

In The
Supreme Court of the United States

DIANA BERBER,

Petitioner,

V.

WELLS FARGO BANK, N.A.,

AND

MARSHA PAINTER,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED

After entry of judgment and affirmance on appeal, Respondent Wells Fargo Bank, N.A., entered into a Deferred Prosecution Agreement with the United States Attorneys's Offices for the Central District of California and the Western District of North Carolina for unlawful sales practices identical to those that this case turned on. Did the lower courts err when declining to set aside the judgment on the employment retaliation claims of Petitioner Diana Berber that were conceded in the Agreement?

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REASON FOR GRANTING THE PETITION

After entry of judgment and affirmance on appeal, Respondent Wells Fargo Bank, N.A. (“Wells Fargo”), entered into a Deferred Prosecution Agreement (“DFA”) with the United States Attorneys’s Offices for the Central District of California and the Western District of North Carolina for unlawful sales practices identical to those that this case turned on. Did the lower courts err when declining to set aside the judgment on the employment retaliation claims of Petitioner Diana Berber (“Ms. Berber”) that were conceded in the DFA?

Wells Fargo, in its Brief in Opposition to Ms. Berber’s Petition for Writ of Certiorari, contends that Ms. Berber was fired from her position as a personal banker for reasons other than the unlawful Wells Fargo sales practices addressed in the DFA. However, the employment termination letter which was signed by Respondent Marsha Painter (“Ms. Painter”) and given to Ms. Berber on March 18, 2014, gave only *one* reason:

We have reviewed your overall performance as a Personal Banker. We have determined that you have *not* met the performance expectations regarding daily activities to attain *sales* goals required in this position.

Based on the *reason* listed above we will terminate your employment with Wells Fargo effective March 18, 2014. (Emphasis supplied)

As confirmed by Ms. Painter's March 18, 2014, letter, Ms. Berber's employment by Wells Fargo was terminated *solely* in retaliation for her refusal to engage in the unlawful retail sales practices. On February 20, 2020, Wells Fargo agreed to pay \$2,500,000,000.00 in fines and penalties to the United States Department of Justice and \$500,000,000.00 in restitution to the United States Securities and Exchange Commission as a result of those unlawful sales practices.

Rule 60, Federal Rules of Civil Procedure, speaks to this manifestly unjust situation: Wells Fargo's February 20, 2020 acknowledgment (subsequent to the conclusion of Ms. Berber's lawsuit), in the DFA, that the retail sales practices in which Ms. Berber had refused to engage, and which underlay the retaliatory termination of her employment, had violated the federal criminal statutes proscribing false banking entries, reports and transactions (18 U.S.C. § 1005) and identity theft (18 U.S.C. § 1028A).

Ms. Berber's petition constitutes her last chance to prosecute her indisputably meritorious employment retaliation claims against Wells Fargo and Ms. Painter the American way, before a jury of her peers.

CONCLUSION

Ms. Berber's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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