In the
United States Court of Appeals
For the Thirteenth Judicial Circuit

No. 16-0715

SARAH FOSTER,

Plaintiff-Appellant,

v.

SENTINEL MEDIA, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Everton.
No. 16-cv-01435-BLW — **Billy L. Williams**, Judge.

MICHAEL LANGFORD, Clerk of the United States Court of Appeals for the Thirteenth Judicial Circuit, hereby certified that the following original documents were duly filed and constitutes the entire Record on Appeal in this matter:

In the
United States District Court
for the Eastern District of Everton

No. 16-cv-01435-BLW

SARAH FOSTER,

Plaintiff,

v.

SENTINEL MEDIA, INC., *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Billy L. Williams, District Judge

Plaintiff Sarah Foster has moved for partial summary judgment, claiming that she is "whistleblower" under the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* FRCP 56(a). Defendants, Sentinel Media, Inc., *et. al*. ("Sentinel"), object to the motion, and also move for partial summary judgment, claiming that Foster does not qualify as a "whistleblower" under Dodd-Frank. Upon consideration of the parties' respective positions, I grant Foster's motion and deny Sentinel's motion.

I

There is no genuine dispute of material fact with regard to the following factual points.

Sentinel is a multi-faceted, publicly traded media corporation. Sentinel owns several media assets (as well as this court's preferred baseball team). Plaintiff was a financial reporter at *The Everton Sentinel*.

Little Equity Partners, LLC, controlled by its principal, R. Forrest Little ("Little"), conducted a leveraged buyout of Sentinel in 2014. Little Equity disclosed certain information regarding the valuation of the company to shareholders and in SEC filings in conjunction with this transaction. Sentinel later defaulted on transaction-related debt and filed a Chapter 11 bankruptcy.

Although plaintiff had occasional issues with some of her co-workers, she received positive performance reviews and her editor, Karl Woodward, remarked that Foster "is deeply passionate about investigative journalism" and "demands excellence of herself."

Foster testified that, in January 2014, she received a call from a source with information about Little. Foster's source told her that Little was planning on buying Sentinel in a leveraged buyout and details about his strategy for doing so. Foster commenced an investigation of her source's statements. Foster states that, in her investigation, she discovered that the company valuation sent to shareholders and filed with the SEC was excessive. If this is correct, it raises troubling issues under the securities laws.

Foster took this information to Woodward, but Woodward refused to approve plaintiff's story for publication. On March 11, 2014, in connection with the story, Foster met with Sentinel's general counsel and CFO, Karen Crowder. Foster told Crowder what she had learned and asked Crowder to set up a meeting with Little. Crowder denied her request.

Sentinel terminated plaintiff's employment four days later, on March 15, 2014.

II

In March 2016, plaintiff filed this action in bankruptcy court, and it was subsequently transferred here. She claims that her termination violated Everton state law and federal workplace law. Further, she claims that she was a "whistleblower" under the Dodd-Frank Act (the "Act") and therefore protected under the Act's anti-retaliation provisions. See generally 15 U.S.C. § 78u-6(h)(1). The court previously denied Sentinel's motion under FRCP 12(b)(6) to dismiss the complaint.

Plaintiff now asks the court to find as a matter of law that she is a "whistleblower" under the Act.

The Act defines a "whistleblower" in relevant part as an "individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." 15 U.S.C. § 78u-6(a)(6). The Act prohibits retaliation in any form against "whistleblowers" who, *inter alia*, "provid[e] information to the Commission" or "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002" and other securities laws. 15 U.S.C. § 78u-6(h)(1)(A).

There is no clear evidence in the record that plaintiff provided information directly "to" the SEC regarding Little's alleged over-valuation of the company. However, there is no genuine dispute that plaintiff made an internal report, first to Woodward and then to Crowder, regarding the relevant facts. The issue presented by plaintiff's motion is whether her internal report triggered whistleblower protection under the Act.

The SEC is vested with rulemaking authority under the Act. An SEC rule, codified at 17 C.F.R. § 240.21F–2(b)(1), states that the definition of "whistleblower" includes anyone who reports a securities law violation "in a manner described in ... 15 U.S.C. 78u–6(h)(1)(A)[,]" which includes internal, Sarbanes-Oxley reporting. Plaintiff's internal report to her superiors at Sentinel fit the definition of "whistleblower" under this regulation.

Whether the courts should defer to the SEC on this statutory interpretation issue remains an open question in the Thirteenth Judicial Circuit. The majority view favors the employee. *See Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045 (9th Cir. 2017); *Berman v. Neo @Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015). *Contra Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013). I find the majority view persuasive and controlling on the issue before this court.

III

For the foregoing reasons, plaintiff's motion is GRANTED. Defendant's motion is DENIED. The court hereby finds that plaintiff is a "whistleblower" as that term is used in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6(a)(6).

Dated: May 15, 2016

BILLY L. WILLIAMS
United States District Judge

In the
United States District Court
for the Eastern District of Everton

No. 16-cv-01435-BLW

SARAH FOSTER,

Plaintiff,

v.

SENTINEL MEDIA, INC., *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Billy L. Williams, District Judge

Plaintiff Sarah Foster has moved to strike a deposition errata sheet delivered by a witness to a court reporter and/or to reopen that witness's deposition. Defendants, Sentinel Media, Inc., *et. al.* ("Sentinel"), object to the motion. Upon consideration of the parties' respective positions, I deny the motion.

Plaintiff has filed this action for damages claiming wrongful discharge from her employment. Plaintiff was a financial reporter for *The Everton Sentinel.* Defendants own and publish the *Sentinel* and employed plaintiff from 2002 to March 15, 2014.

