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Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719 (D. Neb. 2014): Preserving the Right to Tell Your Employers What They Do Not Want to Hear

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Note*

Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719 (D. Neb. 2014): Preserving the Right to Tell Your Employers What They Do Not Want to Hear

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If liberty means anything at all, it means the right to tell people what they do not want to hear.[1]

I. INTRODUCTION

Isabelle, Isaac, and Emma all work as accountants for large financial institutions engaging in private investment management. The end of the fiscal year is quickly approaching. The accountants look over the books of their respective institutions and realize that something does not add up. They run the numbers through again, thinking their math is off, but the results come out the same. Through further investigation, they discover that their companies may have been engaging in practices that could violate securities laws. Emma, Isaac, and Isabelle approach their respective supervisors with the numbers and express their concerns. Emma also reports her concerns to the U.S. Securities and Exchange Commission (SEC). Two days later, all three receive word that their services are no longer necessary and are given a box into which they can pack up their belongings.

The accountants are upset, thinking they had done the right thing by approaching their boss in the hopes of clearing up a misunderstanding. They decide its time to speak to a lawyer and eventually sue their former employers for wrongfully terminating them in retaliation for speaking up. Emma and Isaac are treated as whistle-blowers—employees who report misconduct—and win their cases. They are subsequently reinstated to their prior positions and awarded two times back pay in damages as well as legal costs. Isabelle's lawsuit, on the other hand, is dismissed outright. She spent thousands in legal fees and is still without a job.

1. Joe Muscolino, *10 George Orwell Quotes for Whistleblowers and Doublethinkers Alike*, SIGNATURE (June 23, 2014), http://www.signature-reads.com/2014/06/10-george-orwell-quotes-for-whistleblowers-and-doublethinkers-alike/ [https://perma.unl.edu/XU8Y-PBUF].

So what is the difference between Isaac and Isabelle? Why is Isaac treated similarly to Emma, while Isabelle is not, though all three of them have the same claim—retaliation under the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank)?[2] Isaac brought his claim in the Federal District Court for the District of Nebraska, while Isabelle brought her claim in the Northern District of Texas, where the Fifth Circuit Court of Appeals has appellate jurisdiction. Emma could have brought her claim in either judicial district and would have been protected, as she reported the misconduct externally to the SEC, qualifying her as a whistle-blower under Dodd–Frank. Isaac and Isabelle, on the other hand, reported internally—within the company to a manager or other supervising authority—and the question of whether they are protected from retaliation after reporting is the subject of an ongoing debate.

This Note focuses on the Federal District Court for the District of Nebraska's interpretation of the anti-retaliation provision of Dodd–Frank and how it differs from other federal court interpretations. Part II provides a social and legal background of Dodd–Frank and the anti-retaliation protection of whistle-blowers under past statutes. Part II also analyzes how internal whistle-blowers have faired under Dodd–Frank and the various approaches the courts have taken in interpreting its anti-retaliation provision, including the approach taken by the District of Nebraska in *Bussing v. COR Clearing, LLC*.[3] Part III argues that the *Bussing* court: (a) correctly interpreted the anti-retaliation provision by taking into account the intent and public policy behind Dodd–Frank, correctly making use of *Chevron* deference unnecessary and (b) opened the door for a more consistent approach to the public policy exception to the at-will employment doctrine applied by nearly all states. Finally, in Part IV this Note concludes that the District of Nebraska's approach to anti-retaliation protection of whistle-blowers is the surest way to preserve the integrity of internal whistle-blowing programs within companies, while protecting those employees most in need of protection from retaliation—those who told their employer what their employers do not want to hear.

II. BACKGROUND

A. The Great Recession

In the face of immense pressure by investors to maintain high returns, financial institutions increasingly relaxed some of their lending criteria in order to persuade even more people to become homeowners.[4] As these new homeowners found themselves unable to keep up

2. 15 U.S.C. § 78u-6 (2012).
3. 20 F. Supp. 3d 719 (D. Neb. 2014).
4. GOODWIN ET AL., MACROECONOMICS IN CONTEXT 346 (2d ed. 2014).

with their mortgage payments, they faced foreclosure. After increased foreclosures, the financial institutions who had provided those mortgages found themselves with greater liabilities than they had assets.[5] Large banks began to go bankrupt, and when Lehman Brothers eventually collapsed, worried consumers withdrew their stocks from the market.[6] Thus, the financial crisis began when the collapse erased more than half the total market value of the outstanding shares of companies in the market.[7]

The initial governmental response took the form of equity or asset purchases of failed financial institutions, such as the Bear Stearns investment house, mortgage brokers Fannie Mae and Freddie Mac, Lehman Brothers, and international insurance firm AIG.[8] These financial institutions had long been recognized as "too big to fail" because the companies had grown so large that their failure would result in even greater and more widespread economic harm in the form of lost jobs and reduced asset values.[9] Should the companies ever run into trouble financially, it was believed that the government would have to step in because the economy could not afford their failure. The Troubled Asset Relief Program (TARP) authorized the U.S. Treasury to spend as much as $700 billion in loans, stock purchases, and asset buyouts for insolvent banks, in addition to the earlier loans provided by the Federal Government.[10]

In 2010, President Barack Obama signed the Dodd–Frank Wall Street Reform and Consumer Protection Act, "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. econ-

5. *See generally* Neil Fligstein & Adam Goldstein, *The Roots of the Great Recession*, *in* THE GREAT RECESSION 21 (David B. Grusky et al. eds., 2011) (explaining the proximate cause of the "Great Recession").

6. *Id.*

7. David B. Grusky et al., *The Consequences of the Great Recession*, *in* THE GREAT RECESSION, *supra* note 5, at 4.

8. *Id.* at 4–5. On September 15, 2008, Lehman Brothers, with $639 billion in assets and $619 billion in debt, filed for the largest bankruptcy in history. ROSALIND Z. WIGGINS ET AL., THE LEHMAN BROTHERS BANKRUPTCY A: OVERVIEW 2 (2014). Lehman was the fourth-largest U.S. investment bank at the time of its collapse, employing 25,000 people worldwide. *Id.* Its bankruptcy wiped out $46 billion of its market value, and its stock plummeted 93% in just three days. Richard Lartey, What Caused the Collapse of Lehman Brothers? 16 (July 6, 2012) (unpublished manuscript), http://www.jteall.com/Lehman%20Brothers%2001.pdf [https://perma.unl.edu/PVG3-7782]. Lehman was the largest company to fail during the U.S. subprime mortgage induced financial crisis. *Id.* at 3. The Bear Stearns investment house was rescued via a government-engineered purchase by J.P. Morgan Chase, and mortgage brokers Fannie Mae and Freddie Mac were taken over by the government before the Lehman Brothers fell into bankruptcy. Grusky et al., *supra* note 7, at 5. The international insurance firm AIG was nationalized the day after the Lehman Brothers collapse. *Id.*

9. GOODWIN ET AL., *supra* note 4, at 353.

10. Grusky et al., *supra* note 7, at 5; GOODWIN ET AL., *supra* note 4, at 353.

omy,"[11] stating, "the American people will never again be asked to foot the bill for Wall Street's mistakes."[12] The President's statements reflected the discontent of many with the enactment of TARP, as it was agreed upon that the failure was a result of the banks' recklessness, not poor fortune.[13] Despite agreeing with the decision to provide the large financial industries with a bailout rather than face a potential and complete economic collapse, many banking industry critics pointed out that had the banks not been permitted to grow "too big" in the first place, the problem would not have surfaced at all.[14] They argued that "after banks (or companies in any sector of our economy) [became] aware that they [were] 'too big,' they [had] an incentive to take on greater risks, anticipating that they [would] lose very little regardless of the outcome of their ventures" because the government would assist them in the event of failure.[15] TARP had essentially used taxpayer money to shoulder $700 billion worth of risk in bailing out these institutions while many millions of households suffered large losses of their own.[16] In signing "the toughest consumer financial protections in our history," President Obama acknowledged that "[f]or years, our financial sector was governed by antiquated and poorly enforced rules that allowed some to game the system and take risks that endangered the entire economy."[17]

