

## Ninth Circuit: Dodd Frank Act's Anti-Retaliation Provision Protects Whistleblowers Who Report Potential Misconduct Internally as Well as Whistleblowers Who Report to the SEC

03.22.17



(Article from *Securities Law Alert*, March 2017)

For more information, please visit the [Securities Law Alert Resource Center](#)

On March 8, 2017, the Ninth Circuit held that the Dodd-Frank Act's anti-retaliation provision "should be read to provide protections to [whistleblowers] who report internally as well as to those who report to the SEC." *Somers v. Digital Realty Trust*, 2017 WL 908245 (9th Cir. 2017) (Schroeder, J.). The Ninth Circuit found that to the extent there is any "uncertainty" on this issue, the SEC's implementing regulation defining the term "whistleblower" to include "those who make internal disclosures" "has resolved any ambiguity and . . . is entitled to deference." *Id.* (citing 17 C.F.R. § 240.21F-2).

In so holding, the Ninth Circuit deepened a circuit split on the question of whether the Dodd-Frank Act's anti-retaliation provision reaches whistleblowers who do not report to the SEC. The Second Circuit has ruled that the Dodd-Frank Act protects whistleblowers who report potential misconduct internally, while the Fifth Circuit has held that the anti-retaliation protections only apply to whistleblowers who report to the SEC. Compare *Berman v. Neo@Ogilvy*, 801 F.3d 145 (2d Cir. 2015)[[1](#)] with *Asadi v. G.E. Energy (USA)*, 720 F.3d 620 (5th Cir. 2013).[[2](#)]

### **Ninth Circuit Finds the Statutory Definition of the Term "Whistleblower" Does Not Limit the Reach of the Dodd-Frank Act's Anti-Retaliation Provision**

The Dodd-Frank Act defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission." 15 U.S.C. § 78u-6(a)(6). The Ninth Circuit acknowledged that "[t]his definition . . . describes only those who report information to the SEC." *Somers*, 2017 WL 908245.

However, the Ninth Circuit explained that subdivision (iii) of the Dodd-Frank Act's anti-retaliation provision "gives whistleblower protection to all those who make any required or protected disclosure under [the] Sarbanes-Oxley [Act] and all other relevant laws." *Id.* (citing 15 U.S.C. § 78u-6(h)(1)(A)). The court noted that the "Sarbanes-Oxley [Act] expressly protects those who lawfully provide information to . . . 'a person with supervisory authority over the employee.'" *Id.* (citing 18 U.S.C. § 1514A(a)). The Ninth Circuit determined that "[b]y broadly

incorporating, through subdivision (iii), Sarbanes-Oxley’s disclosure requirements and protections, [the Dodd-Frank Act] necessarily bars retaliation against an employee of a public company who reports violations to the boss.”

The Ninth Circuit found the Dodd-Frank Act’s definition of the term “whistleblower” “should not be dispositive of the scope of” the anti-retaliation provision. The court reasoned that “[t]erms can have different operative consequences in different contexts.” In this case, the court determined that “[r]eading the use of the word ‘whistleblower’ in the anti-retaliation provision to incorporate the earlier, narrow definition would make little practical sense and [would also] undercut congressional intent.” The Ninth Circuit agreed with the Second Circuit’s finding in *Berman* that such an interpretation would “narrow[ ]” subdivision (iii) of the Dodd-Frank Act’s anti-retaliation provision “to the point of absurdity” because “the only class of employees protected [under subdivision (iii)] would be those who had reported possible securities violations both internally and to the SEC” but who were “fire[d] . . . solely on the basis of the employee’s internal report.” The Ninth Circuit found this reading of the statute “illogical.”

**Ninth Circuit Disagrees with the Fifth Circuit’s Decision in *Asadi***

The Ninth Circuit expressly disagreed with the Fifth Circuit’s decision in *Asadi*. There, the Fifth Circuit found the statutory definition of “whistleblower” applied to the Dodd-Frank Act’s anti-retaliation provision. The Fifth Circuit “reasoned that if [the Dodd-Frank Act] protected the same conduct that [the] Sarbanes-Oxley [Act] did, then the Sarbanes-Oxley enforcement scheme would be rendered moot or superfluous, on the theory that no one would use it” in light of the Dodd-Frank Act’s more favorable provisions. *Somers*, 2017 WL 908245.

The Ninth Circuit found the two “statutes provide alternative enforcement mechanisms” that offer different advantages to different types of plaintiffs. The court noted that the “Sarbanes-Oxley [Act] may be more attractive to the whistleblowing employee” because of its option for adjudication through administrative review, as well as its compensation for special damages, such as emotional injury.

**Ninth Circuit Defers to the SEC’s Implementing Regulation Defining the Term “Whistleblower”**

The Ninth Circuit agreed with the Second Circuit’s determination that “even if the use of the word ‘whistleblower’ in the anti-retaliation provision [of the Dodd-Frank Act] creates uncertainty because of the earlier narrow definition of the term,” the SEC “has resolved any ambiguity and its regulation is entitled to deference.” The Ninth Circuit found the SEC’s implementing regulation “accurately reflects congressional intent that [the Dodd-Frank Act] protect employees whether they blow the whistle internally, as in many instances, or they report directly to the SEC.”

---

[1] Please [click here](#) to read our prior discussion of the Second Circuit’s decision in *Berman*.

[2] Please [click here](#) to read our prior discussion of the Fifth Circuit’s decision in *Asadi*.

Authors and  
Contacts

Paul Gluckow

Partner and General Counsel

[pgluckow@stblaw.com](mailto:pgluckow@stblaw.com)

+1-212-455-2653

Jonathan Youngwood

Partner

Peter Kazanoff

Partner

[pkazanoff@stblaw.com](mailto:pkazanoff@stblaw.com)

+1-212-455-3525

www.simpsonthacher.com

2

