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Only 'Whistleblowers' Need Apply: District Court Concludes Simply Engaging in Protected Activity is Insufficient to Invoke Dodd-Frank Protection

Earlier this month, a district court ruled that an employee simply engaging in activity protected by the Dodd-Frank Act's anti-retaliation provision is insufficient to gain whistleblower protection. Rather, the employee must first qualify as a whistleblower within the Act's definition. The Court's decision in *Verfuerth v. Orion Energy Systems, Inc.*, No. 14-C-352 (Nov. 4, 2014), thus adds one more voice to the debate over the scope of Dodd-Frank's whistleblower protections, possibly increasing the likelihood of eventual Supreme Court review.

In an additional nugget for the defense bar, Chief Judge William Griesbach provided a useful reminder of Rule 8(a)'s utility in paring down lengthy, rambling complaints. Concluding that "[s]ome 73 of the complaint's [96] pages fall into the category of background information," Chief Judge Griesbach struck "as immaterial" more than 450 separate paragraphs of superfluous pleading.

Orion Energy CEO Claimed Whistleblower Protection Based on Email to Company Board

Neal Verfuerth founded Orion Energy in 1996 and assumed the role of CEO in 2005, shortly before the company went public in 2007. After a falling out with the board, Verfuerth resigned in October 2012 (although he retained an emeritus position), and in November 2012 he sent an email to several board members purportedly asserting complaints under the company's internal whistleblower policies as well as the Sarbanes-Oxley Act (SOX). The board terminated his employment the same day, but not until after his termination did Verfuerth bring his complaints to the attention of the Securities and Exchange Commission (SEC).

Verfuerth then brought suit under the whistleblower protection provisions of Dodd-Frank. Orion Energy moved to dismiss Verfuerth's Dodd-Frank claim, contending that he did not qualify as a whistleblower under the statute because he had not complained to the SEC prior to his termination.

Court Holds Dodd-Frank Protects Only Whistleblowers – Merely Engaging in Protected Activity Is Insufficient

Chief Judge Griesbach began with the Dodd-Frank Act's definition of a whistleblower – "any individual who provides … information relating to a violation of the securities laws to the Commission [SEC], in any manner established by rule or regulation by the Commission." 15 U.S.C. § 78u-6(a)(6). Verfuerth conceded that, because he had not complained to the SEC prior to his termination, he did not qualify as a whistleblower under this definition. "Even so," he argued that Dodd-Frank "is ambiguous and that the SEC's own guidance would deem him a whistleblower entitled to the anti-retaliation provisions of the Act." Specifically, Verfuerth pointed to the SEC's comments to its regulations implementing Dodd-Frank, "where the SEC explained 'the third category [of protected activity under Dodd-Frank, i.e., making disclosures required or protected by SOX or other securities law, even where such disclosures need not be made to the SEC,] includes individuals who report to persons or governmental authorities other than the Commission."

The Court in *Verfuerth* rejected plaintiff's argument – adopted by several district courts across the nation, but eschewed by the Fifth Circuit Court of Appeals – that this regulatory guidance results in statutory ambiguity. Rather, the Court concluded that "even if the statute produces a somewhat confusing public policy outcome" – a premise the Court expressly disavowed – "that does not mean there is any ambiguity in the statute itself." Chief Judge Griesbach explained:

> The statute is simple enough to understand. Reporting to the SEC is the precondition that triggers the anti-retaliation provisions of the statute. Only when one has reported to the SEC is that employee protected under all three prongs of the anti-retaliation provision. … [O]nce one qualifies as a whistleblower (by reporting to the SEC), then he is entitled to protection not only for the act of reporting to the SEC but for engaging in other protected activity as well. … Creating a class of people (whistleblowers) and then protecting them from various discriminatory acts in addition to the act that qualified them for that class does not produce ambiguity or conflict. … The SEC's interpretation renders an entire section of the statute superfluous, namely, the definition of whistleblower itself. Congress could not have defined whistleblower more clearly, and yet the SEC apparently believes that entire definition should be cast aside on the flimsy grounds that Congress really didn't mean it.

Rejecting plaintiff's position as one "flummoxed by the simple fact that the protections in the statute extend to activity beyond the activity that qualifies an employee for protection," the Court dismissed Verfuerth's Dodd-Frank whistleblower claim. The Court let stand, however, Verfuerth's separate whistleblower claim under SOX. And the Court did not address the possibility its decision might incentivize would-be Dodd-Frank whistleblowers

Court Reminds of – and Enforces – Rule 8(a)'s "Short and Plain Statement of the Claim" Mandate

Following the Supreme Court's landmark decisions in *Twombly* and *Iqbal*, defendants (and their attorneys) all too frequently challenge complaints only on one front – as being too "bare bones." Chief Judge Griesbach's decision in *Verfuerth* provides a helpful reminder that overly "flabby" complaints are equally impermissible.

Verfuerth's complaint weighed in at 96 pages, "some 73 of [which] fall into the category of background information." In comparison, noted the Court, the "typical complaint filed in federal court is somewhere

between four and twelve pages." Moreover, Chief Judge Griesbach observed that the page limit placed on dispositive motion briefs – 30 pages under applicable Local Rules – was a "helpful benchmark." As the Court explained, "it should go without saying that a complaint, which is really just a formal notification of what the claims are, should not be more than three times the length of a summary judgment brief [where parties argue the merits of their claims]."

The Court expressly rejected plaintiff's contention that an overly lengthy complaint does not prejudice a defendant. "Requiring the Defendant to pay his attorneys to file considered responses to [in *Verfuerth*] 73 pages of background facts definitely falls into the category of prejudice." Rather, the Court struck "as immaterial" more than 450 separate paragraphs of plaintiff's complaint.

Key Takeaways

The Court's decision in *Verfuerth* provides helpful authority to employer defendants – both those facing whistleblower claims under Dodd-Frank as well as those facing long-winded complaints of any nature. For those facing retaliation claims under Dodd-Frank, confirm whether plaintiff meets the statutory definition of a whistleblower, remembering that internal complaints, without transmittal to the SEC, may not suffice to invoke the Act's protections. And for defendants facing any federal complaint, remember that the pendulum swings not only toward *Twombly/Iqbal*, but the other way as well. Rule 8(a) can help trim sprawling complaints back down to size.

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