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

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This week, the Supreme Court heard oral arguments in ***Digital Realty Trust v. Sommers***, a case that will decide whether employees who report suspected securities law violations internally can bring anti-retaliation claims against their employers under the 2010 Dodd-Frank Act, even if they never report their concerns to the Securities and Exchange Commission.

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 Trust'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 a 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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