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2nd Circ. Erred In Requiring Retaliatory Intent In SOX Claim

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On Aug. 5 in Murray v. UBS Securities LLC,[1] a three-judge panel of the U.S. Court of Appeals for the Second Circuit overturned a $2.6 million award to a whistleblower who had filed a retaliation claim against his former employer in 2014 under Section 806 of the Sarbanes-Oxley Act.[2]

At trial, the whistleblower had presented circumstantial evidence of causation based on the temporal proximity between his protected activity and termination.

However, according to the Second Circuit, he had to prove that his employer acted with retaliatory intent, separate and apart from showing that his protected activity was a contributing factor in his termination.[3]

In so ruling, the Second Circuit overlooked a critical fact: A SOX plaintiff may establish causation through circumstantial evidence or direct evidence of retaliatory animus.

The court's holding subverted the plain text of SOX and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century,[4] which Section 806 expressly incorporates, and isolated the Second Circuit as the lone federal circuit to require this heightened burden in a SOX case.

Legislative Intent and Statutory Scheme

Congress enacted SOX 20 years ago, after a series of accounting scandals devastated investors and cast doubt upon the accuracy of publicly traded companies' financial statements. Congress afforded robust protection to whistleblowers to combat a so-called corporate code of silence "that discourage[s] employees from reporting fraudulent behavior [and] … creates a climate where ongoing wrongdoing can occur with virtual impunity."[5]

Section 806 of SOX prohibits a publicly traded company from discriminating against an employee in the terms and conditions of employment if the employee provides information, which he reasonably believes constitutes a violation of one of SOX's enumerated laws related to fraud, to a federal regulatory or law enforcement agency, Congress or a supervisor with authority to investigate the misconduct.[6]

Congress expressly incorporated AIR 21's burdens of proof into Section 806.[7] Thus, a whistleblower prevails by demonstrating that he engaged in protected activity and that the protected activity "was a contributing factor in the unfavorable personnel action."[8] A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[9]

The "contributing factor" standard is distinct from other causation standards commonly used in federal employment statutes. It does not require a whistleblower "to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor" in, or the but-for cause of, his unfavorable personnel action.[10]

Nonetheless, all standards require a whistleblower to prove some degree of a causal relationship between his protected activity and the materially adverse action he suffered.

Not surprisingly, according to the U.S. Court of Appeals for the Tenth Circuit's 1998 ruling in Sanjuan v. IBP Inc., employers "rarely admit retaliatory motives in firing an employee."[11] Thus, a whistleblower may make the requisite showing through direct evidence of retaliatory animus or circumstantial evidence of causation, such as temporal proximity, a pattern of antagonism, comparator evidence and "me too" evidence — that is, evidence that an employer retaliated against a similarly situated employee, other than the plaintiff, who also blew the whistle.[12]

After an employee satisfies his prima facie case, the burden shifts to the employer to prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the plaintiff's protected activity.[13]

Murray's Contradiction of Bechtel and Every Other Circuit Court Decision That Analyzes the Elements of a SOX Retaliation Case

In examining the plain language of SOX, the Murray court disregarded the plain language of AIR 21, which SOX expressly incorporates:

> (iii) Criteria for determination by secretary.—
>
> The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.[14]

In its prior decision in Bechtel v. Administrative Review Board, the Second Circuit in 2013 examined the plain language of AIR 21, Section 806 of the Sarbanes-Oxley Act and U.S. Department of Labor regulations — the last two of which the Murray court did not bother to reference — and explained that these authorities collectively contain the elements and burdens of proof for a SOX retaliation claim.[15]

Following that examination of the statutory language of AIR 21 and the clear language of the DOL regulations, the Bechtel court held that a plaintiff's "sole burden was to prove, by a preponderance of the evidence, that his protected activity contributed to the adverse employment action."[16]

The court also set forth the following elements in a SOX retaliation claim:

- The employee engaged in a protected activity;

- The employer knew that the employee engaged in the protected activity;
- The employee suffered an unfavorable personnel action; and
- The protected activity was a contributing factor in the unfavorable action.[17]

Murray clearly contradicted Bechtel and essentially added a fifth element to a whistleblower's burden.

