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Recent Decisions Provide Guidance with Respect to the Application and Scope of Anti-Retaliation Provision of Dodd-Frank

By Cynthia A. Murray

Among the key provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank") is the inclusion of incentives and protection for whistleblowers. Two recent federal court decisions provide important guidance with respect to the scope and application of the "anti-retaliation" provision of Dodd-Frank.

Section 78u-6(h)(1)(A) of Dodd-Frank prohibits employers from retaliating against a "whistleblower" for:

(i) providing information to the Securities and Exchange Commission ("SEC");

(ii) initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC 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*.) ("Sarbanes-Oxley"), 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 SEC.

Dodd-Frank defines "whistleblower" as "any individual who provides, or two or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). The Dodd-Frank anti-retaliation provision also authorizes individuals who "allege discharge or other discrimination in violation of [section 78u-6(h)(1)(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).

On June 28, 2012, the U.S. District Court for the Southern District of Texas decided *Asadi v. G.E. Energy (USA), LLC* and held that the anti-retaliation provision of Dodd-Frank does not apply to whistleblower claims that occur outside of the United States. The plaintiff, Khaled Asadi, was a U.S.-based employee of GE and was temporarily relocated to GE's office in Aman, Jordan to secure and manage energy services contracts between GE and the Iraqi government. Asadi filed a lawsuit under the "whistleblower" anti-retaliation provision under Dodd-Frank alleging that GE wrongfully terminated his employment after he notified his supervisors (but did not report to the SEC) that GE had potentially violated the Foreign Corrupt Practices Act and company policies by hiring a woman at the request of an Iraqi official while GE was negotiating a lucrative joint venture agreement with the Iraqi government.

GE moved to dismiss Asadi's complaint on the ground that Asadi did not qualify as a "whistleblower" under Dodd-Frank, which requires employees to report possible violations to the SEC. Asadi argued that he should qualify as a "whistleblower" under Dodd-Frank because, even though he did not make a report directly to the SEC, the disclosures he made to his superiors were "required" or "protected" under Sarbanes-Oxley and the Foreign Corrupt Practices Act.

Judge Nancy F. Atlas did not reach the merits of Asadi's argument that he qualified as a "whistleblower" under Dodd-Frank. Instead, Judge Atlas dismissed Asadi's claim on the ground that the anti-retaliation provision of Dodd-Frank does not apply to conduct outside of the territorial United States. In reaching this conclusion, Judge Atlas relied on the U.S. Supreme Court's decision in *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010) which "reaffirmed the 'longstanding principle' that Congress' legislation doesn't apply outside the United States 'unless a contrary intent appears.' …This presumption against extraterritoriality means that 'When a statute gives no clear indication of an extraterritorial application, it has none.'" Because the language in the anti-retaliation provision of Dodd-Frank is silent regarding whether it applies outside of the United States, Judge Atlas

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concluded that "Dodd-Frank's Anti-Retaliation Provision *per se* does not apply extraterritorially." Thus, *Asadi* gives employers a strong defense against claims of retaliation brought under Dodd-Frank by employees working outside of the United States.

Less than two weeks after *Asadi*, the U.S. District Court for the Southern District of New York held that Section 929A of Dodd-Frank, which amended Section 806 of Sarbanes-Oxley, can apply retroactively to protect employees of non-public subsidiaries of publicly traded companies. In *Leshinsky v. Telvent GIT, S.A.*, plaintiff Phillip Leshinsky worked for a privately-held subsidiary of defendant Telvent GIT, S.A, a publicly traded technology company. Leshinsky alleged that defendants wrongfully terminated his employment in July 2008 after he objected to the use of fraudulent information in connection with a bid to obtain a contract with the New York Metropolitan Transit Authority. Leshinsky alleged that his termination was in violation of the whistleblower provisions under Section 806 of Sarbanes-Oxley.

Before the enactment of Dodd-Frank, Section 806 provided for "[w]histleblower protection for employees of publicly traded companies." 18 U.S.C. § 1514A(a) (2002). Section 929A of Dodd-Frank extended whistleblower protection to employees of non-public subsidiaries or affiliates "whose financial information is included in the consolidated financial statements of such [public] company." Defendants moved to dismiss Leshinsky's complaint on the ground that the court lacked subject matter jurisdiction. Defendants argued that Leshinsky was terminated prior to the enactment of Dodd-Frank and Section 806 of Sarbanes-Oxley applies only to employees of publicly traded companies. The "novel question" before Judge J. Paul Oetken was whether the whistleblower provision of Section 929A of Dodd-Frank applied retroactively.

The court concluded that Section 929A of Dodd-Frank merely clarified the existing anti-retaliation provision of Section 806 of Sarbanes-Oxley and therefore could apply retroactively. To determine whether an amendment applies retroactively by virtue of being a clarification of existing law, courts generally consider three factors: (1) whether the enacting body declared that it was clarifying a prior enactment; (2) whether a conflict or ambiguity existed prior to the amendment; and (3) whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history. In applying these factors, Judge Oetken found that the legislative history of Section 929A indicated that Congress intended to "clarify" Section 806 by enacting Section 929A, not set forth a substantively new rule of law. Judge Oetken also found a "conflict or ambiguity" regarding Section 806's application to employees of non-public subsidiaries. In addition, based on the policy and legislative history of Sarbanes-Oxley, the court stated that "it was reasonable to infer that Congress intended to provide protection for whistleblowers at all levels of a public company's corporate structure, not solely those who were employed directly by the public entity itself." Accordingly, Judge Oetken concluded that Dodd-Frank Section 929A should apply retroactively to protect employees of non-public subsidiaries of public parent companies and denied defendants' motion to dismiss.

While *Asadi* and *Leshinsky* provide some useful guidance with respect to the application and scope of Dodd-Frank's anti-retaliation provision, these cases serve as a reminder that companies should take steps to encourage internal reporting of suspected misconduct and develop policies to protect whistleblowers and prohibit retaliation. ◆

For more information about Schnader's Financial Services Litigation Group or to speak with a member of the group at a particular Schnader office location, please contact:

Christopher H. Hart, Co-Chair
415-364-6707
chart@schnader.com

Stephen J. Shapiro, Co-Chair
215-751-2259
sshapiro@schnader.com

Cynthia A. Murray
212-973-8077
cmurray@schnader.com