BACK TO BASICS: HOW WHISTLEBLOWER PROTECTION IS LIMITED TO WHISTLEBLOWERS IN *ASADI V. G.E. ENERGY*

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I. INTRODUCTION

How a whistleblower is perceived depends upon one’s perspective. An employer might see a whistleblower as a snitch, focusing on the act itself, whereas an employee might view a whistleblower as someone with morals and courage, focusing on the difficult decision the whistleblower made. Despite this dichotomy of opinion, the utility of whistleblowing is unquestionable.1

Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)2 to, in part, protect whistleblowers from employer retaliation.3 While Dodd-Frank’s purpose is clear, a problem has emerged in its application. In five federal district courts, employees have successfully expanded the scope of whistleblower protection to individuals

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3. See *id. at* 1376 (describing the purpose of Dodd-Frank); *see also* Lucienne M. Hartmann, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of “Greedy,”* the Eighth Dwarf, 62 MERCER L. REV. 1279, 1287 (2010) (“The Dodd-Frank Act includes two primary whistleblower provisions . . . 2) retaliation protection against the employer.”).
who do not meet the statutory definition of whistleblower. In Asadi v. G.E. Energy (USA), L.L.C., the Fifth Circuit Court of Appeals provided a solution to this problem: Limit whistleblower protections to those who qualify as a whistleblower under the literal statutory definition.

This Note demonstrates that Asadi correctly limited whistleblower protection to those who meet the statutory requirements of achieving whistleblower status. Part II of this Note provides a background of Dodd-Frank, as well as a discussion of cases leading up to Asadi. Part III focuses on the factual history of Asadi and the court’s reasoning in reaching its decision. Part IV dissects the court’s decision, explaining how it correctly interpreted Dodd-Frank to limit whistleblower protection only to statutory whistleblowers. Finally, Part V emphasizes the implication of this decision on whistleblower protection and stresses the necessity of this decision to future courts in their analysis of this issue.

II. THE EMERGENCE OF DODD-FRANK AND THE RECENT TREND OF COURTS INTERPRETING ITS SCOPE

In 2010, Congress enacted Dodd-Frank in response to the 2008 financial crisis, as well as in an attempt to combat a myriad of problems in the financial regulatory system. The statutory provision entitled “Securities Whistleblower Incentives and Protection,” governs who qualifies as a whistleblower and provides retaliatory protections for such whistleblowers. Under this provision, an employee who suffers employer retaliation for whistleblowing has a cause of action against that employer if the employee

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6. Id. at 630.

7. Id. at 622; see also Charles W. Murdock, The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?, 64 SMU L. Rev. 1243, 1249 (2011) (“Dodd-Frank was a response to the worst financial crisis since the Great Depression and is aimed at preventing another such financial meltdown . . . .”).

8. See Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. at 1236 (noting that Dodd-Frank aims to “promote the financial stability . . . by improving accountability and transparency . . . to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services . . . .”); Desai, supra note 1, at 429 (explaining that Congress passed Dodd-Frank to “encourage whistleblower participation in the promotion of corporate governance”).

meets two requirements. First, the employee must meet the statutory definition of whistleblower. Subsection (a) defines a whistleblower as “any individual who provides . . . information relating to a violation of the securities laws to the Commission . . . .” Second, the employee’s whistleblowing act must meet one of the three protected activities under subsection (h).

One year after the enactment of Dodd-Frank, the first court to expand whistleblower protection emerged in Egan v. TradingScreen, Inc. In Egan, the court distinguished the statutory definition of whistleblower under subsection (a), which requires an individual to provide information to the SEC, with the third category of protected activity under subsection (h), which does not require disclosure directly to the SEC. The district court reasoned that “a literal reading of the definition of the term ‘whistleblower’ . . . requiring reporting to the SEC, would effectively invalidate [the third category of] protection of whistleblower disclosures that do not require reporting to the SEC.” Under this analysis, the court held that the third category of protected activity is a “narrow exception” to the definition of whistleblower.

After Egan, more courts were presented with this same issue and continued to follow in Egan’s footsteps. In Nollner v. Southern Baptist

10.  Id. § 78u–6(h)(1)(B)(i) (“An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action . . . .”); see also Asadi, 720 F.3d at 623 (“[Section] 78u–6 . . . create[s] a private cause of action for certain individuals against employers who retaliate against them for taking specified protected actions.”).

