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Court Adopts Legal Framework for Dodd-Frank Retaliation Cases and Grants Summary Judgment to Employer

On September 29, 2016, a federal district court judge in Florida granted summary judgement to an employer in a Dodd-Frank retaliation case. The decision is significant because it is one of the few which have explored and articulated the appropriate standard for establishing a *prima facie* case under Dodd-Frank. Additionally, the court upheld the termination of an individual who worked in compliance, notwithstanding the fact that she had identified problems and had actively participated in an SEC investigation because she also violated company policies by sharing confidential information and using company resources for her own personal businesses.

What you need to know:

In Hall v. Teva Pharmaceutical USA, Inc., the plaintiff worked in the compliance department. She raised a number of issues relating to lax compliance practices in Latin America. She was also interviewed by the Securities and Exchange Commission as part of an investigation into Foreign Corrupt Practices Act concerns. During the same time, the Company received an anonymous tip on its hotline suggesting that the plaintiff was involved in numerous businesses outside of work and that she had used company resources to conduct her personal businesses. The company fired her and she brought suit under Dodd-Frank's whistleblower anti-retaliation provision. The Court first recognized that there is a dearth of authority which delineates the applicable prima facie test for establishing retaliation under Dodd-Frank. Ultimately, the court adopted the same analysis for establishing retaliation under Title VII. Notably, the court did not adopt the standard which exists under another analogous federal whistleblower statute, the Sarbanes Oxley Act ("SOX")—one which is substantially more lenient and easy for plaintiffs to establish a claim of whistleblower retaliation. Applying that standard, the Court held that the employee failed to meet her burden in establishing that the employer fired her because of her protected activity and in fact concluded that it had the right to fire her for moonlighting and using company resources. Significantly, the court expressly noted that "this Court does not sit as a 'super-personnel department' to second-guess the wisdom of an employer's business decision."

What you need to do:

This case raises a host of issues which are hot topics in the whistleblower defense arena at present. We have seen a rising tide of cases brought by individuals who work in compliance roles and whose very job is to identify problems. Determining when and whether they should be viewed as "whistleblowers" can be challenging and the state of the law on this issue varies dramatically based on the statute implicated and the jurisdiction. In addition, while this is a very good recent case for employers on the issue of causation, it is worth noting that on the very same day, the Department of Labor's Administrative Review Board issued a much-awaited decision arising under SOX which underscored a much more lenient "contributing factor" standard for establishing causation. In Palmer v. Canadian National Railway, the ARB went out of its way to underscore the "broad and forgiving" nature of the contributing factor standard. Given the uncertainty of the law on many key issues, employers are strongly urged to consult with counsel before taking adverse action.

For More Information

If you have questions about these developments, please contact Greg Keating, chair of the Whistleblower Defense and Labor, Employment and Benefits Practice Groups at Choate, or any other Choate attorney.

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