What To Expect From High Court's Whistleblower Case

By **Ann-Elizabeth Ostrager and Diane McGimsey** (July 10, 2023)

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On May 1, the U.S. Supreme Court agreed to hear argument in Murray v. UBS Securities LLC.[1]

The Supreme Court's decision is expected to resolve a circuit split regarding whether a plaintiff suing under the whistleblower protection provision of the Sarbanes-Oxley Act, Title 18 of the U.S. Code, Section 1514A, must prove her employer acted with retaliatory intent as part of her case in chief, or whether lack of retaliatory intent is part of an affirmative defense on which the employer bears the burden of proof. The decision could have significant ramifications for the scope of federal whistleblower protections.

The Murray case arises out UBS' 2012 termination of former employee Trevor Murray.[2] In 2011, UBS hired Murray as a strategist in its mortgage strategy group.[3] U.S. Securities and Exchange Commission regulations required Murray to certify that reports he prepared were produced independently, and that they accurately reflected his views.[4]

Murray claims that UBS trading desk leaders pressured him to skew his research results, and that when he reported this to his direct supervisor, he was fired in retaliation for reporting the alleged fraud on shareholders.[5] UBS maintained that Murray was never a whistleblower and was instead terminated as part of a broader reduction in force.[6]

In 2014, Murray sued UBS in the U.S. District Court for the Southern District of New York under SOX's whistleblower protection provision, Section 1514A.[7] The matter went to trial. There, the court instructed the jury, in relevant part, that, for a protected activity to be a contributing factor to Murray's termination, it must have either alone or together with other factors "tended to affect in any way" UBS' decision to terminate the plaintiff's employment.[8]

The court's instruction further provided that Murray was "not required to prove that his protected activity was the primary motivating factor in his termination, or that UBS's articulated reason for his termination ... [were] a pretext, in order to satisfy this element."[9] UBS objected to these instructions, arguing that they omitted an essential element: requiring proof of UBS' alleged retaliatory intent in terminating Murray.[10]

The district court overruled UBS' objection and the jury found UBS liable.[11] In post-trial briefing, UBS moved for judgment as a matter of law or, in the alternative, for a new trial, which the district court denied.[12]

UBS appealed, and the U.S. Court of Appeals for the Second Circuit found that the district court erred in failing to instruct the jury that Murray had the burden of proving that UBS had retaliatory intent in terminating him.[13]

The appellate court vacated the jury's verdict and remanded the case to the district court for a new trial, holding that, to prevail on the contributing factor element of a Section 1514A

claim, a putative whistleblower-employee must prove that the employer took the adverse employment action against the employee with an intent to discriminate against the employee because of the lawful whistleblower activity — i.e., with retaliatory intent.[14]

The Second Circuit further concluded that the unambiguous, ordinary meaning of Section 1514A's text indicates that a SOX anti-retaliation claim requires a showing that the employer acted with retaliatory intent.[15]

Murray filed a petition for a writ of certiorari on Jan. 13, which the Supreme Court granted on May 1.[16]

On July 5, the solicitor general, joined by the SEC, filed an amicus brief supporting Murray.[17] The next day, SEC Commissioners Hester Peirce and Mark Uyeda released a statement dissenting from the decision to join the amicus brief.[18]

In that statement, the dissenting commissioners did not address the merits of the case, but instead noted that Murray v. UBS Securities poses a difficult legal question, and that determining the answer to that question requires significant research, analysis and a full understanding of the matter.[19]

They also discussed the commission's canon of ethics, the duty of the commissioners to promote confidence in their intellectual integrity, and the commission's inability to fulfill that duty in deciding to join the amicus brief.[20] The dissenting commissioners then stated that, in their view, the commission's process for deciding whether to join the amicus brief "did not facilitate full and careful consideration of the recommendation."[21]

Although the dissenting commissioners' argument is procedural rather than substantive, the statement as a whole suggests that there may be disagreement among the commissioners as to the proper interpretation of Section 1514A.

