

Dodd-Frank Whistleblowers: Supreme Court Holds Internal Complaints Are Not Enough

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Last week, the U.S. Supreme Court held in the [Digital Realty Trust, Inc. v. Somers case](#) that the definition of a “whistleblower” under the Dodd-Frank Act (“Dodd-Frank”) does not cover internal complaints made only to the company. The employee is required to file a formal complaint with the U.S. Securities and Exchange Commission (“SEC”) to qualify for the increased remedies and greater protections as compared to the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”). The Court found no ambiguity in the express definition of a “whistleblower” as one who reports “information relating to a violation of the securities laws to the Commission.” 15 U.S.C. § 78u-6(a)(6). This is a significant development since Dodd-Frank established a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC. In 2010, Dodd-Frank created a substantially enhanced bounty program whereby a whistleblower could receive an award of between 10 and 30 percent of the monetary sanctions collected in the enforcement action based on the information provided by the whistleblower. Dodd-Frank also instituted anti-retaliation provisions that prohibit employers from discriminating against or terminating employees for making reports of securities violations to the SEC. This does not mean that internal whistleblowers have no remedies or protections since Sarbanes-Oxley has already provided for anti-retaliation protection for internal whistleblowers since 2002. The key difference is that Sarbanes-Oxley has an administrative-exhaustion requirement requiring a plaintiff to file a complaint with the Department of Labor within 180 days as compared to no administrative filing pre-requisite and a six year statute of limitation under Dodd-Frank. Moreover, in addition to the bounty described above, a successful plaintiff alleging retaliation under Dodd-Frank will receive double backpay with interest as compared to Sarbanes-Oxley which is limited to backpay with interest. This decision is also important as it resolved a split between the Fifth Circuit which held employees must report first to the SEC and the Second and Ninth Circuits which held an internal report to management was sufficient. While this decision may appear to be a victory for companies, it may end up costing more in litigation expenses down the road. Since 2002, many companies have established strong internal reporting systems which permit them to address many issues internally without the involvement of government inspectors and the related expenses of litigation. This decision could force informed whistleblowers to go to the SEC sooner rather than waiting on the resolution of internal reports when they realize they have no protection under Dodd-Frank.

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