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Vanguard Whistleblower Case Proves the Challenges brought on by Somers Decision

By Mehreen Rasheed
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In the wake of the Supreme Court's decision narrowing the scope of who is considered a "whistleblower" under the Dodd-Frank Act of 2010, a former tax attorney with an ongoing whistleblower retaliation claim against his former employer now faces an uphill legal battle for his Dodd-Frank claim to survive.

David Danon brought whistleblower claims against investment management firm Vanguard Group Inc. in December 2015 in federal court in the Eastern District of Pennsylvania, alleging that he was terminated for internally reporting and opposing the firm's violations of tax law. After the claims were initially dismissed, the Third Circuit revived the Dodd-Frank whistleblower claim on appeal, although it upheld the dismissal of the state whistleblower claim and the Sarbanes-Oxley Act (SOX) claim. The parties then agreed to stay the case pending a Supreme Court decision on whether the Dodd-Frank anti-retaliation provisions protect internal whistleblowers.

In February 2018, the Supreme Court ruled in *Digital Realty Trust Inc. v. Somers* that a "whistleblower" under the Dodd-Frank Act is an employee who reports violations externally to the SEC. Thus, an employee who reports illegal conduct internally but not to the SEC is not protected from retaliation under the Dodd-Frank whistleblower provisions.

Somers largely gutted Danon's original legal theory. In his original complaint, Danon pled that he internally reported tax violations between 2008 and 2012. Then, in January 2013, Vanguard told him to find another job and gave him "a short time period to do so" thus effectively terminating him.

Following the *Somers* decision, Danon filed an amended complaint that emphasized his reporting to the SEC. In the amended complaint, filed on March 12, 2018, Danon elaborated upon the timeline of events in an effort to fit his claims into the post-*Somers* interpretation of the law. He added that in January 2013, Vanguard notified him of its intention to terminate him "at the end of an unspecified period of time." He was still employed in May 2013, when he disclosed his internal reports to the SEC. Danon added that he faced additional retaliation that interfered with his ability to get another job until his termination took effect on June 10, 2013.

While Danon's original complaint centered on his internal reports, the amended complaint indicates further retaliatory acts following Danon's external reports to the SEC, and clarifies that his termination was not effectuated until after that external report. However, assuming Vanguard had already made the decision to terminate Danon before his report to the SEC, it is unlikely that the court would find that he has stated a claim because he did not qualify for whistleblower protection under Dodd-Frank at the time the termination decision was made. The alleged additional retaliatory acts subsequent to his SEC report may still be viable. If they are not linked to the termination, however, Danon would likely not be able to benefit from the Dodd-Frank Act's double back pay damages provisions based on those acts alone.

Danon's situation exemplifies the legal challenges many financial sector whistleblowers face in the

wake of *Somers*. Some of these whistleblowers, who lack protection under Dodd-Frank, also will not have recourse under the Sarbanes-Oxley anti-retaliation protections (in Danon's case, his SOX claim was dismissed because he failed to exhaust administrative remedies before bringing this claim in court). Other whistleblowers who are attorneys, like Danon, or accountants of publicly traded companies have separate obligations under the implementing rules of Sarbanes-Oxley to report violations to the SEC in limited situations only, and will typically need to report internally first before they are able to contact the SEC. Because of the *Somers* definition of protected whistleblowers, this leaves them vulnerable to retaliation without the benefit of whistleblower status where they are not or not yet able to report to the SEC.

For this reason, it is critical for financial sector whistleblowers to seek the counsel of an attorney well versed in the intricacies of whistleblower protections as soon as possible, ideally before blowing the whistle. In many cases, a financial sector whistleblower not protected by SOX or Dodd-Frank may be protected under state law or other whistleblower laws depending on how and what the whistleblower reports.