Significance of the Court's Decision to Hear the Case

The question before the Supreme Court is whether, applying the burden-shifting framework applicable to cases under SOX, a plaintiff must prove that his employer acted with a retaliatory intent as part of his case in chief, or whether the lack of retaliatory intent is instead part of an affirmative defense on which the employer bears the burden of proof.[22]

Federal circuit courts are divided on the answer to this question. In the case at hand, the Second Circuit held that retaliatory intent is an element of a Section 1514A claim,[23] while the Fifth and Ninth Circuits have held that retaliatory intent is not an element of a Section 1514A claim.[24]

In its decision, the Second Circuit observed that the Third, Fourth and Tenth Circuits have declined to decide whether retaliatory intent is an element of a plaintiff's case in chief,[25] but Murray argued in his petition to the Supreme Court that decisions of the Fourth and Tenth Circuits also conflict with the Second Circuit's decision.[26]

This is because, in SOX cases, the Fourth and Tenth Circuits have relied on the reasoning of the U.S. Court of Appeals for the Federal Circuit's 1993 ruling in Marano v. U.S. Department of Justice in rejecting the requirement that a whistleblower prove her employer had an improper motive in taking the adverse employment action.[27]

In Feldman v. Law Enforcement Associates Corp. in 2014, the U.S. Court of Appeals for the

Fourth Circuit cited Marano, noting that the contributing factor test is designed to eliminate any requirement that a whistleblower prove that her employer's adverse employment action was motived by protected activity.[28]

Similarly, in Lockheed Martin Corp. v. U.S. Department of Labor in 2013, the U.S. Court of Appeals for the Tenth Circuit adopted Marano's reading that the inclusion of the contributing factor language was intended to override any requirement that whistleblowers prove their protected activity was a motivating factor in their employer's decision.[29]

Beyond resolving a circuit split, however defined, the court's decision will likely have widespread implications for the future of anti-retaliation whistleblower litigation. If the Second Circuit's interpretation stands, it will become more difficult for would-be whistleblower-employees to succeed on anti-retaliation claims under the SOX whistleblower statute, as they will no longer be able to show only that their protected activity was a contributing factor to their termination.

What to Expect at Oral Argument

At oral argument, we can expect the parties to present competing interpretations of the plain meaning of the text of Section 1514A. Section 1514A(a), in relevant part, prohibits employers from discharging an employee because of protected activity.[30]

As in its briefing to the courts below, UBS will likely argue that the unambiguous ordinary meaning of Section 1514A's text requires the plaintiff to provide proof of retaliatory intent,[31] and will look to the dictionary to support this argument.[32] As the Second Circuit noted in its decision, "[t]o 'discriminate' means '[t]o act on the basis of prejudice,' which requires a conscious decision to act based on a protected characteristic or action."[33] The word "discriminate" thus incorporates culpable intent.[34]

Retaliation, per the Supreme Court's 2005 Jackson v. Birmingham Board of Education ruling, is "always — by definition — intentional."[35] Moreover, the court has noted that when Congress creates a federal tort, it adopts the background of general tort law.[36] Intentional torts, per the court's 2011 Staub v. Proctor Hospital ruling, "generally require that the actor intend the consequences of an act, not simply the act itself."[37]

Retaliation is, by definition, a disparate treatment claim on account of protected activity, and as such, requires an employee to establish that their employer had a discriminatory intent or motive in taking the adverse employment action.[38]

As in its briefing to the Second Circuit and the Southern District of New York, UBS will likely rely on the Supreme Court's recent interpretation of the Dodd-Frank Act's anti-retaliation provision to further support its position.[39]

The Dodd-Frank Act, like SOX, prohibits employers from, in relevant part, discharging employees because of a protected activity.[40] Section 78u-6(h) of Dodd-Frank identifies different types of protected activity: providing information to the SEC (clause i) and making disclosures that are required or protected under any law, rule, or regulation subject to the SEC's jurisdiction (clause iii).[41]