Richard Bowen, who had been fired from Citigroup after sending a memo to his superiors enumerating his concerns regarding the company's mortgage underwriting process, testified before the SEC in July 2008, alerting the government to the treatment whistle-blowers faced when they reported misconduct to their employers.[18] This retaliation took place despite potential liability under the Sarbanes–Oxley Act of 2002.[19] Had whistle-blowers been less afraid of retaliation by their employers for speaking up, the reckless practices of these compa-

11. Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 731 (D. Neb. 2014) (citing S. REP. 111-176, at 2 (2010)).
12. President Barack Obama, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), https://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act [https://perma.unl.edu/5A7H-399J].
13. *See* GOODWIN ET AL., *supra* note 4, at 353.
14. *Id.*
15. *Id.*
16. *Id.*
17. Obama, *supra* note 12.
18. Cheryl Hall, *Citigroup Whistleblower Still on the Trail of the Too-Big-To-Fail*, DALL. NEWS (Feb. 14, 2015, 8:41 PM), http://www.dallasnews.com/business/columnists/cheryl-hall/20150214-citigroup-whistleblower-still-on-the-trail-of-the-too-big-to-fail.ece. The SEC is withholding the 926 pages of documents and transcripts of Bowen's hearing because they contained information "that could be competitively harmful to Citigroup—i.e., trade secrets." *Id.*
19. *Id.* Bowen ultimately accepted a severance package from Citigroup in January 2009 that was less than a million dollars and settled his federal complaint. *Id.*

nies may have been discovered before it was too late. This could have prevented the financial crisis in the first place.

B. The Failure of Sarbanes–Oxley

After Enron and WorldCom went bankrupt, costing shareholders billions of dollars, Congress recognized the importance of the whistle-blowers who brought the underlying scandals to light.[20] Sherron Watkins, a vice president of Enron, brought her concerns of accounting fraud, the manipulation of state markets, and bribery of foreign state officials to the attention of the CEO and Chairman of the Board, believing she "would be handing Ken Lay his leadership moment."[21] Instead, when Watkins stepped out of his office, Lay called the company's lawyer and asked if he could fire Watkins without breaking state whistle-blower law.[22] Similarly, Cynthia Cooper, an accounting supervisor at WorldCom, discovered the use of improper accounting techniques to cover up massive losses, and despite recognizing the possibility that she could lose her job, she took her concerns to the auditing committee.[23] The fraudulent practices and regulatory failures of the companies were publicized, and the public cried out for better protections.[24] As a result, Congress included "strong and unprecedented anti-retaliation protection for corporate employees" in the Sarbanes–Oxley Act of 2002 (Sarbanes–Oxley).[25] Despite the praise of scholars as "one of the most protective anti-retaliation provisions in the world,"[26] it soon became apparent that the Act had some "major defects"[27] that contributed to the "ineffectiveness of the Department in protecting whistle-blowers."[28]

1. The Best of Intentions

Sarbanes–Oxley protects from retaliation any employee who reasonably believes the employer was engaging in conduct that violated federal securities laws and who either "provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation" regarding such conduct.[29] For a demonstration of the ad-

20. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 67 (2007).
21. ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 151 (2012).
22. *Id.* at 151.
23. *Id.*
24. *See id.*
25. Moberly, *supra* note 20, at 67.
26. *Id.* at 65.
27. STEPHEN MARTIN KOHN, THE WHISTLEBLOWER'S HANDBOOK 37 (2011).
28. VAUGHN, *supra* note 21, at 201.
29. 18 U.S.C. § 1514A(a)(1) (2012).

ministrative process of Sarbanes–Oxley and the remedies provided under the statute, imagine you are working as a manager for a branch of a large national bank. You realize management at the corporate office is engaging in securities fraud and feeding you false information regarding the worth of the stocks you are supposed to be selling. Under Sarbanes–Oxley, if you report this information or otherwise engage in other statutorily-protected behavior—such as assisting in an investigation—and you are subsequently demoted, discriminated against, fired, or otherwise retaliated against for doing so, you have ninety days to file a complaint with the Occupational Safety and Health Administration (OSHA).[30] OSHA will dismiss complaints that fail to make a prima facie showing of retaliation. Therefore, your complaint must show that you engaged in protected activity, the employer knew about that activity, you suffered an "unfavorable personnel action," and the complaint made a "*prima facie* showing that [the] protected activity was a contributing factor in the adverse action . . . ."[31] Should OSHA find that such an inference can be made, the defendant employer has the opportunity to show, by "clear and convincing evidence, that it would have taken the same adverse action in the absence of the complainant's protected activity."[32]

If your employer meets this clear and convincing burden of proof that the protected activity was not the cause of the adverse employment action, the complaint is dismissed and no investigation is conducted. However, if you present a prima facie case and the employer fails to meet its burden of proof, then OSHA will conduct an investigation.[33] If OSHA finds reasonable cause to believe you were retaliated against for taking a protected action, then OSHA will issue a preliminary order of relief.[34] This order shall include, where necessary: reinstatement of your prior position with the same seniority standing, back pay with interest, and compensation for any special damages such as litigation costs, expert witness fees, and reasonable attorney fees.[35] If reasonable cause is not found, then OSHA will notify the parties of that finding. Finally, if the Department of Labor does not completely resolve a complaint within 180 days, you as the employee—but not your employer—may file a claim in federal court.[36]

30. *Id.* § 1514A(a), (b)(2)(D). By incorporating into Sarbanes–Oxley the procedural rules of an earlier statute providing whistle-blower protection for employees who report airline safety problems, Congress charged OSHA with the authority to investigate Sarbanes–Oxley whistle-blower complaints. Moberly, *supra* note 20, at 78.
31. 29 C.F.R. § 1980.104(e)(1)–(3) (2015).
32. *Id.* § 1980.104(e)(4).
33. *Id.* § 1980.104(d), (e)(5).
34. *Id.* § 1980.105(a)(1).
35. *Id.*
36. 18 U.S.C. § 1514A(b)(1)(B) (2012).

2. *How Sarbanes–Oxley Failed Whistle-Blowers*

During its first three years, only 3.6% of Sarbanes–Oxley whistle-blowers won relief through the initial administrative process.[37] On appeal from these decisions, administrative law judges in the Department of Labor found in favor of a mere 6.5% of whistle-blowers.[38] Many claims were dismissed because whistle-blowers failed to meet the administrative procedural requirements imposed by the Department of Labor or the statutory requirements as a matter of law.[39] Instead of protecting a broad number of disclosures and other activities allowed under the language of Sarbanes–Oxley, the administrative panels adopted more restrictive interpretations. The courts also failed to exercise the discretion provided them to excuse an employee's late filing. Further, when the courts did not dismiss the cases as a matter of law, they misapplied the burden of proof regarding causation.[40] Even though the burdens of proof provided under Sarbanes–Oxley were thought to be employee-friendly, they were interpreted in much stricter terms.[41]

A principle aim of Sarbanes–Oxley was to promote the establishment of robust internal corporate governance mechanisms and processes that could promptly identify and remedy violations of security law.[42] But in pursuing this goal, Sarbanes–Oxley had largely fallen short. So with the failures of the Sarbanes–Oxley whistle-blower provisions in mind and in light of the Great Recession, Congress enacted Dodd–Frank in 2010, using Sarbanes–Oxley as a model.

