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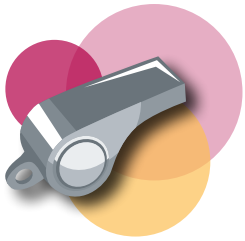

Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Second Circuit Tackles "Whistleblower" Protection Under Dodd-Frank

By Christopher F. Robertson, Gena B. Usenheimer and Needhy Shah

Yesterday, the Second Circuit heard oral arguments in *Berman v. Neo@Ogilvy*, a case that places squarely before the Court the question of who is a "whistleblower" within the meaning of the Dodd-Frank Act Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). As we have discussed in our previous posts, whistleblower status under Dodd-Frank remains a hotly contested issue, with courts around the country sharply divided.

The Debate

The crux of the debate arises from the interplay between the definition of "whistleblower" in Dodd-Frank and the conduct protected in the Act's anti-retaliation provisions. Specifically, the Act defines "whistleblower" as "any individual who provides . . . information relating to a violation of the securities law to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the [SEC]." 15 U.S.C.§ 78u-6(a)(6).

Dodd-Frank goes on, however, to 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 is that because subsection (iii) above does not expressly condition anti-retaliation protection on an employee having complained to the SEC, that such an external complaint is not

required. This interpretation is furthered by the clear reference to the Sarbanes Oxley Act of 2002 ("SOX") in the statute which arguably suggests that internal reporting protected by SOX is sufficient to qualify for Dodd-Frank's anti-retaliation protections. Under this reading of the statute, the protections afforded to a "whistleblower" under subsection (iii) seemingly contradict the clear statutory definition of the term, leading a number of district courts to conclude that there is sufficient ambiguity in the statute to permit deference to the SEC's interpretation on the issue. Not surprisingly, the SEC has argued that that an employee need not report to the SEC in order to benefit from the anti-retaliation provisions of Dodd-Frank. Rather, participation only in a protected activity covered under SOX is sufficient. *See, e.g.*, 17 C.F.R. § 240.21F-2(b)(1) (SEC Rule).

Not all courts agree with the this reading of the law. Many courts find that the law is not ambiguous, the statutory definition of "whistleblower" is abundantly clear, and notwithstanding the language in subsection (iii) above, the anti-retaliation provisions plainly support the conclusion that to be a whistleblower, a person must first complain to the SEC. This line of authority is consistent with *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F. 3d 620 (5th Cir. 2013), out of the U.S. Court of Appeals for the Fifth Circuit -- which is the only circuit court to have conclusively addressed this issue. In *Asadi,* the Fifth Circuit expressly found that: "[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." *Id.* at 625. For a more fulsome discussion on the split in authority in court's throughout the country, see last week's blog on this issue here.

The Arguments Presented in *Berman*

The *Berman* case came to the Second Circuit on appeal from a decision by Judge Woods in the Southern District of New York. Judge Woods found that to benefit from Dodd-Frank's anti-retaliation provisions, an employee must have reported his or her concerns to the SEC. This decision created a split of authority within the Southern District.

Yesterday, the Second Circuit held oral argument that lasted almost one full hour. To begin, the panel unanimously agreed that term "whistleblower" is clearly defined in Dodd-Frank. The remainder of argument, however, seemed to indicate that at least for the judges hearing the appeal, the definition of "whistleblower" was only the beginning of the analysis. Specifically, the judges appeared to fall into three distinct camps with respect to the remainder of the statute's interpretation.

First, Chief Judge Katzmann raised concerns about extending the protection in subsection (iii) to individuals who had not complained to the SEC, arguing that the definition of "whistleblower" could not be clearer. Based on his questioning, he appears to believe that there is no ambiguity in the statute. Judge Katzmann also noted that it seemed compelling that absent a complaint to the SEC, a "whistleblower" still had potential remedies under SOX. In contrast, Judge Newman focused on the policy arguments that support the SEC's position, in particular the fact that if a complaint to the SEC is required, then only in exceedingly limited circumstances would a person be protected under subsection (iii). Accordingly, Judge Newman's questions focused on the apparent "tension" in the statute, which he implied would be sufficient for the Court to find the statute ambiguous. If ambiguous, he suggested deference to the SEC's rule would be appropriate.

Judge Calabresi's questions provided less transparency with regard to his views. His inquiries were more focused on statutory interpretation, questioning, in light of the clear definition of "whistleblower" in the statute, whether the arguably inconsistent language in the anti-retaliation provision allows the Court to conclude the statute is ambiguous. He requested authority from counsel on both sides directly addressing this issue, but counsel were not able to cite to any specific authority supporting either position.

From the questions posed by the panel during the argument and the colloquy between counsel and the panel, it appears that the panel has differing views regarding the language of the statute and whether an ambiguity or inconsistency exists, making it difficult to predict from the argument exactly how the Court will ultimately rule. No matter the result in *Berman*, it will be significant for several reasons. First, at least for employers within the Second Circuit, the Court's decision will resolve the issue and provide clarity. More importantly, the Court's decision will either fall in line with the Fifth Circuit's decision in *Asadi*, bringing a second federal appellate court in line with the conclusion that the statute is not ambiguous and a "whistleblower" only includes an employee who provides information to the SEC. On the other hand, if the Second Circuit deviates from the Fifth Circuit, a split in the appellate courts will exist, creating the opportunity for the issue to be decided once and for all by the U.S. Supreme Court.

Regardless of the outcome, the Second Circuit's decision is certain to influence the development of case law on this issue throughout the country.

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