

[Securities Regulation Daily Wrap Up, WHISTLEBLOWER NEWS—N.D.Tex.: Who's the boss? Whistleblower did not sue his 'employer', \(Mar. 27, 2023\)](#)

Securities Regulation Daily Wrap Up

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By [Rodney F. Tonkovic, J.D.](#)

A whistleblower's claim under SOX failed because the named defendant company was not the "employer" that fired him.

A whistleblower's case was dismissed because he failed to sue his employer. The whistleblower claimed that he was terminated in retaliation for his concerns about "creative accounting" and brought this action under the Sarbanes-Oxley whistleblower protection provision. That provision, however, protects "employees." In this case, the whistleblower worked for a subsidiary of a holding company owned by the defendant company, and the court found that whistleblower failed to plead that his employer was one of the named defendants ([Vuoncino v. Forterra, Inc.](#), March 23, 2023, Kinkeade, E.).

The players. Defendant Forterra, Inc. is a Texas-based manufacturer of pipe and other products for water and drainage infrastructure systems. In April 2016, Forterra acquired United States Pipe Holdings, Inc. ("USP Holdings") and its subsidiaries, U.S. Pipe Fabrication ("USP Fabrication") and United States Pipe and Foundry Company, LLC ("USP Foundry"). The whistleblower plaintiff began working for USP Fabrication as a consultant, and by July 2016 managed the total network of USP Fabrication branches nationwide.

"Creative accounting." In 2016, the plaintiff observed a trend by Forterra to accelerate quarterly revenue in a way that would inflate net earnings. In an October 2016 meeting, the plaintiff voiced his concerns over the company's plan to use "creative accounting" to inflate earnings by \$12 million and show a much greater profit margin. Soon afterwards, the plaintiff learned that a rebate would be recognized as immediate profit, rather than when the pipe was actually sold, and was told that the decision "came from above" when he objected. At this time, the plaintiff expressed his concerns to a Forterra executive.

In early 2017, the plaintiff became concerned that the company was shipping pipe from USP Foundry to USP Fabrication as a way to "cook the books" via inventory shifting. He again expressed his concerns to Forterra's CEO and another executive to no avail.

The plaintiff was fired on January 20, 2017. He contended that he was terminated because he would not let the alleged improper accounting practices be "swept under the rug," but the official company statement was that he left "to pursue other opportunities." The plaintiff filed a complaint with OSHA six months later alleging that he had engaged in protected activity and was fired as a result. When the complaint was not resolved, the plaintiff filed this suit against Forterra and USP Fabrication in the federal district court, bringing, among others, claims under the whistleblower provision of SOX.

Who's the boss? At issue was for whom the whistleblower actually worked. SOX only affords whistleblower protection for "employees," and Forterra argued that the plaintiff was employed by USP Foundry at the time of his termination. The plaintiff later moved to amend his complaint to add USP Foundry and USP Holdings as defendants, but the court denied this motion.

The plaintiff maintained that he sufficiently alleged that he was employed by USP Fabrication and that Forterra controlled or was an alter ego of USP Fabrication. The court disagreed, stating that the plaintiff fatally failed to allege that he was "employed by" Forterra or USP Fabrication. In addition, the plaintiff's W-2s from 2016 and 2017 identified USP Foundry as his employer, and the correspondence from HR surrounding his termination referred to USP Foundry.

The case is [No. 3:21-cv-01046](#).

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Companies: Forterra Inc.; United States Pipe Fabrication LLC

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