SCOTUS Predictions: Ruling in Whistleblower Retaliation Case Will Impact Employers' Defense Strategy

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Does a fired whistleblower need to show their employer acted with retaliatory intent to prove retaliation under the Sarbanes-Oxley Act (SOX)? The Supreme Court has been asked to review the standard of proof in such cases – and the outcome could resolve a disagreement among federal appeals courts and set a consistent standard once and for all. The ruling will impact how publicly traded companies defend against SOX retaliation claims and may also affect whistleblower protections under other laws that are similarly structured. How will SCOTUS decide? During oral argument, the Justices seemed ready to rule in a way that will see more whistleblower claims make it to jury trials, and employers should be prepared to adjust to this new reality. Read on for an analysis of the issues and our specific predictions on how the Justices will decide the case.

A Rundown of the Issues

SOX Whistleblower Protections: Employees of publicly traded companies are protected under SOX when they report financial wrongdoing — and covered businesses may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" when they assert their rights under the act.

Dispute About Reason for Termination: The employee in this case claims he was fired for refusing to create misleading reports about commercial mortgage-backed securities and complaining about being pressured to skew his research. The employer, however, claims the worker was laid off during a larger cost-cutting reduction in force due to the company's financial challenges.

Courts Disagree on Standard of Proof: At trial, the jury was instructed to first consider whether the employee's whistleblowing activity was a "contributing factor" to the adverse employment action, rather than the "primary motivating factor." If so, then the burden would shift to the employer to show that it would have taken the same action regardless of whether the worker engaged in protected activity under SOX.

Applying this standard, the jury found that retaliation was a contributing factor in the termination decision and awarded the employee $653,300 in back pay, $250,000 in non-economic damages, and nearly $1.77 million in attorneys' fees. But the 2nd U.S. Circuit Court of Appeals reversed the district court's decision and held that a whistleblower must prove that the employer acted with "retaliatory intent."

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intent.

Notably, however, other federal appeals courts have applied the "contributing factor" analysis, similar to the district court in this case. This dispute among the appeals courts is what SCOTUS decided to address.

The Impact. If the Justices agree that "contributing factor" is the proper standard, SOX whistleblowers will have an easier time establishing retaliation in their case-in-chief, which will then require employers to show they would have reached the adverse employment decision anyway. On the flipside, a ruling in favor of the employer would establish a higher burden of proof for whistleblower employees to prove "retaliatory intent" in their case-in-chief. This will make it easer for employers to obtain summary judgment in SOX whistleblower cases (and to prevail at trial if they don't).

Justices Don't Seem Likely to Take Employer's Side

The issues in this case are pretty technical, but the result will boil down to how the Justices interpret SOX and its provisions. Much of the conversation at oral argument last fall involved the interpretation of terms like "contributing factor" and "intent."

The Employee's Argument

Counsel for the employee said there's no separate freestanding "retaliatory intent" element. She argued that the law "places exactly one burden of proof on the plaintiff: to show that his protected conduct was a contributing factor in the unfavorable personnel action."

She claimed that "the burden then shifts to the defendant to prove that it would have taken the same unfavorable personnel action in the absence of the protected conduct." She added that, while the 2nd Circuit held that the contributing factor element required a showing of retaliatory intent, the employer "instead contends that in addition to showing the contributing factor element, a plaintiff must separately show retaliatory intent."

Justice Gorsuch said the 2nd Circuit opinion can be read in various ways, including to say that in addition to an intent to discriminate, the employee would have to prove the employer had a further intent or a motive to retaliate. "And we've rejected that in the Title VII context many times, saying you may have a further intent of trying to equalize men and women as groups, you may have a further intent of wishing to discriminate on the basis of motherhood. Irrelevant. Intent to discriminate is enough for the day. Could we simply say that and not get into how this statute overall works?"

The Employer's Argument

Counsel for the employer noted that Congress used the phrase "discriminate because of" in SOX, which "has long been recognized to require a plaintiff to show discriminatory intent." Additionally, he said, Congress incorporated the "contributing factor" standard in SOX to address the distinct issue of the causation standard in a discrimination case.

