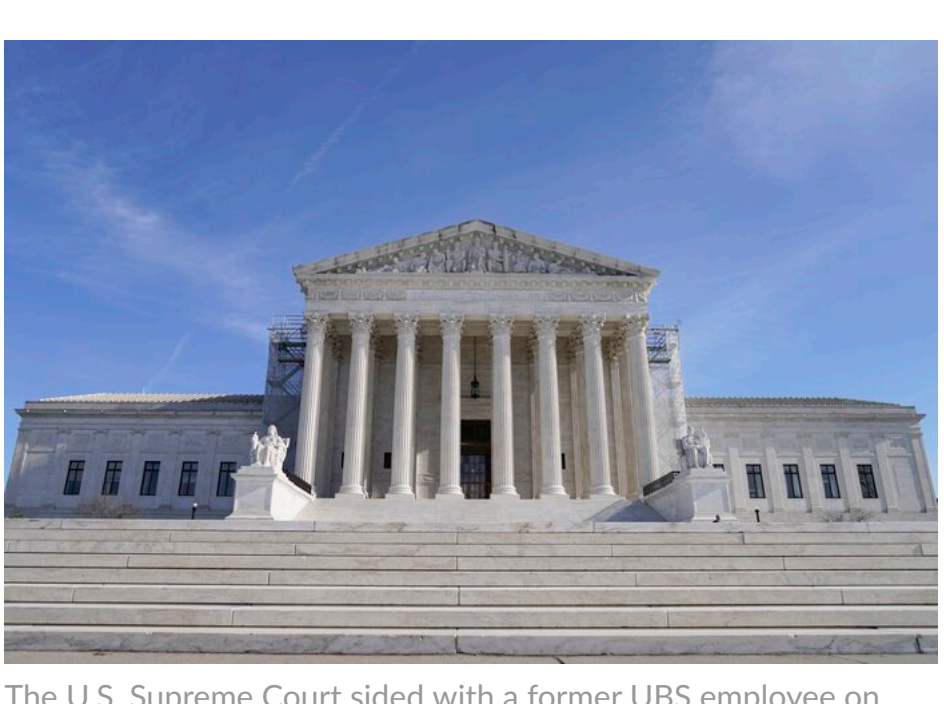
High Court Sides With Whistleblower Against UBS

By Sarah Jarvis ·

Law360 (February 8, 2024, 10:23 AM EST) -- The U.S. Supreme Court on Thursday found that whistleblowers don't need to show retaliatory intent on the part of their employers in order to be protected under federal law, in a unanimous ruling in favor of a former UBS employee and whistleblower who fought to restore a $900,000 jury verdict he secured in 2017.


The U.S. Supreme Court sided with a former UBS employee on Thursday in finding that whistleblowers don't need to show retaliatory intent by their employers in order to be protected under federal law. (AP Photo/Mariam Zuhaib)

In siding with whistleblower Trevor Murray, the justices rejected UBS' position that a separate finding of retaliatory intent is required for whistleblower protection under the Sarbanes-Oxley Act, which governs corporate financial reporting and recordkeeping. The case has been closely watched by attorneys who deal with whistleblowers, who said that a ruling in favor of UBS could have had far-reaching impacts beyond the financial sector.

"Showing that an employer acted with retaliatory animus is one way of proving that the protected activity was a contributing factor in the adverse employment action, but it is not the only way," Justice Sonia Sotomayor wrote on behalf of the unanimous court, in reversing and remanding the case.

Murray won $903,300 in 2017 after a Manhattan federal jury found that he had been unlawfully fired for refusing to cave to pressure to change his research on commercial mortgage-backed securities. In 2022, the Second Circuit overturned the award, finding that fired whistleblowers suing under the Sarbanes-Oxley Act must show that their employer acted with retaliatory intent when firing them.

In October, Supreme Court justices from both sides of the aisle hinted that they sided with Murray's position, with Justice Neil Gorsuch saying at the time that he doesn't see retaliatory intent included in the whistleblower provisions of Sarbanes-Oxley, or SOX.

