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# U.S. Supreme Court Holds That Anti-Retaliation Provisions of Dodd-Frank Apply Only to Whistleblowers Who Report to the SEC

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On February 21, 2018, the U.S. Supreme Court unanimously ruled that an individual is not covered by the anti-retaliation provision of the Dodd-Frank Act unless they have provided information regarding a violation of law to the U.S. Securities and Exchange Commission. *Digital Realty Trust, Inc. v. Somers*, No. 10-1276, 583 U.S. ___ (2018).

Somers was a Vice President of Digital Realty, a real estate investment trust, who filed suit alleging a claim of whistleblower retaliation under Dodd-Frank. Somers alleged that he was terminated for reporting suspected securities law violations to senior management. Digital Realty moved to dismiss Somers' claim on the basis that Somers did not qualify as a "whistleblower" because he never reported any alleged violations to the SEC.

The Dodd-Frank Act defines a "whistleblower" as a person who provides "information relating to a violation of the securities laws to the Commission." The Dodd-Frank Act's anti-retaliation provision protects a "whistleblower" in three situations, including when he or she makes disclosures that are required or protected under the Sarbanes-Oxley Act of 2002. Sarbanes-Oxley includes several provisions regarding internal reporting of securities laws violations. In interpreting this provision, the SEC issued Rule 21F-2, which expressly allows an individual to gain anti-retaliation protection as a whistleblower without providing information to the SEC.

The District Court denied Digital Realty's motion to dismiss, and the Ninth Circuit affirmed. In particular, the Ninth Circuit found the statutory scheme ambiguous and held that the SEC's Rule 21F-2 warranted deference under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

In reversing the Ninth Circuit's decision, the Supreme Court unanimously held that the anti-retaliation provision must be interpreted in accordance with the statute's definition of a "whistleblower." Because this definition was "clear and conclusive" and "Congress [had] directly spoken to the precise question at issue," *Chevron* deference to the SEC's Rule was not appropriate. The Court reasoned that this interpretation is in line with Dodd-Frank's core objective of prompting reporting to the SEC.

Proskauer represented the U.S. Chamber of Commerce in its submission of an *amicus* brief in support of Digital Realty and a reversal of the Ninth Circuit's decision.

The Court's decision settles a circuit split between the Second and Fifth Circuits on the issue. The Ninth Circuit had followed the Second Circuit's decision in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), holding that a whistleblower need not report a securities law violation to the SEC. The Second Circuit concluded that the tension between the definition of "whistleblower" and the protection provided by Dodd-Frank's anti-retaliation provision was sufficiently ambiguous to warrant *Chevron* deference to the reasonable interpretation of the SEC. In contrast, the Fifth Circuit held in *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013), that employees must provide information to the SEC to avail themselves of the anti-retaliation safeguard. The Fifth Circuit held that Congress defined a "whistleblower" unambiguously and rejected the SEC's more expansive interpretation of that term.

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