When It Comes to Whistleblower Protection, It Is No Longer the Thought That Counts

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The United States Supreme Court may have just complicated employers' internal processes for handling whistleblowers. Employers now will be held to a higher standard under federal law when it comes to how courts view the adverse employment actions that an employer may take against a whistleblower. Despite this latest ruling, careful and consistent employers still have some ability to protect themselves from claims of unlawful retaliation.

In *Murray v. U.B.S. Securities, LLC*, 144 S. Ct. 445 (2024), a unanimous Supreme Court ruled that an employer subject to the Sarbanes-Oxley Act, 18 U.S.C. §1514A(a), need not act with "retaliatory intent" in taking an adverse employment action against a whistleblower. While only publicly-traded companies, with some exceptions, are subject to the Sarbanes-Oxley Act, the Act is the basis for many whistleblowing statutes. The employer in the underlying matter, U.B.S., terminated Murray shortly after he raised issues regarding what he believed was unethical and illegal conduct. Murray, raising issues of unlawful retaliation under Sarbanes-Oxley, was successful before the District Court, with a jury finding that he had established a claim under §1514A(a). U.B.S. appealed to the Second Circuit Court of Appeals.

The Second Circuit held that retaliatory intent is required to trigger the protections contained in §1514A(a) of the Sarbanes-Oxley Act. This ruling created a new standard by requiring a claim for retaliation to include evidence that the employer intended to retaliate against a whistleblowing employee. The Second Circuit's holding in U.B.S.' favor caused a circuit split with the Fifth and Ninth Circuits, which had previously held that no such retaliatory intent was required. Murray appealed to the Supreme Court, which agreed to hear the case and resolve the split among the lower federal courts.

Justice Sotomayor's majority opinion concluded that Congress did not intend to require plaintiffs bringing whistleblower claims under the Sarbanes-Oxley Act to show retaliation. The Court's opinion explains that "[s]tatutory context confirms" that the Act "does not import a 'retaliatory intent' requirement: Requiring a whistleblower to prove his employer's retaliatory animus would ignore the statute's mandatory burden-shifting framework. The burden-shifting framework was conspicuously absent from the Second Circuit's opinion, and UBS now insists that the statute's burden shifting addresses only "causation, not intent."

The Court's clarification of the Sarbanes-Oxley Act's whistleblowing provisions brings federal law much closer to New Jersey's Conscientious Employee Protection Act, CEPA. Any adverse action that an employer takes against a whistleblower, or perceived whistleblower, can trigger the protections of CEPA. However, employers are not left powerless in the face of whistleblowing employees.

The Supreme Court's ruling does not foreclose all defenses for the employer who makes a non-retaliatory determination. The Sarbanes-Oxley Act provides that an employer will not be held liable where it "demonstrates, by clear and convincing

evidence, that [it] would have taken the same unfavorable personnel action in the absence of the protected behavior." *Murray*, 144 S. Ct. at 456. Put another way, would the employer have retained an otherwise identical employee who had not engaged in any protected activity? *See Bostock v. Clayton County*, 590 U.S. 644, 660 (2020). If an employer can show that a similarly situated employee received the same treatment, they should prevail under the law.

Employers who have received a report from an employee that could be perceived as whistleblowing under state or federal law must develop internal procedures for ensuring that those employees are treated in a fair and non-retaliatory manner. Employers who already have policies should immediately review their policies to ensure that they are robust and detailed. Employers who can demonstrate that they treat all employees consistently will be able to avail themselves of the protections outlined above. Those employers who are less careful in how they treat similarly situated employees will find it difficult to claim the protections carved out by this newest Supreme Court precedent.

Employers should also ensure that strong anti-retaliation provisions are in place to protect employees who bring complaints. Employers with clear policies and strong anti-retaliation provisions will have more success in defending claims of employee retaliation.