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Supreme Court and Appellate Alert

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Key Points

- Whistleblower protections for securities violations in Dodd-Frank extend to only employees who report violations to the SEC.
- Applying the plain language of the statute's definition of "whistleblower," limiting the definition to individuals who report to the SEC, does not lead to absurd results, defeat the purpose of the statute or leave employees unprotected from retaliation.
- The narrow definition of "whistleblower" adopted by the Supreme Court does not mean that whistleblowers have no protection against retaliation if they complain internally about securities violations. An employee may pursue a claim for retaliation under the Sarbanes-Oxley Act of 2002, provided that the employee timely files a complaint with the Department of Labor.

Supreme Court Limits Whistleblower Protections Under Dodd-Frank

In Digital Realty Trust v. Somers, the Supreme Court unanimously held that the protections against retaliation for whistleblowers in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act extend only to whistleblowers who report securities violations to the Securities and Exchange Commission (SEC).

Enacted in 2008, Dodd-Frank added a new provision to the Securities Exchange Act of 1934 governing whistleblowers. 15 U. S. C. §78u–6. The statute defines a "whistleblower" as "any individual who provides . . . information relating to 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). The term then appears in two separate subsections in that statute. The first subsection allows a whistleblower "who voluntarily provided original information to the Commission" to receive a monetary award in a judicial or administrative action. 15 U.S.C. § 78u–6(b)(1). The second subsection provides anti-retaliation protection to whistleblowers who not only provide information to the SEC, but also make disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, other provisions of Dodd-Frank; and "any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u–6(h)(1)(A).

In 2011, the SEC promulgated a regulation interpreting the whistleblower provisions. The regulation limited awards to whistleblowers who provided information to the SEC, but extended the anti-retaliation protections to a broader group of whistleblowers. 17 CFR §240.21F–2. Relying on the reference to

Sarbanes-Oxley, the SEC interpreted the anti-retaliation provision to extend to employees who did not provide information to the SEC, but to those who reported violations to a company supervisor.

At issue in Digital Realty Trust was whether 15 U.S.C. § 78u–6 was susceptible to this construction. The plaintiff sued his employer for allegedly terminating him in retaliation for reporting securities violations internally, but not to the SEC. A divided panel of the 9th Circuit held that applying Dodd-Frank's definition of "whistleblower" to the anti-retaliation provisions would lead to absurd results. It instead deferred to the SEC's interpretation, holding that it resolved a statutory ambiguity. The 9th Circuit's opinion was consistent with the 2nd Circuit's interpretation of the statute, but conflicted with the 5th Circuit's interpretation.

Resolving the circuit split, the Supreme Court rejected the 9th Circuit's interpretation. In an opinion authored by Justice Ginsburg, the Court held that Dodd-Frank's definition of "whistleblower" "supplies an unequivocal answer" to the question of whether reporting violations to the SEC is required to give effect to the anti-retaliation provision. Because the plain language of the definition requires reporting to the SEC, it did not protect an employee who complained to only its employer.

In addition to the plain language of the "whistleblower" definition, the Court contrasted the wording of 15 U.S.C. § 78u-6(a)(6) with a different protection in Dodd-Frank for employees who report violations of subject to the jurisdiction of the Consumer Financial Protection Bureau (CFPB). The Court applied the rule of statutory construction that, where Congress uses particular language in one section of a statute, but omits it from another, a reviewing court should presume that Congress intended for the provisions to have different meanings. That the CFPB section expressly protects an employee who reported violations to his or her employer, but no such language appears in 15 U.S.C. § 78u-6(a)(6), provided further support for the Court's holding.

The Court also rejected arguments raised by the Solicitor General urging the application of different criteria for whistleblowers seeking awards than for those seeking protection from retaliation. Although it acknowledged that few employees would be protected from retaliation under its reasoning, the Court found that its holding would be compatible with Dodd-Frank's regulatory scheme; would not vitiate the anti-retaliation provisions; and would not jettison protections for auditors, attorneys and employees who are required to report violations internally before they could report to the SEC. None of those concerns or other arguments warranted deviating from the plain language of the statute.

In fact, the Court emphasized that Dodd-Frank's purpose was to improve SEC enforcement of securities laws. Limiting the protections to whistleblowers served that end. Moreover, despite the concern that employees who raise complaints internally might not report wrongdoing to the SEC, the Court noted that 80 percent of whistleblowers who received awards reported violations internally before disclosing them to the SEC.

The Supreme Court's opinion is subject to a significant caveat. As the Court recognized, Sarbanes-Oxley's anti-retaliatory provisions protect more conduct than Dodd-Frank, including reports of securities violations made internally. The plaintiff in Digital Realty Trust could not bring a retaliation claim under Sarbanes-Oxley because he had failed to file a complaint with the Secretary of Labor within 180 days of his termination. However, employees who timely satisfy this requirement would be able to bring claims under Sarbanes-Oxley.

Finally, Digital Realty Trust is notable for one thing that it did not say. Despite current debate surrounding the continuing viability of Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., the Court did not decide that issue. It held instead that, because Congress had spoken to the precise question at issue, the Court would not defer to the agency's interpretation.

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