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CLIENT ALERT

Supreme Court Provides Greater Protection for Whistleblowers

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On February 8, 2024, the Supreme Court issued a unanimous opinion in *Murray v. UBS Securities, LLC*, No. 22-660, clarifying the elements a whistleblower is required to prove to be protected by the provisions of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). The Court resolved a circuit split concerning whether, under 18 U.S.C. § 1514A, a whistleblower-employee must prove her employer acted with "retaliatory intent" when it took an unfavorable personnel action against the employee. The Supreme Court held that retaliatory intent was not an element of section 1514A. Rather, a whistleblower must only prove that his protected activity was a contributing factor in the employer's unfavorable personnel decision.

Case Background

In 2011, petitioner Trevor Murray was employed as a research strategist at securities firm UBS Securities LLC ("UBS"), where he was responsible for reporting on commercial mortgage-backed securities ("CMBS") markets to current and future UBS customers. *Murray v. UBS Sec., LLC*, No. 22-660, slip op. at 4 (U.S. Feb. 8, 2024). Under Securities and Exchange Commission ("SEC") regulations, Murray was required to certify that his reports were produced independently and accurately reflected his own view. *Id.* at 4 (citing 17 CFR § 242.501(a)). Murray alleged that, despite this requirement of independence, two leaders of the UBS CMBS trading desk improperly pressured him to skew his reports to be more supportive of their business strategies and instructed Murray to clear his research articles with the trading desk before publishing them. *Id.* at 4.

According to the Supreme Court's opinion, Murray reported this conduct to his direct supervisor, asserting that it was "unethical" and "illegal." *Id.* at 4. The supervisor's initial response was to emphasize that it was very important that Murray not "alienate" the trading desk, which was his "internal client." *Id.* at 4. When Murray later informed his supervisor that the situation with the trading desk "was bad and getting worse," that he was getting left out of meetings, and that he was subjected to "constant efforts to skew [his] research," the supervisor told Murray that he should just "write what the business line wanted." *Id.* at 4. Shortly after that exchange, and despite having given Murray a very strong performance review just a couple months earlier, Murray's supervisor emailed his own supervisor and recommended that Murray "be removed from [UBS's] headcount." *Id.* at 4. UBS fired Murray one month later. *Id.* at 4.

In response, Murray filed a complaint with the Department of Labor ("DOL"), claiming his termination violated Sarbanes-Oxley (specifically 18 U.S.C. § 1514A) because he was fired in response to his internal reporting of fraud. *Id.* at 5. When DOL did not issue a final decision within 180 days, Murray filed an action in federal court. *Id.* A jury in the United States District Court for the Southern District of New York found for Murray. *Id.* at 6. However, a Second Circuit panel vacated the jury's verdict and remanded for a new trial, finding that the district court erred when it failed to instruct the jury that Murray must prove UBS acted with "retaliatory intent" when it terminated Murray's employment. *Id.* at 7. This ruling was in direct conflict with decisions from the Fifth and Ninth Circuits, which had rejected any such requirement for section 1514A claims. *Id.* at 7. The Supreme Court granted certiorari to resolve this disagreement.

Supreme Court Opinion

The Supreme Court held that a whistleblower who invokes section 1514A "bears the burden to prove that his protected activity 'was a contributing factor in the unfavorable personnel action alleged in the complaint,' but he is not required to make some further showing that his employer acted with 'retaliatory intent.'" *Id.* at 14 (internal citations omitted). Under the burden-shifting framework of section 1514A, a plaintiff-whistleblower must first establish by a preponderance of the evidence that: (1) the plaintiff engaged in whistleblowing activity protected by Sarbanes-Oxley, (2) the employer knew that the plaintiff engaged in the protected activity, (3) that the plaintiff suffered an adverse employment action, and (4) that the protected activity was a contributing factor to the adverse employment action. *See id.* at 5. If the plaintiff proves each of these four elements, the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the employment action even if the whistleblower had not engaged in the protected activity. *See id.* at 5.

The Supreme Court determined that this contributing-factor burden-shifting framework is meant to be plaintiff friendly, and that proof of "retaliatory intent" was not a requirement to show that the protected activity was a "contributing factor." *See id.* at 2. Section 1514A's text states that "no employer subject to Sarbanes-Oxley '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." *Id.* at 8 (quoting 18 U.S.C. § 1514A(a)). The Supreme Court rejected the Second Circuit's finding that the inclusion of the word "discriminate" in the statute imposes an additional requirement that the whistleblower plaintiff prove the employer's "retaliatory intent" or animus. *Id.* at 10. Rather, it found

that because "discriminate" was included in the section's catchall provision, the word was meant to capture other adverse employment actions that are not specifically listed. *Id.* at 9 (quoting 18 U.S.C. § 1514A(a)). Under the "contributing factor" element, the only intent plaintiffs are required to prove is "the intent to take some adverse employment action against the whistleblowing employee 'because of' his protected whistleblowing activity." *Id.* at 10 (quoting 18 U.S.C. § 1514A(a)).

The Court further found that Congress created Sarbanes-Oxley's burden-shifting framework to "sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 12. This framework is intended to "forc[e] the defendant to come forward with some response to the employee's circumstantial evidence." *Id.* at 11. Historically, "Congress has employed the contributing-factor framework in contexts where the health, safety, or well-being of the public may well depend on whistleblowers feeling empowered to come forward," and Sarbanes-Oxley is designed to protect the investing public. *Id.* at 14.

Takeaways

This ruling further highlights the sensitivity with which publicly traded companies need to act if they are considering taking any form of employment action against an employee that has alleged a violation of any SEC rule or any provision of federal law relating to fraud. Obviously, any adverse employment action that is in response to such a report is strictly prohibited. However, it can be the case that a poor-performing employee alleges fraud or engages in other protected activity. Certainly, a company is not required to continue to employ such a poor performer due to her filing a whistleblower complaint. But, the Supreme Court's recent decision lowers the bar as to what such an employee needs to prove to establish a link between his reporting of alleged misconduct and the unfavorable employment action taken against him. Thus, companies taking any employment action need to consider the risk that it will be perceived as retaliation and carefully document the relevant performance-related factors that are the reason for the decision. Where a whistleblower employee can show by a preponderance of the evidence that her protected activity was a contributing factor to an adverse personnel action, a company will be considered to have retaliated *unless* it can show by clear and convincing evidence (a higher burden) that it would have taken the same action against "an otherwise identical employee who had not engaged in the protected activity." *Id.* at 14 (internal quotations omitted). Establishing such a documentary record requires careful consideration, as does any possible employment action against the employee.

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