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7th Circuit Affirms Denial of Equitable Tolling of Statute of Limitations Under SOX

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On March 22, 2021, the Seventh Circuit affirmed a decision by the ARB dismissing a whistleblower retaliation complaint under SOX for failure to file within the 180-day statutory deadline. *Xanthopoulos v. U.S. Department of Labor*, No. 20-2604. The court rejected the plaintiff's equitable tolling arguments.

Background

Plaintiff was an employee of an investment company, and his employment was terminated on October 3, 2017. Prior to and after his discharge, Plaintiff filed several reports on the SEC's whistleblower website by submitting a "tips, complaints, and referrals" electronic form ("TCR Form"). The TCR Forms focused on allegations that Plaintiff's employer was engaged in securities fraud by manipulating investment portfolio ratings and disseminating those ratings to clients.

On September 18, 2018, Plaintiff filed a complaint under SOX with OSHA. Plaintiff renewed his securities fraud claims and alleged that his employer violated SOX's anti-retaliation provision by terminating him. OSHA dismissed the complaint as untimely because Plaintiff filed 350 days after his termination, which was outside SOX's 180-day statute of limitations. Plaintiff appealed the decision, arguing that the statute of limitations should be equitably tolled because the TCR Forms he submitted to the SEC constituted SOX claims mistakenly filed in the wrong forum. The ARB dismissed his claims and Plaintiff appealed. (We previously covered the ARB's decision here.)

Ruling

On review, the Seventh Circuit held that equitable tolling due to a mistakenly filed claim was warranted only if a plaintiff could demonstrate that he had “raised the precise statutory claim in issue but done so in the wrong forum.” If, instead, the earlier, timely-filed claim has remedies that are “separate, distinct, and independent” from those of the untimely claim, the two claims are distinguishable, and the statute of limitations is not tolled.

The Seventh Circuit agreed with the ARB that Plaintiff did not seek employee-based remedies available under SOX in his TCR Forms, such as reinstatement, back pay, or other damages associated with his termination. Instead, Plaintiff repeatedly referenced Dodd-Frank and sought a whistleblower award, which is only available under Dodd-Frank, not SOX. The Seventh Circuit found that Plaintiff sought not to “vindicate his right to be free from retaliation under Sarbanes-Oxley … but rather to prosecute [his employer’s] securities fraud, a separate and independent remedy.” The court concluded that Plaintiff’s filings did not constitute the “precise statutory claim” mistakenly filed in the wrong forum, and thus, equitable tolling of SOX’s 180-day statute of limitations was not warranted.

Implications

The Seventh Circuit’s decision highlights notable distinctions between SOX and Dodd-Frank. Though both statutes contain anti-retaliation provisions, the two differ in important respects. For example, Dodd-Frank authorizes an aggrieved employee to file directly in federal court, while SOX requires a claim to be filed first with OSHA. In addition, SOX provides standard employment-based remedies, such as reinstatement, backpay, and other damages. Dodd-Frank goes further and permits the SEC to provide a whistleblower award of up to 30% of the total monetary sanctions resulting from the whistleblower’s complaint. As this decision illustrates, a plaintiff who seeks to recover under Dodd-Frank by submitting TCR Forms may not later assert that he or she was actually making a SOX claim all along.

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