

CREATING UNIFORMITY IN THE CONTRIBUTING FACTOR FRAMEWORK IN THE SEC WHISTLEBLOWER ERA AND CONTEXT

Armine Amy Margaryan*

I. INTRODUCTION

On June 2022, Peiter “Mudge” Zatkan, Twitter’s former head of security, blew the whistle on the social media company, alleging, “Twitter has major security problems that pose a threat to its own users’ personal information, to company shareholders, to national security, and to democracy.”¹ Mr. Zatkan was fired for “ineffective leadership and poor performance,” but he contends that he was fired in retaliation for his claims against Twitter.² Given this, should he be required to prove retaliatory intent, in which he would show concrete evidence that Twitter terminated him because of his lawful protected activity? Circuit courts were split on this issue.

* J.D., Southwestern Law School, Class of 2024; Notes and Comments Editor of *The Southwestern Law Review*, 2023-2024; B.A., Psychology, University of California, Los Angeles, 2020. I would like to dedicate this Note to my family, who have been my biggest supporters throughout my career and life. I would also like to extend my gratitude to all who have helped in the making of this Note. Specifically, I would like to thank Professor Emily Rehm for listening to my ideas and helping to perfect this Note. I would also like to thank the Executive Board and Staffers of *The Southwestern Law Review* for their insight and feedback throughout the editing process. I am so honored to have been a part of such an amazing and supportive team. Lastly, I would like to thank my extended family and friends for their constant support and feedback throughout my entire law school career.

1. WHISTLEBLOWER AID, RE: PROTECTED DISCLOSURES OF FEDERAL TRADE COMMISSION ACT VIOLATIONS, MATERIAL REPRESENTATIONS AND OMISSIONS, AND FRAUD BY TWITTER, INC. (NASDAQ:TWTR) and CEO PARAG AGRAWAL, SEC TCR#(2022), <https://s3.documentcloud.org/documents/22186683/twitter-whistleblower-disclosure.pdf>; see also Donie O’Sullivan et al., *Ex-Twitter exec blows the whistle alleging reckless and negligent cybersecurity policies*, CNN BUS. (Aug. 23, 2022), <https://www.cnn.com/2022/08/23/tech/twitter-whistleblower-peiter-zatkan-security/index.html>.

2. Clare Duffy & Brian Fung, *Twitter’s whistleblower goes to Congress to warn of global security threats*, CNN BUS. (Sep. 12, 2022), <https://www.cnn.com/2022/09/12/tech/peter-zatkan-twitter-whistleblower-hearing-walkup/index>.

In *Murray v. UBS Sec.*, the Second Circuit held that 18 U.S.C. § 1514A³ claims require proof of retaliatory intent.⁴ However, the Court of Appeals in at least two other circuits have held otherwise, which created a former circuit split on the issue of whether retaliatory intent is an element of a Section 1514A claim.⁵ On February 8, 2024, the Supreme Court resolved this issue, holding that retaliatory intent shall not need to be proven separately, but rather a whistleblower must prove that his protected activity “was a ‘contributing factor in the unfavorable personnel action.’”⁶ The Court further noted in the concurrence that the burden-shifting framework “provides the ‘mechanism for getting at’ discriminatory intent.”⁷ Moreover, Justice Alito, in his concurrence, explained that the framework requires “proof of intent; that is, the plaintiff must show that a reason for the adverse decision was the employee’s protected conduct.”⁸ Though retaliatory intent may not be a separate requirement for a plaintiff to prove, it is one that is implicated in the contributing factor framework and statute. However, this decision leaves courts to yet grapple with what particularly qualifies to satisfy the broad array of the contributing factor standard as applied to Section 1514A⁹ claims.

The Sarbanes-Oxley Act¹⁰ governs civil action to protect against retaliation in fraud cases, which is codified in Title 18, United States Code Section 1514A. The law states that publicly traded companies “may not discriminate or retaliate against employees who lawfully provide information to or assist an investigation of conduct that they reasonably believe constitutes a violation of securities laws or any federal law relating to shareholder fraud.”¹¹ Under the framework, the complainant must “establish by a preponderance of evidence that the circumstances surrounding the challenged adverse action raise an inference that the protected activity was a ‘contributing factor’ in the adverse action.”¹² One of the policy concerns is how a “disgruntled employee can file a complaint with the government

3. 18 U.S.C. § 1514A.

4. *Murray v. UBS Sec., LLC*, 43 F.4th 254, 262 (2d Cir. 2022), *rev’d*, 601 U.S. 23 (2024).

5. *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010); *see also* *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263 (5th Cir. 2014).

6. *Murray v. UBS Sec., LLC*, 601 U.S. 23, 24, 36, 39 (2024).

7. *Id.* at 35, 40-41.

8. *Id.* at 41.

9. 18 U.S.C. § 1514A.

