Analysis

High Court Whistleblower Case Is Bigger Than Wall Street

By *Jessica Corso* · Listen to article

Law360 (May 2, 2023, 7:32 PM EDT) -- The U.S. Supreme Court's decision to hear the case of a former UBS employee who claims he was fired for alerting his boss to potential illegal activity could reverberate beyond the financial industry to determine the future success of whistleblower retaliation claims pressed by employees in the transportation, nuclear energy and food safety sectors.

The Supreme Court on Monday agreed to hear an appeal brought by former UBS employee Trevor Murray, who says 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 who heard the case in 2017 awarded Murray $903,300 but the Second Circuit overturned that verdict in August, saying that the judge failed to instruct the jury that they needed to find that UBS acted with "retaliatory intent" in firing the analyst.

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

It's now up to the Supreme Court to decide if the Second Circuit improperly contradicted four other circuit courts that have imposed lesser standards of proof on alleged whistleblowers, as Murray and his supporters contend.

"I do think that the Murray decision has made a mess of the pretty well-understood causation analysis in these cases," Alexis Ronickher, a partner at Katz Banks Kumin LLP who specializes in representing whistleblowers, told Law360.

The high court is being asked to look specifically at the whistleblower protections incorporated into the Sarbanes-Oxley Act of 2002, which was passed by Congress after the collapse of Enron exposed reporting deficiencies at publicly traded companies.

It is intended to protect those alerting Congress, federal regulators or their employers to potential securities fraud, according to a text of the law posted to the Department of Labor's website.

But that whistleblower protection language is not unique to Sarbanes-Oxley. A Supreme Court ruling in Murray v. UBS could have spillover effects for workers in the nuclear, aviation and railway industries, said R. Scott Oswald, a managing partner and whistleblower attorney at The Employment Law Group.

"These are areas where there is real danger to the public of these employers not operating at the highest level," Oswald said. "So we want whistleblowers to come forward."

In a February brief encouraging the Supreme Court to hear the case and overrule the Second Circuit, U.S. Sens. Chuck Grassley, R-Iowa, and Ron Wyden, D-Ore., listed 16 federal statutes that contain whistleblower provisions that are "virtually identical" to the one in the Sarbanes-Oxley Act.

In fact, 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 the 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 company can then defend itself by presenting "clear-and-convincing evidence" that it was planning on firing or taking adverse action against the employee, anyway, according to Wyden and Grassley's brief.

The Second Circuit overrode Congressional intent by requiring employees to prove "retaliatory intent" to make their case, the senators said.

"Reducing the burden on whistleblowers is sound policy because 'an employer will rarely admit retaliatory motives in firing an employee,'" the senators wrote, citing the Tenth Circuit's 1998 Sanjuan v. IBP Inc. ruling, which dealt with a workplace injury dispute.

Ronickher of Katz Banks Kumin said the Supreme Court's decision could also impact whistleblower protections in states like California that use the same burden-shifting framework as AIR-21.

But not everybody agrees that the Second Circuit added to employees' burdens to prove their case or that the Murray decision contradicted what other courts have had to say.

UBS, for example, told the Supreme Court that the circuit split cited by Murray is "substantially overstated."

Two of the circuit courts in question never addressed retaliatory intent and another dealt directly with the Whistleblower Protection Act, which does not, like Sarbanes-Oxley, have a requirement to show discrimination, UBS wrote in a brief asking the Supreme Court not to hear the appeal.

"The Second Circuit's holding was expressly predicated on the established meaning of the word 'discriminate," the company said.

That the justices have decided to hear the appeal shows that they believe there is some conflict, Christopher Robertson of Seyfarth Shaw LLP said.

Robertson, who advises companies facing whistleblower complaints, said he wasn't sure that the Second Circuit did anything more than explicitly state what was always required for an employee to prove their case at trial.

"Part of proving your case is convincing the trier of fact that the person who took the retaliatory action did so based upon the purported whistleblowing, and that necessarily has an element of intentional conduct," Robertson said.

But he admitted that the Supreme Court's decision could have an impact on whistleblower cases beyond Sarbanes-Oxley, depending on how the justices tailor their eventual ruling.

It's hard to say where the court's focus will be, however, until briefing and oral argument are complete, Robertson said.

"I'm curious to see where this goes," he said. "Is it really a strict statutory read? Or is there an effort on both sides to try to expand this more broadly?"

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 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.

Grassley and Wyden are represented by Thomas Devine and John Kolar of the Government Accountability Project, Jason Zuckerman of Zuckerman Law, George Chuzi and Richard Renner of Kalijarvi Chuzi Newman & Fitch PC and Lynne Bernabei and Alan Kabat of Bernabei & Kabat PLLC.

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

--Editing by Emily Kokoll and Kelly Duncan.

Update: This story has been updated with additional counsel information.

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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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