

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



[Connie Elder Carrigan](#) is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

## U.S. Supreme Court Clarifies Scope of Whistleblower Protections Under Dodd-Frank

March 1, 2018 | by

On February 21, 2018, in the case of *Digital Realty Trust, Inc. v. Somers*, the United States Supreme Court unanimously decided that employees who raise internal complaints about possible violation of securities laws are not protected as whistleblowers under the Dodd-Frank Act. To obtain protection from retaliatory measures undertaken by their employers, employees must report such complaints to the Securities and Exchange Commission (SEC).

The Dodd-Frank Act was enacted in 2010 to protect consumers from abusive practices by financial service providers. While the Act itself expressly limits the definition of a whistleblower to only those employees who make a report of suspected securities violations to the SEC, the regulations interpreting the Act's anti-retaliation provisions extend its protections well beyond the statute. In reliance upon these regulations, several federal circuit courts throughout the nation adopted the expansive interpretation on the basis that it reflected Congressional intent. This created a split in the circuits as other courts strictly applied the Act's narrow definition of what actions constitute protected whistleblower activity.

In determining that the whistleblower protections are limited to those who report violations to the SEC and in rejecting the employee's assertion that his report of inappropriate activity to senior management was sufficient to trigger Dodd-Frank protections when his employment was terminated, the Supreme Court distinguished such protections from those contained in the Sarbanes-Oxley Act. Both Acts forbid retaliation for reporting unlawful conduct. However, the Sarbanes-Oxley Act includes more expansive whistleblower protection by protecting employees who provide information to federal agencies, to Congress, or to "a person with supervisory authority over the employee."

Justice Ruth Bader Ginsberg, writing for the Court, reasoned that the "core objective" of Dodd-Frank was to aid the SEC's enforcement efforts by rewarding those who report suspected violations of securities law to the SEC. The Dodd-Frank Act unambiguously provides that a whistleblower is a person who provides "information relating to a

violation of the securities laws to the [Securities and Exchange] Commission.” Justice Ginsberg further reasoned that the Court’s narrow interpretation of the Act nevertheless accomplishes the Act’s objective of protecting whistleblowers so long as they report misconduct to the SEC and that the Act’s anti-retaliation provisions appropriately serve to protect employees, attorneys, and auditors who may be required to make disclosures that are protected under any law subject to the SEC’s jurisdiction.

The *Somers* decision is welcome news to employers as it limits the scope of reports that are protected by the Dodd-Frank Act to those which have been asserted directly to the SEC, thereby safeguarding employers from defending against retaliation claims raised by employees who have only made such complaints internally. However, the fact that the Dodd-Frank Act incentivizes employees to report inappropriate activity to the SEC by tempting them with lucrative whistleblower awards should not be taken lightly. The fact remains that pursuant to various federal and state whistleblower protections, employers are obligated not to retaliate against employees who disclose suspected violations of law. A zero-tolerance policy with regard to such retaliation is recommended. Employers should ensure that all reports of wrongdoing are taken seriously and investigated adequately, fairly, and consistently.

If you have questions about the impact of this decision or any other matter relating to employment practices, please contact Connie Carrigan at [ccarrigan@smithdebnamlaw.com](mailto:ccarrigan@smithdebnamlaw.com).

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