10. *Id.*

11. Connie N. Bertram & Lesley A. Pate, *Sarbanes-Oxley: A New Whistle Stop For Whistleblowers*, 21 LAB. L. 19, 19 (2005).

12. *Id.* at 27.

relatively easily, guaranteeing an investigation, and thereby generating headaches for her employer.”¹³

This Note proposes a test to define the bounds of the contributing factor standard with respect to 18 U.S.C. § 1514A claims. Part II provides the history and policy of Sarbanes Oxley Act claims, 18 U.S.C. § 1514A, and examines various whistleblower statutes. Part III discusses the circuit courts’ conflicting holdings on the issue of retaliatory intent and the contributing factor standard. Part IV proposes and applies a five-factor test to create uniformity of the contributing factor standard within 18 U.S.C. § 1514A claims, and Part V concludes.

II. HISTORY AND POLICY OF SARBANES OXLEY CLAIMS AND U.S.C. SECTION 1514A

A. *Sarbanes Oxley Act and 18 U.S.C. Section 1514A Claims*

During the 2000s, the United States experienced many economic scandals amongst large corporations such as WorldCom and Enron.¹⁴ During the Enron scandal, Enron’s stock was rising incrementally based upon a valuation that was driven “by artificially increased profits that resulted from market-to-market accounting in which they would forge unmaterialized future profits,” and no one individual came forward to expose the fraud.¹⁵ Following the Enron scandal, Congress enacted the Sarbanes-Oxley Act of 2002 to “safeguard investors in public companies and restore trust in the financial markets.”¹⁶ By doing so, Congress sought to “create whistleblower protections for employees of publicly traded private corporations” to address the “corporate codes of silence.”¹⁷ It was also originally referred to as The Corporate and Criminal Accountability Act of 2002.¹⁸

The Sarbanes-Oxley Act (“SOX”) protects employees against retaliation for reporting employers for Securities and Exchange Commission (“SEC”) violations.¹⁹ SOX states that employers are any of those of a “company with

13. Usha R. Rodrigues, *Optimizing Whistleblowing*, 94. TEMP. L. REV. 255, 258 (2022).

14. Jake Smith, *More Opportunities, More Concerns: A Look at The Reactionary Nature of Whistleblower Protections In A Growing Global Economy*, 37 ARIZ. INT’L & COMP. L. 381, 387-88 (2020).

15. *Id.* at 382.

16. *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014).

17. Smith, *supra* note 14, at 387-388.

18. S. REP. NO. 107-146, at 2 (2002).

19. Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY UNIV. L. REV. 51, 99 (2011).

a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934.”²⁰ The legislative purpose of SOX was to “provide for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in certain federal investigations, to disallow debts incurred in violation of securities fraud laws from being discharged in bankruptcy, to protect whistleblowers who report fraud against retaliation by their employers, and for other purposes.”²¹

One of these provisions, Title 18, United States Code Section 1514A (hereinafter “Section 1514A”), protects against retaliation for employees of publicly traded companies.²² Subsection (a) of the act states that when an employee provides information on a SEC violation or shareholder fraud:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—.²³

This protection covers the reporting to Congress, government officials, to an internal employer, and “as part of any conduct in a proceeding initiated under securities laws.”²⁴ When pursuing a civil action, the employee would have to raise a claim that his or her termination was a factor in the termination to the Department of Labor (“DOL”) within 90 days.²⁵ It also does not require an employee prove the allegations true to qualify for protection under the act.²⁶ If the whistleblower is successful in the claim and the court determines that they are entitled to relief, the prevailing employee “under

20. *Id.*

21. S. REP. NO. 107-146 at 2 (2002).

22. 18 U.S.C § 1514A.

23. 18 U.S.C § 1514A(a).

24. Hesch, *supra* note 19, at 100.

25. Smith, *supra* note 14, at 389. This “contributing factor” is at issue and discussed in Part III.

26. Hesch, *supra* note 19, at 101.

subsection (b)(1) shall be entitled to all relief to make the employee whole.”²⁷ To establish a *prima facie* claim under Section 1514A of SOX, “an employee’s complaint must allege that (1) the employee engaged in protected activity; (2) the employer knew, actually or constructively, of the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the circumstances raise an inference that the protected activity was a contributing factor in the personnel action.”²⁸ If the employee successfully makes a *prima facie* showing of the claim, then the burden shifts to the employer to rebut the allegations by clear and convincing evidence that the employer would have taken the action without the protected activity.²⁹

