Bloomberg BNA

Securities Regulation & Law Report™

WHISTLE-BLOWERS

Individual Liability Unlikely Under Dodd-Frank Act's Whistleblower Anti-Retaliation Proscriptions



By Michael D. Blanchard, Douglas T. Schwarz and Christopher M. Wasil

Much has been written about the impact that the Dodd–Frank Wall Street Reform and Consumer Protection Act's whistleblower provisions are having on the Securities Exchange Commission's enforcement agenda. With the publicity garnered by eye-popping awards being paid to whistleblowers, there seems a consensus that the SEC's whistleblower program is akin to gasoline poured on a fire, begging whistleblowers with original information that could lead to uncovering securities violations to come forward and report to the SEC. And with the spike in whistleblowing activity, one might also expect greater potential for conflicts between employers and whistleblowers, resulting in litigation that will inevitably include claims of retaliation. The DFA prohibits employers from retaliating against whistleblowers, and incentivizes purported victims of retaliation to seek redress in the courts with recoveries for successful plaintiffs to include double back pay and attorneys' fees.

Capitalizing on the truism that companies can only act through their agents and employees, and consistent with the trend in employment litigation generally, plaintiffs' lawyers often name individual supervisors and managers alongside the employer as defendants in retaliation cases for the *in terrorem* effect of increasing leverage for settlement. The implications of being a named defendant are significant, as individual defendants must be represented and may face years of uncertainty regarding potentially devastating claims against them. The text of the DFA's anti-retaliation provision, however, does not expressly provide for individual liability. Rather, the DFA states: ''No *employer* may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower . . . .''[1] The term ''employer'' is not defined, and therein lies the grist for the mills of interpretation that will at some point surely occupy the attention of the courts.

At least in the Second Circuit, the question of whether individuals may be liable for violating the DFA's whistleblower anti-retaliation provisions should not present a prolonged debate. Well-established canons of statutory construction, as well as longstanding Second Circuit jurisprudence governing analogous statutes in other employment-related contexts, strongly suggest that the DFA whistleblower anti-retaliation provisions do not permit suit against individuals.

Sarbanes-Oxley and the Plain Meaning Rule

At its core, the DFA, signed into law in the wake of the financial crisis, seeks to protect the U.S. economy from the confluence of events and circumstances that

[1] 15 U.S.C. § 78u-6(h)(A).

 ISSN 0037-0665

led to the Great Recession. Among the evils the DFA seeks to eliminate is systemic financial impropriety within banks and other financial institutions. While the Sarbanes-Oxley Act created a whistleblower program designed to flush out such wrongdoing eight years prior, the DFA doubles down on those efforts by not only increasing potential awards, but also providing greater protection against employment-related retaliation. For example, whereas SOX applies only to public companies, the DFA contains no such restriction. Further, the DFA prohibits retaliation not only for disclosures required or protected by SOX, but also pursuant to the Securities and Exchange Act of 1934, and any other law, rule, or regulation subject to the SEC's jurisdiction. It also extends the statute of limitations for bringing retaliation claims,[2] and doubles the back pay remedy available under SOX.

That the DFA expands upon SOX's whistleblower anti-retaliation framework might create the assumption that SOX's express inclusion of individuals as potential defendants is present in the DFA as well. Not so: the DFA's anti-retaliation provision contains textual limitations not present in SOX. Whereas SOX broadly prohibits retaliation by a ''company'' and its ''employees'' (and other ''agents''), the DFA applies only to ''employers,'' a term left undefined. Under the plain meaning rule, ''employer'' should therefore be ascribed its commonly understood meaning: ''[a] person, company, or organization for whom someone works; esp., one who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages.''[3] In the corporate context in which whistleblower cases traditionally arise, only the company is the employer—one's ''boss'' or ''supervisor'' is generally considered to be a co-employee working for the same employer. Thus, because the DFA's anti-retaliation provision expressly applies only to ''employers'' with no further elaboration, the analysis need go no further with respect to whether individuals may be held liable. Under the plain meaning rule, they may not.

The analysis undertaken by the Supreme Court in its 2014 decision in *Lawson v. FMR LLC*,[4] which involved application of the plain meaning rule to SOX's anti-retaliation provision, is instructive. The issue there was whether SOX protects employees of an independent contractor hired by a public company, or whether it protects only employees of the public company itself. The relevant provision states: ''No company . . . or any officer, employee, contractor, subcontractor, or agent of such company'' may retaliate ''against *an employee* in the terms and conditions of employment because of'' whistle-blowing.[5] The Court held that to apply SOX to the independent contractor's employees is ''consistent with the text of the statute and with common sense.''[6] Writing for the majority, Justice Ginsburg explained that the alternative interpretation ''requires insertion of 'of a public company' after 'an employee.' ''[7] Under the ''ordinary meaning'' of the statute, however, ''[a]bsent any textual qualification, we presume the operative language means what it appears to mean: A contractor may not retaliate against its own employee for engaging in protected whistleblowing activity.''[8]

Judicial interpretation of the DFA should proceed in the same way. Following the reasoning of *Lawson*, ''absent any textual qualification,'' the ''ordinary meaning'' of the DFA dictates who may be held liable for alleged retaliation: ''employers.'' To hold individuals liable under the statute would in essence insert the phrase ''or individuals working for the employer'' after ''employer.'' *Lawson* teaches that such a reading is impermissible.

