

US Supreme Court Narrows Dodd-Frank Act Whistleblower Protections

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Labor and Employment Alert
3.6.18

The US Supreme Court recently resolved a long-standing split amongst the Circuits regarding whether the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act) protects both internal and external whistleblowers. In *Digital Realty Trust Inc. v. Somers*, the court found that the Act's protections are narrower than those provided under the Sarbanes-Oxley Act of 2002, which protects both internal and external whistleblowers.

STATUTORY BACKGROUND

In 2010, Congress passed the Act to bolster the SEC's ability to regulate the securities industry. The Act establishes an incentive program for individuals who provide information to the SEC that results in successful enforcement actions.

The Act also provides anti-retaliation protections for "whistleblowers," defined as an individual who provides information relating to a violation of securities laws to the SEC. The anti-retaliation provisions of the Act provide protections to a whistleblower if the individual provided information to the SEC, participated in an investigation, judicial or administrative action of the SEC or made disclosures required or protected under certain federal laws.

CASE SUMMARY

Case History

Paul Somers worked as Vice President of Portfolio Management at Digital Realty Trust, Inc., a real estate investment trust. The company terminated his employment in 2014 following his internal complaint relating to alleged securities violations. Somers did not report his complaint directly to the SEC prior to his termination. Instead, Somers sued the company, claiming that the termination violated the anti-retaliation provisions of the Act because it was based on his internal complaint.

The employer moved to dismiss the claim, asserting that Somers was not a "whistleblower" because he did not make a report to the SEC. The district court disagreed and denied the company's motion to dismiss.

The Ninth Circuit affirmed the trial court's decision, holding that applying the definition of "whistleblower" to the anti-retaliation provision would improperly narrow protections for an individual who made disclosures required or protected under certain federal laws. The Ninth Circuit held that the Act must be read to protect all employees who make disclosures, both internally and externally to the commission

The Supreme Court's Decision

The Supreme Court reversed the Ninth Circuit ruling. The Court held that the plain reading of the Act's definition of whistleblower in conjunction with the anti-retaliation provision did not support the Ninth Circuit's interpretation of the Act. The Court determined that the Act's definition of whistleblower limited who is eligible for protection from retaliation under the Act to individuals who disclose

information to the SEC.

On this basis, the court held that individuals not meeting the threshold requirement of providing pertinent information to the SEC cannot avail themselves of the Act's anti-retaliation protections. Applying this analysis to the facts of the case, the Court concluded Somers' claims failed because he did not provide information to the SEC prior to the time of his alleged retaliatory termination.

RECOMMENDATIONS

Digital Realty provides both employers and employees long-awaited guidance concerning the scope of the Act's protections.

Despite this ruling, employers should continue to exercise caution when taking adverse employment actions against employees who may have engaged in a protected activity recognized under federal, state or local laws.

Employers should discuss with their counsel what policy, training and other best practices are needed to minimize the risks associated with retaliation claims that could be asserted by their employees.

Please contact George Morrison (morrisong@whiteandwilliams.com; 610.782.4911) or another member of the Labor and Employment Group for more information regarding this alert.

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