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No. 25-

ORIGINAL

Supreme Court, U.S.
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In the
Supreme Court of the United States

MITZI G. BAKER,

Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has enacted a statute to protect whistleblowers under the Sarbanes-Oxley Act, 18 U.S.C. § 1514(a). This Court has held that an employee does not have to prove, “retaliatory intent,” in *Murray v. UBS Securities, LLC*, 601 U.S. 23, 28 (2024).

THE QUESTION PRESENTED IS:

Whether federal whistleblowers have to prove “retaliatory intent” in an Individual Right to Action, (IRA), under the Whistleblower Protection Enhancement Act (WPEA).

PARTIES TO THE PROCEEDINGS

Petitioner and Petitioner-Appellant Below

- Mitzi G. Baker

Respondent and Respondent-Agency below

- Social Security Administration

RELATED CASES

U.S. Court of Appeals, Federal Circuit

No. 2024-2179

Mitzi Baker, *Petitioner* v. Social Security
Administration, *Respondent*

Judgment: March 10, 2025

Merit Systems Protection Board

No. CH-1221-18-0412-W-1

Mitzi Baker, *Appellant* v. Social Security
Administration, *Agency*

Final Order: July 17, 2024

U.S. Court of Appeals, Federal Circuit

No. 2024-1478

Mitzi Baker, *Petitioner* v. Social Security
Administration, *Respondent*

Judgment: October 15, 2024

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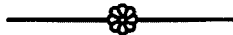
PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mitzi G. Baker, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.



OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit in case No. 24-2179, is non-precedential and is reproduced at Pet.App.1a. The decision of the Merit Systems Protection Board is reproduced at Pet.App.8a.



JURISDICTION

The Federal Circuit entered judgment on March 10, 2025. App.1a. On June 4, 2025, Chief Justice Roberts extended the time to and including August 7, 2025, in which to file this petition. No. 24A1187. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

The Whistleblower Protection Enhancement Act, Publication Law No. 112-199 (11/27/12) provides:

Prohibits retaliation for filing an appeal, complaint, grievance, or testifying on matters related to equal employment opportunity.

The Sarbanes-Oxley Act, 18 U.S.C. § 1514(a) provides:

No covered employer may discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment because of "protected activity."



STATEMENT OF THE CASE

A. Congress Did Not Intend to Create Loopholes for Employers to Elevate their Burden-Shifting Responsibilities in the WPA, Nor the WPEA.

The question presented is very important because uniformity was a specific congressional objective in enacting the statutes at issue and recurring – *e.g.*, it has become a routine practice for the Merit Systems Protection Board (Hereafter, "MSPB") decisions to deny that the Supreme Court decision in *Murray v. UBS, LLC*, 601 U.S. 23, 27 (2024), is inapplicable to the Whistleblower Protection Enhancement Act (WPEA).

However, several Federal Circuit decisions substantially narrowed the scope of protected conduct by creating loopholes that were contrary to congressional intent, and the *Murray* decision. These decisions include: (1) *Horton v. Dept. of the Army*, No. 01A30886 (Fed. Cir. 2003) (holding: that disclosures to the alleged wrongdoer are not protected); (2) *Willis v. Dept. of Agriculture*, 141 F.3d. 1139 (Fed. Cir. 1998) (excluding from WPA protection a disclosure made as part of an employee's normal job duties; (3) *Merrwissen v. Dept. of Interior*, No. 00-3107 (Fed. Cir. 2000) (Holding: that disclosures of information already known are not protected). These decisions were contrary to the plain meaning of the WPA and diverted attention from the real issues in WPA cases – whether the personnel action at issue occurred because of the protected disclosure.

B. Congress' Intent in Establishing the WPA and its Creation of the WPEA.

When Congress enacted the Whistleblower Protection Act of 1989, it specifically protected “any disclosure of covered forms of wrongdoing, *i.e.*, any information that an individual reasonably believes evidence a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to the public health and safety. *See*, 5 U.S.C. § 2302(b)(8).

On November 27, 2012, President Obama, signed into law the Whistleblower Protection Enhancement Act of 2012 (WPEA), which will substantially strengthen whistleblower protections for federal whistleblowers. To ensure that federal employees will come forward with vital disclosures that make the government more efficient, transparent, and accountable, the WPEA

removes judicially created loopholes, that significantly narrowed the scope of protected whistleblowing under the WPEA, enhances the remedies available to government whistleblowers who have suffered retaliation. Additionally, sections 101 and 102 of the WPEA restores the original intent of the WPA to adequately protect whistleblowers by clarifying that disclosures do not lose protection.

