

Texas District Court Grants Summary Judgment on SOX Whistleblower Counterclaim

Proskauer Whistleblower Defense on **September 10, 2024**

On August 6, 2024, the U.S. District Court for the Northern District of Texas granted an employer's motion for summary judgment on a SOX whistleblower retaliation counterclaim, holding that the former employee failed to establish any of the elements of the claim and that the company would have taken the same personnel actions regardless of whether he engaged in protected activity. [Architectural Granite & Marble, LLC v. Pental](#), No. 20-cv-295-L.

Background

An employer sued a former employee for breach of confidentiality provisions in various agreements after he allegedly used sensitive company information to create and work for a competing company. In response, the former employee asserted a counterclaim alleging that he was retaliated against in violation of SOX. He contended that there was a concerted retaliatory effort to force him out of the company after he reported to management that the company had misrepresented its financial condition in SEC filings by artificially inflating revenue in accounting records in anticipation of going public.

Ruling

The court granted the company's motion for summary judgment and dismissed the SOX counterclaim. The elements of a SOX retaliation claim are: (i) the employee engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employee suffered a materially adverse employment action; and (4) the protected activity was a contributing factor in the adverse action. The court concluded that the former employee failed to present evidence that would raise a genuine dispute of material fact regarding the third element of his SOX retaliation claim—that he suffered a materially adverse employment action—because each of the alleged adverse actions on which he relied (such as excluding him from calls and meetings, fabricating false performance deficiencies, and threatening to demote him and reduce his salary) were not supported by competent summary judgment evidence.

The court also held that even if the former employee had satisfied all of the elements for his SOX retaliation claim, his claim still failed because the company had established that it would have taken the same personnel actions in the absence of any protected activity.

Implications

This case is unusual in that a whistleblower retaliation claim was brought defensively as a counterclaim in response to a lawsuit initiated by an employer against a former employee. This decision underscores that regardless of the procedural posture, a purported SOX whistleblower will need to establish every element of the claim.

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- **Lloyd B. Chinn**
Partner