B. *Dodd-Frank Act*

The Dodd-Frank Wall Street Reform and Consumer Act of 2010 (“Dodd-Frank Act”) “enhanced whistleblower protections in the securities arena by (1) extending their reach to privately-held companies, (2) permitting anonymous and confidential reports to the Securities and Exchange Commission (SEC), (3) authorizing the SEC to enforce anti-retaliation provisions directly, and (4) mandating the payment of a bounty to whistleblowers who ‘voluntarily provided original information’ to the SEC that led to sanctions of \$1 million or more.”³⁰ The Dodd-Frank Act was also enacted in response to the economic scandals of 2008 in hopes to combat corporate financial fraud. The difference between a SOX claim and a Dodd-Frank Act claim is that the latter has a narrower definition of a whistleblower.³¹ The Dodd-Frank Act also gives whistleblowers direct access to file in United States federal courts, whereas “SOX requires the whistleblower to file a claim under OSHA,³² and then wait to see if the claim was accepted and moved to a civil court for proceedings.”³³ Thus, as a means of history, both of these acts were created to protect whistleblowers from retaliation stemming from the economic scandals in the 2000s.

27. 18 U.S.C. § 1514A(c)(1).

28. *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010).

29. *Id.* (citing 49 U.S.C. § 42121(b)(2)(B)(ii)).

30. Lauren Rogal, *Secrets, Lies, and Lessons from the Theranos Scandal*, 72 HASTINGS L.J. 1663, 1678 (2021).

31. Smith, *supra* note 14, at 392.

32. OSHA refers to the Occupation Safety and Health Administration. (www.osha.gov)

33. Smith, *supra* note 14, at 389, 392.

C. California Whistleblower Statute

Some of California’s whistleblower statutes require the whistleblowing to be a contributing factor of the termination. California Labor Code section 1102.5, which protects whistleblowers from retaliation by their employers, states:

An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee’s job duties.³⁴

Moreover, when a civil action is brought pursuant to California Labor Code section 1102.5, and “once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.”³⁵ The California Supreme Court in *Lawson v. PPG Architectural Finishes, Inc.* stated that California Labor Code Section 1102.6 provided the correct framework that the whistleblowing should be a contributing factor.³⁶

D. Federal Whistleblower Statutes

The False Claims Act (“FCA”) is one of the government’s tools to combat fraud.³⁷ The False Claims Act states:

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened,

34. CAL. LAB. CODE § 1102.5(b) (West 2024).

35. *Lawson v. PPG Architectural Finishes, Inc.*, 503 P.3d 659, 663 (Cal. 2022) (quoting CAL. LAB. CODE § 1102.6 (West 2024))

36. *Lawson*, 503 P.3d at 667.

37. Hesch, *supra* note 19, at 55-56.

harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.³⁸

To recover damages based on retaliation, courts have required the whistleblower to prove “(1) that he engaged in activity protected by the FCA, (2) his employer knew he was engaged in protected activity, and (3) he was retaliated against because of it.”³⁹ The third element requires the employee to show a causal link between employer retaliation and the employee’s protected activity.⁴⁰ The “because” standard first requires the whistleblower to demonstrate “the employer had knowledge the employee engaged in ‘protected activity’” and then to show the “retaliation was motivated, at least in part, by the employee’s engaging in protected activity . . . [and once] satisfied, the burden of proof shifts to the employer to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.”⁴¹ The employee can prove the causality by direct evidence or intent, or through indirect evidence.⁴² When indirect evidence is used, “the employee ‘merely has to prove that the protected activity and the negative employment action are not completely unrelated.’”⁴³ Thus, this statute requires the employee to establish retaliatory intent by the employer to succeed.

Furthermore, the Federal Railroad Safety Act (“FRSA”) prohibits retaliation against an employee of a railroad carrier that provides information in the means of a protected activity.⁴⁴ The Second Circuit Court of Appeals has interpreted this statute to include an element of retaliatory intent.⁴⁵ To establish that the retaliation against the employee was a contributing factor, “an FRSA plaintiff must produce evidence of ‘intentional retaliation prompted by the employee engaging in protected activity.’”⁴⁶ The plaintiff does not need to display that “the ‘contributing factor’ was the sole factor affecting the discipline or that the employer acted only with retaliatory motive . . . [but must] however, show ‘more than a temporal connection between the protected conduct and the adverse employment action . . . to

38. 31 U.S.C. § 3730(h)(1).

39. Hesch, *supra* note 19, at 58.

40. *Id.* at 60.

41. *Id.*

42. *Id.* at 61.

43. *Id.*

44. 49 U.S.C. § 20109.

45. *Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74, 82 (2d Cir. 2020).

46. *Tompkins*, 983 F.3d at 82 (quoting *Lockhart v. Long Island R.R. Co.*, 266 F. Supp. 3d 659, 663 (S.D.N.Y. 2017)); *see also* *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

present a genuine factual issue on retaliation.”⁴⁷ Thus, this statute has been interpreted to have retaliatory intent as an element as well.

