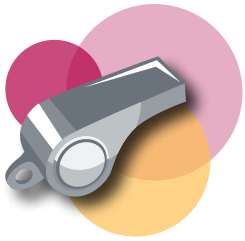
SEYFARTH SHAW



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Employee Files Dodd-Frank Whistleblower Claim in Federal Court. Can the Employer Still Force the Claim into Arbitration?

By Matthew Gagnon

On January 27, 2014, the Southern District of New York handed employers a major victory in the fight to contain the explosion of litigation under the Dodd-Frank whistleblower provisions. In *Murray v. UBS Securities, LLC*, No. 2:12-cv-05914-KPF (S.D.N.Y. Jan. 27, 2014), the Court forced plaintiff's whistleblower claims into arbitration, holding that his dispute did not "arise under" the Sarbanes Oxley Act ("SOX") even though he alleged that his whistleblowing activity was required by that statute. Because plaintiff chose to file his claim directly in district court under Dodd-Frank, rather than through the Department of Labor as would have been required under SOX, he could not take advantage of the anti-arbitration provision applicable to SOX whistleblower claims.

This is an important win for employers looking to escape litigation in federal court. Dodd-Frank allows employees to go straight to federal court without any need to exhaust administrative remedies with the Department of Labor. This decision may provide employers an out. According to the Southern District of New York, as long as there is an arbitration agreement in place, employers can force these disputes into confidential arbitration rather than litigate in federal court.

Background

Plaintiff was responsible for performing research and creating reports about UBS's mortgage products that were distributed to current and potential clients. He alleged that UBS pressured him to skew his ostensibly objective research in ways that were false and misleading and intended to favor UBS's products and trading positions. After he reported those concerns to his supervisors, he alleged that he was given limited resources to perform his research, and was eventually fired in retaliation for his reporting. The plaintiff then filed a whistleblower claim in federal district court.

UBS first brought a motion to dismiss, arguing that the plaintiff was not a "whistleblower" within the meaning of the Dodd-Frank Act because he had not reported his concerns to the SEC. Relying on a growing body of federal case law,[1] as well as the SEC's August 12, 2011 final rule interpreting the definition of a "whistleblower" under the statute, the Court held that whistleblowers are protected under Dodd-Frank even if they do not report directly to the SEC when those disclosures are required or protected by SOX, among other laws.

[1] *See Genberg v. Porter*, 935 F. Supp. 2d 1094 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11-CV-1424 (SRU), 2012 WL 4444820 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10-cv-8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

After failing to get the claims thrown out of court, UBS moved to compel arbitration, relying on arbitration provisions contained in plaintiff's employment agreement, as well as his Form U-4, which required him to arbitrate disputes with his employer before the Financial Industry Regulatory Authority ("FINRA").

The Court's Opinion

Plaintiff first argued that UBS had waived its right to arbitrate because it had chosen to litigate in federal court when it filed its motion to dismiss. The Court rejected this argument, holding that such a motion does not automatically constitute waiver in the Second Circuit, and that plaintiff had suffered no prejudice as a result of UBS's delay in seeking arbitration.

The Court then considered whether plaintiff's claims were exempt from arbitration. First, the Court noted that Dodd-Frank had added two separate provisions: it amended the Securities Exchange Act of 1934 by adding the Dodd-Frank whistleblower provision, and it had added a prohibition against predispute arbitration to the end of the SOX anti-retaliation provision. Crucially, Congress did not add a similar anti-arbitration provision to the Dodd-Frank provision. Given the differences between these provisions, which involve different procedural mechanisms and remedies, it was clear that Congress had created two separate anti-retaliation regimes, one that had an anti-arbitration provision and one that did not.

Plaintiff argued that his claim really arose under SOX because the disclosures that allegedly got him fired were protected under that statute. The Court disagreed, holding that the complaint clearly based plaintiff's claims on Dodd-Frank, not SOX. Moreover, plaintiff's claim could not arise under SOX because he brought suit directly in federal court without exhausting his administrative remedies before OSHA – as he would have been required to do under SOX.

Second, the Court held that when statutory rights are implicated, a party can prevent the enforcement of an arbitration agreement only by showing that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. The Court found no evidence in the statutory text to indicate that Congress intended the SOX anti-arbitration provisions to apply to the Dodd-Frank whistleblower provision.

Implications For Employers

This decision is significant because it exempts Dodd-Frank whistleblower claims brought directly in federal district court from the anti-arbitration provisions otherwise applicable to SOX claims. If the parties have agreed to arbitration, employers now have good authority to move those claims into arbitration for a speedier, less costly, and less public proceeding. Whistleblower claims are often brought by disgruntled employees who sometimes make wild and potentially damaging accusations against their former employer. While it remains to be seen whether other courts will follow the Southern District of New York's lead on this issue, this decision is a win for employers because it allows them to resolve these sensitive claims through arbitration, rather than in the federal courts.

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