Legal Update Article

U.S. Supreme Court Narrows Dodd-Frank Act Whistleblower Protections

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February 22, 2018

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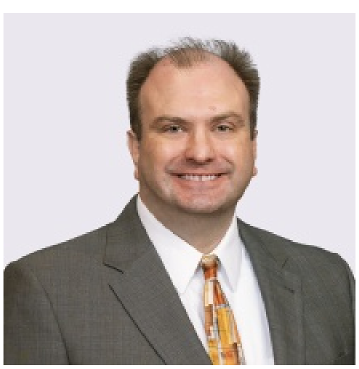

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The anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 protects only employees who complain directly to the Securities and Exchange Commission (SEC), the U.S. Supreme Court has held in a unanimous decision. *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (Feb. 21, 2018).

The Court found that Dodd-Frank's protections were narrower than those afforded under the Sarbanes-Oxley Act of 2002 (SOX), which protects both internal and external whistleblowers.

The decision resolves a long-standing circuit split about whether Dodd-Frank protects internal whistleblowers. It also makes clear that employees who want to sue their publicly-traded employers for retaliation under Dodd-Frank must first report possible securities violations to the SEC.

Statutory Background

Section 21F of Dodd-Frank establishes an incentive program for individuals who provide information to the SEC that results 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.

However, the anti-retaliation Dodd-Frank provision at Section 21F(h)(1)(A) protects whistleblowers if they:

1. provide information to the SEC;
2. initiate, testify, or assist in an investigation, judicial, or administrative action of the SEC based on such information; or
3. make disclosures required or protected under certain federal laws, rules and regulations including SOX.

Factual Background

The plaintiff, Paul Somers, worked for Digital Realty Trust, a real estate investment trust specializing in properties for data centers, until the company terminated him.

Subsequently, he sued Digital Realty Trust, alleging the company retaliated against him in violation of Dodd-Frank's anti-retaliation provision by terminating him for making internal complaints about alleged securities violations. The company moved to dismiss his claims, arguing Somers had not reported 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.

In March 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal. The Ninth Circuit found that Dodd-Frank's anti-retaliation provision "unambiguously and expressly protects" whistleblowers of both types: those who report matters to the

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SEC and those who only make internal reports to their employer. *Digital Realty Trust, Inc. v. Somers,* 850 F.3d 1045 (9th Cir. 2017).

The Ninth Circuit held that applying the definition of "whistleblower" under Section 21F(a)(6) to the anti-retaliation provision encompassed in Section 21F(h)(1)(A) would improperly narrow protections for an individual who made "disclosures required or protected under certain federal laws, rules and regulations, including SOX" and protect only whistleblowers who reported both internally and to the SEC. According to the Ninth Circuit, because such "dual reporting" was unlikely to occur, Dodd-Frank should be read to protect all employees who made such disclosures, whether or not the disclosures are made to the SEC.

Supreme Court's Decision

In a decision written by Justice Ruth Bader Ginsburg, the Supreme Court reversed the Ninth Circuit. The Court held that a plain reading of Dodd-Frank's definition of "whistleblower" in conjunction with its anti-retaliation provision, as well as the intent of Congress in enacting the statute, cut against the Ninth Circuit's expansive reasoning.

First, the Court found that the definition of "whistleblower" under Section 21F(a)(6) "describes *who* is eligible for protection" from retaliation, *i.e.,* someone who "provides pertinent information 'to the Commission,'" and that the definition applies throughout the statute.

Second, the Court found that the three clauses in Section 21F(h)(1)(A) dictate what *conduct,* when engaged in by the whistleblower, is shielded from employment discrimination.

The Court therefore held that individuals not meeting the threshold requirement of providing pertinent information to the SEC cannot avail themselves of Dodd-Frank's anti-retaliation protections. Such a requirement is by statutory design, the Court noted. The Court stressed that Congress enacted Dodd-Frank "to motivate people who know of securities law violations to *tell the SEC,"* and, in connection with this purpose, Congress granted such individuals "immediate access to federal court, a generous statute of limitations … and the opportunity to recover double backpay." The Court, however, found that the reason for such incentives was to effectuate Dodd-Frank's narrow objective of motivating individuals to "tell the SEC," and not (as with SOX) to "disturb the 'corporate code of silence'" and embolden employees to report fraudulent behavior "not only to the proper authorities … but even internally."

The Court concluded that, given the unambiguous definition of whistleblower, because Somers failed to provide information to the SEC prior to his termination, he did not qualify as a "whistleblower" at the time of the alleged retaliation under Dodd-Frank.

Takeaways

Somers provides publicly-traded companies needed guidance on Dodd-Frank's anti-retaliation provision. It also clarifies the risks and potential avenues of redress for employees who complain both internally and externally about perceived securities violations.

An effective corporate governance program that includes codes of conduct, employee reporting mechanisms (whistleblower hotlines), and employee awareness and training programs remains a key component for addressing employee concerns and lowering the risk of employment claims. Please contact a Jackson Lewis attorney if you have any questions about *Somers,* the anti-retaliation provision of Dodd-Frank, or any other related legal development.

Jackson Lewis attorneys Collin O'Connor Udell, Richard Cino, and Joseph Toris filed an amicus brief at the certiorari stage and at the merits stage in support of Petitioner Digital Realty Trust, Inc.