

Alert

Second Circuit Rules That Internal Whistleblowers Are Protected Under Dodd-Frank

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On Sept. 10, 2015 the U.S. Court of Appeals for the Second Circuit held, in a 2-1 decision, that the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) protects employees who report violations of securities laws only internally. The court’s decision in *Berman v. Neo@Ogilvy LLC*¹ conflicts with the U.S. Court of Appeals for the Fifth Circuit’s decision in *Asadi v. G.E. Energy (USA), L.L.C.*,² in which that court held that employees are protected from retaliation under Dodd-Frank only if they report securities law violations to the Securities and Exchange Commission (“SEC”). The scope of Dodd-Frank’s anti-retaliation provision is, therefore, poised for review by the U.S. Supreme Court.

In *Berman*, Daniel Berman served as finance director of Neo@Ogilvy LLC (“Neo”) and was responsible for Neo’s financial reporting and compliance with accounting standards. After his employment was terminated by Neo in April 2013, Berman sued Neo and its parent, WPP Group USA Inc., alleging that his employment was terminated as a result of his whistleblowing activity — specifically, his internal report of alleged accounting fraud. The district court granted Neo’s and WPP’s motions to dismiss the complaint, holding that the anti-retaliation provision of Dodd-Frank only protects employees who report securities law violations to the SEC.

The Second Circuit reversed the district court’s decision. In the majority opinion, Judge Newman concluded that there was tension between the definition of whistleblower in Subsection 21F(a)(6) of the Securities Exchange Act of 1934 (the “Exchange Act”) (which defines a “whistleblower” as an individual who reports violations to the SEC) and the anti-retaliation provision set forth in Subsection 21F(h)(1)(A) of the Exchange Act (which prohibits retaliation for, *inter alia*, internal reporting). While the Fifth Circuit in *Asadi* held that employees who do not report violations to the SEC do not fall within the statute’s definition of “whistleblower,” the Second Circuit held that there was sufficient ambiguity in the statute for the court to give *Chevron* deference to the reasonable interpretation of the agency responsible for administering the statute — the SEC.

After the passage of Dodd-Frank, the SEC implemented Exchange Rule 21F-2, taking the position that employees who report violations in a manner described in Section 21F(h)(1)(A) of the Exchange Act — which includes reporting violations internally — are protected regardless of whether the employee

¹ No. 14-4626 (2d Cir. Sept. 10, 2015).

² 720 F.3d 620 (5th Cir. 2013).

satisfies the requirements to qualify for an award under Dodd-Frank's bounty program.³ After oral argument in *Berman*, the SEC issued a release that reinforced its position that employees who report violations only internally are entitled to the same anti-retaliation protection as employees who report violations to the SEC.⁴ The Second Circuit deferred to the SEC's interpretation.

The decision is likely to result in an increase in whistleblower retaliation claims under Dodd-Frank. Now, in the Second Circuit at least, employees who believe they have been retaliated against for having reported violations only internally will more likely choose to sue their employers under Dodd-Frank, rather than initiating a claim under the Sarbanes-Oxley Act ("SOX"). Dodd-Frank provides a direct route to federal court, while SOX claimants must first file and exhaust administrative claims with the Department of Labor. In addition, Dodd-Frank has a much longer statute of limitations period and double back pay is available. Accordingly, employers should ensure that they: (1) promptly investigate internal reports of securities law violations and take appropriate action to remedy matters reported (including by taking steps to avoid retaliating against a whistleblower); and (2) vet and document the legitimate bases for adverse employment actions against whistleblowers, to be in a better position to defend against retaliation claims under Dodd-Frank should they arise.

Authored by [Holly H. Weiss](#) and Jessica Augarten.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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³ 17 C.F.R. § 240.21F-2(b)(1)(iii).

⁴ Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, SEC Release No. 34-75592, 2015 WL 4624264 (F.R.) (Aug. 4, 2015).