

## Fifth Circuit Creates Split on Scope of Retaliation Protection for “Whistleblowers” Under Dodd-Frank

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Since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, a number of federal courts have grappled with the scope of the Act’s new protections for employee “whistleblowers.” Until recently, however, no federal court of appeals had addressed the issue. In *Asadi v. G.E. Energy (USA), L.L.C.*,<sup>1</sup> the U.S. Court of Appeals for the Fifth Circuit entered the fray — and rejected the conclusion reached by every other court that had previously considered the question.

The plaintiff in *Asadi* alleged that his former employer had fired him for reporting his concerns about a potential violation of the securities laws to his supervisor and a company ombudsperson. The plaintiff thus claimed that he had been fired for engaging in protected activity under the Dodd-Frank Act, which, in part, prohibits employers from discharging, demoting, suspending, threatening, harassing, or otherwise discriminating against a “whistleblower” for assisting or sharing information with the U.S. Securities and Exchange Commission (SEC) — or for “making disclosures that are required or protected” under the securities laws.<sup>2</sup>

Although the district court had dismissed the plaintiff’s claim on jurisdictional grounds,<sup>3</sup> the Fifth Circuit took a different tack by focusing on the statutory definition of “whistleblower”: “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC].”<sup>4</sup> Because the plaintiff conceded that he had made his report internally, and had not provided any information to the SEC, the Fifth Circuit held that he did not qualify as a “whistleblower” eligible for protection from retaliation.

In reaching this conclusion, the Fifth Circuit explicitly rejected the contrary interpretations of the Dodd-Frank Act adopted by the SEC and previous courts. Both the SEC and those other courts had concluded that because the Dodd-Frank Act was designed to expand federal whistleblower protection, employees who made “disclosures that are required or protected” under the securities laws<sup>5</sup> were entitled to statutory protection regardless of whether they shared any information with the SEC.<sup>6</sup>

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<sup>1</sup> No. 12-20522, 2013 U.S. App. LEXIS 14470 (5th Cir. July 17, 2013).

<sup>2</sup> 15 U.S.C. § 78u-6(h)(1)(A), (A)(iii).

<sup>3</sup> For details, please see the following Sutherland Legal Alert: *Federal Court Bars Extraterritorial Application of Dodd-Frank’s Anti-Retaliation Provision to Whistleblowers Employed Abroad* (Oct. 23, 2012), available at <http://www.sutherland.com/files/upload/FederalCourtBarsExtraterritorialApplicationofDodd-FrankAnti-RetaliationProvisiontoWhistleblowersEmployedAbroad.pdf>.

<sup>4</sup> 15 U.S.C. § 78u-6(a)(6).

<sup>5</sup> *Id.* § 78u-6(h)(1)(A)(iii).

<sup>6</sup> See *Murray v. UBS Secs., Inc.*, No. 12 Civ. 5914 (JMF), 2013 U.S. Dist. LEXIS 71945, at \*20 (S.D.N.Y. May 21, 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424 (SRU), 2012 U.S. Dist. LEXIS 136939, \*10-13 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 n.9 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 47713, at \*19-26 (S.D.N.Y. May 4, 2011); SEC Securities Whistleblower Incentives and Protections, 76 Fed. Reg.

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In the Fifth Circuit’s view, however, the Dodd-Frank Act’s “plain language and structure” permitted “only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.”<sup>7</sup> Regardless of the fact that an employee could engage in otherwise-protected activities by “making disclosures that are required or protected” under the securities laws,<sup>8</sup> the Fifth Circuit held that those activities “do not . . . define which individuals qualify as whistleblowers” for the purposes of the Dodd-Frank Act’s retaliation provisions.<sup>9</sup>

The Fifth Circuit’s decision thus calls into question the trend among federal district courts toward a more expansive interpretation of the Dodd-Frank Act with respect to employee whistleblowers. Although this development bodes well for employers concerned about potential retaliation claims from internal whistleblowers, given the uncertainty in this area, companies may wish to consult with counsel before taking adverse employment action against an employee who has expressed concerns about compliance with the securities laws.



*If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.*

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34300, at 34304 (June 13, 2011) (“The second prong of the Rule 21F-2(b)(1) standard provides that, for purposes of the anti-retaliation protections, an individual must provide the information in a manner described in Section 21F(h)(1)(A). This change to the rule reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities *other than the Commission*.”).

<sup>7</sup> *Asadi*, No. 12-20522, 2013 U.S. App. LEXIS 14470, at \*13.

<sup>8</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>9</sup> *Asadi*, No. 12-20522, 2013 U.S. App. LEXIS 14470, at \*13.