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A Review of Recent Whistleblower Developments: July 27, 2023

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Whistleblower Developments is a periodic report covering significant cases, decisions, proposals, and legislation related to whistleblower statutes and how they may impact your business. Recent developments include:

- SCOTUS to Review SOX Retaliation Case Involving Burden of Proof of Retaliatory Intent
- Federal Court Denies Summary Judgment to Defendants Arguing Plaintiff Was Not an "Employee" Under SOX
- Federal Court Rejects Plaintiffs' Effort to Force Company to Reinstate Them
- Third Circuit Denies Whistleblower Petition for Review but Questions SEC's Application of Whistleblower Rules
- SEC Seeks, and Fifth Circuit Grants, Remand of Its Own Order Denying an Award
- SEC Awards Single Whistleblower Record-Breaking Sum of Nearly $279 Million

SCOTUS to Review SOX Retaliation Case Involving Burden of Proof of Retaliatory Intent

On May 1, 2023, in *Murray v. UBS Securities, LLC*, No. 22-660, the United States Supreme Court granted former UBS Securities employee Trevor Murray's petition for a writ of certiorari to review Murray's retaliation claim against UBS under Section 1514A of SOX. In 2018, a jury found in favor of Murray, who had sued UBS Securities for violating SOX's anti-retaliation protection when UBS fired

Murray after he accused his superiors of pressuring him to skew his research. In *Murray v. UBS Securities, LLC*, 43 F.4th 254 (2d Cir. 2022), the Second Circuit reversed the jury's verdict on appeal, holding that Murray failed to prove by a preponderance of the evidence that UBS fired Murray with retaliatory intent under Section 1514A, thereby rejecting Murray's argument that the burden lay not on the employee to prove retaliatory intent but on the employer to prove a lack thereof. In its ruling (which we covered in a prior newsletter), the Second Circuit acknowledged a circuit split on this issue, recognizing its departure from the Fifth and Ninth Circuits while analogizing its approach to a similar approach by the Second, Seventh, and Eighth Circuits with respect to the similarly worded Federal Railroad Safety Act, 49 U.S.C. § 20109(a). On review, the Supreme Court might resolve this split and guide practitioners on a crucial aspect of retaliation claims brought under SOX.

Federal Court Denies Summary Judgment to Defendants Arguing Plaintiff Was Not an "Employee" Under SOX

On April 7, 2023, in *Zornoza v. Terraform Global, Inc.*, the federal district court for the Southern District of New York issued a mixed summary judgment decision in a SOX whistleblower case. The plaintiff had claimed he was terminated in retaliation for alleging that a public energy company's CEO and CFO had made misrepresentations to investors regarding the company's liquidity and cashflow. The plaintiff had been CEO of two other public companies ("Yieldcos") that the energy company had created to acquire facilities and projects developed by it. The public energy company had been the majority shareholder and held majority voting power of the Yieldcos. The Yieldcos sought summary judgment on the grounds that the plaintiff was not their "employee" for SOX purposes but had been employed by the public energy company and paid by one of its subsidiaries; indeed, in their public filings the Yieldcos had stated they did not have any employees. The court denied summary judgment, however, finding the plaintiff had provided sufficient evidence to permit a reasonable trier of fact to find he was an employee of the Yieldcos, including evidence he was supervised by their boards, and the boards had the authority to, and in fact did, terminate him.

In addition, the court granted motions for summary judgment filed by the CEO and CFO of the public energy company, finding insufficient evidence they could be liable for retaliation. Finally, the court denied both sides' motions for summary judgment regarding the presence of retaliatory motive for the plaintiff's termination, determining this was an issue for the trier of fact.

