

SPLIT: THE CASE OF WHEN WHISTLEBLOWER PROTECTIONS ARE
WARRANTED AND THE IMPROPER INCENTIVES THAT MAY LEAD
TO UNWARRANTED REPORTS

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ABSTRACT

Without a clear standard of what constitutes a “reasonable belief,” whistleblowers are at risk of not attaining protection from employer retaliation. Under the Sarbanes-Oxley Act, a whistleblowing employee has engaged in protected activity against employer retaliation when the whistleblower has a “reasonable belief” that their employer has committed a securities violation. However, in determining a whistleblower’s “reasonable belief,” the circuits are split between applying the reasonable person test or the totality of the circumstances test. Accordingly, this Note examines the differing theories of the Circuit Courts and the policy considerations underlying each test to determine to what extent they further the Sarbanes-Oxley Act’s goals. Ultimately, this Note recommends that the Supreme Court resolve the circuit split by adopting the reasonable person test.

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INTRODUCTION	190
I. INSIDER TRADING RULES AND REGULATIONS.....	192
II. THE CIRCUITS DIFFERING DECISIONS.....	194
A. <i>The Reasonable Person Test</i>	194
B. <i>The Totality of the Circumstances Test</i>	196
C. <i>The Eleventh Circuit's Decision</i>	198
D. <i>The Eleventh Circuit Decision if Evaluated Under the Reasonable Person Test</i>	200
III. POLICY CONSIDERATIONS.....	201
A. <i>Sarbanes-Oxley Act</i>	202
B. <i>Reasonable Person Test</i>	203
C. <i>Totality of the Circumstances Test</i>	204
IV. WHAT TEST SHOULD THE SUPREME COURT APPLY?	206
CONCLUSION	208

INTRODUCTION

Whistleblowing describes an employee's disclosure of mismanagement, corruption, illegality, or other wrongdoing at their place of employment.¹ Whistleblower protection laws seek to ensure that private and public entities are held accountable for corporate misconduct regarding securities violations, while also prohibiting retaliation against whistleblowers who expose corporate misconduct.² To limit wrongdoings and protect shareholders, the U.S. Securities and Exchange Commission ("SEC") enforces various legislation to encourage whistleblowers to report securities violations committed by their employers.

Since whistleblower protection legislation was first enacted, the SEC has awarded more than \$1.3 billion to individuals for providing information that aided the Commission in enforcing securities regulations.³ Blowing the whistle on corporate malfeasance allows whistleblowers and harmed investors to be compensated.⁴

Of the many insider trading rules and regulations, Rule 10b-5 and the Sarbanes-Oxley Act ("SOX") have the most significant impact on whistleblower protections.⁵ "[T]he Sarbanes-Oxley Act was enacted in 2002 for the purpose of addressing widespread securities fraud that began with the cataclysmic falls of

¹ 151 AM. JUR. *Trials* 311 § 1 (2017). See also <http://legal-dictionary.thefreedictionary.com/Whistleblowing> [last accessed December 15, 2023] (defining whistleblowing as well as the history of whistleblower statutes and the scope that the various whistleblower statutes cover) [<https://perma.cc/3VY4-ES7L>].

² See Nathan A. Adams IV, *Distinguishing Chicken Little from Bona Fide Whistleblowers*, 83 FLA. BAR J. 100, 100 (2009) (discussing the fact that whistleblowers play a critical role in ensuring accountability in public and private entities and should be protected due to bringing corruption to light).

³ U.S. Sec. and Exch. Comm'n, SEC WHISTLEBLOWER OFFICE ANNOUNCES RESULTS FOR FY 2022 (2022), https://www.sec.gov/files/2022_ow_ar.pdf (finding that, "[e]nforcement actions brought using information from meritorious whistleblowers have resulted in orders for more than \$6.3 billion in total monetary sanctions, including more than \$4.0 billion in disgorgement of ill-gotten gains and interest, of which more than \$1.5 billion has been, or is scheduled to be, returned to harmed investors") [<https://perma.cc/WF6Y-6QKN>].

⁴ Symposium, *What Would We Do Without Them: Whistleblowers in the Era of Sarbanes-Oxley and Dodd-Frank*, 23 FORDHAM J. CORP. & FIN. L. 379, 387 (2018) (discussing how awards are given to whistleblowers and funds are returned to harmed investors).

⁵ See generally 17 C.F.R. § 240.10b-5; see also 18 U.S.C.A. § 1514A.

major companies.”⁶ In *Ronnie v. Office Depot, LLC*, the Eleventh Circuit recently weighed in on a circuit split regarding the proper test to use when evaluating whether a whistleblower is protected against employer retaliation.⁷

The Eleventh Circuit adopted a totality of the circumstances test for determining whether a whistleblower reasonably believes their employer has engaged in wrongdoing. The Eleventh Circuit decision could have a detrimental impact on whistleblower protection. Accordingly, the Supreme Court should resolve the circuit split and adopt the reasonable person test to best protect whistleblowers. The reasonable person test more closely conforms to the policy considerations underlying SOX, whereas the totality of the circumstances test should be limited to other insider trading rules and regulations that are distinct from whistleblower protection. Circuit courts currently apply both tests. In conjunction with the Supreme Court adopting the reasonable person test, Congress should add restrictions to the monetary rewards of whistleblowers and sanction whistleblowers to lessen the number of reports that are not truly violations of Rule 10b-5.

