A Divided Ninth Circuit Extends Dodd-Frank's Anti-Retaliation Protection for Whistleblowers

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Without a bright line requirement of an SEC contact to trigger whistleblower status, employers may not learn until after termination that an employee claims to be a whistleblower. Employees often raise internal questions, concerns and complaints as to business practices and the documentation of those practices. Legitimate differences of opinion may now be accorded whistleblower status, which may or may not have been the intent of Congress.

Last week, a divided three-judge panel of the Ninth Circuit Court of Appeals ruled that employees who internally report on a company's suspected violation of the federal securities laws and other anti-fraud statutes are protected under Dodd-Frank's anti-retaliation protection, even if they never report the violations to the Securities and Exchange Commission (SEC). *Somers v. Digital Realty Trust*, 15-17352 (9th Cir. March 8, 2017). By its ruling, the Ninth Circuit added to the Circuit split on Dodd-Frank's anti-retaliation protection for whistleblowers, with the Ninth Circuit backing up the Second Circuit and opposing the Fifth Circuit.

Dodd-Frank's Whistleblower Protection:

The Dodd-Frank Act's anti-retaliation provision prohibits employers from firing or discriminating against a whistleblower who makes disclosures that are required or protected under Sarbanes Oxley act:

No employer may [retaliate against] a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower … in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002.

15 U.S.C. § 78u-6(h)(1)(A)(iii) (hereafter referred as Subdivision (iii)).

Section 78u-6 of the Act defines a whistleblower as someone who reports the violation(s) to SEC:

The term 'whistleblower' means 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).

The Act also provides that an employee who suffers retaliation in violation of the Subdivision (iii) provision may sue his or her employer in federal court for reinstatement of their former position, two times the amount of back pay including interest and legal fees and costs. *See* 15 U.S.C. § 78u-6(h)(1)(c).

The Circuit Split:

One line of cases, led by the Second Circuit in *Berman v. Neo@OgilvyLLC*, 801 F.3d 145 (2nd Cir. 2015), does not require an employee to report violations to the SEC to be considered a whistleblower. On the other hand, another line of cases, led by *Asadi v. G.E. Energy United States, LLC*, 720 F.3d 620 (5th Cir. 2013), has followed strict constructionist principles, finding that only those who report violations to the SEC are whistleblowers.

Somers' Case Widens the Split:

In Somers, the plaintiff-appellee was employed as Vice President of Digital Realty. He was terminated soon after he reported to the company's senior management possible securities violations by the company. Somers was not able to report his concerns to the SEC before he was terminated. Somers sued on several theories, including Section 21F of the Exchange Act, which includes Frank-Dodd's anti-retaliation protections. The district court denied the motion to dismiss and certified the question of interlocutory appeal.

The majority disagreed with Digital Realty's argument that Somers is not a whistleblower for Dodd-Frank purposes because he never reported to the SEC. The majority held that whistleblower is any employee who reports potential violations, whether to the SEC or internally. Relying on the second circuit ruling in *Berman*, the majority held that if a narrower definition of whistleblower in Dodd Frank is used subdivision (iii) would be narrowed to the point of absurdity because the provision would only protect employees who reported both internally and to the SEC, but fired solely for reporting internally. The panel noted that the anti-retaliation provision was added after the Dodd-Frank Act had gone through the legislative process and thus there was no legislative history supporting the provision. The majority held that, nonetheless, the last-minute addition indicated congressional intent to provide protection under the Dodd-Frank Act to employees who reported violations only internally.

Somers' ruling represents the tension between Dodd-Frank whistleblower protection and the corporate governance mechanism outlined in the Sarbanes-Oxley Act. This growing split among the circuits increases the likelihood that the U.S. Supreme Court will ultimately weigh in to resolve the conflict. Until the split is resolved, employers need to be cognizant of the risk of employee lawsuits under the Dodd Frank Act, even if the employee never reported the violation(s) to the SEC.