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Supreme Court To Review Second Circuit Decision On Whistleblower Retaliation

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On May 1, 2023, the United States Supreme Court granted a writ of certiorari filed by alleged whistleblower against his former employer, a financial institution, in a case that is expected to clarify when the termination of a whistleblower amounts to unlawful retaliation under the Sarbanes-Oxley Act.

As [previously reported](#), a jury in the Southern District of New York awarded the whistleblower approximately \$1 million in 2017 after finding that the financial institution unlawfully terminated him in retaliation for reporting his supervisors’ attempts to have him change aspects of his research reports related to commercial mortgage-backed securities. The Second Circuit overturned that verdict on August 5, 2022, holding that the trial judge failed to inform the jurors as to the critical burden whistleblowers bear under the Sarbanes-Oxley Act: namely, that a whistleblower must prove that their employer *intended* the alleged employment action to be retaliatory. The Second Circuit ruling created a circuit split when it comes to proving anti-retaliatory claims under Sarbanes-Oxley, with both the Fifth Circuit in 2014 and the Ninth Circuit in 2010 ruling that a showing of retaliatory intent was *not* necessary.

In his Supreme Court petition, the whistleblower argued that a whistleblower meets his burden by showing that his protected activity “was a contributing factor in the unfavorable personnel action alleged in the complaint.” If the employee meets that burden, the employer can prevail only if it “demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.” In opposition, the financial institution argued that the whistleblower had “substantially overstate[d] the alleged circuit conflict”.

The Supreme Court’s decision will be closely watched because of the impact it might have on the anti-retaliation protections in Sarbanes-Oxley and other statutes with similar protections.

Links & Downloads -

[Murray- Supreme Court Petition](#)

[Murray v. UBS- Brief in Opposition](#)

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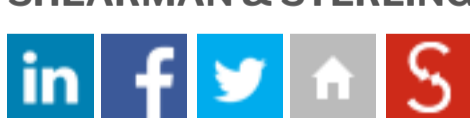
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