In Digital Realty Trust Inc. v. Somers, a unanimous Supreme Court in 2018 held that the Dodd-Frank Act's anti-retaliation provision protects only "whistleblowers" who report alleged misconduct to the SEC.[42] In so holding, the court rejected the plaintiff's argument that this interpretation would "vitiate" the protections provided by the third clause.[43]

The court explained that, under its interpretation, the third clause retained independent significance because, under the Dodd-Frank Act, an employer can recover without having to demonstrate whether the employer's retaliation was motivated by an SEC disclosure or by an internal report — thus yielding protection under both the first and third clauses.[44]

According to UBS, the court's analysis in Digital Realty Trust makes clear that retaliatory intent is a required element under clauses (i) and (iii),[45] as the inclusion of the third clause means only that a Dodd-Frank claim does not depend on whether the employer's retaliation was motivated by an SEC disclosure or by an internal report.[46]

This, UBS will likely argue, supports its ultimate conclusion that, in line with the court's interpretation of the Dodd-Frank Act's similar anti-retaliation provision, the unambiguous ordinary meaning of Section 1514A's text requires the whistleblower to provide proof of her employer's retaliatory intent.[47]

Murray, on the other hand, is likely to argue that the statutory text explains how to determine whether unlawful discrimination has occurred.

Murray will likely rely on an argument that Section 1514A incorporates by reference language from Title 49 of the U.S. Code, Section 42121(b)(2), that states a plaintiff must show that her protected behavior "was a contributing factor in the unfavorable personnel action," and if the plaintiff does so, the employer can prevail if it presents clear and convincing evidence that "the employer would have taken the same unfavorable personnel action in the absence of that behavior."[48]

Moreover, Murray will likely argue that the term "contributing factor" is a term of art, first enacted in the Whistleblower Protection Act of 1989 and later incorporated in Section 42121(b)(2).[49] Additionally, Murray will likely point out that, as the Supreme Court noted in George v. McDonough last year, "[w]here Congress employs a term of art 'obviously transplanted from another legal source,' it 'brings the old soil with it.'"[50] As such, it follows that Section 1514A adopts Section 42121(b)(2)'s interpretation of, and therefore the WPA's interpretation of, the term "contributing factor."[51]

As discussed below, under the WPA, courts interpreting the term "contributing factor" have not required a whistleblower to prove retaliatory intent.[52] As such, Murray will likely argue that the text requires him only to show that his whistleblowing was a contributing factor to his termination, and that, in order to prevail, UBS must show by clear and convincing evidence that it terminated Murray without retaliatory intent.[53]

Moreover, Murray will likely argue that the text must be analyzed within the context of SOX's structure as a whole.[54] SOX contains another whistleblower protection provision, Title 18 of the U.S. Code, Section 1513(e), whose text explicitly requires proof of retaliatory intent, prohibiting "knowingly, with the intent to retaliate,"[55] taking any action harmful to any person for reporting federal crimes to law enforcement.

Murray is likely to rely on the Supreme Court's precedent in which it has articulated the position that courts should assume that, where Congress includes specific language in one section of a statute but omits it from another, Congress intended the two sections to be construed differently.[56] Thus, as he did in his petition for certiorari, Murray will likely argue that the "retaliatory intent" language included in Section 1513(e) suggests that Congress purposefully excluded such language from Section 1514A.[57]

Murray may also look to history to support his interpretation, specifically the Whistleblower Protection Act.[58] When enacting the WPA, Congress required a whistleblower to prove that her protected conduct "was a contributing factor" in the adverse employment action.[59]

The WPA's explanatory statement acknowledged that the contributing factor test was intended to overrule case law requiring a whistleblower to prove that her protected conduct was a motivating factor in an employment action in order to overturn that action.[60] Additionally, WPA sponsor Rep. Pat Schroeder stated at the time that "the word 'contributing' does not place any requirement" on plaintiffs "to produce evidence proving retaliatory motive on the part of" the employer.[61]

Moreover, as the solicitor general recently noted in its amicus brief, it has long been settled under the WPA, that proof of a retaliatory intent is not required to satisfy the "contributing factor" test.[62]

The Second Circuit decision was unanimous, with a panel that included both Biden and Trump appointees. As such, it is not clear that a decision on this issue will divide along political lines. However, the Supreme Court's Section 1514A whistleblower jurisprudence may shed light on how the court will likely rule on this issue.

