No. 22-660

IN THE

Supreme Court of the United States

TREVOR MURRAY,

Petitioner,

v.

UBS SECURITIES, LLC AND UBS AG,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE AMICUS[1]

SHRM, the Society for Human Resource Management, is the world's largest association devoted to human resource management. With nearly 325,000 members in 165 countries, SHRM impacts the lives of more than 235 million workers and families globally. The purposes of SHRM, as set forth in its bylaws, are to promote the use of sound and ethical human resource management practices in the profession, and (a) to be a recognized world leader in human resource management; (b) to provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resource management; (c) to be the voice of the profession on human resource management issues; (d) to facilitate the development and guide the direction of the human resource profession; and (e) to establish, monitor, and update standards for the profession. As an influential voice, SHRM advances the human resource profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy.

SHRM offers this amicus brief in support of Respondents because the issues raised in this appeal are of great importance to both SHRM's members and the business community at large. Reversing the

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[1] Pursuant to Supreme Court Rule 37.6, SHRM states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than SHRM, its members, or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, SHRM notified counsel for the parties of its intent to file this brief, and no party objected to the filing.

decision below would create a lack of clarity for human resource professionals and employers, and would also create inconsistency in the standards for similar retaliation claims, all contrary to Congress' express intent.

SUMMARY OF THE ARGUMENT

Human resource professionals are charged with a myriad of responsibilities, including, and most pertinent here, to conduct workplace investigations for claims of discrimination, retaliation, interference, and similar matters. In the often complex, years-long litigation that may follow these claims, human resource professionals frequently serve as the go-between with regard to an employer and the courts, the parties, and the jury to testify about, or otherwise describe, the intra-office policies and procedures of the employer applicable to allegations of wrongdoing. Balancing the need for compliance with federal law against the ability of companies to operate and make day-to-day employment decisions (like termination of employment) has unfortunately been a tug-of-war in which human resource professionals often find themselves in the middle. The Sarbanes-Oxley Act ("SOX") has only added complexities to these responsibilities, because employees often allege in hindsight that they engaged in some form of SOX protected activity.

The Second Circuit's decision below eases some of the tension of that tug-of-war by promoting clarity and consistency in federal law. SHRM therefore asks the Court to affirm the Second Circuit's decision. SHRM further asks the Court to provide an analytical framework for whistleblower retaliation claims under

SOX that leverages existing law relating to discrimination and retaliation claims, so that human resources professionals do not also have to become securities experts in order to perform their duties in a manner consistent with the law.

In particular, the Second Circuit's holding that SOX plaintiffs asserting retaliation claims must demonstrate retaliatory intent is consistent with the statutory language and with other laws relating to retaliation and discrimination. The Second Circuit's decision also provides much-needed clarity about what is and is not retaliation. The approach taken by the District Court below, and urged by petitioner Trevor Murray ("Petitioner") in this Court, would leave human resource professionals, employers, litigants, and courts guessing about what conduct violates SOX, and would also force human resource professionals to become securities experts in order to decipher which standard applies to which conduct.

The Second Circuit's holding also appropriately reflects the burden of proof in SOX cases. The Second Circuit's decision requires that a plaintiff show retaliatory intent in order to demonstrate that the plaintiff's protected activity was a "contributing factor" in the adverse employment decision, which then shifts the burden to the employer under the statutory framework. Without an intent requirement, human resource professionals and employers would be left in the position of proving that they did not engage in certain conduct as opposed to the traditional requirement that the affected employee bear the burden of proving that they did engage in certain conduct with the requisite state of mind.

In short, SHRM respectfully asks the Court to affirm the decision of the Second Circuit.

ARGUMENT

I. REQUIRING A SHOWING OF RETALIATORY INTENT IS CONSISTENT WITH THE STATUTORY TEXT AND GIVES EMPLOYERS AND HR PROFESSIONALS CLARITY ABOUT THE TYPE OF CONDUCT THAT GIVES RISE TO LIABILITY.

It is critically important for employers and human resource professionals to be able to understand exactly what type of conduct gives rise to liability. The Second Circuit's holding provides much-needed clarity about what conduct gives rise to liability under the relevant provision of SOX. It also is (i) consistent with the plain language of the statute; (ii) consistent with the interpretation of similar statutes; (iii) avoids the vagueness of the standard urged by Petitioner; and (iv) furthers Congress' goals in enacting SOX.

