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SUPREME COURT PROVIDES MUCH-NEEDED CLARITY TO DODD-FRANK ACT WHISTLEBLOWER STATUS

On February 21, 2018, the U.S. Supreme Court ruled that individuals who make internal disclosures of alleged unlawful activity—as opposed to those who report wrongdoing to the Securities Exchange Commission ("SEC")—are not protected as "whistleblowers" under the Dodd Frank Act ("DFA"), overturning the Ninth Circuit's holding in *Somers v. Digital Realty Trust Inc.* and resolving a hotly contested circuit split. The decision provides much-needed clarity for businesses, which now have clear guidelines regarding who qualifies for "whistleblower" protection.

DFA WHISTLEBLOWER PROVISION

The DFA provision states that: "No employer may discharge, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment."[1] On its face, the statute provides broad protections to "whistleblowers" that extend beyond dismissals or demotions, allowing employees to sue their employers for a wide array of adverse actions as long as these actions are connected with a whistleblower complaint.[2] However, the question of who is protected as a "whistleblower" has been unresolved since the DFA was enacted in 2010.

The term "whistleblower" is statutorily defined in the DFA as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC]."[3] However, the DFA also prohibits retaliation against an employee who (i) provides information to the SEC; (ii) initiates, testifies in, or assists with an SEC investigation or action; or (iii) makes disclosures that are protected by the

1 15 U.S.C. § 78u-6(h)(1)(A).

2 *See, e.g., In re International Game Technology*, Release No. 34-78991, 2016 WL 5464611 (2016) (settling claims by the SEC that a technology company retaliated against an employee who was relieved of his responsibilities following a whistleblower report to the employee's managers and the SEC); *In re Paradigm Capital Management, Inc.*, Release No. 3-15930, 109 S.E.C. Docket 430 (June 16, 2014) (settling claims by the SEC that a hedge fund manager retaliated against an employee who was relieved of his responsibilities once the company learned that the employee had reported violations to the SEC).

3 15 U.S.C. § 78u-6(a)(6).

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Sarbanes-Oxley Act ("SOX") or any other law, rule, or regulation subject to the jurisdiction of the SEC.[4] This arguably extends the DFA's prohibition on retaliation beyond individuals who are statutory whistleblowers because employees who report internally are protected under SOX. As a result, the SEC initially interpreted the DFA as having two classes of whistleblower: a narrow class of employees who report securities law violations to the SEC and are both protected from retaliation and able to collect under the DFA's monetary award provisions; and a broader class of employees who report violations internally and are only protected from employer retaliation.[5]

Courts have been divided over the SEC's definition of a "whistleblower" since shortly after DFA became effective.[6] The Fifth Circuit was the first Court of Appeals to consider the question in *Asadi v. GE Energy (USA), LLC*, finding that the DFA clearly stated that employees who do not make disclosures to the SEC are not protected.[7] More recently, in March 2017, a divided Ninth Circuit panel held in *Somers v. Digital Realty Trust, Inc.* that the DFA language "unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally."[8]

THE SUPREME COURT'S DECISION

In the February 21, 2018 opinion delivered by Justice Ginsburg, the Supreme Court resolved this circuit split by holding unanimously that the DFA is unambiguous in providing anti-retaliation protections only to employees who report misconduct to the SEC.[9] The Court explained that the definition section of the DFA's anti-relation provision has two parts that operate in conjunction: (1) a description of *who* is eligible for protections, i.e. an employee who reports misconduct to the SEC; and (2) a description of what *conduct* is protected, i.e. the three clauses described in § 78u-6(h)(1)(A)(i)–(iii). Only an individual who satisfies both definitions receives the DFA's anti-retaliation protections.

The Court looked to other provisions and Congressional intent to support its decision. First, the Court observed that Title 10 of the DFA, which created the Consumer Financial Protection Bureau, explicitly provides retaliation protection to employees who report violations to his or her employer.[10] According to the Court, this distinction suggested that Congress intentionally chose to limit the DFA whistleblower protection to employees who reported misconduct to the SEC. The Court also noted that Congress's "core objective" in enacting the DFA—and specifically its whistleblower program—was to motivate employees to report securities law violations to the SEC to assist with the Commission's enforcement

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4 15 U.S.C. § 78u-6(h)(1)(A).

5 17 C.F.R. § 240.21F-2.

