

Judges Weigh Scope of Dodd-Frank Whistleblower Rules

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Dodd-Frank's whistleblower incentive provisions have generated plenty of excitement for plaintiffs lawyers and teeth-grashing among corporations and their counsel--even if we're all still waiting for the first award. In the meantime, a trickle of court opinions is offering a preview of years of likely litigation over the scope of whistleblower protection under the law.

The latest decision came out on Monday, and it's sure to please the plaintiffs bar. As the New York Law Journal reports, a federal judge ruled that Dodd-Frank gave retroactive protection to whistleblowers at subsidiaries of public corporations--not just those directly employed by their parent companies.

The ruling, by U.S. District Judge J. Paul Oetken in Manhattan, is a victory for a whistleblower named Phillip Leshinsky, represented the Manhattan boutique Reavis Parent Lehrer. Leshinsky is a former employee of a non-public subsidiary of Telvent GIT, a U.S.-listed technology company headquartered in Spain, who says he was fired in retaliation for bringing a whistleblower complaint. (Telvent is represented by Squire Sanders. Partner Victor Genecin was not immediately available for comment.)

The Sarbanes-Oxley Act of 2002 included a provision protecting whistleblowers at publicly traded companies from retaliation. Dodd-Frank spelled out that the provision also protects employees of wholly owned subsidiaries of public companies. The question remained, however, whether that protection applies retroactively. Judge Oetken answered in the affirmative, finding that the amendment in Dodd-Frank was merely a clarification of existing laws, rather than a substantive change. Oetken gave deference to an interpretation of the provision reached by the Department of Labor's administrative review board, but noted that he would have reached the same decision independently.

"This a period of ferment in Sarbanes-Oxley litigation in general and this case is an good example of that," said Eugene Scalia of Gibson, Dunn & Crutcher, who was not involved the in the case. According to Scalia, many judges are grappling with how to interpret Dodd-Frank's whistleblower provisions, and are also asking themselves how much weight to give to rulings by the DOL's administrative review board. The review board has complicated matters by revisiting and reversing some of its own holdings, Scalia said. "That's introduced some increased uncertainty," he said.

Put down Eugene Goldman, a partner at McDermott Will & Emery, as an early critic of Monday's ruling. "I think the judge expansively interpreted the law of retroactivity," he said. "Congress did not say that this provision should apply retroactively. If that was their intention, they could have made that clear."

"The impact could be very significant," Goldman added. "This an important issue of law, and it may be an appropriate one for expedited review."

Reavis partner Alice Jump, who represents Leshinsky, doesn't see it that way. "The opinion is scholarly, well-reasoned, and thorough," she said. And because many public companies do most of their business through wholly owned subsidiaries, "[the decision] is reflective of corporations really work," she added.

Oetken is the second federal judge to rule on the scope of the Dodd-Frank whistleblower provisions in just the past two weeks. In a much more defense-friendly decision issued on June 28, U.S. District judge Nancy Atlas in Houston dismissed a wrongful termination claim brought by a former employee of GE Energy who alleged that he was asked to leave the company after bringing a whistleblower claim under Dodd-Frank. Atlas concluded that Dodd-Frank's anti-retaliation provision doesn't extend to extraterritorial conduct. "The language of the Dodd-Frank Anti-Retaliation Provision is silent regarding whether it applies extraterritorially," Atlas wrote. Therefore, there is a "presumption that the Provision does not govern conduct outside the United States."

Meanwhile, in what a new Gibson Dunn report on the Foreign Corrupt Practices Act called "the first decision to examine an FCPA-related whistleblower claim brought pursuant to Dodd-Frank," on April 3 U.S. District Judge Aleta Trauger in Nashville dismissed a wrongful termination claim brought by a former employee of Southern Baptist Convention Inc., the business arm of the world's largest Baptist congregation.

The SBC employee claimed he was fired after he internally reported alleged bribes to Indian government officials overseeing the building of a church in New Delhi. Judge Trauger dismissed the case on the grounds that the anti-retaliation provision does not apply to non-issuers like SBC, because such companies are outside the jurisdiction of the SEC. "The court will not interpret [Dodd-Frank] as extending its whistleblower protections to companies that otherwise have no relationship to the SEC and that have not committed securities violations," Judge Trauger wrote.

Girard Gibbs partner Jonathan Levine, who was not involved in any of the cases, said that it's too early to draw grand conclusions about whether judges will expand or restrict the scope of the Dodd-Frank whistleblower provisions. There's only been a few decisions so far, and they've all involved unusual facts, he said. "It's going to take a while for a body of case law to develop."