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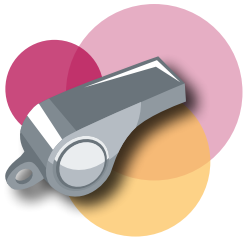

Workplace Whistleblower

Second Circuit Creates Split Regarding Definition of Whistleblower Under Dodd-Frank's Anti-Retaliation Provisions

By Christopher F. Robertson and Gena B. Usenheimer

As we've previously reported, on June 17, 2015 the Second Circuit held oral argument in *Berman v. Neo@Ogilvy, LLC*, a case that presented to the Court the question of who is a "whistleblower" under the Dodd-Frank Wall Street Reform and Consumer Protect Act ("Dodd-Frank" or the "Act"). Specifically, the Court was asked to resolve the question of whether a person could be considered a whistleblower under the Act if he or she did not report concerns to the Securities and Exchange Commission ("SEC"). Yesterday, the Second Circuit answered that question in the affirmative, creating a split between the Second and Fifth Circuits – the only two circuit courts to have ruled on the issue. *See, e.g., Asadi v. G.E. Energy (USA), L.L.C.*, 720 F. 3d 620, 625 (5th Cir. 2013) ("[u]nder Dodd-Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.")

The Analytical Framework

As we have discussed in our earlier posts (*See* here and here), whistleblower status under Dodd-Frank's anti-retaliation provisions is a hotly contested issue, with courts around the country sharply divided. The crux of the debate arises from the interplay between the statutory definition of "whistleblower" and the conduct protected in the Act's anti-retaliation provisions. Specifically, the Act clearly defines "whistleblower" as "any individual who provides . . . information relating to a violation of the securities law to the [SEC]." 15 U.S.C.§ 78u-6(a)(6). The anti-retaliation provisions of the law, however, prohibit retaliation against "whistleblowers" who participate in the following conduct:

> (i) who raise complaints relating to lawful acts done by a whistleblower in providing information to the SEC;
>
> (ii) who participate or assist in any investigation of the SEC based upon such information; and
>
> (iii) who make disclosures required or protected under the Sarbanes-Oxley Act and any other law, rule or regulation subject to the jurisdiction of the SEC.

See 15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii).

One interpretation of the statute – the one ultimately adopted by the Second Circuit – is that because subsection (iii) above does not expressly condition anti-retaliation protection on an employee having complained to the SEC, a complaint to the SEC is not required by the statute. Under this reading, the protections afforded to a "whistleblower" under subsection (iii) seemingly contradict the clear statutory definition of the term "whistleblower" in the earlier section of the statute, leading a number of district courts, and now the Second Circuit, to conclude that there is sufficient ambiguity in the statute to permit deference to the SEC's subsequent whistleblower regulations defining the term more broadly. Not surprisingly, the SEC's position is that an employee need not report to the SEC in order to benefit from the anti-retaliation provisions of Act. In fact, following oral argument in *Berman*, the SEC issued an interpretive rule designed to "clarify that, for purposes of the employment retaliation protections provided by Section 21F of the Securities Exchange Act of 1934 ('Exchange Act'), an individual's status as a whistleblower does not depend on adherence to the reporting procedures specified in Exchange Act Rule 21F-9(a), but is determined solely by the terms of Exchange Act Rule 21F-2(b)(1)." *See Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934*, Exchange Act Release No. 34-75592, 2015 WL 4624264 (Aug. 4, 2015) (forthcoming in Federal Register).

Not all courts agree with this broad reading of the law. The Fifth Circuit and a number of district courts have held the statutory definition of "whistleblower" is abundantly clear, and notwithstanding the language in subsection (iii), the anti-retaliation provisions to support the conclusion that to be a whistleblower, a person must first complain to the SEC. For a more fulsome discussion on the split in authority throughout the country, see our prior blog posts on this issue.

The Second Circuit's September 10th Ruling

In yesterday's ruling, the Second Circuit described the central issue as whether the "arguable tension between the definitional subsection [] which defines 'whistleblower' to mean an individual who reports violations to the [SEC], and subdivision (iii) . . ., which, unlike subdivisions (i) and (ii), does not within its own terms limit its protection to those who report wrongdoing to the SEC" creates sufficient ambiguity as to require deference to the SEC's rule. The Court found that it does.

The majority began its analysis by highlighting the purported "tension" between the definition of whistleblower and the language of subsection (iii), observing that if subsection (iii) is meant to protect individuals who complain to the SEC, it will protect only those few individuals who make simultaneous complaints to their employer and to the SEC. The Court further observed that there are categories of potential whistleblowers who cannot report wrongdoing to the SEC until after they have first reported it to their employer (such as auditors and attorneys), and therefore, "apart from the rare example of simultaneous . . . reporting of wrongdoing . . . there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope." Consequently, the majority opined the central question is "whether Congress intended to add subdivision (iii) . . . only to achieve such a limited result." Ultimately, the Court determined the statutory texts are unclear, and found no legislative history that "even hints at an answer." Accordingly, the Court found the "tension" created sufficient ambiguity to allow deference to the SEC's interpretation of the statute.

In its effort to rationalize the apparent unambiguous definition of "whistleblower" set out in the statute, the majority noted, "[w]e recognize that the terms of a definitional subsection are usually to be taken literally. . . and, pertinent to this case, usually applied to all subsections literally covered by the definition, but we have also recognized that 'mechanical use of a statutory definition' is not always warranted." That is, even though the statute provides a clear definition of a term that is later used in other sections of the statute, the majority still concluded that the statute was somehow ambiguous.

The Dissent

In his dissent, Judge Jacobs harshly criticizes the majority for re-writing the statute, mis-reading its clear terms ("a bad misreading, tantamount to a misquotation") and for placing the Second Circuit on the "wrong side" of a circuit split. Relying heavily on *Asadi*, Judge Jacobs observed: "[p]ersons who report certain violations of the securities laws are protected from retaliation under (at least) two federal statutes. [SOX] protects employees who blow a whistle to management or to regulatory agencies; Dodd-Frank protects "whistleblowers," defined as persons who report violations "to the [SEC]." He then criticized the majority for "assum[ing] its own conclusion," ignoring the distinction between SOX and Dodd-Frank, and for "look[ing] here, there and everywhere – except to the statutory text" for the meaning of the term "whistleblower." Judge

Jacobs next attacked the majority's conclusion that subsection (iii) would have a limited effect, and more so, for its holding that when a plain reading of a statute gives it an "extremely limited" effect, the statutory provision is therefore "impaired or ambiguous."

With a clear circuit split, as well as strong dissent in its own Circuit, this issue seems destined for resolution by the Supreme Court.

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