SCOTUS Clarifies Plaintiffs Do Not Need To Prove Retaliatory Intent To Establish Causation in a SOX Claim, Which Implicates Other OSHA Whistleblower Statutes

June 4, 2024 Matthew Deffebach, Mini Kapoor, Dominique Baldwin, Christina Gad

PRACTICES Labor and Employment, OSHA, U.S. Supreme Court

On Feb. 8, 2024, the U.S. Supreme Court issued a significant decision involving a whistleblower retaliation claim under the Sarbanes-Oxley Act of 2002, 18 U. S. C. §1514A(a) ("SOX"), which may impact several other whistleblower statues within OSHA's jurisdiction that are similarly structured.

By way of background, OSHA enforces whistleblower provisions for numerous whistleblower statutes, including SOX, the Occupational Safety and Health Act (the "OSH Act") and the Taxpayer First Act, to name a few. In *Murray v. UBS Securities, LLC*, the plaintiff alleged he was fired for blowing the whistle after he informed his supervisor "that two leaders of the UBS trading desk were engaging in what he believed to be unethical and illegal efforts to skew his independent reporting."

The U.S. Court of Appeals for the Second Circuit found that Murray had failed to prove that UBS had "retaliatory intent" when discharging his employment. However, in a 9-0 decision, the Supreme Court reversed, and found that a plaintiff does not need to prove retaliatory intent to establish causation in a SOX claim. Instead, a plaintiff alleging retaliation under SOX need only prove that their protected activity was a "contributing factor" in an adverse employment action. This is a lower burden than showing retaliatory intent because it only requires a showing that the protected activity affected (in any way) the outcome of an employment decision. Notably, Justice Sotomayor stated that this "contributing factor" requirement is not as protective of employers, but this is because Congress wanted to encourage whistleblowers to come forward in "contexts where the health, safety, or well-being of the public may well depend on whistleblowers feeling empowered…". The burden would then shift back to the employer to show it would have taken the same action against the employee absent any protected activity.

Notably, the Supreme Court ruling did not address the OSH Act, which requires a "but for" causation - meaning, the employee would not have suffered the adverse employment action but for blowing the whistle. However, this decision has potential to reach further than SOX claims because there are several federal whistleblower statutes that incorporate the same causation language found in SOX, which would certainly lower a plaintiff's burden claiming retaliation under similar statutes. Further, Justice Sotomayor's observation that whistleblowers should be encouraged to come forward in the context of "health" and "safety", poses an interesting question – whether this lower burden may one day apply in the context of whistleblower complaints under the OSH Act.

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