It follows that Section I of this article will explore insider trading rules and regulations related to whistleblower protection. Section II will discuss the circuits’ differing decisions in applying either the reasonable person test or the totality of the circumstances test. Additionally, Section III will examine the Eleventh Circuit’s decision in *Ronnie v. Office Depot, LLC*, and how the outcome would differ if decided under the reasonable person test. Section IV discusses the policy considerations underlying SOX, the reasonable person test, and the totality of the circumstances test. Finally, Section V advises on what test the Supreme Court should apply.

⁶ 151 AM. JUR. *Trials* 311 § 1 (2017).

⁷ See generally *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1351 (11th Cir. 2023).

I. INSIDER TRADING RULES AND REGULATIONS

When a corporate insider trades based on material, nonpublic information in the securities of a corporation, they are liable under § 10(b) and violate Rule 10b-5.⁸ Rule 10b-5 provides that:

[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security.⁹

The SEC is made aware of securities violations by various methods, including encouraging whistleblowers to report insider trading. For instance, SOX protects whistleblowers of publicly traded companies “when they take lawful acts to disclose information or otherwise assist in detecting and stopping actions which they reasonably believe to be fraudulent.”¹⁰ Whistleblowers who report insider trading violations are exempt from employer retaliation if they report insider trading to the SEC.¹¹ Specifically, SOX states:

no [publicly traded] company, or any officer [or] employee ... of such company ... may discharge ... an employee ... because of any lawful act done by the employee ... to provide information ... or otherwise assist in an investigation regarding any conduct which the employee **reasonably believes** constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud],

⁸ United States v. O'Hagan, 521 U.S. 642, 651–52 (1997).

⁹ 17 C.F.R. § 240.10b-5.

¹⁰ Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 218 (2d Cir. 2014) (quoting Bechtel v. Admin. Rev. Bd., 710 F.3d 443, 446 (2d Cir. 2013)).

¹¹ See 18 U.S.C.A. § 1514A; *see also* Feldman v. L. Enft Assocs. Corp., 752 F.3d 339, 344 (4th Cir. 2014).

or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)....¹²

Put plainly, Section 806 contains an employee-protection provision prohibiting retaliation against employees when they provide information or assist in investigations related to violations.¹³ Thus, if an employer takes an adverse employment action against a whistleblower, the whistleblower must prove by preponderance of the evidence that (1) the whistleblower was engaged in a protected activity; (2) the employer knew or suspected the whistleblower was engaged in a protected activity; (3) an adverse action was taken against the whistleblower; and (4) it could be deduced that the protected activity was a contributing factor to the adverse action taken against the whistleblower.¹⁴ Under the first element, the whistleblower must have reasonably believed the conduct reported constituted a violation of the law.¹⁵ Moreover, “[a]s a threshold matter, the complainant must report conduct that falls into one of six categories enumerated by Congress in 18 U.S.C. § 1514A(a)(1): mail fraud, wire fraud, bank fraud, securities fraud, any SEC rule or regulation, or any federal law relating to fraud against shareholders.”¹⁶ The test to determine whether a whistleblower’s belief is reasonable mixes elements of a subjective and objective test.¹⁷ To meet

¹² 18 U.S.C.A. § 1514A (emphasis added).

¹³ *Sylvester v. Parexel Int’l, LLC*, No. 07-123, 2011 WL 2517148, at 6 (U.S. Dep’t of Lab. May 25, 2011).

¹⁴ *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1350 (11th Cir. 2023) (referencing 29 C.F.R. § 1980.104(e)(1)–(2)).

¹⁵ *Id.*; see also *Sylvester*, 2011 WL 2517148, at 11.

¹⁶ *Ronnie*, 81 F.4th at 1350 (referencing 29 C.F.R. § 1980.104(e)(1)–(2)).

¹⁷ *Id.* at 1351.

the subjective aspect of the test, the employee must believe their employer's conduct violated SOX.¹⁸

Furthermore, to meet the objective aspect of the test, the whistleblower must present evidence that shows the whistleblower's reasonable belief behind the report.¹⁹ However, since it is unclear what exactly constitutes a reasonable belief, circuit courts differ in choosing whether to apply the totality of the circumstances test or the reasonable person test to determine whether a whistleblower is protected.

