Securities Regulation Daily Wrap Up, SUPREME COURT DOCKET—U.S.: High Court hears arguments over retaliation in whistleblower cases, (Oct. 11, 2023)

Securities Regulation Daily Wrap Up

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By Rodney F. Tonkovic, J.D.

The argument was over whether the SOX whistleblower protection statute requires a whistleblower to show retaliatory intent.

On October 10, 2023, the Supreme Court heard arguments in *Murray v. UBS Securities, LLC*. The justices had the task of examining the whistleblower protection provision in the Sarbanes-Oxley Act and determining whether the Second Circuit was correct in holding that employees must show retaliatory intent, which, the petitioner says, is a higher burden of proof than what is required in other courts. While the exact disposition of the Court is hard to predict, the justices had reservations about UBS's arguments and several seemed more receptive to Murray's side. Justice Gorsuch proposed a narrow ruling remanding the case back to the Second Circuit while others seemed receptive to going further (*Murray v. UBS Securities, LLC*, October 10, 2023).

In May 2023, the Court granted certiorari in this case on the question of whether a SOX whistleblower must prove retaliatory intent as part of his case in chief, or whether the employer bears the burden of proving the lack of retaliatory intent as an affirmative defense. Petitioner Trevor Murray, a former research strategist at respondent UBS, sued for retaliatory termination under both the Dodd-Frank Act and Sarbanes-Oxley Act Section 806(a). The district court dismissed the Dodd-Frank claim, but the SOX claim survived. The Second Circuit reversed, holding that the employee bears the burden of showing retaliatory intent based on its reading of Section 1514A's language, which prohibits companies from taking adverse employment actions to "discriminate against an employee ... because of" any lawful whistleblowing act.

On September 26, the Court granted the Solicitor General's motion for leave to participate in oral argument as amicus curiae and for divided argument. The government's amicus brief argues, in support of the petitioner, that SOX does not require the whistleblower to show retaliatory intent. The SEC joined in the government's brief.

Argument for Murray. Easha Anand of the Stanford Law School Supreme Court Litigation Clinic represented Murray. Anand said at the outset that the plain text of the statute answers the question at hand: the plaintiff must show that the protected activity was a contributing factor in the termination and the defendant must then prove that it did not act with retaliatory intent.

Anand was initially peppered with questions concerning discriminatory intent as a contributing factor in a discharge decision. She said that the Second Circuit required some sort of animus showing, which the Court has routinely said there's no requirement to show. Congress designed the burden-shifting framework to address discriminatory intent, Anand said, and it is shown in the second step of that framework.

Justice Gorsuch observed that if the Second Circuit opinion is read to require both an intent to discriminate and then an intent to retaliate, that approach has been rejected in the Title VII context many times. He wondered if it would be "enough for the day" to reject the idea that there is a further intent requirement beyond an intent to discriminate "and not get into how this statute overall works."

Andrew Yang, appearing for the U.S. as amicus curiae supporting Murray, argued that the Second Circuit's holding is incorrect. According to Yang, the Court's Title VII cases make it clear that discrimination does not turn on motive or animus, but rather that the decision to treat differently is made because of the protected activity. And, that protected activity simply plays a part in producing that decision. When asked to differentiate

the government's position from the petitioner's, Yang ultimately said that "the thing that has to be a contributing factor has to be the protected behavior itself, not some chain of events that gets to the ultimate outcome."

Justice Kagan referred to Justice Gorsuch's narrow approach as a relatively "bare-bones disposition." Yang said that he would be happy to simply overturn the Second Circuit, but if the issue of discriminatory intent is not settled, the issue may return to the court again. Gorsuch, defending his position, said that the Court has reason to be careful because it is their first look at this statute. Yang said that if the court doesn't address the role of the burden shifting scheme, it can leave open for litigation "a cogent argument made by the other side which ultimately doesn't work."

Argument for UBS. Eugene Scalia (son of the late Justice Antonin Scalia) argued for UBS Securities. Scalia argued that the petitioner overread the burden of proof provision, which, he said, only addresses causation and not all of the elements a plaintiff must establish. There is a "strong presumption," Scalia said, that discriminatory intent is the plaintiff's burden—it is a basic element of a discrimination case.

The justices took issue with Scalia's formulation of causation and tried to pin down how that differed from intent (Jackson) or how proving it would be different than the causation burden-shifting framework (Barrett, Kagan, and Sotomayor). Justice Gorsuch summed up Scalia's position as requiring mens rea and causation, with causation being established through the burden-shifting mechanism, but he and Scalia butted heads as to needing a further intent to retaliate. "Retaliation" is not in the statute, Gorsuch said, asking if Scalia was reading things into the statute that aren't there.

The petition is No. 22-660.

Attorneys: Easha Anand (Stanford Law School Supreme Court Litigation Clinic for Trevor Murray. Anthony A. Yang, U.S. Department of Justice, as amicus supporting the petitioner. Eugene Scalia (Gibson, Dunn & Crutcher LLP) for UBS Securities, LLC.

Companies: UBS Securities, LLC

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