Court Rejects Retroactivity of Dodd–Frank's Whistleblower Remedies

April 18, 2013

Since the 2010 enactment of the Dodd–Frank Wall Street Reform and Consumer Protection Act, a recurring question in judicial opinions interpreting the Act's whistleblower provisions has been whether these provisions should be given retroactive effect. Although federal courts have split on this question with respect to the Act's restrictions on mandatory arbitration,[1] a federal district court in Virginia has now held that the Act's remedies for whistleblowers who share information with the Securities and Exchange Commission (SEC) do not apply retroactively.

The plaintiff in the case, *Jones v. SouthPeak Interactive Corp.*,[2] had been employed as the chief financial officer of one of the defendants. After allegedly concluding that the company falsely reported inflated profits, the plaintiff attempted to report her suspicions to the company's internal audit committee and outside counsel. When her efforts allegedly failed to produce satisfactory results, she filed a complaint with the SEC's Enforcement Division in 2009. The company terminated her employment several days later.

The plaintiff ultimately sued under the Sarbanes–Oxley Act of 2002 (SOX)[3] and Dodd–Frank[4] for unlawful retaliation. In response, the defendants moved to dismiss on the ground (among others) that the plaintiff's Dodd–Frank claim was barred by the general presumption against retroactivity.[5]

The plaintiff's Dodd–Frank claim arose under 15 U.S.C. § 78u-6(h), which prohibits an employer from discriminating against a "whistleblower" for lawfully providing information to the SEC, assisting in an SEC investigation or administrative action, or making disclosures required or protected by the federal securities laws.[6] Although this prohibition overlaps with the whistleblower protections of SOX, the remedies available under Dodd–Frank include a larger award of *double* back pay plus interest,[7] which the plaintiff sought in her complaint. The defendants argued that this provision, which took effect in July 2010, could not be used to increase a potential back-pay award arising from a termination that took place in 2009.

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[1] *See generally Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, 423 & n.2 (S.D.N.Y. 2012) (noting disagreement among courts deciding retroactive effect of Dodd–Frank's ban on mandatory arbitration in retaliation cases under the Sarbanes–Oxley Act of 2002).

[2] No. 3:12cv443, 2013 WL 1155566, 2013 U.S. Dist. LEXIS 37999 (E.D. Va. Mar. 19, 2013).

[3] 18 U.S.C. § 1514A.

[4] 15 U.S.C. § 78u-6(h).

[5] *See generally Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) ("Statutes are disfavored as retroactive when their application 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

[6] 15 U.S.C. § 78u-6(h)(1)(A).

[7] *Id.* § 78u-6(h)(1)(C)(ii); *cf.* 18 U.S.C. § 1514A(c)(2)(B) (entitling a prevailing SOX plaintiff to the *actual* amount of back pay plus interest).

After finding no "clear congressional intent respecting retroactivity" in this context,[8] the district court agreed with the defendants: "Because Dodd–Frank serves to increase the liability imposed on the losing party, . . . the Court concludes that Dodd–Frank cannot be applied retroactively in a situation such as this."[9]

Although the *Jones* decision is a positive development for defendants facing retaliation claims, it is too soon to tell whether other federal courts, including appellate courts, will reach the same conclusion. Until a binding consensus emerges on this issue, employers should proceed with caution in defending against whistleblower retaliation claims, regardless of the date of the alleged retaliation.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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[8] 2013 WL 1155566, at *8, 2013 U.S. Dist. LEXIS 37999, at *24.

[9] *Id.* at *9, 2013 U.S. Dist. LEXIS 37999, at *26.