

TO REPORT OR NOT TO REPORT?—SUPREME COURT DETERMINES DODD-FRANK’S WHISTLEBLOWER PROTECTION ONLY EXTENDS TO INDIVIDUALS WHO REPORT DIRECTLY TO THE SEC

Dig. Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018).

By Stormy L. Strickland¹

On February 21, 2018, the United States Supreme Court clarified whether Dodd-Frank’s anti-retaliation provision for “whistleblowers” extends to individuals who have not reported a securities law violation to the Securities and Exchange Commission (“Commission” or “SEC”).² The Court unanimously held that protection extends only to those who report a securities law violation to the Commission.³

Whistleblower protection first began when Congress enacted the Sarbanes-Oxley Act in 2002 to “safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron.”⁴ Section 1514A of the Act prevents publicly-traded companies from terminating, harassing, or discriminating against any employee who reports securities law violations or misconduct to the SEC, “any other federal agency, Congress, or an internal supervisor.”⁵ Eight years later, in efforts to motivate employees to report securities law violations to the SEC, Congress enacted Dodd-Frank.⁶ Under Dodd-Frank, a whistleblower may receive an award if the person provides information to the SEC, and the information leads to a successful enforcement action.⁷ Additionally, the Act provides whistleblower protection from retaliation for “making disclosures required under Sarbanes-Oxley . . . or any other law subject to the SEC’s jurisdiction.”⁸ The Act “defin[es] 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.”⁹ To help implement the Act, Congress authorized the SEC to issue regulations consistent with the purposes of the Act.¹⁰ Thus, Rule 21F-2 was born, containing two separate “whistleblower” definitions. First, to take advantage of the award program, the Rule states “[y]ou are a whistleblower if . . . you *provide the Commission* with information . . . relat[ing] to a possible violation of the Federal Securities Laws.”¹¹ Second, to

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² Dig. Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018).

³ *Id.* at 772–73, 777.

⁴ *Id.* at 773 (quoting *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014)).

⁵ *Id.* at 772.

⁶ *Somers*, 138 S. Ct. at 772.

⁷ 15 U.S.C. § 78u-6(b)(1).

⁸ *Id.* § 78u-6(h)(1)(A)(iii); *Somers*, 138 S. Ct. at 772.

⁹ *Somers*, 138 S. Ct. at 774; 15 U.S.C. § 78u-6(a)(6).

¹⁰ *Somers*, 138 S. Ct. at 775.

¹¹ *Id.*

take advantage of the retaliation provision, the Rule states that a whistleblower is one who reports information to the agencies consistent with the Sarbanes-Oxley Act.¹²

The petitioner in this case is Digital Realty Trust, Inc., a real estate investment trust.¹³ Petitioner employed respondent Paul Somers from 2010–2014.¹⁴ Somers alleged that Digital Realty “terminated him shortly after he reported to senior management suspected securities law violations by the company.”¹⁵ However, Somers did not report the violations to the SEC before he was terminated.¹⁶ After his termination, Somers filed suit claiming whistleblower retaliation under Dodd-Frank.¹⁷ Somers argued that Dodd-Frank’s whistleblower definition applied only to its award program and not to its retaliation provision; however, the Supreme Court rejected that argument.¹⁸ The Supreme Court looked at Dodd-Frank’s plain language of the statute, along with Congress’s legislative purpose and history when enacting the statute, and determined that a person only qualifies as a “whistleblower” if he or she reports directly to the SEC.¹⁹ Additionally, the Supreme Court rejected Somers’ argument that the term “whistleblower” was ambiguous and received *Chevron* deference from the SEC.²⁰ The Supreme Court reasoned not to afford *Chevron* deference to the SEC because the plain language of Dodd-Frank gave an unambiguous definition of “whistleblower.”²¹ Thus, because Somers only internally reported the alleged securities law violation and did not report directly to the SEC before he was terminated, the Supreme Court held that Somers was not entitled to protection or to an award under Dodd-Frank.²²

¹² *Id.*

¹³ *Id.* at 776.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 778.

¹⁹ *Id.* at 777–781.

²⁰ *Id.* at 782; *see also* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 US. 837 (1984) (defining a two-part test to determine whether a court should defer to a governmental agency’s interpretation of a statute).

²¹ *Id.* at 781.

²² *Id.* at 782.