

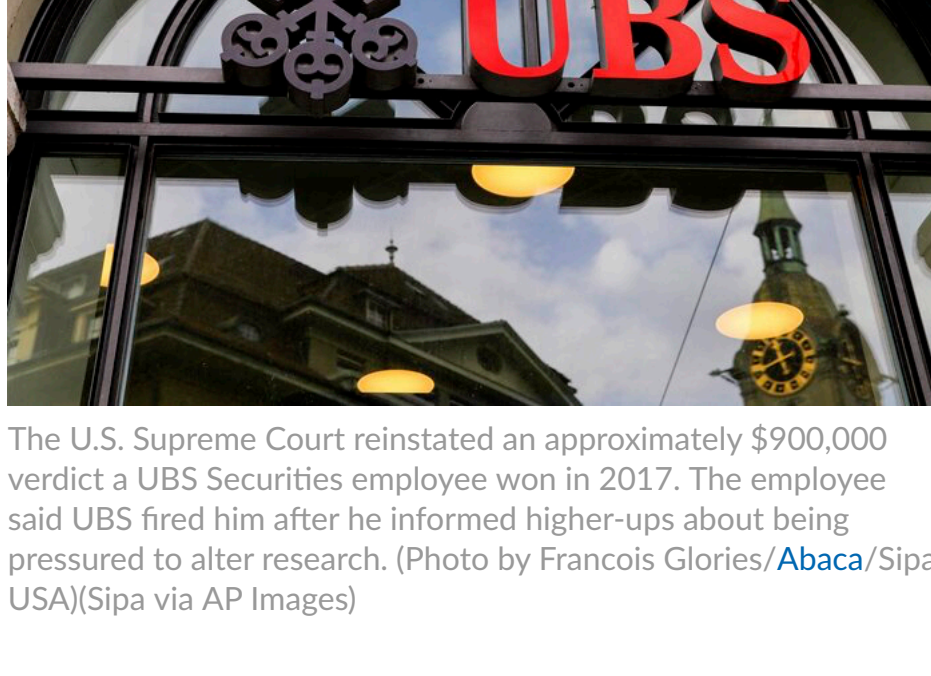
Analysis

# Justices' Whistleblower Ruling May Reverberate Beyond SOX

By [Vin Gurrieri](#) · 2024-02-08 21:47:04 -0500 ·

The [U.S. Supreme Court](#) held Thursday that whistleblowers don't need to show that employers displayed retaliatory intent to have a viable case under the Sarbanes-Oxley Act, a ruling experts say could help workers pursuing retaliation claims under discrimination laws like Title VII keep their claims in court.

In **unanimously siding** with whistleblower Trevor Murray, the nation's highest court held that plaintiffs need only show that their activity was a "contributing factor" to any negative action taken against them — like being fired — to be protected under SOX's whistleblower provisions without separately showing retaliatory intent.



The U.S. Supreme Court reinstated an approximately \$900,000 verdict a UBS Securities employee won in 2017. The employee said UBS fired him after he informed higher-ups about being pressured to alter research. (Photo by Francois Glories/Abaca/Sipa USA)(Sipa via AP Images)

The justices reinstated an approximately \$900,000 verdict Murray **won in 2017** in a suit against UBS Securities, which Murray said fired him after he informed higher-ups about being pressured to alter research he conducted.

In reaching that verdict, jurors had concluded that Murray established his whistleblower retaliation claim, and that UBS failed to show that he would've been fired absent his report of what he believed to be unethical and illegal conduct.

Although Murray's case arose in the context of Sarbanes-Oxley, its effects could easily bleed over to other federal anti-discrimination laws where retaliation claims are evaluated using a burden-shifting framework, attorneys say, and make those claims tougher to knock out before they get to a jury.

"The Murray ruling has far-reaching implications for cases beyond SOX, including retaliation claims brought under the federal anti-discrimination laws and state [or] local laws that are construed in accordance with the federal laws," said Kristen Sinisi, a founding partner at District Employment Law PLLC, which represents employees.