A. The Second Circuit's Holding is Consistent with SOX's Plain Language.

The relevant provision of SOX states that publicly traded companies may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee . . . because of" any lawful whistleblowing act. 18 U.S.C. § 1514A(a). The Second Circuit interpreted this language to require a showing of retaliatory intent as

part of a SOX plaintiff's affirmative burden of proof. *See* App. 2a.[2] The Second Circuit reasoned that "discrimination" and "retaliation" necessarily require intent. *See* App. 9a-11a.

The Second Circuit is correct. A person cannot discriminate or retaliate without intending to do so. The definition of "retaliate" is to "to return like for like," as in "to get revenge," or "to repay in kind." *Retaliate*, MERRIAM-WEBSTER DICTIONARY, https://www.merriamwebster.com/dictionary/retaliate (last visited August 9, 2023). The definitions of "discriminate" include, as is relevant here, "to make a distinction" and "to make a difference in treatment or favor on a basis other than individual merit." *Discriminate*, MERRIAM-WEBSTER DICTIONARY, https://www.merriamwebster.com/dictionary/discriminate (last visited August 9, 2023). These definitions, and the common understanding of these words, require that someone actively, and intentionally, take an action against another person. Put simply, retaliation and discrimination are not accidental; they are necessarily intentional acts.

B. The Second Circuit's Holding is Consistent With Other Anti-Retaliation Statutes.

The Second Circuit's holding that a SOX plaintiff must show retaliatory intent is also consistent with the interpretation of other, similar anti-retaliation laws by this Court and others across the country, including Title VI, Title VII, Title IX, the

[2] References to "App. __" are to the Appendix to the Petition for Writ of Certiorari, filed with the Court on January 13, 2023.

Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the Dodd-Frank Act, the Americans with Disabilities Act ("ADA"), the Family Medical Leave Act ("FMLA"), and the Fair Labor Standards Act ("FLSA").[3] When interpreting these similar statutes, this Court and others have acknowledged that retaliation is, on its face, an intentional act. *Jackson*, 544 U.S. at 174 ("[Retaliation] is an intentional response to the nature of the complaint: an allegation of sex

[3] *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) (Title IX); *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011) (USERRA); *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (Title VII); *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 779 (2018) (Dodd-Frank Act); *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015) (Title VII); *Lockridge v. University of Maine System*, 597 F.3d 464, 470 & n.4 (1st Cir. 2010) (Title VII); *Felder v. United States Tennis Ass'n*, 27 F.4th 834, 848 (2d Cir. 2022) (42 U.S.C. § 1981); *Papelino v. Albany College of Pharm. of Union Univ.*, 633 F.3d 81, 91 (2d Cir. 2011) (Title IX); *Lang v. Wal-Mart Stores East, L.P.*, 813 F.3d 447, 457-58 (1st Cir. 2016) (ADA and comparable state laws); *Ray v. Ropes & Gray LLP*, 799 F.3d 99, 112-13 (1st Cir. 2015) (Title VII); *Corkean v. Drake University*, 55 F.4th 623, 630 (8th Cir. 2022) (FMLA); *Mandawala v. Northeast Baptist Hosp.*, 16 F.4th 1144, 1150-52 (5th Cir. 2021) (Title VI and First Amendment retaliation); *King v. Preferred Tech. Group*, 166 F.3d 887, 891-92 (7th Cir. 1999) (FMLA); *Shannon v. AMTRAK*, 774 F. App'x 529, 544 (11th Cir. 2019) (FMLA); *Sharif v. United Airlines, Inc.*, 841 F.3d 199, 203 (4th Cir. 2016) (FMLA); *Utter v. Colclazier*, 714 F. App'x 872, 881 (10th Cir. 2017) (FMLA); *Tennial v. UPS*, 840 F.3d 292, 307-08 (6th Cir. 2016) (FMLA); *Richey v. City of Independence*, 540 F.3d 779, 784 (8th Cir. 2008) (state law and 42 U.S.C. § 1983); *Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 643 (7th Cir. 2013) (Title VII); *Chadwell v. Koch Ref. Co.*, 251 F.3d 727, 734 (8th Cir. 2001) (state whistleblower statute); *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1379 (10th Cir. 1994) (Title VII); *Rozumalski v. W.F. Baird & Assocs.*, 937 F.3d 919, 924 (7th Cir. 2019) (Title VII).

discrimination"; Title IX); *Du Bois v. Bd of Regents of the Univ. of Minn.*, 987 F.3d 1199, 1204 (8th Cir. 2021) (same, citing *Jackson*); *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 936 (11th Cir. 2000) (FLSA; "all retaliation is inherently intentional").