At issue in the present motion is an errata sheet executed by a deponent, Karl Woodward, who was plaintiff's editor at the *Sentinel.* Wood-

ward sought to change discrete passages of his deposition. Plaintiff moves to strike the errata sheet under FRCP 30(e)(1), and/or to reopen that witness's deposition. Defendants object to the motion.

The court has reviewed the deposition transcript and the errata sheet, which was timely delivered by the deponent to the court reporter under Rule 30(e)(1). Plaintiff claims that the errata sheet impermissibly changes the substance of the deponent's testimony. FRCP 30(e)(1), however, expressly provides that a deponent may make changes "in form or substance" to the deposition transcript. The deponent's changes are expressly authorized by the rule.

Plaintiff's motion is DENIED.

Dated: May 15, 2016

BILLY L. WILLIAMS
United States District Judge

In the
United States Court of Appeals
For the Thirteenth Judicial Circuit

No. 16-0715

SARAH FOSTER,

Plaintiff-Appellant,

v.

SENTINEL MEDIA, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Everton.
No. 16-cv-01435-BLW — **Billy L. Williams**, Judge.

ARGUED OCTOBER 11, 2016 — DECIDED OCTOBER 15, 2016

Before BANKS, *Chief Judge*, and SANDBERG and MADDUX, *Circuit Judges*.

MADDUX, *Circuit Judge*. In this case, we consider what it means to be a "whistleblower" under the Dodd-Frank Wall Street Reform and Consumer Protection Act. We also consider whether a party can supplement a statement given in a deposition with an amendment that contradicts the original statement under Federal Rule of Civil Procedure (FRCP) 30(e).

I

Sentinel Media ("Sentinel") is a multi-faceted, publicly traded media corporation. The company got its start in newspaper publishing. Sentinel once owned a number of media properties including its namesake newspaper, *The Everton Sentinel*, as well as *The N.Y. Herald*, *The Miami Journal*, and *The L.A. Gazette*, WBG-TV, WBG-AM radio, and also Everton's venerable baseball team, the Everton Cougars. At its peak, Sentinel had approximately 18,000 employees; it was valued around $14 billion and its stock price consistently averaged $65 per share.

The availability of free news on the internet has been particularly hard on traditional media industries, and Sentinel, which derived most of its revenue from print media, was not immune from the vicissitudes of the publishing industry. By 2014, through employee-contract buyouts and asset consolidation, Sentinel reduced its workforce to around 10,000 employees and its stock was trading at less than $23 a share. At this point, the company was conservatively valued at around $8 billion—and its controlling shareholders were getting restless.

Sensing opportunity, billionaire investor R. Forrest Little, the primary owner of the investment firm Little Equity Partners, LLC, made a play for control of Sentinel. Little arranged for a leveraged buyout of Sentinel by raising outside capital to be secured by Sentinel's assets. While structuring the transaction, Little obtained several different valuations of Sentinel. He took the highest valuation, $11.3 billion, and proceeded from there. Little Equity invested the first $300 million, and arranged for a cadre of banks and investors to finance the rest. Then, on behalf of the group, Little Equity made a tender offer of $70 per share to Sentinel's stockholders. In March 2014, two main groups of shareholders which together owned 53% of Sentinel's stock, voted to accept the offer, as did a number of additional shareholders. (One imagines they were overjoyed, at the time.) A copy of Little Equity's solicitation to Sentinel's stockholders—the proposed buyout agreement, pamphlets, and projections on continued investment in Sentinel—were jointly submitted to the Securities and Exchange Commis-

sion (SEC) by Little Equity and Sentinel's then-existing management team, which included Sentinel's general counsel and CFO, Karen Crowder.

The buyout closed and was funded in November 2014. The end-result of the transaction proved to be a disaster, and it saddled Sentinel with over $10 billion in debt. In addition, 2014 turned out to be the single worst financial year in the history of the publishing industry. See E. Butler, *2014: Grim for Newspapers, Great for Digital!*, The Everton Sentinel (Feb. 12, 2015). By March 2015, Sentinel, under Little Equity's management, was unable to make interest payments on the buyout, and filed for bankruptcy protection. See 11 U.S.C. § 101 *et seq*.

The buyout and bankruptcy left Sentinel's unsecured creditors—namely, retirees in the Sentinel's pension fund and participants in Sentinel's employee stock ownership plan—holding the proverbial bag. Meanwhile, Little Equity netted some $645 million, in upfront administration fees, for having orchestrated the whole transaction. A reorganization plan was approved and Sentinel subsequently exited bankruptcy protection. See *In re Sentinel Co.*, 470 B.R. 621 (Bankr. D. Ever. 2016).

* * *

From 2002 to March 2014, Sarah Foster was a financial reporter for *The Everton Sentinel*. Foster comes from a long line of journalists. Her mother and father were political correspondents for the *Sentinel* and broke the story of Everton's now-disgraced governor's illegal dealings. Foster's great-grandfather was a well-known muckraker during the days of the penny press, and he reported on the deplorable working conditions immigrants endured in the meat packing plants in Lincoln, Everton's largest city.

Foster's tenure with the *Sentinel* can charitably be described as turbulent. Her coworkers described her as "difficult," and below we highlight a few examples of Foster's difficulties at the *Sentinel*.

When Foster first started at the *Sentinel*, she complained about the "red-tin" coffee in the employee lunchroom. She lobbied to have high

quality coffee imported from Brazil. Foster's one-person crusade consisted of numerous and frequent emails to management and the Board that touted "*the latest* Brazilian coffee technologies and the country's unique topography that produced coffee 'balanced with good body, brightness and flavor.'" (Emphasis in original.) Foster's complaints ultimately fell on deaf ears and she apparently resigned herself to a workplace of coffee mediocrity.