11.  See id. § 78u–6(a)(6).


13.  (A) 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—


15.  See id. at *4.

16.  Id. (citation omitted).

17.  Id. at *5. The court also concluded that anti-retaliation protection under Dodd-Frank requires an individual “to show that he either provided information to the SEC, or that his disclosures fell under the four categories listed in 15 U.S.C. § 78u–6(h)(1)(A)(iii).” Id. at *7 (emphasis added).
the court did just that, holding “the plain terms of anti-retaliation category (iii), which do not require reporting to the SEC, appear to conflict with the [Dodd-Frank] definition of whistleblower.” Then, the district court in Kramer v. Trans-Lux Corp. similarly decided that the statutory definition of “whistleblower” is “broader with respect to the anti-retaliation section than it is for the rest of the statute.” The Kramer court also examined SEC Regulation 21F, which expansively construes the Dodd-Frank whistleblower-protection provision beyond the statutory definition. It found that the SEC regulation is “a permissible construction of the Dodd-Frank Act” because the Egan court “resolved the discrepancies between [subsection (h)] and [subsection (a)] in an identical fashion.”

Along with Egan, Nollner, and Kramer, two other federal district courts have erroneously expanded whistleblower protection to individuals who fail to meet the statutory definition of whistleblower.

The issue presented to the Asadi court was whether an employee who did not meet the statutory definition of whistleblower in subsection (a) could nonetheless claim whistleblower protection because the employee engaged in actions that fall within the third category of subsection (h)’s protected activities. While five other district courts extended whistleblower protection under this suggestion, the Asadi court correctly limited whistleblower protection only to individuals who meet the statutory definition of whistleblower.

III. ASADI: A CATALYST IN DODD-FRANK’S INTERPRETATION

In Asadi, Khaled Asadi learned his employer, G.E. Energy (USA), L.L.C., violated the Foreign Corrupt Practices Act by using improper reportings and actions that qualified under category (iii) of subsection (h). The court found that Asadi did not meet the statutory definition of whistleblower in subsection (a), but his actions were protected because they were within the scope of subsection (h). This decision was significant because it clarified the scope of whistleblower protection under the Dodd-Frank Act.

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19. Id. at 994 n.9 (internal quotation marks omitted). The court also indicated the criteria a plaintiff is required to meet when seeking protection under § 78u–6(b)(1)(A)(ii), which includes a plaintiff reporting a violation of securities laws “to the SEC or to another entity (perhaps even internally) as appropriate.” Id. at 995 (emphasis added).
21. Id. at *4.
26. Asadi, 720 F.3d at 624.
negotiation tactics to gain a “lucrative” joint venture agreement.\textsuperscript{28} Asadi internally reported this information to his supervisor and subsequently received a “surprisingly negative” performance review, along with pressure to step down from his position.\textsuperscript{29} One year after Asadi’s internal report, GE Energy fired him.\textsuperscript{30} Asadi then brought suit against GE Energy for violating Dodd-Frank,\textsuperscript{31} claiming that even though he did not qualify as a statutory whistleblower, the whistleblower-protection provision should be construed to protect individuals who take actions that fall within the third category of protected activity.\textsuperscript{32} Asadi based his suggested construction on both the “perceived conflict” between the statutory definition of whistleblower and the third category of protected activity\textsuperscript{33} as well as Regulation 21F that construes the meaning of whistleblower beyond the statutory definition.\textsuperscript{34} The district court dismissed Asadi’s complaint, yet failed to decide whether Asadi qualified as a whistleblower.\textsuperscript{35} On appeal, the Fifth Circuit affirmed the district court’s decision, expressly concluding that Asadi was not a whistleblower under Dodd-Frank.\textsuperscript{36}

Even though Asadi’s argument has precedent and the SEC regulation supports his suggested construction, the Fifth Circuit correctly limited whistleblower protection only to individuals meeting the statutory whistleblower definition. The court first explained that the “perceived conflict” between the statutory definition and the protected activities “rests on a misreading of the operative provisions.”\textsuperscript{37} There is only one category of whistleblowers—individuals meeting the statutory whistleblower definition; the three categories of protected activities are not additional definitions of whistleblower.\textsuperscript{38} The court then rejected Asadi’s argument that the court should defer to the SEC interpretive regulation, explaining that it would be improper because the statutory language is clear.\textsuperscript{39} In doing so, the court reasoned that Congress unambiguously defined whistleblower in subsection (a) as individuals who report information to the SEC.\textsuperscript{40} Because the SEC regulation is inconsistent with statutorily defined term,

\begin{itemize}
\item \textsuperscript{28} \textit{Asadi}, 720 F.3d at 621.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id} at 624.
\item \textit{Id}.
\item \textit{Id} at 629.
\item \textit{Id} at 621.
\item \textit{Id}.
\item \textit{Id} at 625.
\item \textit{Id}.
\item \textit{Id} at 629–30.
\item \textit{Id} at 623.
\end{itemize}
“whistleblower,” the court held that the SEC’s “expansive interpretation” must be rejected. Therefore, whistleblower status is statutorily defined under subsection (a), not by the protected activities or the SEC regulation.

