

# Ex-UBS Worker Asks Justices To Restore Whistleblower Win

By Sarah Jarvis ·

Law360 (June 28, 2023, 10:25 PM EDT) -- A former UBS employee whose whistleblower case has been taken up by the U.S. Supreme Court has urged the justices to reverse a Second Circuit decision voiding a nearly \$1 million retaliation award, arguing that the lower court ignored parts of the Sarbanes-Oxley Act of 2002.

In a Tuesday brief, Trevor Murray argued that the Second Circuit incorrectly found that he was required to show "retaliatory intent" on the part of UBS in order for his claims to stand. In reality, the whistleblower protection provision of the Sarbanes-Oxley Act — or SOX — only required that he show that his whistleblowing contributed to his eventual firing, Murray argued.

The former UBS employee said that SOX required him to show that his protected activity, or whistleblowing, was a contributing factor in the "unfavorable personnel action" against him. If he did that, the burden would then shift to UBS to clearly show that it would have fired Murray even in the absence of his whistleblowing, he argued.

"The Second Circuit did not mention the burden-shifting framework incorporated by the plain text of SOX, let alone explain how requiring plaintiffs to prove 'retaliatory intent' as part of their case in chief could be squared with that framework," Murray argued. "And that framework makes clear that a plaintiff has no burden to prove 'retaliatory intent.'"

Murray has alleged that he was fired after telling higher-ups about being pressured to alter research he conducted on UBS' commercial mortgage-backed securities business. A Manhattan federal jury that heard the case in 2017 awarded Murray \$903,300, but the Second Circuit overturned that verdict in August 2022, saying the judge failed to instruct the jury that it needed to find that UBS acted with "retaliatory intent" in firing the analyst.

UBS has said that Murray's position was cut as part of a round of layoffs the company undertook because of its poor financial performance in 2011.

Last month, the Supreme Court agreed to hear Murray's appeal, which has garnered the support of the consumer group Public Citizen and U.S. Sens. Chuck Grassley, R-Iowa, and Ron Wyden, D-Ore. Legal experts have said the high court's decision in this case could have effects beyond the financial industry.

The senators said that Congress modeled the Sarbanes-Oxley whistleblower provision after the one in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, or AIR-21, which protects employees filing complaints with the Federal Aviation Administration.

AIR-21 itself incorporates language found in the Whistleblower Protection Act of 1989, which Grassley co-authored, the senators said.

Under the language in the statutes — which cover workers in health care, nuclear energy, transportation, food manufacturing and other industries — the senators said that employees only need to demonstrate that their whistleblowing was a contributing factor to their firing. The employer can then defend itself through the burden-shifting process, the senators said.

In Tuesday's brief, Murray argued that the legislative history of SOX shows its goal was to give whistleblowers in the private sector the same right of action as the Whistleblower Protection Act gave whistleblowers in the public sector. Congress could "easily" have required proof of retaliatory intent if it had wanted to, Murray said.

"Because the text of SOX makes clear how retaliation claims must be proven, that should be the end of the story— no matter how forceful the Second Circuit's concerns, they would not be able to overcome the plain text of the statute," Murray said.

Among other things, the former employee also argued that SOX would be "out of joint" with other employment statutes if the Second Circuit was correct in finding that animus on the part of the employer is required for whistleblower claims to stand.

"And it wouldn't make much sense, either," Murray argued. "To a fired employee, it matters little whether the employer felt animosity when they made the discharge decision. It matters only whether the employee was fired because he engaged in protected conduct."

Counsel for Murray declined to comment beyond the brief, and UBS and its counsel didn't immediately respond to a request for comment.

Murray is represented by Robert L. Herbst and Benjamin J. Ashmore Sr. of Herbst Law PLLC, Robert B. Stulberg and Patrick J. Walsh of Stulberg & Walsh LLP, Easha Anand and Pamela S. Karlan of the Stanford Law School Supreme Court Litigation Clinic, and Scott A. Korenbaum.

UBS is represented by Eugene Scalia, Gabrielle Levin, Thomas G. Hungar, Andrew G.I. Kilberg and Anna Casey of Gibson Dunn & Crutcher LLP.

The case is Murray v. UBS Securities LLC et al., case number 22-660, in the U.S. Supreme Court.

--Additional reporting by Jessica Corso. Editing by Peter Rozovsky.

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Trevor Murray, Petitioner v. UBS Securities, LLC, et al.

**Case Number**  
22-660

**Court**  
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**Nature of Suit**  
3790 LABOR LAWS-Other Litigation

**Date Filed**  
January 18, 2023

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