C. Dodd–Frank and Financial Reform

Congress had hoped that Dodd–Frank would transform the treatment of whistle-blowers like Richard Bowen, not just under the law, but within company policies as well. Dodd–Frank was a "comprehen-

37. Moberly, *supra* note 20, at 67.
38. *Id.*
39. *Id.*
40. *Id.* at 67–68. "Despite a burden of proof for causation that clearly favors employees, OSHA decided in favor of the employee in only 10.7% of the cases in which it evaluated the causation element of an employee's allegations . . . ." *Id.* at 72.
41. Scholars question the appropriateness of OSHA's involvement in the enforcement of Sarbanes–Oxley at all. "[F]rom the Act's inception, OSHA seemed like an unlikely choice . . . . Although the agency administers thirteen other whistleblower provisions, the type of corporate fraud at issue in Sarbanes–Oxley cases seems far removed from the worker safety and health issues addressed by many of the other statutes under OSHA's purview." *Id.* at 146; *see also* Larry E. Ribstein, *Sarbanes-Oxley After Three Years*, 2005 N.Z. L. REV. 365, 371 (noting that "Congress delegated enforcement [of Sarbanes-Oxley] to safety and health regulators unsophisticated in financial fraud rather than to securities regulators.").
42. Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Appellant at 6 n.7, Safarian v. Am. DG Energy Inc., 622 F. App'x 149 (3d Cir. 2015) (unpublished) [hereinafter Brief for the SEC].

sive reform of the U.S. financial regulatory system"[43] and was "designed to improve accountability, resiliency, and transparency in the financial system."[44] One component of that reform was the amendment of the Securities and Exchange Act of 1934 "to provide incentives for whistleblowers to report to the SEC in the form of a 'bounty' program, through which whistleblowers may receive financial awards from the SEC for providing the SEC with original information relating to violation of the securities laws."[45] A whistle-blower is defined by the act as "any individual who provides, or 2 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."[46]

1. Improving Sarbanes–Oxley

The Joint Explanatory Statement of the Committee of Conference explained that "[Dodd–Frank] further enhances incentives and protections for whistleblowers providing information leading to successful SEC enforcement actions."[47] Dodd–Frank both expanded current whistle-blower protections under Sarbanes–Oxley and created a private cause of action for employees when their employers retaliate against them for taking certain protected actions.[48] This means that, instead of pursuing the action by first filing a complaint with OSHA, who then investigates and gathers evidence on the employee's behalf, the employee could assert a private statutory right under Dodd–Frank to pursue the claim on their own in a federal district court.[49] Dodd–Frank also provided a longer statute of limitations. Where Sarbanes–Oxley requires a report to be filed within 180 days of the violation or knowledge of the violation, Dodd–Frank only requires that an action be brought no more than six to ten years after the violation occurred or the material facts of the violation first became known.[50] Finally, while a successful plaintiff under Sarbanes–Oxley may provide for reinstatement of the employee's position, back pay, and other

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43. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 623 (5th Cir. 2013).
44. S. REP. NO. 111–176, at 2 (2010).
45. Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 728 (D. Neb. 2014).
46. 15 U.S.C. § 78u-6(a)(6) (2012).
47. H. R. NO. 111–517, at 870 (2010) (Conf. Rep.).
48. MICHAEL DELIKAT & RENÉE PHILLIPS, CORPORATE WHISTLEBLOWING IN THE SARBANES-OXLEY/DODD-FRANK ERA § 16:1 (2d ed. 2015).
49. *Compare* 18 U.S.C. § 1514A(b)(1) (2012) (requiring filing with OSHA), *with id.* § 78u-6(h)(1)(B)(i) (allowing private statutory right).
50. *Compare id.* § 1514A(b)(1) (requiring that a report be filed within 180 days), *with id.* § 78u-6(h)(1)(B)(iii) (having a statute of limitations of at least six years).

reasonable fees, Dodd–Frank provides for reinstatement, reasonable fees, and double back pay.[51]

2. *The Two Provisions*

By incentivizing whistle-blowing, Dodd–Frank hoped to ferret out wrongdoing that would otherwise go undiscovered.[52] The Act encourages whistle-blowers to report misconduct in two separate and distinct ways—rewarding those who blow the whistle by granting a monetary award when they report externally to the SEC and protecting whistle-blowers from retaliation by their employer.

a. *The Bounty Program*

A claimant is eligible to receive a whistle-blower reward if he or she voluntarily provides the SEC with "original information" about a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur.[53] The information provided must lead to a successful Commission action that results in an award of monetary sanctions of at least $1 million.[54] Under this program, the government—and not an individual—brings the enforcement action. This procedure thus requires the information be provided directly to the SEC. An eligible whistle-blower may receive an award of anywhere from 10%–30% of those monetary sanctions as well as related actions brought by other regulatory and law enforcement authorities.[55] The award percentage may be increased or decreased depending on a num-

51. *Compare id.* § 1514A(c)(2) (allowing back pay), *with id.* § 78u-6(h)(1)(C) (allowing double back pay).

52. *See* Tammy Marzigliano & Cara E. Greene, *The Dodd-Frank Act's Whistleblower Provisions: The Act's Best Hope for Exposing Financial Wrongdoing*, 8 WORKPLACE L. REP. 1507 (2010).

53. 15 U.S.C. § 78u-6(b)–(g). The SEC's Rule 21F-4 provides detail regarding what it means to provide "original information." 17 C.F.R. § 240.21F-4(b) (2015). "The short answer is that original information is derived from a person's independent knowledge (not from publicly available sources) or independent analysis (evaluation of information that may be publicly available but which reveals information not generally known) that is not already known by the Commission." Jennifer R. Korb, *Whistleblower Claims under the Dodd-Frank Act: Highlights from the SEC's Annual Report to Congress for the 2014 Fiscal Year*, 28 UTAH B.J. 2d ser. 24, 25 (2015).

54. 15 U.S.C. § 78u-6(a)(1), (b).

55. *Id.* § 78u-6(b). "'Related actions' include judicial or administrative actions brought by the Attorney General of the United States, an appropriate regulatory authority, a self-regulatory organization, or a state attorney general in a criminal case that is based on the same original information the whistleblower voluntarily provided to the Commission." Korb, *supra* note 53, at 25 (quoting 17 C.F.R. § 240.21F-3).

ber of factors including "the extent to which the claimant participated in the company's internal compliance systems."[56]

b. *Protecting Whistle-Blowers from Retaliation*

In 2013, more than one in five workers who reported misconduct, internally or externally, said they experienced retaliation in return.[57] The anti-retaliation provision allows an individual, rather than the government, to bring a cause of action against an employer for such reprisal. When an employee experiences retaliation, whether a remedy is available to them under Dodd–Frank depends on the approach that worker took in reporting the misconduct. For now, the question of whether internal reporting is protected under Dodd–Frank is unclear because Congress has not explicitly spoken on the issue. This confusion is exacerbated by the differing court interpretations of the whistle-blowing provision. Thirteen federal court decisions have addressed the issue and failed to reach consistent outcomes. Some courts provide remedies to employees who are retaliated against for reporting misconduct internally, and others only provide those remedies to employees who report directly to the SEC.[58] Two circuit courts of appeals have faced the issue, the Second Circuit and the Fifth Circuit, and further muddied the waters by coming down on opposite sides.[59]

The Dodd–Frank Anti-Retaliation Section provides:

> 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—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j–1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[60]

Subsection (iii) provides relief for anyone who is retaliated against for "making disclosures that are required or protected under the

56. Korb, *supra* note 53, at 26. A complete list of criteria used to determine award amounts is included in the Commission's Rule 21F-6. 17 C.F.R. § 240.21F-6.
57. ETHICS RES. CTR., NATIONAL BUSINESS ETHICS SURVEY OF THE U.S. WORKFORCE 27 (2013). "This is nearly identical to the 22 percent retaliation rate in 2011. It is important to keep in mind that retaliation has not always been so widespread; the rate was 12 percent in 2007, the first time it was measured in [the National Business Ethics Survey]." *Id.*
58. *See infra* notes 79, 88, and accompanying text.
59. *See infra* subsections II.D.1–2.
60. 15 U.S.C. § 78u-6(h)(1)(A) (2012).

Sarbanes–Oxley Act . . . , [the Securities Exchange Act], including section 78j–1(m) of [Dodd–Frank], section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the commission."[61] Thus, while the first two subsections of the anti-retaliation section, (i) and (ii), protect whistle-blowers who report to the SEC or work directly with the SEC in some manner, the language of subsection (iii) appears to protect a broad range of disclosures to entities other than the SEC. The Sarbanes–Oxley provisions that fall within this third subsection, for example, protect internal disclosures made to "a person with supervisory authority over the employee."[62]

The introductory paragraph expressly provides that no employer shall take retaliatory acts against "a *whistleblower* in the terms and conditions of employment because of any lawful [enumerated] act done by the *whistleblower*."[63] Despite the fact that an internal disclosure under Sarbanes–Oxley would receive protection under the Dodd–Frank Act through its incorporation into subsection (iii), Dodd–Frank's definition section defines a whistle-blower as someone who provides information to or otherwise cooperates *with the Commission*.[64] Thus, there is a direct tension between subsection (iii), which appears to provide protection for internal disclosures through its incorporation of Sarbanes–Oxley, and the statutory definition of "whistleblower," which requires a disclosure to the SEC.

