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Abandoning "Contributing Factor" Causation: The Clear Path Forward to Settle the Split on Whistleblower Retaliation Claims

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"There is nothing more fundamental in the law than the premise that no man is liable for injury to another unless he has caused it."[1]

Claims are won and lost on the element of causation. Consequently, finding the right balance for the burden to prove causation is crucial to ensure fair and uniform outcomes. Yet, the burden to prove a causal link in some whistleblower retaliation claims has, until very recently, been out of balance. In a recent pivotal opinion, the

[1] John Sherman Myers, *Causation and Common Sense*, 5 U. MIAMI L. REV. 238 (1951).

Second Circuit meticulously analyzed both the statutory text and purpose behind the whistleblower retaliation provisions of the Sarbanes-Oxley Act (SOX). After its analysis, the court concluded that demonstrating some retaliatory intent on the part of the defendant is necessary in a plaintiff's burden to prove the element of causation. Before this opinion—and in several federal circuits to this day—a plaintiff needed only to show that his or her whistleblowing activity contributed ***in any way*** to an adverse employment action. The Second Circuit opinion diverges sharply from the approach taken by other federal circuits, creating a split that will be taken up by the nation's highest Court. Additionally, the Second Circuit opinion offers a welcome recalibration of the burden of proof in SOX whistleblower cases, one that will ensure a greater degree of fairness and consistency, better fulfilling the law's objectives.

I. Background and the Development of "Contributing Factor" Causation

Legal protections for whistleblowers have existed nearly as long as the country itself.[2] By the end of the 20th century, whistleblower protections had become robust and comprehensive, due to the implementation of new federal laws and regulations.[3] The whistleblower landscape expanded significantly in 2002 when Congress passed SOX, aimed at breaking the "corporate code of silence" that had catalyzed massive scandals such as Enron and WorldCom.[4] In Section 806 of SOX, codified as amended at 18 U.S.C. § 1514A, Congress incorporated protections for whistleblowers who believe they have been retaliated against for speaking out about corporate fraud or other wrongdoing.[5] Under SOX, after exhausting administrative remedies at the outset with the Department of Labor (DOL), whistleblowers may sue a corporation in federal court, resulting in a considerable quantity of whistleblower retaliation claims on dockets nationwide.[6]

Modeled after other employment discrimination and whistleblower statutes, Section 1514A prohibits an employer from taking adverse action against an employee

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[2] NAVEX, *A History of Whistleblowing in America*, JD Supra (July 29, 2022), https://www.jdsupra.com/legalnews/a-history-of-whistleblowing-in-america-1001292/.

[3] *Id.*

[4] S. Rep. No. 107–146, at 4-5 (2002).

[5] 18 U.S.C. § 1514A (2002).

[6] *Id.* § 1514A(b)–(c).

because of any whistleblowing activity protected under the statute.[7] In crafting Section 1514A, Congress expressly incorporated the identical elements and burden of proof from another antiretaliation statute, AIR21, which provides whistleblower protection for employees in the aviation industry.[8] Under AIR21's burden-shifting framework, to prevail on a whistleblower claim, an employee must prove that she engaged in protected activity, that the employer knew of such protected activity, and that the employee suffered an unfavorable personnel action.[9]

Finally, to prove the element of causation, whistleblowers must demonstrate that the circumstances raise an inference that the protected activity was a "contributing factor" in the employer's decision to take an unfavorable personnel action.[10] The concept of "contributing factor" as a causation standard originated in 1989 with the Whistleblower Protection Act (WPA), which provides whistleblowing protections for federal employees.[11] Prior to the WPA, federal employees were required to prove that protected speech was a "substantial" or "motivating" factor in the unfavorable personnel decision.[12] In the WPA, Congress replaced this with the now-commonplace "contributing factor" language, which was described as encompassing "any factor, which alone or in connection with other factors, tends to affect in any way the outcome

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[7] *Id.* § 1514A(a) (2002); *see also* Valerie Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 832-37 (2007).

[8] 18 U.S.C. § 1514A(b)(2)(C) (expressly incorporating burdens of proof contained in 49 U.S.C. § 42121 (b)).

[9] *Id.* § 1514A (a); *see, e.g.*, Van Asdale v. Int'l Game Tech., 577 F.3d 989, 996 (9th Cir. 2009) (outlining elements of a whistleblower retaliation claim).

[10] 49 U.S.C. § 42121 (b)(2)(B).

