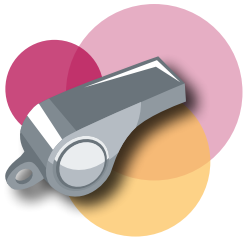
SEYFARTH SHAW



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Four Years to Sue on SOX Claim Withdrawn from OSHA

By Christopher F. Robertson and Craig B. Simonsen

The Fourth Circuit Court of Appeals recently ruled that a Sarbanes-Oxley Act (SOX) claim initially timely filed with OSHA and then withdrawn falls within 28 U.S.C. § 1658(a), the "catch-all limitations period," which provides a four year limitations period. *Jones v. SouthPeak Interactive Corp. of Del.*, No. 13-2399 (4th Cir., 1/26/15).

In this case, SouthPeak Interactive Corp. (SouthPeak), a video game publishing company, fired its chief financial officer after she raised concerns about an alleged "misstatement" on one of the company's filings with the Securities and Exchange Commission (SEC). At trial, the jury found that the company and two of its senior officers violated the anti-retaliation provisions of SOX, and the district court awarded the chief financial officer more than half a million dollars in back pay and emotional distress damages.

In reaching the merits of the claim, the district court rejected SouthPeak's argument that a two-year limitations period for private actions that involve "a claim of fraud" in violation of federal securities laws applied to complaints that have been timely filed with OSHA, but then withdrawn under the so-called "kickout" provision of SOX. SOX's kickout provision allows a claimant to withdraw an unresolved complaint from OSHA's administrative process as a matter of right after 180 days. In the SouthPeak case, the plaintiff timely filed the claim with OSHA, but then withdrew her claim and did not file in the district court until almost three years after her termination and over two years after withdrawal.

The Appellate Court found that the plaintiff's SOX retaliation claim was subject to 28 U.S.C. § 1658(a), the catch-all limitations period, and because the plaintiff "brought her suit within that section's four-year window, her claim is not barred."

The court also rejected SouthPeak's argument that emotional distress damages aren't available on successful SOX retaliation claims. The Fourth Circuit noted that the statute expressly entitles a prevailing plaintiff to receive "all relief necessary to make [her] whole," citing to 18 U.S.C. § 1514A(c)(1), which states that "an employee prevailing in any action under [the Act] shall be entitled to all relief necessary to make the employee whole." Two federal Circuit Courts as well as the Administrative Review Board of the Department of Labor had previously

concluded that emotional distress damages are available. *See Halliburton, Inc. v. Administrative Review Board*, 771 F.3d 254 (5th Cir. 2014), and *Lockheed Martin Corp. v. ARB*, 717 F.3d 1121 (10th Cir. 2013); *Kalkunte v. DVI Financial Svs., Inc.*, 2004-SOX-056, ARB Case Nos. 05-139 & 05-140 at * 15 (Feb. 27, 2009) (upholding an ALJ's award of compensatory damages under SOX for "pain, suffering, mental anguish . . . and humiliation."); *Brown v. Lockheed Martin Corp.*, 2008-SOX-0049 (Jan. 15, 2010) (awarding complainant $75,000 in compensatory damages under SOX for depression and loss of self-esteem).

It important to note that the plaintiff here did file an administrative complaint within the time periods provided under SOX, and then withdrew the administrative complaint after 180 days, as permitted by SOX. Nothing in the Fourth Circuit's decision obviates the need for a plaintiff to initially file with OSHA within 180 days. However, once the complaint is withdrawn, the Fourth Circuit has concluded that there is no immediate timeframe within which the claim must then be filed in federal court as long as it is filed within four years after the claim accrues.

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