Federal Court Rejects Plaintiffs' Effort to Force Company to Reinstate Them

On April 19, 2023, in *Gulden v. Exxon Mobile Corp.*, No. 22-7418, the federal court for the District of New Jersey granted the defendant company's motion to dismiss a SOX whistleblower complaint that sought to enforce an Occupational Safety and Health Administration (OSHA) order. The employees had made internal complaints of purported overstatements regarding certain anticipated oil and gas production. After their internal complaints, the plaintiffs were terminated. After they filed the required SOX whistleblower complaint with OSHA, OSHA investigated and issued a preliminary order instructing the company to reinstate the plaintiffs to their former positions. The defendant filed an objection and ignored the order to reinstate the plaintiffs. The plaintiffs then filed a SOX complaint asking the court to enforce the OSHA reinstatement order while the OSHA review process continued. The court noted that SOX actions are governed by the procedures of another statute that grants courts jurisdiction to approve "final orders." The court agreed with the few courts that have addressed the issue, finding that district courts lack jurisdiction to enforce a preliminary order of reinstatement. While acknowledging SOX was intended to protect whistleblowers, the court said SOX sets deadlines for prompt review and decision making regarding whistleblower matters.

Third Circuit Denies Whistleblower Petition for Review but Questions SEC's Application of Whistleblower Rules

On May 19, 2023, at the request of non-party Bloomberg Industry Group, Inc., the Third Circuit unsealed its March 23, 2023 opinion denying a claimant's ("Doe") petition for review of the SEC's denial of his application for a whistleblower award. Doe had argued he was entitled to an award because he was similarly situated to another claimant ("Claimant 1"), who received a $14 million award. Both claimants had authored a report that examined a company and CEO that had paid millions in penalties, but whereas Claimant 1 had sent the report directly to the SEC a few days after the report was published online, Doe never directly provided the report to the SEC. Doe's failure to do so was the primary reason for the Court's denial of Doe's petition for review. (See our prior newsletter discussing the SEC order, here.) The Third Circuit concluded the SEC had not acted arbitrarily or capriciously in concluding that Doe failed to meet the SEC's definition of a "whistleblower," particularly since Doe had not submitted his information as required by SEC regulations. The bottom line, according to the Third Circuit, was that Doe had not submitted his information to the SEC.

Notwithstanding, the Court (in a footnote) said the SEC's justification for awarding Claimant 1 $14 million and Doe nothing "leaves something to be desired." The Court observed that despite the SEC having previously argued that awards should be granted only where the tip "significantly contribute[d] to the success of the [SEC] action" (citing *Kilgour v. SEC*, 942 F.3d 113, 123 (2d Cir. 2019)), "Claimant 1's email had no ostensible impact on the investigation [as] SEC investigators found the Report on their own." The Third Circuit also questioned the SEC's invocation of the "original source" rule in light of the fact that the SEC had found the subject report on its own before receiving it from Claimant 1. The Court cited the SEC's rejection of the "original source" exception in *Kilgour*, where two claimants were denied awards because they submitted information to the SEC that the SEC had already received from a separate claimant. The information in *Kilgour* included an expert report that, although prepared by the denied claimants, had been previously submitted by the separate claimant. There, the SEC decided the "original source" exception did not apply to the later submission of the report by the crafters themselves, because they had previously interacted with the SEC in their capacity as the separate claimant's experts.

SEC Seeks, and Fifth Circuit Grants, Remand of Its Own Order Denying an Award

On April 19, 2023, in *Bass v. SEC*, No. 22-60674 (5th Cir.),the Fifth Circuit granted the SEC's unopposed motion to remand its order on review for further consideration. In its final order, the SEC had denied an award to the claimant, Kyle Bass, at least in part because it found the information Bass had provided was submitted by an entity wholly owned by Bass rather than by Bass in his individual capacity. Bass petitioned the Fifth Circuit to review the SEC's order, and in his opening brief Bass provided evidence that the entity's general counsel, who had provided the information to the SEC, was working on behalf of both Bass's entity *and* Bass in his individual capacity. The SEC acknowledged this evidence and its implications, and moved the Court to remand the matter back to the SEC so the SEC might address the evidence and reconsider the award determination.

SEC Awards Single Whistleblower Record-Breaking Sum of Nearly $279 Million

On May 5, 2023, the SEC announced its largest-ever whistleblower award under the SEC's whistleblower program: nearly $279 million. Although the whistleblower's information was reportedly

submitted only after the SEC opened the investigation and related to only certain of the misconduct charged, the information reportedly helped expand the investigation and saved the SEC time and resources. Further, the whistleblower reportedly provided ongoing assistance, which included multiple written submissions, communications, and interviews.

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