D. The Interpretation of Dodd–Frank's Whistle-Blower Provisions

The courts have approached this conflict in three different ways: 1) the *Asadi* approach; 2) the *Chevron*-deference approach; and 3) the *Bussing* approach. The *Asadi* and *Chevron*-deference approaches have been adopted by a number of lower federal district courts, but the *Bussing* court stands alone in its reasoning. Despite its isolation, the *Bussing* approach offers the most potential for consistency in the treatment of whistle-blowers, not only at the federal level, but at the state level as well. This consistency in the treatment of whistle-blowers, despite their method of disclosure, realizes the true purpose of the Dodd–Frank anti-retaliation provision.

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61. *Id.* § 78u-6(h)(1)(A)(iii).

62. Caroline E. Keen, *Clarifying what is "Clear": Reconsidering Whistleblower Protections Under Dodd-Frank*, 19 N.C. BANKING INST. 215, 220 (quoting 18 U.S.C. § 1514A(a)(1)(C) (2012)).

63. 15 U.S.C. § 78u-6(a)(6) (emphasis supplied). Specifically, the provision forbids an employer from discharging, demoting, suspending, threatening, harassing, directly or indirectly, or in any other manner discriminating against a whistle-blower. *Id.*

64. *See id.* § 78u-6(a)(6).

1. The Asadi *Approach*

In *Asadi v. G.E. Energy (USA), L.L.C.*,[65] the Fifth Circuit conducted a statutory construction analysis of the language of Dodd–Frank and "began and ended its analysis with the determination that the statutory language in Dodd–Frank was plain and unambiguous."[66] "The perceived conflict between [the statutory definition of whistleblowers] and [subsection (iii)] rests on a misreading of the operative provisions of [the Securities whistleblower incentives and protection section of Dodd–Frank]."[67] This misunderstanding, the court continues, stems from reading the three subsections of the anti-retaliation provision as further defining who may qualify as a whistleblower. "[T]here is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC."[68] The three subsections, on the other hand, "represent the protected activity in a whistleblower-protection claim."[69] Conflict would only exist between the definition provision and subsection (iii) "if we read the three categories of protected activity as additional definitions of three types of whistleblowers."[70] The *Asadi* court concedes that "individuals may take protected activity yet still not qualify as a whistleblower."[71] However, the court describes this as a "practical result" rather than a sign of conflict between the provisions.[72] The question remained then, as to what activity is actually protected by subsection (iii).

"[T]his category protects whistleblowers from retaliation, based not on the individual's disclosure of information to the SEC but, instead, on that individual's other possible required or protected disclosure(s)."[73] In other words, it is the internal disclosure itself rather than the report to the SEC that protects the individual from retaliation. The court demonstrates this protection with an example:

> Assume a mid-level manager discovers a securities law violation. On the day he makes this discovery, he immediately reports this securities law violation (1) to his company's chief executive officer ("CEO") and (2) to the SEC. Unfortunately for the mid-level manager, the CEO, who is not yet aware of the disclosure to the SEC, immediately fires the mid-level manager. The mid-level manager, clearly a "whistleblower" as defined in Dodd–Frank because he provided information to the SEC relating to a securities law violation, would be unable to prove that he was retaliated against because of the report to the SEC. Accordingly, the first and second category of protected activity would

65. 720 F.3d 620 (2013).
66. Keen, *supra* note 62, at 221.
67. *Asadi*, 720 F.3d at 625.
68. *Id.*
69. *Id.*
70. *Id.* at 626.
71. *Id.*
72. *Id.*
73. *Id.* at 627.

> not shield this whistleblower from retaliation. The third category of protected activity, however, protects the mid-level manager. In this scenario, the internal disclosure to the CEO, a person with supervisory authority over the mid-level manager, is protected under 18 U.S.C. § 1514A, the anti-retaliation provision enacted as part of the Sarbanes–Oxley Act of 2002 ("the SOX anti-retaliation provision"). Accordingly, even though the CEO was not aware of the report to the SEC at the time he terminated the mid-level manager, the mid-level manager can state a claim under the Dodd–Frank whistleblower-protection provision because he was a "whistleblower" and suffered retaliation based on his disclosure to the CEO, which was protected under SOX.[74]

The court feared that any other interpretation would render the statutory text superfluous by reading the words "'to the Commission' out of the definition of 'whistleblower' for purposes of the whistleblower-protection provision," thus violating "the surplusage canon, that every word is to be given effect."[75] Finally, the court mused that accepting another construction of the whistle-blower-protection provision would render the Sarbanes–Oxley anti-retaliation provision and its administrative scheme moot.[76] If an internal disclosure was covered both under Sarbanes–Oxley and under Dodd–Frank via subsection (iii), *Asadi* proposed that Sarbanes–Oxley would no longer be useful. Dodd–Frank protections provide for greater monetary damages, a longer statute of limitations, and the ability to file a claim in federal court without first filing their claim with a federal agency.[77] With those incentives in place, if plaintiffs seeking protection under Dodd–Frank weren't further required to disclose their internal complaint to the SEC, the anti-retaliation provision of Sarbanes–Oxley would be ineffective. Thus, the court concluded, "the plain language of the [anti-retaliation provision] limits protection under the Dodd–Frank whistleblower-protection provision to those individuals who provide information 'relating to a violation of the securities laws' to the SEC."[78]

Seven federal district courts adopted this interpretation.[79] However, these courts have failed to recognize a number of flaws stemming from the *Asadi* analysis. *Asadi* completely disregards the practical as-

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74. *Id.* at 627–628 (footnote omitted).
75. *Id.* at 628 ("[E]ven if the whistleblower-protection provision were ambiguous, we would be reluctant to read the provision as suggested by Asadi because such a construction would treat 'to the Commission' as mere surplusage.").
76. *Id.*
77. *Id.* at 629.
78. *Id.* at 630 (quoting 15 U.S.C. § 78u-6(a)(6) (2012)).
79. *See* Davies v. Broadcom Corp., No. 8:15–cv–00928, 2015 U.S. Dist. LEXIS 122812 (C.D. Cal. Sept. 8, 2015); Lutzeier v. Citigroup Inc., 305 F.R.D. 107 (E.D. Mo. 2015); Verfuerth v. Orion Energy Sys., 65 F. Supp. 3d 640 (E.D. Wis. 2014); Zillges v. Kenney Bank & Tr., 24 F. Supp. 3d 795 (E.D. Wis. 2014); Englehart v. Career Educ. Corp., No. 8:14–cv–444–T–33EAJ, 2014 WL 2619501 (M.D. Fla. May 12, 2014); Banko v. Apple Inc., 20 F. Supp. 3d 749 (N.D. Cal. 2013); Wagner v. Bank of Am. Corp., No. 12–cv–00381–RBJ, 2013 WL 3786643 (D. Colo. July 19, 2013).

pects of whistle-blowing. "[I]t is likely to be a very rare instance in which a whistleblower has reported simultaneously to both his or her supervisors and to the SEC, as an employee-whistleblower is likely to choose one method over another."[80] Employees are often motivated to report only internally because they feel a sense of loyalty to the company.[81] They rarely understand the true implications of what they are disclosing, and if they do, they hope to correct the misconduct before information goes public and ruins the employer's reputation. On the other hand, a whistle-blower who decides to report to the SEC or another governmental organization outside of the company is much more likely to avoid the negative consequences stemming from reporting altogether.[82] Those consequences include "loss of employment, disqualification from bonuses, ostracism, and loss of workplace friendships."[83] In other words, when a whistle-blower reports directly to the SEC, the employer likely has no way of knowing who provided the disclosure, making it less likely that that employee would face the kinds of repercussions that render the anti-retaliation provision necessary in the first place.

