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Employment Law Practice Group

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Recent Whistleblower Decisions Under Dodd-Frank and SOX

■ *Summary:* In this issue, we feature two important, recent decisions relating to the anti-retaliation provisions under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") and the Sarbanes-Oxley Act of 2002 ("SOX") that continue the trend of interpreting the statutes broadly in favor of employees. Recently, United States District Court Judge Jesse M. Furman of the Southern District of New York in *Murray v. UBS Securities, LLC*, 12 Civ. 5914 (S.D.N.Y. May 21, 2013), joined four other district court opinions holding that the anti-retaliation protections of Dodd-Frank cover not only whistleblowing to the Securities and Exchange Commission (the "SEC"), but also internal reporting of certain alleged securities law violations. Additionally, the United States Court of Appeals for the Tenth Circuit affirmed a decision of the Administrative Review Board of the Department of Labor (the "ARB") in *Lockheed Martin Corp. v. Administrative Review Board*, No. 11-9524 (10th Cir. June 4, 2013), which concluded that protected activity under Section 806 of SOX includes reporting alleged mail fraud, wire fraud, bank fraud, securities fraud and any rule or regulation of the SEC, even if the conduct did not constitute a fraud against shareholders. In so holding, the Tenth Circuit confirmed the ARB's interpretation of SOX recognized in many federal opinions, including the majority of those out of the Southern District of New York.[1] *Full story on page 2.*

Second Circuit Confirms That Claims Under New York City Human Rights Law Are Subject to Less Stringent Standard

■ *Summary:* The United States Court of Appeals for the Second Circuit in *Mihalik v. Credit Agricole Cheuvreux North America Inc.*, No. 11-3361-cv (2d Cir. Apr. 26, 2013), recently confirmed that discrimination and retaliation claims brought under the New York City Human Rights Law (the "NYCHRL") are subject to a less stringent standard of liability than federal and state law discrimination claims. In this article, we supplement discussions in our Summer 2010 and Fall 2011 issues of our newsletter regarding the differences between the NYCHRL and its federal and state equivalents by reviewing the Second Circuit's decision and what it means for New York City employers in respect of litigation risk. *Full story on page 5.*

UPDATE

NYC Council Overrides Mayor Bloomberg's Veto of Paid Sick Leave Bill

As he had promised to do, on June 7, 2013, Mayor Bloomberg vetoed the bill passed by the New York City Council in May requiring employers to provide five (5) paid sick days each year. On June 27, 2013, the City Council in a 47-4 vote overrode that veto. Accordingly, the Earned Sick Time Act will require businesses with at least 20 employees to offer five (5) paid sick days to employees who have worked at least four months starting in April 2014. The requirement would then start applying to businesses with at least 15 employees from October 2015 forward. However, the effectiveness of the bill could be delayed based on the condition of the New York City economy.

1. Michael B. Weitman, an associate in the firm's Litigation Group, assisted in the preparation of these articles.

New York Federal Judge Holds That Dodd-Frank Whistleblower Protections Extend to Internal Reporting

On May 21, 2013, Judge Furman held in *Murray v. UBS Securities, LLC* that the anti-retaliation protections of Dodd-Frank cover not only whistleblowing to the SEC, but also internal reporting of alleged securities law violations. 2013 U.S. Dist. LEXIS 71945, at *21 (S.D.N.Y. May 21, 2013).

Factual Background

From May 2011 until February 2012, Trevor Murray was employed by UBS Securities, LLC ("UBS Securities") as a Senior Commercial Mortgage-Backed Security ("CMBS") Strategist. In his role as a CMBS Strategist, Murray prepared research reports regarding CMBS products for distribution to current and prospective clients. Murray claimed that his supervisor, Ken Cohen, led efforts to pressure Murray to create reports that were "more favorable" to UBS Securities. In his complaint, Murray described a number of encounters with other employees during which he was told "not to publish anything negative," and to "write what the business line wanted." *Murray*, 2013 U.S. Dist. LEXIS 71945, at *4. Murray internally reported this to his superiors, claiming that the pressure to create false or misleading reports that favored UBS Securities' products and trading positions violated federal securities laws. Murray did not make any report to the SEC. On February 6, 2012, UBS Securities terminated Murray's employment.

