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Supreme Court Narrows Whistleblower Protections Under Dodd-Frank

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The Dodd-Frank Act's whistleblower protections cannot be expanded beyond the statute's explicit language, notwithstanding Securities and Exchange Commission ("SEC") guidance to the contrary, a unanimous Supreme Court has held. *Digital Realty Trust v. Somers*, No. 16–1276, 2018 U.S. LEXIS 1377 (Feb. 21, 2018). Rejecting *Chevron*[1] deference to the agency's expansive interpretation of the term "whistleblower," the unanimous Court has held that the Act's plain language limits its protections to instances in which the individual seeking protection has reported perceived securities law violations directly to the SEC. Complaints directed elsewhere may trigger protections under other statutes (such as the Sarbanes-Oxley Act of 2002), but the extensive and less cumbersome whistleblower remedies available under Dodd-Frank apply only to those who contact the SEC. By taking this plain-language approach to the case, the *Digital Reality* decision avoids, or at least delays, a confrontation over the continuing vitality of *Chevron* deference, a confrontation many had expected to see in the case with the confirmation of Justice Neil Gorsuch.

Background

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act to bolster the SEC's ability to regulate the securities industry. One "core objective" of the Act was "to motivate people who know of securities law violations to tell the SEC."[2] Dodd-Frank accomplished this goal by providing these individuals—defined as "whistleblowers" under the statute—with monetary awards and by protecting them from retaliation by their employer. Until *Digital Realty*, doubt existed as to who qualified as a Dodd-Frank "whistleblower" and therefore qualified for this employment protection.

In-House Complaints

Paul Somers was a Vice President of Portfolio Management for Digital Realty, a real estate investment trust, from 2010 to 2014. While in that role, Somers came to believe that his supervisor Kris Kumar was committing a number of securities transgressions including "hiding seven million dollars in cost overruns."[3] Although Somers did not alert the SEC to these actions, he did voice his concerns to the company's officers and directors. Shortly after raising these complaints, Somers was terminated.

In his subsequent suit against Digital Realty, Somers alleged that he was a whistleblower under Dodd-Frank and claimed that his termination was in retaliation for having reported Kumar's securities violations to senior management. The district court held, and the Ninth Circuit later affirmed, that Somers was entitled to "whistleblower" protection under Dodd-Frank despite his failure to report the violation to the SEC.[4] In reaching this conclusion, the court found the statutory definition of the term "whistleblower" ambiguous, and thus accorded deference to the SEC's Rules, which extended "whistleblower" protection to those who report a securities law violation to *either* the SEC *or* to an internal supervisor.[5]

The Ninth Circuit's conclusion—that Dodd-Frank's anti-retaliation provision protects those who raise either internal or external complaints—was consistent with a prior ruling out of the Second Circuit.[6] The Fifth Circuit, however, had held that only a report to the SEC qualified one as a Dodd-Frank whistleblower.[7] The Supreme Court granted review to resolve the conflict.

Upholding the Statute's Plain Meaning

The unanimous Supreme Court found the limitations imposed by the statute unambiguous and it enforced them.[8] The Court noted that the statute "unequivocally" defined a "whistleblower" as "any individual who provides… information relating to a violation of the securities laws *to the Commission*."[9] The Court also observed that in Sarbanes-Oxley, Congress had used a much broader definition of "whistleblower," including those who complain internally, but did not do so with Dodd-Frank.[10] In sum, the Court had no doubt that "whistleblower," as defined by the text of Dodd-Frank, encompassed only those persons who provided information to the SEC.[11] And because "Congress ha[d] directly spoken to the precise question at issue, [the Court found no basis on which to] accord deference to the contrary view advanced by the SEC . . . ."[12]

Somers and the Solicitor General raised a number of concerns with this narrow statutory construction, but none was persuasive to the Court. For example, the government argued that such an interpretation would "gut" the protection afforded by the statute by shielding fewer individuals from retaliation.[13] Although the Court acknowledged that its decision would limit the protections afforded by the clause, it concluded that the scope of the Act's protections was a legislative, not a judicial, choice, apparently made purposefully, and that the statutory language did not "shrink to insignificance the clause's ban on retaliation."[14]

Employer Takeaways and Best Practices

Although *Digital Realty* delivers much needed clarity on the scope of Dodd-Frank's anti-retaliation protections, its practical impact will be relatively limited. Employers must still refrain from retaliatory actions based on internal complaints, in part because those complaints can still trigger liability under another federal or state law, or a state common-law doctrine.[15] Moreover, if and when employers receive an internal complaint, they should assume that the SEC has already been informed. In all cases, employers should consider retaining outside counsel to determine next steps, including a timely investigation and response.

Indeed, *Digital Realty* may well increase employer compliance risks by encouraging employees to report suspected wrongdoing directly to the SEC instead of voicing those concerns internally with their employer. Employers should revisit their policies, procedures, and protocols (including complaint procedures and whistleblower hotlines) to ensure that employees can raise concerns—and that the employer can respond to them—regardless of what laws might be implicated by the allegations. As always, Paul Hastings will keep its clients apprised as circumstances change.

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[1] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[2] 2018 U.S. LEXIS 1377, at *19.

[3] *Somers v. Digital Realty Trust, Inc.*, 119 F.Supp.3d 1088, 1092 (N.D. Cal. 2015), *aff'd* 850 F.3d 1045 (9th Cir. 2017).

[4] *Id.*

[5] *See* 17 C.F.R. § 240.21F-2(b) (2017).

[6] *Berman v. NEO@OGILVY LLC*, 801 F. 3d 145 (2d Cir. 2015).

[7] *Asadi v. G.E. Energy*, 720 F. 3d 620 (5th Cir. 2013).

[8] *Digital Realty*, 2018 U.S. LEXIS 1377.

[9] 15 U.S.C. § 78u-6(a)(6) (emphasis added).

[10] *Digital Realty*, 2018 U.S. LEXIS 1377, at *18-19.

[11] *Id.* at *21.

[12] *Id.* at *30 (citations omitted).

[13] *Id.* at *22.

[14] *Id.* at *24.

[15] *See,* e.g., Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (prohibiting certain employers from discriminating against employees who report misconduct to the SEC).