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Supreme Court Finds Dodd-Frank Does Not Protect Internal Whistleblowers

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On February 21, 2018, the Supreme Court unanimously held that the anti-retaliation provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") do not cover individuals who do not report violations of the securities laws to the Securities and Exchange Commission ("SEC"). *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (Feb. 21, 2018). Writing for the Court, Justice Ginsburg explained that Dodd-Frank explicitly defined the term "whistleblower" to include only individuals who report to the SEC and that, when a statute explicitly defines a term, courts must follow that definition. *See* 15 U.S.C. § 78u–6(a)(6). Respondent Paul Somers, who had only reported within his company, was therefore ineligible for Dodd-Frank's whistleblower protections. We previously covered the Court's skepticism of Somers' position at oral argument. *See* Shearman & Sterling LLP: Government/Regulatory Enforcement, *Supreme Court Oral Argument Suggests Skepticism Over SEC Rule Protecting Internal Whistleblowers from Retaliation under Dodd-Frank* (Dec. 5, 2017).

Somers was employed by Digital Realty Trust for four years before he was fired in 2014, allegedly in retaliation for reporting to senior management that his supervisor had eliminated internal controls in violation of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). Somers did not report those violations to the SEC, and he did not rely upon Sarbanes-Oxley's remedial scheme for retaliation against whistleblowers. Instead, Somers sued Digital Realty Trust in the United States District Court for the District of California under Dodd-Frank's whistleblower anti-retaliation provisions.

The district court denied Digital Realty Trust's motion to dismiss, applying an SEC rule promulgated under Dodd-Frank that defined the term whistleblower, for purposes of Dodd-Frank's anti-retaliation protections, to include individuals who reported only internally. *See* 17 CFR § 240.21F-2(b). The U.S. Court of Appeals for the Ninth Circuit affirmed, reasoning that applying the more limited statutory definition would narrow the protection "to the point of absurdity," and therefore that Dodd-Frank's anti-retaliation provisions must include individuals who report only internally, without reporting to the SEC. Previously, the Fifth Circuit, when faced with this question, held that "employees must provide information to the SEC to avail themselves of Dodd Frank's anti-retaliation safeguard," but the Second Circuit reached the same conclusion as the Ninth Circuit.

In resolving this Circuit Split, the Supreme Court reversed the Ninth Circuit and concluded that the SEC's rule interpreting the term "whistleblower" did not merit deference under *Chevron* given the plain language of Dodd-Frank. The Court found no ambiguity in the statutory definition of whistleblower, which expressly included only individuals who reported to the SEC. This interpretation was supported, the Court reasoned, by the underlying purpose of Dodd-Frank: "to motivate people who know of securities law violations to tell the SEC." The Court disagreed with the Ninth Circuit that applying the narrow definition would reduce protection "to the point of absurdity." The Court reasoned that Dodd-Frank still "protects a whistleblower who reports misconduct both to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure." Thus, Dodd-Frank protects whistleblowers if they disclose alleged violations to the SEC, even if a contemporaneous disclosure to a company itself is the true cause of any retaliation.

Though the Court's decision limited the scope of whistleblower protection and can be viewed as a setback to the SEC's rulemaking program, it should have no practical consequences for company practices, given that companies should still avoid retaliating against internal whistleblowers. Indeed, these whistleblowers may have reported to the SEC without their employers' knowledge.

CATEGORIES: Supreme Court, Whistleblower
