

Circuits Split on Scope of Dodd-Frank Whistleblower Protection

December 23, 2015

The so-called “whistleblower-protection” provision of the Dodd-Frank Act created a private right of action for a “whistleblower” who is subjected to retaliation by his or her employer. The statute elsewhere defines “whistleblower” to mean an individual who provides information about suspected securities law violations “to the Commission,” which implicitly excludes individuals who provide information only to persons *other than* the SEC. Not surprisingly, therefore, the Fifth Circuit Court of Appeals held, in *Asadi v. G.E. Energy (USA), L.L.C.*, that the plaintiff could not bring an anti-retaliation action against his former employer because the plaintiff admittedly never provided any information to the SEC. In *Berman v. Neo@Ogilvy LLC*, however, a two-one panel in the Second Circuit deferred to the SEC’s broader interpretive rule, which extends the whistleblower protection provision to certain individuals who do *not* qualify as whistleblowers under the statutory definition. Specifically, based on certain language in a subsection of the whistleblower-protection provision, the SEC posits that employees who engage in disclosure activities protected under the Sarbanes-Oxley Act (SOX) and certain other laws are protected under the Dodd-Frank provision, even if they do not provide any information to the SEC. **This is potentially significant because the Dodd-Frank provision offers enhanced monetary remedies, no administrative exhaustion requirement, and a longer statute of limitations compared to the SOX provision.** Declining to “definitively construe the statute,” the Second Circuit majority instead found that “tension” between the statutory definition and the provision language on which the SEC’s interpretation relies created an ambiguity that required *Chevron* deference to the SEC. Dissenting, Judge Jacobs observed that the majority’s “alteration” of Dodd-Frank “creates a circuit split, and places us firmly on the wrong side of it.” However, the defendants have notified the Second Circuit that they will not be pursuing a petition for Supreme Court review.

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