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EXPERT ANALYSIS

Berman v. Neo@Ogilvy Creates Circuit Split On Dodd-Frank's Whistleblower Protections

By R. Scott Oswald, Esq., and David L. Scher, Esq.
The Employment Law Group

In *Berman v. Neo@Ogilvy LLC*, No. 14-4626, 2015 WL 5254916 (Sept. 10, 2015), the 2nd U.S. Circuit Court of Appeals ruled that the Dodd-Frank Act does not require whistleblowers to report wrongdoing to the Securities and Exchange Commission to invoke the act's employee protection provisions. This is the opposite of the result reached by the 5th Circuit in *Asadi v. G.E. Energy (USA) LLC*, 720 F.3d 620 (5th Cir. 2013). As a result, the stage has been set for the U.S. Supreme Court to resolve the conflict.

THE DODD-FRANK ACT

The Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u–6, was passed in 2010 in response to the 2008 economic crash. The law sought to tighten financial regulations and, among other things, offered new protections to encourage whistleblowers to expose financial wrongdoing.

Section 922 of the act provides whistleblowers with two avenues. First, a whistleblower can provide information to the SEC. If that report leads to a successful enforcement action, then the SEC pays the whistleblower a significant monetary award. Second, a whistleblower may file a private cause of action against an employer who retaliates because of the whistleblower's protected disclosures.

The second avenue — the act's anti-retaliation provision — prohibits a broad range of adverse employment actions, including:

- Termination, discharge or firing.
- Demotion or suspension
- Threatening adverse employment actions.
- Harassment.
- Any other conduct that would dissuade an employee from reporting SEC violations.

DEFINING WHISTLEBLOWER UNDER DODD-FRANK

The ambiguity in the Dodd-Frank Act is the apparent conflict between its definition of "whistleblower" and the language in its anti-retaliation provision that incorporates the whistleblower definition to delineate those protected under the statute. The term "whistleblower" includes only those who have provided information to the SEC. However, the anti-retaliation provision does not explicitly state that protected disclosures need to be made to the agency.

The Dodd-Frank reform law offered new protections to encourage whistleblowers to expose financial wrongdoing.

Dodd-Frank defines the term whistleblower as:

> any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the commission*, in a manner established, by rule or regulation, by the commission.

15 U.S.C. § 78u-6(A)(6) (emphasis added).

A plain reading of this definition implies that a whistleblower is only someone who reports to the SEC and that the definition excludes individuals who make reports elsewhere.

In contrast to Dodd-Frank's definition of whistleblower, the law's anti-retaliation provision reaches more broadly.

The anti-retaliation provision states:

> 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 —
>
> in providing information to the commission in accordance with this section;
>
> 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
>
> *in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002* (15 U.S.C. 7201 *et seq.*), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A) (emphasis added).

Thus, Dodd-Frank's anti-retaliation provision applies to three different categories of complaints: information provided to the SEC, involvement with an SEC investigation and disclosures that are protected under Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201.

The third category refers to disclosures about shareholder fraud or violations of SEC rules and guidelines protected under Section 806 of SOX.

This third category is broad. Some examples of whistleblower activities that are protected under SOX are:

- Reporting an employee's failure to disclose accurate financial statements to potential investors.
- Reporting an employer's improper entries on financial statements,
- Committing other violations of law and betraying the public trust.

Most importantly, this third category makes no mention of a requirement to report to the SEC, thus indicating that internal disclosures of potential SOX violations are encompassed within Dodd-Frank's anti-retaliation provision.

Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. 78u-6, is titled "Securities Whistleblower Incentives and Protection." The section allows the SEC to pay awards to whistleblowers who provide the agency with original information about violations of the federal securities laws. In 2011 the SEC used its authority to issue rules implementing the Exchange Act by issuing the following regulations:

> [F]or purposes of the anti-retaliation protections, an individual must provide the information in a manner described in Section 21F(h)(1)(A). This change to the rule reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and *the third category includes individuals who report to persons or*

> *governmental authorities other than the commission*. Specifically, Section 21F(h)(1)(A)(iii) — which incorporate the anti-retaliation protections specified in Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. 1514A(a)(1)(C) — provides anti-retaliation protections for employees of public companies, subsidiaries whose financial information is included in the consolidated financial statements of public companies, and nationally recognized statistical rating organizations *when these employees report to (i) A Federal regulatory or law enforcement agency, (ii) any member of Congress or committee of Congress, or (iii) a person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct.*

See Securities Whistleblower Incentives and Protections, 76 FR 34300-01 (emphasis added).

