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Supreme Court Unanimously Confirms Scope of Whistleblower Protection Under Dodd-Frank

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Seyfarth Synopsis: *The United States Supreme Court ruled 9-0 today that whistleblowing employees seeking to sue for retaliation under the Dodd-Frank Wall Street Reform and Consumer Protection Act must bring their concerns to the Securities and Exchange Commission before suing their employer.*[1] Digital Realty Trust v. Somers*, U.S. S. Ct. Case No. 161276 (Feb. 21, 2018). In an opinion by Justice Ruth Bader Ginsburg, the High Court found that Dodd-Frank's anti-retaliation provision does not extend to an individual who has not first reported a violation of securities laws to the SEC.*

The Court reached this conclusion through straightforward statutory interpretation. Dodd-Frank, the Court first observed, explicitly defines a "whistleblower" as an individual who provides pertinent information "to the Commission." Section 78u-6(a)(6). The statute further instructs that this "whistleblower" definition "shall apply" "[i]n this section"—that is, throughout Section 78u-6. Consequently, the Court concluded, the statute provides "an unequivocal answer"—the only person who can be a whistleblower under Dodd-Frank is an individual who provides information to the SEC.

Also in Section 78u-6 are retaliation protections for "whistleblowers" who engage in one of three types of conduct. Section 78u-6(h)(1)(A). These protections are available to whistleblowers, but not to employees who only complain internally to their employer without also going to the SEC. The Court held, "an individual who falls outside the protected category of 'whistleblowers'" (*i.e.*, someone who has not gone to the SEC) is "ineligible" for protection under the statute even if they engage in the conduct that would otherwise be protected.

As the Court found the statutory definition of "whistleblower" to be "clear and conclusive," it declined to "accord deference to the contrary view advanced by the SEC." For similar reasons, the Court rejected the invitation of the plaintiff/employee and the U.S. Solicitor General to "construe the term 'whistleblower' in its 'ordinary sense,' *i.e.*, without any SEC-reporting requirement."

There were two concurring opinions that the liberal and conservative wings of the Court used to debate whether legislative intent, as found in a Senate Report, should be used to interpret statutes. Justice Sotomayor, joined by Justice Breyer, wrote that "even when, as here, a statute's meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text." On the other hand, Justice Thomas, joined by Justices Alito and Gorsuch, found no use for legislative history, honing tightly to the words of the statute rather than any extraneous information associated with the statute's debate or passage in the legislature. Despite this disagreement, the entire Court agreed with the ultimate outcome in this matter.

1 Seyfarth Shaw represented the employer in this case before the Supreme Court, the Ninth Circuit and the district court.

This is a wonderful victory for employers that are governed by the Dodd-Frank Act. Employees still have many ways to secure whistleblower protections, such as under the Sarbanes-Oxley Act and state laws that protect whistleblowers from retaliation. But this opinion reinforces the importance of rigorous statutory interpretation, and is a clear triumph for simple textualism over policy.

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