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Second Circuit Decision May Have Significant Implications for Whistleblowers and Their Employers

On September 10, 2015, the US Court of Appeals for the Second Circuit issued a decision with significant implications for purported whistleblowers and their employers—*Berman v. Neo@Ogilvy LLC, WPP Group USA, Inc.*, No. 14-4626 (2d Cir. Sept. 10, 2015). The *Berman* decision is the most recent in a string of cases interpreting the "arguable tension" between the statutory definition of the term "whistleblower" in Subsection 21F(a)(6) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), and the use of the term "whistleblower" in the anti-retaliation provision of Dodd-Frank found at Subsection 21F(h)(1)(A), which extends protections against retaliation to "a whistleblower" who "makes disclosures that are required or protected under the Sarbanes-Oxley Act of 2002" (Sarbanes-Oxley). The *Berman* Court resolved this "arguable tension" in a whistleblower-friendly manner that provides broad anti-retaliation protections to employees who make internal reports to their employers required or protected under Sarbanes-Oxley, even if those disclosures are not made pre-termination to the Securities and Exchange Commission (SEC). The *Berman* decision creates a clear split with the US Court of Appeals for the Fifth Circuit's contrary reading of the identical statutory provisions in *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013), and will require employers in the Second Circuit to use extra vigilance in dealing with employees reporting alleged misconduct internally.

Background

The question of when a whistleblower is actually a whistleblower under Dodd-Frank has now been decided differently by multiple courts in multiple circuits. Most notably, in 2013, the Fifth Circuit issued its decision in *Asadi*, and held that a whistleblower was not a whistleblower under Dodd-Frank unless s/he blew the whistle to the SEC prior to adverse personnel acts alleged to have been undertaken in retaliation for the reporting. At issue in *Asadi*, and numerous district courts that considered the same issue, was the interplay between differing definitions of "whistleblower," specifically the relationship between the statute's definition of the term and its use in the Dodd-Frank provision prohibiting employers from retaliation against employees for reporting violations, which was added by a conference committee just before final passage of the bill. In practical terms, the issue presented in these related cases is whether an employee who suffers retaliation because s/he reports wrongdoing internally, but not to the SEC, can obtain protection against retaliation as provided by Dodd-Frank.

The ruling in *Asadi* did not provide for these retaliation protections. *Asadi* enshrined the requirement that any whistleblower seeking Dodd-Frank remedies must report any company violations to the SEC. The Fifth Circuit rejected the plaintiff's argument that the

For more information, or if you have any questions, please contact your Katten attorney or the following member of Katten's **Litigation and Dispute Resolution** practice.

David L. Goldberg
+1.212.940.6787
david.goldberg@kattenlaw.com

whistleblower-protection provision should be construed to protect individuals who take actions to inform the company even if they do not provide information to the SEC. *Asadi* was decided by a strict reading of the definition of whistleblower that required the SEC notification. *Asadi* also rejected the SEC's 2011 implementing regulation, 17 C.F.R. § 240.21F-2, defining "whistleblowers" to include persons who make internal disclosures required or protected under Sarbanes-Oxley, regardless of whether those disclosures are also made to the SEC pre-termination.

Post-*Asadi*, most district courts that have considered the issue reached the opposite conclusion, and ruled in favor of a broad application of the anti-retaliation provisions of Dodd-Frank. Similar to the *Berman* majority, these district courts found the statute ambiguous and, therefore, deferred to the SEC's interpretation of the rule. Conversely, *Berman* cites to just three other district courts that have followed the rule in *Asadi*. *Berman* is the first circuit court to agree on a broad reading of Subsection 21F(h)(1)(a).

Factual Summary and Decision

Importantly for whistle-blowers and companies alike, *Berman* does not adopt *Asadi's* reading of the Dodd-Frank remedy provisions. The plaintiff in this case, Daniel Berman, was the finance director of Neo@Ogilvy (Neo) for three years where he was responsible for their financial reporting and compliance with Generally Accepted Accounting Principles as well as Neo's internal accounting procedures. At the end of his tenure, Berman alleged that he was discharged in violation of the whistleblower protections of Dodd-Frank after he discovered various practices that he thought amounted to accounting fraud and reported these violations internally. Berman waited approximately six months post-termination to report any information to the SEC.

Taking a practical view of the situation, the Second Circuit reasoned that precluding whistleblowers who report violations internally from receiving Dodd-Frank anti-retaliation protection is bad policy and against the spirit of the law and enacting regulation. First, while there may be some potential whistleblowers who report wrongdoing simultaneously to their employer and the SEC, that number will be small since some will feel that reporting only to their employer offers the prospect of having the wrongdoing ended without risk of retaliation, while jumping straight to the government raises a substantial risk of retaliation. Second, and more importantly, *Berman* concluded that a contrary result would fail to protect categories of whistleblowers who cannot report wrongdoing to the SEC until after they have reported to their employer—namely auditors and attorneys.

From this starting point, the *Berman* Court describes and analyzes the legislative history of Dodd-Frank, and reaches the conclusion that the last-minute inclusion of the whistleblower protections at issue here would be moot if the strict definition of whistleblower and adherence to a pre-termination SEC reporting requirement were followed. *Berman* found sufficient ambiguity and tension between the statutory definition of whistleblower and the scope of the anti-retaliation protection to warrant deferring to the SEC's 2011 interpretive regulations, allowing Dodd-Frank anti-retaliation protection for whistleblowers who report internally but fail to inform the government prior to termination.

Not surprising, given the fractious nature of the Fifth and Second Circuit decisions, Circuit Judge Dennis Jacobs issued a strong dissent in *Berman* urging adherence to the rule laid out in *Asadi*. The dissent argued for a stricter adherence to the text of the statute and accused the majority of writing the SEC reporting requirement out of the law. For the dissent, the case is simple and the statute is not ambiguous: A whistleblower may only claim the Dodd-Frank anti-retaliation protections and remedies if he or she reported the wrongdoing to the government prior to termination.

Implications

The clear tension between the majority and dissent and the split between the Second and Fifth Circuits make this issue ripe for Supreme Court review. As it stands, the majority of district courts have adopted the Second Circuit's construction of the issue. However the broader question to be decided in this case—namely the level of ambiguity needed to give deference to an agency's statutory interpretation—is one that the Supreme Court may well be keen to weigh in on. In the interim, employers in the Second Circuit must take note of the *Berman* decision and ensure that any adverse personnel actions against employees who have reported alleged misconduct internally not run afoul of the anti-retaliation provisions in Subsection 21F(h)(1)(A) regardless of whether the employer has "blown the whistle" to the SEC.

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