In Lawson v. FMR LLC, the Supreme Court in 2014 held that Section 1514A whistleblower protections extend to the employees of a public company's private contractors and subcontractors.[63] In its analysis, the court noted that Section 1514A(b)(2)(A) directs that Section 1514A claims shall be governed under Title 49 of the U.S. Code, Section 42121(b)'s rules and procedures, i.e., the rules and procedures of the Ford Aviation Investment and Reform Act, or AIR21, Whistleblower Protection Program's anti-retaliation provision.[64]

As previously noted, under this standard, an employee has the initial burden of showing that her protected activity was a contributing factor in the adverse employment action.[65] If the employee meets that burden, the employer may still prevail if it presents clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of that behavior."[66]

Given the prior ruling that Section 1514A claims shall be governed under AIR21's rules and procedures, Chief Justice John Roberts and Justice Elena Kagan, who joined Justice Ruth Bader Ginsburg's Lawson opinion in full, may look to AIR21's anti-retaliation provision's burden-shifting language when interpreting the language of Section 1514A.

It is unclear whether Lawson offers any relevant insight into the full court's view, however, as Justice Clarence Thomas joined a concurring opinion authored by Justice Antonin Scalia that rejected reliance on Section 42121's anti-retaliation provisions, and Justice Sonia Sotomayor authored a dissent, joined by Justices Samuel Alito and Anthony Kennedy, which likewise declined to interpret the provisions in parallel.[67]

Potential Implications for Whistleblower Laws and Litigation

The implications of the Supreme Court's decision for whistleblower laws and litigation will likely be significant. If the court agrees with the Second Circuit, a plaintiff will be required to produce evidence of her employer's subjective intent to retaliate as opposed to only having to prove that alleged whistleblowing activity was a contributing factor in her termination.

If the court rejects the Second Circuit's interpretation of Section 1514A, however, the

cottage industry that has arisen out of heightened whistleblower protections and reporting incentives will continue to grow. In fiscal year 2022, the SEC awarded approximately $229 million across 103 whistleblower awards.[68] Moreover, 2022 was the SEC's whistleblower program's second-highest year in dollars and number of awards, and the program's highest year in number of tips — more than 12,300.[69]

As such, the court's ruling will likely contribute to either the expansion or scaling back of a system that incentivizes whistleblowing.

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[1] Murray v. UBS Sec., LLC, 43 F.4th 254 (2d Cir. 2022), cert. granted, No. 22-660, 2023 WL 3158354 (U.S. May 1, 2023).

[2] Id. at 256.

[3] Id. at 256.

[4] Id.

[5] Id. at 256–57.

[6] Id. at 257.

[7] Id.

[8] Id. at 258.

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Id. at 263.

[14] Id. at 259–60.

[15] Id. at 261.

[16] Petition for Writ of Certiorari, Murray v. UBS Sec., LLC, 43 F.4th 254 (2d Cir. 2022),

cert. granted, No. 22-660 (May 1, 2023).

[17] See Brief for United States as Amicus Curiae Supporting Petitioner, Murray v. UBS Sec., LLC, U.S., No. 22-660 (filed July 5, 2023).

[18] Commissioners Peirce & Uyeda, Statement Regarding Amicus Brief Filing in Murray v. UBS Securities, LLC (July 6, 2023).

[19] Id.

[20] Id.

[21] Id.

[22] Murray v. UBS Securities, LLC, SCOTUSblog, Murray v. UBS Securities, LLC – SCOTUSblog.

