Securities Regulation Daily Wrap Up, TOP STORY—S.D.N.Y.: Influential court denies whistleblower protection for internal reporting, (Dec. 8, 2014)

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By Anne Sherry, J.D.

The federal district court in New York City has weighed in on the contentious issue of whether a whistleblower who reports misconduct only internally, and not to the SEC, is protected against retaliation. Adopting the Fifth Circuit's reasoning in *Asadi*, the court held that Dodd-Frank protects only whistleblowers who report to the SEC (*Berman v. Neo@Ogilvy LLC*, December 5, 2014, Woods, G.).

The arguments in this case are familiar to courts across the country, which are split on whether Dodd-Frank's protections are limited to employees who report to the SEC or whether internal reporting is enough. Courts that have taken the former view, the highest of which is the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*, hold to the statute's definition of "whistleblower" as an individual or group providing "information relating to a violation of the securities laws to the Commission." But another interpretation of the statute finds a conflict between this definition and the statute's protection of a class of internal reporting and defers to the SEC's rulemaking, which protects internal reporters, under the *Chevron* doctrine.

Plaintiff's allegations. As finance director of Neo@Ogilvy North America (Neo), the plaintiff, Daniel Berman, was responsible for financial reporting and compliance with GAAP and the accounting policies of Neo's parent. Berman alleged that he detected accounting irregularities, fraud, and material compliance failures and attempted to correct these issues, in some cases by reporting the transactions to his supervisors and having them canceled, and in other cases by correcting the company's books. After he was terminated on April 30, 2013, he reported the violations to senior management, to Neo's counsel, and to the parent company's audit committee. Finally, on October 31, 2013, Berman reported the violations to the SEC.

Magistrate's recommendation. Arguing their motion to dismiss before the magistrate judge, the defendants countered that Berman was terminated as part of a workforce reduction after he had already begun looking for a new job within the same corporate family. Nevertheless, defendants' counsel pointed out that "all the rest of this falls by the wayside" if Berman is not a whistleblower. The magistrate, however, pointed to the competing statutory interpretations between *Asadi* and its progeny, on the one hand, and a slew of district courts finding a tension within the Dodd-Frank provisions, on the other. "The very existence of these competing, plausible interpretations of the statutory provisions compels the conclusion that the statutory text is ambiguous," the magistrate judge concluded, and deference to the SEC rule was appropriate under *Chevron*. But even though she determined that Berman could be a whistleblower, the magistrate found the connection between the transactions he identified and a securities law violation to be too tenuous and recommended dismissing his complaint, with leave to amend.

District court ruling. The district court disagreed with the magistrate's report and declined to adopt the recommendations with respect to Berman's anti-retaliation claims. (There was no objection to the magistrate's recommendation that the court dismiss Berman's contract claims, and the court, finding no clear error, adopted that portion of the report.) The district court was persuaded by the *Asadi* court's holding, particularly its use of a hypothetical to illustrate how the apparent tension within the anti-retaliation provision could be reconciled.

Dodd-Frank provides that employers may not discriminate against "a whistleblower" because of a lawful act in providing information to the SEC; in being involved in an investigation or action based on the information; *or in making disclosures required or protected under the securities laws*. That third category of protected disclosures subsumes certain categories of internal reporting and other reports that are not necessarily made to the SEC. The inclusion of internal reporting here—even though "whistleblower" is defined to be only a person who reports to the SEC—led other courts and the magistrate below to find ambiguity in the statute and defer to the SEC's regulation intentionally omitting the requirement of reporting to the Commission. But *Asadi* offers a hypothetical situation in which the third category would be neither contradictory nor superfluous: An employee who reported

a securities law violation both internally and to the SEC on the same day and was then fired by the CEO without knowledge of the SEC report would be protected under, and only under, the third category of disclosures.

The Southern District agreed with the Fifth Circuit's reasoning, which applies traditional canons of statutory construction to understand the meaning of the statutory text. This approach, and its harmonious interpretation of the purported contradictory language, is more appropriate than a judicially created exception to an unambiguous text, the district court stated. The court noted that its holding does not leave internal reporters without a remedy for retaliation; they are still protected under Sarbanes-Oxley as long as they take their grievances first to the Department of Labor, but what the court will not do is create a private right of action allowing whistleblowers to bypass the agency procedure. "It is well-established that courts should be extremely reluctant to extend a private right of action … in the absence of clear intent by Congress," the district court concluded, and by adopting the *Asadi* reasoning, "the court avoids this pitfall."

The case is No. 14-cv-523-GHW-SN.

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Companies: Neo@Ogilvy LLC; WPP Group USA Inc.

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