



Supreme Court Says Whistleblowers Must Report to the SEC Before Suing for Retaliation Under Dodd-Frank

***Digital Realty Trust, Inc. v. Somers*,
No. 16-1276**

Decided February 21, 2018

Today, the Supreme Court held 9-0 that whistleblowers must report alleged misconduct to the SEC before they can sue under the Dodd-Frank Act's anti-retaliation provision.

Background:

The Dodd-Frank Act prohibits retaliating against a "whistleblower" because that person reported misconduct to the SEC; initiated, testified in, or assisted with an SEC proceeding; or made certain required or protected disclosures. 15 U.S.C. § 78u-6(h)(1)(A). The Act defines a "whistleblower" as a person who reports misconduct to the SEC. 15 U.S.C. § 78u-6(a)(6). Paul Somers reported suspected misconduct to his employer but not to the SEC. After he was fired, he sued his former employer for retaliation under the Dodd-Frank Act.

Issue:

Whether the Dodd-Frank Act's anti-retaliation provision extends to individuals who have not reported alleged misconduct to the SEC.

Court's Holding:

Whistleblowers must report suspected misconduct to the SEC to be able to sue for retaliation under the Dodd-Frank Act.

"Courts are not at liberty to dispense with the condition—tell the SEC—Congress imposed."

Justice Ginsburg,
writing for the Court

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What It Means:

- The Court premised its decision on the statute's text. Even though purpose-based arguments were made for extending the anti-retaliation provision to individuals who do not report to the SEC, the Court declined to take that step because the statute clearly defines a "whistleblower" as a person who reported alleged misconduct to the SEC.
- The Court rejected the SEC's contrary interpretation of the statute, which was contained in a regulation. The Court also dismissed concerns that the ruling would undermine protection for "auditors, attorneys, and other employees subject to internal-reporting requirements," explaining that they already had protection under Sarbanes-Oxley and would also be protected under Dodd-Frank once they provided the relevant information to the SEC.
- Recall that the Court addressed a similar issue in *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014). In that case, the Court held for the whistleblower, ruling that contractors and subcontractors of a public company may sue for retaliation under the Sarbanes-Oxley Act. It is important to note that the Sarbanes-Oxley Act does not include a requirement that a whistleblower report to the SEC.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

Appellate and Constitutional Law Practice

Caitlin J. Halligan

+1 212.351.3909

challigan@gibsondunn.com

Mark A. Perry

+1 202.887.3667

mperry@gibsondunn.com

Nicole A. Saharsky

+1 202.887.3669

nsaharsky@gibsondunn.com

Related Practices: Labor and Employment

Catherine A. Conway

+1 213-229-7822

cconway@gibsondunn.com

Eugene Scalia

+1 202-955-8206

escalia@gibsondunn.com

Jason C. Schwartz

+1 202-955-8242

jschwartz@gibsondunn.com

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