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The easier-to-satisfy "contributing factor" framework is enough to prove whistleblower protection under the Sarbanes-Oxley Act.

By Mark Ishu

The Sarbanes-Oxley Act ("Act" or "SOX") shields whistleblowers from retaliation for reporting any wrongdoing by publicly traded companies. Recently, in *Murray v. UBS Securities, LLC*, the U.S. Supreme Court evaluated the threshold whistleblowers must meet to be afforded protection under the Act after the Second Circuit departed from the findings of the Fifth and Ninth Circuits and held that a SOX whistleblower must separately prove "retaliatory intent" to prevail in his claim. An employer acts with "retaliatory intent" where the employer acts out of prejudice, animus, or comparable hostile or culpable intent. On February 8, 2024, the U.S. Supreme Court unanimously (9-0) reversed the Second Circuit decision. The Supreme Court held that a whistleblower must prove that his protected activity was a contributing factor in the employer's unfavorable personnel action, but need not prove that his employer acted with "retaliatory intent."

To prevail in a SOX retaliation claim, the whistleblower must prove the following four elements:

1. That their employer is "covered" by SOX, which generally extends its protections to employees of publicly traded companies and their contractors;
2. "Protected activity," i.e., that they engaged in some activity that was protected by SOX, including opposing or raising concerns about fraud or violations of the securities laws;
3. An "adverse action," i.e., that their employer subjected them to some action (e.g., termination or demotion) that would dissuade a reasonable person from blowing the whistle; and
4. Causation, i.e., a causal connection between the protected activity and the subsequent adverse action.

In *Murray v. UBS Securities, LLC,* Trevor Murray, a former research strategist at UBS Securities, reported suspected fraud to his supervisors and was subsequently terminated. He sued his former employer under the Act. After Murray won his retaliation case following a full jury trial, UBS appealed, and the Second Circuit vacated the verdict, insisting that the jury should have been instructed that Murray had to prove his employer's intention to retaliate against him. *Murray v. UBS Sec., LLC*, 43 F.4th 254, 263 (2d Cir. 2022), *cert. granted*, 143 S. Ct. 2429, 216 L. Ed. 2d 414 (2023), and *rev'd and remanded*, 144 S. Ct. 445 (2024).

At the Supreme Court, Murray argued that the Second Circuit's standard for retaliation under SOX is too high of a burden. He argued that whistleblowers should only need to demonstrate that their protected activity played a role in their employer's adverse personnel decision. Furthermore, Murray asserted that the burden should then shift to the employer to demonstrate otherwise—that the adverse action would have occurred irrespective of the employee's whistleblowing.

Employers like UBS have for years been attempting to impose an additional causation requirement in SOX retaliation cases, arguing that SOX claimants must prove "retaliatory intent" to prevail on their claims. And for years, courts rejected those efforts. *See Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263 (5th Cir. 2014) (holding that retaliatory intent is not an element of a SOX retaliation claim); *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (same). Demonstrating an employer's state of mind presents a formidable challenge for any plaintiff. Likewise, mandating proof that such intent was the sole or primary cause of the employer's action, rather than merely a contributing factor, imposes substantial obstacles. The *Murray* case again brought this issue center stage.

Justice Sotomayor, who delivered the opinion of the Court, agreed with Murray's interpretation of the Act. She explained that the Second Circuit, which adopted UBS's position, was wrong, particularly given the language of the Act. Congress intended, as the Act's language made clear, for the SOX whistleblower's legal burden of proof for causation to be a more lenient "contributing-factor burden-shifting" framework akin to the burden set forth in the Whistleblower Protection Act for federal employees. The Court further clarified:

> **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 different position that did not have SEC reporting requirements....Burden-shifting frameworks have long provided a mechanism for intent in employment discrimination cases, and the contributing-factor burden-shifting framework is meant to be more lenient than most....[This] framework provides that an employer will not be held liable where it "demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of'" the protected behavior.**

Murray v. UBS Sec., LLC, 144 S. Ct. 445, pgs. *6-*8 (2024) (citations omitted). Ultimately, the Court reasoned that placing the heavier evidentiary burden on whistleblowers would dampen even the strongest retaliation claims and deter employees from exposing misconduct within publicly traded companies—contrary to the core objectives of Sarbanes-Oxley.

Courts have described the contributing factor test as a "broad and forgiving" causation standard, as distinct from some of the other causation standards controlling anti-retaliation statutes. *Greatwide Dedicated Transp. II, LLC v. United States Dep't of Lab.*, 72 F.4th 544, 556 (4th Cir. 2023) (noting that "[a] contributing factor is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision" (internal quotation marks and citations omitted)).

The Court's decision in *Murray* carries significant implications not only for SOX whistleblowers but also for employers who must defend against claimants who seek protection under other whistleblowing statutes. The

following is a non-exhaustive list of statutes that have also adopted the "contributing factor" test in whistleblower retaliation cases:

- National Transit System Security Act
- Consumer Product Safety Improvement Act
- Surface Transportation and Assistance Act
- Patient Protection and Affordable Care Act
- Food Safety Modernization Act
- Federal Rail Safety Act
- Pipeline Safety Improvement Act
- Consumer Financial Protect Act
- the Energy Reorganization Act

Ultimately, employers must tread carefully around workers who have filed whistleblower claims with the government under the above referenced statutes. One way to do that is to fully understand that retaliation in this legal context has been defined broadly. Besides terminating the whistleblower, retaliation may include the following employer actions: demotions, suspension, reassignments, placing someone on administrative leave, creating a hostile work environment for the whistleblower, issuing a bad performance review that is then used the as the grounds for an adverse employment action, and even threatening to take any of these actions. Employers must, therefore, exercise a heightened level of caution surrounding employees who have blown the metaphorical whistle. Not doing so can subject the employer to even more legal action. If you have questions about how SOX or any of the other whistleblower statutes impact your organization, please reach out to the Labor and Employment Practice Group at Conn Maciel Carey, LLP.