II. THE CIRCUIT COURTS' DIFFERING DECISIONS

Courts apply either the reasonable person test or the totality of the circumstances test when evaluating whether a whistleblower should be found to have engaged in protected activity. These tests ask whether "the employee **reasonably believes** [the employer's conduct] constitutes a violation."²⁰ The Third, Fifth, Sixth, Ninth, and Tenth Circuits apply the reasonable person test, whereas the First, Second, Fourth, Seventh, Eighth, and Eleventh Circuits apply the totality of the circumstances test.²¹ In *Ronnie v. Office Depot, LLC*, the Eleventh Circuit adopted the totality of the circumstances test.²²

Although all circuits are involved in this split, the analysis in *Ronnie v. Office Depot, LLC* specifically focuses on the Third and Sixth Circuits' application of the reasonable person test and the Second and Fourth Circuits' application of the totality of the circumstances test.²³

A. The Reasonable Person Test

The Third and Sixth Circuits look to *Sylvester v. Parexel Int'l LLC* for guidance on what constitutes a reasonable belief under SOX.²⁴ SOX specifically

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 18 U.S.C.A. § 1514A (emphasis added).

²¹ *Ronnie*, 81 F.4th at 1350.

²² See generally *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345 (11th Cir. 2023).

²³ *Id.*

²⁴ *Sylvester*, 2011 WL 2517148, at *11 (finding that a complainant need only express a "reasonable belief" of a violation to engage in a SOX-protected activity).

states that the proper standard for employee reporting is a “reasonable belief.” However, SOX does not define “reasonable belief.”²⁵ A look into the Act’s legislative history shows that “a reasonableness test is also provided . . . which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts.”²⁶ The reasonable person test provides a subjective and objective viewpoint, requiring a whistleblower to personally believe there has been a violation in addition to someone in a similar position or with similar knowledge also believing there has been a violation.²⁷

To satisfy the subjective viewpoint, “the employee must actually have believed that the conduct he complained of constituted a violation of relevant law.”²⁸ A subjective viewpoint requires that the whistleblower intended to make a good faith report based on an actual belief that the employer’s conduct constituted a violation of SOX.²⁹ Additionally, the employee’s educational background and technical sophistication are considered to determine the whistleblower’s subjective reasonable belief.³⁰ Section 806’s legislative intent explains that a court should always presume that the whistleblower’s report is *per se* reasonable.³¹

Next, under the objective viewpoint, the employee’s belief “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.”³² “The reasonable belief standard requires an examination of the reasonableness of a complainant’s beliefs, but does not require the complainant to actually communicate[] the reasonableness of those beliefs to management or the

²⁵ *Id.*

²⁶ *Id.* (quoting S. Rep. 107-146 at 19 (May 6, 2002)); *see also* Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Lab., 992 F.2d 474, 480 (3d Cir. 1993) (finding that substantial evidence is construed as evidence a reasonable mind would find to support the conclusion that a violation has occurred).

²⁷ *Sylvester*, 2011 WL 2517148 at *11.

²⁸ *Id.* at *11 (citing *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009)).

²⁹ *Sylvester*, 2011 WL 2517148 at *11 (referencing *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10 (1st Cir. 2009)) (quoting *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008)).

³⁰ *Id.*

³¹ *Sylvester*, 2011 WL 2517148 at *11 (citing *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1002 (9th Cir. 2009) (citing 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002))).

³² *Id.* at *12–13 (quoting *Harp*, 558 F.3d at 723).

authorities.”³³ Thus, if another employee with the same training and experience would believe that a securities violation occurred, the whistleblower would not need to provide an explanation.

The *per se* presumption that an employee’s report of a violation is reasonable protects more whistleblowers’ reports of SOX violations. For example, the Fifth Circuit found an employee’s reasonable but mistaken belief that an employer *in fact* engaged in illegal conduct is protected if it is held to be subjectively and objectively reasonable.³⁴ Additionally, the report does not have to describe an actual violation of the law to be a protected activity under SOX.³⁵

Accordingly, under the reasonable person test, a whistleblower sufficiently shows a “reasonable belief” of a SOX violation when (1) the whistleblower personally believes a violation occurred, and (2) a person in a similar position also believes a violation occurred. Moreover, where a whistleblower report is based on a reasonable belief, reports that are mistaken or do not describe an actual violation of the law are protected against retaliation.

B. The Totality of the Circumstances Test

The Second and Fourth Circuits apply the totality of the circumstances test to determine whether a whistleblower had a “reasonable belief.” This test includes the subjective and objective parts of the reasonable person test but heightens the whistleblower’s burden of proof.

In determining what information sufficiently paints a picture of reasonable belief, we employ a totality of the circumstances test based on knowledge available to a reasonable person in the same factual circumstances—and with the same training and experience—as the complainant. Relevant to the totality of the circumstances is whether the employer acted with the requisite scienter, whether the misstatement was material, whether the

³³ *Id.*; see, e.g., *Knox v. U.S. Dep’t of Lab.*, 434 F.3d 721 (4th Cir. 2006).

³⁴ *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 477 (5th Cir. 2008).

