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2 **United States Court of Appeals**
3 **for the Second Circuit**

4
5 August Term, 2021

6
7 (Argued: April 1, 2022 Decided: August 5, 2022)

8
9 Docket Nos. 20-4202(Lead), 21-56(Con)

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11
12 **TREVOR MURRAY,**

13 *Plaintiff-Appellee-Cross-Appellant,*

14
15 v.

16
17 **UBS SECURITIES, LLC, UBS AG,**

18 *Defendants-Appellants-Cross-Appellees.*

19
20 Before:

21
22 **PARK, MENASHI, and PÉREZ, Circuit Judges.**

23
24 Plaintiff Trevor Murray claims that UBS Securities, LLC and UBS AG
25 (together “UBS”) fired him in retaliation for reporting alleged fraud on
26 shareholders to his supervisor. Murray sued UBS under the whistleblower
27 protection provision of the Sarbanes-Oxley Act (“SOX”), 18 U.S.C. § 1514A, and he
28 ultimately prevailed at trial. The district court (Failla, J.), however, did not instruct
29 the jury that a SOX antiretaliation claim requires a showing of the employer’s
30 retaliatory intent. Section 1514A prohibits publicly traded companies from taking
31 adverse employment actions to “discriminate against an employee . . . because of”
32 any lawful whistleblowing act. 18 U.S.C. § 1514A(a). We hold that this provision
33 requires a whistleblower-employee like Murray to prove by a preponderance of
34 the evidence that the employer took the adverse employment action against the
35 whistleblower-employee with retaliatory intent—*i.e.*, an intent to “discriminate

1 against an employee . . . because of” lawful whistleblowing activity. The district
2 court’s legal error was not harmless. We thus vacate the jury’s verdict and remand
3 to the district court for a new trial.

4
5 THOMAS G. HUNGAR (Christopher Smith,
6 Anna Casey, Gibson, Dunn & Crutcher LLP,
7 Washington, D.C.; Gabrielle Levin, Gibson,
8 Dunn & Crutcher LLP, New York, NY, *on the*
9 *brief*), Gibson, Dunn & Crutcher LLP,
10 Washington, D.C., *for Defendants-Appellants-*
11 *Cross-Appellees*.

12
13 ROBERT L. HERBST (Robert B. Stulberg,
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17 Law PLLC, New York, NY, *on the brief*),
18 Herbst Law PLLC, New York, NY, *for*
19 *Plaintiff-Appellee-Cross-Appellant*.

20
21 PARK, *Circuit Judge*:

22 Plaintiff Trevor Murray claims that UBS Securities, LLC and UBS AG
23 (together, “UBS”) fired him in retaliation for reporting alleged fraud on
24 shareholders to his supervisor. Murray sued UBS under the whistleblower
25 protection provision of the Sarbanes-Oxley Act (“SOX”), 18 U.S.C. § 1514A, and he
26 ultimately prevailed at trial. The district court (Failla, J.), however, did not instruct
27 the jury that a SOX antiretaliation claim requires a showing of the employer’s
28 retaliatory intent. Section 1514A prohibits publicly traded companies from taking

1 adverse employment actions to “discriminate against an employee . . . because of”
2 any lawful whistleblowing act. 18 U.S.C. § 1514A(a). We hold that this provision
3 requires a whistleblower-employee like Murray to prove by a preponderance of
4 the evidence that the employer took the adverse employment action against the
5 whistleblower-employee with retaliatory intent—*i.e.*, an intent to “discriminate
6 against an employee . . . because of” lawful whistleblowing activity. The district
7 court’s legal error was not harmless. We thus vacate the jury’s verdict and remand
8 to the district court for a new trial.

