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United States Supreme Court Conclusively Narrows Definition of Whistleblower in Dodd-Frank Retaliation Cases

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On February 21, 2018, the United States Supreme Court unanimously held that employees must report a violation of securities laws to the Securities and Exchange Commission ("SEC") to be entitled to anti-retaliation, whistleblower protection under § 78u-6(h) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The Supreme Court reversed a Ninth Circuit Court of Appeals decision finding internal employee complaints sufficient to trigger Dodd-Frank anti-retaliation protection and resolved a circuit split among the Ninth, Second and Fifth circuits.

In *Digital Realty Trust, Inc. v. Somers*, the employee alleged that after he reported suspected securities law violations to senior management, his employer terminated him in violation of Dodd-Frank's whistleblower anti-retaliation provision. The employee, however, never reported the matter to the SEC, nor did he file an administrative complaint within 180 days of his termination, which rendered him ineligible for anti-retaliation protection under the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). The Ninth Circuit, agreeing with the Second Circuit, held that internal employee complaints were sufficient to trigger Dodd-Frank anti-retaliation protection. The Supreme Court disagreed and reversed.

The Supreme Court held that the anti-retaliation provision of Dodd-Frank unambiguously defined "whistleblower" as "any individual who provides…information relating to a violation of the securities laws **to the Commission.**" It also noted that the core objective of Dodd-Frank's whistleblower program is to motivate employees who know of securities law violations *"to tell the SEC"* to aid in enforcement efforts. Thus to be entitled to Dodd-Frank anti-retaliation protection, employees must report suspected securities law violations to the SEC.

The Supreme Court buttressed this decision by comparing the language and intent of Dodd-Frank with Sarbanes-Oxley, which Congress enacted after the Enron scandal. It noted that Sarbanes-Oxley's anti-retaliation provision, which was aimed at disturbing the "corporate code of silence," was broader than Dodd-Frank's, and expressly applied to employees who reported misconduct to the SEC, other federal agencies, Congress and internal supervisors. Sarbanes-Oxley, however, requires employees to first exhaust administrative remedies prior to filing a complaint in court by filing a complaint with the Secretary of Labor within 180 days of the alleged violation. By contrast, Dodd-Frank's whistleblower provision has a six-year statute of limitations and no administrative exhaustion requirement.

Although employers may benefit from the Supreme Court's narrow definition of "whistleblower" in Dodd-Frank anti-retaliation cases, employers should be aware that this decision may lead to increasing numbers of employee whistleblower reports filed directly with the SEC, instead of internally. Employers must continue to vigorously investigate internal claims of corporate wrongdoing and instruct supervisors that retaliation against internal whistleblowers is strictly prohibited. Our lawyers have deep counseling and litigation experience on these issues. If you would like to discuss these issues further or have questions about this alert, please contact one of the lawyers listed here.

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