Further, *Asadi* ignores at least two advantages to bringing a claim under Sarbanes–Oxley rather than Dodd–Frank. For individuals who want to avoid the burdens of pursuing the claim in court, including potential high litigation costs that they may bear if they do not prevail, actions under Sarbanes–Oxley may be attractive as the claims are first heard in an administrative forum.[84] The Department of Labor even assumes the responsibility for investigating the claims and preparing evidence for the administrative review.[85] Also, a claim under Sarbanes–Oxley may afford greater recovery when, despite suffering minimal pay loss, individuals have experienced emotional distress and reputational harm, but minimal pay loss as the language of Sarbanes–Oxley, but not Dodd–Frank, has been held to authorize such compensation.[86]

Ultimately, the *Asadi* approach fails to provide protection to an internal whistle-blower under Dodd–Frank, a result that, as explained in Subsection III.A.2 of this Note, stands in direct contravention with congressional intent.

80. Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 Temp. L. Rev. 721, 745 (2014).
81. *Id.*
82. Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. Rev. 1107, 1151.
83. Pacella, *supra* note 80, at 746.
84. Brief for the SEC, *supra* note 42, at 25.
85. *See supra* subsection II.B.1.
86. Brief for the SEC, *supra* note 42, at 25–26.

2. *The* Chevron-*Deference Approach*

In *Berman v. Neo@Ogilvy LLC*,[87] the Second Circuit used the *Chevron*-deference approach.[88] Under this approach, when determining whether to grant *Chevron* deference[89] to an agency's construction of a statute in a question of statutory interpretation, a court asks whether Congress has spoken directly to the issue at hand.[90] If the court determines that congressional intent is not clear with regard to that particular issue, the court turns to the agency that has been tasked with enforcement of the statute for guidance.[91] If the agency provides a reasonable construction of the statute, the court defers to that administrative interpretation.[92]

Though the court recognized that the terms of a definitional subsection are usually supposed to be taken literally and applied to all subdivisions covered by that definition, it recognized that such a "mechanical use" of a statutory definition is not always necessary.[93] "Definitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications."[94] Though the definition of "whistleblower" does not exist "in absolute conflict" with subsection (iii), the court still found ambiguity in the statute by recognizing that the simultaneous disclosures referred to in *Asadi* are not likely and that there are categories of whistle-blowers who cannot report wrongdoing to the SEC without first disclosing the wrongdoing to their employers.[95] The court found this to be the first indication that the statutory definition need not be mechanically applied.

A court normally searches for further indications of congressional intent in the legislative history. However, in finding that Congress had not expressly addressed the question at issue, the court noted that legislative history was of little use. Subsection (iii) "was not in either version of Dodd–Frank that was passed by the House and the Senate

87. 801 F.3d 145 (2d Cir. 2015).
88. Five federal district court cases have adopted this interpretation. *See* Dressler v. Lime Energy, No. 3:14–cv–07060, slip op. (D.N.J. Aug. 13, 2015); Somers v. Digital Realty Trust, Inc., 119 F. Supp. 3d 1088 (N.D. Cal. July 22, 2015); Connolly v. Remkes, No. 5:14–CV–01344–LHK, 2014 WL 5473144 (N.D. Cal. Oct. 28, 2014); Ellington v. Giacoumakis, 977 F. Supp. 2d 42 (D. Mass. 2013); Khazin v. TD Ameritrade Holding Corp., No. 13–4149, slip op. (D.N.J. Mar. 11, 2014).
89. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
90. *Id.* at 842.
91. *Id.* at 843.
92. *Id.* at 843–44.
93. Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 154 (2d Cir. 2015).
94. *Id.* (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (1st ed. 2012)).
95. *Id.* at 150–51.

prior to a conference."[96] The subsection was added "at the last minute" without any mention of its addition in any legislative materials.[97]

> When conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages, and someone succeeds in inserting a new provision like subdivision (iii) . . . , it is not at all surprising that no one noticed that the new subdivision and the definition of "whistleblower" do not fit together neatly.[98]

Ultimately, the court found it "doubtful" that the congressmen who accepted the last-minute addition of subdivision (iii) would have expected it to have such a limited scope as it would have under the *Asadi* approach and found sufficient ambiguity to give *Chevron* deference to the reasonable interpretation of the SEC, the agency in charge of administering the statute.[99]

The SEC's interpretation of the statute allows for the protection of internal whistle-blowers under SEC Rule 21F–2(b)(1) "by extending anti-retaliation protection to individuals who first report to designated authorities *other than the Commission*."[100] The SEC explained that, in adopting Rule 21F–2(b)(1), "the anti-retaliation protections will extend to . . . employees of public companies who make certain disclosures internally to 'a person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct.'"[101] The reasons the SEC gives for the reasonableness of this interpretation are four-fold: 1) it "effectuates the broad employment anti-retaliation protections that clause (iii) contemplates;" 2) "it better supports a core overall objective of the whistleblower rulemaking—avoiding disincentivizing individuals from reporting internally first;" (3) it avoids a two-tiered structure of protections that might discourage internal reporting; and (4) it stresses that "if internal compliance and reporting procedures 'are not utilized or working, our system of securities regulation will be less effective.'"[102]

Therefore, under the SEC's view, internal whistle-blowers along with those who report to the SEC are protected from retaliation under Dodd–Frank. Though this reaches the same end reached in *Bussing*, the *Chevron*-deference approach, like the *Asadi* approach, misses an important point: legislative intent was made clear with respect to the

96. *Id.* at 152.
97. *Id.* at 153, 155.
98. *Id.* at 154.
99. *Id.* at 155.
100. Brief for the SEC, *supra* note 42, at 29 n.20.
101. *Id.* at 28 (quoting Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249)).
102. *Id.* 28–29 (quoting Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,500 (proposed Nov. 17, 2010) (to be codified at 17 C.F.R. pts. 240, 249)).

protection of internal whistle-blowers, thus rendering the *Chevron*-deference approach unnecessary.

3. *How Whistle-Blowers Have Faired*

a. *The Statistics of Whistle-Blowing*

From 2012 to 2014, the number of whistle-blower tips received by the Commission increased more than 20%.[103] Of the 10,193 tips received since the program began in August 2011, only fourteen have resulted in monetary awards.[104] Over 80% went to their supervisor or compliance personnel before going to the SEC in an attempt to remedy the problem internally.[105]

The National Business Ethics Survey of 2013 found that more than nine out of ten employees reported internally when they first complained about misconduct.[106] Just 9% of employees first reported problems to the government.[107] Overall, only 20% of reporters ever chose to report misconduct externally by telling someone outside their company.[108] The most common reasons for reporting externally were: (1) the problem was ongoing and they thought someone from outside could help stop it; (2) they did not trust anyone in their company; and (3) they had either been retaliated against for reporting before or were afraid of retaliation.[109] Only 14% of the less than one in ten employees who reported externally were motivated to do so because of the potential to be given a substantial money reward.[110]

b. *Missing the Mark: Whistle-Blowers Left Without Protection*

The number of retaliation cases courts see indicates that the fear of retaliation, which motivated 40% of employees who chose not to report internally in the above study, is not an unfounded one. What the *Asadi* approach fails to take into account, however, is the psychology of the whistle-blower, and how, if not properly accounted for, it could undermine the internal reporting and compliance processes maintained by the companies. In fact, it is the interpretation provided by *Asadi* that encourages the fears of many U.S. businesses that internal

103. U.S. SEC. & EXCH. COMM'N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 20 (2014).
104. Korb, *supra* note 53, at 27. On September 22, 2014, the SEC authorized its largest award to a whistle-blower under the Dodd–Frank Act to date. U.S. SEC. & EXCH. COMM'N, *supra* note 103, at 10. The award was over $30 million, more than double the amount of the previous highest award under Dodd–Frank. *Id.*
105. ETHICS RES. CTR., *supra* note 57, at 29–30.
106. *Id.* at 29.
107. *Id.*
108. *Id.*
109. *Id.* at 30.
110. *Id.*

reporting would cease after the implementation of Dodd–Frank.[111] Giving individuals an opportunity to blow the whistle internally increases cooperation and decreases selfishness within companies.[112]