9 I. BACKGROUND

10 A. Factual Background

11 In 2011, UBS hired Murray as a strategist in its commercial mortgage-backed
12 securities (“CMBS”) business. Murray was “responsible for performing research
13 and creating reports that were distributed to [UBS’s] current and potential clients
14 about CMBS products, services and transactions.” Am. Compl. ¶ 2. As a CMBS
15 strategist, Murray was required by Securities and Exchange Commission (“SEC”)

1 regulations to certify that his reports were produced independently and that they
2 accurately reflected his own views.¹

3 According to Murray, two leaders of UBS’s trading desk—Ken Cohen, the
4 head of the CMBS trading desk, and Dave McNamara, the head CMBS trader—
5 improperly pressured him to skew his research and to publish reports to support
6 their business strategies. For example, Murray testified that in September 2011,
7 Cohen told him “if we’re going to accomplish what we want to accomplish as a
8 business, it’s important that we maintain consistency of message between
9 originations, trading desk, and research,” and that “it would be best if you clear
10 your research articles with the [trading] desk going forward,” and McNamara
11 agreed. App’x at 254. This made Murray “very concerned” because he “was faced
12 with the dilemma of how to maintain a relationship with [his] client while
13 maintaining integrity as a researcher.” *Id.* at 255.

¹ Specifically, Murray was required to “include in [his] research report[s] a clear and prominent certification . . . containing . . . [a] statement attesting that all of the views expressed in the research report accurately reflect the research analyst’s personal views about any and all of the subject securities or issuers; and . . . [a] statement attesting that no part of the research analyst’s compensation was, is, or will be, directly or indirectly, related to the specific recommendations or views expressed by the research analyst in the research report.” 17 C.F.R. § 242.501(a).

1 Murray reported this conduct to his direct supervisor, Michael Schumacher,
2 in December 2011 and again in January 2012. In December, Murray met privately
3 with Schumacher and told him:

4 [M]y relationship with my client had become untenable, that [Cohen
5 and McNamara] had told me to preclear my articles, which I had been
6 doing; that they wanted me . . . to be nothing more than a shill for the
7 market. The only feedback I had gotten [about the articles] for the
8 most part was just negative [I] [t]old [Schumacher] about the
9 reaction I got from both [Cohen] and [McNamara] about [one of my
10 research] article[s] and that I was like I don't know how [Cohen] got
11 away with this. . . . But this type of relationship was completely
12 foreign to me; and that it wasn't just unethical, it was illegal, and I
13 wanted it to stop.

14
15 *Id.* at 283. According to Murray, Schumacher responded: "I sympathize with your
16 situation. It is a tough position to be in when you have a dour view of the market
17 that is in conflict [with] . . . your internal client but it is very important that you do
18 not alienate your internal client." *Id.*

19 The following month, Murray met with Schumacher to go over his
20 performance review. Afterwards, Murray "told [Schumacher] once again that the
21 situation with [his] client," referring to the UBS trading desk, "was bad and getting
22 worse." *Id.* at 294. Murray explained that he had been left out of meetings that
23 "would normally be a normal part of [his] job function" and outlined Cohen and
24 McNamara's "constant efforts to skew [his] research dating back to the

1 beginning.” *Id.* at 294–95. Schumacher responded that “these were the confines
2 under which [you] should expect [your] job to be, . . . [you’re] going to have to
3 operate, and . . . just . . . write what the business line wanted.” *Id.* at 295.

4 Shortly after this, Schumacher emailed his supervisor, Larry Hatheway,
5 recommending that UBS “remove [Murray] from our head count.” *Id.* at 539,
6 1,544. Alternatively, he suggested that “[i]f Ken Cohen and the CMBS team want
7 to keep a presence in analysis, they can move [Murray] onto the desk” as a desk
8 analyst, unregulated by the SEC. *Id.* at 539–40, 1,544. Schumacher continued that
9 “[o]therwise, we will make the tough call,” which Schumacher later explained
10 meant that “[Murray] would be a candidate for termination.” *Id.* at 540, 1,544. The
11 CMBS trading desk declined to take Murray on as a desk analyst, and UBS
12 terminated him in February 2012.