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"But just as Congress did not eliminate an intent requirement in Title VII when it adopted the reduced motivating factor causation test in Title VII, so in Sarbanes-Oxley it did not eliminate an intent requirement by incorporating the reduced contributing-factor causation test," he argued. The employer's attorney further argued that the employee incorrectly overreads the burden of proof provision and that proving retaliatory intent is still required.

Justice Gorsuch, however, seemed hesitant to read "retaliate" into the statute: "I see discrimination in this statute, and I see whistleblowing activity, and I know there's a causation requirement, but I don't see the retaliation in this statute."

The Justices also noted that intent is hard to prove. All of our discrimination statutes "have some requirement that a prohibited factor came into a decision and that it was there in your head when you made the decision," Justice Kagan said. "But what all of our decisions have recognized is that intent is a very difficult thing to prove, and as a result of that, what Congress has done – and sometimes this Court has done it – [is] set up burden-shifting mechanisms: You do this first. Then we'll give you a chance to do that."

FP SCOTUS Prediction: SCOTUS Will Hand Win to Employees

Although the Justices focused on many points during oral argument, much of the discussion was about whether "retaliatory intent" is required (separate and apart from the contributing factor standard). Justice Gorsuch, in particular, focused on this issue and very well may have built a consensus to overturn the 2nd Circuit's decision.

Therefore, we expect the Supreme Court to find that SOX whistleblower protections <u>do not</u> require an employee to demonstrate that the employer acted with "retaliatory intent." It is less clear how the Court will reach that result, as much of the oral argument was devoted to questions from the Justices as to how much the Court needs to – or should – decide in this particular case. Here are our specific predictions:

Jeff Shapiro: 6-3 reversing the 2nd Circuit, with Justice Gorsuch writing the majority opinion and one of the Democrat-appointed Justices (Justices Sotomayor, Kagan, or Jackson) writing a separate concurring opinion. I think Justice Thomas and Justice Alito will dissent, and they may be joined by Justice Kavanaugh and/or Justice Barrett.

Jeff Fritz: 6-3 in favor of reversal, with Justice Gorsuch authoring the majority opinion, joined by Justices Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson – and perhaps concurrences by Justice Jackson and/or Justice Kavanaugh. I predict that Justice Thomas will write the dissent, and he will be joined by Chief Justice Roberts and Justice Alito.

Katie Reynolds: 9-0 reversing the 2nd Circuit, with Justice Gorsuch authoring a pretty narrow opinion largely mapping his line of questioning during oral argument. If there is a dissent, I think it

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would be written by Justice Thomas. I also think we could see concurrences by Justices Jackson and Kavanagh.

Conclusion

We expect the Court to issue an opinion soon. We will continue to monitor developments related to this case and provide updates as warranted, so make sure you subscribe to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney or the authors of this Insight.

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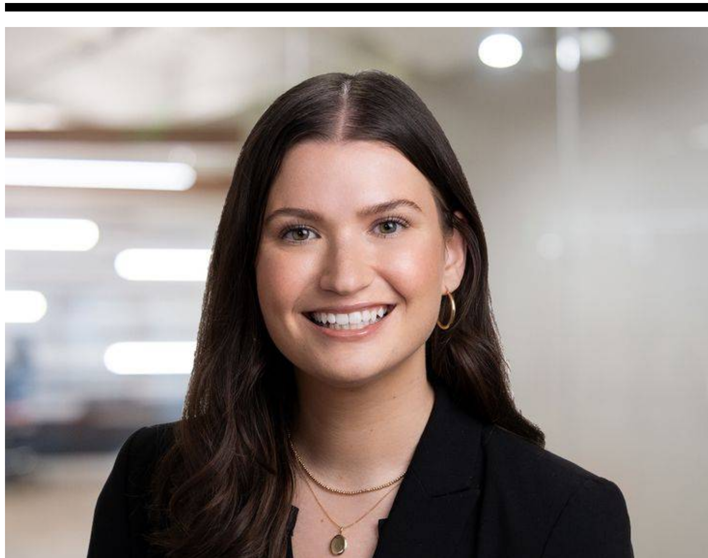

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