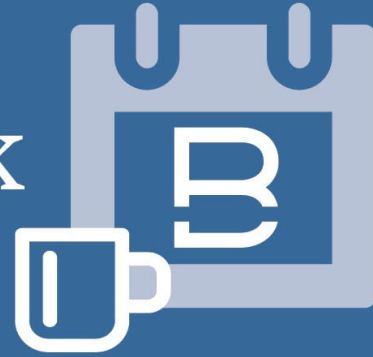


The Work Week

Bassford Remele Employment Practice Group



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Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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A Whistleblower Claim Under The Sarbanes-Oxley Act Does Not Require Retaliatory Intent

[Beth L. LaCanne](#)

As we [previewed last fall](#), the United States Supreme Court issued the first of two pivotal employment-law decisions on the docket for this current term. In a unanimous decision in *Murray v. UBS Securities, LLC*, the Supreme Court held that retaliatory intent is not required for a whistleblower claim under the Sarbanes-Oxley Act (“SOX”). In other words, an employee’s whistleblower claim asserted under SOX may be brought even if the employer’s adverse employment action was not in retaliation for the employee’s whistleblowing.

Congress enacted SOX to regulate public corporations’ financial disclosures and financial recordkeeping largely in response to the Enron scandal. Under SOX, public companies cannot “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee” who has reported conduct that the employee reasonably believes constitutes fraud or violations of SOX.

Most whistleblower retaliation claims require an employee prove that: (1) the employee engaged in protected whistleblowing activity; (2) the employer knew about the protected activity; (3) the employer took adverse-employment action against the employee; and (4) there was a causal link between the employee’s whistleblowing activity and the adverse-employment action.

The causal-connection element was at the heart of the Supreme Court’s decision in *Murray*. Specifically, the Supreme Court analyzed the role the employee’s protected activity played in the employer’s decision to take adverse-employment action. Prior to *Murray*, federal courts were split on the causal-connection requirement. Some courts held that SOX required the employee’s whistleblowing need only be a “contributing factor” to the employer’s adverse-employment action. Other courts held that the employee’s whistleblowing must have been the motive for the adverse-employment action.

In *Murray*, the Supreme Court resolved the circuit split by holding that a retaliation claim under SOX does not require retaliatory intent—only that the whistleblowing activity was a contributing factor in the employer’s decision to take the adverse employment action. The Supreme Court explained that a plaintiff did not need to prove retaliatory intent, which the Supreme Court interpreted as “something akin to animus.” In other words, a plaintiff does not need to show that the employer took adverse employment action motivated by hostility or anger toward the plaintiff’s whistleblowing activity.

Although there is now clarity as to the causal connection required for SOX claims, the “contributing factor” standard does not apply to all statutes or laws that provide protections to employees for engaging in whistleblowing activity, such as the Minnesota Whistleblower Act. But it’s possible that the Supreme Court’s decision in *Murray* may influence state court interpretations of state whistleblower laws moving forward.

Regardless of which causal-connection standard applies, employers can mitigate the risk related to whistleblower claims. For example, employers should consider implementing or refining their policies and procedures to provide a mechanism for employees to report misconduct and ensure that reports are investigated appropriately. Additionally, employers can provide regular training to managers on appropriately handling employee reports. If faced with a situation where an employee has made a report, and the employee also has some performance or behavioral issues, employers would be well-served to document why they would have taken the same action regardless of the employee’s whistleblowing activity.

At Bassford Remele, our [Employment Law](#) practice team routinely advises and represents clients regarding whistleblower claims, including navigating employment decision-making in the context of an employee who has reported purported unlawful conduct. Feel free to reach out to us for assistance!

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