[11] *See* Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531 (1999); *see also* Jason Zuckerman, *What Is the Contributing Factor Causation in a SOX Whistleblower Case?* (Dec. 11, 2022), https://www.zuckermanlaw.com/clear-convincing-evidence-whistleblower-case/.

[12] Marano v. Dep't of Just., 2 F.3d 1137, 1140 (Fed. Cir. 1993) ("Rather than being required to prove that the whistleblowing disclosure was a 'significant' or 'motivating' factor, the whistleblower under the WPA . . . must evidence only that his protected disclosure played a role in, or was 'a contributing factor' to, the personnel action taken."); *see also* Devine, *supra* note 11, at 554.

of the decision."[13] The result has been interpreted as a "substantial reduction" in a whistleblower's burden to prove causation, allowing a plaintiff to succeed if she can show that her protected activity had ***any*** role, no matter how insignificant, in the decision to act adversely toward her.[14] To date, most of the corporate whistleblower protections enforced by the DOL incorporate the "contributing factor" language.[15]

II. *Murray v. UBS Securities*: The Requirement of Retaliatory Intent and the Creation of a Circuit Split

The recent Second Circuit opinion, *Murray v. UBS Securities, LLC*, critically reexamined the conventional interpretation of "contributing factor" to determine if it aligned with the statute's text and purpose.[16] In both respects, the court unanimously found that it did not.

In 2011, Trevor Murray was hired as a commercial mortgage-backed securities strategist by UBS Securities (UBS), a global financial services firm. As part of his role, Murray was responsible for researching and reporting on some of UBS's products, services, and transactions. Murray was further required by the Securities and Exchange Commission to certify the independence and accuracy of those reports. According to Murray, two leaders of UBS's trading desk improperly pressured him to skew his research and publish reports that were favorable to the company's business strategy. Murray reported his concerns to superiors and, not long after, was laid off. Although there was undoubtably temporal proximity between Murray's disclosures and his

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[13] *Marano*, 2 F.3d at 1140 (citing 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)).

[14] *Id.*; Watnick, *supra* note 7, at 850; *see also Investigator's Desk Aid to the Sarbanes-Oxley Act (SOX) Whistleblower Protection Provision*, OSHA Whistleblower Protection Program (Sept. 27, 2018), https://www.osha.gov/sites/default/files/SOXDeskAid.pdf.

[15] Brief of Senator Ron Wyden and Representative Jackie Speier as Amicus Curiae in support of plaintiff-appellee-cross-appellant, Murray v. UBS Sec., LLC, No. 20-4202 (2nd Cir. filed July 13, 2021). https://www.zuckermanlaw.com/wp-content/uploads/AMICUS-CURIAE-BRIEF-OF-SENATOR-RON-WYDEN-AND-REPRESENTATIVE-JACKIE-SPEIER-AND-IN-SUPPORT-OF-THE-PLAINTIFF-APPELLEE-CROSS-APPELLANT.pdf.

[16] Murray v. UBS Sec., LLC, 43 F.4th 254 (2d Cir. 2022).

termination, UBS offered evidence that the decision to terminate his employment was unrelated to his reports and instead was a result of financial difficulties at the company. At trial, the district court instructed the jury that Murray need only prove that his protected activity was a "contributing factor" in the termination of his employment. He did not need to prove that it was the primary or even a motivating factor in his termination, nor did he need to offer evidence that UBS's decision was motivated by retaliatory intent. Murray was ultimately successful at trial and was awarded over $2 million in damages, fees, and costs. UBS appealed.

The Second Circuit, in a three-judge panel opinion, vacated the award and remanded the case, finding that the district court had erred in failing to instruct the jury that proving "contributing factor" requires a showing of "retaliatory intent." The court was "compelled" to its conclusion based on the "unambiguous, ordinary meaning" of the statute.[17] First, the court thoroughly dissected the statutory language. The statute provides that no covered employer "may discharge, demote, suspend, threaten, harass, or in any other manner ***discriminate*** against an employee . . . ***because of*** whistleblowing."[18] The court then analyzed this phrasing against the plain-language definition of "discriminate" and "because." Relying on those definitions, the court interpreted the statute to prohibit discriminatory actions "caused by—or 'because of'—whistleblowing" and found that "actions are 'discriminatory' when they are based on the employer's conscious disfavor of an employee for whistleblowing."[19] Therefore, a discriminatory action "because of" whistleblowing necessarily required retaliatory intent. As such, the district court's instructions that Murray's protected activity need only be a "contributing factor" that "in any way" influenced UBS's decision was a misinterpretation of the statute's "explicit requirement" that the employer's conduct be "discriminatory."[20]

Supporting this conclusion, the court also relied on its previous interpretation of nearly identical language in the Federal Railroad Safety Act (FRSA). In *Tompkins*, the Second Circuit had interpreted the whistleblower antiretaliation provision of the FRSA and held that "some evidence of retaliatory intent" was a necessary component

[17] *Id.* at 259.

