Second Circuit Expands Scope of Dodd-Frank Anti-Retaliation Provisions, Sets up Chance for Supreme Court Review

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Once upon a time, Daniel Berman was the finance director of Neo@Ogilvy LLC, a subsidiary of the publicly-traded WPP Group USA, Inc. He did not find a handsome prince or princess there. According to the allegations of a complaint he later filed, Berman discovered various practices at Neo that amounted to accounting fraud. He also alleged that these practices violated GAAP, Sarbanes-Oxley, and Dodd-Frank, and that he had reported these violations internally. A senior officer at Neo became angry with Berman, and he was terminated as a result of his “whistleblower” activities in April 2013. In August 2013 he reported his allegations to the WPP Audit Committee. In October 2013, after the limitations period on one of his Sarbanes-Oxley claims had ended, he provided information to the SEC. In January 2014, Berman sued Neo and WPP, alleging that he was discharged in violation of the whistleblower protection provisions of section 21F of Dodd-Frank and in breach of his employment contract.

Berman eventually provided his information to the SEC, so under Dodd-Frank Section 21F(b) he is eligible to collect an award from the Commission if that information leads to a successful enforcement action. But is Berman protected by Dodd-Frank’s anti-retaliation provisions even though he didn’t give his information to the SEC until after he was fired? Last Thursday, the Second Circuit said yes.

**Statutory Provisions**

Section 21F(a)(6) defines a “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws to the Commission . . . .” Section 21F(h)(1)(A) provides:

(A) In General – No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (U.S.C. 7201 et seq.), this chapter [i.e., the Exchange Act], including section 78j-1(m) of this title [i.e., Section 10A(m) of the Exchange Act], section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.
Judge Jacobs's Dissent

It might make sense to look at Judge Jacobs's dissent first. For him, the statutory provisions quoted above say what they say, and he doesn’t need much more to complete his analysis. Which is this: because Berman didn’t report his information to the Commission before his termination in April 2013, he was not a “whistleblower” under Section 21F(a)(6). And if he’s not a whistleblower, then his employer may, in fact, discharge, demote, suspend, threaten, harass, or in any manner discriminate against him because of his lawful acts in making his internal reports of potential securities law violations. As unattractive as the result might be, this analysis has a simplicity that’s hard to ignore.

The Majority Opinion

Still, the SEC wants its whistleblower program to be robust. And it doesn’t want employers to retaliate against employees when they report securities violations internally before reporting them to the SEC, as its rules generally encourage people to do. Seeking to prevent that from happening, the SEC passed Rule 21F-2(b)(1), which says, among other things, “The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.” And just last month the SEC issued an interpretive release “to clarify that, for purposes of the employment retaliation protections provided by Section 21F . . . , an individual’s status as a whistleblower does not depend on adherence to the reporting procedures specified in Exchange Act Rule 21F-9(a) [specifying procedures to be followed to qualify for a whistleblower award], but is determined solely by the terms of Exchange Act Rule 21F-2(b)(1).”

That is, the SEC doesn’t really care if an employee reports internally only. The Commission still wants that employee to be protected by the anti-retaliation provision of Section 21F(h)(1)(A).

For the majority opinion, that’s enough to open the door to Chevron deference to the SEC’s interpretation and determine whether the statute contains enough ambiguity to allow it to defer to that interpretation. Because while 21F(a)(6) defines a “whistleblower” as someone who reports information to the SEC, subsection (iii) of Section 21F(h)(1)(A) protects people whose information is reported internally and not necessarily to the SEC.

The court says:

First, although there may be some potential whistleblowers who will report wrongdoing simultaneously to their employer and the Commission, they are likely to be few in number. Some will surely feel that reporting only to their employer offers the prospect of having the wrongdoing ended, with little chance of retaliation, whereas reporting to a government agency creates a substantial risk of retaliation.

Second, and more significant, there are categories of whistleblowers who cannot report wrongdoing to the Commission until after they have reported the wrongdoing to their employer. Chief among these are auditors and attorneys.

Anyway, Berman’s suit for being retaliated against has been revived, and the Second Circuit is now in conflict with the Fifth Circuit’s decision in Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013). Lots of district courts have gone both ways on this issue. The Supreme Court might be next.

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