

One Minute Memo[®]



Fifth Circuit Narrowly Construes Definition of “Whistleblower” under Dodd-Frank

The U.S. Court of Appeals for the Fifth Circuit, in a stark departure from every other court to previously consider the issue, has *ruled* that potential whistleblowers are only protected from retaliation under the Dodd-Frank Act of 2010’s whistleblower-protection provision if they report a violation of the securities laws directly to the U.S. Securities Exchange Commission (“SEC”). Although the five district court decisions to previously consider the definition of a “whistleblower” under the statute all concluded that the whistleblower-protection provision could also extend to certain individuals who made an internal report to the employer, even if they did not make a report directly to the SEC, the Fifth Circuit, in the first circuit court decision to address this issue, found the reasoning of those cases unpersuasive.

Khaled Asadi, a former employee of G.E. Energy LLC who was based in Iraq, sued his former employer alleging that it had violated the Dodd-Frank whistleblower-protection provision by terminating him after he made an internal report of a possible securities law violation. The district court dismissed Asadi’s complaint with prejudice after concluding that the statute did not protect overseas whistleblowing activity. Interestingly, although the lower court premised its decision on the location where Asadi made his report, the Fifth Circuit did not address that issue on appeal and instead based its decision solely on its conclusion that Asadi did not meet the definition of a “whistleblower” under the statute because he did not provide any information to the SEC.

At first glance, the question of who can qualify as a whistleblower under the Dodd-Frank Act appears straightforward from the statute itself, which in subsection (a)(6) expressly defines a “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws to the Commission” (emphasis added). This definition unambiguously requires that an individual provide information to the SEC to qualify as a whistleblower for purposes of the statute. The waters are muddied a bit, however, in subsection (h), which provides a private cause of action against employers who take retaliatory measures against a whistleblower for taking certain protected actions. These actions include, *inter alia*, “making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . and any other law, rule, or regulation subject to the jurisdiction of the [SEC].” Because subsection (h) does not contain any express requirement that a disclosure be made to the SEC, the five district court decisions to consider the issue have read this subsection as establishing an exception to the general requirement that a report be made to the SEC.

The Fifth Circuit rejected this reading, explaining that because the statutory definition of a “whistleblower” is unambiguous and does not conflict with any other portion of the statute, rules of statutory construction require a literal reading of the statutory definition, which requires a report to the SEC. The Court also held that construing the Dodd-Frank whistleblower-protection provision beyond the statutory definition would render Sarbanes-Oxley’s (“SOX”) anti-retaliation provision moot, as it would be completely subsumed by Dodd-Frank. Finally, the Court held that a recent regulation promulgated by the SEC which adopted the more expansive definition of a “whistleblower” favored by the district courts must be rejected given that Congress had already expressly defined the term.

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The Fifth Circuit's more limited interpretation of Dodd-Frank is particularly important for employers for a number of reasons. Under the broader interpretation given by the district courts, an employee with a whistleblower claim under SOX could instead bring the claim under Dodd-Frank, which provides for two times back pay (unlike SOX which provides only for single back pay). Dodd-Frank also allows an employee to proceed directly to district court, as opposed to first filing with the Secretary of Labor. Lastly, Dodd-Frank contains a significantly longer statute of limitations.

Hopefully, the Fifth Circuit's ruling is the beginning of a reversal of the troubling trend of pro-employee decisions which favored an expansive interpretation of Dodd-Frank's whistleblower-protection provision. Seyfarth is monitoring the district and circuit courts in order to see if the interpretation adopted by the Fifth Circuit is embraced by other courts.

In the interim, we recommend that employers ensure that they have strong internal compliance programs in place and that any adverse employment actions against individuals who complain about violations of the securities laws, even if only internally, are based on non-retaliatory factors.

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