

# Feds Back Ex-UBS Worker In High Court Whistleblower Case

By Sarah Jarvis ·

Law360 (July 7, 2023, 9:44 PM EDT) -- A former UBS employee's whistleblower suit, which was taken up by the U.S. Supreme Court, has garnered formal support from the U.S. government and various advocacy groups, which have filed amicus briefs to help the ex-employee to reverse a Second Circuit decision voiding a nearly \$1 million retaliation award.

The federal government — represented by officials from the Solicitor General's Office, the Department of Labor and the Securities and Exchange Commission — argued in a Wednesday brief that the Second Circuit was wrong to hold that petitioner Trevor Murray needed to prove retaliatory intent on UBS' part for his whistleblower claims to stand.

The Sarbanes-Oxley Act of 2002 doesn't include that requirement, the U.S. argued, adding that the justices should consider the decisions of the DOL's Administrative Review Board, which only require proof that a whistleblower's protected activity contributed to an adverse action — in this case, Murray's eventual firing.

"That interpretation is reasonable, and it is entitled to deference," the U.S. argued.

Murray has made similar arguments, saying the Sarbanes-Oxley Act, or SOX, required him to show that his 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.

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 also garnered the support of the advocacy groups and two U.S. senators. Legal experts have said the high court's decision in this case could have effects beyond the financial industry.

Two SEC commissioners dissented from the SEC's decision to join the federal government's amicus brief. Republican Commissioners Hester Peirce and Mark Uyeda said in a Thursday statement that the agency opted to join the amicus brief while weighing major, complex rulemakings and that it can "engage in only so many robust deliberative processes at one time."

"The commission cannot pursue every item on its wish list all at once, but instead it must prioritize," the commissioners said. "It is not clear to us that such prioritization is taking place."

In a joint amicus brief filed Wednesday, the Anti-Fraud Coalition, National Employment Lawyers Association and the Wall Street reform group Better Markets Inc. also urged the high court to reverse the Second Circuit's judgment, saying it "grafts an additional elemental burden of proof onto that which Congress unambiguously imposed on whistleblower plaintiffs under SOX."

The groups argued that the Second Circuit's interpretation would discourage would-be whistleblowers from reporting financial frauds and would "insulate financial misconduct from detection and prosecution," unless the decision is reversed.

"Investors, financial markets, and potentially our entire economic system will suffer the negative consequences," the groups argued.

Better Markets' Legal Director Stephen Hall said in a statement that when the Supreme Court addresses the case next term, it should "repair the damage and fully restore the safeguards against whistleblower retaliation." He added that the Second Circuit's holding is wrong on legal and policy grounds and conflicts with plain statutory language.

Jacklyn DeMar, director of legal education at the Anti-Fraud Coalition, said in a statement that whistleblowers come forward "at great personal and financial risk" after making the difficult choice to report illegal activity.

"Those brave whistleblowers deserve protection and compensation for retaliation," DeMar said. "The plain language of the statute demands it, and it is clear that Congress intended broad retaliation protections."

Other amicus filings in the case include briefs from the National Whistleblower Center, consumer protection group Public Citizen, the Academy of Rail Labor Attorneys and U.S. Sens. Chuck Grassley, R-Iowa, and Ron Wyden, D-Ore.

The senators noted in their late June amicus brief that Grassley co-authored the Whistleblower Protection Act of 1989 and Wyden was the original House sponsor of legislation that became a precedential private-sector whistleblower protection statute under the Energy Reorganization Act. Grassley is also the chair of the U.S. Senate Whistleblower Protection Caucus, and Wyden is its vice chairman, per their filing.

The senators said the Second Circuit "seriously erred in imposing a burden of proof on petitioner that is nowhere found in SOX."

"This brief is written from the perspective of members of Congress who wrote the provisions at issue, which amici believe will assist the court in properly understanding the applicable burden of proof in the whistleblower provisions of SOX," the lawmakers said.

The senators have previously said that Congress modeled the SOX 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. And AIR-21 itself incorporates language found in the Whistleblower Protection Act, 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 have 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 National Whistleblower Center said in its own amicus brief, filed in late June, that when Congress developed the "contributing factor" test, it determined it was necessary to change the traditional burdens of proof in employment cases to make it easier for whistleblowers to win retaliation cases. But the Second Circuit "took it upon themselves" to raise the burden of proof to retaliatory intent.

"This interpretation completely negates the purpose of Congress crafting the 'contributing factor' standard to lower the burden for whistleblowers and the plain meaning of the mandatory 'contributing factor' burden of proof," the center argued.

Counsel for Sens. Grassley and Wyden declined to comment, and counsel for the National Whistleblower Center didn't respond to a request for comment Friday.

The government is represented by Elizabeth B. Prelogar, Edwin S. Kneedler and Anthony A. Yang of the U.S. Department of Justice, Seema Nanda, Jennifer S. Brand, Megan E. Guenther, Joseph E. Abboud, Jesse Grauman and Anne W. King of the U.S. Department of Labor and Megan Barbero, Michael A. Conley and Thomas J. Karr of the Securities and Exchange Commission.

The Anti-Fraud Coalition, National Employment Lawyers Association and Better Markets are represented by Samuel J. Buffone Jr. of Black & Buffone PLLC, Clayton E. Wire of Ogborn Mihm LP and Jacklyn DeMar of The Anti-Fraud Coalition.

The National Whistleblower Center is represented by Stephen M. Kohn, Michael D. Kohn and David K. Colapinto of Kohn Kohn & Colapinto LLP.

The senators are represented by Alan B. Morrison, Jason Zuckerman of Zuckerman Law and Thomas M. Devine of the Government Accountability Project.

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.

--Editing by Rich Mills.

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- Anti-Fraud Coalition et al. Brief
- National Whistleblower Center Brief
- Sens. Grassley, Wyden Brief
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**Case Title**  
Trevor Murray, Petitioner v. UBS Securities, LLC, et al.

**Case Number**  
22-660

**Court**  
Supreme Court

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

**Date Filed**  
January 18, 2023

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### Law Firms

- Black & Buffone
- Gibson Dunn
- Herbst Law PLLC
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### Companies

- Better Markets Inc.
- Government Accountability Project
- National Employment Lawyers Association
- Public Citizen Inc.

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- Federal Aviation Administration
- U.S. Department of Justice
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