III. FROM NOT REQUIRED TO REQUIRED RETALIATORY INTENT

A. *The Ninth and Fifth Circuit Do Not Require Retaliatory Intent*

Whether the employee needed to prove retaliatory intent to succeed in a SOX claim was at issue within the former circuit split. In *Coppinger-Martin v. Solis*, the Ninth Circuit Court of Appeals decided that an employee does not need to demonstrate retaliatory intent, and only needs to demonstrate that their protected behavior was a contributing factor.⁴⁸ In this case, Nordstrom hired the plaintiff as “Chief Technical Architect of its Business Information Systems Strategic Planning Group.”⁴⁹ Six years later, the plaintiff reported to her immediate supervisor that she believed that there were security vulnerabilities in Nordstrom’s information systems that would potentially expose the company to SEC violations.⁵⁰ Before that report, the plaintiff had received favorable work-performance reviews.⁵¹ However, after that report to her immediate supervisor, she received an unfavorable evaluation.⁵² The plaintiff was told that her employment would end in January 2006, but she continued to work until April 2006.⁵³

Then, the plaintiff filed a complaint alleging that in July 2006, a Nordstrom employee informed her that there were other employees who were performing her former job duties, and she realized that the “elimination of her job may have been retaliatory for reporting her SEC concerns to [her immediate supervisor] and other Nordstrom senior management.”⁵⁴ Based on this, the plaintiff filed a whistle-blower action under SOX and OSHA, claiming that Nordstrom had terminated her in retaliation for her protected activity of reporting potential SEC violations.⁵⁵ Nordstrom moved to dismiss the case as untimely, and the Administrative Law Judge and Administrative Review Board dismissed the complaint, and the plaintiff timely petitioned for a review.⁵⁶

47. *Tompkins*, 983 F.3d at 82 (quoting *Kuduk*, 768 F.3d at 792).

48. *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010).

49. *Id.* at 747.

50. *Id.* at 748.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

The court reviewed this decision under the standard that they would “reverse an agency’s decision only if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”⁵⁷ The court focused on the statute of limitations issue, but established that had it been filed within the time period, she would have made her *prima facie* showing for a SOX claim.⁵⁸ The court noted that “the employee need only make ‘a *prima facie* showing that the protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.’”⁵⁹ The Ninth Circuit Court of Appeals decided that an employee does not need to demonstrate retaliatory intent, and only needs to demonstrate that their protected behavior was a contributing factor.⁶⁰ The court reasoned that the circumstances surrounding plaintiff’s termination “raise the inference that her protected activity was at the very least a contributing factor in the decision to terminate her.”⁶¹ Further, “the timing of notice of her termination after engaging in the protected activity and the dramatic change in her good evaluations before engaging in her protected activity compared to her unfavorable evaluation after engaging in the protected activity followed by her termination” showcased that the circumstances surrounding the termination were a contributing factor.⁶² Ultimately, the court held that the Administrative Review Board did not err in dismissing the plaintiff’s complaint because it was untimely filed.⁶³

Similarly, in *Halliburton, Inc. v. Admin. Rev. Bd.*, the Fifth Circuit came to the same conclusion.⁶⁴ In *Halliburton*, the plaintiff was hired by a global energy products and services company, Halliburton, as Director of Technical Accounting Research and Training.⁶⁵ The plaintiff monitored accounting issues and reported directly to the Chief Accounting Officer.⁶⁶ A couple of months later, the plaintiff raised concerns that Halliburton’s accounting practices involving revenue recognition were not conforming to the standard accounting principles by circulating a memorandum to colleagues within his department and his direct supervisor.⁶⁷ His direct supervisor met with him after and told him that although the memorandum was good, the plaintiff was

57. *Id.*

58. *See id.* at 750, 751.

59. *Id.* at 750 (quoting 29 C.F.R. § 1980.104(b)).

60. *Id.* at 750-51.

61. *Id.* at 751.

62. *Id.*

63. *Id.* at 752.

64. *See Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263(5th Cir. 2014).

65. *Id.* at 256.

66. *Id.*

67. *Id.*

not a “‘team player’ and needed to work more closely with his colleagues to resolve any concerns over accounting practices.”⁶⁸ Halliburton ordered and conducted a new study on the issue, and concluded that the practices were proper.⁶⁹ The plaintiff sought to meet with his immediate supervisor again on the issue, which was declined, and in response he filed a confidential complaint with the SEC about the “questionable” accounting practices.⁷⁰

As part of the procedure, the plaintiff emailed Halliburton’s Board of Directors to make the same complaint.⁷¹ This internal complaint was forwarded to Halliburton’s General counsel, and a few days later the SEC contacted the General Counsel to notify them that the SEC is investigating the company’s alleged improper accounting practices.⁷² Though the SEC did not specify who had reported the claims, the General Counsel knew who had reported them due to the internal complaint.⁷³ That internal complaint, identifying the plaintiff, was sent to fifteen members of the plaintiff’s group.⁷⁴ After that day, the plaintiff was treated differently by his colleagues, and because of this, he missed work frequently and later requested a paid administrative leave that was granted by the company.⁷⁵ Ultimately, the SEC concluded that no enforcement action against Halliburton was recommended.⁷⁶ As a result, the plaintiff resigned because he alleged he could not return to the company while it persisted with the accounting practices.⁷⁷