> [I]nternal systems of disclosure support the loyalty of employees to the institutions of which they are part and permit the expression of concerns within those institutions. By making such disclosures, employees may believe that they have reduced the likelihood of retaliation by the organization's management. . . . . If an organization fails to consider allegations or mistreats those employees who do speak up, others are discouraged from raising these concerns internally. The realization that whistleblowers making such disclosures enjoy no legal protection further dissuades employees.[113]

Ninety-two percent of whistle-blowers report internally.[114] Though the *Chevron*-deference approach would protect these individuals, such deference is not necessary. "Recognizing the significant role that internal company reporting can play, Congress for nearly two decades has enacted a series of amendments to the securities laws to encourage, and in some instances to require, internal reporting of potential misconduct."[115] To suggest that Dodd–Frank had no intention of protecting the majority of whistle-blowers from retaliation ignores the events leading up the enactment of Dodd–Frank, including the failures of Sarbanes–Oxley and the recognition of the importance of correcting misconduct in order to prevent another Great Recession. Further, relying on *Chevron* deference ignores that Congress has given the anti-retaliation provision an express purpose. The provision is to provide protection to individuals who disclose misconduct in the private sector. Recognizing this policy paves the way for a consistent approach to the treatment of these disclosures, not only at the federal level, but also at the state level as well. The *Bussing* approach is the only interpretation that embraces the statute's true purpose and therefore renders the *Chevron* deference unnecessary.

E. Bussing v. COR Clearing, LLC

1. The Facts

In September 2011, Julie Bussing was working as an independent contractor for COR Securities Holdings, Inc. (COR), a private investment management company.[116] Bussing was a certified public ac-

111. Christopher M. Matthews, *Most Whistleblowers Report Internally, Study Finds*, WALL STREET J.: CORRUPTION CURRENTS BLOG (May 30, 2012, 9:25 PM), http://blogs.wsj.com/corruption-currents/2012/05/30/most-whistleblowers-report-internally-study-finds/.
112. *See* James Dungan et al., *The Psychology of Whistleblowing*, 6 CURRENT OPINION IN PSYCHOL. 129 (2015).
113. VAUGHN, *supra* note 21, at 323.
114. ETHICS RES. CTR., *supra* note 57, at 29.
115. Brief for the SEC, *supra* note 42, at 5.
116. Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 723 (D. Neb. 2014).

countant with a masters of business administration and "had obtained a comprehensive familiarity with trading, clearing operations, finance, accounting, and compliance with the rules and regulations of FINRA and Securities and Exchange Commission (SEC)."[117] As part of Bussing's duties, she assisted with the business investigations required for COR's acquisition of Legent Clearing, LLC ("Legent"); Legent provides clearing services to brokerage clients and is now COR's wholly owned subsidiary.[118] Prior to the acquisition of Legent by COR, Legent was involved in several regulatory investigations and examinations resulting in sanctions for violations of Financial Industry Regulatory Authority (FINRA) and federal securities laws.[119]

"On January 1, 2012, Bussing began working for Legent as its executive vice president" and, pursuant to an oral agreement, reported directly to Steven Sugarman, director and CEO of COR and the COR Board of Directors.[120] She did not report to Legent's CEO, Christopher Frankel.[121] Shortly after Bussing started in this position, FINRA began another investigation of Legent for the same types of violations that had been found in previous years. "On April 23, 2012, FINRA instituted formal proceedings against Legent" for failure to comply with the requirements of the Bank Secrecy Act as well as other financial reporting responsibilities imposed under FINRA and SEC rules.[122] FINRA, pursuant to FINRA Rule 8210, requested that Bussing provide extensive documents and information to FINRA staff when they arrived at Legent's office on April 30.[123] Bussing alleged that "in the course of preparing responses to the request, she identified several potential or existing violations of FINRA rules and federal securities regulations, which FINRA was likely to discover . . . ."[124]

Initially, Carlos Salas, a director of COR, and Sugarman expressed their support of Bussing continuing her investigation and disclosing what she found to FINRA. When Bussing discovered another violation she directed Legent staff to cease processing penny stocks and to perform several audits and account reviews.[125] Salas then met with Bussing and expressed his dissatisfaction with her response to the request and her subsequent decisions.[126] According to Bussing, "Salas advocated ignoring or responding incompletely to FINRA's document

117. *Id.* at 722–23.
118. *Id.* at 723.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 724.
123. *Id.* "FINRA Rule 8210 is a rule subject to the jurisdiction of the SEC." *Id.* at 734.
124. *Id.* at 724.
125. *Id.*
126. *Id.*

request."[127] Bussing later discussed her findings with Legent and COR management, including Sugarman, Salas, and Frankel, and was told to "stall, delay, stop digging, and stop responding" to the document request for FINRA.[128] Bussing refused, and participated in FINRA's onsite examination of Legent in direct contravention to orders.[129]

The following day, Salas notified Bussing that he, Sugarman, and COR had decided Bussing "needed a vacation."[130] She was ordered to take leave immediately and was told that when she returned her position would be changed.[131] Finally, around May 20th, 2012, Bussing was notified that Legent terminated her employment.[132]

2. The District of Nebraska Steps In

In arguing that she was protected from retaliation under Dodd–Frank for complying with the document process of FINRA and making disclosures to her supervisors, Bussing pointed out, as others before her had, that the first two subsections protect external whistle-blowers, while the third subsection does not contain such limiting language. Bussing did not report to the SEC, but sought relief as an internal whistle-blower under subsection (iii)—which the District of Nebraska granted.

The court found this to be an "unusual case" in which applying the statutory definition of whistle-blower would defeat the purpose of subsection (iii), to shield a broad range of employee disclosures.[133] Recognizing the direct tension between the statutory definition of "whistleblower" and subsection (iii) of the anti-retaliation provision, the *Bussing* court read the ordinary meaning of whistle-blower—"a person who tells police, reporters, etc., about something (such as a crime) that has been kept secret," or an "employee who reports employer wrongdoing to a governmental or law-enforcement agency"—into the anti-retaliation provision.[134] By doing so, the *Bussing* court was "faithful" to the text of the statute, gave "meaningful effect to all of its parts," and furthered the purposes underlying Dodd–Frank's enactment following the Great Recession.[135] For these reasons and those further discussed below, *Bussing* presents the best interpreta-

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 724–25.
132. *Id.* at 725.
133. *Id.* at 729 ("Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case." (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 206–07 (2009))).
134. *Id.* (citations omitted).
135. *Id.* at 733.

tion of the Dodd–Frank whistle-blower provisions by reading the everyday definition of "whistleblower" into the statute. In so doing, the court recognized Congress's intended purpose behind the provision, thus rendering deference to the SEC regulations unnecessary.

III. ANALYSIS

A. The District of Nebraska Correctly Interpreted the Dodd–Frank Whistle-Blower Protections

1. *Separating the Anti-Retaliation Provision From the Bounty Program*

The court in *Bussing* begins its analysis by making one subtle, but very important, distinction regarding the whistle-blower provisions of Dodd–Frank: the Dodd–Frank Act amended the Securities and Exchange Act of 1934 to "provide incentives for whistleblowers to report to the SEC in the form of a 'bounty' program," *as well as* "created a private cause of action for certain individuals whose employers retaliate against them for taking certain protected actions."[136] Where other courts have treated the anti-retaliation provision and the bounty program of Dodd–Frank whistle-blower protections as one, serving a common purpose, incentivizing the same kind of actions, and providing the same form of protection, *Bussing* is quick to point out that this is not the case. This distinction is critical. Whistle-blowers who are reporting internally to their direct supervisors or upper-management are not motivated to disclose by the monetary gain provided by the bounty program but instead are motivated to disclose out of loyalty to the company and respect for their job.[137] Further, internal whistle-blowers likely report without knowing the seriousness of the violation and are merely hoping to get the situation fixed as soon as possible.

Recognizing this distinction made it possible to read the ordinary meaning of the word whistle-blower into the anti-retaliation provision alone.

