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High Court Ruling Solidifies SOX Whistleblower Protections

By **Sarah Jarvis**

Law360 (February 8, 2024, 11:37 PM EST) -- The U.S. Supreme Court's unanimous decision Thursday in favor of a UBS whistleblower has solidified whistleblower protections across a wide range of industries, with one attorney saying the ruling has made the Sarbanes-Oxley Act the most pro-employee labor law in the country.)

Attorneys who handle whistleblower matters praised the clarity offered by the high court's decision in Trevor Murray v. UBS Securities LLC et al. on the burden of proof required to back up retaliation claims. Stephen M. Kohn, a partner with Kohn Kohn & Colapinto LLP who represented the National Whistleblower Center in an amicus brief in the case, called the ruling "a sweeping victory for whistleblowers across the board."

"This now is the most pro-employee labor law in the country," Kohn said. "By statute, it has shifted the burdens of proof in a manner for which a whistleblower can realistically prevail."

He said the burden of proof is "far better" than those found in the laws for sex, race and age discrimination and under the National Labor Relations Act, adding "it's a more pro-employee, pro-whistleblower burden than under any other federal discrimination law." He noted the ruling covers every federal employee and a slew of industries, including food safety and transportation.

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, or SOX, which governs corporate financial reporting and recordkeeping. The case has been closely watched by attorneys who deal with whistleblowers, who have said that a ruling in favor of UBS could have had far-reaching impacts beyond the financial sector.

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 SOX must show that their employer acted with retaliatory intent when firing them.

But Thursday's opinion, written by Justice Sonya Sotomayor, said 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."

Kohn said Thursday's decision makes it clear that Congress has recognized whistleblowers are unique in serving the public interest and that they are "the skunks at the picnic," meaning they aren't hired to work in human resources or represented on boards of directors or other controlling groups of major companies.

"The whistleblower is isolated, which makes their ability to present a case much more difficult because there's no one up the management chain who can relate to what they're going through," Kohn said.

Christopher Robertson, chair of the whistleblower practice at Seyfarth Shaw LLP and counsel for the amicus party Society for Human Resource Management, said he had an idea the high court wasn't on board with the Second Circuit's finding that retaliatory intent is required for SOX whistleblower claims based on the justice's questioning during oral arguments in October.

While he wasn't surprised by the ruling, he said it's unusual for this court to put forward a unanimous decision. And although the Society for Human Resource Management wanted the court to affirm the Second Circuit, he said the decision does offer clarity for human resources professionals.

"Now, the standard by which a claim will be evaluated — and if it does go to trial, tried — I think now is pretty straightforward," Robertson said.

He said the decision will require employers to be "much more deliberate" about their employee review process and documenting violations of policy to meet their burdens and back up their potential adverse employment decisions, such as firing an employee, in these kinds of cases.

Employers who don't have good documentation of those matters before an employee raises issues with a company will have a much more difficult time making adverse employment decisions against that employee for issues such as insubordination or violating policies. Even if an employer's reasoning on those areas is true, "ultimately, it's about what you can prove, and now that burden is on you," Robertson said.

He added that another reason documentation is important is that SOX plaintiffs aren't as visible to a company as employees who are in other protected classes, such as women, minorities and workers with disabilities.

"You don't have that visibility with someone who's a SOX plaintiff, because yesterday they could not be protected, but tomorrow they could be because they say, 'I think you're cooking the books,'" Robertson said.

As a result, employers should document employee issues that arise so they can make decisions with more confidence they aren't creating liability for themselves.

"The more they can document the decisions they make and document that they were ongoing and independent of some form of protected activity, the better off they're going to be," he said.

Gordon Schnell, a whistleblower partner at Constantine Cannon LLP, said that if the high court had gone the other way with its decision, it would have further disincentivized those who may already fear retaliation from coming forward with whistleblower claims.

"For example, the employer could get around a retaliatory action by just coming up with some other reason — some nonretaliatory-based reason — for taking the adverse action, and that could defeat it under that higher standard," Schnell said. "But under this standard, that won't help them, as long as just some part of the reason was based on the whistleblowing activity."

He said it was nice that the high court went out of its way to highlight Congress' intent behind the lower standard of proof for whistleblowers, saying it emphasizes the critical role whistleblowers play in protecting public health, safety and well-being.

Noting that clients come to him after they've tried to fix issues internally with their companies and have been fired or retaliated against, Schnell said the high court's decision will force companies to take a harder look at their compliance departments and whistleblower programs, to the extent they have any.

"Whistleblowers provide an early warning sign, and it's only when the companies ignore them, try to cover it up, fire them, that it blows up into much bigger issues that come back to bite the company in spades," Schnell said.

"Hopefully, the enlightened companies will continue to do what they're doing and embrace whistleblowers, and the unenlightened companies will see a decision like this and start to take measures to improve their dealings with whistleblowers," he said.

Preston Pugh, co-chair of Crowell & Moring LLP's False Claims Act practice, said employers should take measures such as establishing whistleblower hotlines and protocols, testing their reporting procedures and monitoring the named and anonymous claims they receive.

He said there has been a trend in the past 10 years at least in which "the courts, the federal government and state governments are all pointed in the direction that they want to see more whistleblower claims, not fewer." He pointed to the Southern District of New York's recently announced whistleblower program for corporate fraud and public corruption and the European Union's Whistleblowing Directive as examples.

Employers who recognize that trend, he said, will make sure whistleblowers have a way to get their claims heard within their organization.

Alexis Ronickher, managing partner at the whistleblower law firm Katz Banks Kumin LLP, said she's "very happy that it came down the way it should have, which is just a very straightforward acknowledgment of what the statute says and what's required."

"It's very clear as to what a whistleblower has to prove, which is that they don't have this new heightened requirement of proving animus in addition to intent, or as the main means of proving intent," Ronickher said. "It's a huge relief for the whistleblower bar because protecting whistleblowers is really critical."

She said the message from the high court is clear with respect to Congress' intent, which was to make a whistleblower-friendly standard for proving retaliation, in order to protect the public.

"I appreciate — as someone who works with whistleblowers who risk their livelihoods and sometimes even their safety to do the right thing for the greater good — that it's acknowledged here," Ronickher said. "Congress did this for a reason."

--Editing by Jay Jackson Jr. and Emily Kokoll.
