

## Supreme Court: Dodd-Frank's Anti-Retaliation Provisions Apply Only to Employees Who Report Allegedly Wrongful Activity to the SEC

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On February 21, 2018, the Supreme Court unanimously held that the anti-retaliation protections created by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) do not apply to an employee who internally reports allegedly wrongful activity but fails to report the activity to the SEC. *Digital Realty Trust v. Somers*, 138 S. Ct. 767 (2018) (Ginsburg, J.) (*Digital Realty Trust II*). The Court’s decision resolves a split between the Second, Fifth and Ninth Circuits.

Section 78u-6 of the Dodd-Frank Act defines a “whistleblower” as “any individual who provides ... information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. § 78u-6(a)(6) (emphasis added). The same section creates anti-retaliation provisions for “whistleblowers,” prohibiting employers from firing employees who “mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002,” among other things. 15 U.S.C. § 78u-6(h)(1)(A)(iii). In 2011, the SEC promulgated a rule that, for the purposes of the anti-retaliation protections, interpreted “whistleblower” to include employees who make only internal disclosures of potentially wrongful activity. 17 C.F.R. § 240.21F-2(a)(1).

In *Somers v. Digital Realty Trust*, 850 F.3d 1045 (9th Cir. 2017) (*Digital Realty Trust I*),<sup>[1]</sup> the Ninth Circuit adopted the Second Circuit’s 2015 conclusion in *Berman v. Neo@Ogilvy*, 801 F.3d 145 (2d Cir. 2015)<sup>[2]</sup> that the “tension” between the definition of whistleblower and the anti-retaliation provisions is “as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute [i.e. the SEC].” By contrast, in *Asadi v. G.E. Energy (USA)*, 720 F.3d 620 (5th Cir. 2013), the Fifth Circuit held that the Dodd-Frank Act’s definition of whistleblower “expressly and unambiguously requires that an individual provide information to the SEC to qualify as a ‘whistleblower’ for purposes of [the anti-retaliation protections].”<sup>[3]</sup> In rejecting the Fifth Circuit’s approach, the Ninth Circuit noted that the SEC regulation is “consistent with Congress’s overall purpose to protect those who report violations internally as well as those who report to the government.” *Digital Realty Trust I*, 850 F.3d 1045.

In an opinion authored by Justice Ginsburg, the Supreme Court unanimously reversed the Ninth Circuit’s judgment. The Court began by noting that the “definition section of the statute supplies an unequivocal answer” to the issue of the meaning and reach of the term “whistleblower” in the Dodd-Frank Act’s anti-retaliation provisions. The Court emphasized that the definition requires reporting “to the

Commission,” and that the statutory text instructs “that the ‘definition shall apply’ ‘in this section,’ that is, throughout § 78u-6.” *Digital Realty Trust II*, 138 S. Ct. 767 (quoting 15 U.S.C. § 78u-6(a)(6)).

The Court further noted that “when Congress includes particular language in one section of a statute but omits it in another, ... this Court presumes that Congress intended a difference in meaning.” *Id.* (quoting *Loughrin v. United States*, 134 S. Ct. 2384 (2014)). Title 10 of the Dodd-Frank Act, which created the Consumer Financial Protection Bureau, features “another whistleblower-protection provision [that] imposes no requirement that information be conveyed to a government agency.” *Id.* Specifically, it prohibits discrimination against a “covered employee” who provides “information to [an] employer, the Bureau, or any other State, local, or Federal, government authority.” 12 U.S.C. § 5567(a)(1). Because Congress placed a government-reporting requirement in § 78u-6 but not elsewhere in the Dodd-Frank Act, the Court concluded that Congress intended that the definition of “whistleblower” cover only individuals who report potentially wrongful activity to the SEC.

The Court explained that the “purpose and design” of the Dodd-Frank Act “corroborate[s] [its] comprehension of § 78u-6(h)’s reporting requirement.” The Court cited a Senate Report stating that the core objective of the Act’s whistleblower protection scheme is “to motivate people who know of securities law violations to *tell the SEC*.” *Id.* (quoting S. Rep. No. 111-176, p. 38) (emphasis added by the Court). The Court found that by creating § 78u-6, Congress “undertook to improve SEC enforcement.” In a concurring opinion joined by Justices Alito and Gorsuch, Justice Thomas took issue with the Court’s reliance on the Senate Report as evidence of Congressional intent. Justice Sotomayor, joined by Justice Breyer, rebutted Justice Thomas’s opinion in her own concurrence defending the Court’s use of this kind of legislative history as a method for ascertaining the Act’s purpose.

The Court rejected the respondent’s contention, supported by the United States, that Congress intended the term “whistleblower” to retain its “ordinary sense” rather than the statutory definition. While conceding that “the plain-text reading of the statute undoubtedly shields fewer individuals from retaliation than the alternative proffered by [the respondent] and the Solicitor General,” the Court was not persuaded that applying the § 78u-6 definition would “create obvious incongruities,” “produce anomalous results,” and “vitate much of the statute’s protection[s]” such that a departure from the statutory definition would be warranted. *Id.* Finally, finding that Congress’s primary aim in creating this section of the Dodd-Frank Act was to incentivize “prompt reporting to the SEC,” the Court rejected as unpersuasive arguments that its holding would diminish the deterrent effects of the Act.

[1] Please [click here](#) to read our discussion of the Ninth Circuit’s decision in *Digital Realty Trust I*.

[2] Please [click here](#) to read our discussion of the Second Circuit’s decision in *Berman*.

[3] Please [click here](#) to read our discussion of the Fifth Circuit’s decision in *Asadi*.

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