³⁵ *Sylvester*, 2011 WL 2517148, at *14.

misstatement was relied upon, and whether it yielded economic loss.³⁶

The totality of the circumstances test considers both the whistleblower-employee and the employer to determine whether the employee's report is protected from retaliation. The factors in this analysis mirror those applied to the employer when evaluating a Rule 10b-5 violation.

Rule 10b-5 regulates the use of manipulative and deceptive devices used in connection with the sale of securities.³⁷ Specifically, Rule 10b-5 provides that,

[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ and device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security.³⁸

To prevail on a Rule 10b-5 claim, a shareholder must show “(1) the defendant made a false statement or omission of material fact (2) with scienter (3) upon which the plaintiff justifiably relied (4) that proximately caused the plaintiff's damages.”³⁹ A “material fact” under Rule 10b-5 is shown when a reasonable seller or purchaser would have found the information influential when considering whether to buy or sell securities.⁴⁰ In addition to being material, the employer must have acted with scienter, “a mental state embracing intent to deceive, manipulate, or defraud.”⁴¹

³⁶ *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1351 (11th Cir. 2023).

³⁷ *See* 17 C.F.R. § 240.10b-5.

³⁸ *Id.*

³⁹ *In re PEC Sols., Inc. Sec. Litig.*, 418 F.3d 379, 386–87 (4th Cir. 2005) (quoting *Hillson Partners Ltd. P'ship v. Adage, Inc.*, 42 F.3d 204, 208 (4th Cir. 1994)).

⁴⁰ *Id.* (quoting *Longman v. Food Lion, Inc.*, 197 F.3d 675, 683 (4th Cir. 1999)).

⁴¹ *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 127 S. Ct. 2499, 2507 (2007) (quoting *Ernst & Ernst v. Hotchfelder*, 425 U.S. 185, 193 (1976)).

The totality of the circumstances test mirroring Rule 10b-5 protects only whistleblowers who report an actual securities violation. This standard heightens a whistleblower's burden of proof. Although "the employee need not 'definitively and specifically' prove each element of fraud, he must make more than a conclusory allegation."⁴² A whistleblower may not be protected if the whistleblower has only speculated or is suspicious that a material violation occurred.⁴³ Conversely, under the reasonable person test, protection is not conditioned upon a whistleblower proving an actual violation occurred.

In conclusion, to constitute a reasonable belief of a violation under the totality of the circumstances test, a whistleblower must first meet the reasonable person test. Next, the whistleblower must show that the employer (1) made a material misstatement (2) with scienter (3) that a stockholder relied on, and (4) it yielded economic loss. Under this standard, a whistleblower must show that its employer would be found liable for a securities violation.

C. The Eleventh Circuit's Decision

On September 25, 2023, the Eleventh Circuit considered which test to apply in *Ronnie v. Office Depot, LLC*.⁴⁴ There, the Court attempted to strike a balance between protecting employees from retaliation and protecting employers from baseless allegations.⁴⁵ After reviewing both tests, the Eleventh Circuit ultimately adopted the totality of the circumstances test when assessing whether an employee has a reasonable belief.⁴⁶

Ronnie, an employee at Office Depot, noticed a discrepancy in data, which he believed to be a violation of SOX.⁴⁷ Ronnie reported the discrepancy to his supervisors, who subsequently tasked him with determining its cause.⁴⁸ Ronnie

⁴² *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1351 (11th Cir. 2023); *see also* *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 224 (2d Cir. 2014).

⁴³ *Ronnie*, 81 F.4th at 1351; *see also* *Livingston v. Wyeth*, 520 F.3d 344, 354 (4th Cir. 2008).

⁴⁴ *See generally* *Ronnie*, 81 F.4th 1345.

⁴⁵ *Id.* at 1351.

⁴⁶ *Id.*

⁴⁷ *See generally* *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345 (11th Cir. 2023).

⁴⁸ *Id.* at 1349.

failed to determine the cause of the discrepancy, ultimately leading to his termination.⁴⁹ After reviewing the decision of the Administrative Review Board (“ARB”), the Eleventh Circuit found that the ARB was correct in applying the totality of the circumstances test.⁵⁰ The complainant must have an objectively reasonable belief, and the complaint must fall under one of the enumerated categories in SOX.⁵¹ “Ronnie’s failure to demonstrate key factors of fraud—notably, scienter and materiality—does not support a conclusion that a reasonable person in his same position with his same education, training, and experience would believe the data error constituted a violation.”⁵² Thus, under the totality of the circumstances test, Ronnie was not awarded protection against retaliation.

The Court held that a whistleblower report based solely upon the employee’s speculation or suspicion will not be protected under SOX.⁵³ On one hand, retaliation will likely occur against employees whose whistleblowing reports do not support a securities violation. On the other hand, the totality of the circumstances test safeguards employers from having baseless reports made against them if they have not actually committed a violation.

