

[Securities Regulation Daily Wrap Up, TOP STORY—S.D.N.Y.: Whistleblower's SOX claim for retaliatory firing survives summary judgment, \(Apr. 26, 2017\)](#)

Securities Regulation Daily Wrap Up

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By Rebecca Kahn, J.D.

A registered broker-dealer's employee who was terminated after refusing to bow to corporate pressure to skew his independent analyses for the benefit of his employer made a prima facie case surviving summary judgment on deposition testimony alone, a N.Y. district court ruled. A rational jury could find that the employee was objectively and subjectively reasonable in believing that the employer "engaged in wrongdoing" under Sarbanes Oxley Act Section 806(a) (*Murray v. UBS Securities, LLC*, April 25, 2017, Failla, K.).

The employee was a commercial mortgage-backed security strategist and executive director at UBS Securities. He claimed that CMBS division personnel pressured him to create reports bolstering the company's activities, regardless of his independent research-based opinions to the contrary. Rather than succumb to the pressure, the employee complained to his superiors and continued to turn out honest reports. After only nine months, in February 2012, he was fired. UBS maintained that he was let go due to an economic downturn, citing a November 2011 reduction in workforce and a \$4.5 billion reduction in operating income for 2011 compared to the prior year.

The employee sued for retaliatory termination under both the Dodd-Frank Act and Sarbanes-Oxley Act Section 806(a). He claimed he was fired for blowing the whistle about illegal efforts by his employer to sway his independent research analysis. Although his Dodd-Frank whistleblower protection claim had been [dismissed](#) due to a narrow reading of that provision, the SOX Section 806 claim survived.

Section 806 requires an employee to prove that he engaged in protected activity; the employer knew about it; the employee suffered an unfavorable personnel action; and the protected activity was a contributing factor in the unfavorable action. If the employee makes a prima facie case, summary judgment is only appropriate when, construing all of the facts in the employee's favor, there is no genuine dispute that the record clearly and convincingly demonstrates that the adverse action would have been taken in the absence of the protected behavior. Thus, a defendant's burden under Section 806 is greater than under other federal employee protection statutes, the court noted.

Belief is enough. UBS asserted that the whistleblower claim failed because the employee did not match the conduct he believed to be illegal with the precisely applicable securities law or regulatory provision. The Second Circuit had ruled that an employee's reported conduct "need not 'definitively and specifically' relate to one of the listed categories of fraud or securities violations . . . in order for that employee to claim protection under the statute." *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 220 (2d Cir. 2014). The employee believed it was illegal to skew or falsely certify his independent research reports in order to benefit UBS's CMBS Business, so he did not do it. He also believed that the campaign to skew or chill his independent analysis was itself illegal, so he reported it and, construing the evidence in his favor, got fired for doing so.

Contributing factor. Section 806 only requires a showing that the protected activity was merely "a contributing factor in the unfavorable action." To prevail, the employee was not required to show that the protected activity was the primary motivating factor in his termination or that the employer's articulated reason was pretext. Despite alternate reasons offered for termination, the court found that the employee's reports of efforts by CMBS Business personnel to skew or chill his independent analysis was a contributing factor to his termination. At best, the court stated, UBS's counter-narrative implicated genuine disputes of material fact, including assessments of

witness credibility, concerning how and why the employee was terminated. At worst, UBS's cost-cutting narrative was consistent with its own liability: UBS may have selected the employee for termination because of financial reasons and because he had been a "thorn in the side of his whistleblowing targets." The employee did not need to prove that his protected activity was the primary motivating factor in the termination, only that it was a contributing factor.

Deposition testimony sufficient. UBS criticized the employee's reliance on his own deposition testimony because there was no corroborating testimony and no contemporaneous documentation of any kind. But the court found the employee's own testimony sufficient to defeat summary judgment since it was not contradictory or implausible.

The case is [No. 14-cv-927](#).

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Companies: UBS Securities, LLC; UBS AG

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