[18] *Id.* at 260 (citing 18 U.S.C. § 1514A(a)) (emphasis added).

[19] *Id.* at 259 (internal citations omitted).

[20] *Id.*

of an FRSA claim.[21] Specifically, the court had pointed to the statute's language that referenced "discrimination" as mandating some evidence of retaliatory intent. Finally, the court noted that its interpretation of the causation standard was in line with the proper characterization of whistleblower retaliation as a "tort of discriminatory animus," which, under traditional principles, requires a victim to prove that she was subjected to ***intentional*** retaliation prompted by her protected activity.[22] With this in mind, the *Murray* court conceded that although there may have been circumstantial evidence that UBS terminated Murray in retaliation, this evidence was insufficient to establish causation under its interpretation of Section 1514A.

The Second Circuit's approach departs from the interpretation of several other federal circuits. The Fifth and Ninth Circuits, analyzing nearly identical issues, have concluded that retaliatory intent is ***not*** an element of a whistleblower's retaliation claim. In 2014, in *Halliburton Inc. v. Administrative Review Board*, an employer argued that it should not be enough for a whistleblower to show that his protected conduct was merely a "contributing factor" that "in any way" impacted the adverse action.[23] Rather, the whistleblower should be required to prove that there was some "***wrongfully motivated*** causal connection."[24] The Fifth Circuit rejected this argument, adopting an expansive interpretation of the "contributing factor" standard that could impose liability ***regardless of the employer's motives***. The Ninth Circuit took a similar approach in its 2010 decision in *Coppinger-Martin v. Solis*, concluding that proof of an employer's motivation was unnecessary to meet the whistleblower's prima facie burden.[25] Notably, however, these opinions offer little substantive reasoning in support of their conclusions, a fact that the *Murray* court recognized when it noted that both *Halliburton* and *Coppinger-Martin* had overlooked the plain meaning of the text.[26]

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[21] Tompkins v. Metro-N. Commuter R.R. Co., 983 F.3d 74 (2d Cir. 2020).

[22] *Id.* at 261.

[23] Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 263 (5th Cir. 2014).

[24] *Id.* (emphasis added).

[25] Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010).

[26] *Murray*, 43 F.4th at 261 n.7.

III. The Supreme Court Should Adopt the Second Circuit's Interpretation

The *Murray* opinion has divided the legal community, creating a split among the circuits and uncertainty over how lower courts should allocate the burden of causation in whistleblower actions.[27] On May 1, 2023, the Court granted Murray's petition for certiorari.[28] The causation standard as interpreted by *Murray* should guide the Court's decision. Not only does the *Murray* interpretation better serve the purpose and spirit of Section 806(a), it also is in alignment with the Court's understanding of the meaning of the word "because" in statutory text. Moreover, to mandate the "contributing factor" standard as interpreted by the Fifth and Ninth Circuits would result in continued confusion, inconsistency and, ultimately, unfairness.

A. The Supreme Court Has Clarified That "Because" Means "But For"

Since the Ninth and Fifth Circuits wrote their opinions on the "contributing factor" standard, the Supreme Court has clarified how it views the word "because." In *Nassar*, the Supreme Court made clear in its analysis of the antiretaliation protections under Title VII that "because of" means "but for" causation.[29] Just as the Second Circuit did in *Murray*, the Court in *Nassar* came to this conclusion by examining the ordinary meaning of the statutory language, explaining that "because" means "by reason of" or "on account of." As such, the Court concluded that "because of" required "proof that the desire to retaliate was ***the*** but-for cause of the challenged employment action."[30] The Court revisited the meaning of "because" in its 2020 decision *Bostock v.*

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[27] The *Murray* decision also conflicts with the DOL's interpretation of the "contributing factor" standard in both administrative proceedings and litigation. *See, e.g.*, Hutton v. Union Pac. R.R. Co., ARB No. 11-091, 2013 WL 2450037 (ARB May 31, 2013); *see also Investigator's Desk Aid to the Sarbanes-Oxley Act (SOX) Whistleblower Protection Provision*, OSHA Whistleblower Protection Program (Sept. 27, 2018), https://www.osha.gov/sites/default/files/SOXDeskAid.pdf.