[23] Murray v. UBS Sec., LLC, 43 F.4th 254 (2d Cir. 2022), cert. granted, No. 22-660 (May 1, 2023).

[24] See Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 263 (5th Cir. 2014); Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010).

[25] Murray v. UBS Sec., LLC, 43 F.4th 254, 261 n.7 (2d Cir. 2022).

[26] Petition for Writ of Certiorari at 16.

[27] See Marano v. Department of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993); Id.

[28] Feldman v. Law Enforcement Associates Corp., 752 F.3d 339, 348 (4th Cir. 2014).

[29] Lockheed Martin Corp. v. Department of Labor, 717 F.3d 1121, 1136 (10th Cir. 2013).

[30] See 18 U.S.C. § 1514A(a).

[31] Brief in Opposition at 1.

[32] Brief in Opposition at 15-20.

[33] Murray v. UBS Sec., LLC, 43 F.4th 254, 259 (2d Cir. 2022) (quoting "Discriminate," Webster's II New Riverside Univ. Dictionary (1994)).

[34] Brief in Opposition at 15.

[35] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183 (2005).

[36] Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011).

[37] Id.

[38] See Brief in Opposition at 16 (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).

[39] Brief in Opposition at 15–17.

[40] 15 U.S.C. § 78u-6(h)(1)(A).

[41] See id.

[42] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 779 (2018).

[43] Id.

[44] Brief in Opposition at 17 (quoting Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 779 (2018)).

[45] Brief in Opposition at 17.

[46] Id.

[47] Id. at 1.

[48] Reply Brief for Petitioner at 9 (citing 18 U.S.C. § 1514A(b)(2)(C) (incorporating 49 U.S.C. § 42121(b)(2) by reference)).

[49] Brief for United States as Amicus Curiae Supporting Petitioner, Murray v. UBS Sec., LLC, U.S., No. 22-660 at 17 (filed July 5, 2023).

[50] George v. McDonough, 142 S. Ct. 1953, 1959 (2022) (quoting Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019))

[51] See Brief for United States as Amicus Curiae Supporting Petitioner at 18.

[52] See id. at 20 (citing Kewley v. HHS, 153 F.3d 1357, 1362 (Fed. Cir. 1998); Caddell v. DOJ, 61 M.S.P.R. 670, 681 (1994); Carr v. SSA, 185 F.3d 1318, 1323–1325 (Fed. Cir. 1999)).

[53] See id. at 6–10.

[54] Petition for Writ of Certiorari at 27–29.

[55] 18 U.S.C. § 1513(e).

[56] Loughrin v. United States, 573 U.S. 351, 358 (2014) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

[57] Petition for Writ of Certiorari at 28.

[58] Petition for Writ of Certiorari at 27–29.

[59] Brief for United States as Amicus Curiae Supporting Petitioner at 23 (citing 5 U.S.C. 1221(e)(1)).

[60] Id. (citing 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20, 101st Cong., 1st Sess. 1989) ("WPA Explanatory Statement")).

[61] WPA Explanatory Statement, supra, at 5037 (remarks of Rep. Pat Schroeder).

[62] See Brief for United States as Amicus Curiae Supporting Petitioner at 20 (citing Kewley v. HHS, 153 F.3d 1357, 1362 (Fed. Cir. 1998); Caddell v. DOJ, 61 M.S.P.R. 670, 681 (1994); Carr v. SSA, 185 F.3d 1318, 1323–1325 (Fed. Cir. 1999)).

[63] Lawson v. FMR LLC, 571 U.S. 429, 430 (2014).

[64] Id. at 443.

[65] 49 U.S.C. § 42121(b)(2)(B).

[66] 49 U.S.C. § 42121(b)(2)(B).

[67] Lawson v. FMR LLC, 571 U.S. 429, 431 (2014).

[68] Bryan B. House et al., Review of Recent Whistleblower Developments: January 2023, 13 The National Law Review (2023).

[69] Id.