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Supreme Court on Title VII, Retaliatory Intent and Exemption from Arbitration

By David E. Schwartz and Emily D. Safko
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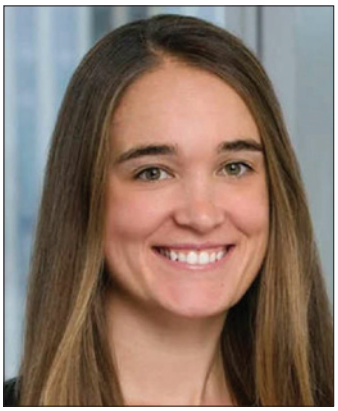
With three unanimous decisions this term, the U.S. Supreme Court lowered the bar for plaintiffs bringing discrimination claims under Title VII and retaliation claims under the Sarbanes-Oxley Act and clarified the scope of the transportation workers exception in the Federal Arbitration Act.

This column discusses three recent rulings that impact an employee's ability to challenge their employer's actions and an employer's ability to compel arbitration.

Relaxed Standard for Title VII

In the much-anticipated *Muldrow v. City of St. Louis*, 144 S. Ct. 967 (2024) case, the Supreme Court addressed the standard for determining whether a job transfer is considered an adverse action under Title VII. The Supreme Court, in a unanimous decision authored by Justice Elena Kagan, held for the plaintiff and resolved a circuit split, finding that Title VII plaintiffs must show that the employment action, in *Muldrow*, a job transfer, brought "some harm" with respect to the identifiable term or condition of employment, but the harm need not be "significant" or "exceed[ ] some heightened bar."



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The dispute in *Muldrow* arose when the St. Louis Police Department transferred a plainclothes officer assigned to the Intelligence Division to an uniformed position in another department. The plaintiff's rank and pay remained unchanged. However, she no longer worked with the same high-ranking officials, had schedule changes and lost access to a take-home vehicle. The plaintiff maintained that her employer transferred her based on her sex in violation of Title VII.

The district court granted summary judgment in favor of the city and the U.S. Court of Appeals for the Eighth Circuit affirmed, both finding that the plaintiff needed to show that the transfer caused a

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"significant" change to her terms or conditions of employment resulting in a "material employment disadvantage." Both courts agreed that the plaintiff could not meet this heightened standard of harm.

The Supreme Court vacated the Eighth Circuit's decision, finding that nothing in Title VII's text requires an employee-plaintiff to show "significant" harm. Kagan concluded that demanding "significance" would be an impermissible addition of words to the statute, effectively rewriting the law. Rather, the court held that a plaintiff need only show an injury—not a significant one—to meet Title VII's standard. In other words, if the transfer leaves the employee "worse off," the action falls under Title VII's ambit.

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Whistleblowers and Retaliatory Intent

In another unanimous decision, the Supreme Court in *Murray v. UBS Securities,* 144 S. Ct. 455 (2024) clarified the initial burden on a whistleblower-plaintiff when bringing a retaliation claim under the Sarbanes-Oxley Act of 2002 (18 U.S.C. §1514A(a)). Specifically, the court held that a plaintiff need not demonstrate that their employer acted with "retaliatory intent."

The individual at the center of the dispute in *Murray* sued his former employer under the Sarbanes-Oxley Act's antiretaliation provision. He alleged that his employer terminated his employment because he reported potential fraud to his supervisor.

The case went to trial in district court, during which the trial court instructed the jury that the plaintiff must show that his "protected activity was a contributing factor in the termination of his employment," among other elements. When the jury asked for clarification on this instruction, the court instructed the jury to consider whether the protected activity affected the termination decision.

On appeal, the U.S. Court of Appeals for the Second Circuit vacated the jury's verdict, finding that this additional instruction was incorrect as a matter of law. Specifically, it found that to demonstrate that the protected activity was a contributing factor of the adverse employment action, a whistleblower-employee must demonstrate that the employer acted with "retaliatory intent."

