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Dodd-Frank Whistleblower Provision

U.S. Supreme Court Holds That Dodd-Frank Act's Whistleblower Provisions Cover Persons Who Report Concerns to the SEC, Not Those Who Exclusively Report Internally.

SUMMARY

In *Digital Realty Trust, Inc.* v. *Somers* (Feb. 21, 2018),[1] the Supreme Court held that the Dodd-Frank Act's definition of a "whistleblower" is "unambiguous" and "unequivocal": it means "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*." The Court held, in accordance with that definition, that the Dodd-Frank Act's anti-retaliation provision—which prohibits employers from retaliating against "whistleblowers" for each of three types of "lawful act[s]"—provides a private cause of action only for persons who report suspected wrongdoing directly to the SEC, and not for persons who report exclusively to their employers internally. The decision resolved a conflict in the courts of appeals, which had split over the question of whether the portion of the anti-retaliation provision, which protects "whistleblowers" who made "disclosures that are required or protected under . . . any . . . law, rule or regulation subject to the jurisdiction of the Commission," also protected individuals who made internal complaints about possible violations of securities laws. As a result of this decision, individuals who do not report to the SEC may not bring claims under Dodd-Frank; however, they may well have claims under the Sarbanes-Oxley Act, which explicitly protects individuals who report concerns internally from retaliation for having done so.

BACKGROUND

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act added amendments to the Securities Exchange Act of 1934 that (a) created a bounty provision, allowing whistleblowers who provide information to the SEC that results in a recovery of funds to participate in a share of the recovery; and (b) created a cause of action for whistleblowers who claim to have been retaliated against. There is only one definition of whistleblower: in Section 21F(a)(6), Dodd-Frank states, "In this section the following

definitions shall apply . . . The term 'whistleblower' means 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."[2]

The provision creating a private cause of action for retaliation, Section 21F(h)(1)(A), states that "a whistleblower" is protected from retaliation for any of three "lawful act[s]": "(i) providing information to the Commission in accordance with this section; (ii) 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) making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), this chapter [i.e., the Securities Exchange Act], including section 78j-1(m) of this title [i.e., Section 10A(m) of the Securities Exchange Act], section 1513(e) of Title 18, and any other law, rule or regulation subject to the jurisdiction of the Commission."[3]

It is the third category of protected activity that was considered by various courts, as well as the SEC, to be in tension with the definition of whistleblower and thus to create ambiguity in the statute. In 2011, the SEC adopted Rule 21F-2, taking the position that persons reporting internally can bring causes of action under Dodd-Frank as whistleblowers.[4]

PROCEEDINGS BELOW

Paul Somers was an employee of Digital Realty Trust whose employment was terminated in 2014 after he reported internally that his supervisor had eliminated certain internal controls mandated by the Sarbanes-Oxley Act. Somers filed suit, claiming that his termination constituted illegal retaliation against a whistleblower under Dodd-Frank. Digital Realty moved to dismiss the claim on the basis that Dodd-Frank's whistleblower protections apply only to individuals who report to the SEC. The district court denied Digital Realty's motion, deferring to the SEC's interpretation in Rule 21F-2 that internal whistleblowers are protected by Dodd-Frank. The Ninth Circuit affirmed, holding that Dodd-Frank protects internal whistleblowers as well as those who report directly to the SEC.

The decision contributed to a split among the courts of appeals over whether Dodd-Frank's whistleblower protections apply to individuals who report possible securities law violations internally but not to the SEC. The Fifth Circuit and certain district courts had held that the Act only covered those who reported alleged misconduct directly to the SEC, while the Second Circuit and a number of district courts had held that Dodd-Frank's anti-retaliation provision can be invoked not just by individuals who report concerns to the SEC but also by individuals who complain to their employers internally.[5]

THE SUPREME COURT'S DECISION

In a unanimous decision for the Court authored by Justice Ginsburg, the Supreme Court held that "under Dodd-Frank's anti-retaliation provision, a person must first 'provide . . . information relating to a violation of the securities laws to the [SEC].'"[6]

