2nd Circuit Expands Dodd-Frank Anti-retaliation Protection To Cover Internal Whistleblowing

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On September 10, 2015, the Second Circuit Court of Appeals ruled in Berman v. Neo@Ogilvy LLC that an employee who reports an alleged securities violation only to his or her employer, and not to the SEC, is nevertheless covered by the anti-retaliation protections afforded by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").

Berman, a former finance director of Neo@Ogilvy, claimed that his employer and its corporate parent, WPP Group USA, Inc., violated the whistleblower protections of Dodd-Frank by wrongfully terminating him for raising concerns internally about business practices that allegedly constituted accounting fraud. The companies moved to dismiss the claim, arguing that Berman was not a whistleblower subject to protection under Dodd-Frank because he did not report the alleged violations to the SEC. The District Court agreed.

In a 2-1 decision, the Second Circuit reversed the District Court’s decision on appeal. The Court found that the provisions of Dodd-Frank are ambiguous as to whether an employee who reports an alleged violation internally, but not to the SEC, qualifies as a whistleblower. On the one hand, Section 21F(a)(6) of Dodd-Frank limits the definition of “whistleblower” to include only those individuals who provide information relating to an alleged securities violation to the SEC. Yet, on the other hand, Section 21F(h)(1)(A) of Dodd-Frank’s retaliation protection provision prohibits retaliation against individuals who make disclosures that are, inter alia, required or protected under the Sarbanes-Oxley Act of 2002 ("SOX"), and SOX protects employees who make internal complaints of suspected securities laws violations without reporting them to outside agencies.

Finding that these were conflicting statutory provisions, the Court deferred to the SEC’s interpretation of the statute, under which an individual is a “whistleblower” if he or she provides information pursuant to Section 21F(h)(1)(A) of Dodd-Frank, which, as explained above, prohibits retaliation against employees for making internal complaints that would be protected by SOX. Accordingly, the Court held that under SEC Rule 21F-2, “Berman is entitled to pursue Dodd-Frank remedies for alleged retaliation after his report of wrongdoing to his employer, despite not having reported to the Commission before his termination.”

Judge Dennis Jacobs, dissenting, opined that Dodd-Frank is “unambiguous”: Section 21F(a)(6) is controlling because it defines who is a “whistleblower” under the relevant section of the statute and expressely provides that only those who report to the SEC can qualify. Judge Jacobs pointed out that Dodd-Frank Section 21F(h)(1)(A), which the majority found creates ambiguity by incorporating protections provided by SOX, does not expand the statutory definition of whistleblower under Dodd-Frank, but instead identifies which acts done by whistleblowers are protected by Dodd-Frank. In other words, according to Judge Jacobs, Section 21F(h)(1)(A) does not apply to protect a person...
unless he or she qualifies as a “whistleblower,” as the term is defined by Section 21F(a)(6). Judge Jacobs criticized the majority for disregarding the plain text of Dodd-Frank’s definition of whistleblower and creating an ambiguity in the statute that does not exist solely to expand the reach of the anti-retaliation provisions of Dodd-Frank.

Notably, the Second Circuit’s decision creates a split in authority with the Fifth Circuit Court of Appeals, which came down the opposite way when faced with the same issue in 2013. As a result, this issue is almost surely headed to the Supreme Court for resolution. Further, in holding that Dodd-Frank provides a private right of action for those who report violations only internally, the Second Circuit’s decision may lead to significantly more whistleblower retaliation claims in the future because, in comparison to the SOX whistleblower protections, Dodd-Frank offers a much longer statute of limitations, double back pay damages, and no administrative exhaustion requirement.

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