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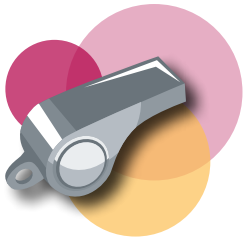

Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Second Circuit Limits Extraterritorial Reach of Dodd-Frank Act, Declines to Address Who Qualifies as a "Whistleblower"

By Christopher F. Robertson and Robert T. Szyba

Part of the purpose of the Dodd-Frank Wall Street Reform & Consumer Protection Act ("Dodd-Frank Act") is to protect whistleblowing employees from retaliation. But does the Dodd-Frank Act apply when that employee is a foreign national, working abroad, for a foreign corporation? On August 14, 2014, the Second Circuit issued its decision in *Liu v. Siemens AG*, No. 13-4385-cv, 2014 WL 3953672, concluding that it does not.

In *Siemens*, the plaintiff was a citizen and resident of Taiwan, and was employed as a compliance officer of the healthcare division of a Chinese corporation. In turn, the Chinese corporation was a subsidiary of a German corporation. The plaintiff's complaint – the purported whistleblowing activity – was an internal complaint that other employees were making improper payments to officials in North Korea and China. After he complained, the plaintiff had meeting with a high-ranking executive in Shanghai to discuss the details. The involved parties were foreign citizens, interacting with foreign entities, and the transactions all occurred on foreign soil. The German parent corporation's shares, however, were listed on the New York Stock Exchange ("NYSE") at all relevant times. The plaintiff thus alleged that his complaint implicated U.S. anti-corruption laws. The plaintiff's employment was terminated, and two months later the plaintiff reported to the Securities & Exchange Commission that the company had violated the U.S. Foreign Corrupt Practices Act ("FCPA"). The plaintiff then filed a civil action in the Southern District of New York under the Dodd-Frank Act. In dismissing the plaintiff's case, the Southern District explained that "[t]here is simply no indication that Congress intended the [Dodd-Frank Act's] Anti-Retaliation Provision to apply extraterritorially." 978 F. Supp. 2d 325, 329 (S.D.N.Y. 2013).

On appeal to the Second Circuit, the plaintiff could only prevail if one of two circumstances existed: (1) the facts, as alleged, provided for a domestic application of the Dodd-Frank Act, or (2) the Dodd-Frank Act's anti-retaliation provision has an extraterritorial reach. Affirming the Southern District, the Second Circuit found neither to be true.

First, the Second Circuit explained that all of the underlying facts upon which the plaintiff's claim was predicated occurred outside the territorial jurisdiction of the United States. The plaintiff, his employer, the alleged wrongdoing, and the purported whistleblowing – all abroad. The Second Circuit discounted the sole "slim connection" to the U.S. created by Siemens listing on the NYSE. In fact, U.S. securities laws generally do not apply extraterritorially to the actions abroad of a company solely because the company lists its securities on a U.S. exchange. There must be something more. The plaintiff could not establish a domestic application of the Dodd-Frank Act.

Turning to the plaintiff's argument that the Dodd-Frank Act had extraterritorial reach, the Second Circuit explained that, unless Congress provides a "clear indication of extraterritoriality," U.S. laws are "meant to apply only within the territorial jurisdiction of the United States." The Second Circuit found no such clear indication. The Second Circuit concluded that the statute's reference to "all employees" provides no insight into Congressional intent on extraterritoriality. And the express reference to extraterritorial reach in another section of the Dodd-Frank Act was insufficient to cover other sections of the Dodd-Frank Act. The Second Circuit concluded that this inclusion in certain sections demonstrated that Congress was aware that other aspects of the law were not intended to apply beyond the U.S.

The plaintiff also sought to rely on the SEC's regulations, which provide for a bounty to a whistleblower even where the whistleblower is located abroad. But the Court explained that it saw no statutory ambiguity, rendering the SEC's regulations inapplicable. As reasoned by the Second Circuit, simply because the bounty provision might reward foreign whistleblowers who provide information leading to enforcement actions against companies otherwise subject to the jurisdiction of the SEC, did not mean that Congress intended to regulate the conduct of foreign employers (and thus infringe on foreign sovereigns' ability to regulate their employers) by extending the anti-retaliation provision to apply abroad.

After determining that the Dodd-Frank Act's anti-retaliation provision did not apply extraterritorially, the Second Circuit declined to address certain other questions presented in this case. Critically, the Court did not decide whether internal complaints constitute "whistleblowing" activity as opposed to complaints made to the SEC. Thus, the Second Circuit declined to weigh in on the growing divide between courts on this specific issue, including the Fifth Circuit, the Southern District of New York, the District of Nebraska, the District of Connecticut, the District of Colorado, the Middle District of Florida, and the Northern District of California. In addition, the Court declined to address whether disclosures of FCPA violations are covered by the Dodd-Frank Act. So while one important issue was addressed, several other important issues were left for another day.

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