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Second Circuit Rules That Retaliatory Intent Is an Element of a Sarbanes-Oxley Whistleblower Claim

On August 5, 2022, the Second Circuit held that individuals claiming they were terminated in retaliation for protected whistleblower activities under Sarbanes-Oxley must prove that their employer acted with retaliatory intent. *Murray* v. *UBS Securities LLC*, No. 20-4202 (2d Cir.). The decision raises the bar for plaintiffs to plead and prove a claim under Sarbanes-Oxley's anti-retaliation provision, 18 U.S.C. § 1514A, and may reduce the cost to settle such claims. The decision also creates a split with the Fifth and Ninth Circuits, which previously held that retaliatory intent is not an element of a section 1514A claim, and raises the prospect that the issue will wind up before the Supreme Court.

Background

In 2014, Trevor Murray filed a complaint against his former employer, UBS, alleging that he was terminated in violation of section 1514A. Murray had worked as a strategist in UBS's commercial mortgage-backed securities business, where he researched and drafted reports for distribution to UBS's current and potential client base. Murray alleged and testified at trial that, even though SEC regulations required him to certify that his reports were produced independently and reflected his own views, he was pressured by leaders of the trading desk to skew his research and publish reports to support their business strategies. Murray reported this conduct to his supervisor in December 2011 and January 2012, and was terminated in February 2012. Murray alleged that his termination was retaliation for whistleblowing; UBS argued that it terminated Murray due to a shift in business strategy.

After the close of evidence at trial, the district court instructed the jury that to succeed on his section 1514A claim, the plaintiff must prove, among other things, that his "protected activity was a contributing factor in the termination of his employment." The court went on to explain, however, that the plaintiff was "not required to prove that his protected activity was the primary motivating factor in his termination, or that UBS's articulated reasons for his termination . . . was a pretext, in order to satisfy this element." UBS objected that the court failed to instruct the jury that proof of retaliatory intent is an element of a section 1514A claim, but the court overruled the objection.

The jury found UBS liable and returned an advisory damages verdict recommending that Murray receive $903,300 in back pay and non-economic damages, which the district court adopted. The district court also awarded Murray more than $1.7 million in attorneys' fees. UBS appealed.

The Second Circuit Opinion

A three-judge panel of the Second Circuit unanimously held that the district court erred by failing to instruct the jury that retaliatory intent is an element of a section 1514A claim, vacated the $2.67 million award, and ordered a new trial.

The court explained that the plain statutory language indicates that retaliatory intent is an element of a section 1514A claim. Section 1514A states that no covered employer "may discharge, demote, suspend, threaten, harass, or in any other manner *discriminate* against an employee . . . *because of*" whistleblowing. The court focused on the meaning of "discriminate" and "because of," and explained that the statute prohibits actions based on conscious disfavor ("discrimination") motivated by ("because of") the employee's whistleblowing. The court also relied on its previous interpretation of the nearly identical antiretaliation provision of the Federal Railroad Safety Act ("FRSA"), which the Second Circuit held in 2018 requires "some evidence of retaliatory intent." Thus, the court concluded that, to succeed a section 1514A claim, whistleblowing employees must prove by a preponderance of the evidence that the employer took adverse employment action against them with retaliatory intent.

The Second Circuit acknowledged that its decision was inconsistent with decisions from the Fifth and Ninth Circuits, which held that retaliatory intent is not an element of a section 1514A claim. The court stated that the other appellate courts "overlooked the plain meaning of the [statutory] text," and noted that different appellate courts—the Seventh and Eighth Circuits—had interpreted the same language in the FRSA as requiring retaliatory intent.

Implications

The Second Circuit's decision makes it more difficult for plaintiffs (within the circuit) to succeed on anti-retaliation claims under the Sarbanes-Oxley whistleblower statute. It is no longer sufficient for plaintiffs to show that their protected activity was a "contributing factor" to their termination—they now must also produce evidence of the employer's intent to retaliate. This could significantly reduce the number of Sarbanes-Oxley whistleblower actions that survive motions for judgment as a matter of law, or that result in a plaintiff's verdict after trial. The increased burden on whistleblowing plaintiffs may also reduce the cost to settle anti-retaliation claims.

The decision also creates a circuit split on the issue of whether retaliatory intent is an element of a section 1514A claim. It remains to be seen whether other circuit courts will adopt the Second Circuit's reasoning and require proof of retaliatory intent in such cases, and whether the Supreme Court will weigh in on this issue to resolve the split.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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