On August 2, 2012, Murray filed a complaint under Dodd-Frank against UBS Securities and its parent company, UBS AG (collectively, "UBS") alleging that his employment was terminated, in part, in retaliation for making disclosures of information that he reasonably believed constituted a violation of SEC rules or regulations. Murray alleged that he was protected from retaliation under 15 U.S.C. § 78u-6(h)(1)(A) of Dodd-Frank, which provides:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower:
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), Section 1513(e) of Title 18, United States Code, and any other law, rule or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A).

Specifically, Murray alleged that under subsection (iii), his disclosures were protected by Section 806 of SOX, which covers employees of public companies and their subsidiaries.

UBS Moved to Dismiss the Complaint On The Grounds That Murray Was Not a "Whistleblower" Under the Statute

UBS moved to dismiss the complaint, arguing that because Murray did not report to the SEC, he was not a "whistleblower" under Dodd-Frank entitled to protection from retaliation. UBS pointed out that Dodd-Frank defines "whistleblower" as "any individual who provides…information relating to a violation of the securities laws *to the Commission*." 15 U.S.C. § 78u-6(a)(6) (emphasis added). Thus, to the extent Murray relied on the third prong of 15 U.S.C. § 78u-6(h)(1)(A) in making disclosures "protected by" SOX, Murray would not be considered a "whistleblower," because he did not report the alleged SOX violations to the SEC.

Murray, however, argued that Dodd-Frank's anti-retaliation provisions in § 78u-6(h)(1)(A)(i)-(iii) do not necessarily require that the statutory definition of "whistleblower" in 15 U.S.C. § 78u-6(a)(6) be applied. Rather, Murray contended, the anti-retaliation provisions establish a narrow exception to that definition, and protect an employee who makes any of the provision's enumerated disclosures, including disclosures that are "required or protected" under SOX.

The Court Rejects UBS's Argument That Murray Was Not a "Whistleblower" Under the Statute

Judge Furman agreed with Murray, following the reasoning of four other district court judges who had previously faced similar issues. *See Egan v. TradingScreen, Inc.*, 2011 U.S. Dist. LEXIS 47713 (S.D.N.Y. May 4, 2011) (Sand, J.); *Nollner v. S. Baptist Convention*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012); *Kramer v. Trans-Lux Corp.*, 2012 U.S. Dist. LEXIS 136939 (D. Conn. Sept. 25, 2012); *Genberg v. Porter*, 2013 U.S. Dist. LEXIS 41302 (D. Colo. Mar. 25, 2013). To reach this conclusion, Judge Furman relied heavily on SEC Rule 21F-2(b)(1)

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Tenth Circuit Affirms SOX Whistleblower Protections Expand Beyond Allegations of Fraud Against Shareholders

On June 4, 2013, the Tenth Circuit affirmed a decision of the ARB in *Lockheed Martin Corp. v. Administrative Review Board*, which concluded that Lockheed Martin Corp. ("Lockheed") violated Section 806 of SOX by constructively discharging employee Andrea Brown after she had engaged in protected activity. 2013 U.S. App. LEXIS 11159, at *40 (10th Cir. June 4, 2013). The decision broadly interpreted the whistleblower provisions of SOX to protect employees of public companies and their subsidiaries who report alleged mail fraud, wire fraud, bank fraud, securities fraud and any rule or regulation of the SEC, even if the conduct did not constitute a fraud against shareholders.

Factual Background

From June 2000 until February 2008, Brown worked as Communications Director for Lockheed. In May 2006, Brown learned that one of her supervisors, Wendy Owen, had allegedly developed sexual relationships with several U.S. soldiers through a pen pal program run by Lockheed, and was sending inappropriate gifts to troops overseas using company funds. Brown also learned that Owen had allegedly traveled to welcome-home ceremonies for soldiers on the pretext of business, where she would take the soldiers to expensive hotels paid for with company funds. Brown became concerned that Owen's actions were fraudulent, illegal and could expose the company to government audits and affect the company's future contracts and stock price. Brown reported Owen's behavior to Lockheed's Vice President of Human Resources, who submitted an anonymous ethics complaint on Brown's behalf.

