Supreme Court Grants Review on Proof Needed in Sarbanes-Oxley Anti-Retaliation Claim

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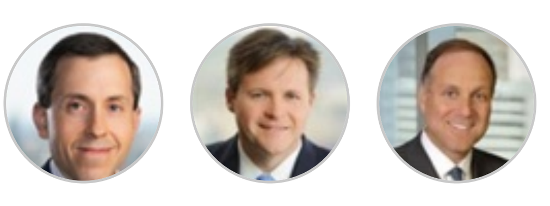

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The Supreme Court granted the petition for writ of *certiorari* in *Murray v. UBS Securities LLC et al.*, No. 20-4202 (2d Cir. 2022), a case with important implications for claims brought under Sarbanes-Oxley's anti-retaliation provision, 18 U.S.C. § 1514A. The issue is whether, under the burden-shifting framework that governs Sarbanes-Oxley cases, a whistleblower must prove his employer acted with a "retaliatory intent" as part of his case in chief, or alternatively, whether the lack of "retaliatory intent" is part of the affirmative defense on which the employer bears the burden of proof.

Background

In *Murray*, the Second Circuit's three-judge panel unanimously held that the district court erred by failing to instruct the jury that retaliatory intent is an element of a Section 1514A claim. The Second Circuit reasoned that the plain statutory language of section 1514A, which states that no covered employer "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against and employee . . . 'because of'" whistleblowing, indicates that retaliatory intent is an element of a section 1514A claim. The Second Circuit focused on the meaning of "discriminate" and "because of," and explained that the statute prohibits actions based on conscious disfavor motivated by the employee's whistleblowing. The Second Circuit also relied on its previous interpretation of a nearly identical anti-retaliation provision in the Federal Railroad Safety Act (FRSA), which the court held requires "some evidence of retaliatory intent." The Second Circuit acknowledged that its decision was inconsistent with decisions from the Fifth and Ninth Circuits, but stated that the other appellate courts "overlooked the plain meaning of the [statutory] test," and noted that different appellate courts — the Seventh and the Eighth Circuits — had interpreted the same language in the FRSA as requiring retaliatory intent.

The petition argued that the Second Circuit's decision was incorrect because Sarbanes-Oxley specifies a burden-shifting framework where the plaintiff's initial burden is to show that his whistleblowing "was a contributing factor in the unfavorable personnel action alleged," and if he does, he prevails unless the employer can "demonstrate[] by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." The petition also urged the Supreme Court to resolve the split among the Courts of Appeals, observing that the split undermines a central purpose of Sarbanes-Oxley to provide uniform protection to corporate whistleblowers. In opposition, the company argued that the petition "substantially overstates the alleged circuit conflict" since the Fifth Circuit's decision cited in the petition "did not address [] the textual analysis adopted by the Second Circuit" and the other cases identified in the petition "either recognize that intent is a critical element of a SOX retaliation claim or do not resolve the question" at all.

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