Moreover, the WPEA, prohibits retaliation for filing an appeal, complaint, grievance, or testifying on matters related to equal employment opportunity. After, the *Murray* decision, the Federal Circuits decisions again substantially narrowed the scope of protected conduct by creating loopholes that are contrary to congressional and the Supreme Courts intent. These decisions include: (1) *Baker v. SSA*, No. 2024-1478 (Fed. Cir. 2024) (Holding: that 3 additional requirements 1) institutional motive to retaliate stating that since managers suffered no adverse consequences as a result of 2) their adverse actions they should not be held accountable, 3) that the agency); (2) *Abuttalib v. MSPB*, No. 23-1400 (Fed. Cir. 2025)(Holding: retaliation for filing an EEO complaint did not constitute whistleblowing under 5 U.S.C. § 2302(b)(8) or protected activity under § 2302(b)(9)(A)(i) – additionally the Court opined that the appellant did not present her argument regarding the EEO settlement agreement as evidence of whistleblowing to the AJ, and waived it for the first time on appeal).

C. The Federal Circuit Decision is Wrong and Conflicts with this Court's Decision as Well as Other Circuits.

The Supreme Court decision in *Murray* expressly left open (or reserved) the issue of whether the Courts'

decision applied to the WPEA, FRSA, other than the Sarbanes-Oxley Act (SOX), in regarding to whistleblowing and “retaliatory intent.” This shows that the Court recognized it as a genuine open issue.

There’s a circuit split that the Federal Circuit again has created with this case, and others circuits have cited the *Murray* case, in deciding whether the employee must show “retaliatory intent” in taking an adverse employment action. Several circuits have applied the *Murray* case with the language, and others merely mentioned it without application on the merits. This is a strong showing that some circuits got it wrong and the Court should act now and not allow further percolation. For example, summarizing cases, the Eighth Circuit, in *Continental Cement Co. v. Secretary of Labor (MSHA)*, on behalf of T Otten, No. 23-2213, (8th Cir. 2/28/24) The Court adjudicated the case under 30 U.S.C. § 815(c)(f). The Secretary alleged that Otten was illegally discriminated against, when she suffered a loss of pay as a result of exercising her walkaround right. The Eight Circuit cited *Murray* and applied to the above statute. Like, *Murray*, the Respondents argued that § 815(c)(1) required Otten to demonstrate that they acted with retaliatory intent or retaliatory animus. Here, the Eighth Circuit analyzed the case with the burden-shifting approach for analyzing § 815(c)(1). Inevitably, the Court reversed the decision of the Commission stating that Continental had not violated § 815(c)(1) based on the record. Likewise, the Eight Circuit in *Estella Morris v. Dept of Veteran Affairs*, No. 23-3548, (8th Cir. 10/10/24), the petitioner brought a civil rights action pursuant to 42 U.S.C. § 2000e-(2a)(1).

The District Court granted summary judgement for Respondents, although the *Murray* case was casually mentioned regarding animus by the decision maker, the Eight Circuit affirmed the District Court In *Aaron Katzel v. American International Group, Inc.*, No 22-2764 (2nd Cir. 6/20/24) (Summary Order). Here, the Plaintiff sued AIG for purported violations of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514(a), and New York State Law. While the Court recognized that the Act prohibits publicly traded companies from retaliation against employees who report what they reasonably believe to be instances of criminal fraud or securities law violations citing *Murray*, the Court applied the burden-shifting analysis as in the WPEA. Consequently, the Court concluded that Katzel had not satisfied his burden of showing that his protected activity was a contributing factor in his termination.

In *Stepen Monden v. Consolidated Nuclear Security, LLC*, No. 23-10553, (5th Cir. 3/8/24), Monden a production section manager supervising production technicians, was fired from CNS for timekeeping fraud following an HR investigation. Monden filed a lawsuit in the District Court, alleging that his testimony to the Inspector General (IG), was a contributing factor to CNS's decision to terminate his employment and CNS, thus violated 41 U.S.C. §§ 4712(a)(1).

