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March 10, 2017

SIDLEY UPDATE

Ninth Circuit Holds Internal Reports Protected by Dodd-Frank Whistleblower Provisions

On March 8, 2017, a divided Ninth Circuit panel issued a decision finding that a company's retaliation against a whistleblower is actionable under the Dodd-Frank Act, even if the whistleblower reports internally rather than to the Securities and Exchange Commission (SEC).[1] Circuit courts and district courts have disagreed on this issue. In its decision, the Ninth Circuit followed a ruling by the Second Circuit, which also found in favor of providing protection to employees who make internal reports. In contrast, the Fifth Circuit in 2013 held that the whistleblower provisions apply only to employees making disclosures directly to the SEC.

Paul Somers, the plaintiff, alleged that defendant Digital Realty Trust, Inc., fired him after he reported to senior management possible securities laws violations by the company.[2] Somers sued Digital Realty, arguing that the company had violated various state and federal laws, including the anti-retaliation protections under the Securities Whistleblower Incentives and Protection section of the Dodd-Frank Act. Digital Realty moved to dismiss the claim, asserting that Somers was not a whistleblower under the definition of the Act and thus not entitled to the Act's protections. The district court denied Digital Realty's motion to dismiss, and the Ninth Circuit affirmed the decision.

The Ninth Circuit held in a 2-1 decision that, although the Dodd-Frank Act includes language describing whistleblowers as individuals making reports to the SEC, this definitional provision should not be interpreted as a limitation on who may be considered a whistleblower under the Act.[3] Rather, the Court stated, interpreting the word whistleblower so narrowly "would make little practical sense and undercut congressional intent."[4] The Ninth Circuit noted that the Securities Exchange Act of 1934 requires certain categories of whistleblowers to report internally prior to raising concerns to the SEC, and that the limited reading advocated by the defendant would "do nothing to protect these employees from immediate retaliation in response to their initial internal report."[5] The Court rejected the Fifth Circuit's reasoning that a broad reading of the term whistleblower would render certain provisions of the Sarbanes-Oxley Act of 2002 unnecessary.[6]

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[1] *Somers v. Digital Realty Trust Inc., No. 15-17352 (9th Cir. Mar. 8, 2017)*.

[2] *See id.* at 5.

[3] *See id.* at 9-10.

[4] *Id.* at 10.

[5] *Id.* at 10.

[6] *Id.* at 11.

The majority opinion, written by Judge Mary M. Schroeder and joined by Judge Kim McLane Wardlaw, tips the scales (at least for now) in the ongoing circuit split so far between the Second Circuit's holding in *Berman v. Neo@Ogilvy LLC, WPP Group USA, Inc., No 14-4626 (2nd Cir. Sept. 16, 2015)* and the Fifth Circuit's ruling in *Asadi v. GE Energy USA LLC, No. 12-20522 (5th Cir. Jul. 17, 2013)*, endorsed by the Ninth Circuit panel's dissenter, Judge John B. Owens. The issue is currently being weighed by the Third Circuit in *David Danon v. The Vanguard Group Inc., No. 16-2881 (3rd Cir.)*. The Sixth Circuit considered a similar issue in *Verble v. Morgan Stanley Smith Barney LLC, et al., No. 15-6397 (6th Cir. Jan. 13, 2017)*, but ultimately did not address the question, ruling that the plaintiff's claims were too vague. Plaintiff in that case has filed a *writ of certiorari* with the Supreme Court.

The Ninth Circuit holding highlights the need to be mindful of the continuing expansion of the application of whistleblower protections and the ramifications this may have with respect to personnel decisions. Companies should closely analyze potential risks of employment actions involving individuals who may have made internal complaints in light of recent and pending court decisions.

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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