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Report from Washington

Supreme Court Holds That Dodd-Frank's Anti-Retaliation Provisions Apply Only to Employees Who Report Allegedly Wrongful Activity to the SEC

February 22, 2018

Introduction

On February 21, 2018, in *Digital Realty Trust, Inc. v. Somers*, No. 16-1276, the Supreme Court unanimously held that the anti-retaliation protections created by the Dodd-Frank Act do not apply to an employee who internally reports allegedly wrongful activity but does not report the activity to the Securities and Exchange Commission. The Court's decision resolves a split between the Second, Fifth and Ninth Circuits.

"Dodd-Frank's text and purpose leave no doubt that the term 'whistleblower' in §78u-6(h) carries the meaning set forth in the section's definitional provision. The disposition of this case is therefore evident: Somers did not provide information 'to the Commission' before his termination… so he did not qualify as a 'whistleblower' at the time of the alleged retaliation."

— Justice Ginsburg

Background

Section 78u-6 of Dodd-Frank 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." §78u-6(a)(6) (emphasis added). The same section creates anti-retaliation provisions for "whistleblowers," prohibiting employers from firing employees who "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002," among other things. In 2011, the SEC promulgated a rule that, for the purposes of the anti-retaliation protections, interpreted "whistleblower" to include employees who make only internal disclosures of potentially wrongful activity.

Paul Somers was an employee of Digital Realty who alleged that he was fired after making reports to the firm's senior management about possible securities law violations. Somers did not report his concerns to the SEC before he was terminated. He sued the firm in federal court, arguing that his firing violated the anti-retaliation protections contained in §78u-6 of Dodd-Frank. Digital Realty moved to dismiss the case, asserting that Somers was not a "whistleblower" as defined by Dodd-Frank and thus was not entitled to the Act's protections because he only reported the alleged violations internally and not to the SEC.

The District Court for the Northern District of California denied Digital Realty's motion, finding "ambiguity in the interplay between [the definition section and the anti-retaliation provisions of Dodd-Frank]." Analyzing these provisions, the District Court concluded that the "narrow definition of whistleblower cannot easily be reconciled with [the anti-retaliation provisions'] seemingly expansive scope." Because of this ambiguity, the court reasoned, the SEC's rule was entitled to *Chevron* deference (required where, facing an ambiguous provision in its governing statute, an agency issues a reasonable interpretation of that provision).

The Ninth Circuit affirmed the lower court's denial after reviewing the two circuit court decisions that previously addressed this issue. The court adopted the Second Circuit's 2015 conclusion in *Berman v. Neo@Ogilvy LLC* that the "tension" between the definition of whistleblower and the anti-retaliation provisions is "as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute [*i.e.* the SEC]." 801 F.3d 145, 155 (2d Cir. 2015). By contrast, in *Asadi v. G.E. Energy (USA), L.L.C.*, the Fifth Circuit had held that Dodd-Frank's definition of whistleblower "expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower' for purposes of [the anti-retaliation protections]." 720 F.3d 620, 623 (5th Cir. 2013). In rejecting the Fifth Circuit's approach, the Ninth Circuit noted that the SEC regulation is "consistent with Congress's overall purpose to protect those who report violations internally as well as those who report to the government." 850 F.3d 1045, 1047 (9th Cir. 2017).

Summary of the Court's Decision

The Supreme Court unanimously reversed the Ninth Circuit's judgment. Writing for the Court, Justice Ginsburg began by noting that the "definition section of the statute supplies an unequivocal answer" to the issue of the meaning and reach of "whistleblower" in Dodd-Frank's anti-retaliation provisions. She emphasized that the definition requires reporting "*to the Commission*," and that the statutory text instructs "that the 'definition shall apply in this section,' that is, throughout §78u-6."

