



5th Circuit Surprise: To Qualify for Dodd-Frank Protection, "Whistleblower" Must Provide Information to SEC

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Is a corporate employee who reports his or her employer's possible securities law violations to a supervisor or a law enforcement agency but not to the SEC - considered a "whistleblower" entitled to protection under Dodd-Frank? Until last week, many experts along with the SEC - assumed that the answer was "yes." But in *Asadi v. G.E. Energy (USA), LLC*, No. 12-20522 (5th Cir. July 17, 2013), the Fifth Circuit said unequivocally "no."

Asadi was a GE Energy executive based in Amman, Jordan. At a meeting in 2010, Iraqi officials informed Asadi of their suspicion that GE Energy had hired a woman closely associated with a senior Iraqi official to curry favor with that official in negotiating a joint venture agreement. Concerned that this conduct violated the Foreign Corrupt Practices Act, Asadi reported the issue internally, to his supervisor and to the GE Energy ombudsperson for the region. He did not, however, notify the SEC.

Within a short time after making the internal reports, Asadi received a "surprisingly negative" performance review, and was pressured to accept a reduced role in the region. Asadi refused to comply, and, about a year later, GE Energy fired him. Asadi filed a complaint alleging that his employer had violated Dodd-Frank's whistleblower-protection provision by terminating him because of his reports about the potential FCPA violation.

Section 922 of the Dodd-Frank law created a new private right of action by a "whistleblower" alleging retaliation by his employer. Such an action may be brought in federal court within 6 years (and in some cases within 10 years) of the alleged retaliation. Covered "retaliation" includes discharge, demotion, suspension, threats, harassment, and any manner of discrimination against a whistleblower. Remedies available to the whistleblower include reinstatement, twice the amount of back pay owed (with interest), and compensation for attorneys' fees and litigation costs.

But who is a protected "whistleblower"? The Dodd-Frank statute expressly defines a "whistleblower" as any individual who provides information relating to a violation of the securities laws to the SEC, in a

manner established by the SEC. 15 U.S.C. § 78-u-6(a)(6). Thus, the definitional section of the law limits the universe of "whistleblowers" to persons reporting directly to the SEC. But the same Dodd-Frank statute provides that a "whistleblower" is broadly protected from retaliation by his employer because of whistleblowing actions other than reporting to the SEC, including reporting possible securities law violations to a law enforcement agency, or (as commonly occurs) to a supervisor. 15 U.S.C. § 78-u-6(h)(1)(A)(iii).

Construing Dodd-Frank's narrow definition of "whistleblower" alongside its broadly worded protections against retaliation, several district courts have held that the statute is either contradictory or ambiguous, and have interpreted the law to protect against retaliation certain employees who did not make disclosures to the SEC. See, e.g., *Egan v. TradingScreen, Inc.*, 2011 WL 1672066 (S.D.N.Y. May 4, 2011). The SEC followed suit in promulgating its regulations to enforce the new provision. In those regulations, the Commission provided a general definition of "whistleblower" consistent with the statute's (as requiring reporting to the SEC), but also provided a second definition, applicable "[f]or purposes of the anti-retaliation provisions" of Dodd-Frank, that included as a "whistleblower" anyone who provided information either to the SEC or (in some circumstances) to a supervisor or law enforcement agency. 17 C.F.R. § 240.21F-2.

Such was the favorable state of the legal landscape when Asadi sued GE Energy in the Southern District of Texas after his termination. GE Energy moved to dismiss on two grounds: (1) even though he had reported suspected FCPA violations internally, Asadi was not a "whistleblower" under Dodd-Frank; and (2) the statute did not apply extraterritorially. The district court granted GE Energy's motion with prejudice, concluding that the whistleblower-protection law did not protect extraterritorial activity, and did not decide whether Asadi qualified as a whistleblower.

Remarkably, on Asadi's appeal, the Fifth Circuit bypassed the issue of extraterritoriality addressed by the lower court, and tackled the more fundamental question of Asadi's status as a whistleblower. In a surprisingly brief and uncluttered opinion, the court of appeals rejected the contrary district court cases, swept aside the SEC's "expansive" interpretation of the law, and affirmed the lower court's dismissal of the suit on the ground that Dodd-Frank's plain and unambiguous definition of "whistleblower" meant what it said, and required a disclosure to the SEC that Asadi had never made.

In explaining its decision, the Fifth Circuit emphasized that, by limiting Dodd-Frank's definition of "whistleblower" to the statutory text, it preserved a meaningful role for the separate anti-retaliation provisions - including the administrative scheme - of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A. As the court recognized, any "whistleblower" under SOX who also qualifies as a Dodd-Frank whistleblower will be unlikely to raise a SOX claim, since Dodd-Frank (1) authorizes recovery of two times back pay (while SOX provides for only back pay); (2) does not require the filing of an administrative complaint (while SOX requires an administrative filing with the Secretary of Labor before suit can be filed); and (3) has a plaintiff-friendly statute of limitations of 6-10 years (while SOX requires legal action within 180 days). After *Asadi*, because Dodd-Frank whistleblowers (reporters to the SEC) are effectively a subset of the larger universe of whistleblowers under SOX (reporters to the SEC *plus* reporters to supervisors, regulators, and law enforcement agencies), the older and less potent SOX remedies and procedures will continue to be relevant in whistleblower cases.

The holding in *Asadi* will surely prove to be controversial. If it prevails (and if Congress fails to amend Dodd-Frank), whether a whistleblowing employee in fact provided information about a securities law violation "to the Commission" will assume critical importance. And presumably the SEC (in addition to re-tooling its regulations) must gear up to receive a greater volume of reports of possible corporate wrongdoing, as savvy would-be plaintiffs position themselves to take full advantage of Dodd-Frank's protections. Stay tuned.

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