



# SCOTUS Slams Door On Attempt To Expand Retaliation Law

Insights

2.21.18

Today, in a unanimous decision, the U.S. Supreme Court declined to broaden the definition of “whistleblower” in federal anti-retaliation law, ruling that employees who simply raise complaints with their employers are not protected by the Dodd-Frank Act despite regulations which sought to provide additional protections. This is a positive decision for employers because it significantly limits the type of reports protected by the Act, while decreasing the likelihood that you could face liability for discharging an employee (*Digital Realty Trust, Inc. v. Somers*).

## Background: What Is The Dodd-Frank Act?

Enacted in response to the financial crisis of 2008, the Dodd-Frank Act protects consumers from abusive financial service practices. It also provides both lucrative incentives and protections for whistleblower employees who report suspected violations of the law. Specifically, the Act protects any individual who provides information to the Securities and Exchange Commission (SEC) relating to a possible violation of securities law, as well as a rule or regulation promulgated by the SEC, that results in a successful enforcement action yielding monetary sanctions of over \$1 million. In other words, any employee that makes such a complaint would be entitled to the Act’s anti-retaliation provisions, even if an employee is not necessarily in the financial services industry.

The Dodd-Frank Act itself limits the definition of whistleblower by only including those employees who make a report of suspected malfeasance to the SEC. However, the interpreting regulations for the Act’s anti-retaliation provisions extend its protections well beyond the statute. The SEC’s rules permit employees who believe they faced retaliation after only making internal reports to claim protection under the Act. This is similar to some state whistleblower protection laws that protect whistleblowers who make reports to their employer, or even just to a supervisor or manager.

This was not the first time Congress enacted whistleblower protection legislation in response to a crisis. In 2002, it passed the Sarbanes-Oxley Act aimed at curbing securities violations. That law requires certain employees to internally report suspected securities law violations. The Sarbanes-Oxley Act also protects whistleblower employees who provide information to federal agencies, Congress, or “a person with supervisory authority over the employee.”

## Employee Convinces Lower Courts He’s A “Whistleblower”

With this background, Paul Somers worked as a vice president for Digital Realty from 2010 until he was terminated in April 2014. While employed there, Somers claims to have reported possible violations of security law to senior management, and alleges he was fired shortly after making these

internal reports. In November 2014, Somers filed suit against his former employer, claiming that Digital Realty retaliated against him in violation of the Dodd-Frank Act by firing him for making an internal report protected by the Sarbanes-Oxley Act.

Digital Realty immediately asked the court to dismiss the case, arguing that Somers was not entitled to whistleblower protection because he did not meet the statutory definition under the Dodd-Frank Act. After all, the Act defines a “whistleblower” as an “individual who provides . . . information relating to a violation of the securities laws to the [Securities and Exchange] Commission,” and, by his own admission, Somers did not make any reports to the SEC.

However, a California federal court, then the 9th Circuit Court of Appeals, both refused to dismiss Somers’ case. The lower courts said it was difficult to find a clear way to harmonize the Act’s narrow definition of whistleblower with the broad protections of its anti-retaliation provision, and therefore deferred to the SEC’s interpretation of the Act—which extends protection to individuals who make internal reports. Recognizing that certain provisions of the Sarbanes-Oxley Act require internal reporting, the 9th Circuit reasoned that a strict application of the Dodd-Frank Act’s whistleblower definition would narrow the anti-retaliation provisions of the Act “to the point of absurdity,” leaving entire categories of employees, such as in-house counsel and auditors, with little protection under the Act.

In short, the 9th Circuit elevated Congressional intent and regulatory interpretation over the plain language of the Act. This created a split in the circuits, as the 5th Circuit Court of Appeals had strictly applied the Act’s definition of whistleblower in an earlier case. The Supreme Court accepted the case to resolve the dispute, and today issued a ruling disagreeing with the 9th Circuit’s broad ruling of the statute.

### **SCOTUS Slams Door On Employees Hoping To Bring Suit**

The Supreme Court was tasked with resolving who Congress intended to protect when it defined “whistleblower” in the Dodd-Frank Act, and ultimately decided that the narrow words of the statute itself should be applied. The unanimous opinion, authored by Justice Ginsburg, first looked to the legislative definition of “whistleblower” and determined that the statute’s explicit definition must be followed, even if it varies from a term’s ordinary meaning. Here, that definition is someone who provides pertinent information “to the SEC.”

Second, the Court reasoned that its understanding of the definition was corroborated by the purpose and design of Dodd-Frank. Namely, the core objective is to aid the *SEC*’s enforcement efforts by rewarding those who report suspected violations of law to the SEC.

The Court also rejected Somers’ and the Solicitor General’s contention that the “whistleblower” definition applies only to the statute’s award program and not (as the definition plainly states), to its anti-retaliation provision, thereby vitiating the statute’s whistleblower protections. Instead, the Court determined that its own narrower reading of the statute would leave the statute’s whistleblower protections intact because whistleblowers would still be protected from retaliation by third parties

protections intact because whistleblowers would still be protected from retaliation by third parties (i.e., employers) so long as they *also* report misconduct to the SEC in addition to the third party. As soon as a person reports misconduct to the SEC, it explained, the statute's protections are automatically triggered, and employees, attorneys, and auditors who may also be required to report information within a company are automatically protected by the statute.

Lastly, the Court gave *no deference* to the SEC regulations implementing Dodd-Frank which did not require individuals to make a report to the SEC in order to establish whistleblower protection. The Court reasoned that Congress had directly spoken on the precise question at issue—namely the definition of a whistleblower—and therefore deference should not be afforded to a contrary view even if was contained in the SEC's regulations.

### **What This Decision Means For Employers**

Today's decision is good news for employers. It limits the ability of disgruntled former employees to seek whistleblower protection under the Dodd-Frank Act, and means there is one fewer weapon out there to be used against you. But it is not necessarily cause for celebration. There are still plenty of landmines in this area of the law to worry about.

The Dodd-Frank Act incentivizes employees to report violations of the law, tempting them with awards often exceeding \$1 million. In fact, the SEC website boasts of whistleblower awards totaling more than \$150 million. While today's decision means that employees will not have Dodd-Frank anti-retaliation protections if they only file internal reports of suspected violations, you shouldn't necessarily expect to see a decrease in the number of whistleblowers hoping for a windfall payment under the Act.

Moreover, you may already be under an obligation to treat employees who disclose suspected violations of law as whistleblowers pursuant to other federal and state laws, so the *Digital Realty* decision should not be taken as a green light to indiscriminately fire employees who report their concerns in-house. Finally, this decision could incentivize workers to file claims with the SEC in order to cloak themselves under Dodd-Frank's protections, opening your organization up to intrusive regulatory scrutiny. So long as an employee reports misconduct to the SEC (with or without an employer's knowledge), Dodd-Frank's protections will trigger.

In any event, this decision should serve as a reminder to ensure your zero-tolerance policy for retaliation is effective. You should ensure you take all reports seriously, investigate them effectively, and treat tipster employees in a fair and consistent manner.

If you have any questions about the implications of this decision, contact your local Fisher Phillips attorney.

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