Following a company investigation, Lockheed discontinued the pen pal program. After Owen learned in December 2006 that Brown may have been the source of the formal complaint, Brown began receiving negative performance reviews, and Lockheed demoted her and reassigned her to an office that doubled as a storage room. In January 2008, Brown left Lockheed on medical leave after having an emotional breakdown and falling into a deep depression.

On January 25, 2008, Brown filed a complaint (amended on February 6, 2008) with the Occupational Safety and Health Administration ("OSHA"), alleging a violation of SOX based on her constructive discharge in retaliation for reporting Owen's misconduct. OSHA denied Brown's complaint on May 27, 2008. Following a two-day hearing before an Administrative Law Judge ("ALJ"), Lockheed was found to have violated section 806 of SOX, and Brown was awarded reinstatement, back pay, medical expenses, and non-economic compensatory damages in the amount of $75,000. The ARB affirmed, and Lockheed sought review from the Tenth Circuit.

SOX's Whistleblower Provisions Expand Beyond Allegations of Fraud Against Shareholders

Section 806 of SOX protects employees of publicly traded companies from retaliation for reporting violations of "[18 U.S.C.] §§ 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A. In its appeal to the Tenth Circuit, Lockheed argued, among other things, that Brown did not qualify for whistleblower protection under SOX because the reported conduct did not constitute a fraud on the shareholders. In other words, Lockheed contended that the phrase "relating to fraud against shareholders" modifies not only the clause which immediately precedes it — "any provision of Federal law" — but also the other five protected activities.

The Court disagreed, finding the statute plain and unambiguous. Because each of §§ 1341, 1343, 1344, and 1348 is a provision of federal law, the Court concluded that "Lockheed's reading of the statute would render their enumeration…wholly superfluous." *Lockheed*, 2013 U.S. App. LEXIS 11159, at *17. The Court further held that "the proper interpretation of § 1514A(a) gives each phrase distinct meaning and holds a claimant who reports violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348 need not also establish such violations relate to fraud against shareholders to be protected from retaliation under [SOX]." *Id.* at *18. Thus, because Brown engaged in protected activity (*i.e.*, reporting what she reasonably believed to be mail or wire fraud), and Brown's report was a contributing factor to her constructive discharge, the Tenth Circuit affirmed the ARB's decision. *Id.* at *40.

What This Decision Means for Employers

The Tenth Circuit's decision confirms that that an employee of a public company or its subsidiaries does not need to complain about "shareholder fraud" to be protected under SOX. As SOX was intended to prevent shareholder fraud at public companies in the wake of Enron, some commentators believe this decision went too far, stretching SOX into a more generalized whistleblower law that protects a wide range of company wrongdoings. Nevertheless, this decision should not affect the way that employers respond to internal complaints, and employers should always think carefully before taking any adverse action against an employee who alleges wrongdoing by the company. ◆

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regarding the relationship between § 78u-6(a)(6) (the definition of "whistleblower") and § 78u6(h)(1)(A) (the anti-retaliation provision). *Murray*, 2013 U.S. Dist. LEXIS 71945, at *8-9. In Rule 21F-2(b)(1), the SEC defines a whistleblower for purposes of the anti-retaliation protections of Dodd-Frank to include an individual who provides information "in a manner described in [15 U.S.C. § 78u-6(h)(1)(A)]," which would cover internal reporting "required or protected by" SOX, the Securities Exchange Act of 1934, Section 1513(e) of Title 18 (reporting of a federal crime to a federal law enforcement officer) and any other law, rule or regulation subject to the jurisdiction of the SEC. 17 C.F.R. § 240.21F-2(b)(1). In the SEC's comments to the rules, it expressly noted that "the statutory anti-retaliation protections apply to three different categories of whistleblowers, *and the third category includes individuals who report to persons or governmental authorities other than the Commission.*" Exchange Act Release No. 34-64545, at p.17 (May 25, 2011) (emphasis added). Judge Furman also noted that if UBS's interpretation of the statute were accepted, § 78u-6(h)(1)(A)(iii) would be effectively read out of the statute entirely because it makes no mention of reporting to the SEC. *Murray*, 2013 U.S. Dist. LEXIS 71945, at *16. Thus, because Murray's internal reporting was protected under SOX, Murray qualified as a whistleblower under Dodd-Frank, despite the fact that he did not report the alleged violation of federal securities laws to the SEC. *Id.* at *21.