> If . . . the anti-retaliation provision is read using the word "whistleblower" in its everyday sense, there is no such tension. In that sense, a whistleblower is "a person who tells police, reporters, etc., about something (such as a crime) that has been kept secret," or an "employee who reports employer wrongdoing to a governmental or law-enforcement agency." If this reading of the term "whistleblower is applied to the anti-retaliation provision—while maintaining the statutory definition for the other subsections, which deal solely with the bounty program—all parts of the statute fit together into a harmonious and coherent whole. This interpretation gives effect to the full range of disclosures protected by the anti-retaliation provision, while reserving rewards under the bounty program for whistleblowers who report to the SEC.[138]

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136. *Id.* at 728.
137. *See supra* notes 80–83 and accompanying text.
138. *Bussing*, 20 F. Supp. 3d at 729 (citations omitted).

Ultimately, the court found it apparent that Congress intended the word whistle-blower to be given its ordinary meaning, despite the presence of a statutory definition to the contrary, and applied the ordinary meaning to the anti-retaliation provision only. In so finding, the court believed it pertinent to explain the full scope of subsection (iii)'s reach.

> Subsection (iii) operates by incorporation; it protects disclosures required or protected by other laws. Unlike the preceding subsections, it applies to disclosures that are completely unrelated to any tip to the SEC. And, most importantly, subsection (iii) applies to a vast array of situations where the applicable laws or regulations call for disclosure to entities other than the SEC—disclosures that would not qualify for protection if the statutory definition of "whistleblower" is applied. . . .
>
> [For example,] subsection (iii) protects disclosures required or protected by the Sarbanes–Oxley Act of 2002. This statute, in turn, protects a broad range of employee disclosures to persons or entities other than the SEC, including internal reports to company officials.[139]

The court further references the distinction between the anti-retaliation provision and the bounty program when comparing the three subsections. "[S]ubsection (i) only applies to information provided 'in accordance with this section,' that is, tips under the bounty program."[140] Subsection (ii) encompasses a slightly broader scope of disclosures in that it aims at covering testimony or assistance based upon or related to the tip.[141] By contrast, subsection (iii) protects an even broader category of disclosures that don't require any connection to the SEC. To the court, this lack of connection makes sense, because the "anti-retaliation provision was drafted to have effect independent of the bounty program."[142] Without congressional intent to grant the bounty and anti-retaliation provisions independent effect, "it simply doesn't make sense" that subsection (iii) would explicitly apply to a range of disclosures, not just those made to the SEC, because disclosures not made to the SEC "would *never* fall under the bounty program."[143]

2. *Doing Away with* Chevron *Deference*

Bussing points out that a lack of legislative history directly on point does not mean that Congress did not have a specific intent with regard to the purpose of Dodd–Frank. Dodd–Frank put into place "the toughest consumer financial protections in our history" with the ulti-

139. *Id.* (citation omitted).
140. *Id.* at 730 (quoting 15 U.S.C. § 78u-6(h)(1)(A)(i) (2012)).
141. *Id.* (citing 15 U.S.C. § 78u6(h)(1)(A)(ii) (2012)).
142. *Id.*
143. *Id.* The court draws further support from the fact that subsections (i) and (ii) do not require that a tip meet the qualifications for an award, nor that the information or other assistance result in a successful enforcement action. *Id.* at 730 n.11.

mate goal of making the financial system more transparent.[144] Whistle-blowers are the "single most effective source of information" in detecting and correcting corporate misconduct.[145] The anti-retaliation provision of Dodd–Frank was intended to protect those individual employees who would provide this vital information.

The court noted that nothing in the legislative history suggested Congress anticipated a potential conflict between the statutory definition of "whistleblower" and subsection (iii). There were scant references to what would become the Securities Whistleblower Incentives and Protection Section,[146] and even fewer regarding the late addition of subsection (iii).[147] Further, the term "whistleblower" was not present in the anti-retaliation provision until the bill passed the Senate, where the phrase "employee, contractor, or agent" in the anti-retaliation provision was replaced with "whistleblower."[148] Without guidance from legislative history, the court conceded that it could embrace one of two interpretations of the language: the one described above "which harmonizes all parts of the statute and gives subsection (iii) a meaningful purpose" or the interpretation suggested in *Asadi*.[149]

The court found that *Asadi* not only fails to protect the majority of whistle-blowers but also fails to protect those who are most vulnerable to retaliation—internal reporters.[150] The *Bussing* court feared that adopting the *Asadi* interpretation would disincentivize internal reporting, something Congress would not have intended for a number of reasons, but mostly because internal reporting: (1) "allows companies to remedy improper conduct at an early stage"; (2) prevents simple misunderstandings from becoming larger problems; and (3) keeps reports out of the SEC that could be more efficiently handled internally, which would otherwise waste government resources.[151] Additionally,

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144. President Barack Obama, Remarks by the President on Wall Street Reform (June 25, 2010), https://www.whitehouse.gov/the-press-office/remarks-president-wall-street-reform-1 [https://perma.unl.edu/EMS8-Z5QJ]; *see also* S. REP. NO. 111-176, at 2 (2010) (stating Dodd–Frank was "designed to improve accountability, resiliency, and transparency in the financial system.").
145. KOHN, *supra* note 27, at xii.
146. 15 U.S.C. § 78u-6 (2012).
147. *Bussing*, 20 F. Supp. 3d at 731.
148. *Id.*
149. *Id.* at 731–732.
150. *Id.* at 733.
151. *Id.*

> Encouraging external reporting over internal reporting is problematic for several reasons. First, the bounty provisions require whistleblowers to report *original* information to the SEC. Therefore, employees are more likely to rush to report information about securities violations to the SEC—without verifying the information's accuracy—in order to be the first party to report the violation. This rush to report violations without verification leads, in turn, to the second problem with external

the court noted that it is counterintuitive to call upon employees to report to the SEC should they want any protection for making an internal report.[152]

In recognizing that Congress clearly would not intend to disincentive internal reporting, *Bussing* demonstrates why *Chevron* deference is not necessary. When congressional intent is clear, it is unnecessary to turn to the SEC's interpretation of the statute.[153] Subsection (iii) was enacted to protect a wide range of disclosures, and reading the ordinary definition of whistle-blower into the anti-retaliation provision best gives effect to the statute's true purpose.

3. *Going Even Further: Recognizing the History of Whistle-Blower Protection*

Though *Bussing* persuasively describes why, due to the very nature of the whistle-blower, Congress would not have intended to disincentivize internal whistle-blowing, the court in *Bussing* could have made its argument even more persuasive by analyzing the history of internal whistle-blower protection. Congress has spent nearly two decades amending past securities laws to encourage, or even require, internal reporting of potential misconduct.[154] In addition to the implementation of Sarbanes–Oxley in 2002, Congress amended the Securities Exchange Act of 1934.[155] In 1995, Congress added a section to the Securities Exchange Act that imposes a series of internal company disclosure obligations on an accountant who discovers a pub-

> reporting: flooding the SEC with frivolous tips. The SEC, burdened with a flood of frivolous tips, may have trouble distinguishing legitimate tips of securities violations from meritless ones, and it will have to spend time and effort weeding out the frivolous tips rather than focusing on correcting legitimate violations of securities laws. Finally, encouraging employees to race to report violations to the SEC undermines the culture of corporate compliance that companies set up in the wake of Sarbanes-Oxley. The bounty program will "promote the very culture of opportunism that these [internal] compliance systems are intended to combat."

Jeff Vogt, Note, *Don't Tell Your Boss? Blowing the Whistle on the Fifth Circuit's Elimination of Anti-Retaliation Protection for Internal Whistleblowers Under Dodd-Frank*, 67 OKLA. L. REV. 353, 377 (2015) (alteration in original) (footnotes omitted) (quoting Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act "Bounty Hunting"*, 45 CONN. L. REV. 483, 520 (2012)).

152. *Bussing*, 20 F. Supp. 3d at 732–733 ("And there are no doubt others who are simply not savvy enough to know that they should take the counterintuitive step of first reporting to the SEC if they want any protection for internal reporting.").

153. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("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.").

