

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-1165

RETIREMENT PLANS COMMITTEE OF IBM, ET AL., PETITIONERS

v.

LARRY W. JANDER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO
PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE
AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae supporting neither party and that the United States be allowed ten minutes of argument time. Petitioners and respondents each have agreed to cede five minutes of their argument time to the United States and therefore consent to this motion.

This case concerns the scope of a fiduciary duty imposed on pension plan fiduciaries by the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829. Specifically, it concerns when a fiduciary of an employee stock ownership plan (ESOP) who is also a corporate official of the employer is required by ERISA's duty of prudence, 29 U.S.C. 1104(a)(1)(B), to publicly disclose material, nonpublic information about the employer. Respondents were participants in an ESOP offered by their employer International Business Machines Corporation (IBM). Petitioners served as ERISA fiduciaries to the plan. Respondents allege that the petitioners knew or should have known, based on material, nonpublic information, that IBM's stock price was artificially inflated, and that petitioners breached the duty of prudence by failing to take action to prevent the ESOP from making additional purchases of IBM stock at an inflated price. The court of appeals held that respondents have alleged sufficient facts to support a claim that petitioners violated the duty of prudence by failing to publicly disclose the material, nonpublic information in order to remove any inflation in IBM's stock price.

The United States has filed a brief as amicus curiae in support of neither party, arguing that the court of appeals evaluated the complaint under the wrong standard and urging this Court to vacate the judgment and remand the case to allow the court of appeals to apply the correct standard in the first instance.

The United States has a substantial interest in this case. The Secretary of Labor has primary authority for administering ERISA. The Department of Justice and the Securities and Exchange Commission administer and enforce the federal securities laws. The government has previously presented argument in other cases addressing the scope of ERISA's fiduciary duties and the statute's other protections for plan participants and beneficiaries. See, e.g., Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014); LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248 (2008); Varsity Corp. v. Howe, 516 U.S. 489 (1996). The government's participation in oral argument in this case will provide the federal perspective on, inter alia, the application of ERISA's duty of prudence to ESOPs. In Dudenhoeffer, the Court noted that the Securities and Exchange Commission's views, in particular, "may well be relevant" to determining the scope of ERISA's duty of prudence in similar circumstances. 573 U.S. at 429. The Commission has signed the government's brief in this case, along with the Department of Labor and the Department of Justice. The government therefore believes that participation by the United States will be of material assistance to the Court.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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