

Wisconsin Federal Court Follows 5th Circuit Asadi Decision, Dismisses Dodd-Frank Whistleblower Claim



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The U.S. District Court for the Eastern District of Wisconsin in [Verfuert v. Orion Energy Systems, Inc.](#), No. 14-cv-352 (E.D. Wis. Nov. 4, 2014) recently ruled that the Dodd-Frank whistleblower protection provision does not protect employees who only report alleged violations of the securities laws internally. In dismissing a former CEO's whistleblower retaliation claim, the court followed the Fifth Circuit's decision in *Asadi v. F.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013) and held that the text of the statute requires that a "whistleblower" report an alleged violation to the SEC to be covered by Dodd-Frank's whistleblower protection provision.



Background

In his complaint, Plaintiff Neal Verfeurth (Plaintiff), the former CEO of Orion Energy Systems, Inc. (Company), alleged that he sent an e-mail to the Company's board of directors about potential securities law violations. That same day, the board allegedly terminated Plaintiff's employment for cause due to misconduct that occurred prior to the email. After the termination, Plaintiff allegedly sent a copy of his e-mail to an attorney at the SEC, and filed a lawsuit against the Company asserting a Dodd-Frank whistleblower retaliation claim.

Ruling

The Company moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) on the grounds that he did not complain to the SEC and thus was not a "whistleblower" under Dodd Frank. Plaintiff argued that because there is a "conflict between the Act's definition of whistleblower and the kinds of activity the statute protects," the statute is "ambiguous." However, the court found that there is "no ambiguity in the statute at all" because the definition of "whistleblower" is "perfectly clear." The court stressed that "reporting to the SEC is the precondition that triggers the anti-retaliation protections of the statute" and that "the fact that the retaliation protections are broader than the definition of whistleblower does not create any ambiguity." *Id.* at 6. Notably, the court declined to follow other district court decisions holding that the statute does not require whistleblowers to make complaints to the SEC, explaining that those decisions were flawed because they are based upon public policy concerns, and did not strictly interpret the statute.

Implications

This decision is in line with the only circuit court decision to address the question of whether an individual must report directly to the SEC to receive whistleblower protection under Dodd-Frank. This deepens the divide in district court decisions, a conflict we are continuing to monitor closely. To illustrate, as we [reported](#), a California district court recently declined to dismiss a whistleblower claim even though the plaintiff failed to report the alleged misconduct to the SEC. It may be just a matter of time before this issue is considered by additional circuit courts. Stay tuned ...

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