No. AMC3-SUP 2016-37-02

FOR THE APPELLATE MOOT COURT COLLEGIATE CHALLENGE

UNION ALLIED CORPORATION,

Petitioner,

v.

KAREN PAGE,

Respondent.

On Writ of Certiorari to

The Supreme Court of The United States

BRIEF FOR THE PETITIONER

Team #271

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QUESTION PRESENTED

Whether an individual who reports securities violations internally, but not to the SEC, is entitled to the anti-retaliation whistleblower protections provided by the Dodd–Frank Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

OTHER AUTHORITIES

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CASE No. AMC3-SUP 2014-37-02

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JURISDICTION

We agree that as the final court of appeals, the Supreme Court of the United States has jurisdiction over this case. We further agree to not raise any jurisdictional issues in either our brief or our oral arguments.

STATEMENT OF THE CASE

The Respondent, Karen Page, (hereinafter Page) brought civil action in the United States District Court for the District of Hell's Kitchen pursuant to 15 U.S.C. § 78u-6(h)(1)(a)(iii) alleging that Petitioner, United Allied Corporation, (hereinafter United Allied) violated the Dodd-Frank Act by retaliating against her for whistleblowing. After internally reporting what she believed to be a violation of the Securities Exchange Act of 1934, Page was given a negative performance review and offered a severance package which included a nondisclosure agreement and the release of United Allied from any subsequent claims by Page. R. at 5-7, 9. After declining to sign the severance agreement, Page was released from her position on October 9, 2015. R. at 4. Page filed a complaint alleging retaliation claims against United Allied, which in turn filed a motion to dismiss Page's complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The motion to dismiss was granted on December 1, 2015 by the District Court. R. at 9. Page appealed

to the United States Court of Appeals for the Fourteenth Circuit which overturned the District Court's ruling. This appeal by United Allied was granted writ of certiorari by this honorable Court on October 13, 2016. R. at 22.

STATEMENT OF THE FACTS

In May 2013, Karen Page began working for Union Allied Company, a subsidiary of the investment company Confederated Global Investments. In 2014, Page received an "Outstanding" performance review and an end-of-year bonus from Union Allied. R. at 2, 3. On April 10, 2015, an email intended for Page's supervisor, Michael McClintlock, was instead sent to her. After viewing an attached file indicating that a number of the firm's Chinese clients were involved in transactions with unverified and unrecorded entities, Page notified McClintlock of her concerns regarding the aforementioned client transactions within the same day. McClintlock assured Page that everything was in order. Three months later, on July 17, 2015, Page received a negative performance review, and then on September 17, 2015, McClintlock, along with an attorney representing the firm, met with Page. R. at 5. During this meeting, McClintlock offered Page a severance package, which included a lump sum payment and required Page to sign a nondisclosure agreement stipulating that she release any and all claims against Union Allied. R. at 6, 7. After Page declined to sign the agreement, Union Allied terminated her employment on October 9, 2015.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in reversing the District Court's order granting United Allied's motion to dismiss. First, Page does not qualify as a "whistleblower" under the Dodd-Frank Act and therefore is not entitled to the anti-retaliation protections provided by the act. Further, the definition of a "whistleblower" is clear and unambiguous, precluding the need for Chevron deference. Second, the District Court's interpretation of the Dodd-Frank Act stands in

full accord with the surplusage canon, granting significance to each word of the Dodd-Frank Act. Third, the District Court properly exercised judicial restraint in recognizing the congressional intent behind the narrow definition of "whistleblower" in the Dodd-Frank Act. As such, this honorable court should reverse the decision of the Court of Appeals and reinstate the District Court's order dismissing Page's complaint for failure to state a claim.

ARGUMENT

I. THE LANGUAGE OF THE DODD-FRANK ACT IS UNAMBIGUOUS.

A. Whistleblower Definition and Anti-Retaliation Protections

The fundamental question which determines whether Page is entitled to the anti-retaliation protections of the Dodd-Frank Act (hereinafter the Act), is whether Page meets the statutory definition of a whistleblower as defined therein. Congress clearly and unambiguously defines "whistleblower" in the Act as "any individual who provides, or two or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." 15 USC 78u-6(a)(6). In *Asadi v. G.E. Energy* 720 F.3d 620 (5th Cir., 2013), the court found profound clarity in this definition, saying, "this definition, standing alone, expressly and unambiguously requires that an individual provide information to the SEC [Securities and Exchange Commission] to qualify as a whistleblower… Under Dodd-Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a security law violation to the SEC". *Id*. at 623. As Page failed to provide information to the SEC, there can be no ambiguity as to her failure to meet Congress' statutory definition of a whistleblower.

