Mitigating Whistleblower Risks After High Court UBS Ruling

By **Jane Norberg, Kathleen Reilly and Stephanna Szotkowski** (February 27, 2024)

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On Feb. 8, the U.S. Supreme Court ruled unanimously in Murray v. UBS Securities LLC that whistleblowers who sue their employers for retaliation under the whistleblower provision of the Sarbanes-Oxley Act, Title 18 of the U.S. Code, Section 1514A, are not required to show that the employer had retaliatory intent when the employer took any adverse action against them.[1]

The facts of this case and the ruling provide important reminders for companies to consider when an employee raises concerns.

History of the Action

In 2014, Trevor Murray sued his former employer, UBS, alleging that the bank terminated his employment in violation of the SOX whistleblower provision.

Murray was a research strategist who generated reports for UBS customers and was required to certify under U.S. Securities and Exchange Commission regulations that his reports were created independently and reflected his own views.[2]

Murray alleged that he was subject to improper pressure by other UBS employees to conform his reports to UBS' business strategy and was subsequently terminated after repeatedly reporting his concerns to his manager.[3]

As required under SOX, Murray first filed his complaint with the Occupational Safety and Health Administration. In these cases, if the U.S. Department of Labor does not issue a decision within 180 days, complainants may opt to file their action in federal court, which Murray did.

Before a district court, employees need to show that: (1) the employee engaged in SOX-protected whistleblowing activity; (2) the employer knew the employee engaged in that activity; (3) the employee suffered an adverse employment action; and (4) the protected activity was a contributing factor in the adverse employment action.

The employer then may rebut this by showing, by clear and convincing evidence, that it would have taken the same action in the absence of any alleged protected activity.

After a jury found in favor of Murray in December 2017, UBS appealed the action to the U.S. Court of Appeals for the Second Circuit, which in August 2022 reversed and remanded the verdict based on nonharmless error in the jury instructions.

Specifically, the appeals panel held that the SOX whistleblower provision required whistleblower-employees "to prove by a preponderance of the evidence that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent — i.e., an intent to 'discriminate against an employee ... because of' lawful

whistleblowing activity," which it found was not adequately explained to the jury.[4]

The Supreme Court disagreed with the Second Circuit's interpretation of the statute's requirements. In an opinion by Justice Sonia Sotomayor, the court unanimously held that "[w]hile a whistleblower bringing a §1514A claim must prove that his protected activity was a contributing factor in the unfavorable personnel action, he need not also prove that his employer acted with 'retaliatory intent.'"[5]

In its decision, the court relied on the statutory language of the SOX whistleblower provision and the burden-shifting framework imported into SOX from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, signed into law in April 2000. Namely, the relevant SOX provision states that "no covered employer may '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."[6]

SOX then relies on the burden-shifting framework of the Aviation Investment and Reform Act, Title 49 of the U.S. Code, Section 42121(b), to set forth the applicable burdens of proof for each party regarding whether the employer's action was or was not retaliatory.

Under this framework, the employee must first make a prima facie showing by a preponderance of the evidence that his or her protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint."[7] If the employee succeeds, then the burden shifts to the employer to show by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of" the employee's protected activity.[8]

In interpreting the statute, the court reasoned: "Section 1514A's text does not reference or include a 'retaliatory intent' requirement, and the provision's mandatory burden-shifting framework cannot be squared with such a requirement."[9]

The court explained that "[w]hen 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 whistleblowing activity, the employer violates §1514A."[10] The court found that reading a retaliatory intent requirement into the statute would ignore the congressionally mandated burden-shifting framework.[11]

In a concurring opinion, Justices Samuel Alito and Amy Coney Barrett emphasized their view that intent is not read out of the statute by virtue of this ruling, as "a discriminatory discharge that is made 'because of' a particular factor necessarily involves an intentional choice in which that factor plays some role in the employer's thinking."[12] In other words, the justices emphasized that there must be at least some proof that the employer treated the employee differently because of the protected activity.

Implications for Employers Moving Forward: Reducing Litigation Risk

Employers always face a risk that an employee may allege retaliation after an adverse employment action. In the wake of the Murray decision, companies should consider taking key proactive steps to: (1) recognize and address whistleblower complaints in an appropriate manner; and (2) document the nonretaliatory reasons for any employment decision in real time.

While it is always good practice for companies to periodically review whistleblower trainings, policies and procedures, Murray helps demonstrate their importance in reducing litigation risk.

To this end, employers should consider the following.

Thoughtfully document and develop a record for employment decisions.

Temporal proximity is one way employees meet their burden of proving the alleged protected activity was a contributing factor in the unfavorable personnel action. In Murray, the court highlighted the "close temporal proximity" between the whistleblowing and the termination, and that Murray received a good performance evaluation before his internal reporting.