Foster also had a habit of chiding those who gathered to smoke outside the *Sentinel*'s main entrance. She would often waive her hands vigorously through the air as she passed by them, purportedly attempting to part the second-hand smoke, but sometimes delivering a blow to the back of the head of an unsuspecting person. "Sorry!" she would say loudly with a smile. One victim, William Sianis, filed a complaint with human resources about Foster's behavior.

Foster was also known to mumble condescendingly behind people's backs. A favorite target of hers was Maya Brooks, a reporter in the Arts section of the *Sentinel* who had recently received the Pulitzer Prize for poetry. Foster had been a finalist for the Pulitzer Prize in investigative reporting for her story uncovering the financial mismanagement of funds at group homes for developmentally disabled adults, but had lost out to a story by a journalist in Springfield about that state's opioid epidemic. Brooks once heard Foster mumble, "poetry, that's not even real writing, any kindergartner could do it. It's like modern art - a stripe of paint on canvas and everyone oohs and aahs over it. Ridiculous."

In 2012, Foster's article regarding Ally's Organics IPO caused a stir as well. The article detailed the company's opening, including basic information such as the initial stock price and how much the price had risen by the end of the day. However, controversy ensued when the owner, Ally Wentworth, claimed that several quotes attributed to her had been fabricated. Unfortunately, Foster's recording of the interview with Wentworth was accidently erased and the matter seemed to end there.

Also in 2012, Foster wrote a critical letter about the *Sentinel's* endorsement of a candidate in the presidential primaries, highlighting the candidate's lack of experience and lack of knowledge in foreign policy. She specifically pointed out his most recent embarrassment on a national news program in which he was unable to name numerous foreign leaders as well as the capital city of a country that was often in the news. The letter was published by the *Sentinel's* competitor, *The Lincoln Times*. Foster's letter criticized the *Sentinel* for endorsing the candidate, calling those in charge "wimps," and for "kowtowing to special interests." Although numerous other employees publicly expressed disappointment about the endorsement, Foster's critical letter was the most widely disseminated and publicized from a *Sentinel* employee.

Despite the above controversies and Foster's apparent and abundant "quirks," she generally received positive performance reviews. Her editor, Karl Woodward, remarked that Foster "is deeply passionate about investigative journalism" and "demands excellence of herself."

Foster, as part of her beat, covered the Sentinel buyout with great interest. In January 2014, Foster received a call from a source with information about Little. Foster had interviewed Everton's most famous investor, Little, several times over the years. Foster's source told her that Little was planning on buying Sentinel—and by extension *The Everton Sentinel*—in a leveraged buyout. But there was a twist. Little's strategy was to make an offer "so good" to the controlling shareholders that they could not say no—that they would not dispute his valuations and "would cut any nay saying shareholders or management loose."

Foster began to investigate. She scrutinized the pamphlets, documents, and spreadsheets sent to shareholders in connection with the buyout—the same materials submitted to the SEC. Foster determined that the valuations Little used were far too high. (If true, this would arguably constitute securities fraud. See 15 U.S.C. § 78j; 17 C.F.R. 240.10b-5.) Foster took this information to Woodward. He told her that she didn't have enough information yet to write the story.

On March 11, 2014, in connection with the story, Foster met with Sentinel's GC and CFO, Crowder, in Crowder's office. The parties heavily dispute the particulars of Foster's and Crowder's conversation; however, they do agree at least on the following details. Foster shared "[s]ome" of what she had learned about the buyout valuations with Crowder, and Foster asked Crowder to comment. Foster also asked Crowder to help facilitate a meeting with Little. Crowder, in so many words, declined both requests, and Foster stormed out of the room. Five of six witness statements claim that Foster stood in Crowder's office doorway and yelled, "Just wait. The truth will come out. It always does. You had your chance." On March 15, 2014, Foster was terminated.

In 2016, Foster filed suit against Sentinel in the Eastern District of Everton. The case was timely filed in bankruptcy court and transferred to the district court, per 28 U.S.C. § 1412.

In her complaint, Foster alleged that her termination violated Everton state law and federal workplace law. In addition, Foster claimed that she was a "whistleblower" under the Dodd-Frank Act and therefore protected under the Act's anti-retaliation provisions. See generally 15 U.S.C. § 78u-6(h)(1) (discussed below). The district court, for reasons not relevant to this appeal, denied Sentinel's motion to dismiss Foster's complaint.

The parties proceeded to discovery and numerous witnesses were deposed, including Woodward. One issue in this appeal concerns Woodward's deposition over Foster's termination.

During Woodward's deposition, the following colloquy occurred:

> "Q: [Foster's counsel:] Do you know why Ms. Foster was fired?
>
> A: [Woodward:] Basically, she was just too hard to get along with. Many of her co-workers were afraid of her and tended to avoid her. Her personality was so abrasive.

Q: But, you had generally given her positive performance reviews?

A: Yes. Overall, her work was good, she was a good writer - probably even deserved that Pulitzer."

