

# Client Update

## Recent Decisions Create Further Uncertainty on Question of Whether Internal Reporting Triggers Dodd-Frank Whistleblower Anti-Retaliation Protection

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There is uncertainty under the law on an important question relating to the anti-retaliation provision of the Dodd-Frank Act. Specifically, the courts have disagreed about whether a purported whistleblower must report wrongdoing to the U.S. Securities and Exchange Commission (“SEC”) in order to be protected, or, instead, whether internal reporting within a company or reporting to a different regulator is sufficient. As we noted in a previous [Client Update](#), the Second Circuit<sup>1</sup> held in September that the Dodd-Frank anti-retaliation provision protects whistleblowers who complain only to their employers, while the Fifth Circuit,<sup>2</sup> and a minority of district courts to have considered this issue, have held that the anti-retaliation provision of Dodd-Frank is limited to those who provide information to the SEC and does not extend to protect those who report internally or to another regulator or law enforcement agency.

Two federal district courts recently issued decisions on this important question. Both courts—one in the Eastern District of Tennessee and one in the Eastern District of Virginia—sided with the Fifth Circuit. The decision in the Eastern District of Tennessee has already been appealed to the Sixth Circuit Court of Appeals, which inevitably will deepen the circuit split and perhaps make review of this issue by the U.S. Supreme Court more likely.

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<sup>1</sup> See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

<sup>2</sup> *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013).

The dispute centers on whether Dodd-Frank's definition of a "whistleblower" as someone who reports a potential violation to the SEC limits the scope of individuals who are protected under the law's anti-retaliation provision. Dodd-Frank's anti-retaliation provision prohibits an employer from taking adverse employment action against a whistleblower who either (i) provides information to the SEC; (ii) testifies in or assists in an SEC investigation or action based on information provided; or (iii) makes disclosures that are required or protected under the Sarbanes-Oxley Act ("SOX"), the federal securities laws and rules, or section 1513(e) of title 18.<sup>3</sup>

### EASTERN DISTRICT OF TENNESSEE DECISION

In *Verble v. Morgan Stanley Smith Barney, LLC*,<sup>4</sup> an investment advisor alleged that he was placed on leave and eventually terminated for assisting federal authorities, including the FBI, with respect to several alleged frauds, including a scheme against the government and insider trading by colleagues at his employer, Morgan Stanley Smith Barney ("MSSB"). Plaintiff was placed on temporary leave and eventually terminated. Three months after termination, the Plaintiff filed a complaint with the SEC regarding the underlying activity. Plaintiff brought retaliation claims under Dodd-Frank and SOX,<sup>5</sup> as well as other claims.

Plaintiff claimed that his termination violated the Dodd-Frank anti-retaliation provision, which prohibits an employer from terminating a whistleblower for any lawful act done by the whistleblower "in making disclosures that are required or protected under . . . section 1513(e) of Title 18 . . ."<sup>6</sup> Section 1513 criminalizes retaliation against a witness, victim or informant who provides information to a law enforcement officer.<sup>7</sup> Plaintiff alleged his reporting to the

<sup>3</sup> See 15 U.S.C. § 78u-6(h)(1)(A). The anti-retaliation provision creates a cause of action for any individual who is improperly discharged or discriminated against, allowing that individual to seek reinstatement, two times back pay, and costs. *Id.* § 78u-6(h)(1)(B).

<sup>4</sup> No. 3:14-CV-74, 2015 WL 8328561 (Dec. 8, 2015 E.D. Tenn.).

<sup>5</sup> Plaintiff's SOX claims were dismissed by the court because he failed to follow a statutorily imposed administrative procedure, which requires employees to file a complaint with the Occupational Safety and Health Administration ("OSHA") within 180 days of the violation and another 180 days for OSHA to resolve the complaint administratively. *Id.* at \*3 (citing 18 U.S.C. 1514A(b)). If the plaintiff had followed this procedure, his SOX claim may have been allowed to proceed because SOX's anti-retaliation provision does not require reporting to the SEC and expressly protects whistleblowers who report certain wrongdoing to law enforcement or internally. See 18 U.S.C. 1514A(a).

<sup>6</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>7</sup> See 18 U.S.C. 1513(e).

FBI fell within this provision and thus also the anti-retaliation provision of Dodd-Frank.

