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DC Circuit: SOX's Anti-Retaliation Provision Does Not Apply Extraterritorially

Proskauer Whistleblower Defense on **February 14, 2023**

As we previously reported, on February 13, 2020, an Administrative Law Judge (ALJ) of the Department of Labor (DOL) dismissed a former in-house attorney's whistleblower claims because he worked entirely outside of the United States. On December 23, 2022, the D.C. Circuit unanimously affirmed, holding that SOX's anti-retaliation provision does not apply extraterritorially. *Garvey Morgan Stanley*, No. 21-1182.

Background

In 2006, Complainant began working in Tokyo for a foreign subsidiary of a U.S. company. In 2011, he began working for a different foreign subsidiary of the same U.S. company and relocated to Hong Kong. In February 2016, Complainant claimed that he was constructively discharged after he objected to certain conduct that he believed was in violation of the U.S. Foreign Corrupt Practices Act and other laws.

In August 2016, Garvey filed suit under SOX's anti-retaliation provision (Section 806), and the company moved to dismiss on the grounds that the ARB's decisions in *Hu v. PTC, Inc.* , ARB Case No. 2017-0068 (Sept. 18, 2019) and *Perez v. Citigroup, Inc.*, ARB Case No. 2017-0031 (Sept. 30, 2019) precluded extraterritorial claims under Section 806. The ALJ adopted the Board's analysis in *Hu* and *Perez*, holding that "(1) Section 806 lacks extraterritorial reach, and (2) Garvey, like Hu, was a foreign-based worker at a foreign subsidiary employed entirely outside of the United States who could not allege a domestic application of Section 806."

After unsuccessfully seeking review of the ALJ's decision by the Board, Complainant appealed to the D.C. Circuit. He argued that his complaint stated a viable cause of action because the primary focus of SOX's anti-retaliation provision is to prevent corporate fraud and his allegations of fraud affecting U.S. securities markets were sufficient to establish a domestic nexus. Complainant also argued that, upon filing his complaint, the U.S. company had harassed his attorneys, which itself constituted an adverse employment action and a domestic application of SOX.

Ruling

The D.C. Circuit denied Complainant's petition for review and affirmed the Board's judgment. The court held that "the text, context, and legislative history of Section 806 do not contain a clear, affirmative indication that the statute applies extraterritorially." The court found unconvincing Complainant's arguments that the scope of Section 806 was limited by definitions that had specific extraterritorial reach and that Section 806 incorporated predicate statutes that had extraterritorial reach. In addition, the court concluded that the clear focus of Section 806 was on regulating employment relationships and not on preventing corporate or securities fraud violations. Thus, given Garvey's undisputed employment abroad, the court found that this case did not involve a domestic application of Section 806.

Finally, the court deemed irrelevant the alleged post-termination harassment of Complainant's attorneys by the U.S. company. The court noted that this was not an adverse employment action or domestic application of Section 806 because it has arisen after Complainant's employment ended and there was no evidence it would affect his future employment opportunities.

Implications

The D.C. Circuit's decision confirms that employees of multinational employers who live and work abroad cannot invoke the whistleblower protections of SOX.

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