There is no reason for a different outcome in the context of SOX. The anti-retaliation language in SOX is strikingly similar to the language in many of these other statutes. A comparison with FMLA provides an illustrative example. Like SOX, FMLA does not simply prohibit "discrimination"; it states that an employer may not "discharge or in any other manner discriminate against any individual because such individual" filed a charge, provided information or testified. *See* 29 U.S.C. § 2615(b) *and compare with* 18 U.S.C. § 1514A(a) (covered employers may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee . . . because of" any lawful whistleblowing act). As with SOX, the key is that the employee is being "discharge[d]" or facing other adverse employment action "because of" their whistleblowing activity. *See* 29 U.S.C § 2615(b). Courts interpreting the FMLA have held that a retaliation claim necessarily requires a showing of intent to retaliate. *See* n. 3, *supra*. There is no reason for the similarly-worded SOX provision to be interpreted differently from FMLA and other, similar anti-retaliation statutes.

Consistency with similar statutes is important to employers and human resource professionals who are training employees, performing investigations, and making personnel decisions. Variation in the law makes it harder for employers and human resource professionals to understand which standard applies

under which circumstances. Treating SOX in a manner similar to a host of other anti-retaliation statutes would, in addition to comporting with the plain language of the statute, ease that burden.

C. Petitioner's Approach Would Cause Confusion.

By contrast, the District Court's approach, urged by Petitioner, would leave employers and human resource professionals guessing about what conduct would give rise to liability under SOX. The District Court asserted that Petitioner was required to prove by a preponderance of the evidence that his whistleblowing activity "tended to affect in any way UBS's decision to terminate plaintiff's employment." *See* App. 6a. The "tended to affect in any way" standard is extraordinarily vague and its outer limits are unclear. That standard would, therefore, leave employers, human resource professionals, courts, and juries guessing about what the standard means and what conduct it covers.

For example, the "tended to affect in any way" standard could conceivably cover a situation where the officials at the employer who made the decision to terminate the plaintiff after conducting a workplace investigation had absolutely no knowledge of plaintiff's whistleblowing activity. But perhaps lower-level employees did know that their co-worker had reported something, but that information was never communicated to the officials who made the termination decision. Nonetheless, as part of the workplace investigation, the lower level employees were interviewed and confirmed the violations of policy that led to the termination decision. Thus,

there is no evidence of any retaliatory intent on behalf of the individuals who made the termination decision, including the human resource professionals involved in the investigation and termination decision, but one could argue the possibility that the whistleblowing might have "tended to affect" the decision because the lower level employees who were arguably aware of some form of reporting participated in the investigation. There is no evidence that Congress intended for SOX to cover that type of situation, but a SOX plaintiff could conceivably meet his or her affirmative burden of proof at trial under those facts if the Court adopts the vague standard advocated by Petitioner.

Human resource professionals cannot train staff about the applicable laws, conduct investigations, or make personnel decisions consistent with those laws when the standard is unclear. Moreover, inconsistency between SOX and other similar laws puts human resources professionals in the position of having to become securities experts. If one standard applies to SOX, but a different standard applies to other retaliation claims, human resource professionals would have to be able to determine with absolute certainty whether the conduct in question triggers SOX, as opposed to triggering FMLA, Title VII or other similar statutes. There is no indication that Congress intended such a result, nor to create this disparity, and the plain language of the statute and similar retaliation statutes indicates otherwise.

D. The Second Circuit's Decision Advances SOX's Goals.

SOX's whistleblower protections will be undermined if the applicable standard is unclear and human resource professionals are left to guess about what conduct it covers. Congress' goal in enacting the whistleblower protections was to help "ward off another Enron debacle," *Lawson v. FMR LLC,* 571 U.S. 429, 447 (2014), and to protect employees who "are [often] the only firsthand witnesses to . . . fraud." *Id.* at 434. The critical element of SOX protected activity is that the underlying conduct amounts to fraud. If, by continuing to erode the statutory requirements that mirror the specific fraud concerns that were the foundation of the statute, employers and human resources professionals do not know what conduct is or is not retaliation, they will not be able to put policies in place, or train employees in a manner, that will help ensure protection for lawful whistleblowers raising genuine fraud concerns in good faith. Likewise, employers need to be able to enforce their legitimate workplace policies without fear that in hindsight some alleged whistleblowing might have "tended to affect" the decision to discipline an employee.

