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ASK THE PROFESSOR

How has the Recent U.S. Supreme Court Opinion in *Murray v. UBS Securities* Provided Much Needed Protection to Whistleblowers?

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INTRODUCTION AND BACKGROUND

On February 8, 2024, the U.S. Supreme Court issued its slip opinion in *Murray v. UBS Securities, LLC et al.*[1] The issue before the Supreme Court is whether a whistleblower is required, under the Sarbanes Oxley Act of 2002 (SOX), to prove retaliatory intent by the employer in connection with an employment termination.[2]

In this case, Trevor Murray, a research analyst at UBS Securities LLC (UBS), was required in his capacity to certify, pursuant to regulations promulgated by the U.S. Securities and Exchange Commission (SEC),[3] that his research reports to UBS customers on the firm's securities business were "independently" produced and reflected his own views.[4] Murray had argued that two members of the CMBS desk at UBS improperly pressured him to skew his reports to be more supportive of their business strategies.[5] Murray then reported that conduct to his direct supervisor in December 2011 and again in January 2012.[6] Murray had told his supervisor that his situation on the CMBS trading desk "was bad and getting worse" and that he was being left out of meetings and subjected "to constant efforts to skew his research."[7] UBS fired Murray in February 2012.[8]

Murray first filed a claim with the De-

partment of Labor (DOL) alleging that his termination violated Section 1514A of SOX because he was fired in response to the reporting of the fraud by the UBS trading desk. The DOL did not take any action so Murray then filed an action in federal court.[9] UBS then moved for judgment, as a matter of law, arguing, primarily on the grounds, that Murray had "failed to produce any evidence that his supervisor possessed any "sort of retaliatory animus" toward Murray.[10] The district court denied UBS' motion.[11]

Judge Katherine Polk Failla, the district court judge, had instructed the jury that, in order to prove his § 1514A claim, Murray needed to establish four elements: (1) that he engaged in whistleblowing activity protected by SOX; (2) that UBS knew that he engaged in the protected activity; (3) that he suffered an adverse employment action (i.e., that he was fired); and (4) that his "protected activity" was a contributing factor in the termination of his employment.[12] As to this fourth element, the judge further instructed the jury that "[F]or a protected activity to be a contributing factor, it must have either alone or in combination with other factor that tended to affect his employment at UBS."[13] The district court also explained that Murray was "not required to prove that his protected activity was the primary motivating factor in his termination."[14] The judge then instructed the jury that, if Murray had proved these four elements by a preponderance of the evidence, then UBS must demonstrate "by clear and convincing evidence that UBS would have terminated Murray even if he had not engaged in the protected activity."[15] The jury found for Murray.[16] The court then awarded Murray $1,000,000 in damages and an additional $1.76 million in attorney's fees.[17]

On appeal, the Second Circuit vacated the jury's verdict and remanded for a new trial.[18] The Second Circuit confirmed the four elements cited by the district court but that, as to the fourth element, the jury instruction was incorrect.[19] The Second Circuit held that "to prevail on the contributing factor element" on a § 1514A anti-retaliation claim, the whistleblower-employee must prove that the employer took the adverse employment action against the whistleblower with "retaliatory intent."[20] The Second Circuit noted that its decision was consistent with its recent interpretation of nearly identical language found in the Federal Railroad Safety Act.[21] The Second Circuit's decision conflicted with both the Fifth and Ninth Circuits, both of which had rejected the retaliatory intent requirement.[22]

SECTION 1514A OF SOX

SOX was enacted in the wake of the Enron scandal "to prevent and punish corporate and criminal fraud, protect the victims of such fraud and hold wrongdoers to be accountable for their actions."[23] Section 1514A prohibits publicly-traded companies from retaliating against employees who report what they reasonably believe to be instances of criminal fraud or securities violations.[24] Section 1514A states that no employer may "discharge, demote, suspend, threaten, harass or in any other manner, discriminate against an employee in the terms and conditions of employment."[25] All such employees are deemed to have "protected whistleblowing activity."[26] If an employer violates this Section 1514A provision, then the employee may file a complaint with the DOL seeking reinstatement, back pay, compensation and other relief.[27] In connection with any such action taken by the employee, the employee has the burden to prove that

his protected activity was "a contributing factor in connection with his unfavorable personnel action."[28] If the employee is successful in making this showing, then the burden shifts to the employer to show "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the "absence of he protected activity."[29]

ANALYSIS OF THE *MURRAY* DECISION

As noted above, the Second Circuit's decision in *Murray* created a split among the circuits (Second Circuit versus the Fifth and Ninth Circuits) on the issue as to whether the element of retaliatory intent was required to be proven in order for a whistleblower to be successful in bringing his/her claim against their employer. The Supreme Court granted *cert.* to resolve this split.

The Supreme Court held that Section 1514A does not specifically "reference or include a 'retaliatory intent' requirement and that the provision's mandatory burden-shifting framework cannot be squared with such a requirement."[30] It then held:

> "While a whistleblower bringing a § 1514A claim must prove that his protected activity was a contributing factor in the unfavorable personnel action, he need not also prove that his employer acted with 'retaliatory intent.' ''[31]

The Supreme Court then analyzed what this term "retaliatory intent" meant. It noted that the Second Circuit had interpreted this term as a "prejudice" or "animus." UBS took exception in its filings as to how the Second Circuit had interpreted this term and did not believe that "hostile feelings toward the employee" was required to be shown but that § 1514A does nevertheless still require the element of proving "retaliatory intent" for a whistleblower employee to successfully bring a claim.[32]

The Supreme Court then noted that both the Second Circuit and UBS apparently relied heavily on the word "discriminate" in § 1514A to "impose a retaliatory intent requirement" on whistleblower plaintiffs.[33] As noted above, § 1514A clearly states that no employer may, among other things, "discriminate" against the employee. The Supreme Court then focused on the meaning of "discriminate" in § 1514A. It held:

