



## 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.

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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:

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