13 Murray contends that his termination was retaliation for whistleblowing.
14 UBS asserts that it terminated Murray due to a shift in strategy prompted by
15 financial difficulties. Indeed, UBS had implemented a series of reductions in force,
16 including one in February 2012 which resulted in the elimination of Murray’s
17 position.

1 B. Procedural History

2 Murray sued UBS in 2014.² He alleged that he was terminated by UBS in
3 response to his complaints about fraud on shareholders in violation of the
4 Sarbanes-Oxley Act's antiretaliation provision, 18 U.S.C. § 1514A.³ The case went
5 to trial before a jury. UBS moved for judgment as a matter of law, which the
6 district court denied. The district court then instructed the jury on the elements of
7 a section 1514A claim:

8 First, that plaintiff engaged in activity protected by Sarbanes-Oxley;

9
10 Second, that UBS knew that plaintiff engaged in the protected
11 activity;

12
13 Third, that plaintiff suffered an adverse employment action -- here,
14 the termination of his employment at UBS; and

15
16 Fourth, that plaintiff's protected activity was a contributing factor in
17 the termination of his employment.

18
19 * * *

20
21 For a protected activity to be a contributing factor, it must have either
22 alone or in combination with other factors tended to affect in any way
23 UBS's decision to terminate plaintiff's employment. Plaintiff is not
24 required to prove that his protected activity was the primary

² Murray first sued UBS in 2012 for violating the Dodd-Frank Act's antiretaliation provision, 15 U.S.C. § 78u-6(h), but the district court granted UBS's motion to compel arbitration.

³ Murray also sued for violation of 12 U.S.C. § 5567(b), but that cause of action is not at issue in this appeal.

1 motivating factor in his termination, or that UBS's articulated reasons
2 for his termination . . . was a pretext, in order to satisfy this element.

3
4 App'x at 1,389–90, 1,393. UBS objected to these jury instructions, arguing that they
5 lacked a key element of a section 1514A claim: proof of UBS's retaliatory intent in
6 taking the adverse employment action. The district court overruled UBS's
7 objection and the case went to the jury, which found UBS liable. The jury also
8 returned an advisory damages verdict, determining that Murray should be
9 awarded \$653,300 in back pay, no front pay, and \$250,000 in non-economic
10 damages.

11 In post-trial briefing, UBS renewed its motion for judgment as a matter of
12 law or, in the alternative, for a new trial, and moved to limit Murray's back-pay
13 award. The district court denied UBS's motions. The district court reasoned that
14 "there is evidence to support the jury's finding as to each of the elements of the
15 Section 1514A offense, principally derived from Mr. Murray's testimony." Sp.
16 App'x at 10. In reaching this conclusion, the district court again did not view
17 retaliatory intent as an element of a section 1514A claim. The district court also
18 adopted the jury's advisory verdict on damages.

19 Murray then moved for statutory attorney's fees and costs. The district
20 court entered judgment, awarding Murray \$1,769,387.52 in attorney's fees and

1 costs, as well as \$653,300 in back pay, no front pay, and \$250,000 in non-economic
2 damages—identical to the jury’s advisory verdict on damages. UBS appealed the
3 district court’s denial of its motion for judgment as a matter of law or, in the
4 alternative, a new trial, while Murray cross-appealed the damages and attorney’s
5 fees awards.

6 II. DISCUSSION

7 This appeal presents the question whether the Sarbanes-Oxley Act’s
8 antiretaliation provision requires a whistleblower-employee to prove retaliatory
9 intent. We review this legal question *de novo*. See *United States v. Williams*, 733 F.3d
10 448, 452 (2d Cir. 2013).