Immediately following this exchange, Sentinel's counsel requested that, pursuant to FRCP 30(e)(1), Woodward be given an opportunity to review the transcript of his deposition. The next month, the court reporter informed Woodward that a transcript of his deposition was available. One week later, Woodward submitted a notarized errata sheet that indicated revisions to his deposition. The revisions at issue are noted below and appear as bolded and underlined:

"[A]: [Woodward]: Basically, she was just too hard to get along with. Many of her co-workers were afraid of her and tended to avoid her. Her personality was so abrasive. **And, the Ally Organics' IPO article. I'm not sure what I thought about the whole episode, but we all, in management, took it very seriously. Everyone felt that journalistic integrity was crucial to the *Sentinel's* reputation. So do I.**

[* * *]

[A]: Yes. Overall, her work was good, she was a good writer - probably deserved that Pulitzer. **But, again, I was also beginning to wonder whether she had fabricated those quotes. It was definitely an issue.**"

In his affidavit, Woodward explained that the reason for his revisions was due to a recent conversation he had with Crowder. In their conversation, Crowder reminded him of a meeting management had held to address the fabrication allegations against Foster. Woodward had forgotten about the meeting, which he attributed to his preoccupation with his spouse's recovery from knee surgery.

The district court, over Foster's objection, deemed the changes permissible under FRCP 30(e) and the court denied Foster's motion to reopen the deposition and to strike the deposition errata sheet. The parties also filed cross-motions for (partial) summary judgment on Foster's anti-retaliation claim and whether she qualified as a whistleblower under the Dodd-Frank Act. The district court determined that Foster *did* qualify as a whistleblower even though she reported the securities violation "up" Sentinel's corporate ladder and not "out"—*i.e.* to the SEC. At the parties' request, the district court certified its discovery order and its partial grant of summary judgment for interlocutory appeal. 28 U.S.C. § 1292(b). Foster appeals from the district court's discovery order; Sentinel cross-appeals from the partial grant of summary judgment. We affirm the former and reverse the latter.

II

A. The Dodd-Frank Act

We address first the grant of summary judgment in Foster's favor on her anti-retaliation claim. Foster claims she's a protected whistleblower under federal law because she reported a potential violation of securities law (securities fraud (See 15 U.S.C. § 78j; 17 C.F.R. 240.10b-5) to her employer. We review *de novo* both the district court's construction of a statute as well as its grant of summary judgment. *Evert v. Navratilova*, 866 F.3d 134, 136 (13th Cir. 2017). The Dodd-Frank Act defines a "whistleblower" as an "individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." 15 U.S.C. § 78u-6(a)(6). The Act also prohibits retaliation in any form against "whistleblowers" who, *inter alia*, "provid[e] information to the Commission" or "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002" and other securities laws. 15 U.S.C. § 78u-6(h)(1)(A).

In the district court, Foster conceded that she did not provide information *directly* "to the Commission" before she was terminated. *Cf.* 15 U.S.C. § 78u-6(h)(1)(A). Instead, she asserts that she made an "internal

report"—first to Woodward, then to Crowder—which triggered the Sarbanes-Oxley Act, which in turn (she argues) activated the whistleblower protections under the Dodd-Frank Act. In 2011, the SEC issued interpretive guidance that would appear to embrace Foster's position. According to the SEC, "[f]or purposes of the anti-retaliation protections afforded by Section [78u-6(h)(1)] * * * you are a whistleblower if * * * [you provide] information in a manner described in Section [78u-6(h)(1)(A)]" which includes an internal report of a potential securities violation under the Sarbanes-Oxley Act. See 17 C.F.R. 240.21F-2(b)(1)(ii). The district court and our dissenting colleague have accepted this interpretation. They believe that Foster's report of potential securities fraud to Crowder, at the very least, and to Woodward as well, were enough to take advantage of Dodd-Frank's generous definition of what it means to be a whistleblower—to say nothing of Dodd-Frank's charitable statute of limitations for anti-retaliation claims and comparably munificent provision for damages. *Compare* 15 U.S.C. § 78u-6(h)(1) *with* 18 U.S.C. § 1514A(c). At least two circuits (by which we mean two divided panels in two different circuits) adhere to this position. See *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045 (9th Cir. 2017); *Berman v. Neo @Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015). Those circuits give *Chevron* deference to the SEC's rule. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The district court relied on the Ninth and Second Circuit's split-panel decisions when it found in Foster's favor.

However, an undivided panel of another circuit and other esteemed jurists have pointed out that there is *no* ambiguity in the Dodd-Frank Act's definition of a whistleblower, and therefore that there is no need to defer to the SEC's "interpretive guidance." See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013); see also *Somers*, 850 F.3d at 1050 (Owens, J., dissenting); *Berman*, 801 F.3d at 155 (Jacobs, J., dissenting). We adopt this approach, as it is ineluctably correct. Section 78u-6(a)(6) defines a "whistleblower" as an individual who "provides * * * information relating to a violation of the securities laws *to the Commission*" (15 U.S.C. § 78u-6(a)(6) (emphasis added))—full stop. There is nothing ambiguous about that definition that requires us to consider the SEC's interpretation;

Congress has already spoken. "[T]o the Commission" *means* "to the Commission" and not to anyone else. See generally *Verble v. Morgan Stanley Smith Barney, LLC*, 676 F. App'x 421, 426 (6th Cir. 2017) (implying that alleged cooperation with FBI might not state whistleblower/anti-retaliation claim under Dodd-Frank.) Thus, to the extent Foster concedes that, before her termination, she did not report possible securities fraud directly "to the [SEC]", she necessarily also concedes that she does not qualify as a whistleblower for the purposes of Dodd-Frank's anti-retaliation provision.

That, as they say, is that. Or at least it should be. But our dissenting colleague would have us go on to consider whether our interpretation undercuts the statute's primary purpose, or is otherwise supported by legislative history. We don't need to take that step in the least. It is true that we defer to an agency's reasonable interpretation of a statute when it issues regulations in the first instance, and that the agency is entitled to further deference when it adopts a reasonable interpretation of legislative enactments. See *Chevron*, 467 U.S. at 843-45; *cf. Auer v. Robbins*, 519 U.S. 452 (1997) (deferring to agency's interpretation of its own regulations). But an agency cannot, under the guise of interpreting a statute or regulation, create *de facto* new law (*Fed. Ex. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008))—and that is precisely what the SEC is doing here when it ventures a definition of whistleblower that Congress, when it passed the Dodd-Frank Act, did *not* endorse. Put differently, the SEC isn't merely interpreting the law; it's amending it.