The U.S. government backed Murray in this case, with officials arguing that the U.S. Department of Labor and its administrative review board have long interpreted SOX to require no showing of retaliatory intent. The high court agreed Thursday.

"Section 1514A(a)'s text does not reference or include a 'retaliatory intent' requirement, and the provision's mandatory burden-shifting framework cannot be squared with one," Justice Sotomayor wrote, referring to SOX. "Although the Second Circuit and UBS both rely on the word 'discriminate' in §1514A(a) to impose a 'retaliatory intent' requirement on whistleblower plaintiffs, the word 'discriminate' cannot bear that weight."

Robert B. Stulberg of Stulberg & Walsh, whose firm has represented Murray since he was fired in 2012, said in a statement that the decision "represents a resounding vindication of Trevor Murray's courageous 12-year effort to challenge his discharge by UBS Securities in retaliation for protected whistleblowing."

"It also represents the Supreme Court's uncompromising recognition that Sarbanes-Oxley — and similar statutes — were designed to empower whistleblowers to come forward in order to protect public health, safety and security," Stulberg said. "Now that Mr. Murray's rights have been firmly secured under the standards Congress established, we look forward to the day when he finally receives the full and fair remedies to which he is entitled."

Counsel for UBS and a company representative didn't immediately respond to requests for comment Thursday.

The ruling says Congress decided that when it comes to a plaintiff's burden of proof on intent under SOX, they only need to show that their protected activity contributed to an unfavorable personnel action, such as a firing. The burden then shifts to the employer to prove it would have taken that same adverse action regardless of the employee's protected activity, in a framework that the justices said "is meant to be plaintiff-friendly."

"This court cannot override Congress' policy choice by giving employers more protection than the statute provides," the decision reads.

The justices noted that the Second Circuit's opinion requiring whistleblowers to prove retaliatory intent conflicted with opinions from the Fifth and Ninth circuits rejecting such a requirement. That requirement "is simply absent from the definition of the word 'discriminate,'" the opinion reads.

"When an employer treats someone worse — whether by firing them, demoting them, or imposing some other unfavorable change in the terms and conditions of employment — 'because of' the employee's protected whistleblowing activity, the employer violates §1514A," Justice Sotomayor said. "It does not matter whether the employer was motivated by retaliatory animus or was motivated, for example, by the belief that the employee might be happier in a position that did not have [U.S. Securities and Exchange Commission] reporting requirements."

In a concurring opinion joined by Justice Amy Coney Barrett, Justice Samuel Alito wrote that the high court's rejection of an "animus" requirement doesn't read intent out of the law, and that plaintiffs still need to show an intent to discriminate.

"The plaintiff must show that a reason for the adverse decision was the employee's protected conduct," Justice Alito said. "The plaintiff need not prove that the protected conduct was the only reason or even that it was a principal reason for the adverse decision."

Employers must then show that an employee's protected conduct didn't cause the employment decision an employee is challenging — such as a firing.

"And if the employer satisfies that burden, the element of causation has not been proved," Justice Alito said. "On the understanding that this is the interpretation adopted today, I join the opinion of the court."

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

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

The United States is represented by Solicitor General Elizabeth B. Prelogar, Deputy Solicitor General Edwin S. Kneedler and Assistant to the Solicitor General Anthony A. Yang, as well as officials from the Department of Labor and the U.S. Securities and Exchange Commission.

The case is Trevor Murray v. UBS Securities LLC et al., case number 22-660, before the Supreme Court of the United States.

--Additional reporting by Cara Bayles and Jessica Corso. Editing by Daniel King.

Update: This story has been updated with additional details from the decision and with comment from counsel for Murray.

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Case Information

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

Law Firms

- Gibson Dunn
- Herbst Law PLLC
- Stulberg & Walsh

Government Agencies

- U.S. Department of Labor
- U.S. Securities and Exchange Commission
- U.S. Supreme Court

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