Thus, the SEC regulations clarify the SEC's position: Congress intended that the Dodd-Frank Act's employee protection provisions be broad enough to include disclosures to persons or governmental authorities other than the SEC.

The 5th Circuit's decision in *Asadi* rejected the SEC's regulatory interpretation; the appeals court held that disclosures under Dodd-Frank encompass only those disclosures made to the SEC.

ASADI: PLAIN LANGUAGE REQUIRES SEC REPORT

In July 2013, the 5th Circuit in *Asadi* held that Dodd-Frank's definition of whistleblower includes only those who report to the SEC — and only individuals who meet that definition of "whistleblower" are protected under Dodd-Frank's anti-retaliation provisions.

Khaled Asadi alleged that his employer violated the Dodd-Frank Act by terminating him after he made an internal report of a possible securities law violation. Because Asadi did not report the violation to the SEC, the 5th Circuit determined that he was not a whistleblower under the act.

The issue that the appeals court considered was whether someone who is not a whistleblower under the statutory definition in 15 U.S.C. §78u-6 may seek relief under Dodd-Frank's anti-retaliation provision. The 5th Circuit held that the plain language of the provision excludes individuals who do not report a securities violation to the SEC.

In contrast to Dodd-Frank's definition of a whistleblower, which seems to apply only to individuals who report to the SEC, the law's anti-retaliation provision reaches more broadly.

BERMAN: SEC'S REGULATIONS ARE REASONABLE

In September, the 2nd Circuit in *Berman* reversed a lower court's decision based *solely* on deference to the SEC — finding it unnecessary to construe the statute. The appeals court reviewed the language of Dodd-Frank, found it to be ambiguous, declared its legislative history essentially unhelpful, and said that it would defer to the SEC's reasonable interpretation.

Daniel Berman was the finance director at Neo@Ogilvy LLC and was responsible for Neo's financial reporting and compliance. He also handled the internal accounting procedures of Neo and its parent, WPP Group USA Inc. 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 alleged that while employed at Neo he discovered, and internally reported, various practices of accounting fraud. Shortly thereafter, in April 2013, Neo terminated Berman. Berman alleged the termination was due to his whistleblower activities. Neo did not report any unlawful activities to the SEC until about six months after he was terminated.

U.S. Magistrate Judge Sarah Netburn of the Southern District of New York reviewed the defendants' motion to dismiss and issued a report and recommendation ruling in favor of Berman. Magistrate Netburn recommended that he be considered a whistleblower under the Dodd-Frank Act because he was protected under the third category of disclosures protected under the statute (disclosures protected under SOX that are reported internally but not to the SEC).

The 5th Circuit's decision in Asadi *rejected the SEC's regulatory interpretation; the appeals court held that disclosures under Dodd-Frank encompass only those made to the SEC.*

However, Magistrate Netburn recommended that the retaliation claims be dismissed for legal insufficiency, without prejudice to amendment. The District Court disagreed with Magistrate Netburn and, relying on the definition of "whistleblower" under Dodd-Frank, ruled that whistleblower protection applies only to those who report to the SEC. Thus, the District Court dismissed Berman's Dodd-Frank claims because Berman had been terminated months before he reported the alleged violations to the SEC.

On appeal, the 2nd Circuit identified the following precise issue: whether the arguable tension between the definitional section of 15 U.S.C. § 78u-6(A)(6) and the anti-retaliation provision of 15 U.S.C. § 78u-6(h)(1)(A) creates sufficient ambiguity to the coverage of subdivision (iii) to oblige the court to give *Chevron* deference to the SEC's rule. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc.*, 104 S. Ct. 2778 (1984).