Examining SOX is also helpful because it demonstrates that when Congress intends to create retaliation liability for individuals, it does so expressly. As stated above, unlike the DFA, SOX states: ''No company . . . *or any officer, employee, contractor, subcontractor, or agent of such company*'' may retaliate against whistleblowers.[9] It would have been a simple drafting exercise to copy the key phrase above from SOX and paste it into the DFA's analogous anti-retaliation provision. That Congress instead chose to draft a new provision for the DFA shows that it intended its meaning to be different. *Lawson* again provides guidance. There, the Court held that ''where Congress meant 'an employee of a public company,' it said so.''[10] Applying the same logic to the issue of individual liability, where Congress meant ''or any employee of such company,'' *i.e.*, in SOX, it said so. The absence of similar language—indeed the pointedly different language—in the DFA must be accorded significance.

The Second Circuit's Refusal to Impose Individual Liability Under Federal Employment Statutes

While the Second Circuit has not yet opined on the potential for individual liability for retaliation under the DFA, it has thoroughly addressed the more general issue of individual liability under other federal employment statutes. The unmistakable theme from these cases is that the Court will make every effort to avoid imposing liability upon individual employees. Tellingly, it has held that Congress' use of the word ''employer'' and even ''person'' in other federal employment statutes does not create personal liability for individual employees of the ''employer.'' For example, Title VII states: ''It shall be an unlawful employment practice for an employer – (1) to . . . discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.''[11] Similarly, the Age Discrimination in Employment Act states: ''It shall be unlawful for an employer . . . to . . . discriminate against any individual . . . because of such individual's age.''[12] Significantly, both Title VII and the ADEA define the term ''employer''—primarily for the purpose of setting

[2] SOX retaliation claims can now be filed within 180 days after an alleged violation, up from 90 days. 18 U.S.C. § 1514A(b)(2)(D). DFA retaliation claims may be filed within six years after the date of alleged retaliation or 3 years after the date on which the facts material to the right of action are known or reasonably should be known by the whistleblower. 15 U.S.C. § 78u-6(h)(B)(iii)(aa), (bb).

[3] Black's Law Dictionary (10th ed. 2014).

[4] 134 S. Ct. 1158 (2014).

[5] 18 U.S.C. § 1514A(a) (emphasis added).

[6] 134 S. Ct. at 1161.

[7] *Id.* at 1165.

[8] *Id.* at 1166.

[9] 18 U.S.C. § 1514A(a) (emphasis added).

[10] 134 S. Ct. at 1165.

[11] 42 U.S.C. 2000e-2.

[12] 29 U.S.C. § 623(a).

  SRLR ISSN 0037-0665

a minimum number of employees the employer must have to come under their mandates—to include ''agents'' of the employer.[13]

Nonetheless, the Second Circuit has long refused to find individuals personally liable under either Title VII or the ADEA. In *Guerra v. Jones*, the Court held that neither Title VII nor the ADEA ''subjects individuals, even those with supervisory liability over the plaintiff, to personal liability.''[14] In *Tomka v. Seiler Corp.*, the Court held that Title VII does not provide for personal liability because, when it was enacted, ''a successful Title VII plaintiff was typically limited to reinstatement and backpay as potential remedies . . . which are most appropriately provided by employers, defined in the traditional sense of the word.''[15] That same principle applies to the DFA, which provides successful plaintiffs with reinstatement, two times back pay and attorneys' fees.

Perhaps even more persuasive is the Second Circuit's holding in *Spiegel v. Schulmann*,[16] which found no personal liability under the anti-retaliation provision of the Americans with Disabilities Act. The ADA plainly states: ''No *person* shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter . . . .''[17] It further defines ''person'' by reference to Title VII, which defines ''person'' to ''include[] one or more *individuals*.'' [18] Despite what appears to be clear language imposing personal liability upon individuals, the Court in *Speigel* held that the ADA does *not* impose individual liability. The Court reasoned that the ADA's remedies, *i.e.*, reinstatement and back pay, are inconsistent with personal liability: ''This conclusion is arguably contrary to a literal reading of [the ADA], where the phrase '[n]o person shall' suggests the possibility of individual liability. Because we apply the remedies provided in Title VII to the anti-retaliation provision of the ADA, however, [the ADA] presents that 'rare case[]' in which 'a broader consideration of' the ADA, in light of the remedial provisions of Title VII, 'indicates that this interpretation of the statutory language does not comport with Congress'[s] clearly expressed intent.''[19]

