

Second Circuit's Dodd-Frank Internal Reporting Decision Creates Circuit Split

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On September 10, 2015, the Second Circuit Court of Appeals [held](#) that plaintiff Daniel Berman had stated a claim of unlawful retaliation under the whistleblower-protection provisions of the 2010 [Dodd-Frank Act](#) even though he alleged he was fired for reporting accounting fraud internally rather than to the U.S. Securities and Exchange Commission. As the former finance director at WPP Plc's Neo@Ogilvy LLC division, Berman asserted that he had discovered accounting fraud in the form of improperly recognized revenue. In April 2013, after he reported the suspected accounting fraud to his superiors, BPP terminated him. Six months later, in October 2013, Berman reported the suspected accounting fraud to the SEC. In January 2014 he sued WPP for whistleblower retaliation under the Dodd-Frank Act. The district court found that Berman had not stated a claim of retaliation because he had not reported his concerns to the SEC and thus was not a "whistleblower" entitled to protection under Dodd-Frank. The Second Circuit reversed, noting that restricting the statute's protections to complaints made directly to the SEC would make it virtually impossible for most employees to pursue a Dodd-Frank claim for unlawful retaliation. In so ruling, the court deferred to the SEC's interpretation of the statute as explained in its *amicus curiae* brief. The Second Circuit's holding that the Dodd-Frank Act's whistleblower protections extend to employees who make internal reports—and not just to employees who report suspected violations to the SEC—conflicts with the Fifth Circuit's ruling in the *Asadi v. G.E. Energy (USA), L.L.C.*, which held that only those employees who report suspected violations directly to the SEC are protected under the Act. In July 2015, the Third Circuit agreed with the Fifth Circuit in an unpublished decision in *Safarian v. American DG Energy, Inc.* Federal district courts have issued conflicting opinions on the issue, although the majority have sided with the SEC and reached the same conclusion as the Second Circuit. The circuit split here means that review by the U.S. Supreme Court is likely. The Second Circuit's revival of Mr. Berman's [whistleblower retaliation](#) lawsuit is good news for employees: protection from retaliation permits employees to push companies to stop potential securities law violations directly, without putting their careers on the line.