The Fifth Circuit reviewed the Administrative Review Board’s reversal of the Administrative Judge’s decision on the affirmative defense, holding Halliburton liable for retaliation, and affirmed their decision.⁷⁸ The issue challenged was the element of adverse action.⁷⁹ In regards to proving that the plaintiff’s protected conduct was a “contributing factor” in the employer’s adverse action, the Review Board found that plaintiff’s whistleblowing was a contributing factor.⁸⁰ The *Halliburton* court cites the *Allen* court, in that a “contributing factor” is “any factor, which alone or in

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 256–57.

73. *Id.*

74. *Id.* at 257.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 255–56, 258.

79. *Id.* at 259.

80. *Id.* at 262–63.

combination with other factors, tends to affect in any way the outcome of the decision.”⁸¹ The *Halliburton* court also cited the *Marano* court, in that a whistleblower “need not demonstrate the existence of a retaliatory motive on the part of the [employer] in order to establish that his [protected conduct] was a contributing factor to the personnel action.”⁸² Thus, in these two circuits, it is clear that retaliatory intent is not an element that must be required to establish a *prima facie* antiretaliation claim under SOX.

B. *The Second Circuit’s Requirement of Retaliatory Intent*

The August 2022 decision of *Murray v. UBS Sec.* created a circuit split on this issue by deciding that retaliatory intent must be required.⁸³ To begin with, the plaintiff, Trevor Murray, was hired by UBS Securities, LLC (“UBS”) as a strategist in its mortgage-backed securities business (“CMBS”) and was responsible for performing research and creating reports to clients about CMBS’s products, services, and transactions.⁸⁴ As a strategist, the plaintiff was required by the SEC to certify that his reports were independently produced and reflected his own views.⁸⁵ The plaintiff alleged that two leaders of UBS’s trading desk “pressured him to skew his research and to publish reports to support their business strategies.”⁸⁶ The plaintiff reported this conduct to his direct supervisor twice in two months, in which he told him that “it is very important that you do not alienate your internal client.”⁸⁷ The following month, the plaintiff met with his supervisor to go over his performance review, and afterward explained that the UBS trading desk situation was getting worse, and he was being left out of meetings that would normally be a part of his job.⁸⁸ The supervisor responded that “these were the confines under which [you] should expect [your] job to be,” and that he had to “write what the business line wanted.”⁸⁹ After this, the plaintiff’s supervisor emailed his supervisor, recommending that UBS remove the plaintiff.⁹⁰ Ultimately, UBS terminated the plaintiff.⁹¹

81. *Id.* at 263 (quoting *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 (5th Cir. 2008)).

82. *Id.* (quoting *Marano v. Dep’t of Just.*, 2 F.3d 1137, 1141 (Fed. Cir. 1993)).

83. See *Murray v. UBS Sec., LLC*, 43 F.4th 254, 256, 262 (2d Cir. 2022), *rev’d*, *Murray v. UBS Sec., LLC*, 601 U.S. 23 (2024).

84. *Id.* at 256.

85. *Id.*

86. *Id.*

87. *Id.* at 256-57.

88. *Id.* at 257.

89. *Id.*

90. *Id.*

91. *Id.*

The plaintiff contended that his termination was in retaliation for his protected activity. While UBS argued that it terminated him due to a “shift in strategy prompted by financial difficulties,” in which UBS had implemented a series of reductions, including one that resulted in the “elimination of Murray’s position.”⁹² Ultimately, the plaintiff sued UBS in 2014 in violation of Section 1514A, in which the jury was instructed the four elements⁹³ of a SOX claim as well as the following:

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.⁹⁴

UBS objected to these instructions, claiming that it lacked proof of UBS’s retaliatory intent in taking the adverse action.⁹⁵ The district court overruled the objection and the jury found UBS liable for retaliation, awarding the plaintiff \$1,769,387.52 in attorney’s fees as well as \$653,300.00 in backpay, no front pay, and \$250,000.00 in non-economic damages.⁹⁶ UBS appealed and Murray cross-appealed for damages and attorney’s fees.⁹⁷

The *Murray* court concluded based on the plain meaning of the statute and their interpretation of the nearly identical FRSA statute that retaliatory intent is an element of a Section 1514A claim.⁹⁸ The court reasoned that the statute in itself says that “no covered employer ‘may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee . . . because of’ whistleblowing.”⁹⁹ According to the court, “because of” suggests a causal relationship.¹⁰⁰ Thus, the statute “prohibits discriminatory actions caused by . . . whistleblowing, and actions are ‘discriminat[ory]’ when they are based on the employer’s conscious disfavor of an employee for whistleblowing.”¹⁰¹ They further held that to prevail on the element of a “contributing factor,” the “whistleblower-employee must prove that the employer took the adverse employment action against the

92. *Id.*

93. *See* 29 C.F.R. § 1980.104(e)(2) (2021).

