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SCOTUS MAKES IT HARDER FOR EMPLOYERS TO DEFEND AGAINST WHISTLEBLOWER RETALIATION CLAIMS: KEY TAKEAWAYS FOR BUSINESSES

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The Supreme Court just rejected an employer's argument that a whistleblower needs to show the employer acted with retaliatory intent to prove retaliation under the Sarbanes-Oxley Act (SOX), a federal law that protects financial investors. Yesterday's decision resolves a disagreement among federal appeals courts and sets a consistent standard of proof in SOX cases. As a result, we expect to see more whistleblower claims make it to a jury trial. As we predicted last month, the Court reversed the 2nd Circuit and unanimously held that a whistleblower needs to show that their protected activity (such as reporting or disclosing violations of SEC rules and regulations) was a contributing factor in the adverse employment decision. The Court clarified that an employee does not need to prove that the employer had discriminatory intent to retaliate. The ruling impacts how publicly traded companies will defend against SOX retaliation claims and will likely affect whistleblower protections under other laws that are similarly structured. This underscores the importance of employers being able to articulate the reasons for the employment decision and to prove they would have made the decision anyway in such cases. Here's what you need to know about the ruling and its impact on employers.

What Are the Key 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

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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 claimed 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, claimed 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. Court of Appeals reversed the district court's decision and held that a whistleblower must prove that the employer acted with "retaliatory 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.

How Does the SCOTUS Ruling Impact Employers?

Contributing Factor Analysis. The Justices agreed with the employee that the "contributing factor" analysis is the proper standard. Under SOX, an employee must prove their protected activity "was a contributing factor in the unfavorable personnel action," but they don't need to also prove their employer acted with "retaliatory intent," Sotomayor wrote for the court.

She explained that an animus-like "retaliatory intent" requirement is not included in the definition of "discriminate." Instead, an employer violates the act when it treats an employee worse than other employees because of

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their protected whistleblower activity. “It does not matter whether the employer was motivated by retaliatory animus or was motivated, for example, by the belief that the employee might be happier in a position that did not have SEC reporting requirements,” Sotomayor added.

Burden Shifting. The burden then shifts to the employer to show it would have taken the adverse action anyway. “Burden-shifting frameworks have long provided a mechanism for getting at intent in employment discrimination cases, and the contributing-factor burden-shifting framework is meant to be more lenient than most,” Sotomayor wrote.

The Supreme Court rejected the argument by business groups that “without a retaliatory intent requirement, innocent employers will face liability for legitimate, nonretaliatory personnel decisions.” The burden-shifting framework under SOX does not lead to that result, according to the Court, because the employer has the opportunity to prove it would have taken the same action against an otherwise identical employee who had not engaged in the protected activity.

Framework is Not as Protective of Employers. The Court acknowledged that “the contributing-factor framework that Congress chose in Sarbanes-Oxley is not as protective of employers as a motivating-factor framework” (which is used for retaliation claims under Title VII of the Civil Rights Act). But “that is by design,” the Court said. “Congress has employed the contributing-factor framework in contexts where the health, safety, or well-being of the public may well depend on whistleblowers feeling empowered to come forward.”

The ruling means SOX whistleblowers will have an easier time establishing retaliation in their case-in-chief (and surviving the employer’s motion for summary judgment), and that employers in these cases must be prepared to defend their employment decisions by “clear and convincing evidence” that they would have fired the employee even absent the protected whistleblowing activity. As always, it’s important to maintain clear documentation of the reasons for an employment decision. In addition, employers should consult with employment counsel before taking an adverse employment action against an employee who may have recently engaged in protected activity. Employers should also review their internal whistleblowing programs to ensure

allegations are promptly investigated and addressed as necessary to reduce the risk of potential litigation.

How Did We Do With Our Predictions?

After the Justices heard oral agreements in this case, we correctly predicted that SCOTUS would reverse the 2nd Circuit. Katie Reynolds gets bonus points for predicting a unanimous decision! We were a bit surprised to see Justice Sotomayor pen the opinion. Based on the questioning at oral argument, we predicted Justice Gorsuch would take the lead on this one. But ultimately, we knew the Supreme Court would find that SOX whistleblower protections do not require an employee to demonstrate that the employer acted with "retaliatory intent."

Conclusion

We will continue to monitor workplace law developments 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.