Blogs
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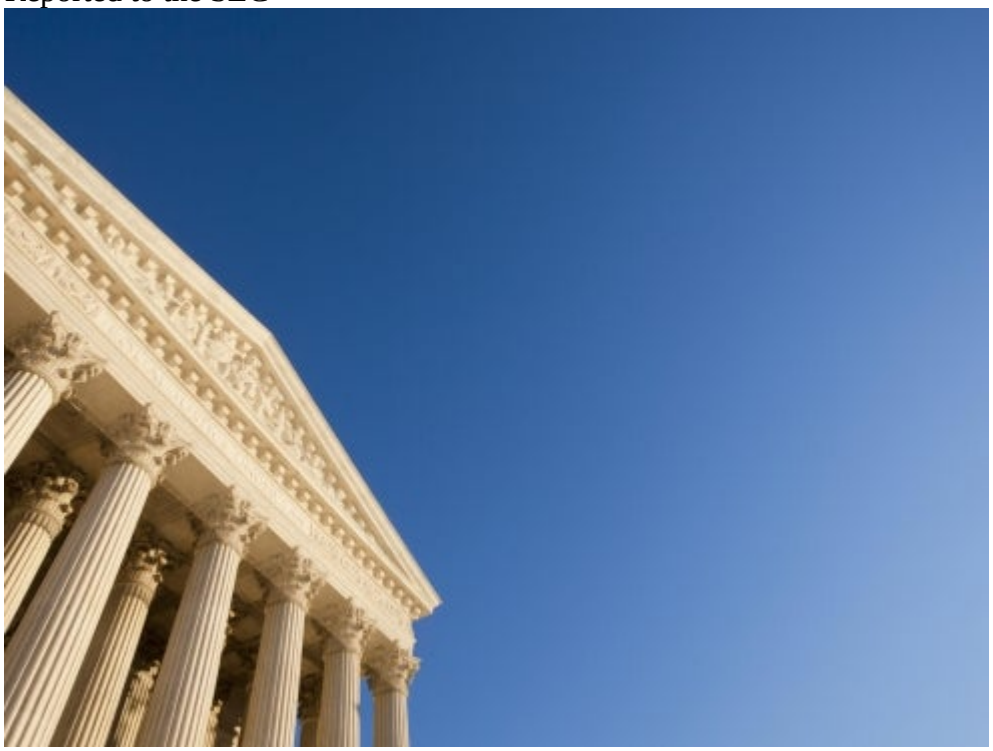
Second Circuit: Dodd-Frank "Anti-Retaliation" Applies Even When Whistleblower-Employees Have Not Reported to the SEC



Creating a circuit split that will likely be headed for resolution by the U.S. Supreme Court, the Second Circuit's recent decision in *Berman v. Neo@Ogilvy LLC* expanded the Dodd-Frank Act's anti-retaliation protections to include employees who were terminated by their companies after *internally* reporting to their employers concerns about potential violations of the federal securities laws.

The Fifth Circuit reached the opposite conclusion two years ago, in *Asadi v. G.E. Energy (USA), L.L.C.*, holding that Dodd-Frank unambiguously defines "whistleblower" as someone who reports to the SEC. As explored previously in this blog, in *Asadi*, the Fifth Circuit held that the Dodd-Frank Act's whistleblower protections extend only to employees who provide information relating to a violation of the securities laws ***to the SEC***. *Asadi* was perceived to be a significant blow to the final rules enacted by the SEC under the authority of Dodd-Frank, because the SEC's rules declare that under certain circumstances an individual may be a protected whistleblower even though he or she only reports suspected violations *internally*, and not to the SEC. The retaliation protection provision in question, subsection 21F(h)(1)(A) of the Securities Exchange Act, provides that no employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower in: (i) providing information to the SEC; (ii) initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC based upon or related to such information; or (iii) making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, and other laws, rules, or regulations subject to the jurisdiction of the SEC. The Second Circuit's analysis in *Berman* turned on its reading of subdivision (iii)--specifically, **disclosures required or protected under Sarbanes-Oxley**. Section 806(a) of Sarbanes-Oxley prohibits a publicly traded company from retaliating against an employee who provides information concerning securities law violations to, among others, a federal regulatory or law enforcement agency, a member of Congress, or "a person with supervisory authority over the employee." The Second Circuit reasoned that subdivision (iii) expands the protections of Dodd-Frank to include the whistleblower protection provisions of Sarbanes-Oxley, and because the Sarbanes-Oxley provisions contemplate an employee reporting

violations *internally*, their incorporation into the Dodd-Frank Act suggests that whistleblowers under Dodd-Frank likewise need not report suspected violations to the SEC in order to qualify for protection under the anti-retaliation provisions. Given the"arguable tension" that therefore appears to exist between subsection (iii) and subsection 21F(a)(6) of the Dodd-Frank Act (which defines a whistleblower as an individual ***who provides information to the SEC***), the Second Circuit concluded that there is sufficient ambiguity as to the coverage of subdivision (iii), obliging it to afford *Chevron* deference to the SEC's view that Dodd-Frank's anti-retaliation protections include individuals who report to persons or authorities other than the SEC, including company management.

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