Generally, applying the totality of the circumstances test means that fewer employers will be reported to the SEC because only employees who report an actual violation will be protected from retaliation..⁵⁴

⁴⁹ *Id.*

⁵⁰ *Id.* at 1352.

⁵¹ *Id.*; see also 18 U.S.C.A. § 1514A (describing enumerated categories as “a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders”).

⁵² *Ronnie*, 81 F.4th at 1352.

⁵³ See generally *Ronnie*, 81 F.4th 1345.

⁵⁴ See also Megan E. Mowrey et al., *Does Sarbanes-Oxley Protect Whistleblowers? The Recent Experience of Companies and Whistleblowing Workers Under SOX*, 1 WM. & MARY BUS. L. REV. 431 (2010) (finding the Sarbanes-Oxley Act has never protected whistleblowers and that most employees who claim whistleblower protections do not successfully attain these protections).

D. The Eleventh Circuit's Decision if Evaluated under the Reasonable Person Test

The reasonable person test and the totality of the circumstances test lead to different conclusions regarding what constitutes a “reasonable belief.” If a court evaluated *Ronnie v. Office Depot, LLC* under the reasonable person test, Ronnie may have been protected from retaliation. Under the reasonable person test, a whistleblower must subjectively believe that a violation has occurred, and a person in a similar position must also believe a violation has occurred.⁵⁵

To satisfy the subjective viewpoint, “the employee must actually have believed that the conduct he complained of constituted a violation of relevant law.”⁵⁶ Moreover, the subjective viewpoint requires that the employee intended to make a good faith report based on their actual belief that the employer's conduct constituted a violation covered by SOX.⁵⁷

Here, Ronnie personally believed that a violation had occurred.⁵⁸ He reported the discrepancy to his employer and *then* to the Department of Labor's Occupational Safety and Health Administration (“OSHA”).⁵⁹ If a court applied the reasonable person test, it would find that Ronnie personally believed that a violation occurred.

To satisfy the second element, known as the objective viewpoint, the employee's belief “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.”⁶⁰ “The reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but not whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities.”⁶¹ In other words, the objective viewpoint is

⁵⁵ See generally *Sylvester v. Parexel Int'l LLC*, No. 07-123, 2011 WL 2517148 (U.S. Dept. of Labor May 25, 2011).

⁵⁶ *Id.* at *12–13 (citing *Harp v. Charter Commc'ns*, 558 F.3d 722 (7th Cir. 2009)).

⁵⁷ *Id.* at *12. (referencing *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10) (quoting *Welch v. Chao*, 536 F.3d 269, 278 n.4 (4th Cir. 2008)).

⁵⁸ See generally *Ronnie*, 81 F.4th 1345 (11th Cir. 2023).

⁵⁹ *Id.* at *1349.

⁶⁰ See *Sylvester*, 2011 WL 2517148, at *12–13 (quoting *Harp*, 558 F.3d at 723).

⁶¹ *Id.*; see e.g., *Knox v. U.S. Dep't of Labor*, 434 F.3d 721 (4th Cir. 2006).

satisfied so long as another employee with the same training and experience would also believe that a securities violation occurred.

It is unclear whether a person similarly situated to Ronnie would believe a violation occurred. The Eleventh Circuit determined that “Ronnie failed to allege sufficient facts to establish that a reasonable person with his training and experience would believe that Office Depot’s conduct constituted a SOX violation.”⁶² However, under a reasonable person test, while it is relevant whether another person in the same position would find that the employer’s conduct constituted a SOX violation, that does not end the inquiry. Ronnie’s mistaken belief that the data discrepancy constituted a violation would still afford him whistleblower protection under SOX. It follows that Ronnie would attain protection from employer retaliation under the reasonable person test.

In conclusion, if the Eleventh Circuit in *Ronnie v. Office Depot, LLC* had evaluated Ronnie’s claim under the reasonable person test, Ronnie’s reasonable belief would have allowed him to attain whistleblower protections under SOX.

III. POLICY CONSIDERATIONS

The Eleventh Circuit’s decision in *Ronnie v. Office Depot, LLC* failed to consider how the reasonable person test and totality of the circumstances test further SOX policies. The policy considerations under each test determine whether a whistleblower or their respective employer will be protected.

SOX aims to protect employees who “take lawful acts to disclose information or otherwise assist in detecting and stopping actions which they reasonably believe to be fraudulent.”⁶³ SOX contains key whistleblower protections for employees who report employer violations. “Congress passed the Sarbanes Oxley Act of 2002 (SOX) in the hope that SOX would interrupt, check, and prevent illegal accounting practices by public companies whose activities threatened investors.”⁶⁴ SOX

⁶² *Sylvester*, 2011 WL 2517148, at *6.

⁶³ *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 218 (2d Cir. 2014) (quoting *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443, 446 (2d Cir. 2013)).

