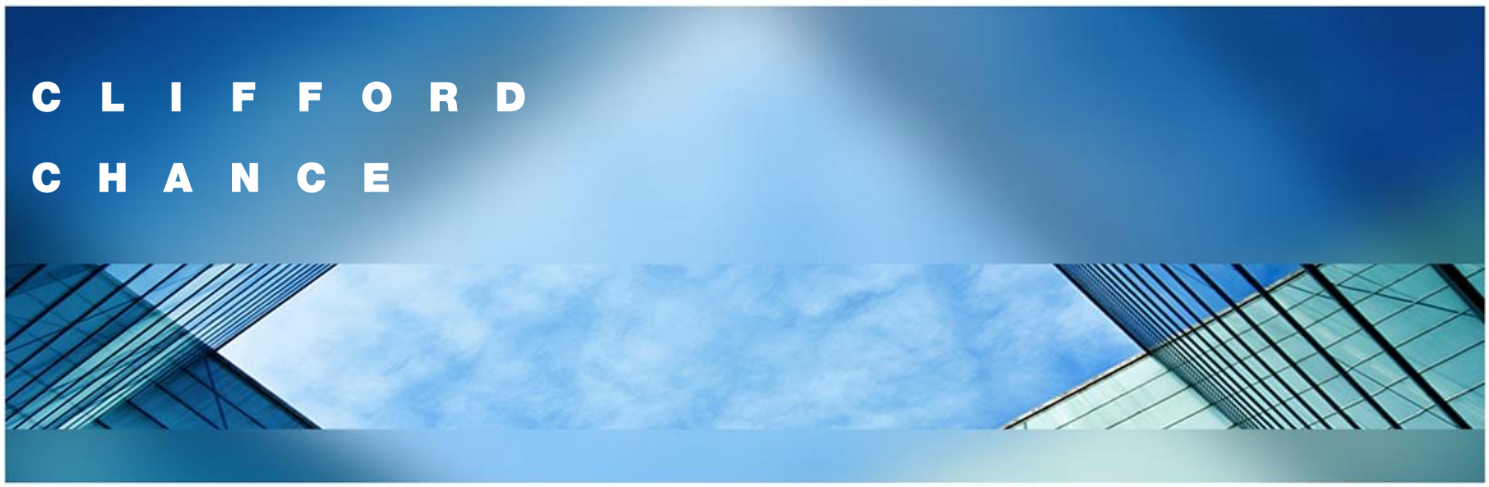

SUPREME COURT RULES THAT WHISTLEBLOWER RETALIATION PLAINTIFFS DO NOT NEED TO SHOW EMPLOYERS' "RETALIATORY INTENT"

On February 8, 2024, the Supreme Court ruled unanimously in *Murray v. UBS Securities, LLC* that whistleblowers making claims under the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act") do not need to prove that they were the victims of intentional retaliation. The ruling sets a worker-friendly standard that makes it more difficult for U.S. listed corporations to defend against whistleblower retaliation claims.

SOX'S ANTI-RETALIATION PROVISION

Section 1514A of the Act protects employees, contractors, and subcontractors of U.S. publicly listed companies from retaliation for reporting certain criminal offenses (bank fraud, mail or wire fraud, securities or commodities fraud) or potential violations of "any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders."[1] In 2010, the Dodd Frank Act ("DFA") amended § 1514A by extending it to subsidiaries and affiliates of publicly traded companies. Employers may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" because of protected whistleblowing activity.[2] Under the Act, an employee can file a complaint against his or her employer with the Department of Labor, seeking reinstatement, back pay, compensation, and other relief. If there is no final decision from the Secretary of Labor within 180 days, the employee can file suit in federal court seeking the same relief.

FACTS OF *MURRAY V. UBS SECURITIES, LLC*

Trevor Murray, a former research strategist, claimed that he was fired because he reported to his supervisor that he was being pressured to skew his independent research reports. Murray's role required him to certify the independence of his reports, in accordance with SEC regulations.[3] After his termination, Murray sued

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1 18 U.S.C. § 1514A(a)(1).
2 18 U.S.C. § 1514A(a).
3 *Murray v. UBS Securities, LLC,* No. 22-660, slip op. at 4, 601 U.S. _____ (2024).

under SOX, claiming retaliation. Following a jury verdict in Murray's favor, his employer appealed to the Second Circuit, arguing that the District Court had erred by not instructing the jury on Murray's burden to prove retaliatory intent as part of his § 1514A claim. The Second Circuit agreed and reversed the jury verdict.[4] The Supreme Court granted certiorari to resolve the question of whether the phrase "discriminate against an employee . . . because of" Section 1514A(a) protected activity requires a whistleblower to prove that the employer acted with retaliatory intent.

