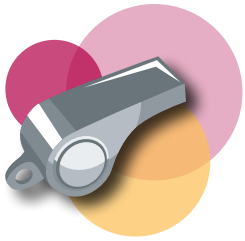
SEYFARTH SHAW



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

Debate Continues Over Whether Dodd-Frank Requires An SEC Complaint

By Ada W. Dolph and Olushola Ayanbule

Our Whistleblower Team continues to monitor whether courts will require an employee to have complained directly to the SEC to state a claim for whistleblower retaliation under the Dodd-Frank Wall Street Reform and Consumer Protection Act. (See our past blogs on this issue here, here and here). We checked in again on the state of the law and can report that the debate rages on.

The controversy arises from two separate provisions of Dodd-Frank. First, under "Definitions," Dodd-Frank defines a whistleblower as "any individual who provides, or two or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission, in a manner established, by rule or regulation, by the Commission*." 15 U.S.C. § 78u–6(a)(6) (emphasis added). However, under the section titled "Protection of Whistleblowers," Dodd-Frank prohibits retaliation for any lawful act done by the whistleblower:

> (i) in providing information to the Commission;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) *in 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 Commission.*

15 U.S.C. § 78u–6(h)(1)(A) (emphasis added). Plaintiffs who want to state a Dodd-Frank claim based solely on internal complaints rely upon this third prong, which they argue prohibits retaliation against those who make disclosures "that are required or protected under [SOX]," without regard to the recipient of the disclosure. Unsurprisingly, the SEC, too, has taken the position that direct reporting to the agency is not required and, therefore, an employee may state a claim based solely on an internal report. *See* 17 C.F.R. § 240.21F–2(b)(1); *see also* Brief for the Securities and Exchange Commission as *Amicus Curiae* Supporting Appellant, *Liu v. Siemens AG*, No. 13–4385 (2d Cir. Feb. 20, 2014) (available here).

As we have noted in our past blogs, the first circuit court to address this issue concluded that an employee must have made his complaint to the SEC. In *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013), the Fifth Circuit found that the language in Dodd-Frank unambiguously extends only to putative whistleblowers who reported alleged violations directly to the Commission: "Under Dodd–Frank's plain language and structure, there is only one category of whistleblowers:

individuals who provide information relating to a securities law violation to the SEC." *Id*. at 625. Therefore, the court concluded that there was no conflict between the whistleblower definition in § 78u–6(a)(6), and § 78u–6(h)(1)(A)(iii)'s protection of disclosures under the Sarbanes–Oxley Act, and gave no deference to the SEC's broad interpretation of these provisions.

The *Asadi* decision remains the only circuit court opinion to decide this issue. The Second and Eighth Circuits arguably had the question before them, but sidestepped it. *See Liu v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014) (resolving Dodd-Frank's coverage on other grounds, that its anti-retaliation provisions do not apply extraterritorially); *Bussing v. COR Clearing, LLC*, No. 14-8015 (8th Cir. 2014) (denying interlocutory appeal on this issue).

District court decisions on this issue are a near-even split, with a slight majority extending Dodd-Frank's protections to internal complaints. District court decisions out of the First, Third, and Sixth Circuits have uniformly disagreed with the Fifth Circuit and applied the expansive interpretation of the Dodd-Frank Act's anti-retaliation provisions. *See, e.g., Khazin v. TD Ameritrade Holding Corp*., 2014 WL 940703 (D.N.J. Mar. 11, 2014); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42 (D. Mass. 2013). The courts typically reached this conclusion by finding either that the language of the Dodd-Frank Act unambiguously protects such persons, or that the anti-retaliation provisions were ambiguous and then according *Chevron* deference to the SEC's broad interpretation. In contrast, district courts that considered this issue in the Fifth, Seventh, and Eleventh Circuits have either agreed with, or recognize that they are bound by, the reasoning of the Fifth Circuit in *Asadi*. *See, e.g., Lutzeier v. Citigroup, Inc.*, 305 F.R.D. 107 (E.D. Mo. 2015). As of publication, there are no known decisions out of the Fourth Circuit on this issue.

Interestingly, intra-circuit splits have emerged within the Second, Eighth, Ninth, and Tenth Circuits, which makes them ripe for an appellate decision. *See, e.g., Yang v. Navigators Group, Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014) (statute does not limit whistleblower protection to individuals who report violations to SEC); *Berman v. Neo@Ogilvy LLC*, 2014 WL 6860583 (S.D.N.Y. Dec. 5, 2014) (Dodd-Frank provides private cause of action only for individuals who report violations to SEC).

In short, we are likely to see additional circuit courts weigh in on both sides of the issue and a circuit split emerge that will need to be resolved by the Supreme Court. In the meantime, publicly-traded companies and private companies that contract with those companies should continue to maintain robust compliance, reporting and investigative whistleblowing programs and policies to encourage employees to report alleged violations internally. In crafting those policies and agreements, however, companies should also take care to comply with the SEC's directives not to chill protected whistleblower activity (see a recent blog on SEC activity in the area of employment agreements and policies here). And, if you are involved in Dodd-Frank litigation, until you have a binding answer from your circuit court, consider challenging the viability of any Dodd-Frank claim grounded solely on an internal complaint.

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