Justice Ginsburg further noted that "'when Congress includes particular language in one section of a statute but omits it in another, … this Court presumes that Congress intended a difference in meaning'" (quoting *Loughrin v. United States*, 134 S.Ct. 2384, 2390 (2014)). Title 10 of Dodd-Frank, which created the Consumer Financial Protection Bureau, features "another whistleblower-protection provision [that] imposes no requirement that information be conveyed to a government agency." Specifically, it prohibits discrimination against a

"covered employee" who provides "information to [an] employer, the Bureau, or any other State, local, or Federal, government authority. …" 12 U.S.C. §5567(a)(1). Because Congress placed a government-reporting requirement in §78u-6 but not elsewhere in the Act, the Court concluded that Congress intended that the definition of "whistleblower" cover only individuals who report potentially wrongful activity to the SEC.

The Court explained that the "purpose and design" of Dodd-Frank "corroborate our comprehension of §78u-6(h)'s reporting requirement." Justice Ginsburg cited a Senate Report stating that the core objective of the Act's whistleblower protection scheme is "to motivate people who know of securities law violations to *tell the SEC*." S. Rep. No. 111-176, p. 38 (emphasis added by the Court). By creating §78u-6, Congress thus "undertook to improve SEC enforcement." In a concurring opinion joined by Justices Alito and Gorsuch, Justice Thomas took issue with the Court's reliance on the Senate Report as evidence of Congressional intent. Justice Sotomayor, joined by Justice Breyer, rebutted Justice Thomas's opinion in her own concurrence defending the Court's use of this kind of legislative history as a method for ascertaining the Act's purpose.

The Court rejected Somers' contention, supported by the United States, that Congress intended the term "whistleblower" to retain its "ordinary sense" rather than the statutory definition. While conceding that "the plain-text reading of the statute undoubtedly shields fewer individuals from retaliation than the alternative proffered by Somers and the Solicitor General," the Court was not persuaded that applying the §78u-6 definition would "create obvious incongruities," "produce anomalous results," and "vitiate much of the [statute's] protections" such that a departure from the statutory definition would be warranted. Finally, finding that Congress's primary aim in creating this section of Dodd-Frank was to incentivize "prompt reporting to the SEC," the Court rejected as unpersuasive arguments that its holding would diminish the deterrent effects of the Act.

Implications

The Court's decision could have important implications for corporate compliance and internal whistleblowers, particularly for auditors, lawyers, and other professionals with internal reporting obligations under Sarbanes-Oxley. More broadly, in its 2017 Annual Whistleblower Report to Congress, the SEC indicated that over 80% of whistleblowers who received SEC awards under Dodd-Frank since 2012 first reported the alleged wrongdoing internally, and only later made the disclosures to the SEC. The Court's decision in *Digital Reality* could lead to an increase in the number of direct reports to the SEC in order to preserve Dodd-Frank anti-retaliation protections for the complainants.

For further information about this decision, please contact one of the following members of the Firm's Litigation Department.

WASHINGTON, D.C.

Jeffrey H. Knox
+1-202-636-5532
jeffrey.knox@stblaw.com

Cheryl J. Scarboro
+1-202-636-5529
cscarboro@stblaw.com

NEW YORK CITY

Paul C. Curnin
+1-212-455-2519
pcurnin@stblaw.com

Paul C. Gluckow
+1-212-455-2653
pgluckow@stblaw.com

Nicholas S. Goldin
+1-212-455-3685
ngoldin@stblaw.com

Peter E. Kazanoff
+1-212-455-3525
pkazanoff@stblaw.com

Joshua A. Levine
+1-212-455-7694
jlevine@stblaw.com

Joseph M. McLaughlin
+1-212-455-3242
jmclaughlin@stblaw.com

NEW YORK CITY

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

Michael J. Osnato, Jr.
+1-212-455-3252
michael.osnato@stblaw.com

Mark J. Stein
+1-212-455-2310
mstein@stblaw.com

Craig S. Waldman
+1-212-455-2881
cwaldman@stblaw.com

David J. Woll
+1-212-455-3136
dwoll@stblaw.com

PALO ALTO

James G. Kreissman
+1-650-251-5080
jkreissman@stblaw.com

Alexis S. Coll-Very
+1-650-251-5201
acoll-very@stblaw.com

Stephen P. Blake
+1-650-251-5153
sblake@stblaw.com

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Simpson Thacher

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000