SUPREME COURT'S DECISION

The Court held that a whistleblower employee bears the burden to prove that the protected activity was a "contributing factor" in their firing, but is not required to prove that the employer acted with an animus-like "retaliatory intent."[5] Under the statute's burden-shifting framework, once a whistleblower shows that the protected activity was a contributing factor in the alleged "unfavorable personnel action," the burden shifts to the employer to show that it would have taken the same action in the absence of the whistleblowing activity.[6] The Court held that the only intent required under § 1514A is "the intent to take some adverse employment action against the whistleblowing employee 'because of' his protected whistleblowing activity."[7] Accordingly, it does not matter whether the employer was motivated by retaliatory animus or was motivated, for example, "by the belief that the employee might be happier in a position that did not have SEC reporting requirements" – either scenario may involve the requisite intent.[8]

The Court further rejected the employer's argument that, in the absence of a retaliatory intent requirement, employers will face liability for legitimate, nonretaliatory personnel decisions. The Court reasoned that a proper understanding of the statute and the burden-shifting framework would prevent such a result. An employer will not be held liable where it demonstrates that it would have taken the same unfavorable personnel action in the absence of the protected behavior.[9] The Court acknowledged that the contributing-factor framework is purposefully less protective of employers to ensure that whistleblowers feel "empowered to come forward" in situations where "the health, safety, or well-being of the public" is dependent on them being able to do so.[10]

IMPLICATIONS FOR U.S. LISTED COMPANIES

The *Murray* decision clearly signals to employers of U.S. listed companies that SOX's anti-retaliation protections strongly protect covered whistleblowers, making already difficult claims even harder to defend. Under *Murray's* burden-shifting framework, employers must carefully consider any actions they take with respect to employees engaging in protected activity, and carefully document the legitimate, non-retaliatory reasons for those actions.

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4 *Murray v. UBS Securities, LLC*, 43 F. 4th 254, 258 (2d Cir. 2022).
5 *Murray*, slip op. at 7-8, 10.
6 49 U.S.C. §§ 42121(b)(2)(B)(iii), 42121(b)(2)(B)(iv).
7 *Murray*, slip op. at 10.
8 *Id.*
9 See *id.* at 13.
10 *Id*. at 14.

Though *Murray* applies to claims brought under SOX, a similar standard could apply under other whistleblower protection provisions of the DFA as well, given that those anti-retaliatory provisions use analogous language and provide comparable requirements for bringing whistleblower claims.[11] The same may be said with respect to potential retaliation by financial institutions and others in the context of the recently enhanced whistleblowing rewards program that encourages tips on economic sanctions and anti-money laundering violations.[12]

Companies with global operations may have an extraterritoriality defense to whistleblower claims in some circumstances. In December 2022, the U.S. Court of Appeals for the District of Columbia Circuit held that § 1514A does not apply extraterritorially.[13] Similarly, in August 2014, the U.S. Court of Appeals for the Second Circuit found in *Liu Meng-Lin v. Siemens AG* that the DFA's anti-retaliation provisions do not apply extraterritorially.[14] However, under the DFA, even if a company can successfully avoid a retaliation suit by a whistleblower using an extraterritoriality defense, the SEC may still bring suit for the same conduct. This is because the SEC can enforce the DFA's anti-retaliation provision for "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[15]

Clifford Chance advises companies operating in the U.S. on compliance with these acts' anti-retaliation provisions and other requirements. For more information about these services, please reach out to any of the contacts listed below.

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11 18 U.S.C. § 1514A(b)(2) (providing that whistleblower actions are to follow the procedure set out in 49 U.S.C. §§ 42121(b)); 17 C.F.R. § 240.21F-2(d)(ii). *See* Implementation of the Whistleblower Provisions of Section 21f of the Sec. Exch. Act of 1934, Exchange Act Release No. 64545, 101 SEC Docket 630, 2011 WL 2045838, at *19, n. 41 (May 25, 2011) (noting that the burden-shifting analysis for claims brought under the DFA's anti-retaliation provisions is similar to the analysis for those brought under SOX).

12 In December 2022, the U.S. Congress passed the Anti-Money Laundering Whistleblower Improvement Act as part of the Consolidated Appropriations Act of 2023, to expand an existing whistleblowing program for anti-money laundering purposes to include rewards for whistleblowers providing information related to sanctions violations. *See* 31 U.S.C. § 5323(g) for provisions relating to protection of whistleblowers.

13 *Garvey v. Administrative Review Board*, No. 21-1182 (App. D.C. Dec. 23, 2022).

14 *Liu Meng-Lin v. Siemens AG,* 76 F.3d 175 (2d Cir. 2014).

15 15 U.S.C. § 78aa(b)(2).

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