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EXPERT ANALYSIS

Whistleblower Anti-Retaliation Provision Does Not Apply Outside the U.S.

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The 2nd U.S. Circuit Court of Appeals ruled Aug. 14 that the Dodd-Frank Act's prohibition on retaliation against whistleblowers does not apply extraterritorially. In affirming the dismissal of the case on extraterritoriality grounds, the court declined in *Liu v. Siemens AG,* No. 13–4385–cv, 2014 WL 3953672 (2d Cir. Aug. 14, 2014), to address another issue that has attracted attention: whether a person qualifies as a whistleblower for purposes of the anti-retaliation provision if he or she has disclosed the alleged misconduct only within the corporation, rather than to the Securities and Exchange Commission.

FACTUAL BACKGROUND

The plaintiff in the Liu case — a citizen and resident of Taiwan — had worked as a compliance officer for a division of a Chinese company that is a wholly owned subsidiary of a German corporation, Siemens AG, whose shares are listed on the New York Stock Exchange. The plaintiff claimed to have discovered improper payments to officials in North Korea and China. He reported the alleged conduct to his superiors, met with the German company's officials in China, and then was allegedly demoted and ultimately fired.

The plaintiff later reported the alleged conduct to the SEC, charging that the German company had violated the Foreign Corrupt Practices Act. He then sued in the U.S. District Court for the Southern District of New York, alleging that he had been fired because of his whistleblowing, in violation of the Dodd-Frank Act's anti-retaliation provision.

The court dismissed the case, holding that the alleged facts as pled involved only extraterritorial conduct, which was not within the statute's reach, and that the complaint failed to establish that the plaintiff had made a disclosure to the SEC that was "required or protected" by the enumerated statutes.

THE 2ND CIRCUIT'S DECISION

The 2nd Circuit affirmed the dismissal, reaching only the extraterritoriality issue. The court held that, to state a claim, the plaintiff needed to plead that either that the alleged conduct involved a *domestic* application of the anti-retaliation provision or that Congress intended the provision to apply extraterritorially. The plaintiff's claim failed on both grounds.

The court made short shrift of the first alternative:"This case is extraterritorial by any reasonable definition. … The whistleblower, his employer, and the other entities involved in the alleged wrongdoing are all foreigners based abroad, and the whistle-blowing, the alleged corrupt activity, and the retaliation all occurred abroad."

The fact that the German parent's shares are listed on the NYSE was irrelevant; the federal securities laws do not apply extraterritorially to a foreign company's foreign conduct merely because that company has issued U.S.-listed securities, the court said.

As for the second alternative, the court ruled that nothing in the Dodd-Frank Act's text or legislative history suggests that "Congress intended the anti-retaliation provision to regulate the relationships between foreign employers and their foreign employees working outside the United States."

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LIU'S IMPLICATIONS

The 2nd Circuit's decision clarifies some issues and leaves others unresolved for future litigation.

First, the court clearly held that the anti-retaliation provision does not apply extraterritorially. However, because the facts of this case so clearly involved only extraterritorial conduct, the court had no need to consider the dividing line between domestic and extraterritorial conduct.

Second, the court saw no reason to reach another basis for the District Court's decision, an issue that has divided the courts: whether purely intracorporate whistle-blowing suffices to trigger the anti-retaliation provision, or whether the whistleblower must actually disclose to the SEC. The 5th Circuit has held that the anti-retaliation provision does not apply unless and until the whistleblower has gone to the SEC,[1] but some district courts have disagreed.[2] The 8th Circuit is currently considering whether to grant an interlocutory appeal on that issue.[3]

Third, the 2nd Circuit, in passing, seems to have raised questions about the SEC's construction of Dodd-Frank's whistleblower bounty provisions as having international reach. But the court did not need to decide that issue, because it held that, even if the bounty regulations can apply to whistleblowers located abroad, "it would not follow that Congress intended the anti-retaliation provision to apply similarly."

NOTES

[1] *Asadi v. G.E. Energy,* 720 F.3d 620 (5th Cir. 2013); *see also, e.g., Englehart v. Career Educ. Corp.,* 2014 WL 2619501 (M.D. Fla. May 12, 2014); *Banko v. Apple Inc.,* 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013); *Wagner v. Bank of Am. Corp.,* 2013 WL 3786643 (D. Colo. July 19, 2013).

[2] *See, e.g., Bussing v. COR Clearing LLC,* 2014 WL 2111207 (D. Neb. May 21, 2014); *Ellington v. Giacoumakis,* 977 F. Supp. 2d 42 (D. Mass. 2013); *Murray v. UBS Sec. LLC,* 2013 WL 2190084 (S.D.N.Y. May 21, 2013); *Genberg v. Porter,* 935 F. Supp. 2d 1094 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.,* 2012 WL 4444820 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention Inc.,* 852 F. Supp. 2d 986 (M.D. Tenn. 2012).

[3] *Bussing v. COR Clearing LLC,* No. 14-8015) (8th Cir.); *see Bussing v. COR Clearing LLC,* 2014 WL 3548278 (D. Neb. July 17, 2014) (granting motion to certify for interlocutory review).



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