COMPLIANCE WEEK

{REGULATORY POLICY}

Supreme Court to consider case that could affect corporate whistleblowing

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BY AARON NICODEMUS, COMPLIANCE WEEK

The Supreme Court agreed to hear arguments in a case that has focused attention on the burden of proof whistleblowers reporting misconduct internally must meet to establish retaliation by their public company employer.

One expert said the court's decision could discourage employees from reporting misconduct internally and instead encourage them to file a claim with the Securities and Exchange Commission (SEC).

The case, Murray v. UBS Securities, was placed on the court's docket in May, following an August decision by the U.S. Court of Appeals for the Second Circuit to overturn a lower court's decision that had favored the whistleblower, Trevor Murray.

Murray had been hired by UBS in 2011 to write research reports on mortgage-backed securities. He accused his employer, specifically its sales team, of pressuring him to write the reports in such a way that favored UBS's products and sales strategies.

Murray refused, then blew the whistle on these potential securities law violations to UBS's senior management in January 2012. He was fired a month later.

Murray filed a lawsuit against UBS in 2014, claiming he was fired by the firm for blowing the whistle. In 2017, a federal jury awarded him $903,300, according to his June 27 brief submitted to the court.

The appeals court overturned the decision, arguing the jury should have been instructed to consider whether UBS displayed "retaliatory intent" in firing Murray because he blew the whistle to his superiors.

The case revolves around a lower standard of proof whistleblowers must meet to prove retaliation by an employer, set by the Sarbanes-Oxley Act of 2002 (SOX). In crafting the law, Congress set a low standard of proof for an employee attempting to claim retaliation: the "contributing factor" standard.

U.S. Solicitor General Elizabeth Prelogar, along with representatives of the Department of Labor and SEC, argued in a July 5 amicus brief the appeals court erred when it required proof of retaliatory intent.

"If Congress had intended to require a complainant also to demonstrate that reprisal, retaliation, or retaliatory intent by the employer was a contributing factor, it would have enacted text to that effect," they wrote.

Sens. Chuck Grassley (R-Iowa) and Ron Wyden (D-Ore.) said in a June 30 amicus brief the appeals court's interpretation imposed "a new burden on SOX whistleblowers that is fundamentally different from the burden that Congress expressly chose to include in SOX."

The court's decision in the case could have a direct impact

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on all corporate internal reporting cases, said Stephen Kohn, a whistleblower attorney and chairman of the National Whistleblower Center.

"Dodd-Frank does not protect internal whistleblowers, employees who report to compliance, or auditors who report fraud internally. These whistleblowers are only covered under SOX," Kohn said.

He said a review of cases under SOX demonstrates more than 90 percent of all whistleblower cases concern internal whistleblowing. If Murray loses his appeal, Kohn said, the risk of retaliation for reporting concerns through management will significantly increase.

"Why would an employee use an internal system if the ability of corporations to prevail in retaliation cases dramatically increases based on an anti-whistleblower Supreme Court decision?" he asked. "The safest way to make a disclosure would be to avoid compliance programs and go directly to the SEC."

The court has extended the time to file briefs on the merits of the case until Aug. 8. ■