LEGAL UPDATE ON FEDERAL RAILROAD SAFETY ACT (FRSA) (A/K/A OSHA WHISTLEBLOWER) CLAIMS

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QUICK BACKGROUND PRIMER

- **49 U.S.C 20109**
  - **All of 3 pages in length**
  - **Why called OSHA Whistleblower cases**
  - **2009, Congress transferred jurisdiction from FRA to OSHA**
  - **Congress also amended the statute to include more provisions, protections and penalties favoring Railroad employees**
    - **Added the reporting of work-related injury as protected activity**
    - **Added protections for requests for medical treatment and non-interference protections**
    - **Increased Penalties, including Punitive Damages**
    - **A One-Way Opt-Out for Plaintiff to start over in Federal Court**

OVER THE NEXT DECADE…

- **FRSA cases worked their way through the administrative and federal court system**
- **Not terribly surprising, the federal circuit courts of appeal began to fracture over the legal standards for proving a FRSA claim**
- **7th 8th and 2nd Circuits adopted a higher burden of employee proof, rejecting "chain of events theories of causation and holding a requirement that plaintiff show intentional "animus" level proof of retaliatory intent**
- **5th and 9th Circuits adopted a more plaintiff-friendly standard**

THE *MURRAY* DECISION

- ***Murray v. UBS Sec., LLC*, 601 U.S. 23, 144 S. Ct. 445, 217 L. Ed. 2d 343 (2024)**
  - **Decision issued February 8, 2024**
  - **SEC case, however, the SEC statute, like FRSA and many other AIR 21 laws, employs same or similar burden-shifting legal framework. Ultimately, same legal issue to be decided:**
- **IS PROOF OF RETALIATORY ANIMUS REQUIRED TO PROVE CONTRIBUTING FACTOR PRONG OF PRIMA FACIE CASE?**
  - **SCOTUS held no retaliatory animus required but intent still required**

THE *MURRAY* DECISION

- **What is "retaliatory intent" in the Supreme Court's eyes?**
  - **Before explaining why a § 1514A claim does not require proof of "retaliatory intent," it is necessary to understand what that term means.**
  - **The Second Circuit seemed to conceive of "retaliatory intent" as "prejudice" or "animus." 43 F.4th at 259, 261.**
  - **UBS insists that it means something else, arguing that "[t]he Second Circuit mentioned 'animus' only twice" and that the Circuit explicitly required "a showing of 'retaliatory intent,' not hostile feelings toward the employee." Brief for Respondents 27, n. 3.**
  - **UBS's circular definition does not reveal anything about what "retaliatory intent" means, however, and UBS itself equated retaliatory intent with "animus" in its briefing below. See supra, at 451.**
  - **Thus, consistent with the Second Circuit's opinion, this Court treats "retaliatory intent" as something akin to animus. See also Brief for United States as Amicus Curiae 16 (suggesting that an employer acts with "retaliatory intent" "where the employer act[s] out of prejudice, animus, or comparable hostile or culpable intent").**

Id. at 33.

THE *MURRAY* DECISION

Supreme Court's Holding:

An animus-like "retaliatory intent" requirement is simply absent from the definition of the word "discriminate." . . .

It does not matter whether the employer was motivated by retaliatory animus or was motivated, for example, by the belief that the employee might be happier in a position that did not have SEC reporting requirements. . . .

[T] he only intent that § 1514A requires is the intent to take some adverse employment action against the whistleblowing employee "because of " his protected whistleblowing activity.

***Id.* at 34-35.**

THE *MURRAY* DECISION

But see Justice Alito's concurrence:

I write separately to explain in simple terms how the statute works and to reiterate that our rejection of an "animus" requirement does not read intent out of the statute.

Rather, as the Court confirms, a plaintiff must still show intent to discriminate. . . . And a discriminatory discharge that is made "because of " a particular factor necessarily involves an intentional choice in which that factor plays some role in the employer's thinking.

. . . .

This requires proof of intent; that is, the plaintiff must show that a reason for the adverse decision was the employee's protected conduct. The plaintiff need not prove that the protected conduct was the only reason or even that it was a principal reason for the adverse decision.

