

THE NATIONAL LAW REVIEW

SDNY Dismisses SOX and Dodd-Frank Whistleblower Claims Against Private Company

Wednesday, June 19, 2019

On June 3, 2019, the U.S. District Court for the Southern District of New York granted a defendant-employer's motion for summary judgment on SOX and Dodd-Frank whistleblower retaliation claims, finding that the alleged whistleblowing did not involve fraud related to a public company. [Tellez v. OTG Interactive, LLC, No. 15-cv-8984](#).

Background

Defendants operate restaurants and concession facilities in airports via iPad stations, which allow patrons to order food, access the Internet, and check their flight status. Plaintiff was hired as President of one of the Defendant entities that develops and provides the software used by the iPad stations. Shortly after Plaintiff was hired, Defendants decided to begin a "model test" to explore whether Defendants could generate additional revenue by offering video game accessibility on the iPads for a small fee. The test began in a Delta Airlines concourse on devices displaying the Delta logo.

Approximately one month after the "model test" was implemented, Plaintiff allegedly learned that the payroll software responsible for launching the video games on the iPads created a potential violation of third-party licensing agreements with the game manufacturers. Plaintiff alleged that he informed Defendants' General Counsel, Chief Technology Officer, and Chief Executive Officer that the payroll was fraudulent and illegal. Plaintiff's employment was terminated shortly thereafter (two months after his hiring). Plaintiff filed suit claiming he was retaliated against in violation of SOX and Dodd-Frank for reporting this allegedly fraudulent scheme.

Ruling

Defendants moved for summary judgment, arguing they are not covered by SOX because they are not publicly traded companies and were not acting on behalf of Delta (a public company) by implementing the payroll system on iPads displaying the Delta logo. Plaintiff relied upon [Lawson v. FMR LLC \(2014\)](#) (discussed [here](#)), arguing that a private contractor need not act on behalf of a public company for SOX's protections to apply and that Defendants' contractual relationship with Delta itself was sufficient to warrant coverage under SOX.

The court disagreed with Plaintiff, however, and dismissed the SOX claim, holding that a contractual relationship alone is insufficient to impose liability upon a private company under SOX. The court explained that while Delta stood to benefit from its contractual relationship with Defendants, Plaintiff offered no evidence that could lead a reasonable juror to infer that the payroll model test was undertaken on behalf of Delta, or that Delta had any specific involvement with the program. The court added that imposing liability under these circumstances would be inconsistent with SOX's purpose, since the alleged fraudulent activity did not relate to a public company. Finally, the court clarified that Dodd-Frank only protects against retaliation for making disclosures required under SOX, and because Plaintiff made no such disclosures to the SEC, the Dodd-Frank claim should also be dismissed.

Implications

This decision limits the risk that private contractors would be subject to whistleblower liability under SOX merely because they engage in business arrangements with public companies.



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