Securities Regulation Daily Wrap Up, DODD-FRANK ACT—5th Cir.: Fired GE Energy executive not Dodd-Frank whistleblower, (Jul. 18, 2013)

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By Mark S. Nelson, J.D.

An executive hired to manage relations between an energy company and post-war Iraqi officials could not bring a private Dodd-Frank whistleblower claim because he did not offer the SEC information about the company's alleged violation of the Foreign Corrupt Practices Act (FCPA), according to the U.S. Court of Appeals for the Fifth Circuit. The executive did not appeal the dismissal of his related supplemental breach of contract claim (*Asadi v. G.E. Energy (USA), L.L.C.*, July 17, 2013, Elrod, J.).

Background. GE Energy (USA), L.L.C. (GE Energy) hired Khaled Asadi in 2006 to be its Jordan-based Iraq Country Executive. Mr. Asadi learned in 2010 that GE Energy had hired a female employee with ties to a high-ranking Iraqi official to help win a joint venture deal. He reported this alliance to his supervisor and GE Energy's regional ombudsman as a possible FCPA violation. Mr. Asadi soon got an unexpectedly bad performance review and was allegedly urged to leave GE Energy. Mr. Asadi never stepped down and GE Energy fired him a year after his internal FCPA reports.

Mr. Asadi then filed suit alleging a violation of the Dodd-Frank Act's whistleblower provision now codified in Exchange Act Section 21F. The district court granted GE Energy's motion to dismiss with prejudice because Section 21F does not apply outside the U.S. The district court, however, said that a decision on Mr. Asadi's "whistleblower" status was needless. Mr. Asadi appealed and the Fifth Circuit affirmed, but on the ground that he was not a whistleblower.

Ambiguity noted. Exchange Act Section 21F(a)(6) narrowly defines "whistleblower" to mean a person who offers tips to the SEC. But Section 21F(h)(1)(A) implies other definitions, including ones that conflict with the narrow Section 21F(a)(6) definition. Mr. Asadi, for example, argued that he need not give his FCPA tip to the SEC because his actions are protected under various federal securities laws by Section 21F(h)(1)(A)(iii). Mr. Asadi relied on this wider definition because he admitted that he failed to meet Section 21F(a)(6)'s definition.

The Fifth Circuit's opinion noted in footnote 6 that a few districts courts have grappled with the tension between the possible "whistleblower" definitions in Section 21F. According to the Fifth Circuit, these courts extended whistleblower status to persons who did not report to the SEC. The Fifth Circuit, however, disagreed with this view and instead looked to Section 21F's plain meaning.

Plain text of law. The Fifth Circuit held that Mr. Asadi did not meet the plain meaning of "whistleblower" under Section 21F. The court said that Section 21F(a)(6) states the only definition of "whistleblower" and that Section 21F(h)(1)(A) recites protected activities in which a person who meets that definition may engage. The court noted that Section 21F(h)(1)(A) is not extraneous merely because some persons who engage in protected activities may fall outside of Section 21F(a)(6)'s narrow definition.

Specifically, the court rejected Mr. Asadi's reliance on Section 21F(h)(1)(A)(iii). For one, the Fifth Circuit said that this provision bars an employer from retaliating against a "whistleblower" and not just an "individual" or "employee." Moreover, said the court, Section 21F(h)(1)(A)(iii) still has meaning under its view because it protects activities beyond a person's report to the SEC.

The Fifth Circuit also suggested a hypothetical scenario to demonstrate the interplay between Section 21F and the Sarbanes-Oxley Act (SOX). An employee who reports a possible securities law violation to his CEO and to the SEC (but whose CEO is unaware of the SEC report) may still claim Section 21F whistleblower status if he is fired in retaliation because his report to the SEC allows him to invoke Section 21F(h)(1)(A)(iii) to assert SOX's anti-retaliation bar. The court noted that while an employee may raise a separate SOX claim, he likely would opt for the Section 21F suit because the Exchange Act offers greater protection than SOX.

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SEC regulation flawed. According to the Fifth Circuit, Mr. Asadi's argument for an expansive "whistleblower" definition based on the SEC's implementing regulation was amiss. Exchange Act Rule 21F-2(b)(1) defines "whistleblower" as a person who, for purposes of the anti-retaliation bar, has a reasonable belief that he is providing information of a possible securities law violation or who provides information under Exchange Act Section 21F(h)(1)(A).

The Fifth Circuit found that under *Chevron* it need not credit the SEC's broader regulatory "whistleblower" definition because the plain meaning of Exchange Act Section 21F defines "whistleblower" as a person who provides information about a possible securities violation to the SEC. As a result, Mr. Asadi could not bring a private suit under Section 21F because he never reported his information about GE Energy's alleged FCPA violation to the SEC.

The case is No. 12-20522.

Attorneys: Ronald E. Dupree, Jr. (Law Office of Ronald Edward Dupree) for Khaled Asadi. Linda L. Addison (Fulbright & Jaworski) for GE Energy (USA), L.L.C.

Companies: GE Energy (USA), L.L.C.

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