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Whistleblower Antiretaliation Provision Does Not Apply Outside the U.S.

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The Court of Appeals for the Second Circuit ruled today 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* to address another issue that has attracted attention: whether a person qualifies as a whistleblower for purposes of the antiretaliation 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 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 Southern District of New York, alleging that he had been fired because of his whistleblowing, in violation of the Dodd-Frank Act's antiretaliation provision. The court dismissed the case, holding that (*i*) the alleged facts as pled involved only extraterritorial conduct, which was not within the statute's reach, and (*ii*) 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 Second Circuit's Decision

The Second Circuit affirmed the dismissal, reaching only the extraterritoriality issue. The court held that, to state a claim, the plaintiff needed to plead that either (*i*) the alleged conduct involved a *domestic* application of the antiretaliation provision or (*ii*) Congress intended the provision to apply extraterritorially. The plaintiff's claim failed on both grounds.

The court made short shrift of the first alternative, holding that "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 whistleblowing, 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.

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 antiretaliation provision to regulate the relationships between foreign employers and their foreign employees working outside the United States." The "presumption against extraterritoriality" and "the absence of any direct evidence of a congressional intent to apply the relevant provision extraterritorially" thus defeated the plaintiff's claim.

Liu's Implications

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

First, the court clearly held that the antiretaliation 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 whistleblowing suffices to trigger the antiretaliation provision, or whether the whistleblower must actually disclose to the SEC. The Fifth Circuit has held that the antiretaliation provision does not apply unless and until the whistleblower has gone to the SEC; some District Courts have disagreed. The Eighth Circuit is currently considering whether to grant an interlocutory appeal on that issue.

Third, the Second 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 antiretaliation provision to apply similarly."