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Legal Sidebar

Blowing the Whistle Indoors: Can Internal Whistleblowers Sue for Retaliation Under Dodd-Frank?

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In the Dodd-Frank Wall Street Reform and Consumer Protection Act (also known as Dodd-Frank), Congress established new incentives and protections for whistleblowers who report certain violations of securities laws. This November, in *Digital Realty Trust Incorporated v. Somers*, the Supreme Court is scheduled to hear oral argument on the scope of who may qualify as a "whistleblower" for purposes of the Act's anti-retaliation provisions. Specifically, the Court will consider whether internal whistleblowers—*i.e.*, those who report violations within their organizations but *not* to the Securities and Exchange Commission (Commission)—can sue their employers for retaliation under the Act.

The dispute in *Digital Realty*, which centers on the interplay between Dodd-Frank's definition of a "whistleblower" and the anti-retaliation provision's reference to disclosures made pursuant to the Sarbanes-Oxley Act, raises significant issues not only for securities law enforcement and companies' internal compliance programs, but also for broader matters of statutory interpretation.

Background: Whistleblower Protections under Sarbanes-Oxley and Dodd-Frank

The most significant whistleblower protection provision in federal securities law before Dodd-Frank's was in the Sarbanes-Oxley Act (SOX), which Congress enacted in the wake of the Enron and WorldCom accounting scandals in 2002. SOX's anti-retaliation provision generally protects an "employee" who provides information regarding a suspected violation of certain securities laws to any of three classes of people: (1) a federal regulatory or law enforcement agency, (2) a Member or Committee of Congress, or (3) "a person with supervisory authority over the employee" working for the same employer. Significantly, as related to the third category, SOX also mandated that public companies' audit committees establish procedures for internal complaints and reporting of suspected abuses within the company. SOX and other laws even require a company's auditors and attorneys to report internally before reporting violations to an outside agency. Commentators have noted that the internal reporting regime under SOX has been widely integrated into corporate compliance programs over the past 15 years.

SOX allows employees who believe they have been penalized for their reporting activity or for their assistance to law enforcement to file a complaint with the Secretary of Labor within 180 days, and they

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can bring an action in federal court only if the Secretary does not act on their complaint within another 180 days. As for remedies, employees are entitled to reinstatement, backpay, and special damages (which may include, for example, damages for emotional injury).

With Dodd-Frank, Congress intended to enhance securities law whistleblowing processes through a new and relatively robust whistleblowing program. For example, Congress provided for monetary incentives (*i.e.*, "bounties") for individuals reporting certain violations of securities laws and strengthened anti-retaliation protections for whistleblowers in several respects. In contrast to SOX, Dodd-Frank does not first require filing an administrative complaint to sue in court for retaliation, the statute of limitations is much longer (between three and ten years, depending on the circumstances), and the remedies can include reinstatement and *double* backpay.

In terms of protected activity, Dodd-Frank's anti-retaliation provision prohibits an employer from retaliating against "a whistleblower" "because of" three types of activity. First, the provision protects whistleblowers who provide information regarding securities law violations to the Commission. Second, the provision also applies to whistleblowers who assist the Commission in an investigation or proceeding. Third, and most relevant to *Digital Realty*, the anti-retaliation provision further specifies that it protects whistleblowers who "mak[e] disclosures that are required or protected under [SOX]," among other laws.

Dispute Regarding Appropriate Reading of Dodd-Frank

The third category of protected activity under Dodd-Frank does not suggest that the whistleblower needs to have made any disclosures *to the Commission* in order to recover. However, the definition of the term "whistleblower" in Dodd-Frank complicates reaching a conclusion that internal whistleblowers are protected under the Act. The definition refers to individuals who provide "information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission," suggesting that an individual must report to the Commission to benefit from the subsection's protections.

