

Updates

February 26, 2018

U.S. Supreme Court Refuses to Expand Definition of "Whistleblower" Beyond Express Definition in Statute

The United States Supreme Court last week held in [*Digital Realty Trust, Inc. v. Somers*](#) that when a whistleblower reports suspected violations of securities laws internally, but not to the Securities and Exchange Commission (the Commission or SEC), the whistleblower is *not* entitled to the protections of the Dodd-Frank Act's anti-retaliation provisions. The Supreme Court's ruling reverses the Ninth Circuit's decision in *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045 (9th Cir. 2017).

Background

Somers reported suspected violations of securities laws to the senior management of his employer, Digital Realty Trust, Inc. (Digital Realty), and was subsequently fired. Somers asserted a claim under the Dodd-Frank Act's anti-retaliation provision, which prohibits an employer from retaliating against a "whistleblower." 15 U.S.C. § 78u-6(h)(1)(A).

Digital Realty moved to dismiss on the ground that Somers was not a "whistleblower," because the statute defines "whistleblower" as one who provides "information relating to a violation of the securities laws *to the Commission*," 15 U.S.C. § 78u-6(a)(6) (emphasis added), and Somers did not report any violations *to the Commission*. The district court denied Digital Realty's motion, and the Ninth Circuit affirmed, holding that the anti-retaliation provision protects "those who report internally as well as to those who report to the SEC." *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045, 1047 (9th Cir. 2017).

The Ninth Circuit acknowledged that although the statutory definition of "whistleblower" included only those who reported violations "to the Commission," a 2011 SEC rule made clear that for purposes of the Dodd-Frank Act's anti-retaliation provisions, "whistleblower" includes those who report violations internally. *Somers*, 850 F.3d at 1051 (citing 17 C.F.R. § 240.21F-2). In so ruling, the Ninth Circuit sided with the Second Circuit and against the Fifth Circuit in a growing circuit split.

U.S. Supreme Court's Ruling

The Supreme Court reversed because the Ninth Circuit improperly expanded the definition of "whistleblower" beyond the express language in the statute. The Supreme Court confirmed: "To sue under Dodd-Frank's anti-retaliation provision, a person must first 'provid[e] . . . information relating to a violation of the securities laws *to the Commission*.' [15 U.S.C.] § 78u-6(a)(6)." Slip Op. at 2 (emphasis added).

The Court emphasized that the statute explicitly defines "whistleblower" as one who reports violations "to the Commission," and the Court was required to follow that definition, even if it varied from the ordinary meaning of the term. *Id.* at 9. The Court went on to say that its strict reading of the definition of "whistleblower" was consistent with the "purpose" of the statute as set forth in a Senate Report. *Id.* at 11-12, 16-18. Additionally, because Congress explicitly defined "whistleblower," the Court would not accord any "deference to the contrary view advanced by the SEC in [17 C.F.R. § 240.21F-2]." *Id.* at 18-19. The Court's ruling resolves the circuit split in favor of strict adherence to the express language of the Dodd-Frank Act and related statutes.

Justice Ginsberg delivered the opinion of the Court, in which Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor and Kagan joined.

Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justices Alito and Gorsuch joined. Justice Thomas said the statute's express definition of "whistleblower" was conclusive, and the

Court should not have gone on to discuss "the supposed 'purpose' of the statute" as set forth in "a single Senate Report," because the law is "what Congress enacted rather than . . . what it intended."

Justice Sotomayor filed a concurring opinion, in which Justice Breyer joined, to respond to Justice Thomas. Justice Sotomayor said she believed it was proper for the Court to discuss the "purpose" of the statute as set forth in a Senate Report.

Real-World Implications

- The Supreme Court's decision may discourage employees from reporting internally and incentivize them to go directly to the SEC.
- Companies should implement robust internal reporting and anti-retaliation policies to encourage internal reporting. Even if employees ultimately also report to the SEC, having a strong internal compliance program that encourages internal reporting will provide the company with knowledge of the allegations, so that it can prepare for any SEC inquiry.
- Employees may not be aware that reporting internally does not preclude them from claiming the benefits of reporting elsewhere. For example, a whistleblower who reports first internally can still recover a bounty if he or she reports to the SEC within 120 days. Note that most lawyers who actively encourage and represent whistleblowers are aware that there may be some benefits to dual reporting, and they also know that the SEC's position is that participation in internal compliance programs will be a positive factor when the SEC is considering an award percentage.

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