And why would the SEC do all this? Its rationale appears to be that lowering section 78u-6(h)(1)'s whistleblower-bar will encourage more securities-fraud reporting. But does that really make for good policy? In fact, this is an excellent case *against* the SEC's point because, had Foster reported her securities-fraud suspicions *to the Commission*, as section 78u-6(h)(1) plainly requires, then the SEC might have been able to avert Little Equity's disastrous buyout of Sentinel altogether. Instead, Foster sat on her hands; she was not enrolled in any of the company's deferred compensation plans and, as a higher-profile reporter, likely had some sense of job security. So, Foster, was apparently content to let the company crum-

ble as long as she remained employed. Maybe she wanted the story all to herself. Now, here she is, some three years later to stick her former employer (now reorganized and under new management) with the burdensome costs of additional federal litigation or, perhaps cynically, to extract a settlement. Is that what Congress intended? We think not. And in our opinion, the only thing more perverse than Foster's suggestion that she ought to be rewarded for being dilatory and opportunistic is the SEC's tacit endorsement of her position.

In addition, we find the *Berman* and *Somers* decisions infirm. Like the district court, the Second and Ninth Circuits rely almost entirely on the United States Supreme Court's decision in *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015). Much ink has been spilled on account of *King* and we have no need to add to that accounting here. However, we respectfully suggest that lower courts cabin the decision in *King* to its unique facts—namely, the fact that it is a decision of the United States Supreme Court.

Our dissenting colleague accuses us of collapsing *Chevron*'s two-step analysis, but we plainly are not. Again, section 78u-6(h)(1) is *not* ambiguous. We lament that other circuits, the district judge, and the dissent are so solicitous of an agency's often-shifting interpretations of duly enacted federal law. Interpreting statutes is *our* job under Article III of the Constitution. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167 (1803). "In this way, *Chevron* seems no less"—and often times, no more—"than a judge-made doctrine for the abdication of the judicial duty." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151-52 (10th Cir. 2016) (Gorsuch, J., concurring). What is at stake is no less than the integrity of the federal judicial system and, with it, public recognition of the rule of law; control over the levers of our democracy. Sadly, perhaps by sheer repetition, whole swaths of the federal judiciary have been sedated by rote dosing with *Chevron*'s tiresome platitudes. That is because "[f]or decades, and for no good reason, we have been giving agencies the authority to say what" the law is "under the harmless-sounding banner of defer[ring] to an agency's interpretation" of the law. *Decker v. Northwest. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part) (internal quota-

tion marks omitted). And just look how blurry the lines have become. After all, *Chevron* does *not* require that we yield to an agency's understanding of an *unambiguous* statute, yet others clearly think that it does.

In short, it is time for the federal judiciary to wake up. In the meantime, only the Supreme Court can further clarify *Chevron*; and until it does, we must apply *Chevron* felicitously, which is to say, we do not apply it today. Instead, here, we "follow the text even if doing so will supposedly undercut a basic objective of the statute." *Baker Botts LLP v. ASARCO LLC,* 135 S.Ct. 2158, 2169 (2015) (internal quotation marks omitted); *see also id.* (Sotomayor, J., concurring in part and concurring in the judgment) ("Given the clarity of the statutory language, it would be improper to allow policy considerations to undermine the American Rule in this case"). And, since we are following the text, we have no need to look beyond the four corners of the statute at hand. The statute's text dictates that Foster was not a whistleblower under the Dodd-Frank Act. Accordingly, we reverse summary judgment in Foster's favor. We remand this case to the district court for further proceedings and to reconsider Sentinel's motion for summary judgment in light of our finding.

B. FRCP 30(e)

As the issue may crop up again on remand, we address Foster's claims concerning FRCP 30(e). Foster alleges that the district court erred when it allowed Woodward to revise the transcript of his deposition using a timely-submitted errata sheet, and when it denied her request to reopen the deposition. On appeal, Foster contends the errata sheet impermissibly altered the substance of Woodward's deposition testimony. More specifically, Foster submits that Sentinel, through the altered testimony, sought to bolster its theory of the case: that Foster was terminated due to her work performance, and not her internal reporting or any act as a would-be whistleblower.

We review *de novo* the district court's interpretation of the Federal Rules of Civil Procedure, and its ultimate decision to permit an amendment to a deposition for an abuse of discretion. *Connors v. Lendl, LLC*, 766

F.3d 680, 688 (13th Cir. 2014); *Everton ex rel. Andrew v. Kwalwasar*, 867 F.3d 302, 351 (13th Cir. 2010).

FRCP 30(e) provides that a deponent or a party may, during the course of a deposition, request that the deponent have an opportunity to review the transcript of his or her deposition and, if necessary, submit changes thereto. The rule provides clear procedural directions for changing a deposition transcript, but no guidance as to what changes are permissible. The rule states that "if there are changes in form or substance, * * * [the deponent must] sign a statement listing the changes and the reasons for making them." FRCP 30(e)(2).

To what extent a deponent may substantively change a deposition transcript after review is a question of first impression in this circuit. Other circuits, however, are divided on this issue. Some courts have held that FRCP 30(e) places no restriction on changes. See, *e.g.*, *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 103 (2d Cir. 1997). According to these courts, changes *must* be permitted even if they contradict the original answers or the reasons for the changes are unconvincing. Other courts construe the rule more narrowly, and permit substantive changes only to the extent the proposed alteration comports with the deponent's testimony. See, *e.g.*, *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000). Still other courts have adopted a case-specific approach that permits contradictory errata if sufficiently persuasive reasons are given. See, *e.g.*, *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 270 (3d Cir. 2010).

