general anti-retaliation statute. Rather, complainants must still provide information regarding conduct that they reasonably believe constitutes a violation of one of the legal violations enumerated in SOX. The ARB further clarified that an ALJ may consider, as part of the totality of the circumstances, evidence relevant to particular elements of the enumerated law when deciding if it was reasonable for the employee to believe that the law had been violated.

Implications

This decision is a valuable win for employers, as it clarifies what a complaint regarding a lack of internal controls must include and fortifies the rule that SOX is not a general anti-retaliation statute, despite the standard articulated in *Sylvester*.

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