⁶⁴ Megan E. Mowrey et al., *Does Sarbanes-Oxley Protect Whistleblowers? The Recent Experience of Companies and Whistleblowing Workers Under SOX*, 1 WM. & MARY BUS.

sought to incentivize whistleblower reports to better help identify corporate fraud.⁶⁵ Overall, SOX works to protect whistleblowers who report their employers to the SEC for possible securities violations. Thus, a court should consider the policies behind SOX, the reasonable person test, and the totality of the circumstances test to decide which standard to apply in a reasonable belief analysis.

A. Policy Considerations of the Sarbanes-Oxley Act

The SEC uses multiple methods to encourage whistleblowers to report securities violations. As discussed above, SOX includes anti-retaliation provisions that allow employees to recover damages if their employer retaliated against them for reporting.⁶⁶ Congress and the SEC have also implemented “bounties” or “rewards” to motivate securities fraud whistleblowing.⁶⁷

Even with these incentives, “rulings [under] Sarbanes-Oxley complaints, and the implementation of existing regulations adopted by the Department of Labor to date, are evidence that Sarbanes-Oxley whistleblower protections are not nearly strong enough to protect whistleblowing employees, and to bring about the changes envisioned by Congress.”⁶⁸ The protections offered under SOX impose more hardships than protections for employees. Furthermore, “[t]he legislative history of Sarbanes-Oxley makes clear that its protections were ‘intended to include all good faith and reasonable reporting of fraud, and there should be no

L. REV. 431, 431 (2010). See also Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 109-10 (2007) (finding that the Sarbanes-Oxley Act focused on structural redesign and worked to hold corporate managers more accountable; however, the Act has done “little to actually reduce corporate and financial fraud”).

⁶⁵ Elizabeth Mihalek, *The Employee-Whistleblower and the Decision to Expose Corporate Fraud: Show Me the Money*, 17 No. 4 PIABA B.J. 401, 406 (2010).

⁶⁶ See 18 U.S.C.A. § 1514A.

⁶⁷ See Rapp, *supra* note 65, at 109 (2007) (referencing 15 U.S.C.A. § 78u-1) (finding that, “the Insider Trading and Securities Fraud Enforcement Act of 1988 authorized the SEC to offer whistleblowers rewards of up to 10% of the penalty imposed against a person found to have violated the insider trading laws”).

⁶⁸ Valerie Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and A Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 833 (2007).

presumption that reporting is otherwise.”⁶⁹ Overall, the Supreme Court should consider SOX’s goal of encouraging whistleblower reports when deciding whether to adopt the reasonable person test or the totality of the circumstances test. Particularly, the Supreme Court should adopt the more whistleblower-friendly reasonable person test due to recent evidence that SOX’s whistleblower protections are insufficient.

B. Policy Considerations Under the Reasonable Person Test

In general, the reasonable person test (1) makes a subjective inquiry into whether the person personally believed that fraud was taking place and (2) makes an objective inquiry into whether a reasonable person in the same situation and with the same training would also believe that a violation occurred.⁷⁰ The reasonable person test supports policy goals such as stronger whistleblower protection and an increase in the reporting of violations.

First, under the reasonable person test, the threshold to constitute a reasonable belief is lower than under the totality of the circumstances test.⁷¹ This lower threshold will result in more whistleblowers attaining protection.⁷² For example, under the reasonable person test, a whistleblower may attain protection despite a mistaken belief.⁷³ However, under the totality of the circumstances test, a mistaken belief is not covered. Therefore, the reasonable person test protects more whistleblowers than the totality of the circumstances test.

Second, the reasonable person test would increase the number of whistleblowers who report violations. A whistleblower is more likely to report a violation, even if mistaken, because they will attain protection under the reasonable

⁶⁹ *Sylvester v. Parexel Int’l LLC*, No. 07-123, 2011 WL 2517148, *12–13 (U.S. Dept. of Labor May 25, 2011) (quoting *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1002 (9th Cir. 2009) (citing 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002))).

⁷⁰ Anne M. Payne, *Litigation of Whistleblower Protections in Sarbanes-Oxley Act*, 151 AM. JUR. *Trials* 311 § 1 (2017).

⁷¹ See Steven P. Scalet, *Fitting the People They Are Meant to Serve: Reasonable Persons in the American Legal System*, 22 L. & PHIL. 75, 76 (2003) (discussing that being reasonable is advantageous due to the fact that the law conforms to standards of reasonableness).

⁷² *Id.*

⁷³ *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 477 (5th Cir. 2008).

person test due to the lower threshold.⁷⁴ The reasonable person test will increase reports of violations because whistleblowers will feel more confident knowing they are protected.

These policy benefits may create some negative externalities, such as unwarranted protection for whistleblowers and unwarranted reports that fail to establish a violation.⁷⁵ Protection could be seen as unwarranted if whistleblowers fail to establish a violation that severely impacts employers who have not violated SOX.⁷⁶ Furthermore, due to the broad protection under the reasonable person test, unwarranted reports will increase as more whistleblowers feel “protected” in reporting violations.