94. *Murray*, 43 F.4th at 258.

95. *Id.* at 258.

96. *Id.*

97. *Id.*

98. *Id.* at 261, 262-63.

99. *Id.* at 259.

100. *Id.*

101. *Id.*

whistleblower-employee with retaliatory intent,” which is an intent to “discriminate against an employee . . . because of ‘lawful whistleblowing activity.’”¹⁰²

Similar to this provision, the Federal Railroad Safety Act (FRSA) prohibits retaliation against an employee of a railroad carrier that provides information in the means of a protected activity.¹⁰³ The court, in analyzing the jury instructions, reasoned that there was evidence that supported UBS’s position that it terminated the plaintiff without retaliatory intent, but though the jury did not find that UBS would have taken the same action in the absence of the protected activity, the court cannot know whether the jury would have found that UBS acted with retaliatory intent.¹⁰⁴ Thus, at the end, the court vacated the jury’s verdict and remanded for a new trial.¹⁰⁵ Therefore, this case signified a massive shift as now the Second Circuit Court of Appeals has interpreted Section 1514A to include an element of retaliatory intent.¹⁰⁶

C. Retaliatory Intent as a Contributing Factor

As mentioned previously, some courts have focused on retaliatory intent as a contributory factor, like the Ninth and Fifth Circuits. Prior to *Murray*, the Second Circuit also stated in *Bechtel v. Admin. Rev. Bd.* that the protected activity be a “contributing factor” in the adverse action alleged in the complaint.¹⁰⁷ This is a massive difference from what the court held in *Murray* because the court went from considering a contributory factor to requiring full-fledged retaliatory intent.¹⁰⁸ Moreover, in *Kuduk v. BNSF Ry. Co.*, the Eighth Circuit calling the contributing factor standard a “lenient standard,” stated that an “employee must prove . . . intentional retaliation prompted by the employee engaging in protected activity.”¹⁰⁹ The court also referred to 29 C.F.R. § 1979.104, which states that the burden of this standard is satisfied if the “complaint shows that the adverse personnel action took place shortly after the protected activity,” giving rise to the inference that it was a factor in the adverse action.¹¹⁰

102. *Id.* at 259-60.

103. 49 U.S.C. § 20109(a).

104. *Murray*, 43 F.4th at 262.

105. *Id.* at 263.

106. See *Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74, 82 (2d Cir. 2020); see also *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

107. *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443, 448-51 (2d Cir. 2013).

108. *Murray*, 43 F.4th at 262; *Bechtel*, 710 F.3d at 448-51.

109. *Kuduk*, 768 F.3d at 791.

110. *Id.* at 792 (citing 29 C.F.R. § 1979.104 (2021)).

Further, courts have not required direct evidence to prove that the protected activity was a contributory factor in the adverse action taken by the employer.¹¹¹ In *Ray v. Union Pacific Rail Road Company*, the court states that circumstantial evidence that the protected activity was a contributory factor in the adverse action taken by the employer may include evidence of, “temporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward the complainant after he or she engages in protected activity.”¹¹² In *Kewley v. Department of Health and Human Services*, the Federal Circuit reinstated its holding that “the circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, *prima facie*, that the disclosure was a contributing factor to the personnel action.”¹¹³ On another note, in *Marano v. Department of Justice*, the Federal Circuit emphasized that “‘any’ weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the ‘contributing factor’ test.”¹¹⁴ Thus, many district and circuit courts have chosen the more “lenient standard,” and utilize the “contributory factor” as a means of satisfying element four of a SOX claim.

IV. A NEW NARRATIVE TO CREATE UNIFORMITY IN THE CONTRIBUTING FACTOR FRAMEWORK WITH A FIVE-FACTOR TEST

To create uniformity in the contributing factor burden-shifting framework, this Note proposes a five-factor test. Though the Supreme Court did not find a retaliatory element to be a separate element of a Section 1514A claim, it did still find that intent is built into the contributing factor burden-shifting framework.¹¹⁵ However, the Supreme Court has yet to address clear instances of how to satisfy the contributing factor standard with some uniformity. The Supreme Court itself said the “meanings of the words ‘contribute’ and ‘factor’ suggest that the word ‘contributing factor’ is broad indeed.”¹¹⁶ A uniform test would allow courts to weigh in the policy

111. *Williams v. JPMorgan Chase & Co.*, No. 21-CV-9326, 2022 U.S. Dist. LEXIS 133198, at *20 (S.D.N.Y. July 26, 2022).

