

Supreme Court Rules that the Dodd-Frank Act's Whistleblower Protections Apply Only to Individuals Who Report to the SEC

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For several years, courts have disagreed on whether the anti-retaliation protections for “whistleblowers” under the Dodd-Frank Wall Street Reform and Consumer Protection Act are limited to individuals who have actually reported information directly to the Securities & Exchange Commission (the Commission). On February 21, 2018, the Supreme Court resolved that disagreement. In *Digital Realty Trust, Inc. v. Somers*, the Court confirmed that Dodd-Frank’s “whistleblower” protections are, in fact, available only to individuals who have actually disclosed information to the Commission.

Dodd-Frank defines the term “whistleblower” to include anyone who discloses a “violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. § 78u-6(a)(6) (emphasis added). In the same section, however, Dodd-Frank also prohibits an employer from discharging a whistleblower who makes “disclosures that are required or protected under the Sarbanes-Oxley Act of 2002.” 15 U.S.C. § 78u-6(h)(1)(A) (iii). Sarbanes-Oxley’s own internal “whistleblower” provision protects anyone who reports misconduct to the Commission, or to another federal agency, or even just to an internal supervisor. Compare 15 U.S.C. § 78u-6 (a) (6) with 18 U.S.C. § 1514A(a)(1)(C). Notably, the procedures and available relief for retaliation claims differ as between Dodd-Frank and Sarbanes-Oxley in important respects. These provisions gave rise to a recurring question: Can an alleged whistleblower bring a claim for retaliation under Dodd-Frank using the “whistleblower” definition of Sarbanes-Oxley, which would allow a claim by someone who made a report only to an internal supervisor and not to the Commission?

In *Digital Realty*, an alleged whistleblower named Somers told senior executives at his employer that a senior vice president had committed serious misconduct in violation of Sarbanes-Oxley, including hiding seven million dollars in cost overruns. Somers did not disclose the misconduct to the Commission or to any other outside enforcement agency. Digital Realty terminated him shortly after his internal disclosure. Somers then sued Digital Realty for, among other things, whistleblower retaliation in violation of the anti-retaliation provision of Dodd-Frank.

Relying on the Fifth Circuit’s decision in *Asadi v. G.E. Energy (USA), L.L.C.*, Digital Realty moved to dismiss the claim, asserting that Somer was not a “whistleblower” under Dodd-Frank’s anti-retaliation provision because he had not reported the misconduct to the Commission itself. The district court denied the motion to dismiss, reasoning that the whistleblower-protection provision that prohibits retaliation based on disclosures made pursuant to Sarbanes-Oxley would be “ineffective if whistleblowers must report directly to the SEC.” The district court pointed out that in June

2011, the SEC issued a rule extending the whistleblower-protection provision to employees who report violations internally. The district court then concluded that because the two provisions under Dodd-Frank created an ambiguity, the SEC’s rule was entitled to deference. The Ninth Circuit affirmed, agreeing with the Second Circuit (and disagreeing with the Fifth) in concluding that the anti-retaliation provision of Dodd-Frank protects an individual even if he has *not* reported a violation of the securities laws directly to the Commission.

The Supreme Court granted certiorari and reversed. The Court concluded that Dodd-Frank’s text “leave[s] no doubt” that the term “whistleblower” for purposes of that statute requires an individual to report directly to the Commission. The Court explained that this unambiguous whistleblower definition operates in conjunction with Dodd-Frank’s anti-retaliation provision, “shield[ing] employees [who report internally]..., *as soon as they also provide relevant information to the Commission.*” The Court observed that its reading of the provision aligns with the “core objective” of Dodd-Frank’s whistleblower program—“to motivate people who know of securities law violations *to tell the SEC.*”

The Supreme Court’s decision provides needed clarity to employers on this important issue. Still, employers should remain mindful that other whistleblower protections, including under Sarbanes-Oxley, may exist for employees who make internal complaints about corporate misconduct.

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