

Supreme Court, U.S.
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No. 24 - 52

In the Supreme Court of the United States

GUNES BIRAY

Petitioner,

v.

UNITED STATES
SECURITIES EXCHANGE COMMISSION

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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Petitioner

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SUPREME COURT, U.S.

QUESTION PRESENTED

Does the United States Securities and Exchange Commission (SEC) possess absolute immunity from appellate scrutiny when it arbitrarily or capriciously denies whistleblower awards, particularly in instances where such rejections stem from the SEC's failure to adhere to its own established procedures, in defiance of Supreme Court precedents?

(i)

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15 U.S.C. § 78u-6(b)	3
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OPINION BELOW

The Court of Appeals' order can be found in the public records and is included in Appendix A (App. 1a).

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered judgment on March 21, 2024. A petition for panel rehearing and rehearing *en banc* was denied on April 17, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute, 15 U.S.C. § 78u-6(b), is available in the public domain for reference and is included in Appendix E (App. 14a).

STATEMENT OF THE CASE

According to a sworn statement by an SEC attorney, the SEC launched the DryShips Investigation on April 28, 2017, one day after a Wall Street Journal article raised concerns about potential profit-making by the CEO of DryShips through stock sales to a hedge fund. The investigation sought to identify any securities law violations by DryShips or associated traders. On August 30, 2017, DryShips publicly acknowledged receiving an SEC subpoena regarding these transactions.

On August 17, 2021, the SEC settled with Murchinson Ltd., the hedge fund's owner, over

allegations of selling DryShips' shares without actual ownership and incorrectly labeling them as 'long' sales. This 'Covered Action' was posted on the SEC's website on September 30, 2021. The Petitioner, having applied for a whistleblower award on October 1, 2021, faced rejection of his application by the SEC on August 25, 2023.

The Petitioner had previously informed the SEC, on June 25, 2017, about Murchinson and its hedge fund, Kalani Investments Ltd., allegedly engaging in the naked short selling of DryShips' shares. This tip, which was both original and aligned with the SEC's enforcement priorities, was not escalated by the SEC's triage attorneys to the DryShips Investigation team, despite the investigation being active for two months. The tip was consequently marked as 'No Further Action' and ignored by the investigation team, leading to the denial of the Petitioner's award application.

Furthermore, the Petitioner submitted three additional tips regarding material misstatements by DryShips and conflicts of interest and breaches of fiduciary duty by its executives. Two of these tips were considered by the investigating team but were reportedly not used in the enforcement action.

On September 8, 2023, the Petitioner challenged the SEC's denial of his award application before the Court of Appeals for the District of Columbia Circuit. In his briefs, he argued that his information was pertinent to the conduct involved in the covered action, yet the SEC's triage attorneys failed to follow mandatory protocols in

evaluating his whistleblower submission and did not forward his information to the investigative team. This failure, he contended, constituted a violation of his rights to an award, with the SEC acting negligently or arbitrarily.

On March 21, 2024, the D.C. Circuit Court of Appeals concluded that the Petitioner did not prove his information 'led to the successful enforcement' of the SEC's covered action as required by 15 U.S.C. § 78u6(b)(1). The court found that any procedural objections to the SEC's handling of his information, or errors in the investigation process, were irrelevant since the Petitioner's tips were not utilized in any investigative or prosecutorial action, thus no whistleblower award was warranted.

The Petitioner maintains that the Appeals Court's judgment conflicts with established Supreme Court precedents, specifically *Morton v. Ruiz*, *Service v. Dulles*, and *Vitarelli v. Seaton*. These cases underscore the necessity for agencies to strictly adhere to their own procedures when making decisions that affect individual rights. The failure to do so typically requires the court to vacate the initial decision and remand the matter back to the agency for further consideration.

In the case of *Morton v. Ruiz*, the Supreme Court ruled that the Bureau of Indian Affairs could not deny benefits based on unpublished criteria inconsistent with the agency's statutory mandate. *Service v. Dulles* established that the State Department must follow its own procedures when dismissing an employee. *Vitarelli v. Seaton*

highlighted that agencies are bound by their regulations even when exercising discretionary power.

In the present case, the SEC failed to follow its own mandatory procedures in evaluating the Petitioner's tips, despite these procedures being documented in the SEC's Enforcement Manual, annual reports to Congress on the Whistleblower Program, and on its whistleblower website. This oversight led to the denial of the Petitioner's award application, even though his tips were original, timely, and relevant to the conduct in question.

REASONS FOR GRANTING THE PETITION

A. Conflict with Supreme Court precedent

The SEC's disregard for its mandatory procedures in evaluating the Petitioner's tips renders the denial of the award application indefensible. The Court of Appeals' judgment is at odds with established Supreme Court precedent, which mandates strict adherence to agency procedures when individual rights are at stake.

B. Threat to the Whistleblower Program's Integrity

Upholding the Court of Appeals' decision as a binding precedent would undermine the integrity of the Whistleblower Program. It would allow the SEC to sidestep responsibility for the negligent or arbitrary assessment of whistleblower tips, granting the agency unchecked discretion to deny awards, irrespective of the substantive value of the

information provided.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.



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