We determine that FRCP 30(e) places no limitation on the type of changes that may be made by a witness on review of his or her deposition transcript. By its plain language, the rule contemplates that "changes in form *or substance*" are permissible. Therefore, substantive changes *are* permitted under FRCP 30(e). Further, reading restrictions into the rule would appear to be contrary to its aims. Trials are a search for the truth, and the purpose of pretrial discovery is to prepare for trial. After all, if a given deposition amendment clarifies an earlier answer, or provides additional context, and is, in fact, "the truth"—and at least some amend-

ments assuredly are—then the viability of the trial process will only be thwarted by its exclusion.

To be clear, allowing changes to depositions does not expunge earlier testimony from the record, nor does it bar opposing parties from cross-examining and impeaching a witness at trial based upon his or her contradictory statements. See *Podell*, 112 F.3d at 103. However, the calculus of whether, and to what extent, a deposition should be changed belongs first to the parties and their witnesses, and then the court. It is for the district court, in the first instance, to examine the substance of proposed changes and the sufficiency, reasonableness, or legitimacy of the reasons given. No additional safeguard is appropriate or necessary.

Contrary to our dissenting colleague, we do not believe that our holding provides deponents with a license to perjure, nor will it reduce depositions to a form of written discovery and endless supplementation. We note that a party may not simply retool sworn deposition testimony to his or her satisfaction, particularly with the objective of forcing or thwarting summary judgment. See, *e.g.*, *Trout v. FirstEnergy Generation Corp.*, 339 Fed.Appx. 560, 565-66 (6th Cir. 2009). If that appears to be the situation, the court has discretion to order the depositions reopened so that the revised answers may be examined and the reasons for the corrections explored. See *Pina v. Children's Place*, 740 F.3d 785, 792 (1st Cir. 2014).

In this case, we determine that the district court properly applied FRCP 30(e). We further determine that the court did not abuse its discretion either when it allowed Woodward to revise his deposition or when it declined to reopen his deposition at Foster's request. The district court accepted Woodward's explanation for his amendments as credible—namely, that at the time of the deposition he was under stress due to his spouse's surgical recovery—and we will not substitute our assessment for that of the district judge who evaluated the evidence.

C. Conclusion

Because this opinion places this circuit in conflict with two lines of decisions from other circuits, it was circulated before release to all judges in active service to see whether a majority of the judges wanted to rehear the case *en banc*. See 13th Circuit Rule 40(e). A majority did not vote to rehear *en banc*. Therefore, the judgment of the circuit court is

AFFIRMED in part, REVERSED in part, and REMANDED.

BANKS, *Chief Judge*, dissenting. This case presents two important legal issues. In resolving those issues, my colleagues have leapt errantly rather than having looked carefully. I would affirm summary judgment because Foster is a whistleblower and I would reverse the order granting Woodward leave to amend his statements.

With respect to the Dodd-Frank Act and *Chevron*, I fear my colleagues have missed both the forest and the trees. A number of policy considerations animate *Chevron* deference. Among them is the notion that, given the vastness of the federal government's regulatory needs, executive agencies *assist* Congress in fulfilling its Article I mission. In other words, Congress, by passing open-ended and vague statutes, is granting *its* discretionary power to the agencies to fill in the statutory gaps. Congress has several compelling reasons for doing so, not the least of which is the sheer degree of institutional competency that resides in career executive officials. It is not a stretch to say that agencies are often more knowledgeable, and more competent than the courts or Congress when carving out the substantive law in their field. Moreover, there is an acute notion of political accountability and expediency—that agencies, as executive bodies, ultimately headed by the President of the United States, can be held politically accountable for their actions and interpretations. But the most compelling reason of all is simple efficiency. Numerous, subject-matter specialized agencies can more efficiently promulgate the massive amount of interpretation required to maintain the modern regulatory state—found in the Code of Federal Regulations and other places—than two houses of Congress or Thirteen Federal Circuits can. These are the foundations on which *Chevron* deference is built. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

These principles provide the heft in *Chevron*'s two-step analytical process. And in my view, *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045 (9th Cir. 2017), and *Berman v. Neo @Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), give the SEC the *Chevron* deference it rightly deserves in cases such as the one before us. I would note for my colleagues that the *same* Congress that passed the supposedly crystal-clear definition of "whistleblower" *also* said the following in the very same statute:

> **"(j) Rulemaking authority**
>
> The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section *consistent with the purposes of this section*." 15 U.S.C. § 78u-6(j) (emphasis added).

Thus, Congress, the same body that enacted the Dodd-Frank Act, also gave near plenary power to the SEC, the chief enforcement arm for federal securities violations, to issue rules and regulations consistent with the Act's purpose. Consequently, the SEC used its rulemaking authority to expand on the Act's definition of a whistleblower. The question the majority should be asking isn't whether Congress *could* delegate rulemaking authority to the SEC in this manner. (Of course it can. See, *e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, *n. 16 (1983) (noting that rulemaking may resemble, but emphatically is not the same, as "lawmaking" for it can be revoked at any time).) Rather, the question the majority should be asking—and the only question that matters here—is whether the rule the SEC made, 17 C.F.R. § 240.21F–2(b)(1), is "consistent with the purposes of [Dodd-Frank's anti-retaliation provision,]" 15 U.S.C. § 78u-6. Undoubtedly, it is.