Unlike Title VII, the ADEA and the ADA—each of which could be construed to include individuals as coming within its scope but are construed by the Second Circuit to apply only to employers—the DFA on its face only applies to ''employers.'' If Title VII and the ADEA, both of which refer to ''agents,'' and the ADA, which expressly applies to ''person[s],'' do not provide for individual liability, then the DFA, which does *not* make such references, likewise should not allow for individual liability.[20]

The Public Policy Disfavoring Individual Liability

Congress's decision not to provide for individual liability in the DFA is also understandable as a matter of public policy. As it has done in every other piece of significant legislation protecting employees, save SOX, Congress determined that the important policies embodied in the statute are best served by placing on the employer a significant risk of liability—and a concomitant obligation to police its workforce. SOX stands as a rejected outlier in terms of individual liability, an emotional reaction to the Enron scandal, and cases in which courts have ordered individuals to pay damages under SOX's retaliation provisions are virtually non-existent. Following this trend, and—more importantly—the text of the DFA and interpretation of similar statutes, the proper interpretation of the DFA is not to permit individual liability.

Michael D. Blanchard is a partner at Morgan Lewis, where he represents clients in all facets of securities litigation and enforcement actions. He is currently a lead defense counsel for a Fortune 100 company in defense of Madoff-related securities litigation and is defending a securities exchange in class actions related to high-frequency trading.

Douglas T. Schwarz is a partner at Morgan Lewis. He advises employers on all aspects of labor and employment law, including human resources matters, employment agreements, internal investigations, and employment aspects of corporate transactions. He also litigates in court, arbitration, and administrative proceedings.

Christopher M. Wasil is an associate at Morgan Lewis and has a diverse litigation practice representing a variety clients in shareholder class actions and derivative suits, securities litigation and regulatory defense, complex contractual disputes, and business torts. His practice also includes real estate litigation, unfair trade practice claims, and employment matters.

[13] 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b).

[14] 421 F. App'x 15, 17 (2011).

[15] 66 F.3d 1295, 1314 (2d Cir. 1995).

[16] 604 F.3d 72 (2d Cir. 2010).

[17] 42 U.S.C. § 12203(a) (emphasis added).

[18] 42 U.S.C. § 12111(7); 42 U.S.C. § 2000e(a) (emphasis added).

[19] 604 F.3d at 79-80 (quoting *Tomka*, 66 F.3d at 1314). The Second Circuit is among the majority of Circuit Courts in refusing to recognize individual liability under Title VII, the ADEA and the ADA. *See, e.g.*, *Dactelides v. Bd. of School Trustees of South Bend Cmty. School Corp.*, 562 Fed. App'x 531, 536 (7th Cir. 2014) (''The individual defendants were not themselves [the plaintiff's] employer and therefore cannot be held liable under the ADA.''); *Fantini v. Salem State College*, 557 F.3d 22, 31 (1st Cir. 2009) (''[W]e find that there is no individual employee liability under Title VII.''); *Dearth v. Collins*, 441 F.3d 931, 933 (11th Cir. 2006) (''[W]e now expressly hold that relief under Title VII is available against only the employer and not against individual employees whose actions would constitute a violation of the Act[.]''); *Hill v. Borough of Kutztown*, 455 F.3d 225, 246 n.29 (3d Cir. 2006) (''[T]he ADEA does not provide for individual liability.'') (listing cases).

[20] Looking outside the Second Circuit, the only court that has apparently faced the issue essentially chose not to address it. In *Azim v. Tortoise Capital Advisors*, No. 13-2267-KHV, 2014 BL 49100 (D. Kan. Feb. 24, 2014) a magistrate judge in the District of Kansas granted the plaintiff leave to amend his complaint to add individuals as defendants, declining to adopt the defendants' argument that the text of the DFA foreclosed the possibility of individual liability. The magistrate judge acknowledged that the district court ''may ultimately adopt the defendants' argument on a summary judgment motion,'' but ruled that the plaintiff's proposed amendment would not be futile ''given the state of existing law''—*i.e.*, because there is not yet any relevant case law. *Id.* at *3. As the Azim case illustrates, there is a need for courts to provide guidance on this issue. When the Second Circuit inevitably does so, it will have the benefit of the *Lawson* decision (decided after *Azim*), as well as its vast employment law jurisprudence described above. This should steer the court toward a plain-text analysis of the statute, the result of which should be that individuals may not be held liable.