U.S. Supreme Court Eases Employees' Burden of Proof in SOX Retaliation Cases

PUBLISHED ON
February 13, 2024

According to a recent U.S. Supreme Court decision, employees who believe they were mistreated by their employer for reporting criminal fraud or securities law violations will have an easier time proving their cases under the whistleblower provisions of the Sarbanes-Oxley Act (SOX).

Since the Enron scandal, the Sarbanes-Oxley Act has prevented publicly traded companies from retaliating against whistleblowing employees who report unethical and illegal behavior. Under Section 1514A of the Act, employees must show their whistleblowing activity was a "contributing factor in the unfavorable personnel decision."

The*Murray v. UBS Securities*case arose when Trevor Murray, a research strategist at UBS, told his supervisor he was being pressured to skew reports that the U.S. Securities and Exchange Commission (SEC) required him to produce independently and according to his own viewpoint. The supervisor warned Murray not to "alienate his internal client," and instructed him to just "write what the business line wanted." Soon after, UBS fired him.

A trial court found that UBS had violated SOX's whistleblower protections and awarded Murray nearly $1 million in lost wages, plus attorneys' fees and costs. UBS asked the Supreme Court to reverse the decision, arguing that an employee must prove that the employer acted with retaliatory intention for the employer to be held liable for violating SOX's whistleblower protections. The Court disagreed.

Instead, the Court held that an employee need only demonstrate that his whistleblowing activity contributed to the employer's decision to take adverse action. "Showing that an employer acted with retaliatory animus is one way of proving that the protected activity was a contributing factor in the adverse employment action, but it is not the only way." That is a radically different standard of proof than applies to whistleblowing protections under other laws, such as Title VII of the Civil Rights Act.

This lower burden of proof is just one of many challenging aspects employers face related to SOX retaliation claims. Publicly traded companies should keep the following points in mind:

- **Get help identifying whistleblowers.** Unlike other protected classes, it is not always easy to identify when an employee becomes a protected whistleblower under SOX. For example, employees who act in good faith are entitled to whistleblower protection even when their underlying complaints are inaccurate or wrong. Employers should consult with an experienced employment law attorney when addressing personnel matters involving employees who may have engaged in protected whistleblowing activity.

- **Address whistleblowing reports head-on.** Transferring an employee-even to alleviate perceived discomfort in the workplace-may violate SOX. If you are unsure, contact an experienced employment law

attorney.

• **Documentation is more important than ever.** Employers are not liable when their actions are unrelated to an employee's whistleblowing activity. Managers should always document ongoing personnel issues. For publicly traded companies, establishing that paper trail will be even more important in the wake of the Supreme Court's decision.

Employers who need assistance in navigating SOX's whistleblower protections may consult attorney Hannah Schroer, partner David Freedman or any a member of Barley Snyder's Employment Practice Group.

WRITTEN BY:

David J. Freedman

Partner

Tel: (717) 399-1578

Email: dfreedman@barley.com

Hannah M. Schroer

Associate

Tel: (717) 399-1510

Email: hschroer@barley.com