While the burden-shifting framework under SOX differs from the so-called McDonnell Douglas burden-shifting test used for retaliation cases brought under laws like Title VII of the Civil Rights Act or the Americans with Disabilities Act that involve indirect evidence of bias, both legal frameworks "enable a plaintiff to prove retaliation through circumstantial evidence," according to Sinisi.

Under the McDonnell Douglas test, which was established in the U.S. Supreme Court's landmark 1973 ruling in [McDonnell Douglas Corp. v. Green](#), aggrieved workers trying to overcome summary judgment must establish a prima facie case of unlawful discrimination or retaliation.

If they do, the onus shifts to employers to prove that an adverse action was taken for legitimate and nondiscriminatory reasons. The worker must then show the employer's stated reason was merely pretext for unlawful bias or retaliation to defeat summary judgment.

Thursday's opinion, written by Justice Sonia Sotomayor, said that burden-shifting tests have a well-worn history in employment laws beyond SOX, and used Title VII as an example.

In rejecting UBS's effort to heighten Murray's burden of proof under SOX, Sinisi said the high court recognized that the burden-shifting framework it endorsed "gets at the facts surrounding an employer's intent." And any attempts by employers to use "retaliatory intent" arguments in cases involving McDonnell Douglas will likely fall flat, which could be a boost for plaintiffs looking to get cases past summary judgment, she said.

"Under today's decision, attempts by employers to import a 'retaliatory intent' requirement to the McDonnell Douglas framework should similarly be rejected, because, as the court noted, such a requirement [would] 'ignore the statute's mandatory burden-shifting framework,'" Sinisi said.

Katie Reynolds of [Fisher Phillips](#) said Thursday's ruling could be the basis for how courts interpret other whistleblower protection statutes that require a similar burden-shifting framework as SOX, which could lead to more whistleblower retaliation cases.

But given the differences between the burden-shifting frameworks in SOX and McDonnell Douglas, it isn't likely that the high court is signaling a broad shift away from how the latter is applied, according to Fisher Phillips partner Jeffrey Shapiro. He also noted that Thursday's ruling dealt with specific language in SOX that may limit its impact on laws like Title VII.

"As the dust settles from this decision ... it's still easier for employees to show a 'contributing factor' versus a 'motivating factor,'" Shapiro said. "Certainly this court, as conservative as it is, isn't going to go and water down the McDonnell Douglas framework that has been existing for years, and the courts would not really have any logical reason to let it invade how they [view] McDonnell Douglas."

But Christopher Robertson, leader of [Seyfarth Shaw LLP's](#) whistleblower practice, said that while Murray is a SOX-specific case, it's significant that the high court specifically referenced Title VII in its ruling.

"Just like the Supreme Court cited Title VII cases, I could see other areas citing this case for a standard that if someone tries to insert some sort of intent element or some sort of deliberateness element as a component of what the case has to show at the beginning, then I think they'll say this to say that's not accurate," said Robertson, who authored an amicus brief on behalf of the Society for Human Resource Management that backed UBS.

R. Scott Oswald, managing principal of plaintiffs' firm The Employment Law Group PC, noted that Justice Sotomayor engaged in a lengthy discussion about what the word "discrimination" means, with the justices positioning Murray's case alongside recent rulings such as [Babb v. Wilkie](#) and [Bostock v. Clayton County](#).

In Babb, the justices endorsed a plaintiff-friendly causation standard for federal employees to successfully prove an age bias claim in court, and in Bostock they held that Title VII protects workers from being fired because of their sexual orientation or gender identity.

"At first blush, today's opinion reaches only anti-retaliation laws that follow a 'contributing factor' standard — in other words, not laws such as Title VII that require the protected behavior to be a 'motivating factor' of an employer's adverse action, which is a higher bar," Oswald said.

But the high court "has been admirably clear lately" that anti-discrimination laws prohibit "all differential treatment that starts from an illegal place," he added.

"The court is teaching us that the degree of discrimination doesn't matter, and nor does the exact mindset of the discriminator, as long as the elements of a specific law are met," Oswald said.

--Additional reporting by Sarah Jarvis and Jessica Corso. Editing by Nick Petruncio.

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