

Whistleblowers, The Supreme Court and the SEC

The SEC's position on the scope of the whistleblower protections in Dodd-Frank was rejected by the Supreme Court. In *Digital Realty Trust, Inc., v. Somers*, No. 16-1276 (Feb. 21, 2018) the Court concluded that the SEC's interpretation of that provision and its related rules is inconsistent with the plain text of the statute. The decision thus narrows the scope of the Dodd-Frank anti-retaliation provisions from that adopted by the agency. It also illustrates the approach of the various justices to statutory interpretation and, to a certain extent, deference to an administrative agency under *Chevron*.

The opinion

The question resolved by the Court was "Does the anti-retaliation provision of Dodd-Frank extend to an individual who has not reported a violation of the securities laws to the SEC and therefore falls outside the Act's definition of 'whistleblower' . . ." according to the Court. Writing for the Court, Justice Ginsberg stated: "We answer that question 'No.'"

Petitioner Digital Realty Trust, Inc. is a real estate investment trust. Respondent Paul Somers was a vice president at the firm from 2010 to 2014. The firm terminated him, according to Mr. Somers, after he reported to senior management suspected securities law violations by the company. He did not notify the SEC. He did not file an administrative complaint within the time period specified by the Sarbanes-Oxley Act or SOX.

Subsequently, Mr. Somers filed a complaint in the district court alleging violations of the anti-retaliation provisions of Dodd-Frank. The firm moved to dismiss, arguing that only a whistleblower could invoke that Section of the Act and Mr. Somers did not qualify because the definition specifies that such a person must report to the SEC. The district court rejected the motion, concluding that the statute was ambiguous. On an interlocutory appeal a divided panel of the Court of Appeals for the Ninth Circuit affirmed. The panel concluded that applying the definition of "whistleblower" in the statute would

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inappropriately narrow the scope of the third prong of Section 78u-6(h) which contains the anti-retaliation provisions of Dodd- Frank. That subsection extends protections to those “making disclosures that are required or protected under” either SOX or certain other provisions. That contrasts with the first two subsections which only extend such protections to those who either report to, or testifying on behalf of, the SEC – those that explicitly fall within the statutory definition of whistleblower.

The Court began its analysis by reviewing SOX and Dodd-Frank. The former was passed to safeguard investors in public companies following the collapse of Enron Corporation. It created new protections for employees at risk of retaliation for reporting misconduct. Essentially an employee “qualifies for protection when he or she provides information or assistance either to a federal regulatory or law enforcement agency, Congress, or any ‘person with supervisory authority over the employee.’” (internal citation omitted). To invoke those protections the employee must exhaust administrative remedies by filing a complaint with the Secretary of Labor within the proscribed period. Under certain circumstances the employee may eventually file in federal court. An employee who prevails is entitled to reinstatement, back pay and any special damages and litigation costs.

Dodd-Frank also has provisions protecting employees from retaliation under certain circumstances. The statute was passed in the wake of the 2008 financial crisis and in part focuses on the SEC’s need for additional authority and funds. To facilitate the Commission’s work the statute created a robust whistleblower program. Accordingly, the term whistleblower was defined in terms of those who report to the agency. The statute protects such an employee by prohibiting an employer from discharging or otherwise harassing a person who acts as a whistleblower. Unlike SOX, Dodd-Frank gives an aggrieved employee-whistleblower a cause of action in federal court along with remedies which include reinstatement, double back pay, interest and litigation costs.

Dodd-Frank also authorized the SEC to issue rules and regulations. Accordingly, the agency issued a notice of proposed rulemaking for purposes of both the awards provisions and the anti-retaliation sections which tracked the language of the statute. In “promulgating the final Rule, however, the agency changed course,” writing two definitions of whistleblower. The first, for purposes of an award, tracked the statutory definition. The second, for purposes of the three prongs of the anti-retaliation provisions discussed above, expanded the definition to cover those who report or work with the agency and those who fall within the third subsection under which reporting to the SEC is not required.