[28] *See Murray v. UBS Sec., LLC*, SCOTUSBlog, https://www.scotusblog.com/case-files/cases/murray-v-ubs-securities-llc/ (last visited May 31, 2023).

[29] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

[30] *Id.* at 339 (emphasis added).

Clayton County Georgia.[31] This time in the context of Title VII status discrimination, the Court reiterated that "in the language of the law . . . Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation." [32] Furthermore, according to the Court, "[t]hat form of causation is established whenever a particular outcome would not have happened 'but for' the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."[33]

The relevant antiretaliation provision of SOX incorporates the same "because of" language that the Court has now defined twice over in both *Nassar* and *Bostock*. Section 1514A provides that "[n]o company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee . . . ***because of*** any lawful [protected activity] done by the employee." As such, following the clear guidance of *Nassar* and *Bostock*, "because of" in this context should be interpreted as "but for" causation. The interpretation that a whistleblower need only prove that her actions were in ***any*** way a "contributing factor" is far from the "simple" and "traditional" standard the Court envisioned. Moreover, it directly conflicts with the Court's *instruction* to change one thing at a time to arrive at ***the*** but-for cause. On the other hand, the *Murray* court's view, which requires retaliatory intent, closely aligns with the Court's mandate. Finally, *Murray's standard* would help to simplify the legal landscape, bringing retaliation claims brought under SOX in line with those under Title VII. Given that both statutes aim to address the same concern, curbing employer retaliation, it is only logical that the burdens of proof be aligned.

B. The "Contributing Factor" Standard Creates Inconsistency, Uncertainty, and an Unbalanced Burden

The Court should also consider the inconsistency and uncertainty that are fostered by the "contributing factor" standard as interpreted by the Ninth and Fifth Circuits. This is especially true because it remains unclear what an employee must do to meet the "contributing factor" standard if he or she does not need to show retaliatory

[31] Bostock v. Clayton Cnty, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

[32] *Id.* at 1739.

[33] *Id.*

animus.[34] For example, when instructing the jury on this element, the district court in *Murray* provided the following instructions:

> 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.[35]

As the Second Circuit highlighted, these instructions leave open the possibility of several illogical and inconsistent outcomes. The "tend to affect" language increases the level of abstraction to the point that a jury could look beyond whether whistleblowing activity ***actually*** caused the termination to whether it was the "sort of behavior" that ***would tend to affect*** a termination decision in the hypothetical sense.[36] Moreover, "tend to affect in any way" is broad and imprecise, offering little guidance to juries and leaving significant room for fact-finders to disagree about how attenuated a connection is permissible. Under the same facts, one jury could find that the protected activity had some small impact on the adverse action, where another jury could reach the exact opposite result. Finally, "tended to affect in any way" would, of course, include the obvious situations in which Murray's whistleblowing would have led to his termination. Yet, it also logically encompasses scenarios where, because of Murray's whistleblowing, UBS chose ***not*** to terminate him. Under that reasoning, should a jury be able to find an employer liable for retaliation if it planned to lay off an employee but, after hearing about his whistleblowing activity, chose to delay the termination to conduct an investigation, and then subsequently terminated the employee when the investigation did not corroborate the employee's concerns? Under the Fifth and Ninth Circuits' interpretation, this situation falls within the "contributing factor" standard. Surely such situations were not what Congress intended when enacting protections against retaliatory practices.

Without requiring any evidence of retaliatory intent, plaintiffs often can rely on little more than evidence of temporal proximity to meet their burden that their

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[34] Watnick, *supra* note 7, at 849-51.

[35] *Murray*, 43 F.4th at 258.