In conclusion, policy considerations furthered by the reasonable person test include enhanced whistleblower protection and an increase in reports of violations. However, due to the lower threshold of a reasonable belief under the reasonable person test, these policy considerations may have negative implications, such as unwarranted protection for whistleblowers and unwarranted reports that fail to establish a violation.

C. Policy Considerations Under the Totality of the Circumstances Test

In general, a totality of the circumstances test considers all of the circumstances while applying the circumstances, based on the available knowledge, to what a reasonable person in the same factual circumstances with the same training and experience would believe.⁷⁷ Additionally, a whistleblower must prove that “the employer acted with the requisite scienter, whether the misstatement was material, whether the misstatement was relied upon, and whether it yielded economic loss” under the SOX requirements.⁷⁸ Policy considerations

⁷⁴ *Id.*

⁷⁵ See Epstein Becker Green, *Eleventh Circuit Adopts Employer-Friendly Standard for Establishing Key Element of SOX Whistleblower Claim*, JD SUPRA (Oct. 02, 2023) [https://www.jdsupra.com/legalnews/eleventh-circuit-adopts-employer-9853049/\[https://perma.cc/6EPU-SWAJ\]](https://www.jdsupra.com/legalnews/eleventh-circuit-adopts-employer-9853049/[https://perma.cc/6EPU-SWAJ]) (finding that “Ronnie is a win for employers in the Eleventh Circuit because its newly adopted standard better protects employers from baseless accusations of wrongdoing under SOX.”).

⁷⁶ *Id.*

⁷⁷ *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1351 (11th Cir. 2023).

⁷⁸ *Id.*

furthered by the totality of the circumstances test include a decrease in unwarranted reports and an increase in reports that warrant a more likely result of a sufficient case to prove a violation of Rule 10b-5.

Under the totality of the circumstances test, the threshold to constitute a reasonable belief is higher than under the reasonable person test.⁷⁹ The higher threshold under the totality of the circumstances test results in fewer whistleblowers attaining protection.⁸⁰ Unlike the reasonable person test, under the totality of the circumstances test, a whistleblower cannot attain protection unless a Rule 10b-5 violation is established.⁸¹ Thus, the totality of the circumstances test protects fewer whistleblowers than the reasonable person test.

However, the totality of the circumstances test punishes whistleblowers who believe they are acting in good faith but ultimately fail to establish a Rule 10b-5 violation.⁸² Due to the limited scope of protection, whistleblowers may be reluctant to report a violation. Therefore, by applying the totality of the circumstances test, whistleblowers will be less likely to report reasonable violations because of the fear that they may not be protected if the report does not establish a Rule 10b-5 violation.

In conclusion, policy considerations furthered by the totality of the circumstances test include a decrease in unwarranted reports and an increase in reports that are more likely to result in a Rule 10b-5 violation. However, due to the strict compliance with Rule 10b-5, these policy considerations can have negative

⁷⁹ See Steven J. Pearlman, Andrew Sherwood & Pinchos Goldberg, *Eleventh Circuit Affirms Rejection of Employee's SOX Claim for Lack of Protected Activity*, PROSKAUER (Oct. 10, 2023), <https://www.whistleblower-defense.com/2023/10/10/eleventh-circuit-affirms-rejection-of-employees-sox-claim-for-lack-of-protected-activity/> [<https://perma.cc/X2QR-3SK8>] (finding that the Eleventh Circuit adopted the more rigorous standard, the totality of the circumstances test, rather than the standard followed by the Third and Sixth Circuits).

⁸⁰ *Id.*

⁸¹ *Ronnie*, 81 F.4th at 1351.

⁸² See Gregory Keating, *Eleventh Circuit Adopts Employer-Friendly Standard for Establishing Key Element of SOX Whistleblower Claim*, JD SUPRA (Oct. 02, 2023) <https://www.jdsupra.com/legalnews/eleventh-circuit-adopts-employer-9853049/> [<https://perma.cc/6EPU-SWAJ>] (discussing how *Ronnie* is a win for employers because employees must produce evidence that shows how the employer's conduct meets the elements of securities fraud).

implications, including a decrease in reports and a lack of protection for whistleblowers who reasonably believe a violation has occurred.

IV. WHAT TEST SHOULD THE SUPREME COURT APPLY?

The Supreme Court should apply the reasonable person test because it most closely mirrors the policies behind SOX. However, Congress should also take steps to help minimize false reporting. Congress could do so by enacting legislation that (1) does not compensate whistleblowers and (2) sanctions whistleblowers who make false reports. Furthermore, Rule 10b-5's distinct test for corporate insider trading should be separate from evaluating whistleblower protection.