11 UBS argues that the district court erred by failing to instruct the jury that
12 Murray had to prove UBS’s retaliatory intent to prevail on his section 1514A claim.
13 Murray responds that there was no such error because retaliatory intent is not an
14 element of a section 1514A claim. We conclude based on the plain meaning of the
15 statutory language and our interpretation of a nearly identical statute that
16 retaliatory intent is an element of a section 1514A claim. The district court
17 committed a non-harmless error by failing to instruct the jury accordingly. We

1 thus vacate the judgment and remand for a new trial on liability and do not reach
2 the cross-appeal.

3 A. The Plain Meaning of the Sarbanes-Oxley Act’s Antiretaliation Provision

4 First, the plain meaning of the statutory language makes clear that
5 retaliatory intent is an element of a section 1514A claim. To interpret statutory
6 language, “we begin with the statute’s text because ‘we assume that the ordinary
7 meaning of the statutory language accurately expresses the legislative purpose.’”
8 *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 147 (2d
9 Cir. 2016) (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013)). “[U]nless
10 otherwise defined, words will be interpreted as taking their ordinary,
11 contemporary, common meaning.” *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir.
12 1992) (citation omitted). “If the statutory language is unambiguous and the
13 statutory scheme is coherent and consistent . . . the inquiry ceases.” *Friends of the*
14 *E. Hampton Airport*, 841 F.3d at 147–48 (citation omitted).

15 The unambiguous, ordinary meaning of section 1514A’s statutory language
16 requires retaliatory intent. Section 1514A directs that no covered employer “may
17 discharge, demote, suspend, threaten, harass, or in any other manner *discriminate*
18 against an employee . . . *because of*” whistleblowing. 18 U.S.C. § 1514A(a)

1 (emphasis added). To “discriminate” means “[t]o act on the basis of prejudice,”
2 which requires a conscious decision to act based on a protected characteristic or
3 action. *Discriminate*, WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1994);
4 *see Discriminate*, THE NEW OXFORD AMERICAN DICTIONARY (2001) (to “make an
5 unjust or prejudicial distinction in the treatment of different categories of people”).
6 And “because of” means “by reason of” or “on account of,” connoting a causal
7 relationship between the parts of the sentence the phrase connects. *See Because of*,
8 THE AMERICAN HERITAGE DICTIONARY (4th ed. 2000); *Because of*, WEBSTER’S THIRD
9 NEW INTERNATIONAL DICTIONARY (1993).

10 The statute thus prohibits discriminatory actions caused by—or “because
11 of”—whistleblowing, and actions are “discriminat[ory]” when they are based on
12 the employer’s conscious disfavor of an employee for whistleblowing. *Cf. Vega v.*
13 *Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015) (explaining that, in
14 the Title VII context, “an action is ‘because of’ a plaintiff’s [protected characteristic]
15 where it was a ‘substantial’ or ‘motivating’ factor contributing to the employer’s
16 decision to take the action”). A discriminatory action “because of” whistleblowing
17 therefore necessarily requires retaliatory intent—*i.e.*, that the employer’s adverse
18 action was motivated by the employee’s whistleblowing. The plain meaning of

1 section 1514A's statutory language thus compels our conclusion that retaliatory
2 intent is required to sustain a SOX antiretaliation claim.

3 We have previously articulated the elements of a SOX antiretaliation claim
4 in *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443 (2d Cir. 2013). There, we explained that
5 "an employee must prove by a preponderance of the evidence that (1) [he]
6 engaged in protected activity; (2) the employer knew that [he] engaged in the
7 protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the
8 protected activity was a contributing factor in the unfavorable action." *Id.* at 447
9 (citation omitted). The district court instructed the jury that "[f]or a protected
10 activity to be a contributing factor, it must have either alone or in combination
11 with other factors tended to affect in any way UBS's decision to terminate
12 plaintiff's employment." App'x at 1,393. But this explanation of the contributing
13 factor element fails to account for the statute's explicit requirement that the
14 employer's conduct be "discriminat[ory]."⁴ We therefore hold that to prevail on

⁴ The inadequacy of the "contributing factor" standard utilized by the district court is illuminated by the fact that "tended to affect in any way UBS's decision to terminate plaintiff's employment" could include a scenario in which Murray's whistleblowing resulted in termination, but also a scenario in which, by virtue of his whistleblowing activity, Murray was *insulated* from a termination to which he would otherwise have been subjected sooner. In addition, "tended to affect" increases the level of abstraction such that a jury might look beyond whether the whistleblowing activity *actually* caused the termination to whether it was *the sort of behavior* that would *tend to affect* a termination decision.

