Proskauer

Second Circuit: SOX Whistleblower Claims Require Retaliatory Intent

Proskauer Whistleblower Defense Blog on **September 12, 2022**

On August 5, 2022, the Second Circuit overturned a nearly $1 million jury award granted to a former employee of UBS Securities LLC ("UBS"). The Court held that the judge's instruction to the jury—that Plaintiff was "not required to prove that his protected activity was the primary motivating factor in his termination"—was incorrect as a matter of law. Instead, the Sarbanes-Oxley Act ("SOX") requires whistleblowers to specifically prove that the employer took the adverse employment action "with retaliatory intent." *Murray v. UBS Securities LLC et al.*, No. 20-4202.

Background

Trevor Murray sued UBS in 2014, alleging that he was terminated by UBS after he complained that he was pressured to alter his research, in violation of SOX's antiretaliation provision, 18 U.S.C. § 1514A. Section 1514A prohibits publicly traded companies from taking adverse employment actions to "discriminate against an employee… because of" any lawful whistleblowing activity. 18 U.S.C. § 1514A(a). At trial, the district court instructed the jury on the elements of a section 1514A claim as follows:

First, that plaintiff engaged in activity protected by Sarbanes-Oxley;

Second, that UBS knew that plaintiff engaged in the protected activity;

Third, that plaintiff suffered an adverse employment action — here, the termination of his employment at UBS; and

Fourth, that plaintiff's protected activity was a contributing factor in the termination of his employment.

* * *

For a protected activity to be a contributing factor, it must have either alone or in combination with other factors tended to affect in any way UBS's decision to terminate plaintiff's employment. Plaintiff is not required to prove that his protected activity was the primary motivating factor in his termination, or that UBS's articulated reasons for his termination . . . was a pretext, in order to satisfy this element.

While UBS contended that it had terminated Plaintiff in connection with a large reduction in force triggered by substantial recent financial losses, the jury found UBS liable and issued an advisory verdict on damages awarding Plaintiff $653,300 in back pay, no front pay, and $250,000 in non-economic damages. The district court subsequently adopted the jury's advisory verdict on damages, and awarded an additional $1,769,387.52 in attorney's fees and costs.

At issue on appeal was whether the district court properly instructed the jury on the fourth element. UBS argued that the district court erred by failing to instruct the jury that Murray had to prove UBS's retaliatory intent to prevail on his section 1514A claim. Plaintiff responded that retaliatory intent is not an element of such a claim.

Ruling

Relying on the plain meaning of the statutory language and its interpretation of a nearly identical statute, the Second Circuit concluded that "retaliatory intent is an element of a section 1514A claim" and that "[t]he district court committed a non-harmless error by failing to instruct the jury accordingly."

First, the Second Circuit determined that the "plain meaning" of the statutory language makes clear that retaliatory intent is an element of a section 1514A claim because the text of the statute prohibits discriminatory actions "because of" whistleblowing, which necessarily requires retaliatory intent – *i.e.*, the employer's adverse action must be motivated by the employee's whistleblowing.

Second, the Second Circuit found that reading retaliatory intent into this provision is consistent with the Court's previous interpretation of nearly identical language in the Federal Railroad Safety Act, and that "[w]e generally interpret identical language in different statutes to have the same meaning."

The panel concluded that it was “unconvinced” that the erroneous jury instruction did not influence the verdict, and therefore vacated the jury’s verdict and remanded to the district court for a new trial.

Implications

This narrow interpretation of section 1514A will make it more challenging for plaintiffs within the Second Circuit’s jurisdiction to prove causation. As the Second Circuit acknowledged, however, this decision is at odds with the approach of the Fifth and Ninth Circuits, which have specifically read the statute not to require retaliatory intent. It remains to be seen whether the United States Supreme Court will ultimately resolve this circuit split.

View original