
Supreme Court Articulates Dodd-Frank Whistleblower Definition in *Digital Realty Trust, Inc. v. Somers*

FEBRUARY 23, 2018

On February 21, 2018, the Supreme Court held in *Digital Realty Trust, Inc. v. Somers* that the anti-retaliation whistleblower protections under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) apply only to those who have reported allegations to the Securities and Exchange Commission (“SEC”) as of the time of the allegedly retaliatory conduct. This ruling was based on the plain language of the Dodd-Frank Act and its definition of a whistleblower. The Court of Appeals for the Ninth Circuit had previously ruled that Somers, who had been fired after reporting alleged securities violations within the company but not to the SEC, could pursue a retaliation lawsuit against his former employer.¹

Statutory Framework

The Dodd-Frank Act defines “whistleblower” as a person who provides “information relating to a violation of the securities laws to the Commission,” 15 U.S.C. § 78u-6(a)(6). Under the Act, whistleblowers are eligible to receive monetary awards from the SEC and are protected from retaliation by their employers.² The anti-retaliation provisions of the Dodd-Frank Act permit whistleblowers who face retaliation from employers to sue their employers for reinstatement, double backpay and litigation costs without first exhausting administrative remedies.

The anti-retaliation provisions extend not only to whistleblowers who face retaliation because they provided information relating to a securities law violation to the Commission, but also to whistleblowers who face retaliation because they provided information regarding potential violations of certain enumerated laws (which include any rule or regulation of the SEC and, by way of example, any provision of federal law relating to fraud against shareholders) to a federal regulatory or law enforcement agency, Congress, or “a person with supervisory authority over the employee.”³ However, as noted, in order to qualify as a whistleblower under the Dodd-Frank Act, the person must meet the threshold definition of whistleblower—i.e., have reported a securities law violation to the SEC.

A rule promulgated by the SEC under the Dodd-Frank Act purported to extend the definition of whistleblower beyond the statutory definition in the context of the anti-retaliation provisions. Specifically, Rule 21F-2(b) provides that “for purposes of the anti-retaliation protections . . . [y]ou are

a whistleblower if . . . [y]ou possess a reasonable belief that the information you are providing relates to a possible securities law violation,” and that information is provided to a federal regulatory or law enforcement agency, Congress or “a person with supervisory authority over the employee.”⁴ This definition of whistleblower incorporates the definition of whistleblower in the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”), which does not require an individual to have reported a violation of the securities laws to the Commission, and therefore encompasses a broader group of whistleblowers.

While the Sarbanes-Oxley Act's statutory definition protects individuals that report up the chain (as opposed to requiring reporting to the SEC), the Dodd-Frank Act anti-retaliation protections are more expansive than those available to whistleblowers under the Sarbanes-Oxley Act in two key respects. The Dodd-Frank Act provides that an employee may sue a current or former employer even if the employee has not exhausted his or her administrative remedies. And as noted above, the Dodd-Frank Act also requires an award of double backpay, with interest, to a prevailing employee. Thus, by expanding the definition of whistleblower, the SEC rule purported to make the Dodd-Frank Act anti-retaliation protections available to a broader group of people, including those who did not provide information regarding wrongdoing to the SEC.

The Decision

In *Digital Realty*, the Court determined that Somers was not a “whistleblower” covered by the anti-retaliation provision of the Dodd-Frank Act.⁵ Justice Ginsburg, delivering the opinion of the Court, held that “Dodd-Frank's anti-retaliation provision does not extend to an individual, like Somers, who has not reported a violation of the securities laws to the SEC.” Justice Ginsburg's opinion was joined by Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor and Kagan. The remaining justices either concurred or concurred in the judgment.

In reaching its conclusion, the Court rejected arguments from Somers and the United States (filing an amicus brief) that the petitioner's reading was so narrow as to reduce the scope of the provision “to the point of absurdity.” Somers pointed to the provision of the Dodd-Frank Act that protects whistleblowers who make “disclosures that are required or protected under Sarbanes-Oxley,”⁶ including internal disclosures to a supervisor, arguing that it would “produce anomalous results” if such disclosures were only protected if a person also made a disclosure to the SEC. The Court rejected this argument, concluding that the clearly stated statutory definition of “whistleblower” was consistent with “Congress' aim [in the Dodd-Frank Act] to encourage SEC disclosures” and that the SEC was therefore “preclude[d] . . . from more expansively interpreting that term.”

Conclusion

The Court's ruling incentivizes potential whistleblowers to report potential violations of securities laws to the SEC immediately, rather than pursuing internal options to their conclusion. By doing so, they render themselves eligible for an SEC award, and in the event of retaliation, can avail themselves of the broader protections of the Dodd-Frank Act. As noted above, the Dodd-Frank Act entitles a successful plaintiff to double backpay and thus could result in increased costs for companies. At the same time, the decision narrows the population of employees who may sue

under the Dodd-Frank Act's anti-retaliation provisions, and it therefore may, at least in the short term, reduce companies' liability under those provisions.

[1] The Second Circuit previously reached this result in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015). In contrast, the Court of Appeals for the Fifth Circuit had previously held that whistleblowers must take their complaints to the SEC before availing themselves of the Dodd-Frank Act whistleblower protections.

[2] Specifically, the Act prohibits discharging, demoting, suspending, threatening or harassing a whistleblower because of any lawful act done by him or her.

[3] 15 U.S.C. § 78u-6(h)(1)(A).

[4] See 15 U.S.C. § 78u-6(h)(1)(A).

[5] Somers failed to satisfy the Sarbanes-Oxley Act requirements for anti-retaliation protection because he had not filed a complaint with the Secretary of Labor in the prescribed period of time as required by the statute to exhaust one's administrative remedy.

[6] 15 U.S.C. § 78u-6(h)(1)(A)(iii).

Authors



Matthew T. Martens

PARTNER

Co-Chair, Securities Litigation
and Enforcement Practice
Group

✉ matthew.martens@wilmerhale.com

☎ +1 202 663 6921



Elizabeth L. Mitchell

PARTNER

✉ elizabeth.mitchell@wilmerhale.com

☎ +1 202 663 6426



Christopher Davies

PARTNER

Vice Chair, Securities &
Financial Services Department

✉ christopher.davies@wilmerhale.com

☎ +1 202 663 6187

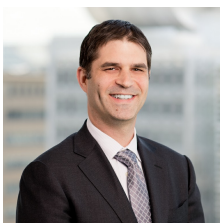


Nicole Rabner

PARTNER

✉ nicole.rabner@wilmerhale.com

☎ +1 202 663 6876



Robert Greffenius

SPECIAL COUNSEL

✉ robert.greffenius@wilmerhale.com

☎ +1 202 663 6108