In Case Of First Impression, Court Rules That Dodd-Frank's Whistleblower Provisions Require Disclosure To The SEC And A Plaintiff Need Not "Personally" Make The Disclosure

On May 4, 2011, the U.S. District Court for the Southern District of New York issued the first decision interpreting the anti-retaliation provisions in the Securities Whistleblower Incentives and Protection provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), 15 U.S.C. § 78u-6, passed in July 2010. *Egan v. TradingScreen*, Inc., Case No. 10-cv-8202 (S.D.N.Y.). The court ruled that: (1) Dodd-Frank's anti-retaliation provisions require a plaintiff's disclosures to be made to the Securities and Exchange Commission ("SEC") or that they fall under one of four categories of disclosures delineated by 15 U.S.C. § 78u-6(h)(1)(A)(iii) that do not require reporting to the SEC as a predicate to filing suit; and (2) the plaintiff need not personally make such disclosures.

Background

Plaintiff Patrick Egan was the head of sales for the Americas of defendant TradingScreen, Inc. ("TSI"), a financial software business that provides hedge funds, asset managers, private bankers, and high net-worth individuals with software that assists in Internet trading. In early 2009, Egan allegedly learned that TSI's CEO was diverting corporate assets to another company that he solely owned. Egan reported that alleged conduct to TSI's President, who then informed members of the Board of Directors. The Board hired a law firm to conduct an investigation, which confirmed Egan's allegations of misconduct. The CEO subsequently terminated Egan's employment.

The Court's Analysis And Ruling

Egan brought suit against TSI and the CEO alleging violations of Dodd-Frank's anti-retaliation provisions. Defendants moved to dismiss, arguing that Egan could not invoke those provisions because he never personally contacted the SEC regarding the CEO's alleged misconduct.

The court first addressed the issue of the types of disclosures that are required for a plaintiff to bring a claim for retaliatory discharge under Dodd-Frank's anti-retaliation provisions. The court determined that a plaintiff "must either allege that his information was reported to the SEC, or that his disclosures fell under the four categories of disclosures delineated by 15 U.S.C. § 78u-6(h)(1)(A)(iii) that do not require such reporting: those under one of the Sarbanes-Oxley Act, the Securities Exchange Act, 18 U.S.C. § 1513(e), or other laws and regulations subject to the jurisdiction of the SEC." Egan's disclosures did not fall under any of the four categories that do not require reporting, so he needed to show that the alleged misconduct was reported to the SEC.

Although Egan did not directly report any information to the SEC, he argued that he met Dodd-Frank's reporting requirement by acting jointly with the law firm hired by TSI's Board of Directors to report information to the SEC. More specifically, he contended that by initiating the inquiry into the CEO's alleged misconduct and disclosing information in interviews with the law firm conducting the investigation, he was acting jointly with those attorneys and he expected them to report the information to the SEC. This argument raised the question of whether Dodd-Frank's anti-retaliation provisions require a plaintiff personally to report information to the SEC. The court held that "[t]he plain text of the statute merely requires that the person seeking to invoke the private right of action have acted with others in such reporting, not that he or she led the effort to do so." Thus, the court concluded that Egan's cooperation with the law firm's investigation was sufficient to allow him to take advantage of Dodd-Frank's protections if he could also show that the law firm subsequently provided the information to the SEC. The court thus granted Egan leave to amend his complaint to plead facts supporting his knowledge that the law firm reported its findings to the SEC.

Implications

The *Egan* decision is the first judicial interpretation of Dodd-Frank's anti-retaliation provisions and signals a potential flood of similar lawsuits. While the court clarified that there are strict prerequisites to filing suit (i.e., disclosures to the SEC or disclosures of the above-referenced four types that need not be reported to the SEC) it took a rather expansive view of the type of "joint action" that satisfies the reporting requirements. Indeed, it broadly concluded that employees cooperating in internal investigations are "covered employees" under Dodd-Frank where the results of those investigations are provided to the SEC. However, the court's ruling is favorable to employers to the extent it requires a plaintiff to allege particular facts demonstrating that the plaintiff has knowledge — beyond mere "information and belief" — that the information he or she provided to an investigator or other joint actor was in fact relayed to the SEC.

For more information, please contact the Seyfarth attorney with whom you work or any member of our *SOX Whistleblower Team*.

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