

Ninth Circuit Dodd-Frank Whistleblower Opinion

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Today, the Ninth Circuit issued an opinion in [*Somers v. Digital Realty Trust Inc., No. 15-17352 \(9th Cir. Mar. 8, 2017\)*](#), deciding that Dodd-Frank Act's anti-retaliation provision "should be read to provide protections to those who report internally as well as to those who report to the SEC." *Id.* at 12. As the Court notes, this issue "has divided the federal district and circuit courts." *Id.* at 3-4. The Fifth Circuit has limited protection to those individuals who disclose violations directly to the SEC. The Second Circuit also provides protection to employees who report concerns internally. The Ninth Circuit ultimately agreed with the Second Circuit, concluding that Congress intended "to provide protection for those who make internal disclosures as well as to those who make disclosures to the SEC." *Id.* at 4-5.

Paul Somers, the plaintiff, alleged that the defendant, Digital Realty Trust, Inc., violated Dodd-Frank's anti-retaliation provision when it fired him after he reported possible securities law violations to senior management. *See id.* at 5. Digital Realty moved to dismiss the claims arguing that plaintiff was not a "whistleblower" under Dodd-Frank because he did not make his reports to the SEC. The district court denied the motion to dismiss. The Ninth Circuit affirmed.

The Ninth Circuit, following the Second Circuit, held that despite a definitional provision in Dodd-Frank that describes "whistleblowers" as individuals who report to the SEC, Congress intended for the anti-retaliation provision—which appears elsewhere in the statute—also to protect individuals who report internally. *See id.* at 8-9. The Ninth Circuit found that a limited reading of "whistleblower" would unduly narrow the anti-retaliation provision, potentially even encouraging companies to terminate employees as soon as they raise a claim internally, and before they alert the SEC. *See id.* at 8-9. Moreover, the Ninth Circuit concluded that because Sarbanes-Oxley requires auditors and attorneys to report internally before raising issues with the SEC, interpreting Dodd-Frank not to protect internal-reporters would "do nothing to protect those employees from immediate retaliation," which would be inconsistent with congressional intent. *Id.* at 10.

The Court also dismissed the Fifth Circuit's concern that broad protections under Dodd-Frank would render provisions of Sarbanes-Oxley superfluous. The SEC filed an amicus brief taking issue with that argument, and the Ninth Circuit found the SEC's position persuasive. *See id.* at 11. Finally, the Court agreed with the Second Circuit that the SEC's interpretation of Dodd-Frank is entitled to deference. *See id.* at 12.

The majority opinion was written by Circuit Judge Mary M. Schroeder and was joined by Circuit Judge Kim McLane Wardlaw. Circuit Judge John B. Owens penned a dissent endorsing the Fifth Circuit's interpretation of Dodd-Frank.

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