

The Whistleblower Perception Problem in Judicial Imagination and Treatment

Courts praise employees who report securities fraud but often distrust those who report workplace discrimination. The authors argue that these perceptions produce unequal legal protection against retaliation.

Whistleblowers help expose unlawful conduct that governments and organizations might otherwise never discover. Yet courts do not treat all whistleblowers equally. Leora F. Eisenstadt and Jennifer M. Pacella compare judicial treatment of employees who report securities fraud under the Sarbanes-Oxley Act, or SOX, with employees who report discrimination under Title VII of the Civil Rights Act.

Through comparative legal analysis, the authors examine Supreme Court decisions, federal statutes, legislative histories, lower-court rulings, and legal scholarship. In *Murray v. UBS Securities*, the Supreme Court described securities whistleblowers as serving the public and endorsed SOX's employee-friendly "contributing factor" causation standard. In *University of Texas Southwestern Medical Center v. Nassar*, however, the Court portrayed discrimination complainants as potentially dishonest and applied the more demanding "but-for" standard.

The disparity also appears in the "reasonable belief" requirement. SOX protects employees who genuinely and reasonably suspect wrongdoing, even when no violation is ultimately proven. Title VII complainants may be expected to anticipate whether a court would consider the reported conduct unlawful. The authors argue that these differences discourage discrimination reporting and reflect unsupported judicial assumptions. They recommend applying consistent, whistleblower-friendly causation and reasonable-belief standards across legal contexts.

MAJOR TAKEAWAYS:

- Courts portray securities whistleblowers as valuable public servants but often approach discrimination whistleblowers with skepticism.
- SOX's contributing-factor causation and contextual reasonable-belief standards provide stronger retaliation protection than Title VII's judicially imposed standards.
- The Supreme Court or Congress should establish more consistent protections so that legal treatment does not depend on the subject of the whistleblower's report.

WHO NEEDS TO KNOW:

- Judges and courts
- Federal lawmakers and policymakers
- Employment and corporate attorneys
- Employers, compliance officers, and human resources professionals
- Whistleblowers and employee-rights advocates

CONTACT US:

- **Leora Eisenstadt**, associate professor, Risk, Actuarial Science, Healthcare Management and Legal Studies, leora.eisenstadt@temple.edu
- **Jennifer Pacella**, associate professor, Business Law and Ethics, jpacell@iu.edu