***Id.* at 40-41.**

POST-MURRAY FRSA AND RELATED DECISIONS

- ***Continental Cement Company v. Secretary of Labor, issued Feb 28, 2024***

- **But an employer's treatment of an employee must still be "because of" the employee's characteristic or activity that the law seeks to protect before it is actionable.**

MURRAY APPLIED TO FRSA CASES

- **Murray will most likely apply to FRSA cases**
  - **Butler v. BNSF Ry. Co., No. 1:22-CV-00367, 2024 WL 4527092, at *4, n.1 (E.D. Tex. Aug. 1, 2024)**
- **Contrary to BNSF's cherrypicked assertions, the Court declared that the Section 42121(b) framework is "not unique to Sarbanes-Oxley" but was "incorporated ... into ... similar whistleblower statutes," as Congress decided that "[w]histleblowing should never be a factor that contributes in any way to an adverse personnel action." Murray, 601 U.S. at 28 (alteration in original) (citation omitted). . . .**
- **Although the Murray Court did not include the FRSA in its illustrative list of whistleblower statutes, holding that its decision is inapplicable to the FRSA would contradict this binding update to the Section 42121(b) jurisprudence. See id. at 28 n.1 (collecting statutes).**

MURRAY APPLIED TO FRSA CASES

- ***Hitt v. CSX Transportation, Inc.***, 116 F.4th 1309, 1316 (11th Cir. 2024) (affirming grant of summary judgment to railroad)

Recently, the U.S. Supreme Court interpreted these standards in *Murray v. UBS Securities, LLC* —a securities case involving Sarbanes-Oxley. . . . To meet the contributing factor standard, an employee "need not [ ] prove that his employer acted with 'retaliatory intent' "—"something akin to animus." Instead, the employee must prove its employer's "intent to take some adverse employment action against the [ ] employee 'because of' his protected [ ] activity." In other words, the employer must have made "an intentional choice in which that factor play[ed] some role in the employer's thinking."

[citations omitted]

HITT V. CSX (9.9.2024)

- **Applying *Murray*, the 11th Circuit still affirmed Summary Judgment in the Railroad's favor.**

HITT V. CSX (9.9.2024)

- **Key Principles and Considerations:**
  - ***"chain of events" causation unavailing***
  - ***No reasonable jury could conclude that Hitt's protected activity – his refusal to work during a lightning storm or operate at speeds he considered unsafe right after it ended – contributed to his supervision's decision to conduct the banner test in the first place.***

HITT V. CSX (9.9.2024)

- **Key Principles and Considerations:**
  - **Banner Test a Known and Regular Procedure**
  - **Decision to test the Enginer, not the Person**
  - **Lack of Knowledge vis a vis employee**
  - **Temporal proximity not enough**

HITT V. CSX (9.9.2024)

- **Key Principles and Considerations:**
  - **Alleged retaliatory manager no role in termination**
  - **None of the decisionmakers considered any arguably biased report from that manager**
  - **“Cat’s Paw” theory unavailing**

HIGHSMITH V. CSX (6.24.2024)

- **Applying *Murray*, district court denied summary judgment to Railroad**

HIGHSMITH V. CSX (6.24.2024)

Key principles and Considerations:

- **Temporal Proximity**
- **Supervisor Antagonism and Cat's Paw**
- **Indications of Pretext**
- **Inconsistent Application of Policies and Comparator Evidence**

MURRAY APPLIED TO FRSA CASES

- ***Crivilare v. Union Pac. R.R. Co.***, No. 3:21-CV-858-DWD, 2024 WL 1285407, at *5 (S.D. Ill. Mar. 26, 2024) (denying summary judgment on contributing factor without deciding whether *Murray* or prior Seventh Circuit standard applied)

This requires proof of intent, but only to the extent that "a reason for the adverse decision was the employee's protected conduct. . .

[O]ur Supreme Court suggested that the only intent required is that mandated by the text of § 1514A, i.e., an "intent to take some adverse employment action against…[an] employee 'because of' his protected…activity." After all, "a discriminatory discharge that is made 'because of' a particular factor necessarily involves an intentional choice in which that factor plays some role in the employer's thinking."

[citations omitted]

PARKER V. BNSF (5.15.2025)

- **9th circuit affirmed district court's bench trial findings in favor of Railroad on the affirmative defense**
- **Majority cited favorably to *Murray* for purposes of finding *prima facie* case met**
- **But ultimately affirmed findings that BNSF met its "high bar" on its defense**

OTHER NOTABLE FRSA DECISIONS

- **Ziparo v. CSX (2d Cir. 2021)**
  - **Court addressed the "good faith" requirement for reporting a hazardous safety condition under the FRSA, holding it only requires a subjective belief by the employee**

QUESTIONS?

FRSA UPDATE

Please note that these materials are designed to give general and timely information in the covered subjects. The materials are not intended as legal advice or assistance with respect to individual problems. Attendees should consult counsel in regard to specific legal matters/issues.

THANK YOU!

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