Page argues that ambiguity arises within the Dodd-Frank Act based on an alleged tension between the statutory definition of a whistleblower and the third subsection of anti-retaliation protections. Based on this "ambiguity," Page asks this court to affirm the ruling of the circuit court, which adopted an overly broad definition of "whistleblower" based on protected behaviors, rather than the clear and specific definition of "whistleblower" contained in the Act. Page asks this court to ignore multiple principles of statutory interpretation, and to use to protections granted to "whistleblowers" to retroactively define what qualifies as a "whistleblower" in the first place. Contrary to Page's argument, the lack of ambiguity in Congress's definition of "whistleblower" was recognized by the district court in *Verfuerth v. Orion Energy Systems, Inc.* 65 F. Supp. 3d 640 (E.D. Wisc., 2014), which stated "[t]here is no ambiguity in the statute at all ...." *Id*. at 644. If an individual qualifies as a whistleblower, then and only then is that individual entitled to the protections offered solely to whistleblowers. Reporting to the SEC is a precursor to qualifying for the protections described in the three anti-retaliation clauses. In *Verfuerth,* the apparent ambiguity in Dodd-Frank is explained as a step/tier system. If one qualifies as a whistleblower under tier one, then one is entitled to the protections listed in tier two, even though the activities protected in tier two may be broader in scope than the activities required for qualification in tier one. With this understanding, it is apparent Congress drew a clear distinction between those behaviors which render an individual a "whistleblower," and those which a "whistleblower," once qualified, is protected in performing. This interpretation follows the principle established in *FDA v. Brown & Williamson Tobacco Corp* and in *Asadi* by reconciling the extra-definitional broadness of subsection (iii) with the statutory definition of "whistleblower," where the court said that, [a]lso, if possible, we interpret provisions of a statute in a manner that renders them compatible, not contradictory." *See FDA v.*

Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed. 2d. 121 (200) ("A court must … interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole,")" *Asadi v. G.E. Energy Systems* 720 F.3d 620; 2013 U.S. App. *Id*. at 622. Finally, even if the statute results in what appears to be an unintuitive practical result, the court rightly noted, "[b]ut even if the statute produces a somewhat confusing public policy outcome, that does not mean there is any ambiguity in the statute itself." *Verfuerth v. Orion Energy Systems, Inc.* 65 F. Supp. 3d 640; 2014 U.S. Dist. *Id*. at 644.

When looking at the meaning of a statute, this court stated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id* at 842-843. Considering the language of Dodd-Frank, Congress spoke directly to the definition of "whistleblower" and then moved through a step/tier system of protections; therefore, consistent with this court's own directive, effect must be given to the "unambiguously expressed intent of Congress." This means "it is the end of the matter" under the directives of *Chevron* and proceeding to step two of *Chevron* is prohibited, and any deference to 17 C.F.R. § 240.21F-2 is unwarranted. The SEC's interpretation and rule is deemed unnecessary, because the deference called for by step two is extraneous as the meaning and intent of 15 U.S.C. § 78u-6(h)(1)(a)(iii) is clear. A clear, concise, non-ambiguous definition has been laid out by Congress, and as Page failed to report to the SEC, she failed to fulfill the qualifications of a "whistleblower"—and therefore is not entitled to the anti-retaliation protections of the Act.

B. The District Court's Interpretation of the Dodd-Frank Act Observes the Surplusage Canon.

In *Duncan v. Walker* 533 U.S. 167 (2001), this Court stated, "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute.' *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 99 L.Ed. 615 (1955)'. . .We are thus 'reluctan[t] to treat statutory terms as surplusage' in any setting. *Babbitt v. Sweet Home Chapter Communities for Great Ore.*, 515 U.S. 687, 698, 115 S. Ct. 2407, 132 L.Ed.2d 597 (1995)." *Id*. at 174. *Asadi v. G.E. Energy* 720 F.3d 620 (5th Cir., 2013), states, "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." *Id*. at 628. Rendering any single word or phrase superfluous is something the Court does not take lightly. The Courts have ruled both ways on this issue with regard to the phrase "to the Commission" in the Act's definition of a whistleblower from section 15 U.S.C. § 78u-6. However, the reading necessitated by the surplusage canon is to read the anti-retaliation provisions of Dodd-Frank through the lens of the previously stated definition of a "whistleblower." This inevitably narrows the funnel for those who can be protected by the act, but it follows the wording of the act and gives each word meaning, in accordance with the surplusage canon.

