

Scalia's Son To Make High Court Debut In Whistleblower Case

By **Jessica Corso**

Law360 (September 19, 2023, 9:30 PM EDT) -- Eugene Scalia, the son of the late U.S. Supreme Court Justice Antonin Scalia, will present oral arguments before the high court for the first time next month as he seeks to uphold a victory won by UBS AG in a case accusing the bank of retaliating against an alleged whistleblower, Law360 has learned.

Scalia, a partner at Gibson Dunn & Crutcher LLP, has been chosen to represent UBS during oral arguments before the Supreme Court on Oct. 10.

"I'm grateful to have been given the privilege of arguing this important employment case, and of appearing before the court that meant so much to my father," Scalia said in a statement to Law360 on Tuesday.

The court's eventual ruling in the case could set the standard for proving employer retaliation claims across a number of industries as alleged UBS-whistleblower Trevor Murray seeks to reinstate his \$900,000 jury award after it was vacated by the Second Circuit.

Though Scalia has participated in several Supreme Court appeals during his time with Gibson Dunn and as U.S. secretary of labor, next month will mark his first time speaking before the court where his father's legacy still looms large.

Justice Scalia died unexpectedly in February 2016 after more than three decades on the bench, during which time the conservative jurist became known for the originalist ideology displayed through his witty dissents and rapid-fire questioning of the attorneys who argued before the court.

Eugene Scalia, one of nine children that Justice Scalia shared with his wife Maureen, was beginning his own legal career as a student at the University of Chicago Law School while his father was serving his first years on the high court bench in the late 1980s.

The younger Scalia has since gone on to build his own credentials as a conservative legal scholar in the field of labor and employment law, serving as the solicitor of the U.S. Department of Labor under the administration of President George W. Bush and later as its secretary under the administration of President Donald Trump.

Scalia returned to Gibson Dunn, the firm where he began his career, after he stepped down as labor secretary with the inauguration of President Joe Biden.

But despite his high-profile career and famous father, Scalia was described by a former colleague as approachable and down to earth.

Richard Zack of Troutman Pepper Hamilton Sanders LLP remembered calling upon Scalia's expertise when he petitioned the Supreme Court last year to hear an appeal of a Third Circuit ruling against his client, TitleMax of Delaware Inc.

The Troutman Pepper partner said he had never met Scalia before but knew that Gibson Dunn was the right firm to help him draft the petition due to its experience with the "esoteric" dormant commerce clause issue at the center of the case. He said that Scalia's famous last name never went to his head.

"There were a couple of times throughout the process [of working with him] where I reached out to him, and he said 'hey, just call me on my cellphone,'" Zack said. "He is not someone that makes you go through his assistant."

Though the Supreme Court ultimately decided not to hear the TitleMax appeal, Scalia would have argued the case had it gone before the court for oral arguments, Zack said. He didn't think the Gibson Dunn attorney would be intimidated by the unique position of arguing before several of his father's former colleagues next month.

"I'm sure he's got emotions about it and there's a lot of pressure on him, but when we worked together he was very calm and unflappable," Zack said.

Deborah White also worked alongside Scalia when he helped prepare an amicus brief on behalf of the Retail Litigation Center in another case the high court declined to hear last year. The center, where White is general counsel, urged the court to hear the appeal brought by an employer benefits organization challenging a Seattle ordinance requiring local businesses to fund hotel workers' health insurance.

White told Law360 in an email Tuesday that Scalia, who is referred to by friends and colleagues as Gene, is an "outstanding lawyer."

"We are delighted that he will get a chance to argue before the Supreme Court," White said. "The justices will surely be the better for the quality of the arguments that Gene will bring to the podium."

Arguing across the aisle from Scalia will be Easha Anand of the Stanford Law School Supreme Court Litigation Clinic, who will present Murray's case to the court, according to fellow Murray attorney Robert L. Herbst of Herbst Law PLLC.

The federal government has also been given permission to argue in favor of upholding Murray's jury award, saying that the Second Circuit's decision placed too high a burden on whistleblowers suing under the Sarbanes-Oxley Act of 2002.

Herbst told Law360 on Monday that Anthony Yang of the U.S. Solicitor General's Office has been earmarked to present oral arguments for the government. A representative for the U.S. Department of Justice didn't immediately respond to an email seeking confirmation.

Murray is a former UBS analyst who claims the bank fired him after he reported internal pressure to

alter research he conducted on UBS' commercial mortgage-backed securities business. The company claims that Murray was laid off due to the bank's poor financial performance in 2011.

The Second Circuit said that Murray could retry his case, but this time the jury would need to be instructed on the need to find that UBS acted with "retaliatory intent" in firing the analyst. Murray appealed that finding to the Supreme Court and has received the support on not only the U.S. government but two of Congress' leading whistleblower statute architects, U.S. Sens. Chuck Grassley, R-Iowa, and Ron Wyden, D-Ore.

The senators said in a brief that the Second Circuit's ruling overrode congressional intent that terminated employees only need to prove that their alleged whistleblowing was a contributing factor to their firing to make their case.

The U.S. Chamber of Commerce, meanwhile, is among those supporting UBS before the high court. The Chamber argued in its brief that a ruling in Murray's favor would burden the business community by threatening liability under whistleblower statutes when there with even a "minimal causal relationship" between a protected activity and an employee's termination.

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

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

The case is Murray v. UBS Securities LLC et al., case number 22-660, in the U.S. Supreme Court.

--Editing by Alex Hubbard.