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Ninth Circuit Broadly Interprets Anti-Retaliatory Provision of Dodd-Frank's Whistleblower Protections

On March 8, 2017, the U.S. Court of Appeals for the Ninth Circuit held that the anti-retaliation protections of the Dodd-Frank Act (DFA) extend "to those who report internally as well as to those who report to the SEC."[1] Section 21F of the DFA prohibits retaliatory conduct against "whistleblowers" who provide information to the SEC pursuant to the DFA and also to those who make protected or required disclosures under Sarbanes-Oxley and other federal securities laws and regulations.[2] The SEC has interpreted Section 21F to provide protection from retaliation against those who make internal disclosures to management under Sarbanes-Oxley without reporting to the SEC as well as those who report to the SEC.[3] The Ninth Circuit stated that the SEC's regulation 21F accurately reflects Congress's overall purpose "to protect those who report violations internally," and in so ruling joined the Second Circuit, which reached a similar conclusion.[4] The Fifth Circuit previously reached a different conclusion, finding that section 21F only protects those who reported to the SEC, and adopted a contrary interpretation to the SEC's regulation.[5] We anticipate this issue to remain unsettled pending further judicial or legislative action.

The plaintiff in this case, Paul Somers, alleged that he was terminated by his employer after he made several *internal reports* to senior management of "possible securities law violations by the company."[6] The Ninth Circuit reasoned that whistleblower protections would be "narrowed to the point of absurdity" if courts were required to follow the DFA's definition of "whistleblowers" as employees who report "to the Commission" to the exclusion of other employees who only report internally to management.[7] The Ninth Circuit found that a narrow interpretation of persons covered under Section 21F would result in the DFA's providing no protection to other potential whistleblowers, such as auditors and lawyers, who are required to report internally to management before making a whistleblower report to the SEC.[8] The court determined this would be inconsistent with the language of Section 21F of the DFA, which extended anti-retaliatory protection to those making reports under Sarbanes-Oxley. The Ninth Circuit thus allowed Somer's DFA anti-retaliation claim to continue against his former employer.

Companies operating in the Ninth Circuit must be cognizant, therefore, that DFA anti-retaliatory protections now extend to employees reporting internally to management on allegations of possible violations of the securities laws. We have previously issued guidance for recommended best practices in handling whistleblower complaints under Dodd-Frank.[9] Today's ruling

reinforces the need for anti-retaliation policies in employer codes of conduct. It is also highlights the importance of having a program to manage internal allegations of misconduct that is ultimately overseen by the Board and permits, when necessary, investigation of such allegations independently of senior management.

1. *Somers v. Digital Realty Trust*, No. 15-17352, 2017 WL 908245 (9th Cir. March 8, 2017).
2. 15 U.S.C. § 78u-6(h)(1)(A) provides: "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower*— (i) in providing information to the Commission in accordance with this section;. . . (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j–1 (m) of this title, section 1513 (e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission" (emphasis added).
3. 17 CFR § 240.21F-2(b)(1), states that "[f]or purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if" you have information about "a possible securities law violation" and. . . [y]ou provide that information in a manner described in [the anti-retaliation provision] of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A))."
4. *Somers*, 2017 WL 908245, at *1, *3 (citing *Berman v NEO@Ogilvy LLC*, 801 F.3d 145, 151, 155 (2d Cir. 2015)).
5. *Asadi v. GE Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013). *See also Verble v. Morgan Stanley Smith Barney, LLC*, 148 F.Supp.3d 644, 656 (6th Cir. 2015) (stating that "the Court w[ould] not give deference to the SEC regulation" because the DFA is unambiguous in its definition of "whistleblowers" and not entitled to *Chevron* deference). The Sixth Circuit, without definitively stating its agreement with the Fifth Circuit, held that the plaintiff was required to have provided information to the SEC to qualify as a whistleblower.
6. *Somers*, 2017 WL 908245, at *2.
7. *Id*. at *4.
8. *See* 15 U.S.C. § 7245 ("[T]he Commission shall issue rules . . . including a rule—(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence . . . requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.")
9. *Alert: White Collar Defense & Investigations, available at* (http://www.weil.com/~/media/white_collar_alert_sept_2014.pdf).

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