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Ninth Circuit — Dodd-Frank Protects Internal Whistleblowers

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On March 8, 2017, a split three-judge panel of the ***Ninth Circuit*** Court of Appeals affirmed a Northern District of California decision declining to dismiss a *Dodd-Frank* whistleblower retaliation claim because the plaintiff did not report his concerns to the ***SEC***. ***Somers v. Digital Realty Trust*****,** 15-17352 (9th Cir. March 8, 2017). The Ninth Circuit thus aligned itself with the Second Circuit on this issue while the Fifth Circuit came to the opposite conclusion.

Factual Background

Paul Somers was employed by defendant Digital Realty Trust, Inc. as a Vice President from 2010 to 2014. According to Plaintiff, he made several reports to Defendant's senior management about a Senior Vice President who he believed had committed a number of acts of "serious misconduct," including "hiding seven million dollars in cost overruns on a development in Hong Kong." Plaintiff's employment was subsequently terminated. He did not report his concerns to the SEC before Defendant terminated his employment.

Plaintiff filed a complaint in the Northern District of California asserting violations of various state and federal laws, including a whistleblower retaliation claim under Dodd-Frank. Defendant moved to dismiss Plaintiff's Dodd-Frank claim on the ground that, because Somers did not report his concerns to the SEC, he was not a "whistleblower" entitled to protection under the statute.

On May 5, 2015, the District Court denied Defendant's motion to dismiss Plaintiff's Dodd-Frank claim, finding that there was "sufficient ambiguity" over whether Dodd-Frank protects whistleblowers who report alleged misconduct internally only (and not to the SEC). *Somers v. Dig. Realty Tr. Inc.*, 119 F. Supp. 3d 1088 (N.D. Cal. 2015). As a result of this ambiguity, the District Court allowed Plaintiff's Dodd-Frank claim to proceed and certified the question of whether Dodd-Frank protects individuals who only make internal whistleblower reports for interlocutory appeal to the Ninth Circuit.

Existing Circuit Split

In *Asadi v. G.E. Energy, LLC*, 720 F.3d 620 (5th Cir. 2013), the Fifth Circuit became the first circuit court to address the apparent ambiguity in the definition of "whistleblower." The Fifth Circuit held that "[u]nder Dodd-Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC."

In 2015, however, the Second Circuit disagreed with *Asadi*'s reasoning, and deferred to an SEC regulation interpreting Dodd-Frank's anti-retaliation provision to extend protections to all those who make disclosures of suspected violations, whether the disclosures are made internally or to the SEC. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015). The Third Circuit is expected to rule on the issue later this year.

Ninth Circuit Ruling

In a 2-1 decision, the Ninth Circuit affirmed the District Court's decision and held that Dodd-Frank's "anti-retaliation provision unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally." In reaching this holding, the Ninth Circuit Majority concluded that, in using the term "whistleblower," Congress did not intend to limit protections to those who disclose information to the SEC. To hold otherwise, the Ninth Circuit Majority explained, would "make little practical sense" and would be inconsistent with Congress's overall purpose to protect those who report violations internally as well as those who report to the government. Consistent with this view, the Ninth Circuit Majority stressed throughout its opinion that Plaintiff's case "must be seen against the background of twenty first century statutes to curb securities abuses," and, in particular, the 2008 financial crisis that precipitated Dodd-Frank's passage.

The Ninth Circuit Majority also explained that, even if the use of the word "whistleblower" in Dodd-Frank's anti-retaliation provision created uncertainty because of the statute's other, narrow definition of the term, the SEC has resolved any such uncertainty through its Exchange Act Rule 21F-2. That rule makes clear the agency's view that internal whistleblower disclosures are protected. As such, it is both "entitled to [*Chevron*] deference" and consistent with "congressional intent that [Dodd-Frank] protect employees whether they blow the whistle internally . . . or they report directly to the SEC."

Notably, the Ninth Circuit Majority also tackled head on one of the *Asadi* court's primary reasons for rejecting the SEC's expansive interpretation, *i.e.*, that it "renders the SOX anti-retaliation provision, for practical purposes, moot." As the Ninth Circuit Majority reasoned, "[Dodd-Frank's] enforcement scheme is not more protective in all situations and would not swallow [SOX] because [SOX] offers a different process from [Dodd-Frank]." Instead, SOX may still be "more attractive to the whistleblowing employee" because it: (1) provides for adjudication through administrative review, with the Department of Labor taking responsibility for asserting the claim on the whistleblower's behalf; and (2) allows employees to recover special damages. Because of these "alternative enforcement mechanisms," the Ninth Circuit Majority concluded, Dodd-Frank's protection of internal disclosures will not render SOX's anti-retaliation provision "superfluous."

Judge Owens wrote a single paragraph dissent succinctly stating his agreement with *Asadi* and the dissent in *Berman*.

Implications

Numerous federal district courts and three circuit courts of appeal have now weighed in on this issue, reaching diametrically opposing results. When the employer (NeoOgilvy) lost in the Second Circuit, it declined to petition the Supreme Court for a resolution. It remains to be seen whether Digital Realty Trust (the losing party in the Ninth Circuit) will do so now.

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