

Say Something, but to the Right People: Supreme Court Clarifies Definition of 'Whistleblower' Under Dodd-Frank

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Yesterday, the U.S. Supreme Court significantly narrowed the scope of the Dodd-Frank Act's anti-retaliation measures. The decision resolved a split in authority by excluding from Dodd-Frank's whistleblower protections those persons reporting suspected violations only within their companies.

In reversing the Ninth Circuit, the Court held 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." Noting that the "core objective" of Dodd-Frank's whistleblower program is to "aid the commission's enforcement efforts by motivating people who know of securities law violations to tell the SEC," the Court limited the definition of "whistleblowers" under the Dodd-Frank Act to persons who provide "information relating to a violation of the securities laws to the Commission."

Plaintiff Paul Somers was fired from Digital Realty Trust ("DRT") in 2014, shortly after reporting to senior management that his supervisor had eliminated certain internal controls in violation of the Sarbanes-Oxley Act of 2002. Somers later sued DRT alleging the company had violated Section 21F of the Securities Exchange Act of 1934 ("Section 21F"), which was enacted pursuant to the Dodd-Frank Act and prohibits retaliation against corporate whistleblowers. DRT moved to dismiss Somers's claim on grounds that Section 21F protects only those who report potential violations to the SEC and does not extend to those who report only through internal processes.

The California district court denied DRT's motion to dismiss. Relying on language in Section 21F of Dodd-Frank that prohibits retaliation against whistleblowers "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002," the court held that Section 21F prohibits retaliation against not only those employees who report to the SEC, but also those employees who report suspected violations to "a person with supervisory authority over the employee." On appeal, the Ninth Circuit agreed, citing the potential ambiguity between Dodd-Frank's *definition of* "whistleblower" and the *use of* that term in the operative text of the same statute to conclude that Section 21F protects both internal whistleblowers and whistleblowers who report to the SEC.¹ According to the Ninth Circuit, holding otherwise and employing a unitary statutory definition would result in an absurd outcome.

The Supreme Court reversed the Ninth Circuit, holding that the principle of statutory interpretation in *Burgess v. United States*² — "[w]hen a statute includes an explicit definition, we must follow that definition"—resolved the question before the Court. Because Dodd-Frank's definition of "whistleblower" is "clear and conclusive," the Ninth Circuit's more expansive interpretation of the term is invalid.

The Supreme Court's decision resolves an outstanding circuit split, wherein the Ninth and Second Circuits had endorsed a broader view of who qualifies as a "whistleblower" and the Fifth Circuit had applied the plain language of Dodd-Frank to narrow the class of persons entitled to statutory protections.³ While the decision narrows potential liability for companies with respect to claims of

whistleblower retaliation, companies should not lose sight of their anti-retaliation obligations. Protecting internal whistleblowers and creating a culture of internal reporting promotes compliance and facilitates early detection and remediation of potential securities law violations. This decision, particularly if combined with a corporate tolerance for retaliatory behavior, could lead to more whistleblowers reporting to the SEC rather than internally.

Read the full *Digital Realty Trust* [opinion](#). For more information please contact one of the lawyers listed below.

¹ *Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2017).

² 553 U. S. 124, 130 (2008).

³ Compare *Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2017) and *Berman v. NEO@OGILVY LLC*, 801 F. 3d 145 (2nd Cir. 2013) with *Asadi v. G. E. Energy (USA), L.L.C.*, 720 F. 3d 620 (5th Cir. 2013).