

Fifth Circuit Revives SOX Whistleblower Claim But Rejects Allegations Not Exhausted Before OSHA

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In [Wallace v. Tesoro Corp.](#), the Fifth Circuit revived a SOX whistleblower complaint that was dismissed by the U.S. District Court for the Western District of Texas, finding that the plaintiff's alleged belief that the company violated SEC rules was not objectively unreasonable (as plead in the complaint). (Case No. 13-cv-51010, July 31, 2015). The Fifth Circuit also affirmed the dismissal of claims not included in the OSHA complaint on the grounds that they were not administratively exhausted.

Background

Kevin Wallace (Plaintiff), formerly Vice President of Pricing and Commercial Analysis at Tesoro (Company), filed a complaint with OSHA alleging that the Company retaliated against him for engaging in protected activity in violation of Section 806 of SOX. Among other alleged protected activity, Plaintiff claimed that the Company retaliated against him after he complained that the Company allegedly counted taxes as revenues on certain financial forms in violation of GAAP.

After OSHA dismissed the complaint, Plaintiff kicked his case out to federal district court, and subsequently filed amended complaints, alleging the same categories of protected activity as in his OSHA complaint but also alleging—for the first time—that he engaged in protected activity when he investigated and reported suspected wire fraud. The Company successfully moved to dismiss: the district court found that Plaintiff's purported belief that booking taxes as revenue violated SEC rules was objectively unreasonable and that his other allegations did not reflect protected activity. The court also dismissed Plaintiff's claim relating to wire fraud because it alleged activity outside the scope of the OSHA complaint.

Fifth Circuit's Ruling

The Fifth Circuit ruled that the district court erred in dismissing Plaintiff's claim that he engaged in protected activity under Section 806 of SOX when he reported that the Company booked taxes as revenue. In doing so, the court noted that there was an issue as to the level and role of Plaintiff's accounting expertise. However, the Fifth Circuit affirmed the dismissal of Plaintiff's allegations that

were not raised before OSHA, holding that the exhaustion requirement applicable to Title VII claims filed with the EEOC applies with equal force to SOX claims filed with OSHA. Specifically, the court stated:

The OSHA investigation prompted by this complaint could not reasonably be expected to extend to Wallace's belief that Tesoro was committing wire fraud through other practices We have similarly held that an EEOC complaint alleging sex discrimination would not reasonably lead to an investigation that would encompass race discrimination as a motivation for the same adverse action. By failing entirely to reference a distinct category of protected activity in his OSHA complaint, Wallace did not file a complaint whose investigation would reach that activity.

Implications

This case underscores the potentially broad reading courts may give to SOX's reasonableness standard in the Rule 12(b)(6) motion to dismiss context (this is an issue on which the Company could still prevail at later stages in the case) but it is a welcome development for employers insofar as it underscores the fatal implications of failing to exhaust claims.

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