The Supreme Court reversed the Second Circuit's decision and found that although a whistleblower must prove that the alleged protected activity was a contributory factor in the employer's retaliatory action, the plaintiff need not also prove that the employer acted with "retaliatory intent."

Justice Sonia Sotomayor, writing for the Supreme Court, opined that "retaliatory intent" would require the plaintiff to show that the employer acted with animus, which is not necessary to maintain an anti-retaliation claim. The court clarified that the statute's burden shifting framework—which requires that a plaintiff show that the protected activity was a contributing factor in the adverse employment action after which the burden shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the same action in the absence of the protected activity—"provides a means of getting at intent."

Disagreeing with the Second Circuit, the court made clear that an employee need not show retaliatory intent to meet the employee's initial burden in this framework.

In reaching this decision, the court looked to congressional intent in enacting the Sarbanes-Oxley Act, which was drafted to "hold wrongdoers accountable for their actions." The Supreme Court reasoned that requiring the plaintiff to make an affirmative showing of retaliatory intent would be opposed to this goal and is not supported by the plain text of §1514A(a).

This decision significantly lowers the plaintiff's burden to prevail on a retaliation claim under the Sarbanes-Oxley Act.

Exemption from Arbitration

In *Bissonnette v. LePage Bakeries Park St.,* 601 U.S. 246 (2024), the Supreme Court evaluated the scope of the exception in Section 1 of the Federal Arbitration Act (FAA) for any "class of workers engaged in foreign or interstate commerce."

As it recently did in *Southwest Airlines v. Saxon*, 596 U.S. 450 (2022), the court considered whether the exception applies to all employees employed by employers in the transportation industry or only those employees performing transportation services for their employer—regardless of the industry. Like in *Saxon*, the court in *Bissonnette* held that the applicability of the exception in Section 1 turns on the work the employee performs rather than the industry of the employer.

In *Bissonnette*, the two plaintiffs worked as independent distributors for the defendant, a producer and marketer of baked goods. As distributors, the plaintiffs received baked goods from the defendant and distributed them to retailers. They also performed promotional work, advertised, looked to secure additional retailers and managed retail inventory.

Each of the distributor agreements contained an arbitration provision, which required that any dispute be submitted to binding arbitration under the FAA. When the distributors brought suit in federal court for violation of wage and hour laws, the defendant moved to compel arbitration. The plaintiffs argued that they fell within the exception in Section 1 of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The district court compelled arbitration. The Second Circuit affirmed. It reasoned that the plaintiffs did not fit in the transportation exemption of the FAA because the defendant—a producer and marketer of baked goods—was not in the transportation industry.

The Supreme Court, in an opinion authored by Chief Justice John Roberts, disagreed and vacated the Second Circuit's judgment. The court held that a class of workers that engages in interstate transportation need not be employed by a company in the transportation industry to fall within the transportation exemption in Section 1 of the FAA. In doing do, it looked to its decision in *Saxon*, where it "expressly declined to adopt an 'industry-wide' approach" but rather focused on whether the individual employee is engaged in commerce—not the work of the employer as a whole.

'Chevron' Deference in Flux

Looking ahead, employers should keep an eye on the Supreme Court's upcoming decision in *Loper Bright Enterprises v. Raimondo* (No. 22-451), in which it will consider the decades-old *Chevron* doctrine. *Chevron* calls for deference to agencies' interpretations of ambiguous laws. This decision will have wide impact on the judicial deference afforded to agency decisions.

Conclusion

Employers are advised to review their policies, procedures and practices on changing terms of employment for those who may be in a protected class in light of the Supreme Court establishing lower standards for plaintiffs to bring a workplace discrimination lawsuit under Title VII and the Sarbanes-Oxley Act. These decisions will, no doubt, embolden the plaintiff's bar.

Further, employers are advised to review their arbitration agreements to ensure they are in line with the Supreme Court's decision in *Bissonnette,* which may indicate a broader interpretation of the FAA.