I agree with those circuits that find both that the statute ambiguous and further that the SEC's rule is consistent with the Act's purposes. The SEC's rule, 17 C.F.R. § 240.21F–2(b)(1), clearly states that the definition of "whistleblower" includes anyone who reports a securities law violation "in a manner described in * * * 15 U.S.C. 78u–6(h)(1)(A)[,]" which includes internal, Sarbanes-Oxley reporting. And, generally, a Sarbanes-Oxley report must be made internally *first*, before it can be made externally, *i.e.*, to the Commission. See generally 15 U.S.C. § 78j-1(b). Thus, it is plain as day, to me at least, that Foster, because she reported "up," consistent with the Dodd-Frank Act, is a *bona fide* whistleblower, protected by Act's anti-retaliation provisions.

I do not see doom and gloom (or symptoms of a somnambulant judiciary) that would follow from our otherwise routine deference to executive expertise. I would note that our deference—both the rule of and the

purpose behind *Chevron*—is practically a given in the grand, imperfect compromise of legislating. It is not that executive officials are somehow, with mere rulemaking authority, lying in wait to seize the prize of judicial or legislative power. Far from it. Rather, our circuit, with its decision today, has jammed a wrench in the otherwise smooth-running cogs of the federal regulatory state.

I must also part company with the majority when it comes to amending deposition transcripts under FRCP 30(e). In the district court, Sentinel sought to revise Woodward's deposition testimony after he was deposed. The court, over Foster's objection, accepted those revisions. I would find that the trial court's allowance of the revisions to Woodward's deposition testimony was error. The rules allow a deponent, within 30 days of notification that the transcript or recording of his deposition is available for review, to review that transcript or recording. FRCP 30(e)(1)(A). Uncontroversial enough. It is what happens next that is the subject of the parties' dispute. Upon review of the transcript, the rule allows the deponent, "if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them." FRCP 30(e)(1)(B).

The majority holds that Rule 30(e) places "no limitations" on a deponent's desire to make changes to his or her deposition transcript by submitting an errata sheet. Yet, my colleagues nonetheless caution that "a party may not re-tailor sworn deposition testimony to his or her satisfaction * * *." This sounds suspiciously like a limitation. So, which is it? Those bound by the court's decision today, myself included, are left to wonder. Finding no discernible standard in the approach adopted by the majority, I would instead conclude that Rule 30(e) does not permit freewheeling revisions to deposition testimony and adopt the approach of courts in the Third Circuit allowing substantive corrections only in the most compelling circumstances. In my view those circumstances are not present here. I respectfully dissent.

Rule 30(e) allows for "changes in form or substance" to deposition testimony so long as the signed statement listing those changes is submitted within 30 days of being notified that the transcript or recording of the

deposition is available. FRCP 30(e)(1)(B). As the majority notes, our review of the district court's construction of this rule is *de novo*.

The majority has set itself adrift because it does not moor its holding to interpretive first principles. We interpret the Federal Rules of Civil Procedure using the same maxims as any other statute and, as such, our primary task is to give the text of the rule its plain meaning. "The Supreme Court and this Court have repeatedly held that the Federal Rules of Civil Procedure, like any other statute, should be given their plain meaning." *Berckeley I*, 259 F.3d at 142 n. 7 (citing *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540, 111 S.Ct. 922, 928, 112 L.Ed.2d 1140 (1991); *Elliot v. Archdiocese of New York*, 682 F.3d 213, 225 (3d Cir. 2012) (relying, in part, on *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540 (1991). In fact, where the meaning of the text is plain, applying that meaning is our *only* task. *Elliot*, 682 F.3d at 225.

The text we are asked to interpret reads that, upon review of the deposition transcript, "the deponent must be allowed…if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them." FRCP(e)(1)(B). Converting the rule to a less linguistically obtuse if-then statement, it would read: '*if* there are changes in form or substance, *then* the deponent must be allowed to sign a statement listing the changes and the reasons for making them.' The majority isolates the antecedent (if) phrase—"if there are changes in form or substance"—and concludes that, because the word "substance" is included, the rule must mean any and all substantive changes. However, the majority does not account for the consequent (then) phrase: "the deponent must be allowed…to sign a statement listing the changes *and the reasons for making them*." FRCP(e)(1)(B) (emphasis added). The plain text of the rule instructs that deposition errata must be submitted with reasons justifying their submission.

The logical corollary to this part of the rule is obvious: the reasons given for submitting errata must be *sufficiently persuasive*. Now, to be sure, the rule does not appear to contain any requirement that the reason given must be of a certain quality. But, if the rule does not require at least some

minimum threshold for the persuasiveness of the reason offered by the deponent, then there is no point in requiring the party to submit its reasons at all. Put another way, if the party could submit deposition errata for *any* reason, then requiring that party to detail those reasons is a hollow exercise indeed. We should not read Rule 30(e), just as we should not read statutes, in a way that renders portions of its text superfluous. *Cf. Kaymark v. Bank of America, N.A.*, 783 F.3d 168, 177 (3d Cir. 2015) ("courts should disfavor interpretations of statutes that render language superfluous."). I would hold that the plain language of the rule requires a deponent to offer not only reasons, but sufficient reasons, for the submission of his errata sheet.

It is here, however, that the text of the rule reaches the limits of its utility. While we can follow language and logic to the conclusion that the rule requires the reasons supporting the submission of errata to meet some threshold quality, we are still left with the following question unanswered by the rule's text: which reasons are good enough? The answer, we shall find, lies in the purpose of Rule 30(e).

