

## Supreme Court Set to Decide Whether Dodd-Frank Protects Internal Whistleblowers

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July 18, 2017

On June 26, 2017, the U.S. Supreme Court agreed to review whether the Dodd-Frank Act's whistleblower anti-retaliation provisions protect employees who only complain internally to their employer, but do not complain directly to the U.S. Securities and Exchange Commission. In doing so, the Court may resolve a more than year old split among the circuit courts over what actions an employee must take in order to be considered a "whistleblower" for the purposes of Dodd-Frank's whistleblower protections.

### Statutory Background

Section 21F of Dodd-Frank establishes an incentive program for individuals who provide information to the SEC resulting in successful enforcement actions. Subsection 21F(a)(6) defines "Whistleblower" as an individual who provides information relating to a violation of securities laws to the SEC.

(i) Section 21F(h)(1)(A) also protects Whistleblowers from employment retaliation. Specifically, it prohibits retaliation against whistleblowers who: (i) provide information to the SEC; (ii) initiate, testify, or assist in an investigation, judicial, or administrative action of the SEC based on such information; or (iii) make disclosures required or protected under certain federal laws, rules and regulations including the Sarbanes-Oxley Act ("SOX").

### *Digital Realty Trust v. Somers*

Paul Somers worked for Digital Realty Trust, a real estate investment trust specializing in properties for data centers, until the company terminated him. He later sued Digital Realty Trust, alleging that the company retaliated against him in violation of Dodd-Frank's anti-retaliation provision by terminating him for making internal complaints about alleged SOX violations. The company moved to dismiss his claims given Somers' failure to report his complaint directly to the SEC, as Dodd-Frank's definition of "whistleblower" requires. In May 2015, the federal district court denied the company's motion to dismiss, and, in March 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed, finding that Dodd-Frank's anti-retaliation provision "unambiguously and expressly protects" whistleblowers of both types: those who report matters to the SEC and those who only make internal reports to their employer. *Digital Realty Trust, Inc. v. Somers*, 850 F.3d 1045 (9th Cir. 2017), *cert. granted* (U.S. June 26, 2017) (No. 16-1276).

### Resolving a Circuit Split

Prior to *Digital Realty Trust*, the circuit courts were already split as to whether Dodd-Frank protects internal whistleblowers. In 2015, the Second Circuit held that the retaliation provision is ambiguous and that courts must, therefore, defer to the SEC's internal guidance, which broadly states the anti-retaliation provision applies to all individuals, regardless of whether they qualified for a whistleblower award pursuant to the SEC's incentive program. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015). By contrast, in 2013, a Fifth Circuit panel unanimously held that the statute was unambiguous and as such, only those who report to the SEC are statutorily-protected whistleblowers. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013). The Ninth Circuit's recent decision, therefore, widened the already existing circuit split, which likely influenced the Supreme Court's grant of *certiorari*.

Note: Jackson Lewis P.C. filed an *amicus curiae* brief with the United States Supreme Court in support of Digital Realty's petition for a *writ of certiorari*.

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