112. *Ray v. Union Pac. R.R. Co.*, 971 F. Supp. 2d 869, 885 (S.D. Iowa 2013).

113. *Kewley v. Dep’t of Health & Hum. Servs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998) (quoting *Horton v. Dep’t of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995)).

114. *Marano v. Dep’t of Just.*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

115. *Murray v. UBS Sec., LLC*, 601 U.S. 23, 36 (2024).

116. *Id.* at 37.

concerns of both employers and employees with factors to examine whether the protected activity was indeed a contributing factor to the adverse employment action. Similar to the current framework, if the employee is able to *prima facie* establish this element with the factors weighing for them, then the employer has the burden to prove with a preponderance of evidence standard that they would have taken that adverse action in the absence of the protected activity. Since it is a five-factor test, the court must find that three out of the five factors are met in favor of the employee for a finding that the protected activity *was* a *contributing factor* to the adverse employment action. Thus, this test serves to define the bounds of the “broad” contributing factor standard whilst balancing both policy considerations. Because the legislature intended to protect whistleblowers and prevent another corporate scandal as Enron, the factor test would promote whistleblowers to engage in the protected activity, but protect employers from unmerited whistleblowers. This test can be applied to other statutes that employ similar contributing factor frameworks.¹¹⁷ The factors within the test are (1) the record of employment evaluation, (2) change in employer’s attitude towards the employee, (3) the relationship of time of disclosure and time of adverse employment action, (4) discouragement of prevention of action, and (5) the weight of the importance of the information.

A. *Factor 1: Record of Employment*

The first factor, record of employment, would analyze what the employee’s past conduct entailed. Samples of evidence can be evaluations, demotions, and promotions, along with testimony from others who can speak to the character and employment history of the employee. Once the employee has successfully provided such evidence, the burden would shift then to the employer to produce evidence against a good record of employment that would warrant the dismissal. Courts have used evidence of record of employment in considering whether the protected activity was a “contributing factor” to the adverse action.¹¹⁸ For instance, the court in *Coppinger-Martin v. Solis* did note that the plaintiff did have favorable performance reviews prior to the protected activity, which prompted a change in evaluations.¹¹⁹ It would be logical to assume that if an employee has had good evaluations, then it is more likely that he or she were terminated in retaliation for their protected activity. However, if an employee has had bad evaluations and their performance is lacking good quality, then it is more

117. See CAL. LAB. CODE § 1102.5.

118. *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010).

119. *Id.* at 751.

likely that the employer would have taken the same action in the absence of the protected activity. If nothing in an employee's record is alarming or egregious to signify that they were not a satisfactory employee, then this factor will be met. For instance, if an employee's record states that the employee has just been doing their job with no significant praise and with no adverse conduct, then this factor would be met in favor of the employee. Thus, a record of good evaluation prior to the whistleblowing would suggest that this factor weighs for the employee.

B. Factor 2: Change in Employer's Attitude

The second factor is the change in employer's attitude towards the employee after the protected activity, which would weigh against the employer if sufficient evidence, either direct or circumstantial, is provided by the employee. For instance, if after an analyst files a report to the SEC, his supervisor stops giving him work to do and constantly gives him bad reports, then this factor would be met. Moreover, the court in *Coppinger-Martin v. Solis* did note a dramatic change to an unfavorable evaluation after the protected activity.¹²⁰ Another example would be creating an intolerable work environment because of the employer's attitude change. An example of this in a general context would be when an employee was always praised and given difficult tasks, but after informing the supervisor, the supervisor started noting that the employee was incompetent. However, it is important to note that employers have broad authority to make their own decisions.¹²¹ Within this authority, the employers' decision to terminate can be arbitrary or irrational so long as it is not unlawful.¹²² This serves to recognize the "[l]egislature's goal to give law-abiding employers broad discretion in making managerial decisions."¹²³ For employers to properly manage their operations, they must, on occasion, review, criticize, demote, transfer, and discipline their employees.¹²⁴ An employee cannot be "unreasonably sensitive" to their work environment as every job has stressors, obstacles, and frustrations.¹²⁵ The conditions must be "sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain" working on the job.¹²⁶ For example, if one's

120. *Id.*

121. *Diego v. Pilgrim United Church of Christ*, 180 Cal. Rptr. 3d 359, 364 (Ct. App. 2014).

122. *Carter v. Escondido Union High Sch. Dist.*, 56 Cal. Rptr. 3d 262, 264 (Ct. App. 2007).

123. *Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1054 (Cal. 1998).

124. *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1032 (Cal. 1994).

125. *Id.* at 1026-27.

126. *Id.* at 1026.

job involves a certain software to be used and after whistleblowing the employer restricts access to this software for this employee, then this does meet this factor of an attitude change that would create an intolerable work environment. Thus, this attitude change must be one that is egregious enough for a reasonable person to not be able to do their job.

