

## High Court Ruling May Send Whistleblowers Straight to the SEC

By Francis G. X. Pileggi



Francis G. X. Pileggi is the member-in-charge of the Wilmington, Delaware, office of Eckert Seamans Cherin & Mellott LLC. His e-mail address is [fpileggi@eckertseamans.com](mailto:fpileggi@eckertseamans.com). He summarizes key corporate and commercial decisions of Delaware courts at [www.delawarelitigation.com](http://www.delawarelitigation.com).

The Supreme Court of the United States unanimously ruled to throw out a lawsuit against Digital Realty Trust by a former executive who was fired after he complained about alleged violations of federal securities laws to his employer.

Writing for the court, Justice Ruth Bader Ginsberg said the 2010 Dodd-Frank Act authorized whistleblower lawsuits only by people who had reported the alleged misconduct to the Securities and Exchange Commission (SEC). Lower courts had been divided on the issue.

As a result, there will be an increased risk of employees being inclined to report suspected securities law violations directly to the SEC so that it is more difficult for the company to terminate their employment.

In *Digital Realty Trust Inc. v. Somers*, the court analyzed a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act that protects whistleblowers from retaliation and an SEC regulation that expanded on that provision. The court compared that provision with a similar but substantially different anti-retaliation provision in the Sarbanes-Oxley Act of 2002 that protects whistleblowing employees.

The court found that because the employee did not report the

alleged violation to the SEC directly, Dodd-Frank did not protect him from retaliatory termination of his employment.

The employee in this case, Paul Somers, was a vice president of Digital Realty Trust. Somers alleged that he was terminated from his job shortly after he reported to senior management suspected securities law violations. The court observed that prior to his termination, nothing prevented Somers from alerting the SEC, but he did not do so. Nor did he avail himself of the options under the Sarbanes-Oxley Act to file an administrative complaint within 180 days of his termination.

Rather, Somers sued in federal court in California. Both the District Court and the Ninth Circuit Court of Appeals denied a motion to dismiss. The Ninth Circuit found the language of the anti-retaliation ambiguous, and therefore deferred to the SEC's interpretation of the rule. The Ninth Circuit went so far as to emphasize that it would be absurd to interpret the anti-retaliation provision in Dodd-Frank, and the corresponding SEC regulation, as applying only if a complaint had been made directly to the SEC. Rather, the Ninth Circuit interpreted Dodd-Frank as protecting employees from retaliatory termination, just as Sarbanes-Oxley

does, even if the employee does not complain directly to the SEC.

The Supreme Court took a different view, however, relying on the specific definition of "whistleblower" in Dodd-Frank, even though the legal definition was not consistent with the conversational meaning of the term. "When a statute includes an explicit definition," the court wrote in its opinion, "we must follow that definition." As a result, the court reasoned that the whistleblower provision was not correctly interpreted in the lower court's ruling.

The court explained that a core objective of Dodd-Frank's robust whistleblower program was to motivate people who knew of securities law violations to inform the SEC. Congress provided monetary incentives for SEC reporting, including heightened protection against retaliation. Unlike Sarbanes-Oxley, however, Dodd-Frank only provides anti-retaliation protection for employees who report fraud directly to the SEC, as opposed to an employee who reports a violation to an internal supervisor.

In this case, Somers did not provide information to the SEC directly before he was fired, and therefore he did not qualify for anti-retaliation protection, as defined in Dodd-Frank, at the time of the alleged retaliation.