Second Circuit to Supreme Court on Whistleblowers: Your Turn

posted on: Monday, September 14, 2015

The U.S. Court of Appeals to the Second Circuit’s recent decision holding that Dodd-Frank’s “whistleblower” anti-retaliation protections apply to employees who are dismissed after reporting alleged violations internally but before alerting the Securities and Exchange Commission (the “Commission”) creates a Circuit spilt and sets up a potential statutory-interpretation showdown in the U.S. Supreme Court. *Berman v. Neo@Ogilvie LLC & WPP Group USA, Inc.*, slip op. at 2 (2d Cir. Sept. 10, 2015).

The Second Circuit’s decision focuses on the conflict between Dodd-Frank’s definition of “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws of the Commission,” 15 U.S.C. § 78u-6(a)(6) (emphasis added), and the retaliation protection provision of the same statute which through incorporation of the Sarbanes-Oxley Act provides a cause of action to a “whistleblower” terminated after reporting alleged violations to his or her employer. 15 U.S.C. § 78u-6(h)(1)(A)(iii). The district court had dismissed a lawsuit brought by a former Neo@Ogilvie financial reporting director, Daniel Berman, who was terminated after informing his supervisors of alleged accounting fraud but six months before the Commission was alerted to any purported bad conduct. Id. at 12. This decision was consistent with an opinion issued by the U.S. Court of Appeals for the Fifth Circuit which held that a person has to meet the definition of a “whistleblower”—i.e., must have reported allegedly bad conduct to the Commission prior to his or her termination—before he or she is entitled to Dodd-Frank’s anti-retaliation protections. See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 620 (Fifth Cir. 2013).

In reversing the district court and rejecting *Asadi*, the Second Circuit reasoned that the tension between the definition of “whistleblower” in Section 15 U.S.C. § 78u-6(a)(6) and Section 78u-6(h)(1)(A)(iii) creates ambiguity as to the coverage of Section 78u-6(h)(1)(A)(iii) requiring a court to afford *Chevron* deference to an SEC rule providing that internal reporting is sufficient to trigger Dodd-Frank’s anti-retaliation protections. *Berman*, slip op. at 28. The Second Circuit’s analysis relies in large part on the late addition of the “whistleblower” definition to Dodd-Frank and its view that a strict textual reading “ignore[s] the realities of the legislative process.” Id. at 26.

The Second Circuit’s deference to the Commission’s reconciliation of the conflicting provisions, as Judge Jacobs points out in dissent, appears to be an attempt to patch a perceived “hole in [the statute’s] coverage” rather than an exercise in statutory construction. In fact, and taken to an extreme, the Second Circuit’s decision arguably encourages courts and regulatory agencies such as the Commission to engage in a “shadow” legislative drafting whenever a statute can be characterized as “ambiguous.” It will be interesting to see if any certiorari petition is filed and, if so, whether the Second Circuit’s approach withstands Supreme Court review.

©2015 Drinker Biddle & Reath LLP. All Rights Reserved