1 the “contributing factor” element of a SOX antiretaliation claim, a whistleblower-
2 employee must prove that the employer took the adverse employment action
3 against the whistleblower-employee with retaliatory intent—*i.e.*, an intent to
4 “discriminate against an employee . . . because of” lawful whistleblowing activity.

5 B. Consistency with Our Interpretation of a Nearly Identical Provision in the
6 Federal Railroad Safety Act

7 This reading of the SOX antiretaliation provision is consistent with our
8 interpretation of nearly identical language in the Federal Railroad Safety Act, 49
9 U.S.C. § 20109(a) (“FRSA”). See *Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d
10 74 (2d Cir. 2020).⁵ We generally interpret identical language in different statutes
11 to have the same meaning. See, e.g., *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428
12 (1973) (“The similarity of language in § 718 and § 204(b) is, of course, a strong
13 indication that the two statutes should be interpreted *pari passu.*”); *Wasser v. N.Y.*
14 *State Off. of Vocational & Educ. Servs. for Individuals with Disabilities*, 602 F.3d 476,
15 479 (2d Cir. 2010) (“Given the similarity between, and in fact the nearly identical
16 wording of, 29 U.S.C. § 722(c)(5)(J)(ii) and 20 U.S.C. § 1415(i)(2)(C), we see no basis
17 for interpreting the standard of review required by these provisions differently.”).

⁵ We note that the district court did not have the benefit of our decision in *Tompkins* during the pendency of Murray’s trial; *Tompkins* was decided one day after the district court entered final judgment in this case.

1 The relevant statutory language of the SOX and the FRSA is nearly identical.
2 *Compare* 18 U.S.C. § 1514A(a) (No covered employer “may discharge, demote,
3 suspend, threaten, harass, or in any other manner discriminate against an
4 employee in the terms and conditions of employment because of any lawful act
5 done by the employee . . . to provide information, cause information to be
6 provided, or otherwise assist in an investigation regarding any conduct which the
7 employee reasonably believes constitutes a violation of [federal law].”), *with* 49
8 U.S.C. § 20109(a) (A covered railroad carrier “may not discharge, demote,
9 suspend, reprimand, or in any other way discriminate against an employee if such
10 discrimination is due, in whole or in part, to the employee’s lawful, good faith act
11 done, or perceived by the employer to have been done or about to be done . . . to
12 provide information, directly cause information to be provided, or otherwise
13 directly assist in any investigation regarding any conduct which the employee
14 reasonably believes constitutes a violation of any [federal law].”). Accordingly,
15 our articulations of the elements of these claims must likewise be consistent.⁶

⁶ *Compare Bechtel*, 710 F.3d at 447 (To prevail on a SOX antiretaliation claim, “an employee must prove by a preponderance of the evidence that (1) [he] engaged in protected activity; (2) the employer knew that [he] engaged in the protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.” (citation omitted)), *with Tompkins*, 983 F.3d at 80 (To prevail on an FRSA antiretaliation