1. The placement of the word "discriminate" was meant to merely capture "other adverse employment actions that were not enumerated in this provision";

2. When a general term follows a specific term, then the general term (discriminate in this section), is merely referencing subjects similar to the more specific terms listed (i.e., "discharge." "demote," "suspend," "threaten" and "harass" in § 1514A);

3. The word "discriminate" typically means simply to make a difference in treatment but does not mean animosity;

4. An animus-like 'retaliatory intent' requirement is absent from the definition of "discriminate";

5. The Second Circuit incorrectly interpreted the word "discriminate" as importing a retaliatory intent requirement in § 1514A; and

6. Whether an employer "discriminated" against the employee can simply be resolved through the contributing-factor burden shifting framework required by SOX.[34]

IMPACT OF THE *MURRAY* DECISION ON FUTURE WHISTLEBLOWER CLAIMS

The *Murray* case clearly shows that the Supreme Court has liberally interpreted § 1514A and supports fully whistleblower claims. True, the employee still has the burden to prove the four elements noted above to be successful in bringing a whistleblowing claim but the hurdle of being required to prove "retaliatory intent" is no longer an issue. To successfully defend any such claims, the employer is required to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action against the whistleblower employee in the absence of the protected activity.[35]

Keep in mind that the decision was a unanimous one and that the burden imposed on whistleblower plaintiffs appears to be a low bar going forward. This will require employers to properly document any such adverse personnel action taken against an employee who just happens to be a whistleblower and have established that it would have taken this same unfavorable personnel action notwithstanding the protected activity. In other words, employers may now have more of a burden to prove on this point than the employee.

One further point to make is that, technically, § 1514A claims applies solely to securities firms. However, it would appear likely that this low bar for whistleblower plaintiffs will apply, *mutatis mutandis*, to future whistleblower cases involving other industries.

On a side note, there is a new whistleblower case now before the Second Circuit so it will be interesting to see how the Second Circuit will decide this case in light of the *Murray* decision.[36]

ENDNOTES:

[1]*Murray v. UBS Securities, LLC*, 601 U.S. 23, 144 S. Ct. 445, Fed. Sec. L. Rep. (CCH) P 101762 (2024) (February 8, 2024). A number of amici briefs were filed in this case.

[2]18 U.S.C.A. § 1514A9(a).

[3]See SEC Rule 242.501(a) (2022), 17 C.F.R. § 242.501(a).

[4] Slip Opinion at p. 4.

[5]*Ibid.*

[6]*Ibid.*

[7]*Ibid.*

[8]*Ibid.*

[9]*Ibid.*

[10]*Ibid. Murray v. UBS Securities, LLC*, 2020 WL 7384722 (S.D. N.Y. 2020) (December 16, 2020).

[11]Slip Opinion at p. 5.

[12]*Ibid.*

[13]*Ibid.*

[14]*Ibid.*

[15]*Ibid.*

[16]Slip Opinion at 6.

[17]*Ibid.*

[18]*Ibid. Murray v. UBS Securities, LLC*, 43 F.4th 254, 2022 I.E.R. Cas. (BNA) 272533, Fed. Sec. L. Rep. (CCH) P 101441 (2d Cir. 2022), cert. granted, 143 S. Ct. 2429, 216 L. Ed. 2d 414 (2023).

[19]*Ibid.*

[20]Slip Opinion at p.7.

[21]See *Tompkins v. Metro-North Commuter Railroad Company*, 983 F.3d 74, 2020 Employee Benefits Cas. (BNA) 490502, 2020 I.E.R. Cas. (BNA) 490502 (2d Cir. 2020).

[22]See *Halliburton, Inc. v. Administrative*

Review Bd., 771 F.3d 254, 39 I.E.R. Cas. (BNA) 529, 98 Empl. Prac. Dec. (CCH) P 45187 (5th Cir. 2014) and *Coppinger-Martin v. Solis*, 627 F.3d 745, 31 I.E.R. Cas. (BNA) 801, 93 Empl. Prac. Dec. (CCH) P 44046, Fed. Sec. L. Rep. (CCH) P 95970, 2010 O.S.H. Dec. (CCH) P 33101 (9th Cir. 2010).

[23]Slip Opinion at p.1. See *Lawson v. FMR LLC*, 571 U.S. 429, 134 S. Ct. 1158, 188 L. Ed. 2d 158, 37 I.E.R. Cas. (BNA) 1193, 97 Empl. Prac. Dec. (CCH) P 45023, Fed. Sec. L. Rep. (CCH) P 97838, 2014 O.S.H. Dec. (CCH) P 33358 (2014).

[24]Slip Opinion at p.2.

[25]*Ibid.*

[26]*Ibid.*

[27]*Ibid.*

[28]Slip Opinion at p.3.

[29]*Ibid.*

[30]*Ibid.*

[31]Slip Opinion at p. 8.

[32]*Ibid.*

[33]*Ibid.*

[34]Slip Opinion at pp. 9-10.

[35]Justice Alito submitted a concurring opinion. He agreed with the Court to reject an "animus requirement" but that intent was required under § 1514A, that is, that the plaintiff must "show that a reason for the adverse decision was the employee's protected conduct." He then wrote: "Showing that it help(ed) to cause or bring about that decision is enough. If the plaintiff makes this showing, the statute's intent requirement is met." Concurring Opinion at 2. Justice Amy Coney Barrett joined in this Concurring Opinion.

[36]See *Cody Ziparov. CSX Transporation, Inc.*, Docket No. 23-262, (2nd Cir.) (filed on March 1, 2023).