6 *Compare Egan v. TradingScreen, Inc.*, 2011 WL 1672066 (S.D.N.Y. May 4, 2011) (noting the conflict between the DFA's statutory definition of whistleblower and the DFA's anti-retaliation provision and finding that the best way to harmonize the contradictory provisions was to allow a "narrow exception" to the statutory definition of whistleblower for reports not made to the SEC) *with Sullivan v. Harnisch*, 969 N.E.2d 758 (N.Y. 2012) (noting that the DFA "seems not to apply to conduct like that alleged in Sullivan's complaint" because the plaintiff had only confronted his employer's CEO, Harnisch, and had not reported the alleged misconduct to the SEC).

7 720 F.3d 620, 625 (5th Cir. 2013).

8 850 F.3d 1045, 1049 (2017).

9 Justices Thomas, Alito, and Gorsuch wrote separately only to protest the majority opinion's reliance on Congressional intent. In that concurrence, the three justices agreed with the majority that the text of the statute was clear, stating that this finding alone was sufficient to resolve the dispute.

10 12 U.S.C. § 5567(a)(1).

objectives. It distinguished this from Congress's objectives for enacting SOX, which included encouraging employees to report fraudulent behavior internally.

The Court continued its discussion by addressing several of the counterarguments advanced by Somers, the respondent, and the Solicitor General, who submitted an amicus brief. The Court first dismissed the argument that subdivision (iii) would have no meaning under the Court's interpretation, noting that it still protects an employee who reports misconduct both to the SEC and internally and is later retaliated against for internal reporting by an employer who is unaware of the report to the SEC. The Court then addressed the concern that auditors, attorneys, and other professionals who have internal-reporting obligations will be left vulnerable, noting that such professionals would receive protection as soon as they also report to the SEC, which is in line with Congress's primary motivation for enacting the DFA.

THE IMPACT OF *SOMERS*

With its decision, the Court has conclusively rejected the idea that individuals who only report misconduct internally are considered whistleblowers protected by the DFA. This eliminates one of the most vexatious issues created by the DFA: the precise definition of an internal whistleblower report. Previously, courts have held that less formal reports may be sufficient to qualify as an internal "report" for anti-retaliation purposes. For example, in one case, the court found that the plaintiff had made a whistleblower report based on the "simple fact" that "Plaintiff raised a concern related to the veracity of Defendant's SEC proxy statement."[11] Similarly, in another case, an employee was held to have made a whistleblower report based on her recommendation that her employer end a relationship with a client she believed might be engaged in illegal activity.[12] Instead of being able to allege that statements such as these qualify as whistleblower reports, genuine whistleblowers under the DFA must now submit their reports under penalty of perjury either on the SEC's website or by mail to the SEC Office of the Whistleblower.[13]

To be clear, the *Somers* decision does not give companies *carte blanche* to retaliate against employees for reporting misconduct—the DFA still protects whistleblowers who report misconduct to the SEC and internal whistleblowers at public companies (and certain service providers to public companies) will still be protected by SOX. Further, as the Court points out in its opinion, employers may not even be aware that an employee who reported misconduct internally has also reported it to the SEC, meaning retaliatory actions against that employee are still prohibited under the DFA. Thus, while the Court's decision in *Somers* is certainly clarifying, corporations should still be careful to ensure that their in-house disciplinary procedures protect whistleblowers and are in line with the DFA. Vigilance in documenting any warning or disciplinary actions taken against an employee will help support the position that a whistleblower was disciplined or

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[11] *Yang v. Navigators Group, Inc.*, 155 F. Supp. 3d 327, 334 (S.D.N.Y. Jan. 4, 2016), *vacated and remanded on other grounds by Yang v. Navigators Group, Inc.*, No. 16-77-cv, 2016 WL 7436485 (2d. Cir. Dec. 22, 2016).

[12] *Sharkey v. J.P. Morgan Chase & Co.*, No. 10 Civ. 3824, 2015 WL 5920019 (S.D.N.Y. Oct. 9, 2015), *vacated and remanded on other grounds by Sharkey v. J.P. Morgan Chase & Co.*, 660 F. App'x. 65 (2d Cir. Sept. 12, 2016).

[13] 17 C.F.R. 240.21F-9.

terminated for conduct unrelated to a whistleblower report should it later come out that the employee had made the same report to the SEC.

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