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February 13, 2024

COZEN O'CONNOR

Supreme Court Defines "Contributing Factor" Standard in Whistleblower Cases

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On February 8, 2024, the Supreme Court issued its long-awaiting decision in *Murray v. UBS Securities*. *Murray* interpreted the "contributing factor" element that a plaintiff must prove to make out a claim of whistleblower retaliation under the Sarbanes-Oxley Act (SOX). Dozens of other whistleblower protection statutes, covering a wide variety of industries, including healthcare, airlines, rail, food processing, and nuclear power, share the same contributing factor element, which has been the subject of extensive litigation generating a split between the Circuits. *Murray* therefore will have an immediate and profound impact on federal whistleblower litigation.

Although the "protected activity" is defined differently under each statute, the various whistleblower protection statutes share the same basic analytical framework. A plaintiff must establish a *prima facie* case of unlawful retaliation by proving that he or she engaged in protected activity, experienced an adverse action, and the protected activity was a contributing factor in the adverse action. Once a plaintiff makes this *prima facie* showing, an employer may avoid liability by proving, through clear and convincing evidence, that it would have taken the same adverse action regardless of the plaintiff's protected activity.

Up until now, the Circuit Courts have divided over whether the contributing factor element that a whistleblower plaintiff must establish requires some showing of retaliatory intent or animus. The Court's opinion in *Murray*, authored by Justice Sotomayor for a unanimous Court, holds that that a plaintiff need *not* establish retaliatory intent or animus.

The Court rejected the argument, following in several Circuits, that SOX (and the other federal whistleblower protection statutes) is a anti-discrimination statute, requiring proof of unlawful intent. The statute's prohibition of an employer "in any other manner discriminat[ing] against an employee" does not relate back to modify other adverse actions listed in the statute, namely "discharge, demote, suspend, threaten, and harass." In other words, use of the term "discriminate" in the catch-all category of adverse actions does not convert SOX into an anti-discrimination statute. Even if it did, however, the *Murray* Court held that any adverse action taken because of protected activity still would be sufficient to establish discrimination, citing *Bostock v. Clayton Co.*, 590 U.S. 644 (2020).

The Court cites favorably the case of *Marano v. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), which has long stood for the proposition that the whistleblower protection statutes are intended to protect whistleblowers from any harms that might flow from their protected activity, not to punish employers for any wrongdoing. As a result, a perfectly well-meaning employer still could be liable for engaging in unlawful retaliation. In one hypothetical discussed by the Court, an employer who reassigned an employee based on a sincere belief that the employee would be happier in a new position without SEC reporting requirements could still be taking an adverse action because of the employee's protected activity, if protected activity played any role in the employer's decision.

Justice Sotomayor's opinion notes that Congress intended for the contributing-factor framework to be less protective of employers, relative to the motivating-factor framework used in other employment litigation, since "the health, safety, or well-being of the public may well depend on whistleblowers feeling empowered to come forward." The syllabus summarizes this holding as: "[t]he contributing-factor burden-shifting framework is meant to be plaintiff-friendly." The Court further explained that a lesser showing might be required by a plaintiff because intent can be hard to establish, and a burden-shifting framework is an appropriate means of addressing this difficulty of proof.

Concurring, Justice Alito notes that "our rejection of an 'animus' requirement does not read intent

out of the statute." Instead, he states the Court will still require a plaintiff to prove that the employer "intentionally treat[ed the plaintiff] worse because of the protected conduct." Justice Alito would permit the intent requirement, then, to be satisfied with proof that the employer took the adverse action against the employee intentionally; an employee need not show that the employer retaliated intentionally. Justice Alito therefore distinguishes between intent and causation. The former will virtually always be satisfied, while the latter will be litigated through the employer's affirmative defense.

The one note of optimism for employers is that the Court appears to take a forgiving view of the showing required by an employer to rebut, by clear and convincing evidence, an employee's *prima facie* case of retaliation. For example, if a client departed a firm because of an employee's whistleblowing, eventually leading to the employee's dismissal for lack of work, the employer could prevail by proving it would have dismissed the employee for lack of work, regardless of the reason for the client's departure. Now that a plaintiff's *prima facie* case of retaliation will be easier to prove, we can expect the employer's affirmative clear and convincing defense to assume a much more prominent role in whistleblower litigation as lower courts interpret both the means and quantum of evidence necessary for an employer to show that it would have taken the same adverse action regardless of the protected activity.