While employees who report conduct internally are not forever shielded from adverse employment actions, litigation risks can be reduced when supervisors clearly and comprehensively document the reasons for an employment action, and the reasons for the action are legally sound, fully evaluated and factually supported.

When the facts of a case are not straightforward, fact-finders often rely on timing, as well as the stated reasons for the termination and any contemporaneous evidence associated with it, in making their decisions. Establishing policies that require regular and accurate written employee evaluations and manager feedback is paramount, as well as considering whether, for example, a decision to terminate employment or take other adverse action follows closely after an internal report with no clear intervening event to support the adverse action.

Train supervisors to recognize potential whistleblower reports and retaliatory actions.

Similar to the situation in Murray, not every employee calls an ethics, compliance or whistleblower hotline to raise concerns. Many contested litigations involve an employee alleging that they reported their concerns — not always using words like "fraud" or "illegal activity" — to a supervisor who subsequently played a decision-making role in taking an adverse employment action against the employee.

Training supervisors regarding their role in their company's whistleblower reporting system, including how to appropriately recognize when an employee has raised a concern or engaged in protected activity and where to escalate the issue, reduces the risk of whistleblower litigation. Additionally, consider providing management training with clear examples of what may constitute retaliatory behavior. Some supervisors may not be aware of the wide breadth of actions courts or juries view as retaliatory.

Communicate with employees who made a report.

Oftentimes, fact-finders in litigation focus on the reaction of the supervisor or others within the organization to the employee's report. Supervisors who appear to disregard the employee's report are more likely to be viewed by the employee and fact-finders as having engaged in retaliatory behavior. Training supervisors to acknowledge the employee's concerns and then to pass those concerns on to those within the company tasked with triaging internal reports is a best practice.

Human resources and/or counsel should also be a ready resource for supervisors to avoid misunderstandings about what constitutes protected activity or could trigger liability for the company.

For example, an employee does not necessarily need to be correct in their belief that illegal or improper activity is occurring to gain protection under most whistleblower statutes. This does not mean, however, that the employee's concerns should not be acknowledged or addressed.

Whether the employee's concerns turn out to be correct or not, an employer should consider — while being mindful of privilege, confidentiality and privacy issues — whether to share appropriate information with the employee at the end of any investigation to bring closure to the matter. Open communication and follow-up may assuage an employee's concerns that their report was ignored or not taken seriously and may reduce the risk of external reporting and litigation.

Build and maintain adequate controls around internal whistleblower reports and employment decisions.

Companies should consider whether their controls relating to whistleblower policies and procedures require that all internal reports, whether verbal or in writing, and regardless of who receives the report, are triaged and, if appropriate, investigated. Consideration should be given to whether internal controls should include a requirement that HR and/or counsel be alerted when an internal report is received.

Among other things, HR or counsel can assist in evaluating any contemplated adverse action against the individual in the future, including considering whether any internal reporting may have played a role in the decision.

Stress test internal reporting channels.

Just as companies perform tabletop exercises related to corporate crisis situations, companies should consider stress testing internal reporting structures and crisis response.

For example, do first-line supervisors know how to handle a report from an employee? Do they know to whom to elevate the concern? Are C-suite employees trained on proper handling of reports? What if the C-suite employee is the one who raised the concern? Does the board know their role in the internal reporting framework? Do all managers and board members understand what retaliation may look like?

Having robust, tested procedures in place can help prevent extreme responses by employees that can be financially and reputationally costly to the company.

Conclusion

Murray provides useful context to employers regarding their evidentiary obligations under the burden-shifting framework in the SOX whistleblower provision. It also provides a timely reminder to employers to consider whether their trainings, policies, procedures and controls relevant to whistleblowers are designed appropriately and operating effectively to address employee concerns and reduce litigation risk.

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[1] Murray v. UBS Securities LLC , 144 S.Ct. 445, 449 (2024) ("Opinion").

[2] Opinion at 450-51; see also 17 C.F.R. § 242.501(a).

[3] Opinion at 450-51.

[4] Murray v. UBS Securities, LLC , 43 F.4th 254, 256-58, 262 (2d Cir. 2022).

[5] Opinion at 452.

[6] Opinion at 448-49 (quoting 18 U.S.C. § 1541A(a)).

[7] 49 U.S.C. § 42121(b)(2)(B)(iii).

[8] 49 U.S.C. § 42121(b)(2)(B)(iv).

[9] Opinion at 452.

[10] Id. at 453.

[11] Id. at 454.

[12] Id. at 457 (Alito, J., concurring).