

Protecting the Protectors: In *Murray v. UBS*, the U.S. Supreme Court Articulates the New Standard for SOX Whistleblower Claims

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On February 8, 2024, the United States Supreme Court issued its unanimous decision in *Murray v. UBS Securities, LLC*, concluding there is no implicit “retaliatory intent” requirement for whistleblower claims brought under the Sarbanes-Oxley Act of 2002 (“SOX”), 18 U.S.C. § 1514A(a). The Supreme Court’s reasoning is specific to Section 1514A claims, but it may extend to industries and sectors protected by antiretaliation statutes that are similar in scope. Securities firms should take note that SOX is now one of the most employee-friendly whistleblower-protection statutes in the nation.

In a case that resulted first in a jury verdict for the employee and then a Second Circuit reversal, the United States Supreme Court addressed the standard for SOX retaliation claims. Trevor Murray was a research strategist in UBS’s commercial mortgage-backed securities (“CMBS”) business. Murray’s job involved reporting on CMBS markets to current and future UBS customers. SEC regulations required Murray to certify that his reports were produced independently and accurately reflected his own views. Murray believed that UBS impinged upon his statutorily protected independence when two trading desk leaders began a campaign which he believed intended to pressure him into writing reports supportive of UBS’s business strategies. Murray complained to his direct supervisor in December 2011 and January 2012, including that the trading desk’s pressure was “unethical” and “illegal,” and argued that he was subsequently told not to alienate his “internal client” (the trading desk). Murray later complained that he was being left out of meetings and that the trading desk was treating him even worse. Shortly after this exchange, in February of 2012, Murray’s supervisor recommended that he be “removed from the head count” and UBS subsequently terminated Murray’s employment.

After trial, the district court instructed the jury that Murray needed to prove, among other elements, that his protected activity was a “contributing factor” in the decision to terminate his employment. The judge directed the jury to consider whether “anyone with th[e] knowledge of [Murray’s] protected activity, because of the protected activity, affect[ed] in any way the decision to terminate [Murray’s] employment.” The jury found for Murray. On appeal, the Second Circuit vacated the award and remanded for a new trial

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holding the district court's instruction during deliberations was wrong as a matter of law because the statutory language in SOX required a plaintiff to show retaliatory intent.

In a unanimous decision authored by Justice Sotomayor, the U.S. Supreme Court reversed and remanded. Its decision hinges on the statutory text of Section 1514A(a), which states that no employer subject to SOX "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" the employee's protected whistleblowing activity. Considering prior precedent and statutory construction, the Supreme Court explained that discrimination simply requires evidence of differential treatment. Absent an animus-like "retaliatory intent" requirement, all that matters is whether an employer treats the employee worse "because of" the protected whistleblowing 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."

The Supreme Court also noted that the burden-shifting framework in place for Section 1514A claims requires a threshold showing of intent. That framework is more lenient than the burden-shifting tests in place for claims under other statutes (specifically including Title VII) that impose a higher bar for plaintiffs to show the protected activity was a motivating factor or a substantial factor in the adverse action. Plaintiffs bringing claims under SOX § 1514A need only show the employee's protected activity was a "contributing factor." For this reason, "[s]howing that an employer acted with retaliatory animus is one way of proving that the protected activity was a contributing factor in the adverse employment action, but it is not the only way."

Although *Murray* applies specifically to securities firms subject to SOX, it will likely also expand protections available to employees in other industries and sectors in which Congress, in an effort to encourage reporting of illegal activity, has set a lower bar for antiretaliation claims (such as in the aviation industry). Companies should consider taking the following steps in light of this significant court ruling:

- Update their antiretaliation policies and procedures to ensure employees understand how to raise such claims.
- Incorporate the *Murray* standard into training for managers and supervisors with authority to make personnel decisions that could cause exposure to a whistleblower claim. In other words, build in the question from the decision -- would the employer be making the same personnel decision in the absence of the "protected conduct?"

As is always the case, employers want to be able to articulate, in clear and concise language, the rationale for their personnel decisions.