CLIENT ALERT

Fifth Circuit Limits Scope of Who Qualifies to Bring Dodd-Frank Whistleblower Retaliation Claims

Jul.24.2013

With its recent decision in *Asadi v. GE Energy LLC*, the Fifth Circuit limited the definition of individuals who can bring a retaliation claim under the Dodd-Frank Act to exclude employees who have only raised internal complaints. The Court's ruling dismissed a claim brought by Khaled Asadi against his former employer GE Energy USA LLC (GE Energy) because he had not provided "information" to the U.S. Securities and Exchange Commission (SEC). Asadi therefore did not qualify as a "whistleblower" as that term is defined under 15 U.S.C. § 78u-6(a)(6). The Fifth Circuit is the first Circuit court to consider the issue. Its decision conflicts with the holdings by several district courts that had previously allowed claims to proceed where the putative whistleblower had not contacted the SEC. The Fifth Circuit also refused to defer to the SEC's recent regulation adopting the same broad definition as the district courts. The decision is welcome news to employers concerned about the expansive view of the scope of coverage under Dodd-Frank's retaliation provisions taken by the lower courts and SEC. However, further circuit court and potential Supreme Court litigation over this issue looms.

Asadi worked for GE Energy as its Iraq Country Executive from 2006 until 2010. In his complaint, he claimed that he was informed by Iraqi officials that GE Energy had hired a woman who was close to a senior Iraqi official to curry favor with him as GE Energy was negotiating a joint venture agreement. Concerned that this might be a violation of the Foreign Corrupt Practices Act, Asadi claims he reported the hiring to his supervisor and the GE Energy ombudsman for the region. He then claims he was given a negative performance review and pressured to step down from his role into one with minimal responsibility. Asadi was terminated approximately one year after his internal reports.

Asadi then brought his claim pursuant to Section 922 of Dodd-Frank (codified as 15 U.S.C. § 78u-6), which provides a private cause of action for employees who are retaliated against for engaging in certain whistleblower activities. GE Energy moved to dismiss Asadi's claim arguing that he was not a "whistleblower" as that term is defined in 15 U.S.C. § 78u-6(a)(6) which includes only those individuals "who provide…information relating to a violation of the securities laws *to the Commission*" (emphasis added). GE Energy also sought dismissal on the basis that Dodd-Frank does not extend to activities that occur outside the United States. The district court dismissed Asadi's claim on this second basis – that Dodd-Frank does not extend extraterritorially – and failed to address GE Energy's claim that Asadi did not meet the definition of a "whistleblower" under the statute because he did not provide information to the SEC.

The Fifth Circuit focused its attention on the statutory definitional issue and affirmed the lower court's ruling dismissing the complaint. The court determined that Asadi was not a "whistleblower" under the statute because he only brought internal complaints. Asadi argued that 15 U.S.C. § 78u-6(h)(1)(A)(iii) provided an additional definition of a "whistleblower" because it prevents an employer from retaliating against an employee for making disclosures required or protected under the Sarbanes-Oxley Act (SOX), the Securities Exchange Act, or any other law or regulation under the SEC's jurisdiction. Relying on this provision, Asadi claimed that by complaining to his supervisor, he had satisfied the elements for protection by SOX, and therefore was also covered by Dodd-Frank. Each of the district courts to have considered the issue – along with the SEC who recently issued a similar regulation – had sided with Asadi's reading of the statutory text.

The Fifth Circuit, however, found that Asadi's reading of the statute – which would not require him to provide information to the SEC – improperly rendered the "to the Commission" language of § 78u-6(a)(6) superfluous. Instead, the Fifth Circuit said the proper reading of § 78u-6(h)(1)(A) was that it identifies the activities protected by the statute, but does not define the term "whistleblower." The Fifth Circuit also held that Asadi's reading would make SOX moot because if anyone who could bring a SOX claim was also covered by Dodd-Frank, they would only bring a Dodd-Frank action and never utilize SOX. The court noted three reasons underlying this analysis: (1) Dodd-Frank allows for greater monetary damages because of its double back pay provision, as opposed to SOX only allowing for back pay, (2) Dodd-Frank claimants can bring a claim immediately in court and do not have to first file with a federal agency like SOX complainants, and (3) Dodd-Frank has a substantially longer statute of limitations (up to 10 years) than SOX's 180-day statute.

Finally, the Fifth Circuit refused to give *Chevron* deference to the SEC's regulation – 17 C.F.R. § 240.21F-2(b)(1) – finding that Congress addressed the "precise question at issue" in defining "whistleblower" under § 78u-6(a)(6). The Fifth Circuit also held the SEC's regulations were inconsistent in that another provision required an individual to submit information to the SEC to be considered a "whistleblower." Because the Fifth Circuit found Asadi did not meet the definition of a "whistleblower" under Dodd-Frank, it dismissed his claim without reaching the extraterritoriality issue.

The Fifth Circuit's decision is a significant roadblock for the SEC and plaintiffs' whistleblower attorneys in their efforts to expand the scope of Dodd-Frank's coverage. As additional cases involving only internal complaints come to the Circuit court level, it is quite possible that one or more of the other Circuit courts will follow the logic of the district courts that have considered this issue, and thereby create a Circuit split. If that happens, the Supreme Court will likely then be the final arbiter of the definition of "whistleblower" under Dodd-Frank. Congress may also take up the issue in light of the emerging split and adopt the broader definition of "whistleblower" advocated by the SEC and Asadi.

Until that time, employers faced with this issue will be wise to cite the Fifth Circuit's decision in *Asadi* to refute Dodd-Frank retaliation claims where the plaintiff has only made internal complaints. Moreover, employers can use the *Asadi* decision to prevent employees who may have a viable SOX claim, but not a Dodd-Frank claim, from doing an end run around the SOX procedural rules and limitations on damages. At the same time, proactive employers should maintain the necessary internal reporting and monitoring procedures to minimize the potential for Dodd-Frank or SOX retaliation claims to arise in the first place.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Kris D. Meade
Partner – Washington, D.C.
Phone: +1 202.624.2854
Email: kmeade@crowell.com

Rebecca L. Springer
Partner – Washington, D.C.

Phone: +1 202.624.2569
Email: rspringer@crowell.com