Securities Regulation Daily Wrap Up, WHISTLEBLOWER NEWS—S.D.N.Y.: JPMorgan exec likely fired for lying, not whistleblowing, (Oct. 14, 2015)

Securities Regulation Daily Wrap Up

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By Anne Sherry, J.D.

A former J. P. Morgan Chase executive again failed to make the case that her firing violated Sarbanes Oxley, even after the Second Circuit directed the Southern District of New York to apply a more lenient standard. The only evidence in the employee's favor was the fact that she was fired two weeks after reporting a client's alleged wrongdoing, but the termination also coincided with a fireable incident in which she allegedly lied about her communications with a different client (*Sharkey v. J.P. Morgan Chase & Co.*, October 9, 2015, Sweet, R.).

Background. The executive alleged that she was terminated for reporting to the bank her concerns that one of her assigned clients was engaging in fraud. The district court originally granted summary judgment for the defendants, concluding that the executive failed to show that her complaints "definitively and specifically" related to one of the categories of misconduct listed in Sarbanes-Oxley's anti-retaliation provision. Eight months later, in an unrelated case (*Nielsen*), the Second Circuit ruled that although a district court came to the right result in dismissing a whistleblower complaint, its use of the "definitively and specifically" standard was improper. In light of this new decision, the executive appealed, and the Second Circuit vacated summary judgment and remanded the case to the district court.

Another explanation. The defendants argued that the executive was fired not for reporting misconduct, but for lying about having spoken to an office manager who was trying to get in touch with her. Although there was a factual dispute about the executive's communication with the office manager, the executive did not deny that she admitted that she lied.

The district court's initial conclusion that the executive did not make a prima facie case under SOX had been based in part on the overturned "definitively and specifically" standard. On remand, applying the Second Circuit's more lenient *Nielsen* test, the court determined that the executive established at least a prima facie case that she had an objectively reasonable belief of an enumerated violation.

However, she did not make a prima facie case that the protected activity contributed to her firing. The only evidence that the executive's report of alleged wrongdoing led to her termination was the fact that she was fired two weeks after her report. While temporal proximity can be sufficient to establish a causal connection in a retaliation claim and two weeks is "very close" proximity, the termination also occurred soon after the alleged deception regarding the office manager, thus weakening any inference that could be drawn. "Lying to one's employer about an important client is a separate and sufficient reason to fire an employee," the court explained, and whether or not the executive actually lied, there was clear evidence that those making the decision to fire believed that she had. On this basis, the court again granted summary judgment in the defendants' favor.

The case is No. 10 Civ. 3824.

Attorneys: Douglas Holden Wigdor (Wigdor Law LLP) for Jennifer Sharkey. Anthony D. Boccanfuso (Arnold & Porter LLP) for J.P. Morgan Chase & Co.

Companies: J.P. Morgan Chase & Co.

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