IV. HOW ASADI PROPERLY LIMITED WHISTLEBLOWER PROTECTION TO WHISTLEBLOWERS

The Asadi court was correct in its ruling because not only did it use the plain language and unambiguous structure of the Securities Whistleblower Incentives and Protection Provision to interpret the statute but also its holding is supported by the clear intent of Congress in drafting the statute. Asadi conceded that he was not a whistleblower as defined in the statute. He also did not contend that the language used to define the third protected activity was, by itself, ambiguous. However, Asadi maintained that both the definition of whistleblower and the SEC regulation defining whistleblower conflict with the third protected activity. Despite Asadi’s contentions, his proposed construction violates the plain language, structure, and legislative intent of the whistleblower statute.

A. The Perceived Conflict

Asadi’s “perceived conflict” argument failed because, by his own admission, the whistleblower protection statute is unambiguous, so the statute must be applied according to its terms. Under cannon of statutory

41. Id. at 630; see also 17 C.F.R. §§ 240.21F–2(b)(1)(i)–(ii) (2011); 17 C.F.R. §§ 240.21F–9(a)(1)–(2).
42. Asadi, 720 F.3d at 630.
43. Id. at 627, 630.
44. Id. at 624.
45. Id. at 626.
46. See id. at 624, 629.
47. Id. at 626. Along with Asadi’s admission, the Fifth Circuit also concluded the whistleblower protection statute is unambiguous. See id. at 623, 625. Three of the five district courts that expanded whistleblower protection failed to decide whether the statute was ambiguous or not. See Genberg v. Porter, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 993–94 & n.9 (M.D. Tenn. 2012); Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *4–5 (S.D.N.Y. May 4, 2011). As for the remaining two district courts, the Kramer court only stated that it “[d]id not believe it is unambiguously clear that the Dodd-Frank Act’s retaliatory provision only applies to those individuals who have provided information . . . to the Commission.” Kramer v. Trans–Lux Corp., No. 3:11CV1424 (SRU), 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012). However, when the court concluded that the definition of whistleblower was broader than the rest of the statute, it cited Nollner and Egan as support—two courts that did not decide on the ambiguity, or lack thereof, of the statute. Id. The Murray court is the only court that determined the whistleblower protection statute was ambiguous. See Murray v. UBS Sec., LLC, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *4–5 (S.D.N.Y. May 21, 2013).
48. See Carcieri v. Salazar, 555 U.S. 379, 387 (2009) (“[U]nder settled principles of statutory construction . . . we must first determine whether the statutory text is plain and
interpretation, a court must “presume that [the] legislature says in a statute what it means and means in a statute what it says there.” 49 Therefore, a court should confine its interpretation to the literal text of a statute to interpret it. 50

By looking at the plain, unambiguous language of the statute, there is no conflict. Subsection (h)’s introductory language expressly states that a cause of action resulting from the three protected activities is limited only to those who qualify as whistleblowers. 51 In drafting the statute, Congress intentionally used the narrower term “whistleblower” instead of the broader terms “individual” or “employee.” 52 This important distinction sheds light on the congressional intent to limit whistleblower protections only to those who meet the statutory definition of whistleblower. 53 Thus, the introductory clause in subsection (h) sets the outer limits of the listed protections to whistleblowers, as defined in subsection (a), denying protection to non-subsection (a) whistleblowers. 54 The only way a perceived conflict could exist is if “we read the three categories of protected activity as additional definitions of three types of whistleblowers.” 55

B. The SEC Regulation

The Fifth Circuit also correctly dismissed Asadi’s argument that it “should defer to the SEC’s recent regulation construing the Dodd-Frank whistleblower-protection provision.” 56 The SEC issued Regulation 21-F, redefining whistleblower to allow an individual to qualify as a whistleblower without meeting the statutory requirement of reporting any unambiguous. If it is, we must apply the statute according to its terms.” (citation omitted)); see also BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) (“Our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.”).