Justice Ginsberg essentially began and ended her analysis by quoting from *Burgess v. United States*, 553 U.S. 124, 130 (2008) for the proposition that “‘When a statute includes an explicit definition, we must follow that definition.’” In this case the Court’s “charge” is to determine the meaning of the term “whistleblower.” The answer to that question is provided by the specific definition in the statute which is unequivocal – it is “‘any individual who provides. . . information relating to a violation of the securities laws

to the Commission.” (emphasis original). The definition clearly states who is covered.

The Court’s reading of the statute was reinforced by consideration of the purpose of Dodd-Frank and SOX. The former sought to enlist whistleblowers to assist the Commission in identifying and prosecuting those who violated the securities laws. Stated differently, “Congress undertook to improve SEC enforcement and facilitate the Commission’s ‘recover[y] [of] money for victims of financial fraud.’” Since financial incentives alone may not have been sufficient to encourage persons to step forward, the Act strengthened the anti-retaliation provisions, providing immediate access to federal court and a generous statute of limitations for filing such an action along with the opportunity to recover double back pay.

SOX had a different objective. It sought to “disturb the ‘corporate code of silence’” that discouraged employees from reporting fraudulent behavior not just to the proper authorities such as the FBI and the SEC but even internally. Thus the anti-retaliation provisions apply not just to those who report to the SEC but also internally.

Mr. Somers and the Solicitor General urged the Court to read the term “whistleblower” in its “ordinary sense” so that it would cover the conduct in each of the three prongs of the anti-retaliation provision. That would be contrary to the plain text of the statute. It is the function of the Court to give effect to the statute as written. The Court also rejected claims that its reading of the Act leaves certain persons unprotected. Dodd-Frank provides anti-retaliation protections for the first two subdivisions that are consistent with the definition of whistleblower and the purpose of that Act. SOX protects those covered by the third subsection in a manner that is consistent with that statute. Accordingly, the Court concluded that the statute’s definition of “whistleblower” is clear and conclusive. Thus deference under *Chevron* was not appropriate. The determination of the Court of Appeals was reversed and the case remanded for further proceedings.

Justice Sotomayor, joined by Justice Breyer, concurred. The Justice wrote to express her disagreement with the suggestion in the concurrence of Justice Thomas, arguing that reliance on the Senate Report was not appropriate in interpreting a statute. While the report is not the law, it can aid the Court’s understanding of the statute.

Justice Thomas, joined by Justice Alito and Justice Gorsuch, concurred in part and concurred in the judgment. In his opinion Justice Thomas noted that he joined the Court’s opinion only to the extent that it relied on the text of the statute, arguing that reliance on the purpose of the statute with reference to the Senate Report was inappropriate.

Comment

The Court’s opinion clearly narrows the reach of the anti-retaliations of Dodd-Frank, compared to that of the SEC’s rules. In reaching that conclusion the Court rejected the SEC’s position. Under Dodd-Frank the agency was given extensive rule writing authority. In this case, however, the agency failed to give proper notice regarding the rules it wrote on the term whistleblower – a point that was discussed during the oral

argument.

More importantly, however, the Commission wrote rules that were in conflict with the plain language of the statute. While those rules may have broadened the anti-retaliation provisions of Dodd-Frank and perhaps bolstered the whistleblower program of the agency, they were at odds with the statute. Accordingly, they exceeded the authority of the agency.

Finally, the decision illustrates the approach of the various Justices on critical interpretation and deference issues. The majority relied on the text of the statute plus the overall purpose of each statute in reaching its conclusion. Justices Sotomayor and Breyer, in a concurring opinion, specifically noted their agreement with looking to the legislative materials to bolster the Court's determination. In contrast Justices Thomas, Alito and Gorsuch objected to that approach. The split here is an indication of future battles over the role of the federal courts in interpreting statutes. At the center of those battles may well be a dispute over what deference, if any, should be accorded to federal regulatory agencies such as the SEC under *Chevron*. While not a significant issue in any of the final opinions here, at oral argument the Justices raised a number of questions on the point, displaying markedly different views which will no doubt emerge in future opinions.