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Steven Mintz: Supreme Court ruling bad for whistleblowers

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Thinking about blowing the whistle on wrongdoing at your organization? Well, you need to read on because the U.S. Supreme Court ruling on February 21, 2018 in the case Digital Realty Trust, Inc. v. Somers changes the rules of the game. Employees who choose to inform the Securities and Exchange Commission of financial wrongdoing under the Dodd-Frank Financial Reform Act of 2010 must now inform the SEC while the issue with the employer is unfolding to be eligible for Dodd-Frank protections.

The key issue in the Digital Realty case is the interpretation of who is a whistleblower under Dodd-Frank and when does a would-be whistleblower qualify for protection against retaliation. The statute defines a whistleblower as a person who reports potential violations of the securities laws to the SEC.

The SEC had been interpreting the act with respect to the retaliation provision broadly, thereby allowing the protections to apply to internal company reporting even if the individual did not report to the SEC. The Supreme Court disagreed with that interpretation. Writing for the court in its 9-0 unanimous decision, Justice Ruth Bader Ginsburg put it this way: "A whistleblower is any person who provides … information relating to a violation of the securities laws to the Commission."

"That definition," she added, "describes who is eligible for anti-retaliation protection if the individual engages in any of the protected conduct enumerated in the (act). Moreover, she observed, "this interpretation is consistent with the 'core objective' of Dodd-Frank's robust whistleblower program," … (which) is 'to motivate people who know of securities law violations to tell the SEC.'"

Prior to the ruling in the Digital Realty case, employees would almost automatically first report the alleged violation internally and take the matter up the chain of command all the way to the board of directors before going to the SEC. Informing the SEC was seen as a last resort. A typical

scenario is an employee jumps through the hoops internally, fails to induce change, may be demoted, treated badly, or fired, and then files for whistleblower protections under Dodd-Frank. If successful under the SEC process, the whistleblower could be reinstated and receive back pay. There is even an award if the SEC brings a lawsuit based on original information voluntarily provided to the SEC that leads to sanctions in excess of $1 million. The award is 10 percent to 30 percent of the total sanctions. This provision does not seem to be disturbed by the ruling since the SEC, presumably, would have first been informed of the retaliation.

Here’s the problem in a nutshell. Let’s assume an employee reports wrongdoing. Will that employee go to the SEC first before informing his or her supervisor? If I were the CEO and found out one of my managers went straight to the SEC without giving me a chance to first fix the matter, well you fill in the blanks. Just imagine an employee goes to the SEC to qualify for whistleblower protections, the organization finds out because the SEC starts investigating, the employee is then fired. What should the employee do next? Go back to the SEC and say, “Now look what you’ve done.”

The Supreme Court ruling is counter-productive to the intent of the act, which is to protect whistleblowers, but also to encourage internal reporting. In fact, the SEC has openly promoted internal reporting, especially for compliance officials. The bottom line is the ruling will have unintended consequences whether it is to heighten the pressures internally on an employee who wants to do the right thing and must now first report to the SEC or creating a floodgate of reports that the SEC won’t be able to handle because its resources are limited. Either way the ruling is a loss for whistleblowers and, most likely, companies because more employees will run to the SEC.

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