

PUBLICATION

U.S. Supreme Court Sides with SOX Whistleblower in *Murray v. UBS Securities*

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On February 8, 2024, the U.S. Supreme Court unanimously decided that an employee who blows the whistle under the Sarbanes-Oxley Act of 2002 (SOX) does not need to show that their employer had retaliatory intent to find protection under SOX. In siding with the whistleblower, Trevor Murray, the Court rejected UBS Securities, LLC's position that a finding of retaliatory intent is required for whistleblower protection under SOX, which governs corporate financial reporting and recordkeeping.

Specifically, Congress enacted the whistleblower protections of the Sarbanes-Oxley Act of 2002 to prohibit publicly traded companies from retaliating against employees who report what they reasonably believe to be criminal fraud or securities law violations. Title 18 U. S. C. §1514A(a) provides that employers may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of..." protected whistleblowing activity.

The Underlying Case

Trevor Murray filed a SOX complaint in federal district court alleging UBS terminated his employment in violation of §1514A. Murray worked for UBS as a research strategist. He was required to certify in accordance with applicable Securities and Exchange Commission regulations that his reports to UBS customers about the firm's securities business were independently produced and reflected his own views.

UBS terminated Murray's employment not long after he informed his supervisor that two UBS trading desk employees were engaging in what he believed to be unethical and illegal efforts to slant his independent reporting. UBS stated its non-retaliatory reason for terminating Murray's employment was the company had lost "billions of dollars" and had to lay off employees and Murray's strategist position was "not necessary" to generate revenue, but rather was a "nice to have" position.

UBS argued it was entitled to summary judgment because Murray "failed to produce any evidence that [his supervisor] possessed any sort of retaliatory animus toward him." The district court denied UBS's motion, and it instructed the jury that, to prove a §1514A claim, Murray was required to prove beyond a preponderance of the evidence that his "protected activity was a contributing factor in the termination of his employment." If Murray met that burden, then UBS would be required to demonstrate by clear and convincing evidence that it would have terminated Murray's employment even if he had not engaged in protected activity.

The jury found that Murray had established a §1514A claim and UBS had failed to prove that it would have fired Murray even if he had not engaged in protected activity. The jury awarded Murray over \$900,000 in damages and over \$1.7 million in attorneys' fees. UBS appealed.

On appeal, the Second Circuit vacated the jury's verdict and remanded for a new trial. As is relevant here, the Second Circuit held that "[r]etaliatory intent is an element of a section 1514A claim," and that the trial court had failed to instruct the jury on Murray's burden to prove retaliatory intent. The Second Circuit decision created a circuit split, and Murray appealed to the U.S. Supreme Court. Thus, the issue before the Court was whether a SOX whistleblower must prove the employer acted with "retaliatory intent" to prevail under SOX.

The Supreme Court's Decision

The Court held that SOX whistleblower must prove that their protected activity was a "contributing factor in the employer's unfavorable personnel action but need not prove that his employer acted with 'retaliatory intent.'" The Court reasoned that the text of Section 1514(a) does not refer to or include a "retaliatory intent" requirement. Further, the Court held that requiring a whistleblower to prove retaliatory intent ignores SOX's "mandatory burden-shifting framework." Specifically, the Court stated that Congress decided that a whistleblower's burden on "intent" is only to demonstrate the protected activity was a "contributing factor in the unfavorable personnel action." Once the whistleblower meets that burden, then the employer must show it would have taken the same action in the absence of whistleblowing.

The Court dismissed UBS's position that without a retaliatory intent requirement, employers would face liability for legitimate, non-retaliatory employment decisions because, said the Court, the statute's burden-shifting framework would prevent such a result even though the contributing-factor framework is not "as protective of employers as a motivating-factor framework." In short, the Court held that it could not override "Congress policy choice by giving employers more protection than the statute provides."

In sum, employers are faced with the same burden of proof in a SOX whistleblower case as before the Court's decision in *Murray v. UBS*. As always, employers should ensure that the reason(s) for taking adverse actions against employees are well-documented, legitimate reasons having nothing to do with employees' protected activity. And, specifically as was the case in *Murray v. UBS*, where the adverse action follows not long after the employee allegedly engages in protected activity, employers should be especially vigilant to assess the merits of the adverse action before taking to mitigate risk and defend against retaliation claims. This is because the closer in time the adverse action taken is to the alleged protected activity, the defense of a whistleblower claim becomes even more challenging.

Baker Donelson will continue to monitor these developments and other anticipated court decisions. If you have questions about these recent developments, contact [Donna M. Glover](#) or any member of Baker Donelson's [Labor & Employment Team](#).