Supreme Court Defines the Scope of the Dodd-Frank Act's Whistleblower Protection

On February 21, 2018, the Supreme Court of the United States held in *Digital Realty Trust, Inc.* v. *Somers* that the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") do not afford protection to whistleblowers who report violations of the federal securities laws to their employers instead of to the Securities and Exchange Commission ("SEC").[1] The Court's decision resolved a split among the circuit courts of appeal by limiting the meaning of the term "whistleblower" found in the anti-retaliation provisions of the Dodd-Frank Act to someone who reports violations to the SEC.

I. Background

The 2010 Dodd-Frank Act purportedly was designed to correct perceived shortcomings in the federal regulation of financial markets, including the failure to identify in the first instance violations of the federal securities laws. To that end, the Dodd-Frank Act included provisions intended to protect from retaliation employees who report possible securities law violations to the SEC.

Specifically, the Dodd-Frank Act amended the Securities Exchange Act of 1934 ("Exchange Act") by adding Section 21F(h), which provides, in part, "No employer may discharge, demote, suspend, threaten, harass . . . or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in providing information to the Commission in accordance with this section."[2] For the purposes of this anti-retaliation provision, the Exchange Act defines "whistleblower" to mean "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* . . . ."[3]

At issue in *Digital Realty Trust* was whether, given Dodd-Frank's definition of "whistleblower," the anti-retaliation provisions of the Act could extend to a whistleblower who reported a violation of the securities laws to senior management of his employer, but not to the SEC.[4] A divided panel of the Court of Appeals for the Ninth Circuit had held that Section 21F(h) did not obligate whistleblowers to provide information to the SEC and that internal disclosure to the whistleblower's employer was sufficient.[5] Two other appellate courts also had considered the issue and had reached different conclusions. In *Asadi* v. *G.E. Energy (USA) LLC*, the Court of Appeals for the Fifth Circuit had held that employees must provide information to the SEC to avail themselves of Dodd-Frank's anti-retaliation safeguard.[6] In *Berman* v. *Neo@Ogilvy LLC*, however, a divided panel of the Court of Appeals for the Second Circuit had reached the opposite conclusion.[7]

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[1] *Digital Realty Trust, Inc.* v. *Somers*, No. 16-1276, 2018 WL 987345, at *4 (Feb. 21, 2018).

[2] 15 U.S.C. § 78u-6(h)(1)(A).

[3] 15 U.S.C. § 78u-6(a)(6) (emphasis added).

[4] *Digital Realty Trust*, 2018 WL 987345, at *4, *7.

[5] *Id.* at *7.

[6] 720 F.3d 620, 630 (5th Cir. 2013).

[7] 801 F.3d 145, 155 (2d Cir. 2015).

II. The Supreme Court's Decision

In the majority opinion authored by Justice Ginsburg, the Supreme Court reversed the Ninth Circuit's decision and held unanimously that "Dodd-Frank's anti-retaliation provision does not extend to an individual . . . who has not reported a violation of the securities laws to the SEC,"[8] and further specified that "[t]o sue under Dodd-Frank's anti-retaliation provision, a person must first '[p]rovide . . . information relating to a violation of the securities laws to the Commission.'"[9] Citing the definition of "whistleblower" found in Section 21F(a)(6) of the Exchange Act, the Court reasoned, "'[w]hen a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning."[10] The Court explained that the definitions section of the Dodd-Frank Act supplied an "unequivocal answer" to the question before it by expressly defining the term "whistleblower" to mean "any individual who provides . . . information relating to a violation of the securities laws *to the Commission.*"[11] In reaching its decision, the Court also looked to the statute's purpose and design, citing a Senate Committee Report to explain that Dodd-Frank's "core objective" is "to motivate people who know of securities law violations to *tell the SEC.*"[12]

The Court rejected arguments from respondent Somers and the Solicitor General that the Court should ignore the plain language of the statute because applying the definition would narrow the scope of the anti-retaliation provision "to the point of absurdity." The Court found that clause (iii) of Dodd-Frank's anti-retaliation provision (Exchange Act Section 21F(h)(1)(A)(iii)), which protects disclosures made to a variety of individuals and entities in addition to the SEC, was not superfluous but instead was designed to protect a whistleblower who reports misconduct to both the SEC and another entity.[13] While this reading of the clause shields fewer individuals than applying the broader definition of "whistleblower" offered by Somers and the Solicitor General, that clause, the Court explained, would protect an employee against a retaliating employer who is unaware that the employee has alerted the SEC.[14]

The Court also rejected Somers's argument that auditors, attorneys, and other employees subject to internal reporting requirements would be vulnerable to retaliatory action for complying with their internal reporting obligations, stating that employees in these circumstances are shielded by Dodd-Frank "*as soon as they also provide relevant information to the Commission*," which, the Court determined, is consistent with Congress's aim to encourage disclosure to the SEC.[15] Additionally, the Court declined to extend *Chevron* deference to the SEC's interpretation that Exchange Act Rule 21F-2 does not require SEC reporting to secure anti-retaliation protection, because the Court reasoned that the statute's "unambiguous whistleblower definition" precludes the SEC from more expansively interpreting the term.[16]

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[8] *Digital Realty Trust*, 2018 WL 987345, at *1.

[9] *Id.* at *4 (quoting 15 U.S.C. § 78u-6(a)(6)).

[10] *Id*. at *8 (quoting *Burgess* v. *United States*, 553 U.S. 124, 130 (2008)).

[11] *Id.* (quoting 15 U.S.C. § 78u-6(a)(6)) (emphasis in original).

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

[13] *Id.* at *11. The Court explained that clause (iii) "prohibits retaliation against a 'whistleblower' for 'making disclosures' to various persons and entities, including *but not limited to* the SEC, to the extent those disclosures are 'required or protected under' various laws other than Dodd–Frank." *Id.* (emphasis in original). This, in the Court's view, protects a whistleblower who reports misconduct to both the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. *Id.*

[14] *Id*.

[15] *Id*. at *12 (emphasis in original).

[16] *Id.* at *13.

III. Significance of the Decision

The Supreme Court's decision in *Digital Realty* is important because it resolved a split among the circuits concerning the breadth of the anti-retaliation remedy created by the Dodd-Frank Act. In doing so, the Court narrowed the scope of conduct that qualifies for protection: under the Court's interpretation of the anti-retaliation provisions, only whistleblowers who provide notification *to the SEC* can claim protection. Those who report through other channels, including through internal corporate reporting lines, fall outside of the provisions' purview. The decision is also notable in that the Court declined to defer to the SEC's interpretation of Dodd-Frank's whistleblower provisions because, in the Court's view, "'Congress has directly spoken to the precise question at issue.'"[17]

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; David S. Slovick at 212.701.3978 or dslovick@cahill.com; or Allyson B. Hopper at 212.701.3736 or ahopper@cahill.com.

[17] *Id.* (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)).