Page argues that narrowing "whistleblower" to mean someone who reports to the Commission and not someone who reports internally renders section 15 U.S.C. § 78u-6(h)(1)(a)(iii) superfluous. In *Somers v. Digital Realty Trust, Inc.* 850 F.3d 1045 (2017), the Court says, "A strict application of DFA's definition of whistleblower would, in effect, all but read Subdivision (iii) out of the statute." *Id*. at 1050. However, this is inaccurate. 15 U.S.C. § 78u-6(h)(1)(a)(iii) states that whistleblowers are protected "in making disclosures that are

required or protected under the Sarbanes-Oxley Act of 2002." When read naturally, as it follows the Dodd-Frank definition of a whistleblower which defines it as someone who reports to the Commission, this section means that within the confines of the DFA whistleblower definition, someone who reports something protected by Sarbanes-Oxley to the Commission is protected under Dodd-Frank, and Subsection (iii) becomes a catch-all provision for the rare cases where those who report to the SEC are not protected. The principle of whistleblowers being defined and protected through the definition is evident in *Asadi v. G.E. Energy* 720 F.3d 620 (5th Cir., 2013), when the Court states that, "There is only one category of whistleblowers: individuals who provide information relating to the SEC. The three categories listed in 15 U.S.C. § 78u-6(h)(1)(a) represent the protected activity in a whistleblower-protection claim." *Id*. at 625. The concept of the catch-all is evidenced in *Verble v. Morgan Stanley Smith Barney, LLC*, 676 Fed. Appx. 421; 2017 U.S. App. (2017), in which the Court says, "while clauses (i) and (ii) already address situations where a whistleblower is terminated for providing information to the SEC, clause (iii) would protect plaintiff in a situation where he provided information to both the SEC and the FBI, but defendants were only aware of the disclosure to the FBI and terminated plaintiff for that reason." *Id*. at 654. In *Puffenbarger v. Engility Corporation, et al.* 151 F. Supp. 3d 651 (E.D. Vir., 2015), the Court declares that the definition of whistleblower does not render Section (iii) superfluous, but rather gives bounds with which to define a whistleblower, and the activity protected within those bounds. *Id*. at 664, 665.

C. Observance of Congressional Intent and Use of Judicial Restraint Necessitate a Narrow Definition of "Whistleblower."

Page argues that preference should be given to a more favorable wording of the statute based on the stated intent of the Act to provide more protections to whistleblowers and eradicate illegal business practices. "But, the court is not to disregard the unambiguous text of a statute in order to achieve broad statutory aims." *Verble v. Morgan Stanley Smith Barney, LLC,* 676 Fed. Appx. 421 (E.D. Tenn, 2015). *Id*. at 655. This court should exercise proper restraint in this instance and reject the notion that the Judiciary should rewrite, rather than responsibly interpret statutes. Separation of powers dictates that the drafting and passing of legislation, like the statute in question, lies solely within the purview of the legislative branch. Just because a court may be able to conceive of a better way to mold public policy or shape business practices, does not empower the judiciary to enact legislation. Rather, as stated in *Barnhart,* "[w]here the statutory language is clear and unambiguous, this Court need neither accept nor reject a particular "plausible" explanation for why Congress would have written the statute as it did" *Barnhart v. Sigmon Coal Co., Inc.* 534 U.S. 438; 122 S. Ct. 941; 151 L. Ed. 2d 908; 2002 U.S. *Id*. at 460-461. It is not the place of the courts to adopt a more favorable wording for the purpose of greater effect, and it is improper of the respondent to ask this court to do so. To engage in such a violation of the separation of powers as to take on the role of lawmakers, rather than jurists, would be to undermine the very foundation of the Constitution which granted this court its enumerated powers.

When considering congressional intent, one must first examine the specific language. It is clear in the Dodd-Frank Act that Congress intentionally choose a specific definition. As stated in *Egan,* "[t]he absence of similarly broad protections for whistleblowers alleging securities law

violations indicates that Congress intended to encourage whistleblowers reporting such violations to the SEC" *Egan v. Tradingscreen, Inc., No. 10 Civ. 8202, 2011 WL 1672066, (S.D.N.Y. May 4, 2011).* Congress purposefully limited their definition of whistleblowers to those who reported to the SEC and did not extend anti-retaliation protections to those who only reported internally. Had Congress "intended to legislate such a definition, it could have done so explicitly" *Carcieri v. Salazar* 555 U.S. 379; 129 S. Ct. 1058; 172 L. Ed. 2d 791; 2009 U.S. *Id.* at 1066. By the very inclusion of a different definition for whistleblower, it "makes much more sense to assume that Congress was attempting to create something *different* than pre-existing law, and it did so by defining "whistleblower" and then creating certain protections for those who qualify." *Verfuerth v. Orion Energy Systems, Inc.,* 65 F. Supp. 3d 640 (E.D. Wisc., 2014). *Id*. at 646. For this court to ignore the intent of Congress in their purposeful inclusion and exclusion of specific words and phrases, would be to usurp the role of the legislature and undermine the principles of separation of powers found in the Constitution.

CONCLUSION

Based on the foregoing arguments and authorities, United Allied respectfully requests that this honorable court reverse the judgment of the Court of Appeals and affirm the District Court's granting of the motion to dismiss as Page is not entitled to any of the anti-retaliation protections of the Act, as she is not a "whistleblower" under the plain language of the statutory definition.

Respectfully submitted,

Team #271