50. See Asadi, 720 F.3d at 626 n.9 (noting that the court did not have to rely on the legislative history of Dodd-Frank for their analysis); see also Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (“[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material.”); United States v. Gonzales, 520 U.S. 1, 6 (1997) (“Given the straightforward statutory command, there is no reason to resort to legislative history. Indeed, far from clarifying the statute, the legislative history only muddies the waters.”).
52. Asadi, 720 F.3d at 626–27.
53. See Texas v. United States, 497 F.3d 491, 501 (5th Cir. 2007) (“[I]f the statute is clear and unambiguous, that is the end of the matter; for [this] court . . . must give effect to the unambiguously expressed intent of Congress.” (quoting K Mart, Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988))).
54. See Asadi, 720 F.3d at 627; see also 15 U.S.C. §§ 78u–6(a)(6), (b)(1)(A).
55. Asadi, 720 F.3d at 626.
56. Id. at 629; see also 17 C.F.R. §§ 240.21F–2(b)(1)(i)–(ii) (2011).
information to the SEC.\textsuperscript{57} Even though this seems to conflict with the statutory definition of whistleblower under subsection (a), Asadi’s suggestion fails for three additional reasons. First, Congress unambiguously defined whistleblower in subsection (a), clearly requiring individuals who wish to invoke protection under subsection (h) to report information to the SEC;\textsuperscript{58} thus, Congress has directly addressed the precise issue and should not defer to an agency’s interpretation.\textsuperscript{59} Second, Asadi’s suggested construction eliminates the words “to the Commission” out of the definition of whistleblower for whistleblower protection under subsection (h), “violat[ing] the surplusage canon[] that every word is to be given effect.”\textsuperscript{60} Finally, two independent SEC regulations include inconsistent definitions of “whistleblower,”\textsuperscript{61} indicating that the SEC’s interpretation does not “reasonably effectuate[] Congress’s intent.”\textsuperscript{62} Accordingly, the outer limits of the term “whistleblower” is defined by only one provision, subsection (a), and is not expanded by the SEC regulation.

V. FUTURE IMPLICATIONS AND CONCLUSION

The Asadi court took a stand in limiting whistleblower protection and ending the trend of courts expanding whistleblower protection to non-whistleblowers. Currently, there are mixed reviews of Dodd-Frank’s impact on the workplace. Critics of Dodd-Frank believe the statute discourages internal compliance by employees.\textsuperscript{63} Proponents, on the other hand, argue

\begin{itemize}
\item \textsuperscript{57} Asadi, 720 F.3d at 629.
\item \textsuperscript{58} See 15 U.S.C. § 78u–6(a)(6) (“The term ‘whistleblower’ means any individual who provides . . . information relating to a violation of the securities laws to the Commission . . . .”).
\item \textsuperscript{59} Asadi, 720 F.3d at 630; see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (noting that if the intent of Congress is clear, then “Congress has directly spoken to the precise question at issue . . . . [T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). The Chevron court also noted that “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” Id. at 843–44. Because there is no explicitly left gap in the whistleblower statute, this delegated authority is inapplicable. See 15 U.S.C. § 78u–6.
\item \textsuperscript{60} Asadi, 720 F.3d at 628; see also Duncan v. Walker, 533 U.S. 167, 174 (2001) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (quoting Market Co. v. Hoffman, 101 U.S. 112, 115–16 (1879))).
\item \textsuperscript{61} Compare 17 C.F.R. §§ 240.21F–2(b)(1)(i)–(ii) (redefining the definition of whistleblower in 15 U.S.C. § 78u–6(a)(6) by allowing individuals to qualify as a whistleblower without reporting information to the SEC), with 17 C.F.R. §§ 240.21F–9(a)(1)–(2) (requiring individuals who wish to be considered a whistleblower to submit information about possible securities law violation to the SEC).
\item \textsuperscript{62} Asadi, 720 F.3d at 630 (alternations in original) (quoting Texas v. United States, 497 F.3d 491, 506 (5th Cir. 2007)).
\end{itemize}
that Dodd-Frank promotes legal compliance by employers and eliminates the tough position of employees when deciding whether to report misconduct to the SEC or through internal compliance in the first place. Even with these split opinions, if the Supreme Court reviews the Fifth Circuit decision, it would undoubtedly affirm it, given not only the court’s sound reasoning but also the implementation of a bright-line test. The Asadi decision creates a simple test for courts to use in their determination and establishes a uniform standard regarding whistleblower protection for other courts to apply.

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65. Instead of having the third category of protected activity be an exception to the definition of whistleblower, the court now created a bright-line test where only those who qualify under the definition of whistleblower can claim the whistleblower protections.