[36] *Id.* at 260 n.4.

protected activity was a "contributing factor" in the adverse employment action. In fact, some courts and the DOL have held that temporal proximity between the protected activity and the adverse action ***alone*** may be sufficient to satisfy the contributing-factor test.[37]

If temporal proximity alone can fulfill the plaintiff's prima facie case, defendants face an unfair burden. This was evidenced in *Deltek, Inc. v. Department of Labor*, where the Fourth Circuit affirmed a finding that an employer was liable for terminating an employee in violation of SOX based primarily on proximity in time between the protected activity and the termination.[38] Judge Agee wrote a compelling dissent. He criticized the determination that the plaintiff could establish the "contributing factor" standard merely by showing that her termination came after her protected activity, even though there was no other evidence that "tied the chain of events to causation other than happenstance."[39] Judge Agee argued that to find causation based merely on a sequence of events was a logical fallacy based on "the false inference that a temporal relationship proves a causal relationship."[40] He continued by stating that "[r]etaliation under SOX necessarily requires more than the mere occurrence of protected activity followed by adverse employment action . . . the statute cannot be read to mean . . . that whenever an employee engages in protected activity prior to an adverse employment action . . . the plaintiff has met her burden as to causation."[41]

Yet, as the majority ruling in *Deltek* demonstrates, the "contributing factor" standard allows for just this type of scenario to occur. As such, defendants face an unfair burden, especially at summary judgment. Even when an employer puts forward robust evidence of its reasons for termination, and they are entirely unrelated to the plaintiff's protected activity, summary judgment can be denied if the plaintiff can point to some form of temporal proximity, regardless of whether it is, in the words of Judge Agee,

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[37] *See Van Asdale*, 577 F.3d at 1003; Deltek, Inc. v. Dep't of Lab., 649 F. App'x 320, 326 (4th Cir. 2016).

[38] *Deltek, Inc.*, 649 F. App'x at 326.

[39] *Id.* at 336 (Agee, J. dissenting).

[40] *Id.* at 337.

[41] *Id.*; *see also* Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1179 (7th Cir. 1998) ("Timing may be an important clue to causation, but does not eliminate the need to show causation—and [the plaintiff] really has nothing but the *post hoc ergo propter hoc* 'argument' to stand on.").

"merely happenstance." The standard is all the more uncertain given that the range of temporal proximity is imprecise. Although temporal proximity is typically found within a few weeks or months, in at least one case temporal proximity was interpreted to mean a period of a ***full year*** between the reporting activities and the adverse action.[42] This is on top of the fact that defendants already face a skewed burden with respect to plaintiffs' prima facie burdens. SOX's broad definition of "protected activity" protects employees who blow the whistle on actions they ***reasonably believe*** violate certain laws.[43] This means that a plaintiff can still prevail even if she is wrong about whether the corporate conduct is even illegal or improper. Thus, under the current "contributing factor" standard, even defendants with strong evidence of an alternative reason for taking adverse action may be forced into expensive litigation based on little more than a timing coincidence.

IV. Conclusion

A key purpose in creating the SOX whistleblower protections was to provide a "uniform" means to address concerns of corporate retaliation so that plaintiffs did not need to rely on the "patchwork and vagaries" of differing laws.[44] Today, the legal landscape in this area is anything but uniform. Moreover, the disagreement over the appropriate standard has implications far beyond claims under SOX. Nearly two dozen whistleblower statutes, covering sectors from nuclear energy to food safety, incorporate the language set out in AIR21 and SOX.[45] As such, clarifying the causation standard will have an impact on how lower courts interpret the entire statutory family. The

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[42] Thomas v. Ariz. Pub. Serv. Co., 1989-ERA-19 (Sec'y Sept. 17, 1993); *see also* Watnick, *supra* note 7, at 851.

[43] 18 U.S.C. § 1514A(a)(1).

[44] 9 S. Rep. No. 107-146, at 10 (2002).

[45] These statutes include the National Transit Systems Security Act, 6 U.S.C. § 1142; Consumer Financial Protection Act, 12 U.S.C. § 5567; Consumer Product Safety Improvement Act, 15 U.S.C. § 2087; FDA Food Safety Modernization Act, 21 U.S.C. § 399d; Patient Protection and Affordable Care Act, 29 U.S.C. § 218c; Seaman's Protection Act, 46 U.S.C. § 2114; Federal Railroad Safety Act, 49 U.S.C. § 20109; Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171; Surface Transportation Assistance Act, 49 U.S.C. § 31105; Pipeline Safety Improvement Act, 49 U.S.C. § 60129. *See* Brief of Senator Ron Wyden and Representative Jackie Speier as Amicus Curiae, *supra* note 15.

Court now has the opportunity to address the inadequacies of the "contributing factor" standard that the *Murray* court brought to light. In doing so, the Court has the opportunity to craft a more balanced standard that is aligned with the statutory text and honors the purpose of the law.

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