C. Factor 3: Relationship of Time Between Adverse Action and Disclosure

The third factor, relationship of time of disclosure and time of adverse employment action, would analyze the length of time and the greater the time, the lesser the likelihood of the activity being a contributory factor of the adverse action. This is in line with *Kewley*, where the Federal Circuit reinstated its holding again that “the circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, *prima facie*, that the disclosure was a contributing factor to the personnel action.”¹²⁷ Moreover, the court in *Coppinger-Martin v. Solis* did note that the timing of the notice of plaintiff’s termination after engaging in the protected activity suggested that plaintiff’s protected activity was at very least a contributing factor in the termination.¹²⁸ If the termination happened within days or weeks after the whistleblowing occurred, then this factor is clearly met. Thus, for this factor to weigh for the employee, there must be minimal time between the adverse employment action and the protected activity.

D. Factor 4: Discouragement or Prevention of Action

The fourth factor is the discouragement or prevention of action. This factor was examined in *Blackorby v. BNSF Railway Company*, which involved a FRSA claim.¹²⁹ The court reasoned in favor of the employee because there was evidence of the employer discouraging the employee from filing a report, which raised an inference to intentional retaliation.¹³⁰ Examples of discouragement can be shown with evidence that suggests that the employee was not allowed to file internal reports or report alleged conduct to the proper person of the company or evidence that would suggest that the employee was discouraged from filing a report to the SEC after the

127. *Kewley v. Dep’t of Health & Hum. Servs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998) (quoting *Horton v. Dep’t of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995)).

128. *Coppinger-Martin v. Solis*, 627 F.3d 745, 751 (9th Cir. 2010).

129. *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 722 (8th Cir. 2017).

130. *Id.*

employer learns of the alleged SEC violations. A concrete example may be emails that indicate that an employee learned about the SEC violation at issue and informed his or her superior, but the superior told him not to do anything about it or that they had no right to report such a thing. Thus, if there is no evidence of any discouragement to file a claim/report to the employer, then this factor would weigh against the employee.

E. Factor 5: Weight of the Importance of Information

The last factor, the weight of the importance of the information, considers whether the information the employee provided was crucial to the public benefit and so exculpatory that it needed to be reported. This factor can be satisfied if the SEC violations are so egregious that the public must know about it to stop such activity from occurring. This factor goes to the legislature’s intent to “safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation.”¹³¹ Further, Congress employed the contributing factor standard “in contexts where the health, safety, or well-being of the public may well depend on whistleblowers feeling empowered to come forward.”¹³² In order to prevent a scandal like Enron from happening, information of that magnitude should put this factor in favor of the employee. Shareholders of publicly traded companies should not have to fear more risks in their investments because of such conduct; that is why information of such magnitude should be disclosed. An example in another context would be if a publicly traded phone company is not paying its shareholders the adequate number of profits it is entitled to based upon its investments, and one of the employees finds evidence that such conduct is occurring. Should the public know of such conduct happening? Probably, given the fact that potential shareholders would not want to risk investing in such a company where they are putting their investment at stake. In the modern society with benefit corporations, the stakeholders and shareholders are investing in purposeful companies. Given that context, stakeholders would want to be informed of such violations including ones of the SEC to devote their efforts to companies that emphasize stakeholders over just shareholders. Moreover, an example of weighing important information would be security threats that would pose an issue to the privacy of individuals and shareholders as was the case with Zlatko and Twitter.¹³³ This factor is similar to that in *Marano*, where the Federal Circuit emphasizes that “‘any’ weight given to the protected disclosure, either alone

131. *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014).

132. *Murray v. UBS Sec., LLC*, 601 U.S. 23, 39 (2024).

133. O’Sullivan, *supra* note 1.

or even in combination with other factors, can satisfy the ‘contributing factor’ test.”¹³⁴ However, here this factor would be weighed evenly against the others. Thus, the higher the magnitude of the disclosed SEC violations, the more likely that this factor weighs in favor of the employee, and likely would have been a contributing factor in the employee’s termination.

V. CONCLUSION

The *Murray v. UBS, Sec. Second District* decision indeed created a former circuit split that was resolved by the Supreme Court on February 8, 2024. Intent or discriminatory intent is embedded within the contributing factor framework and need not separately be proven. However, courts are still left facing what instances would suffice the contributing factor standard for Section 1514A claims. The proposed solution is a uniform five-factor test that would weigh in these different perspectives to protect both the employer and the employee. There will be no more Enron scandals tolerated, but there should not be unmerited claims that impact the well-being of a publicly traded company. Let’s not live in a world where one blows the whistle out of thin air, causing a company like Twitter (now called “X”) or Meta to suffer—blow the whistle only if you have a garden of thistles of evidence.

134. *Marano v. Dep’t of Just.*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).