Implications of *Murray* for Private and Public Companies

While *Murray* involved alleged internal disclosures protected under SOX because UBS is a public company, Dodd-Frank's anti-retaliation provisions apply to both public and private companies. Notably, the third prong of § 78u-6(h)(1)(A) includes not only SOX disclosures, but also "disclosures that are required or protected under…the Securities Exchange Act of 1934 (15 U.S.C. § 87a *et seq.*)…, Section 1513(e) of Title 18 and any other law, rule or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u-6(h)(1)(A)(iii). Thus, internal reporting of alleged securities laws violations under *Murray* and its companion decisions in *Egan, Nollner, Kramer* and *Genberg* could constitute protected activity under Dodd-Frank even at a private company, such as an investment adviser or broker-dealer, so long as the underlying disclosures are "required or protected" under the enumerated statutory provisions. *Egan* held that mere allegations of violations of law would not be sufficient unless they were made pursuant to SEC laws or rules specifically requiring or protecting such disclosures. *Egan*, 2011 U.S. Dist. LEXIS 47713, at *17. But, in *Genberg*, the court held that the plaintiff had stated a cause of action for retaliation based on an internal report to management that the employer had violated the SEC's rules on proxy voting. *Genberg*, 2013 U.S. Dist. LEXIS 41302, at *29.

Murray signifies a trend among the district courts to apply Dodd-Frank's anti-retaliation provisions broadly to include internal reporting, but the issue addressed has not been taken up by any appellate court. Until there is any contrary decision, public and private employers alike should be cognizant that an employee who internally reports alleged violations of the securities laws may be covered by the anti-retaliation provisions of Dodd-Frank. ◆

Discrimination Claims Under New York City Human Rights Law Are Subject to a Separate and Less Stringent Standard of Liability

On April 26, 2013, the Second Circuit in *Mihalik v. Credit Agricole Cheuvreux North America Inc*. reversed the district court's decision granting summary judgment to Credit Agricole Cheuvreux ("Credit Agricole") and dismissing Plaintiff Renee Mihalik's ("Mihalik") complaint, holding that claims of discrimination and retaliation under the NYCHRL must be analyzed separately from identical claims under federal and state law and remanded the case for trial. 715 F.3d 102 (2d Cir. 2013) *Mihalik* is the third Second Circuit opinion this year to reverse a district court on the basis that it applied the incorrect standard to NYCHRL claims. *See, e.g., St. Jean v. United Parcel Serv. Gen. Serv. Co.*, No. 12-544-cv, at *1 (2d Cir. Jan. 30, 2013); *Simmons v. Akin Gump Strauss Hauer & Feld, LLP*, No. 11-4480-cv, at *2 (2d Cir. Jan. 24, 2013). In so holding, the Second Circuit has made clear that district courts must follow New York State courts which construe discrimination claims under the NYCHRL liberally in favor of plaintiffs.

Background

For many years, New York courts considered discrimination claims under the NYCHRL under the same standard as claims brought under the federal and state anti-discrimination laws. This approach was invalidated by the New York City Council's passage of the Local Civil Rights Restoration Act of 2005 (the "Restoration Act"), which amended the NYCHRL to require that it:

> be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title have been so construed.

Restoration Act § 7 (amending N.Y.C. Admin. Code § 8-130). To this end, the Restoration Act specifically explained the standard applicable to discrimination and retaliation claims under the NYCHRL, as amended:

> The retaliation or discrimination complained of…need not result in an ultimate action with respect to employment…or in a materially adverse change in the terms and conditions of employment…provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.

Restoration Act § 3 (amending N.Y.C. Admin. Code § 8-107(7)).

