

## BLOGS

Employment Law Updates

# Lower Burden of Proof for Whistleblowers Established in Landmark Supreme Court Case

Recently, the Supreme Court of the United States issued a decision in *Murray v. UBS Securities, LLC* holding that whistleblowers are not required to prove their employer acted with “retaliatory intent” to be protected under the federal Sarbanes-Oxley Act of 2002 (“SOX”). Instead, whistleblowers only need to prove that their protected activity was a “contributing factor” in the employer’s adverse personnel action against them.

Congress enacted SOX to prohibit publicly traded companies from retaliating against employees who report what they reasonably believe to be criminal fraud or securities law violations. Title 18 U.S.C. §1514A(a) of SOX specifically provides that employers may not “discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment because of” protected whistleblowing activity.

Trevor Murray was employed at UBS Securities, LLC (“UBS”), a New York securities firm, as a research strategist in UBS’s commercial mortgage-backed securities business, and he was responsible for creating independent and accurate reports. UBS terminated Murray, stating that Murray was laid off as part of a strategic reorganization caused by the company’s financial difficulties. Murray filed a whistleblower action against UBS, claiming his termination was retaliatory in violation of §1514A of SOX. Murray alleged that he was fired after he informed his supervisor that two UBS senior leaders had attempted to pressure him to skew his research, which he considered to be illegal and unethical.

At trial, the district court judge instructed the jury that Murray was required to establish that his protected activity was only a “continuing factor” in the termination of his employment. The judge further instructed the jury that, if Murray could meet that burden, the burden would then shift to UBS to demonstrate by clear and convincing evidence that it would have terminated Murray’s employment even if he had not engaged in protected activity. The jury ruled in favor of Murray and awarded him nearly \$1,000,000 in damages. UBS appealed.

On appeal, the U.S. Court of Appeals for the Second Circuit vacated the jury verdict and remanded the case for a new trial, ruling that Murray was required to put forward specific proof of his employer’s “retaliatory intent” to prevail. Murray appealed to the Supreme Court. In a unanimous 9-0 decision, the Supreme Court

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reversed the Second Circuit's decision and held that, under the SOX law, whistleblowers need only demonstrate that their protected activity was a contributing factor to an unfavorable personnel decision — not that the employer acted with "retaliatory intent."

In sum, the *Murray* decision means whistleblowers will have an easier time establishing retaliation. As such, employers should use extreme caution when taking adverse personnel actions against those employees who have expressed concerns that are protected under SOX. Although *Murray* applied specifically to securities firms subject to SOX, that ruling could have a broader impact down the road because there are a host of other federal whistleblower statutes that contain similar causation language found in SOX.