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Courts Struggle Over Whether FCPA Whistleblowers May Sue Under the Dodd-Frank Anti-Retaliation Provision

In recent months, two district courts have addressed the issue whether employees who claim they were retaliated against for internally reporting violations of the Foreign Corrupt Practices Act can bring a private civil lawsuit against their former employers under the Dodd-Frank anti-retaliation provision. Although both courts decided that the anti-retaliation provision of the Dodd-Frank Act did not apply in these particular cases, the courts disagreed over whether Dodd-Frank whistleblower protections *could* apply to FCPA whistleblowers who report internally but not to the SEC.

The Whistleblower Provisions

The "anti-retaliation" provision of the Dodd-Frank Act, 15 U.S.C. §78u-6(h)(1)(A) prohibits employers from retaliating against a "whistleblower" for:

i. providing information to the Securities and Exchange Commission ("SEC" or "Commission");
ii. initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
iii. making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.) ("SOX"), [certain other securities laws], and any other law, rule, or regulation subject to the jurisdiction of the Commission.

The Act defines "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). The Act authorizes individuals who "allege discharge or other discrimination in violation of subparagraph (A)" to bring a civil action in U.S. courts and to seek reinstatement, two-times back pay, and attorneys fees. 15 U.S.C. §78u-6(h)(1)(B)-(C)

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The courts that have considered these provisions have differed over their application to employees who report potential FCPA violations through internal processes and not to the SEC.

Nollner: Internal Reporting May Be Covered

In one of the first decisions to discuss the application of the Dodd-Frank anti-retaliation provision to internal reports, the U.S. District Court for the Middle District of Tennessee suggested that, in certain situations, employees who internally report potential FCPA violations may bring a civil action. Nollner v. Southern Baptist Convention, Inc., 2012 WL 1108923 (M.D. Tenn. April 3, 2012) ("the DFA [Dodd-Frank Act] conceivably could protect FCPA whistleblowers who work for 'issuers'").

Nollner was a U.S.-based overseas employee of the International Mission Board of the Southern Baptist Convention, Inc. ("Mission"), who oversaw a Mission construction project in New Delhi, India. Nollner observed what he believed to be a number of potential FCPA violations in connection with obtaining government permits and managing construction. He reported the perceived violations to his supervisors. He claimed that in response the Mission asked him to resign and when he refused, terminated his contract.

Nollner sued under the Dodd-Frank anti-retaliation provision on the ground that the FCPA is a securities law, and that he was terminated for reporting a violation. The Court dismissed his claims on the ground that the Mission was not an "issuer" of securities, and therefore that the SEC lacked jurisdiction over the Mission and the alleged violations did not "relate to violations of the securities laws." However, in evaluating what types of reporting would be protected under the anti-retaliation provision, the Court suggested that internal disclosures of FCPA violations may be covered in some situations.

The Court identified four factors that an employee would need to prove to qualify for protection under the anti-retaliation provision: (1) that the plaintiff was retaliated against for reporting a violation of the securities laws; (2) that the plaintiff reported that information to the SEC or to another entity (including internal reporting); (3) that the disclosure was made pursuant to a law, rule or regulation subject to the SEC's jurisdiction; and (4) that the disclosure was "required or protected" by that law, rule or regulation. Accordingly, even though an internal report may not constitute a report "to the Commission" as set forth in the definition of "whistleblower" (15 U.S.C. 78u-6(a)(6)), the Nollner court suggested that it may be "required or protected" under the securities laws within the meaning of the anti-retaliation provision (15 U.S.C. §78u-6(h)(1)(A)(iii)).[1]

Asadi: Internal Reporting Is Not Covered

In Asadi v. G.E. Energy, the U.S. District Court for the Southern District of Texas took a different approach, and dismissed a whistleblower claim. See Asadi v. G.E. Energy (USA), LLC, Civil Action No. 4:12-345 (S.D. Tx. Decided June 28, 2012).

The plaintiff in Asadi was a dual U.S. citizen who was employed as an Iraq Country Executive by GE Energy, a subsidiary of General Electric Company (GE). Asadi alleged that he held this position from 2006 until 2011, when his contract was terminated. Asadi brought a claim under the anti-retaliation provision alleging that GE Energy terminated his employment because he used internal channels to report potential violations of U.S. securities laws, including violations of the FCPA, in connection with the securing of energy service contracts from the Government of Iraq. Asadi also claimed that his disclosure was required and protected under Sections 302, 404, and 806 of SOX (15 U.S.C. §7241, §7262, 18 U.S.C. §1514A(a)). Asadi argued that his termination was unlawful under the Dodd-Frank Act because his disclosures to GE Energy, alleging violations of both the FCPA

[1] In a case that did not involve the FCPA, the U.S. District Court for the Southern District of New York applied a similar analysis, holding that the anti-retaliation provision applies not only to whistleblowers who report violations of securities laws to the SEC, but also to those whose disclosures are "required or protected" under SOX, the Securities Exchange Act, 18 U.S.C. §1513, or any other law, rule or regulation subject to the SEC's jurisdiction. Egan v. Trading Screen, Inc., 2011 WL1672066 (S.D.N.Y. May 4, 2011).

and SOX, are "required and protected" by the securities laws and therefore subject to protection under the third paragraph of the anti-retaliation provision, §78u-6(h)(1)(A)(iii).

With respect to the FCPA allegation, the Asadi Court noted that Asadi "cited the Court to no provision of the FCPA that 'protects' or 'requires' his internal report of the alleged bribery," and held that "the Provision does not protect Asadi against retaliation for his disclosure of the alleged bribery."

Addressing an even broader argument, the Court also analyzed whether the anti-retaliation provision applies at all to activity that occurs outside the territory of the United States, applying the "presumption against extraterritoriality" articulated by the U.S. Supreme Court in Morrison v. Nat'l Australia Bank Ltd., 130 S.Ct. 2869, 2878 (2010) and subsequently applied in a number of securities cases. See, e.g., Norex Petroleum v. Access Inds., 631 F.3d 29, 33 (2d. Cir. 2010) (involving RICO). As a general matter, the Court concluded that it does not, on the ground that the provision does not explicitly state that it is to apply extraterritorially. The Court declined to address whether the law might extend to extraterritorial activity in the specific context of the FCPA (which often involves activity outside the United States), resting instead (as noted above) on the ground that the internal report at issue was not a report "to the Commission" or "required or protected" under the securities laws.

Conclusion

The first courts to address the application of Dodd-Frank's anti-retaliation provisions to internal reports under the FCPA have struggled with the imperfect language of those provisions and have reached inconsistent results. Given the availability of double-back pay and attorneys fees under these provisions, litigation involving claims of retaliation is likely to continue. Moreover, these cases do not expressly address the SEC's authority to address these provisions in enforcement matters. Accordingly, companies should take steps to address and prevent retaliation claims by maintaining policies protecting whistleblowers, including policies encouraging anonymous internal reporting and prohibiting retaliation.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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