In *Williams v. N.Y.C. Housing Authority*, 872 N.Y.S.2d 27 (1st Dep't 2009), a New York court, for the first time, applied the Restoration Act to a gender discrimination claim. The *Williams* court declined to apply the federal severe and pervasive standard of liability, opting to apply a more lenient rule premised on the existence of differential treatment based on gender, recognizing that even one comment could constitute actionable discrimination. Since *Williams* and in light of the Restoration Act, the New York Court of Appeals has broadly construed various provisions of the NYCHRL. *See Albunio v. New York City, N.Y.*, 16 N.Y.3d 472 (2011) (broadly construing the use of the word "oppose" in NYCHRL's retaliation provision); *Zakrzewska v. New Sch.*, 14 N.Y. 3d 469 (2010) (federal *Faragher/Ellerth* defense to sexual harassment claims does not apply to actions under the NYCHRL).

The Second Circuit's Decision in *Mihalik*

In *Mihalik*, the plaintiff alleged that over the course of Mihalik's approximately nine months of employment, she was subject to a "boys club" work environment which included (i) sexually suggestive conduct and comments regarding strip clubs, pornography and sexually explicit videos; (ii) comments about her appearance, relationship status, dating preferences and sexual acts; and (iii) direct sexual propositions, all of which emanated from the Chief Executive Officer (who was also her direct supervisor). Mihalik alleged that after she complained about the CEO's conduct, he retaliated against her by criticizing her performance, ridiculing her in front of her coworkers, ostracizing her from team meetings, and ultimately terminating her employment during a performance review in which she raised with the CEO the fact that she rejected his alleged sexual propositions. Mihalik, suing in federal court under diversity jurisdiction, alleged that Credit Agricole violated the NYCHRL, but did not assert any claims under federal or state statutes.

Considering the totality of the circumstances, the Second Circuit determined that a jury could reasonably find Mihalik was subjected to differential treatment on the basis of her gender — which, in and of itself, was sufficient for maintaining a discrimination claim under the NYCHRL. *Mihalik*, 715 F. 3d at 110 ("To establish a gender discrimination claim under the NYCHRL, the plaintiff need only demonstrate 'by a preponderance of the evidence that she has been treated less well than other employees because of her gender.'"). Similarly, the Second Circuit found Mihalik had sufficiently established a retaliation claim under the NYCHRL on the basis of the CEO's treatment of Mihalik following her complaints and that she may not have been fired if she had not complained about her treatment.

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The Second Circuit set out six factors for federal courts reviewing NYCHRL discrimination claims to consider, as follows:

1. NYCHRL claims must be analyzed separately and independently from federal and state discrimination claims;
2. the totality of the circumstances must be considered because the overall context in which the challenged conduct occurs cannot be ignored;
3. the federal severe or pervasive standard of liability no longer applies to NYCHRL claims, and the severity or pervasiveness of conduct is relevant only to the scope of damages;
4. the NYCHRL is not a general civility code, and a defendant is not liable if the plaintiff fails to prove the conduct is caused at least in part by discriminatory or retaliatory motives, or if the defendant proves the conduct was nothing more than 'petty slights or trivial inconveniences';
5. while courts may still dismiss truly insubstantial cases, even a single comment may be actionable in the proper context, and;
6. summary judgment is still appropriate in NYCHRL cases, but only if the record establishes as a matter of law that a reasonable jury could not find the employer liability under any theory.

Mihalik, at 113 (citations and quotations omitted).

Litigation Risks

New York City employers should note that it will be increasingly unlikely for New York courts to dismiss on summary judgment discrimination claims asserted under the NYCHRL — a direct reflection of the liberal standard for NYCHRL claims. And, this is not the only substantive difference between claims brought under the NYCHRL and its federal and state law equivalents. Employers should also recall that the affirmative *Faragher-Ellerth* defense to vicarious liability for discrimination and harassment perpetrated by supervisory employees, available under federal and New York state law when employers maintain a complaint procedure and take prompt remedial action, is not available to defendants under the NYCHRL. Rather, the NYCHRL imposes strict employer liability for discrimination by supervisors. Additionally, unlike federal law (which caps punitive damages), and state law (which does not provide for punitive damages), punitive damages are uncapped under the NYCHRL. For all of these reasons, given the risks that litigation may impose, employers need to take steps to prevent discrimination claims from being made to the extent possible by training personnel, putting the proper policies and procedures in place, taking complaints seriously, taking appropriate and prompt corrective action and seeking legal advice to deal with problematic situations. ◆