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Court Rejects SEC's 'Expansive' Whistleblower Definition

Va. federal judge rules against payroll manager who claimed protections under Dodd-Frank.

C. Ryan Barber, The National Law Journal

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Three years ago in the offices of a Virginia-based government contractor, Janet Puffenbarger approached her bosses about an \$850 payout that a coworker received instead of vacation time.

As director of payroll at Engility Corp., Puffenbarger claims she was worried the payout had not been approved through the proper channels—and that any further alleged misappropriation and override of internal controls could affect the company's financial accounting.

The company retaliated against Puffenbarger after she raised those concerns, according to the [complaint she filed](#) last year in Alexandria, Virginia, federal district court. Engility, Puffenbarger claimed, minimized her role, leaving her no choice but to find a new job and resign in October 2013.

A Virginia federal trial judge on New Year's Eve knocked the wind out of her retaliation claim and denied her any whistleblower protection under the Dodd-Frank financial reform law.

“[N]o reasonable juror could conclude that a reasonable person” in Puffenbarger's position would have considered the payout a violation of any fraud-related law, U.S. District Judge T.S. Ellis III [wrote in dismissing](#) claims under the Sarbanes-Oxley Act and Dodd-Frank Act. At most, Ellis wrote, the payout was only a violation of company policy.

Because Puffenbarger raised a red flag internally rather than through the U.S. Securities and Exchange Commission, she was not covered by the whistleblower protections provided under the Dodd-Frank Act, Ellis ruled. Ellis' decision went against the commission's interpretation of the Dodd-Frank Act's requirements for whistleblower protection.

And it weighed in on a question that has divided a pair of federal appeals courts: Does an employee need to directly contact the SEC to receive whistleblower status under Dodd-Frank?

Ellis sided with the U.S. Court of Appeals for the Fifth Circuit, [which in 2013](#) strictly interpreted the Dodd-Frank Act's definition of a whistleblower as someone who brings information “to the commission.”

The U.S. Court of Appeals for the Second Circuit [ruled in September](#) that the meaning of “whistleblower” is ambiguous enough to defer to the commission’s interpretation. For the purposes of protection against retaliation, the commission [came out with a more expansive definition](#) in August that affords whistleblower status to those who make internal reports of suspected securities violations.

Ellis wrote that the commission’s interpretation runs “contrary to the plain language” of the law. A spokeswoman for the SEC declined to comment Friday.

The U.S. Court of Appeals for the Fourth Circuit has yet to consider the issue, Ellis noted in his ruling.

Puffenbarger’s attorney, Stephen Lofaso of Lofaso PLLC, told The National Law Journal that he expects to know by Monday whether his client wants to appeal Ellis’ decision.

“It’s still open with my client right now. She has not given me a definitive answer,” Lofaso said Friday.

“The statute is actually very clear and leaves it to the SEC to decide what is reporting to the SEC and what is not reporting to the SEC,” he said.

Engility’s attorneys, Zachary Stinson and Michael Murphy of Ogletree, Deakins, Nash, Smoak & Stewart, did not respond to an interview request.

Butzel Long partner Max Maccoby, who recently asked a federal appeals court to force the commission to make a decision on a whistleblower’s award application, said the split between the Second and Fifth Circuits shows that Congress should clarify the Dodd-Frank Act.

“There’s no reason why internally-reporting whistleblowers are afforded fewer protections and lesser relief than those whistleblower who report to the SEC,” he said. “It’s much more efficient for companies to fix the problem internally before things get out of hand.”

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