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The Diminished Scope Of Dodd-Frank Whistleblower Protections After *Asadi v. G.E. Energy (USA), LLC*

Nicole H. Sprinzen

AKIN GUMP STRAUSS HAUER &
FELD LLP

The recent case of *Asadi v. G.E. Energy (USA), LLC*, decided on June 28, 2012 in the U.S. District Court for the Southern District of Texas, put a finer point on the whistleblower protections of the still relatively new Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank” or “the Act”). A few other cases have been filed and decided relating to the Dodd-Frank whistleblower protections, including whether non-issuers of securities are covered by the provisions, whether reports of law or rule violations made to an individual or entity other than the U.S. Securities and Exchange Commission (“SEC”) are protected, and the types of disclosures protected under the Act. See *Nollner v. Southern Baptist Convention, Inc.*, ___ F. Supp.2d ___, 2012 WL 1108923 (M.D. Tn. April 3, 2012); *Egan v. Tradingscreen, Inc.*, 2011 WL 1672066 (S.D.N.Y. 2011). However, the *Asadi* decision marks the first time that a federal court has addressed the jurisdictional reach of those provisions. Moreover, the *Asadi* opinion is significant for followers of U.S. Foreign Corrupt Practices Act (“FCPA”) legal developments because the claims made by the plaintiff therein

Nicole H. Sprinzen is Senior Counsel with Akin Gump Strauss Hauer & Feld LLP and a former federal prosecutor. Her practice includes white collar criminal defense, including FCPA and anti-money-laundering counsel and litigation, civil litigation, and corporate investigations.

relate to retaliation for the reporting of alleged violations of the FCPA to the plaintiff’s employer.

Specifically, plaintiff *Asadi* alleged that he was fired from GE Energy (USA), LLC (“GE Energy”) in retaliation for reporting to supervisors and colleagues his concerns about FCPA violations resulting from the company’s hiring of a local Iraqi woman who was reportedly closely associated with the senior deputy minister of electricity in order to “curry favor” with the minister while GE Energy was negotiating a \$250 million joint venture agreement between GE Energy and the minister. *Asadi* brought suit against his former employer under Dodd-Frank’s whistleblower protections and also brought a state-law breach of contract claim. In deciding GE Energy’s motion to dismiss, the court discussed *Asadi*’s argument that he was a protected whistleblower as that term is defined in Dodd-Frank. However, the court concluded that it need not decide that issue because the question of the extraterritorial application of the whistleblower protections dictated the court’s ruling on the motion.

Plaintiff *Asadi*, who maintained dual citizenship in the U.S. and Iraq, was considered a U.S.-based employee of GE Energy, but had “temporarily relocated” to Amman, Jordan, where he coordinated with Iraq’s governing bodies in order to secure and manage energy service contracts for the company. However, when *Asadi* was terminated by an email from GE Energy’s Human Resources Depart-



Nicole H.
Sprinzen

ment, he was told that he was being terminated “as an at-will employee, as allowed under U.S. law” and that “[a]s a U.S.-based employee you will be terminated in the U.S. . . .”

The court found that the extraterritorial application of the Dodd-Frank anti-retaliation provisions was a threshold issue. The court cited to *Morrison v. National Australia Bank Ltd.*, ___ U.S. ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010), finding that in that recent case, the Supreme Court had reaffirmed the “longstanding principle” that unless Congress has expressed a clear intention to give a statute extraterritorial effect, in the statutory language or its context, the courts must assume that it has none and that it has solely domestic application. The *Asadi* court found that the language of the Dodd-Frank anti-retaliation provisions is silent regarding whether the protections apply extraterritorially. Further, the court found that the statute had a provision that gave federal courts extraterritorial jurisdiction over certain enforcement actions brought by the SEC or the United States, not private actions like *Asadi*’s retaliation claims, and therefore the context of the statute did not provide for extraterritorial application of the statute. Although these findings would have been sufficient to support the court’s ultimate ruling that *Asadi*’s retaliation claims must be dismissed, interestingly, the court did not stop its analysis there.

The court also found that neither the Sarbanes-Oxley Act of 2002 (“SOX”) nor the FCPA extended the territorial reach of the Dodd-Frank whistleblower protections because although those statutes have extraterritorial reach themselves, they did not protect or require the plaintiff’s report

Akin Gump
Strauss Hauer & Feld LLP

Please email the author at nsprinzen@akingump.com
with questions about this article.

to GE Energy supervisors and colleagues of potential FCPA violations by GE Energy. Rather, SOX protects the internal reporting of certain securities laws violations by domestic employees and reporting relating to required disclosures and internal controls by companies subject to SOX, not individuals. FCPA, for its part, does not require or protect the reporting of alleged violations at all.

Although not necessary to the court's decision, the district court also considered Asadi's claim that the Dodd-Frank protections should apply to the plaintiff because of the case's factual connections to the United States. The court rejected this argument too, likening the case to the factual posture of *Morrison*, and found that the reference to U.S. employment and law in the email terminating Asadi and the plaintiff's dual U.S. and Iraqi cit-

izenship were not enough to extend the protections' reach.

Interestingly, in *Nollner*, a case with similar facts that could have been decided under the same reasoning as *Asadi*, the district court there dismissed the plaintiffs' anti-retaliation claims under Dodd-Frank on the grounds that the plaintiffs' employer was not an issuer under the securities laws and therefore only the DOJ, not the SEC, had jurisdiction over the FCPA violations. As in *Asadi*, the *Nollner* court held that the FCPA did not protect or require the whistleblower disclosures and therefore the plaintiffs' anti-retaliation claim could not stand. As the *Nollner* court noted, "[t]he court is constrained to reach this result because of the limited scope of the [Dodd-Frank Act

anti-retaliation provisions] and the apparent lack of remedies available to individual FCPA whistleblowers."

Federal district courts that have considered this issue so far have on various grounds refused to extend Dodd-Frank's anti-retaliation protections to whistleblowers located outside the U.S. Nonetheless, the decisions have left open the door for reports relating to issuers under the securities laws or potentially, under the right factual circumstances, U.S. employees of non-issuers reporting FCPA violations. However, what is clear is that for there to exist truly comprehensive protections of FCPA whistleblowers, Congress will have to further legislate those specific protections because the courts will not interpret them to exist under the current statutory regime.