Stated another way: Is there enough ambiguity between the definition of "whistleblower" and the anti-retaliation provision to trigger deference to the SEC's interpretation of the statute? The 2nd Circuit ruled that there was enough ambiguity and deferred to the SEC's interpretation of the statute. Thus, in the 2nd Circuit the SEC's interpretation stands: Internal disclosures about SEC violations, including those not reported to the SEC, are protected under the Dodd-Frank Act's anti-retaliation provision.

In reaching its conclusion, the *Berman* court started its analysis by looking at the statute — but only to determine whether it is ambiguous. The appeals court explained that the issue was not whether a phrase means something other than what it literally says. Instead, it said the issue was whether the statutory provision applies to another provision of the statute, or more precisely, whether the answer to that question is sufficiently unclear to warrant *Chevron* deference.

In support of its position that the Dodd-Frank anti-retaliation provisions are indeed ambiguous, the *Berman* majority pointed to the numerous district courts that have ruled on each side of the issue.

The following courts have required an employee to report to the SEC:

- 5th Circuit
- U.S. District Court for the Eastern District of Wisconsin

The following district courts have not required an employee to report to the SEC:

- U.S. District Court for the District of New Jersey
- U.S. District Court of the District of Kansas
- U.S. District Court for the District of Massachusetts
- U.S. District Court for the Middle District of Colorado
- U.S. District Court for the Middle District of Tennessee
- U.S. District Court for the District of Connecticut

The following district courts have reached holdings on both sides of the issue:

- U.S. District Court for the Northern District of California
- U.S. District Court for the Southern District of New York
- U.S. District Court for the District of Colorado

As shown above, the volume of district courts that disagreed supported the proposition that the Dodd-Frank Act's definition of whistleblower and its anti-retaliation pro-vision are ambiguous.

Additionally, the 2nd Circuit was unable to find any helpful legislative history to guide its analysis. This led the Second Circuit to defer to the SEC interpretation.

WHO GOT IT RIGHT?

A strong argument can be made that the 2nd Circuit got it right. The anti-retaliation provision of the Dodd-Frank Act is ambiguous — but its ambiguity is an accident of drafting, and its overall purpose remains clear: to protect whistleblowers who report both internally and to the SEC. In the absence of a legislative paper trail, interpretation properly falls to the SEC — the agency charged with administering the statute.

The SEC's interpretation is consistent with legislative intent. Congress meant for the Dodd-Frank Act to serve a remedial purpose: to protect financial whistleblowers to the greatest extent. The Supreme Court in *Lawson v. FMR LLC,* 134 S. Ct. 1158, 1174 (2014), referenced Dodd-Frank's anti-retaliation provision which includes disclosures protected under SOX.

The Supreme Court stated that the purpose of SOX is "to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." Thus, the SEC's broad interpretation gives the truest expression to Congress' remedial goal.

The chilling alternative, as sketched by the 5th Circuit in *Asadi*, is a world in which corporate whistleblowers who dutifully report financial wrongdoing internally consistent with their companies' mandatory reporting regimen are left unprotected and subject to employment termination without recourse — an outcome that perverts the intent of the employee protection provisions of Dodd-Frank.

WHAT'S NEXT?

The 2nd Circuit decision pushes *Asadi* further out on a limb, and it increases the urgency and necessity of Supreme Court review.

The 2nd Circuit in Berman *reviewed the language of Dodd-Frank, found it to be ambiguous, declared its legislative history essentially unhelpful and deferred to the SEC's interpretation.*

R. Scott Oswald (L) is managing principal of **The Employment Law Group**, based in Washington. He has brought nearly 50 trials to verdict and recovered more than $90 million in judgments and settlements for clients. Oswald is a past president of the Metropolitan Washington Employment Lawyers Association and a graduate of the Trial Lawyers College. He can be reached at soswald@employmentlawgroup.com. **David L. Scher** (R) is a principal at the firm, and he focuses his practice on *qui tam* and whistleblower retaliation cases on a national basis. Scher is a frequent news commentator and has been interviewed by Forbes.com, Politico, and the Washington Post in all matters of employment law. He can be reached at dscher@employmentlawgroup.com.