

## Did the Supreme Court Just Strip Protection from Whistleblowers? Short Answer: No.

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On February 21, 2018, the U.S. Supreme Court held that an employee who was fired shortly after he reported suspected securities law violations to senior management in his company was not a “whistleblower” within the meaning of the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) and therefore dismissed his claim for retaliation under that law. Some news outlets concluded that the Supreme Court had gutted an important component of the law that encourages individuals who know of securities law violations to report them without fear of being fired, and some employers may have concluded that reporting securities law violations was now no longer a protected category and an exception to employment at will. In reality, neither is the case.

In *Digital Realty Trust, Inc. v. Somers*, the Supreme Court held that, under Dodd-Frank, a whistleblower is limited to “any individual who provides information relating to a violation of the securities law to the [Securities and Exchange] Commission.” This is hardly a shock since the statute itself provides that a whistleblower is “any individual who provides information relating to a violation of the securities law to the Commission.” Applying this statutory definition, the Court held that an individual who provided information related to a violation of securities laws to his *supervisor, but not to the SEC*, could not bring a lawsuit under Dodd-Frank challenging his subsequent termination.

However, the Court took pains to point out that a *different* law did provide a remedy for someone fired for reporting securities law violations internally at an organization. The Sarbanes-Oxley Act, passed eight years before Dodd-Frank, more broadly defines a whistleblower as an employee of an organization who reports misconduct to the SEC, any other federal agency, or to an internal supervisor. Sarbanes-Oxley, like Dodd-Frank, prohibits retaliation against whistleblowers by employers and creates a remedy for any employee who is disciplined or discharged for making such a report.

The key difference between the two laws is procedural. Under Sarbanes-Oxley, whistleblowers who believe their employer has retaliated against them must file a complaint with the Secretary of Labor within 180 days of the alleged retaliation. A Sarbanes-Oxley plaintiff may only bring a claim in court after giving the Department of Labor a chance to address the case. In contrast, under Dodd-Frank, an individual can wait at least six years, and in some cases

up to 10 years, before bringing a claim, and may proceed directly to court. Pursuant to Sarbanes-Oxley, employees who prevail may be awarded reinstatement to their jobs, back pay with interest, and other damages that arise from the retaliation, while prevailing Dodd-Frank plaintiffs may be awarded double back pay with interest. Employees who actually make a report to the SEC, therefore, may wait a long time before bringing a retaliation claim, and may end up claiming far greater monetary relief. Employees who believe that an employer retaliated based on an internal complaint, on the other hand, need to assert a claim much more quickly.

Thus, the Supreme Court did not leave employees without protection under federal law from retaliatory discharges following a report of securities law violations. In addition, many states have statutory or common law causes of action for retaliatory discharges that violate public policy. Neither Sarbanes-Oxley nor Dodd-Frank preempts those state law causes of action.

From an employer's point of view, therefore, the Supreme Court's decision in *Digital Realty Trust* did not change the way that employment decisions should be made. An employer still takes a large risk if it fires an employee who has made an internal complaint regarding compliance with securities laws, and such status should be considered whenever an employer contemplates terminating an employee. Put simply, the narrow, plain language decision in *Digital Realty Trust* does not grant employers carte blanche to fire employees who internally report violations of the securities laws.