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NEWS

## Supreme Court Will Review Burden of Proof of Corporate Whistleblowers

The justices will consider if and when the burden shifts to employers to show they did not unlawfully retaliate against a whistleblowing employee.

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4 minute read

United States Supreme Court



Jimmy Hoover

The U.S. Supreme Court next term will consider the evidentiary burden of corporate whistleblowers under the Sarbanes-Oxley Act, as the justices on Monday agreed to hear the appeal of a former UBS employee's whistleblower lawsuit against the investment bank.

The case granted review, *Murray v. UBS Securities LLC.*, deals with a purported split among the federal circuit courts over who has the burden of proof in a whistleblower lawsuit brought under the 2002 act: the employee or the employer?

Or more specifically, must corporate whistleblowers show at trial that their punishment resulted from their employers' "retaliatory intent"? Or must employers show they did not have such intent to mount a successful affirmative defense against a whistleblower lawsuit?

The petitioner in the case, Trevor Murray, claims he was fired as a research strategist from UBS after asserting his independence from the investment bank's trading desk. Murray says he was frequently pressured by a senior UBS trader to color his reports about the bank's investments in commercial mortgage-backed securities to make them palatable to investors.

Murray filed a lawsuit under the whistleblower provision of the Sarbanes-Oxley Act, which allows employees to sue for being punished for bringing financial risks to light. Congress passed the in the wake of the Enron accounting scandal.



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Following a more than two-week trial, a jury sided with Murray and awarded him back pay and compensatory damages. However, UBS won its appeal before the U.S. Court of Appeals for the Second Circuit.

A unanimous panel of the federal appeals court in Manhattan held that Murray was required to "prove by a preponderance of the evidence that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent."

In doing so, the Second Circuit improperly shifted the burden onto Murray to prove retaliatory intent, he told the Supreme Court in his petition to the high court in January. Murray is being represented by trial lawyer and former federal prosecutor Robert Lloyd Herbst.

Under the law, corporate whistleblowers are only required to show that the protected activity was a "contributing factor" in their punishment, Murray said in his petition. Instead, it is up to the employer to prove that it lacked retaliatory intent under the burden-shifting framework of the law, he said.

Murray said the Second Circuit's decision poses a "square conflict" with "four other courts of appeals—none of which requires plaintiffs to prove their employer's animus or motivation."

"Only this Court can resolve the conflict over this important question of law, and this petition provides an ideal opportunity to do so," Murray said.

Murray's petition received a boost from U.S. Sens. Chuck Grassley, R-Iowa, and Ron Wyden, D-Oregon. The bipartisan duo said in an amicus brief that the court should hear the case to resolve the "deep and widening split" among the circuits and correct the Second Circuit's wrong approach to burden-shifting under the law. Grassley noted that he "co-authored" the whistleblower provision of the law and therefore "has a strong interest in ensuring that the Court interprets [Sarbanes-Oxley] in accordance with the plain text and congressional intent."

Herbst, Murray's attorney, said his client and legal team were "heartened" by the court's decision to take up the case. "We look forward to arguing this case on the merits, and advancing our contention that the Second Circuit's decision should be reversed," he said.

UBS is represented by Gibson Dunn partner Eugene Scalia, the former Secretary of Labor and son of the late Justice Antonin Scalia.

UBS made a number of arguments in opposing Murray's high court appeal. First the bank said the "retaliatory intent" requirement was only one of multiple problems that the Second Circuit found with the purportedly vague instructions given to the jury at trial. Further, UBS accused Murray of having "substantially overstated" the conflict between the federal circuits, and said the issue is not yet "ripe" for the Supreme Court's review.

The case is *Murray v. UBS Securities LLC*. The number is 22-660.

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