154. Brief for the SEC, *supra* note 42, at 5.

155. *Id.*

lic company has taken part in an illegal act.[156] This process of disclosure only allows the auditing accountant to make a disclosure to the SEC *after* internal disclosures and other conditions are met, including a failure of the company to take an appropriate response to the disclosure.[157]

Subsection 7245(1) of Sarbanes–Oxley requires attorneys to report material violations of securities laws to the chief legal counsel or chief executive officer (CEO) of a public company.[158] If the CEO does not appropriately respond, the attorney is then required to report the violations to the audit or other committee of the board of directors.[159] The SEC's Standards of Professional Conduct recognize that by reporting internally first an attorney "does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer."[160]

Finally, though the bounty program requires a whistle-blower to provide information directly to the SEC, the monetary reward a reporter receives can increase depending on the extent to which the claimant participated in the company's internal compliance systems already in place.[161] Incentivizing internal reporting in the bounty program while disincentivizing it in the area of protection from retaliation is counterintuitive. This kind of disconnect would only serve to confuse an employee who is determining the best way to move forward after observing misconduct.

Though *Bussing* recognizes that encouraging internal whistleblowing is important because whistle-blowers are much more likely to disclose information internally, the court fails to recognize that federal law also *requires* certain individuals to report internally. Auditors and attorneys "would gain little, if any, Dodd–Frank protection if subdivision (iii), despite cross-referencing Sarbanes–Oxley provisions protecting lawyers, protected only against retaliation for reporting to the Commission."[162] With these issues in mind, it is clear that Congress fully intended to protect internal whistle-blowers. To conclude

156. *Id.* at 5–6.
157. *Id.* at 6.
158. *See* 15 U.S.C. § 7245 (2012).
159. *Id.*
160. 17 C.F.R. § 205.3(b)(1) (2015). Only where an attorney "reasonably believes it is 'necessary' to report to the Commission to prevent a securities law violation that will cause substantial financial injury, or to correct past violations of similar severity where the attorney's services were used—*may* attorneys report evidence of a material violation to the Commission." Brief for the SEC, *supra* note 42, at 7 n.8 (citing 17 C.F.R. § 205.3(d)(2)). Even then, "an attorney will typically need to report internally *first* in order to satisfy the requirement that disclosure to the Commission may be necessary." *Id.*
161. *See supra* notes 55–56 and accompanying text.
162. Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 152 (2d Cir. 2015).

otherwise would suggest that Congress was undoing nearly two decades of amendments encouraging internal reports.

Bussing didn't delve as deep into congressional history as it could have, but the court takes a powerful stance in recognizing the intent Congress clearly had in enacting the anti-retaliation provision of Dodd–Frank. Recognizing this policy provides for consistent treatment of employees who recognize misconduct and hope to correct it, even if they take their concerns to their employer rather than the SEC. *Bussing* not only promotes this consistent treatment of whistle-blowers under federal law, but also under state law through the public policy exception to the employment-at-will doctrine. Thus, *Bussing* is an important vehicle through which Congress's acknowledgment of the fundamental importance of whistle-blowers in ferreting out wrongdoing can be actualized throughout the United States.

B. State Whistle-Blower Law Implications

In addition to her claim under Dodd–Frank, Julie Bussing also asserted a Nebraska tort claim for wrongful termination in violation of public policy.[163] In Nebraska, "[u]nless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason."[164] There is, however, a public policy exception to the at-will employment doctrine.[165] Under this exception, an employee can bring a common law tort claim for wrongful discharge when the reason for the firing violates public policy.[166] However, the public policy exception is restricted to cases where a "clear mandate of public policy has been violated, and it should be limited to manageable and clear standards."[167] "In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme."[168]

Because the court found the parties' dispute to be "purely theoretical" at that point in the case, the court assumed that "a federal law can provide the source of public policy for a state tort claim."[169] "Congress has declared that it violates public policy when whistleblowers are fired in retaliation for conduct covered in [the anti-retaliation pro-

163. Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 736 (D. Neb. 2014).
164. Coffey v. Planet Group, Inc., 287 Neb. 834, 844, 845 N.W.2d 255, 263–264 (2014); Trosper v. Bag 'N Save, 273 Neb. 855, 857, 734 N.W.2d 704, 706–707 (2007).
165. *Coffey*, 287 Neb. at 844, 845 N.W.2d at 264.
166. *Id.* at 844, 845 N.W.2d at 264.
167. *Id.*
168. *Id.*
169. Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 736 (D. Neb. 2014).

vision of Dodd–Frank]. The Court cannot alter Congress's expression of public policy. . . ."[170]

Nebraska is not alone in recognizing a public policy exception to the employment-at-will doctrine. In fact, the judiciaries of at least forty-five states have recognized such claims.[171] These states place their own particular limits on what constitutes "public policy" recognizable by the court, for example, Nebraska requires a "clear mandate" of public policy, while others require that the public policy be "clear and compelling," "important and clearly articulated," or "involve a matter of public concern."[172] When these limitations are met, however, the question remains in many states whether those judiciaries accept federal law as the public policy of a state.

> There are three main approaches that courts have taken in determining to what extent federal law can be the basis of a claim for wrongful discharge in violation of public policy: (1) treating federal law the same as state law in evaluating whether it can serve as the state's public policy; (2) requiring the plaintiff to establish some link between federal law and the state's public policy in order to base the claim on federal law; and (3) refusing to allow federal law to be the source of public policy.[173]

While the majority of wrongful discharge claims in violation of public policy have relied on state—not federal—law, *Bussing* shows that Dodd–Frank certainly presents a clear mandate of public policy that can be used consistently in state courts accepting public policy based on federal law.[174]

By doing away with the *Chevron* deference, *Bussing* recognized the public policy and purpose behind Dodd–Frank. In acknowledging that public policy explicitly, the *Bussing* court opens the door to a more consistent protection of whistle-blowers at the state level under the public policy exception to the employment-at-will doctrine. This would result in internal whistle-blowers not only being protected at the federal level, but at the state level as well. Though this result is certainly not possible under the *Asadi* approach, not even the *Chevron*-deference approach is able to provide such consistent relief to internal whistle-blowers at all levels. The *Chevron*-deference approach accepts the premise that the purpose behind the statute is unclear and that protecting internal whistle-blowers is merely a reasonable interpretation of the law. This precedent would not meet the burden in many states that retaliation against a whistle-blower clearly violates public policy. Therefore, not only did *Bussing* correctly address the

170. *Id.* (citing Amen v. Astrue, 284 Neb. 691, 696, 822 N.W.2d 419, 423 (2012)).
171. Nancy Modesitt, *Wrongful Discharge: The Use of Federal Law as a Source of Public Policy*, 8 U. PA. J. LAB. & EMP. L. 623, 623 (2006).
172. *See id.* at 625–626; *Coffey*, 287 Neb. at 844, 845 N.W.2d at 264.
173. Modesitt, *supra* note 171, at 636.
174. For further discussion regarding whistle-blower protection under state laws, see Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975 (2008).

issue, but it opened the door for the most consistent application of Dodd–Frank to not only internal and external whistle-blowers but also to state and federal whistle-blowers as well.

IV. CONCLUSION

The Federal District Court of Nebraska sets an important precedent in recognizing that Congress intended to implement a public policy of protecting whistle-blowers because they have not been adequately protected in the past. The majority of whistle-blowers report internally, either by natural inclination or by statutory requirement. Therefore, in order to adequately incentivize the disclosure of misconduct by private-sector employees, internal whistle-blowers must have a cause of action to seek redress when they are subsequently retaliated against by an employer for making a disclosure. Not only is it counterintuitive to require a double disclosure to both a supervisor as well as the government, the very nature of external reporting does not elicit the retaliatory responses that Dodd–Frank seeks to redress. External whistle-blowers remain anonymous throughout the Dodd–Frank process and are unlikely to be discovered, as they did not speak directly to a supervisor about their concerns.

When courts fail to recognize that it is in line with public policy to protect internal whistle-blowers from retaliation, Dodd–Frank not only ignores these individuals at the federal level, but they are also deprived of protection at the state level. By recognizing this public policy of Dodd–Frank, *Bussing* paves the way for this public policy to be extended into the realm of the states through the public policy exception to the employment-at-will doctrine. This consistent application of the law at all levels further serves Congress's intent to provide protection for whistle-blowers in the private sector. To rule otherwise and disincentivize internal reporting would mean disaster for companies' current internal compliance mechanisms and the ability to correct misconduct before reaching the disastrous level prior to the Great Recession of 2008.