1 In *Tompkins*, we interpreted the whistleblower antiretaliation provision of
2 the FRSA and held that “some evidence of retaliatory intent is a necessary
3 component of an FRSA claim.” 983 F.3d at 82; *see also Armstrong v. BNSF Ry. Co.*,
4 880 F.3d 377, 382 (7th Cir. 2018) (“The [FRSA] prohibits intentional discrimination
5 in response to an employee’s performance of a protected activity. That is to say,
6 an employer violates the statute only if the adverse employment action is, at some
7 level, *motivated* by discriminatory animus.” (citation omitted) (emphasis in
8 original)). We pointed to the language specifically referencing discrimination—
9 *i.e.*, “that a rail carrier may not discharge ‘or in any other way *discriminate* against’
10 an employee for engaging in protected activity”—as requiring evidence of
11 retaliatory intent for an FRSA claim. *Tompkins*, 983 F.3d at 82 (citations omitted)
12 (emphasis in original). We also explained that “the essence of such a tort is
13 discriminatory animus, which in turn requires the employee to prove that she was
14 the victim of intentional retaliation prompted by her protected activity.” *Id.*
15 (cleaned up).

claim, “a plaintiff must show by a preponderance of the evidence that (1) the plaintiff engaged in protected activity; (2) the employer knew that the plaintiff engaged in the protected activity; (3) the plaintiff suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.” (cleaned up)).

1 The unambiguous, ordinary meaning of section 1514A’s statutory language,
2 along with our identical interpretation of the FRSA antiretaliation provision, thus
3 compel the conclusion that a SOX antiretaliation claim requires a showing that the
4 employer took the adverse employment action against the whistleblower-
5 employee with retaliatory intent.⁷ As in *Tompkins*, the whistleblower-employee
6 need not show that retaliatory intent “was the sole factor affecting the discipline
7 or that the employer acted only with retaliatory motive.” 983 F.3d at 82. There
8 must, however, be “more than a temporal connection between the protected
9 conduct and the adverse employment action.” *Id.* (internal quotation marks
10 omitted); *see also Armstrong*, 880 F.3d at 382 (“[W]hile a FRSA plaintiff need not
11 show that retaliation was the *sole* motivating factor in the adverse decision, the

⁷ We recognize that our conclusion departs from the approach of the Fifth and Ninth Circuits as to the elements of a section 1514A claim. *See Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263 (5th Cir. 2014) (holding that retaliatory intent is not an element of a section 1514A claim); *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (same). In our view, those courts overlooked the plain meaning of the text. Moreover, we note that the Second, Seventh, and Eighth Circuits have interpreted the same language in the FRSA to require a showing of retaliatory intent. *See Tompkins*, 983 F.3d at 82; *Armstrong*, 880 F.3d at 382; *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). *But see Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1196 (9th Cir. 2019) (holding that an FRSA antiretaliation claim does not require proof of retaliatory intent); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (same). We also note that three circuits have declined to decide the issue of whether retaliatory intent is an element of a section 1514A claim. *See Wiest v. Tyco Electronics Corp.*, 812 F.3d 319, 330 (3d Cir. 2016); *Feldman v. Law Enforcement Assoc’s Corp.*, 752 F.3d 339, 348 (4th Cir. 2014); *Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013).

1 statutory text requires a showing that retaliation was *a* motivating factor.”)
2 (emphasis in original)).⁸

3 C. The Jury Instruction Error Was Not Harmless

4 We must next determine the appropriate remedy for the district court’s jury-
5 instruction error. “We review a claim of error in jury instructions *de novo*,
6 reversing only where appellant can show that, viewing the charge as a whole,
7 there was a prejudicial error.” *Warren v. Pataki*, 823 F.3d 125, 137 (2d Cir. 2016)
8 (cleaned up). “An erroneous instruction requires a new trial unless the error is
9 harmless and an error is harmless only if the court is convinced that the error did
10 not influence the jury’s verdict.” *Id.* (cleaned up).