The district court disagreed. It found the plain language of Dodd-Frank's statutory definition of a "whistleblower" limits protection to "any individual who provides . . . information relating to a violation of the securities laws to the Commission."<sup>8</sup> "Because plaintiff did not provide information to the SEC before his termination, he does not qualify as a whistleblower as defined in Dodd-Frank, and has no protection under §78u-6(h)(1)(A)." *Verble*, at \*10.

The *Verble* court thus rejected the Second Circuit's reasoning in *Berman*, which found the anti-retaliation provision and definition sections of Dodd-Frank in tension, and thus gave "Chevron deference to the reasonable interpretation of the agency charged with administering the statute." *Berman*, at 155. The *Berman* court found that the SEC's Rule 21F-2, implementing the anti-retaliation provision of Dodd-Frank, does not require reporting to the SEC to qualify for protection.<sup>9</sup> By contrast, the judge in *Verble* found the statutes were not in tension (and thus not deserving of *Chevron* deference); the two provisions could be read together to protect a narrow group of whistleblowers who "provide[] information to both the SEC and the FBI, but [the employer] was only aware of the disclosure to the FBI and terminated plaintiff for that reason." *Verble*, at \*8.

### EASTERN DISTRICT OF VIRGINIA DECISION

In *Puffenbarger v. Engility Corp.*,<sup>10</sup> a director of payroll raised concerns to the company's Chief Accounting Officer ("CAO") about the payment of cash (approximately \$850) to a coworker for personal time off accrued, in alleged contravention of company policy. One week later, the company announced a restructuring of the Payroll Department, which plaintiff alleged reduced her duties and the number of people reporting to her, in alleged retaliation for her complaint to the CAO (the company disputed that the changes were related to the plaintiffs' complaint, and argued the restructuring had been planned for months). Plaintiff brought retaliation claims under SOX<sup>11</sup> and Dodd-Frank.

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<sup>8</sup> 15 U.S.C. § 78u-6(a)(6).

<sup>9</sup> See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34304 (June 13, 2011).

<sup>10</sup> No. 1:15-cv-188, 2015 WL 9686978 (E.D. Va. Dec. 31, 2015).

<sup>11</sup> The court granted defendant's motion for summary judgment on the SOX claim, which in the Fourth Circuit requires a plaintiff to show both a subjectively and objectively reasonable belief that the conduct complained of constituted a violation of one of the

In addressing the Dodd-Frank claim, the *Puffenbarger* court reached the same conclusion as the Fifth Circuit and the *Verble* court. Namely, “the statutory definition of ‘whistleblower’ for purposes of a Dodd-Frank retaliation claim is plain and unambiguous insofar as it is limited to individuals who provide the specified information to the SEC.” *Puffenbarger*, at \*9. Since, the plaintiff had never reported anything to the SEC—only internally—the court granted defendant’s summary judgment motion.<sup>12</sup>

## CONCLUSION

Both recent decisions highlight the legal uncertainty around the question of who is a protected whistleblower under Dodd-Frank’s anti-retaliation provision. These decisions also underscore the importance of ensuring robust policies and procedures relating to internal reporting of whistleblower concerns and protections of potential whistleblowers from retaliation. Since the implementation of Dodd-Frank, every year has seen a rise in the number of whistleblower complaints the SEC receives.<sup>13</sup> This is an area of particular focus for the SEC as well as private litigants and a trend that we see continuing into the foreseeable future. Companies should regularly monitor and test the effectiveness of their whistleblower policies and procedures in order to mitigate risks associated with potential whistleblower retaliation claims.

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Please do not hesitate to contact us with any questions.

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laws listed in the retaliation provision of SOX (18 U.S.C. §1514A). *Puffenbarger*, at \*5. The court found the latter lacking: “no reasonable juror could conclude that a reasonable person in plaintiff’s position would have believed that the [personal time off] cash out constituted a violation of any of the fraud-related laws and regulations referenced in [SOX].” *Id.* Nor was it reasonable for plaintiff to believe that the cash payout had a material effect on the financial statements of the company. *Id.* at 6.

<sup>12</sup> The court also noted that plaintiff’s claim would fail under any reading of the statute because she was attempting to seek protection under the Dodd-Frank anti-retaliation provision that protects whistleblowers whose activity was “protected under SOX,” and the plaintiff could not prove her activity was. *Id.* at \*9.

<sup>13</sup> See SEC, 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program (Nov. 16, 2015), available at: <http://www.sec.gov/about/offices/owb/annual-report-2015.pdf>.