SUPREME COURT RESOLVES DEBATE OVER THE SCOPE OF THE DODD-FRANK WHISTLEBLOWER PROTECTION PROVISIONS

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The Supreme Court recently resolved a circuit split affecting employers subject to the anti-retaliation provisions set forth in Section 21F of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). [1] Finding the plain text of the statute to be "clear and conclusive"—thus negating deference to the interpretation promulgated by the Securities and Exchange Commission ("SEC")—the Court held that Dodd-Frank's whistleblower protections extend only to those individuals who have reported their allegations to the SEC.

CASE BACKGROUND

An individual sued his former employer for whistleblower retaliation on the ground that the employer terminated his employment shortly after he reported to senior management regarding possible corporate misconduct and violations of the securities laws. On a motion to dismiss, the employer argued that, because the individual did not report his allegations to the SEC, he is not a "whistleblower" as defined by Section 21F(a)(6) of Dodd-Frank and, as a result, cannot call upon the anti-retaliation protections contained in Section 21F(h)(1).

The U.S. District Court for the Northern District of California denied the motion. [2] The district court explained that, though Dodd-Frank confines the whistleblower definition to those who report to the SEC, its anti-retaliation provisions appear to extend to individuals who make disclosures pursuant to other statutory reporting schemes. In relevant part, subsection (iii) of Section 21F(h)(1)(A) cross-references Sarbanes-Oxley, which shields so-called whistleblowers who reported exclusively to internal supervisors. According to the district court, this conflict renders the statutory scheme ambiguous. It therefore turned to the SEC's articulation, promulgated in Rule 21F-2, that disclosure to the agency is not a prerequisite for protection against retaliation under Dodd-Frank. [3] Finding this interpretation reasonable, the district court afforded it deference under *Chevron*.

Concluding that the employer's interpretation of the statute would diminish the anti-retaliation provisions "to the point of absurdity," the Court of Appeals for the Ninth Circuit affirmed. [4] In doing so, it sided with the Second Circuit and against the Fifth Circuit in the pending circuit split on this issue. [5]

RESOLUTION OF THE CIRCUIT SPLIT

At the oral argument, several members of the Court, from Justice Gorsuch ("How much clearer could [Congress] have possibly been?") to Justice Kagan ("[Y]ou have this definitional provision, and it says what it says."), foreshadowed their likely approach to the question presented. Therefore, the holding announced on February 21, 2018 was not entirely unexpected. [6]

As an initial matter, the Court held that Section 21F(a)(6), the definitional provision of the statute, "supplies an unequivocal answer" to the meaning of "whistleblower," that is, "any individual who provides . . . information relating to a violation of the securities laws to *the Commission*." This definition expressly applies throughout Section 21F and informs, rather than contradicts, Section 21F(h)(1)(A). In other words, Section 21F(a)(6) defines a whistleblower, and Section 21F(h)(1)(A) describes "what *conduct*, when engaged in by a whistleblower, is shielded from employment discrimination." If the individual does not fit within the definition, the Court explained, Dodd-Frank's protections are unavailable.

In further support of its textual interpretation, the Court also pointed to the narrow objective of Dodd-Frank's whistleblower program. Relying on a Senate report, the Court concluded that Congress created monetary incentives and provided "heightened protection against retaliation" in an effort to motivate SEC reporting specifically and, in turn, "improve SEC enforcement."

Having determined that the "text and purpose" of Dodd-Frank "leave no doubt" about the meaning of "whistleblower," the Court did not consider agency interpretation. Accordingly, the Court reversed the Ninth's Circuit's order and held that, because the individual did not report to the Commission prior to his termination, he could not bring a whistleblower retaliation suit under Section 21F(h)(1)(A). In reaching this decision, the Court discussed and rejected arguments raised by the individual and the U.S. Solicitor General regarding the practical limitations resulting from a narrow reading of the statute. For instance, the Court dismissed their concerns regarding the vulnerability of employees subject to internal reporting requirements, such as those applicable to attorneys and auditors under Sarbanes-Oxley, emphasizing that such employees will become eligible for protection once they report to the SEC.

IMPLICATIONS

In many ways, this case may be viewed as good news for employers. The broad definition of "whistleblower" advanced by the individual, if adopted by the Court, may have promoted the reporting of tenuous and unsubstantiated complaints, leading to increased litigation risk under Dodd-Frank's whistleblower retaliation provisions. At the same time, the Court's holding may cause a greater number of self-styled whistleblowers to report possible misconduct directly to the SEC, without reporting or escalating such matters within the company. [7] As a result, companies may have little opportunity to manage and remedy issues internally before having to face tough questions from regulators and expend additional resources defending a governmental investigation. To that end, companies should continue to reinforce a corporate culture that encourages the internal reporting of potential misconduct and that communicates a responsible and good faith approach to the handling of all "whistleblower" complaints.

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[1] *Digital Realty Trust, Inc. v. Somers*, 583 U.S. ___ (2018).

[2] *Somers v. Digital Realty Trust, Inc.,* 119 F. Supp. 3d 1088 (N.D. Cal. 2015).

[3] *See id.* at 1106.

[4] *Somers v. Digital Realty Trust, Inc.,* 850 F.3d 1045, 1049 (9th Cir. 2017).

[5] The Court of Appeals for the Fifth Circuit held that employees must provide information to the SEC to take advantage of Dodd-Frank's anti-retaliation protections. *See Asadi v. G.E. Energy (USA), L.L.C.,* 720 F.3d 620,

630 (5th Cir. 2013). A divided panel of the Court of Appeals for the Second Circuit reached the opposite conclusion. *See Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015). For further discussion of these cases, see our prior client alert, Second Circuit Filing Re-Ignites Debate over the Scope of the Dodd-Frank Whistleblower Protection Provisions.

[6] The judgment of the Court was unanimous. In a concurring opinion, however, Justices Thomas, Alito, and Gorsuch departed from the majority with respect to its reliance on legislative history. Justice Sotomayor, joined by Justice Breyer, responded with a separate concurrence noting the benefit of consulting reliable legislative history when available.

[7] This case is also expected to increase the frequency of SEC reporting and, in turn, the SEC's workload with respect to managing its whistleblower program, as acknowledged by Richard Best, Regional Director of the Atlanta Regional Office, at an enforcement panel during *The SEC Speaks in 2018* held on February 23, 2018.

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