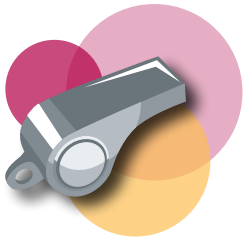
SEYFARTH SHAW



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Federal Court Split Continues Over Who Qualifies as a "Whistleblower" Under Dodd-Frank

By Christopher F. Robertson

As we have *reported previously*, federal courts are currently split on the question of whether the anti-retaliation provisions of the federal Dodd-Frank Act (DFA) apply to employees who disclose their employer's alleged securities violations to company officials but do not report the claimed violations to the Securities and Exchange Commission (SEC). Just in May 2014, for example, district courts in New York and Nebraska held that a communication with the Commission is not required, but a Florida district court ruled otherwise. On December 4, 2014, this split -- not only among the federal courts nationally, but also within the Southern District of New York itself -- was confirmed in *Berman v. Neo@Ogilvy LLC*, No. 1:14-cv-523-GHW-SN (S.D.N.Y. December 4, 2014).

Sarbanes-Oxley Act of 2002 ("SOX") and DFA

SOX prohibits retaliation against employees who communicate alleged wrongdoing to the SEC or to anyone "working for the employer who has the authority to investigate, discover, or terminate misconduct." The section in DFA entitled "Protection of Whistleblowers" permits a civil action for an adverse employment action injuring a "whistleblower" employee who (i) provided certain information to the SEC, or (ii) assisted the SEC in a proceeding relating to the information, or (iii) made disclosures of the information "that are required or protected under" SOX.

While there is no dispute regarding whether a report to the SEC is a prerequisite to a "whistleblower" claim under SOX, the same is not true with regard to DFA. The confusion arises because the definition of "whistleblower" in the DFA is limited to an "individual who provides . . . information relating to a violation of the securities laws to the Commission." Thus, unless the employee passes the initial test of being a "whistleblower" as defined in the statute, those courts reading the statute as unambiguous have concluded that the employee does not fit within the gatekeeping definition and cannot bring a claim. On the other hand, certain courts have concluded that the statute is not as clear, and, applying a *Chevron* analysis, have deemed it appropriate to defer to the SEC's interpretation of the statute, contained in SEC Rule 21-F-2. Rule 21-F-2 expresses the SEC's view that DFA "whistleblower" claims are not precluded where the only reporting was internal to the employer, and the employee concedes that he or she never made any report to the SEC. The SEC rule states that "the statutory anti-retaliation protections apply to . . . [among other people] individuals who report [prescribed wrongdoing] to persons and governmental authorities other than" the SEC.

The *Berman* Decision

In *Berman*, the plaintiff alleged that he reported to his employer a number of transactions that he reasonably believed to be violations of "policy, law, and GAAP," "WPP policies," and "Sarbanes-Oxley, Dodd-Frank and U.S. Securities Laws." Plaintiff claimed that defendants fired him after he made his concerns known to them. The plaintiff, however, conceded that he did not report any of his concerns to the SEC before the defendants took the actions that plaintiff claims were retaliatory. The Court concluded that the employee was not a "whistleblower" under the statute.

In reaching this conclusion, the Court noted that the DFA defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." The Court concluded that the definition unambiguously provides that, in order to qualify as a whistleblower, an individual must report information to the Commission. The Court reasoned that its reading makes sense in the context of the financial bounty provisions of the Act, noting that "it is hard to imagine how the Commission would pay a financial award to a whistleblower who never reported information to the Commission." The Court also noted that the same defined term is used in the anti-retaliation provisions of the Act.

The Court rejected the plaintiff's argument that the statute is ambiguous, and refused to defer to the SEC regulations purporting to define the term, as some other courts had done previously. *See, e.g., Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011); *Kramer v. Trans–Lux Corp.*, No. 3:11 Civ. 1424, 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012). Instead, the Court adopted the reasoning of the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013). In *Asadi*, the Fifth Circuit held that "the plain language of the Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC." *Id.* at 623. In agreeing with the *Asadi* court's statutory interpretation, the *Berman* Court noted that it is the exception, not the rule, for Congress to grant an individual a private right of action to sue for damages arising from retaliation without requiring that individual to make contact with a federal agency first, and noted that other contemporaneous whistleblower statutes included such requirements. The Court further noted that it is well-established that courts should be extremely reluctant to extend a private right of action in such a manner in the absence of clear intent by Congress. By adopting the Fifth Circuit's interpretation of the Act in *Asadi*, the Court stated that it avoided this pitfall.

The *Berman* Court's decision confirms that the split among the federal courts regarding Dodd-Frank's scope shows no signs of slowing down, and appears that this issue is ultimately headed for the United States Supreme Court.

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