In doing so, it disregarded the Second Circuit's jurisprudence that it "is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc."[18]

Further, the Second Circuit is now the sole federal circuit to require this heightened standard in a SOX retaliation case. None other requires a plaintiff to prove a fifth element of retaliatory animus separate and apart from the other four elements.[19]

In fact, both the Fifth and the Federal Circuits had previously rejected the argument that a SOX whistleblower must prove retaliatory animus above and beyond showing that his protected activity was a contributing factor.

In Halliburton Inc. v. Administrative Review Board, the U.S. Court of Appeals for the Fifth Circuit in 2014 expressly rejected the argument that the plaintiff was required to prove the employer acted with a retaliatory motive, because such a requirement conflicts with the definition of contributing factor, as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[20]

Similarly, in construing the "contributing factor" element of a retaliation claim under the Whistleblower Protection Act, in Marano v. U.S. Department of Justice in 1993, the U.S. Court of Appeals for the Federal Circuit held that

> a whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action: "Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing."[21]

FRSA Retaliation Cases Do Not Support Murray

Rather than rely on prior Second Circuit precedent defining the elements of a SOX retaliation case,[22] Murray cited cases decided under the Federal Railroad Safety Act's retaliation provision, which also incorporates the burdens set forth in AIR 21.[23] Murray relies mainly on the Second Circuit's 2020 decision of Tompkins v. Metro-North Commuter Railroad Co., but misconstrues the holding.[24]

Contrary to Murray, Tompkins did not require the whistleblower to prove as a separate element of his claim that the employer acted with retaliatory motive. Rather, Tompkins stated:

> To establish that retaliation was a contributing factor, an FRSA plaintiff must

> produce evidence of "intentional retaliation prompted by the employee engaging in protected activity." The plaintiff need not show that the "contributing factor" was the sole factor affecting the discipline or that the employer acted only with retaliatory motive. The plaintiff must, however, show "more than a temporal connection between the protected conduct and the adverse employment action ... to present a genuine factual issue on retaliation."[25]

In this way, Tompkins explained that a plaintiff proves intentional retaliation by establishing the contributing factor. While a plaintiff may meet this element through circumstantial evidence of causation, Tompkins held that evidence solely of temporal proximity does not meet that burden.[26]

Murray adopted this holding but went a step further than Tompkins and held that a whistleblower must separately prove retaliatory intent.

However, had Congress sought to require a whistleblower to prove an employer's specific intent, above and beyond causation, it would have included such language in the statute.[27]

Murray also cited Kuduk v. BNSF Railway Co., a 2014 decision from the U.S. Court of Appeals for the Eighth Circuit, as further support for this fifth element.[28] However, Kudak did not require the plaintiff to prove retaliatory intent as a separate element from causation, but implicitly recognized that a whistleblower may prove retaliatory intent through a showing of causation.[29]

Murray also cited the 2018 U.S. Court of Appeals for the Seventh Circuit case of Armstrong v. BNSF Railway Co. in support of its new SOX standard.[30]

In Armstrong, an employee claimed that the railway retaliated against him because he submitted a safety complaint. The trial court instructed the jury that the employer could not be liable if it terminated the plaintiff's employment based on its honestly held belief that the plaintiff did not engage in protected activity in good faith, because he filed a false complaint.[31]

The Seventh Circuit reasoned, "If [the employer] fired Armstrong because it honestly believed that he was lying about his complaint, then it necessarily follows that it did not retaliate against Armstrong for filing a good faith complaint."

As Armstrong addresses an issue that is distinct from the facts in Murray, it does not support the Second Circuit judicially amending SOX.

The Fifth Element Serves No Legitimate Purpose

Finally, in support of its holding, the court in Murray incorrectly reasoned that the fifth element is necessary, because without it, the contributing factor prong would encompass "a scenario in which, by virtue of his whistleblowing activity, Murray was insulated from a termination to which he would otherwise have been subjected sooner."[32]

This is illogical, as the last element requires an unfavorable personnel action.

Conclusion

The Second Circuit has heightened a SOX whistleblower's burden of proof even beyond that in the McDonnell Douglas burden-shifting framework.

While Murray purports to rely on FRSA cases construing the contributing factor element, its holding that a whistleblower who proves causation through indirect evidence must also present evidence of retaliatory intent is unprecedented and effectively defeats all cases in which an employer has not expressly admitted to its improper motive.

The Second Circuit should grant a rehearing en banc hearing to correct this panel's error.

