Federal Court Broadly Defines "Whistleblower" Under the Dodd-Frank Act

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On September 25, 2012, Judge Underhill of the United States District Court for the District of Connecticut rejected a narrow interpretation of the whistleblower protection provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereafter "Dodd-Frank"), 15 U.S.C. § 78u-6(h), holding that the Dodd-Frank provision extends protection to individuals who make disclosures required or protected under the Sarbanes-Oxley Act ("SOX") or the Securities Exchange Act of 1934, as well as to those who provide information to the SEC. This decision is significant because, for the first time, a Dodd-Frank whistleblower claim survived a motion to dismiss in federal court. *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 U.S. Dist. LEXIS 136939 (D. Conn. Sept. 25, 2012).

I. Background

Plaintiff Richard Kramer ("Kramer") served as Trans-Lux Corporation's ("Trans-Lux") Vice President of Human Resources and as a member of its pension plan committee. Although, the pension plan required at least three members on the committee, the committee was comprised of only Kramer and Angel Toppi ("Toppi"), Trans-Lux's Chief Financial Officer. Kramer repeatedly advised Toppi that the plan committee was required to have at least three members; Toppi, however, ignored Kramer's concerns.

Between 2008 and 2011, Trans-Lux consistently failed to abide by the terms of the pension plan.

During that time, Trans-Lux amended its pension plan four times. On two of those occasions, the two-person committee approved the amendments even though the plan required approval by a three-person committee. In addition, Toppi failed to bring the 2009 amendments to the board of directors for approval as required by the plan and failed to file the 2009 amendments with the Securities Exchange Commission ("SEC"). Thereafter, in March of 2011, Toppi ordered Kramer not to file a Form 10 with the Pension Benefit Guaranty Corporation notifying it of a missed contribution to the plan. This notification would have resulted in an immediate penalty to Trans-Lux.

Kramer notified Trans-Lux executives of his concerns about Trans-Lux's failure to adhere to the pension plan and failure to submit the required documents to the SEC. Kramer also contacted the board of directors' audit committee and sent a letter to the SEC. Shortly thereafter, Trans-Lux reprimanded Kramer, subjected him to an internal investigation, removed his responsibilities, and finally terminated his employment. Kramer filed suit alleging that Trans-Lux violated the Dodd-Frank's anti-retaliation provision.

II. Who is protected under the Dodd-Frank Whistleblower protection provision?

In its motion to dismiss, Trans-Lux argued that Kramer did not report Trans-Lux's supposed violations in the manner required by the SEC[1] and, therefore, did not meet the statutory definition of whistleblower under Dodd-Frank. In response, Kramer argued for a broader definition of whistleblower covering any individual who makes a disclosure required or protected under SOX or the Securities Exchange Act of 1934. Relying on a final rule promulgated by the SEC on August 12, 2011, Judge Underhill agreed with Kramer. The court explained that applying Trans-Lux's narrow reading of the Dodd-Frank anti-retaliation provision would eviscerate the protections available to potential whistleblowers. Such a reading would be inconsistent with the stated goal of Dodd-Frank, which is "to improve the accountability and transparency of the financial system" and "create new incentives and protections for whistleblowers." The court concluded that Kramer's disclosures were protected under SOX because they related to violations of federal securities laws.[2] Thus, Kramer was protected from retaliation under Dodd-Frank regardless of the manner in which he submitted his concerns to the SEC.

Furthermore, the court rejected Trans-Lux's argument that the SEC's final rule on which the court based its decision was impermissibly broad in that it allowed potential plaintiffs to pursue under Dodd-Frank retaliation claims that would otherwise be barred by the Sarbanes-Oxley Act's shorter 180-day statute of limitations. In doing so, the court reasoned that Dodd-Frank was intended to expand the protections found in SOX. Thus, the SEC's final rule was consistent with the stated purpose of Dodd-Frank and not impermissibly broad.

III. Postscript

The *Kramer* decision illustrates the significance of the Dodd-Frank whistleblower protection provisions in broadening the protections afforded to employees under the Sarbanes-Oxley Act. Not only are aggrieved employees freed of the SOX administrative exhaustion requirements prior to filing suit for relief in federal court, they can also bring those claims within six years of the alleged retaliation, or within three years after the employee discovers the retaliation – up to a maximum of ten years from the date of the last act of retaliation. Further, under Dodd-Frank, SOX whistleblowers can obtain double the economic damages otherwise available to them under SOX alone, in addition to their costs and attorney's fees. Given the size and scope of the liability imposed under the Dodd-Frank whistleblower protection provisions, and the breadth of activity protected under Dodd-Frank, covered employers are well advised to carefully evaluate all adverse personnel decisions following arguably protected activity to determine whether the proposed personnel action can withstand the applicable standards of review.

[1] The SEC requires individuals to provide information either online through its website or by mailing or faxing a Form TCR (Tip, Complaint, or Referral). Mailing a regular letter, as Kramer had done, is insufficient.

[2] The whistleblower protection provisions of the Sarbanes Oxley Act extend to any lawful act done by an employee to provide information regarding any conduct that the employee reasonably believes constitutes a violation of the U.S. Criminal Code relating to mail fraud, wire fraud, bank fraud, securities or commodities fraud, any SEC rule or regulation, or any provision of Federal law relating to fraud against shareholders, including internal corporate disclosures made to any person with supervisory authority over the employee. 18 U.S.C. § 1514A (a) (1).

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