This article was originally published in the Commercial Litigation Advisor *(November 2015)*

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COMMERCIAL LITIGATION ADVISOR

Whistleblowers, Retaliation and a Judicial Dust-Up

By John M. O'Connor

Are whistleblowers under the Dodd-Frank Act protected against retaliation if they report a possible violation of law to their employer but not to the Securities and Exchange Commission? In a recent decision that created a split with the Fifth Circuit, the U.S. Court of Appeals for the Second Circuit held that a Dodd-Frank whistleblower who had informed only his employer, and not the SEC, was entitled to protection against retaliation.

Of course, the most immediate impact of the Second Circuit's decision, *Berman v. Neo@Ogilvy, LLC,* is that the complaint of the employee-whistleblower Daniel Berman stays alive, and that Neo@Ogilvy, the employer-defendant, must continue to defend against the retaliation claim, with the concomitant possibility of liability.[1] However, in the larger picture, there are aspects of this decision that may actually benefit both whistleblower-employees and their employers.

If a whistleblower first informs the employer of information indicating possible illegality, the employer will have an opportunity to address and correct the situation, and the issue might never come to the attention of the SEC. On the other hand, if a whistleblower must contact the SEC in order to obtain protection against retaliation, there would be little incentive to give the employer a first crack at resolving the issue.

Presumably, this rationale contributed to the SEC's rule supporting the interpretation of the Dodd-Frank statute advanced by the plaintiff Berman, *i.e.,* that retaliation was prohibited even if there was no report to the SEC.[2] The Second Circuit held that the Dodd-Frank Act was ambiguous with respect to whether reporting to the SEC was required for a whistleblower to obtain protection from retaliation and therefore looked to the interpretation of the SEC to decide the issue.

Two Laws — and Two Definitions of "Whistleblower"

The statutory ambiguity resulted from the interplay of the Dodd-Frank and Sarbanes-Oxley acts, both of which provide protection from retaliation against whistleblowers. The Dodd-Frank Act contains a definition of a "whistleblower" that refers to an individual who *reports to the SEC* possible violations of the federal securities laws and rules.[3] However, with respect to retaliation, one section of the Dodd-Frank Act refers to the whistleblower provisions of the Sarbanes-Oxley statute, which do *not* require a report to the SEC to trigger protection against retaliation.[4]

The Fifth Circuit had previously held that the statutory provisions were not ambiguous and that definition of "whistleblower" contained in Dodd-Frank determined the issue

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— in other words, in order to be a "whistleblower" as defined, an employee had to have made a report to the SEC.[5] The dissent by Judge Dennis Jacobs in *Berman* agreed with the Fifth Circuit.

Of course, a Circuit court split raises the possibility of a review by the U.S. Supreme Court, and that, in turn, seemed to prompt some "inside baseball" jockeying in the opinions. The majority opinion by Judge Jon Newman cited the statutory analysis undertaken by Chief Justice John Roberts in *Burwell v. King,* which upheld Obamacare. The majority also cited an article by Justice Antonin Scalia, "Reading Law," for the following proposition:

> Definitions are, after all, just one indication of meaning — a very strong indication to be sure, but nonetheless one that can be contradicted by other indications.

It would appear that where a Circuit Court's statutory interpretation may be reviewed by a Supreme Court justice who holds himself out as a "strict constructionist," a few felicitous, prophylactic citations may be thought useful.

In a dissent that some might describe as wry (or is it acerbic? or perhaps apoplectic?), Judge Dennis Jacobs let loose this compliment:

> No doubt, my colleagues in the majority, assisted by the SEC or not, could improve upon many federal statutes by tightening them or loosening them, or recasting or rewriting them.

Judge Jacobs also observed, "The thing about a definition is that it is, well, definitional."

Who said statutory interpretation was boring?

ENDNOTES

[1] *Berman v. Neo@Ogilvy, LLC,* Dckt. No. 14-4626, 2014 US Dist Lexis 115078, ___ *F.3d* ___ *(2d Cir. September 10, 2015).*

[2] Exchange Act Rule 21F-2, 17 C.F.R. § 240.21F-2; and SEC Release No. 34-75592, 2015 WL 4624264 (Aug. 4, 2015).

[3] Section 21F(a)(6), 15 U.S.C. § 78u-6.

[4] Section 21F(h)(1)(A)(iii), 15 U.S.C § 78u-6(h)(1)(A)(iii).

[5] Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620 (5th Cir.2013).