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SCOTUS to decide: Who is a Protected “Whistleblower” Under Dodd-Frank?

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The Dodd-Frank Act broadened whistleblower incentives and protections afforded by the 2002 Sarbanes-Oxley Act. In addition to authorizing [bounty payments](#) to whistleblowers whose tips lead to successful enforcement actions, Dodd-Frank allows an employee who reports suspected wrongdoing to sue their employer in federal court (rather than first file a complaint with the Department of Labor) if they believe the employer retaliated against them for doing so. At issue in *Digital Realty Trust v. Sommers* is whether this anti-retaliation protection covers individuals who only report internally, notwithstanding the fact that Dodd-Frank defines the term “whistleblower” to mean an “individual who provides information . . . to the Commission.”

The case comes to the Supreme Court on an appeal from a Ninth Circuit decision that deepened a jurisdictional split on the issue. The Ninth Circuit affirmed the denial of Digital Realty’s motion to dismiss, holding that the employee was entitled to anti-retaliation protection, despite his failure to report to the SEC. That court found that the meaning of “whistleblower” under Dodd-Frank was sufficiently ambiguous, and thus deferred to the Commission’s interpretation that the anti-retaliation provisions cover those who raise concerns internally as well.

During the hour-long argument before the Supreme Court, lawyers for the respondent-employee and the government argued that the narrow interpretation suggested by Digital Realty – that only those who report to the Commission are protected by Dodd-Frank – would run afoul of Congressional intent. They contended that this perspective would weaken internal corporate compliance programs and substantially diminish Dodd-Frank’s deterrent effect.

Nevertheless, both conservative and liberal justices were wary of this broad interpretation (which Digital Realty’s counsel colorfully termed “nakedly atextual”), emphasizing that Congress very clearly defined a whistleblower as one who reports “to the Commission.” Justice Gorsuch asked: “I’m just stuck on the plain language here . . . how much clearer could Congress have been than to say in this section the following definitions shall apply, and whistleblower is defined as including a report to the Commission?” Justice Kagan even added, “It says what it says.”

How the Supreme Court will ultimately decide remains to be seen, however the questions from the Justices suggest the employee’s position may be in peril. A decision is expected by the end of June 2018.

This article was also written by Elizabeth Weil Shaw.

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