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[1] Murray v. UBS Securities LLC, No. 20-4202 (2d Cir. Aug. 5, 2022).

[2] 18 U.S.C. § 1514A.

[3] Murray, slip op. at 9.

[4] 49 U.S.C. § 42121.

[5] The Corporate and Criminal Fraud Accountability Act of 2002, S. REP. No. 107-146, at 5 (2002).

[6] 18 U.S.C. § 1514A(a)(1).

[7] S. REP. No. 107-146, at 26; 18 U.S.C. § 1514A(b)(2)(C).

[8] 49 U.S.C. § 42121(b)(2)(B)(iii); see also 29 C.F.R. §19880.104(e).

[9] Klopfenstein v. PCC Flow Techs. Holdings, Inc., ARB No. 04–149, 2006 WL 3246904, at *13 (Dep't of Labor May 31, 2006).

[10] Marano v. Dep't of Just., 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal citations omitted).

[11] Sanjuan v. IBP, Inc., 160 F.3d 1291, 1297 (10th Cir. 1998).

[12] See Haddon v. Exec. Residence at White House, 313 F.3d 1352, 1358 (Fed. Cir. 2002) ("Direct evidence is rarely available in retaliation cases and that it is usually necessary to rely on circumstantial evidence.").

[13] 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1989.104(e)(4).

[14] 49 U.S.C. § 42121(b)(2)(B)(iii).

[15] Bechtel v. Administrative Review Board, 710 F.3d 443, 448 (2d Cir. 2013).

[16] Id. at 446-49.

[17] Id. at 451.

[18] United States v. Ianniello, 808 F.2d 184, 190 (2d Cir. 1986), abrogated on other grounds by United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989).

[19] See, e.g., Rhinehimer v. U.S. Bancorp Invs., Inc., 787 F.3d 797, 805 (6th Cir. 2015); Feldman v. L. Enf't Assocs. Corp., 752 F.3d 339, 344-45 (4th Cir. 2014); Lockheed Martin Corp. v. Admin. Rev. Bd., 717 F.3d 1121, 1136 (10th Cir. 2013); Wiest v. Lynch, 710 F.3d 121, 129 (3d Cir. 2013); Bechtel v. Admin. Rev. Bd., 710 F.3d 443, 447-48 (2d Cir. 2013); Tides v. The Boeing Co., 644 F.3d 809, 814 (9th Cir. 2011); Gale v. U.S. Dep't of Lab., 384 F. App'x 926, 929 (11th Cir. 2010); Harp v. Charter Commc'ns, Inc., 558 F.3d 722, 723 (7th Cir. 2009); Day v. Staples, Inc., 555 F.3d 42, 53 (1st Cir. 2009); Allen v. Admin. Review Bd., 514 F.3d 468, 475–76 (5th Cir. 2008); Marano, 2 F.3d at 1141.

[20] Halliburton Inc. v. Administrative Review Board, 771 F.3d 254, 263 (5th Cir. 2014); see also Frost v. BNSF Ry. Co., 914 F.3d 1189, 1195-96 (9th Cir. 2019) (holding that the FRSA's retaliation provision "ultimately requires a showing of the employer's ... retaliatory intent," and that "FRSA plaintiffs satisfy that burden by proving that their protected activity was a contributing factor to the adverse employment decision").

[21] Marano, 2 F.3d at 1141 (quoting S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988)).

[22] See, e.g., Harp, 558 F.3d at 723; Bechtel, 710 F.3d at 444.

[23] 49 U.S.C. § 20109(d)(2).

[24] Tompkins v. Metro-N. Commuter R.R. Co., 983 F.3d 74 (2d Cir. 2020).

[25] Id. at 82 (footnotes omitted).

[26] Id.

[27] Compare 18 U.S.C. § 1513(a)(1) ("Whoever kills or attempts to kill another person with intent to retaliate ..."), with 18 U.S.C. § 1514A(a) ("No company ... may ... discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee ...").

[28] Kuduk v. BNSF Ry. Co., 768 F.3d 786, 791 (8th Cir. 2014).

[29] See id. (explaining that, through the contributing factor element, an employee proves that "intentional retaliation [was] prompted by the employee engaging in protected activity").

[30] Armstrong v. BNSF Railway Co., 880 F.3d 377 (7th Cir. 2018).

[31] Id. at 381.

[32] Murray, slip op. at 12.