KATZ, MARSHALL & BANKS, LLP

Vanguard Whistleblower Gets Procedural Dodd-Frank Retaliation Win Post-Somers, but Hurdles Remain

January 24, 2019

On November 2, 2018, a federal court granted plaintiff David Danon, a former Vanguard Group Inc. attorney, leave to amend his complaint for the second time to better frame his Dodd-Frank Act whistleblower claims. The second amended complaint shifts the focus of his legal theory in an effort to meet the definition of a whistleblower under Dodd-Frank following the Supreme Court's ruling in *Digital Realty Trust Inc. v. Somers* last year. The court will likely next rule on Vanguard's renewed motion to dismiss, however, so the fate of Danon's complaint remains to be seen.

Background on the Whistleblower Retaliation Claim

Danon brought whistleblower claims against his employer, investment management firm Vanguard Group Inc., in the Eastern District of Pennsylvania in December 2015, alleging that he was terminated in retaliation for reporting and opposing tax law violations, in violation of Dodd-Frank. (He also brought Sarbanes-Oxley claims, which were dismissed for lack of administrative exhaustion). In February 2018, the Supreme Court ruled in *Somers* that Dodd-Frank defines a "whistleblower" as an employee who reports violations externally to the SEC. As a result of *Somers*, an employee who reports illegal conduct internally but not to the SEC is not protected under the Dodd-Frank whistleblower protections.

Following the *Somers* decision, Danon amended his complaint to emphasize his external reporting to the SEC and the fact that his employment did not end until after that report. His original complaint had detailed his years of internal reports of tax violations, culminating in Vanguard telling him in January 2013 to find another job and giving him "a short time period to do so" thus effectively terminating him. In his amended complaint, Danon elaborated on the timeline of events, and emphasized that in January 2013, Vanguard notified him of its intention to terminate him "at the end of an unspecified period of time" and that he was still employed in May 2013, when he disclosed his internal reports to the SEC. Danon added that he faced additional retaliation until his termination took effect in June 2013, that interfered with his ability to get another job.

In April 2018, Vanguard moved to dismiss the amended complaint, arguing Danon still conceded that he was notified of the termination decision in January 2013, before he reported to the SEC in May 2013, meaning that under the rule announced in *Somers* he was not a 'whistleblower' at the time of the alleged retaliation in January. In the amended complaint, Danon had also alleged that, notwithstanding his report to the SEC, Vanguard "refused to rescind" its intent to terminate him and then fired him in June 2013. In response to this contention, Vanguard argued that if an employer decides to terminate an employee before the employee engages in protected activity, its failure to alter its decision following the protected activity is not retaliatory.

Judge Grants Motion to Amend Complaint for a Second Time

To forestall a ruling on Vanguard's motion to dismiss, Danon filed a motion for leave to file a second amended complaint, arguing that there is a dispute about when he was terminated: he alleges it was in June 2013, following his May 2013 report to the SEC, while Vanguard claims it was in January 2013. Danon alleged that he had found documents refuting the claim that he was terminated in January 2013 – namely, a written performance review he was given before the January 2013 meeting that contained references to Danon's future year of work at the company. Vanguard argued that Danon should not be permitted to amend his complaint and should be held to his prior statements in this litigation and in other courts, including in a joint stipulation he filed with Vanguard, that he received notice of his termination in January 2013, before his report to the SEC.

On November 2, 2018, a magistrate judge granted Danon's motion to amend his complaint, noting that Danon sought to do so chiefly to establish that his date of termination was after his report to the SEC and that "[p]laintiffs routinely amend complaints to correct factual inadequacies in response to a motion to dismiss…This is permitted even when the proposed amendment flatly contradicts the initial factual position." The court explained that in ruling on a motion to dismiss, a plaintiff cannot be bound by allegations in prior complaints that have been superseded by amendment. The court noted, however, that in ruling on a motion for summary judgment, it may consider contrary factual allegations made in prior pleadings. Following this procedural win, Danon filed the second amended complaint, which removed his earlier complaint's references to his receiving notice of his termination in January 2013, and now noted that he received a performance review during that meeting. Danon's second amended complaint also removed the allegation that Vanguard "refused to rescind" its intent to terminate him, instead framing the termination as occurring in June 2013, when it took effect.

Vanguard Files Motion to Dismiss Citing *Somers* Standard

Although the court allowed Danon to file this amended complaint, it remains to be seen, whether his refashioned claims will survive Vanguard's motion to dismiss, which it filed on December 4, 2018. Vanguard asked the court to dismiss the second amended complaint or to grant summary judgment in its favor. Vanguard argued that Danon's prior statements to the court about the January 2013 notice of termination constituted judicial admissions, and he should not be able to change his story at this stage. Vanguard also argued that the new document Danon put forth – a performance review written before the January 2013 meeting – did not contradict or supersede his own statements based on his memory of the January 2013 meeting that he was notified of the termination decision then. If he is held to those statements, Vanguard argued, then his claim must fail under the *Somers* standard because he was not a whistleblower under Dodd-Frank at the time of the retaliatory adverse action.

Although the memorandum opinion on the motion for leave to amend made clear that the plaintiff is not bound by statements in the earlier complaints on a motion to dismiss, Danon's prior statements indicating that Vanguard notified him of his termination before his SEC report may still be in play if the court accepts Vanguard's arguments that – second amended complaint notwithstanding – judicial estoppel applies because Danon made such statements in not only complaints, but in a joint stipulation, briefing, and prior litigation. The court also left open the possibility that such prior statements may be considered on a motion for summary judgment, meaning that the statements may also be considered if the court grants the defendant's alternative motion for summary judgment.