First, "[t]he legislative history of Sarbanes-Oxley makes clear that its protections were 'intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise.'"⁸³ The only test that allows "all good faith and reasonable reporting of fraud"⁸⁴ is the reasonable person test. Under the reasonable person test, an employee is still protected under SOX if they have a reasonable but mistaken belief that an employer engaged in illegal conduct.⁸⁵ Alternatively, under the totality of the circumstances test, an actual violation must occur for a whistleblower to be protected. It follows that to stay consistent with the policy considerations behind SOX, the Supreme Court should apply the reasonable person test.⁸⁶

Next, Rule 10b-5 has a distinct test to evaluate whether a securities violation has occurred. This test is included in the totality of the circumstances test. Rule 10b-5's test determines whether a securities violation has occurred, whereas the

⁸³ *Sylvester v. Parexel Int'l LLC*, No. 07-123, 2011 WL 2517148, *12–13 (U.S. Dept. of Labor May 25, 2011) (quoting *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009)) (citing 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002)).

⁸⁴ *Sylvester*, 2011 WL 2517148, at *12–13.

⁸⁵ *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 477 (5th Cir. 2008).

⁸⁶ See § 58:76.30. Pleading retaliation under Sarbanes-Oxley Act, 6 Emp. Coord. Employment Practices § 58:76.30 (citing *Wadler v. Bio-Rad Laboratories, Inc.*, 916 F.3d 1176 (9th Cir. 2019)) (finding that "[w]hile the evidence needed to support a whistleblower's reasonable belief will necessarily vary with the circumstances, § 1514A(a)(1) generally does not require an employee to undertake an investigation before reporting his concerns. Such a requirement would undermine the purpose of the Sarbanes-Oxley Act.").

test under SOX considers whether a whistleblower should receive protection. These are two distinct tests and should not be considered together. Considering the tests together would be like a person who thought they were robbed having to ensure every element was met before reporting the crime. In most cases, the reporter believes a violation has occurred but might not know exactly what constitutes a violation. That person would be protected under the reasonable person test but not under the totality of the circumstances test. It follows that the two tests should be treated as distinct, each with their own merits. Nevertheless, the reasonable person test is best where courts strive to defer to SOX policy.

In fact, the negative externalities posed by the reasonable person test are easily remedied. Because the reasonable person test protects mistaken reports, Congress should implement legislation aimed at reducing the number of false reports. For example, this legislation could include altering the compensation given to whistleblowers and sanctioning whistleblowers who make false reports.

Monetary incentives are used to motivate whistleblowers to expose corporate fraud.⁸⁷ Consequently, monetary incentives can lead to false reporting. Whistleblowers are more willing to risk their careers and livelihoods when they can attain a large monetary reward.⁸⁸ Thus, one way to lessen false reporting motivated by monetary rewards would be to cease monetary incentives altogether. A second option would be to structure the monetary incentive in a *qui tam* statute, such that,

the employee only gets a percentage of monies collected. If there is no fraud and no legitimate claim, there is no money to collect. Therefore, employees who would bring frivolous claims would not be exposing fraud and would never see any money as a result of their claim. Only those employees who exposed a legitimate fraud would ever be able to realize any money from their claims.⁸⁹

This structure would require a court to award monetary damages before a whistleblower could collect compensation for their claims. If the whistleblower

⁸⁷ Mihalek, *supra* note 66, at 405.

⁸⁸ *Id.* at 413.

⁸⁹ *Id.* at 415.

did not report a legitimate violation, they would not be compensated and may face sanctions if their claim was unreasonable.

Sanctions may deter whistleblowers from false reporting. “For example, according to the False Claims Act, the court may award the defendant its reasonable attorney’s fees and expenses if the claim was clearly frivolous or vexatious or brought primarily for purposes of harassment.”⁹⁰ Such sanctions would deter false reporting without punishing reasonable but mistaken reports.

In light of these solutions, the Supreme Court should apply the reasonable person test when determining whether an employee had a reasonable belief that its employer committed a SOX violation. The reasonable person test best furthers SOX’s policy goals. Additionally, the totality of the circumstances test, derived from Rule 10b-5, is a distinct test and should not be used to determine whether a whistleblower attains protection. Lastly, to minimize false reporting, Congress should alter the compensation structure of whistleblowers and sanction whistleblowers who make false reports.

CONCLUSION

Under SOX, an employee must *reasonably believe* that the actions of their employer constitute a violation. In determining a reasonable belief, the circuit courts apply either the reasonable person test or the totality of the circumstances test. On September 25, 2023, the Eleventh Circuit focused on the circuit split in determining a “reasonable belief” and adopted the totality of the circumstances test. In evaluating the policy considerations behind SOX in conjunction with the two tests, the reasonable person test better suits the policy goals under SOX. Thus, once the Supreme Court decides what constitutes a “reasonable belief,” it should apply the reasonable person test while collaborating with Congress to sanction whistleblowers who make false reports and alter the compensation of whistleblowers.

⁹⁰ Yehonatan Givati, *A Theory of Whistleblower Rewards*, 45 J. LEGAL STUD. 43, 63 (2015).