11 Because we need to be convinced that the error did not influence the jury’s
12 verdict, the district court’s failure to instruct the jury on Murray’s burden to prove
13 UBS’s retaliatory intent in terminating him was not harmless. Indeed, the district
14 court itself remarked that this was “one of the closest [cases] [it] has ever

⁸ This framework is consistent with the goal of section 1514A to “combat what Congress identified as a corporate culture, supported by law, that discourages employees from reporting fraudulent behavior . . . [by] protect[ing] employees when they take lawful acts to disclose information or otherwise assist . . . in detecting and stopping actions which they reasonably believe to be fraudulent.” *Bechtel*, 710 F.3d at 446 (cleaned up); *see also Guyden v. Aetna, Inc.*, 544 F.3d 376, 383 (2d Cir. 2008) (Section 1514A “protects ‘employees when they take lawful acts to disclose information or otherwise assist . . . in detecting and stopping actions which they reasonably believe to be fraudulent.’”) (quoting S. Rep. No. 107–146, at 19)).

1 observed.” Sp. App’x at 55. UBS offered evidence at trial of non-retaliatory
2 reasons for its decision to terminate Murray. For example, UBS witnesses testified
3 that the company was experiencing significant financial difficulties, resulting in
4 company-wide layoffs when Murray reported the alleged misconduct and was
5 ultimately terminated. In response to a question about why UBS imposed layoffs,
6 a UBS witness testified: “[In] 2011 our financial performance or the performance
7 of the firm was not good. We lost billions of dollars that year and, therefore, we
8 had to layoff people.” App’x at 573; *see id.* at 575 (citing “a two billion dollar
9 trading loss” as a cause of “more financial hardship to [UBS]”). Cohen, the head
10 of the CMBS trading desk, also testified that Murray’s position as a CMBS
11 strategist was “not necessary” to generate revenue, but instead was “nice to have.”
12 *Id.* at 867. This evidence supports UBS’s position that it terminated Murray
13 without retaliatory intent—specifically, that it did so for the non-retaliatory reason
14 of saving money during a time of financial difficulty. To be sure, there was
15 circumstantial evidence at trial that UBS terminated Murray in retaliation for
16 whistleblowing. *See, e.g.,* App’x at 649 (testimony explaining close temporal
17 proximity between Murray’s whistleblowing and termination); *id.* at 447
18 (testimony of Schumacher stating that he gave Murray a “good” performance

1 evaluation in December 2011, prior to Murray’s purported whistleblowing). But
2 we do not know whose reasons—UBS’s or Murray’s—the jury credited, as the jury
3 instructions did not require the jury to find retaliatory intent. And although the
4 jury did not find that UBS “prove[d] by clear and convincing evidence that it
5 would have taken the same unfavorable personnel action in the absence of
6 [Murray’s] protected behavior,” *Bechtel*, 710 F.3d at 447 (citation omitted), this does
7 not mean that Murray proved by a preponderance of the evidence that UBS acted
8 with retaliatory intent in terminating Murray. In other words, even though the
9 jury found that Murray’s whistleblowing was a contributing factor to his
10 termination, we cannot know whether it would have found that UBS acted with
11 retaliatory intent. We are thus unconvinced that the erroneous jury instruction
12 did not influence the verdict, and we accordingly remand to the district court for
13 a new trial.

14 III. CONCLUSION

15 Retaliatory intent is an element of a section 1514A claim. This conclusion
16 flows from the plain meaning of the statutory language and is supported by our
17 interpretation of nearly identical language in the FRSA. The district court erred
18 by failing to instruct the jury on Murray’s burden to prove UBS’s retaliatory intent

1 in terminating him. The jury instructions were incorrect as a matter of law, and
2 the error was not harmless. We thus vacate the jury's verdict and remand to the
3 district court for a new trial.

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of September, two thousand twenty-two.

Trevor Murray,

Plaintiff-Appellee-Cross-Appellant,

v.

UBS Securities, LLC, UBS AG,

Defendants-Appellants-Cross-Appellees.

ORDER

Docket Nos: 20-4202 (L)

21-56 (XAP)

Appellee-Cross-Appellant, Trevor Murray, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