The Second Circuit's decision provides the clarity and consistency needed to further Congress' goals. Adopting a vague "tended in any way to effect" standard would undermine those goals. The Second Circuit's decision should be affirmed.

II. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH CONGRESS' BURDEN OF PROOF FRAMEWORK.

Contrary to the assertions of Petitioner and his supporting *amici*, the Second Circuit's approach is consistent with the SOX burden-shifting framework. The SOX whistleblower provision is "governed by the legal burdens of proof set forth in section 42121(b) of title 49." 18 U.S.C. § 1514A(b)(2)(C). The framework set forth in Section 42121(b), in turn, has two steps. First, the plaintiff must demonstrate, by a preponderance of the evidence, "that any [protected whistleblower activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(i). If the plaintiff succeeds in making that showing, then the burden shifts to the employer to prove by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of" the protected activity. *Id.* § 42121(b)(2)(B)(ii). The Second Circuit's decision promotes consistency and clarity with respect to the parties' burdens of proof under Section 42121(b).

As an initial matter, the burden-shifting framework does not erase the relevant provision of SOX, Section 1514A, or alter the elements a SOX plaintiff must prove at trial. The burden-shifting framework simply means that a plaintiff has to prove, by a preponderance of the evidence, that the prohibited conduct described in Section 1514A was a "contributing factor" in the employment decision.

In other words, the burden-shifting framework, as applied in a SOX case, means that a plaintiff has

to prove, by a preponderance of the evidence, that the employer's retaliatory intent contributed to the adverse employment decision. Then, the burden would shift to the employer to prove, by clear and convincing evidence, that the employment action would have happened when it did regardless of the plaintiff's protected activity.

The Second Circuit's decision is thus consistent with the statutory language. Contrary to Petitioner's and his *amici*'s assertions, the Second Circuit's decision does not make the burden of proof more stringent than Congress intended or otherwise alter the burden-shifting framework. A plaintiff still only has to prove that the retaliatory intent was a "contributing factor" and only has to do so by a preponderance of the evidence. The employer still has to rebut that showing through the heightened "clear and convincing" evidence standard. But Congress clearly intended that, in order for the employer to be faced with that heightened evidentiary standard on rebuttal, a plaintiff would have to meet his or her affirmative burden of proof at trial to demonstrate a SOX violation, including retaliatory intent.

Although some courts have held otherwise, primarily by relying on the Federal Circuit's interpretation of an inapplicable statute in *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993),[4] many courts interpreting the "contributing factor" standard have agreed with the Second Circuit here that "retaliatory intent" is required. *See, e.g., Neylon v. BNSF Ry. Co.*, 968 F.3d 724, 728 (8th Cir. 2020)

[4] *See, e.g., Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158-59 (3d Cir. 2013).

(applying the Federal Railroad Safety Act ("FRSA"), which incorporates the Section 42121(b) framework; collecting supporting cases).

As the Eighth Circuit held, "the 'contributing factor that an employee must prove is *intentional retaliation* prompted by the employee engaging in protected activity.'" *Id.* at 728 (italics in original) (quoting *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 721 (8th Cir. 2017)); *see also, e.g., Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018) (under the "contributing factor" standard, "'the essence of this intentional tort is discriminatory animus'" (internal quotation marks omitted) (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014)).

In addition to being inconsistent with the plain language of the statute and similar statutory regimes, Petitioner's approach would be unworkable. Under Petitioner's approach, employers would be placed in the position of having to prove a negative, and to do so by clear and convincing evidence. Employers could demonstrate conclusively that no one at the company intended to terminate the plaintiff based upon the plaintiff's protected activity. Even if the employer could so demonstrate, however, it might *still* be unable to rebut plaintiff's case because the employer's intent would be irrelevant. As in the hypothetical set forth above, a plaintiff could prevail even if none of the individuals involved in the decision to terminate plaintiff knew about plaintiff's whistleblowing activity, because the alleged whistleblowing might have nonetheless "tended to affect" the decision. That outcome makes no sense and is clearly not what Congress intended.

The SOX anti-retaliation provision provides plaintiffs with a lesser burden of proof as to causation than in some other anti-retaliation statutes. The Second Circuit's decision does nothing to change that. The Second Circuit merely confirmed that, even under that burden-shifting framework, a plaintiff still has to meet his or her affirmative burden of proof at trial. The statutory language makes clear that, in order to meet that burden, a SOX plaintiff must prove retaliatory intent. The Second Circuit's decision should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Second Circuit.

Respectfully submitted,

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