This tension between Dodd-Frank's definition of the term "whistleblower" and its incorporation of SOX in the anti-retaliation provision is the issue on appeal in *Digital Realty*. Paul Somers, when he was a Vice President at Digital Realty, complained internally to the company's management regarding alleged accounting abuses. Digital Realty fired Somers soon afterwards. The Ninth Circuit ruled that Somers was entitled to sue under Dodd-Frank, even though he did not take the additional step of reporting his concerns to the Commission. The Second Circuit reached the same result in a similar case in 2015. But the Fifth Circuit took a different view in 2013, ruling that a "whistleblower" must have reported a complaint to the Commission. These decisions have created a circuit split over the proper reading of Dodd-Frank.

Lower Courts' Views of Who Qualifies as a "Whistleblower"

The lower court in *Digital Realty* reasoned that Dodd-Frank's anti-retaliation provision's specific SOX references and the overall purpose of the statute indicated Congress's intent to protect internal whistleblowers as well as those who report to the Commission. Notably, there is no mention of the third category of protected activity, which was added late in the drafting process in the conference committee, in the conference report or final passage debates in either the House or Senate. The Ninth Circuit also agreed with the Second Circuit that, even if the term "whistleblower" raises ambiguity in the anti-retaliation provision, the Commission's own interpretation is entitled to deference under *Chevron* principles. In its Dodd-Frank regulations, the Commission has defined the term "whistleblower" to encompass internal whistleblowers, explaining that a more limited reading would chill employees' use of valuable internal reporting processes.

The Fifth Circuit, on the other hand, ruled in *Asadi v. G.E. Energy (USA), L.L.C.* that a Dodd-Frank "whistleblower" can only be someone who reports a complaint to the Commission. In analyzing the statutory language, the Fifth Circuit determined that the reference to SOX in the anti-retaliation provision does not expand the definition of a "whistleblower" and concluded that it would be inappropriate to read the words "to the Commission" out of the definition. The Fifth Circuit hypothesized at least one scenario in which the third category of Dodd-Frank whistleblower protections would apply under a more limited reading of the definition: an employee reports both internally *and* to the Commission (the latter making them a "whistleblower"), but is retaliated against only "because of" the internal report (*e.g.*, if the employer was unaware of the report to the Commission). The Fifth Circuit further reasoned that the anti-retaliation scheme for internal reporting that exists under SOX would essentially be rendered "moot" if the Dodd-Frank anti-retaliation provisions were to apply, because whistleblowers would be more inclined to take advantage of Dodd-Frank's stronger protections.

In *Digital Realty*, the Supreme Court is set to resolve these different readings of Dodd-Frank. According to some commentators, a ruling for Digital Realty would limit the availability of a relatively powerful mechanism for deterring retaliation against internal whistleblowers, undermining corporate compliance programs for internal reporting. A ruling for Somers, on the other hand, according to others, could increase costs and burdens for companies faced with potentially increased numbers of federal court whistleblower actions.

Implications for Statutory Interpretation

In addition to clarifying the bounds of Dodd-Frank's anti-retaliation protections, *Digital Realty* may also provide an opportunity for the Supreme Court to shed light on several statutory interpretation principles, particularly in the aftermath of its ruling in *King v. Burwell*—a 2015 decision regarding the Patient Protection and Affordable Care Act (ACA).

Like *King*, *Digital Realty* raises issues of the extent to which a court should look to the broader purpose and operation of a statute in interpreting particular statutory provisions. In *King*, a case that concerned the interpretation of a tax credit provision in the ACA, the Court rejected a reading of the provision that, in the view of the majority, would undermine "the operation of the entire statute." The majority in the Ninth Circuit concluded that the context of Dodd-Frank, like the context of the ACA in *King*, was critical to interpreting the anti-retaliation provision, while the dissent posited that the analysis in *King* should be relegated to its facts.

The Supreme Court may address *King's* reach in resolving the dispute in *Digital Realty*. More broadly, *Digital Realty* appears to implicate a *pot-pourri* of sometimes competing statutory canons, such as the rule against superfluity of statutory language, the import of *Chevron* deference, and other canons concerning related statutory schemes. The *Digital Realty* decision is therefore likely to have broader importance beyond securities law.

Oral argument in *Digital Realty* has been scheduled for November 28.

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