The Court's analysis began with the observation that the Dodd-Frank Act's definition of a "whistleblower" was "unequivocal" and left "no doubt as to the definition's reach": only individuals who provide "information relating to a violation of the securities laws *to the Commission*" are whistleblowers.[7]

The Court observed that the purposes of Dodd-Frank reinforced its conclusion.[8] Quoting a Senate Report, the Court noted that the "core objective" of Dodd-Frank's whistleblower program was "to motivate people who know of securities law violations to tell the SEC."[9]

It also was relevant to the Court that the Sarbanes-Oxley Act of 2002 contains an anti-retaliation provision that does cover individuals reporting concerns internally. The Court observed that, in contrast to Dodd-Frank's more limited goal, Sarbanes-Oxley had a "more far-reaching objective" to "disturb the 'corporate code of silence,'" such that its anti-retaliation provision was logically more broad and applied to reporting internally, to any federal agency, or to Congress.[10]

The Court rejected the arguments of Somers and the Department of Justice (an amicus) that Dodd-Frank's whistleblower provision should be read more broadly. The Department of Justice argued that the narrower reading of the protections would "gut" Dodd-Frank's protections because it would exclude individuals who reported to various persons and entities other than the SEC, as provided for in clause (iii) of Section 21F(h)(1)(A). The Court responded that while "the plain-text reading of the statute undoubtedly shields fewer individuals from retaliation," clause (iii) would still protect a whistleblower "who reports misconduct *both* to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure."[11]

Finally, the Court declined to extend deference to SEC Rule 21F-2: "The statute's unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term."

Justices Thomas and Sotomayor each wrote brief opinions concurring in the judgment but offering different views as to whether the Senate committee report should bear any weight in their interpretation of the relevant statutory text.

IMPLICATIONS

Substantial Narrowing of the Scope of Dodd-Frank Whistleblower Claims. The decision provides needed clarity to courts, employers and individuals. The immediate effect of the decision will be dismissal of pending claims under the Dodd-Frank Act's whistleblower provisions brought by individuals who did not report alleged violations to the SEC. Individuals who believe they have been retaliated against after reporting internally possible securities law violations still may bring claims under the Sarbanes-Oxley Act. A Sarbanes-Oxley retaliation claim must be filed within 180 days of the violation (or the date that the employee became aware of the violation) and in an administrative proceeding before the Occupational Safety and Health Administration. By contrast, the statute of limitations on a Dodd-Frank retaliation claim

is three years, and a Dodd-Frank claimant has immediate access to federal court. A successful Dodd-Frank whistleblower is entitled to double backpay with interest, whereas Sarbanes-Oxley limits recovery to actual backpay with interest.

Ambiguity Regarding Dual Reporting. The Court did not address whether there must be a "temporal or topical connection" between the violation that is reported to the SEC and any internal disclosure as to which the individual claims retaliation.

Meaning of "Provides Information to the Commission." The Court observed that Dodd-Frank permits the SEC to define the "manner" in which information may be reported to the SEC by a whistleblower. In response to this decision, the SEC may adopt a broader definition of the manner in which information can be reported, such as providing testimony to the SEC or turning over information to the SEC in an indirect fashion.

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ENDNOTES

[1] *Digital Realty Trust, Inc.* v. *Somers*, 583 U.S. __, No. 16-1276 (Feb. 21, 2018).

[2] 15 U.S.C. § 78u-6(a)(6).

[3] *Id.* § 78u-6(h)(1)(A).

[4] 17 C.F.R. § 240.21F-2.

[5] *See Berman* v. *NEO@OGILVY LLC*, 801 F.3d 145, 155 (2d Cir. 2013); *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013).

[6] Slip op. at 2 (quoting 15 U.S.C. § 78u–6(a)(6)).

[7] *Id.* at 9 (quoting 15 U.S.C. § 78u–6(a)(6)).

[8] *Id.* at 11.

[9] *Id.* (quoting S. Rep. No. 111-176, at 38 (2010).

[10] *Id.* at 11-12 (citation omitted).

[11] *Id.* at 13-15.

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