NEWS

Supreme Court Relieves Whistleblowers of Showing Employment Action Was Retaliatory

Fired, demoted or transferred workers need only show whistleblowing was a contributing factor in the employer's decision, the justices say.

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United States Supreme Court

Steve Lash

Whistleblowers fired or disciplined by their employers need only show that their report of corporate wrongdoing contributed to the adverse employment action—and was not necessarily a retaliatory act by their bosses—to pursue a lawsuit under federal law, the U.S. Supreme Court unanimously ruled Thursday.

Once the adversely treated worker makes the contributing-factor showing, the burden shifts to the former employer to show "by clear and convincing evidence" that the worker would have been fired or disciplined regardless of the statutorily protected whistleblowing, the high court added.

The court's decision reinstates Trevor Murray's trial court victory in his lawsuit against UBS, which fired the research strategist after he brought to light the securities firm's alleged financial improprieties. The U.S. Court of Appeals for the Second Circuit reversed the jury verdict, saying Murray had to prove the company fired him in retaliation for whistleblowing and not that whistleblowing was merely a contributing factor in his termination.

The Supreme Court disagreed.

The 2002 Sarbanes-Oxley Act, designed to protect those who blow the whistle on financial reporting improprieties, neither contains nor even references a requirement that a worker show a retaliatory intent by the employer, Justice Sonia Sotomayor wrote for the court.

"When an employer treats someone worse—whether by firing them, demoting them, or imposing some other unfavorable change in the terms and conditions of

employment— 'because of' the employee's protected whistleblower activity, the employer violates Section 1514A" of the act, Sotomayor added. "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 position that did not have SEC (Securities and Exchange Commission) reporting requirements."

The court added that lawmakers acted "by design" in not requiring employees to show retaliatory motivation by their employers.

"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," Sotomayor wrote. "This Court cannot override that policy choice by giving employers more protection than the statute itself provides."

Justice Samuel Alito Jr. joined Sotomayor but in a concurring opinion stated that the employee retains the burden of showing that the employer's adverse employment action arose, in part, because of the protected whistleblowing.

"Under this framework, the plaintiff must show that the differential treatment was at least in part 'because of' his or her protected conduct, and was thus a 'contributing factor' in the employer's decision-making process," wrote Alito, joined by Justice Amy Coney Barrett.

"This requires proof of intent; that is, the plaintiff must show that *a* reason for the adverse decision was the employee's protected conduct," Alito added. "The plaintiff need not prove that the protected conduct was the only reason or even that it was a principal reason for the adverse decision. Showing that it helped to cause or bring about that decision is enough."

In the underlying case, Murray claimed UBS fired him for asserting his independence from the investment bank's trading desk. Murray said he was frequently pressured by a senior UBS trader to color his reports about the bank's investments in commercial mortgage-backed securities to make them palatable to investors.

Following a more than two-week trial, a jury sided with Murray and awarded him back pay and compensatory damages. But the Second Circuit reversed prompting his appeal to the Supreme Court.

The high court rendered its decision in *Murray v. UBS Securities LLC*, No. 22-660.

Jimmy Hoover, the National Law Journal's Supreme Court reporter, contributed to this article.

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