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Second Circuit Affirms No Extraterritorial Application For Dodd-Frank Anti-Retaliation Provision

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In , No. 13-cv-4385, 2014 WL 3953672 (2d Cir. Aug. 14, 2014), the Second Circuit affirmed that the **anti-retaliation provision** in Section 922 of Dodd-Frank **does not apply extraterritorially**. This post examines the Court's reasoning and the implications of this decision—particularly for multinational employers.

Plaintiff Liu Meng-Lin, a citizen and resident of Taiwan, worked as a compliance officer for a division of a Chinese company that is a wholly-owned subsidiary of a German corporation (whose shares are listed on the New York Stock Exchange (NYSE)). He claimed to have discovered improper payments to officials in North Korea and China, and to have reported the alleged misconduct to his superiors. As a result, he asserted, he was allegedly demoted and later terminated.

Liu subsequently informed the SEC that the company had allegedly violated the FCPA. He then filed suit in the Southern District of New York, alleging he was discharged in violation of the anti-retaliation provision of Section 922 of Dodd-Frank. Dismissing the case, the district court ruled that: (i) the alleged facts involved extraterritorial conduct beyond the reach of the anti-retaliation provision; (ii) Liu had not made a "required or protected" disclosure to the SEC; and (iii) the disclosure of an alleged FCPA violation did not constitute protected activity under Section 806 of SOX.

The Second Circuit affirmed the dismissal on the grounds that Section 922 of Dodd-Frank does not apply extraterritorially and that the facts alleged in this case would require such application.

First, the Court determined that "this case is extraterritorial by any reasonable definition." That is, "[t]he whistleblower, his employer, and the other entities involved in the alleged wrongdoing are all foreigners based abroad, and the whistleblowing, the alleged corrupt activity, and the retaliation all occurred abroad." The fact that the German parent's shares were listed on the NYSE was deemed immaterial.

Given that the facts here required extraterritorial application, the Second Circuit examined whether Congress intended such an application. The Court made clear that nothing in the text or legislative history of the statute suggested that "Congress intended the anti-retaliation provision to regulate the relationships between foreign employers and their foreign employees working outside the United States." The "presumption against extraterritoriality" and "the absence of any direct evidence of a congressional intent to apply the relevant provision extraterritorially" defeated Liu's claim.

The Court declined to address whether one qualifies as a whistleblower under Dodd-Frank if he or she has disclosed the alleged misconduct only within the corporation, and not to the SEC. Nor did the Court address whether the disclosure of an alleged FCPA violation constitutes protected activity under Section 806 of SOX.

This is a welcome decision for multinational employers, as it is clear that Dodd-Frank's anti-retaliation provision lacks an extraterritorial reach and thus does not invite the inconvenience and other difficulties inherent in defending matters where substantial evidence and witnesses are overseas. Still, it should be noted that different results could be possible where the alleged underlying misconduct, protected activity and retaliation had a meaningful connection to the U.S.

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