The most important purpose of Rule 30(e) is to account for the mistakes of the court reporter. *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 n. 5 (10th Cir. 2002) ("The purpose of Rule 30(e) is obvious. Should the reporter make a substantive error, i.e., he reported 'yes' but I said 'no,' or a formal error, i.e., he reported the name to be 'Lawrence Smith' but the proper name is 'Laurence Smith,' then corrections by the deponent would be in order."). Furthermore, Rule 30(e) undoubtedly provides an important safeguard for deponents themselves. Depositions are not always (and perhaps rarely are) stress-free affairs. A witness could easily fluster himself into confusion or forgetfulness, or misspeak on an issue of importance when he indeed meant something else. *See EBC, Inc.*, 618 F.3d at 268.

With these purposes in mind, the Third Circuit provided useful factors that can offer district courts some guidance regarding the propriety of allowing submissions of errata, including: (1) the care with which the witness was questioned at the deposition, (2) whether the deponent had

access to relevant information at the time of the deposition, (3) the importance of the question on which the witness seeks to contradict herself, and of course, (4) the persuasiveness of the reason ultimately proffered for the change. *EBC, Inc.*, 618 F.3d at 269. I would add to this list a fifth factor: whether the deponent claims that it was the court reporter, and not him, who made the purported error. A careful examination of the reasons that Woodward offered in this case show that acceptance of the errata would frustrate the purposes of Rule 30(e).

I would note that Sentinel is fortunate that the majority has eschewed the Third Circuit's approach for, if they had adopted it, I suspect Sentinel would be out of luck. We review the district court's application of Rule 30(e) for an abuse of discretion, and applying the approach followed in the Third Circuit, I would find that the District Court abused its discretion here. Turning to the first, and in the opinion of the Tenth Circuit, most obvious factor, Sentinel has not even ventured a claim that its errata submission for Woodward's testimony was done to correct a court reporting error. In fact, the *only* reason proffered was that Woodward had forgotten about a meeting he had attended at which "the fabrication allegations against Foster" had been discussed.

Any of the remaining factors are similarly unmet. There is nothing in the record to suggest that Woodward's deposition questioning was careless. Woodward was pointedly questioned about the reason for Foster's firing and made no mention of the fabrication allegations. There is similarly no indication that Woodward did not have the relevant information at the time of the deposition. In fact, by all accounts, the meeting at which Foster's alleged fabrication had been discussed took place well in advance of the deposition. Next, the question on which Woodward contradicted himself was of crucial importance to the central question of the lawsuit: was there a legitimate basis for Foster's firing? Woodward's revised answers constitute the only merits-based justification for dismissing Foster. Even under the majority's approach, this should certainly count as an attempt to "re-tailor sworn deposition testimony to [Sentinel's] satisfaction."

Finally, I am simply not persuaded by the reason that Woodward proffers. Lapses in memory are regrettable any time a witness is giving testimony, and the outside stressor Woodward references (his spouse's recovery from surgery) no doubt suggests that Woodward's memory lapse may be legitimate and raised in good faith. But, "I forgot" would likely not be of any consolation to a jury and, in my view, cannot be the basis for seeking to amend sworn testimony. An approach that allows changes like the one Sentinel submitted for Woodward's testimony in this case gives deponents a perverse incentive to be vague or withholding during their deposition knowing that they can tailor their answers to better fit their theory once discovery has progressed further. This cannot be.

I certainly sympathize with my colleagues' temptation to allow permissive amendments to deposition testimony. Suit-sinking errors made by inattentive or forgetful deponents are undoubtedly a reality. But, an approach that requires a party to attempt to contour its argument to an ever-shifting landscape of facts is manifestly unfair.[12] Only in the most compelling circumstances should we permit the submission of deposition errata. This case does not present us with such circumstances and I must, therefore, respectfully dissent.

---

[1] While I find fault in the majority's truncated analysis of the text of the rule, the circuits that adopt a hybrid approach, it seems to me, fare far worse in that they render Rule 30(e) superfluous in its entirety. In the Seventh Circuit, for example, the court has noted that, while "questionable," Rule 30(e) undoubtedly allows a deponent "to change his deposition from what he said to what he meant." *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000). The Seventh Circuit appears to favor the majority's approach in this case, but offers two safeguards: (1) the original transcript is retained for later cross-examination in front of the fact finder, and (2) the traditional rule that an affidavit which purports to change the substance of a transcript "is impermissible unless it can plausibly be represented as the correction of an error in transcription***." *Thorn*, 207 F.3d at 389. I fail to see what remains of Rule 30(e) where either prophylactic is invoked. If the first, the deponent receives no benefit of his substantive change; and, if the second, he has not actually made a substantive change at all.

[2] Neither am I persuaded by the approach adopted by the Sixth Circuit, which would allow only transcription errors to be corrected by the submission of errata. This approach need not delay us long because it is clearly contrary to the explicit text of Rule 30(e) allowing substantive changes.

In the
Supreme Court of the United States

No. 16-0715

SARAH FOSTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 16-cv-01435 (BLW)
	)	Judge
SENTINEL MEDIA, INC., *et. al.*,	)	Billy L. Williams
	)	
Respondents.	)	

Certiorari to the United States Court of Appeals
for the Thirteenth Judicial Circuit.

December 1, 2016

The petition for a writ of certiorari is GRANTED.

The parties are directed to restrict their briefing and argument to the following issues (and any subsidiary issues):

1. Whether an individual is a "whistleblower" under the Dodd-Frank Wall Street Reform and Consumer Protection Act when the violation is reported internally rather than to the Securities and Exchange Commission; and

2. Whether a party can supplement a statement given in a deposition with an amendment that contradicts the original statement under Federal Rule of Civil Procedure 30(e).

A true Copy:

Teste:

_____

Clerk, United States Supreme Court