This statute incorporates the WPEA at 5 U.S.C. § 1221(e), which requires a plaintiff to prove 1) his disclosure information that was evidence of misconduct of a federal contractor; 2) the protected disclosure was a contributing factor to the adverse employment action, 5 U.S.C. § 4712(a)(6), citing *DuPage Reg. Off of Education v. U.S. Dept of Education*, 58 F4th 326,

352 (7th Cir. 2023). The Court analyzed this case using the *Carr* factors. See, *Carr v. Social Security Administration*, 185 F.3d. 1318, 1323 (Fed. Cir. 1999). As in the *Murry* case the Court assumed Monden produced a prima facie case of retaliation. Nevertheless, the *Murray* case was only mentioned in a footnote, but did not apply the case on the merits and affirmed the District Court's decision, stating CNS evenhandedly terminated other employees for the same offense.

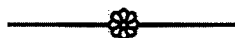
In *Charles Matthew Erhart v. BOFI Federal Bank*, No. 23-3065 (9th Cir. 2/6/25) The District court granted a motion for summary judgment for Erhart. *BOFI* appealed the District Court's award of 1 million dollars to Erhart. *BOFI* argued that it was entitled to judgment as a matter of law on its same-action affirmative defense. Although retaliatory intent was not required, the Court relied on evidence in the record that *BOFI* filed lawsuits against Erhart's mother and former girlfriend for their testimony, which it considered relevant evidence of *BOFI*'s retaliatory intent, because the jury could infer from *BOFI*'s lawsuits harbored animus toward Erhart.

Here, the decision in favor of Erhart was affirmed. (This case is not for publication). Summarily, in *Paul Parker v BNSF Railway Co.*, No. 22-35-695 (9th Cir.8/9/24), this case was more complicated, in that, the Ninth Circuit, reversed and remanded twice back to the District Court due to the defendants persistence of several issues. Mr. Rookaird through his estate representative Paul Parker challenged his termination from *BNSF* Railway, under the anti-retaliation provision of the Federal Railroad Safety Act (FRSA), 49 U.S.C. §§ 20109(d). The jury found in Rookaird's favor. Upon appeal by *BNSF*, the Ninth

Circuit vacated and remanded the verdict stating the District Court should consider it's partial summary judgment for Rookaird on the issue of whether his performance on air brake tests had contributed to *BNSF's* decision to discharge him. On remand, the District Court ruled that BNSF was entitled to an affirmative defense by showing that the air-brake test contributed "very little" to *BNSF's* decision to terminate Rookaird. Rookaird timely appealed, this time contending the District Court erred in its analysis of *BNSF's* affirmative defense and in certain evidentiary rulings. The Ninth Circuit concluded that the District Court's application of the FRSA does not comply with the text of the statute, which prohibits the discriminatory discharge of an employees due even "in part" to the employees refusal to violate or assist in violating a railroad safety law, rule or regulation, 49 U.S.C. § 20109(a)(2).

BNSF needed to demonstrate by clear and convincing evidence not merely that it could have fired Rookaird absent his engaging in the protected activity, but rather that *BNSF* would have fired Rookaird: 49 U.S.C. § 42121(b)(2)(B)(ii); 29 CFR § 1982.104(e)(4); citing *Brousil v. U.S. Dept. of Labor Administration, Review Board*, 43 F.4th 808, 812 (7th Cir. 2022) (citing, *Speckle v. Stone & Webster Constr., Inc.* ARB No. 13-074, 2014 NL 18709.33 at 12 (Dept of labor Admin., Review Board. 4/25/2004). For the second time, the Court again vacated and remanded the affirmative defense issue for further proceedings consistent with their opinion. On remand the District Court made triable issues. However, in September 2021, Mr. Rookaird passed away. The District Court concluded *BNSF* satisfied its affirmative defense and was not liable

for unlawful retaliation. Rookaird appealed on the grounds that the District Court erred in concluding that *BNSF* established its affirmative defense in light of FRSA law and the record. Consequently, in considering the *Murray* case and incorporating the language specific to FRSA, stating the District Court erred in its analysis of *BNSF*'s affirmative defense, thus the case is vacated and remanded.



REASONS FOR GRANTING THE PETITION

I. The Decision Disregards the Well-Settled Issue of Whether Retaliatory Intent Applies to all Whistleblower Statutes.

The cases cited above are an exception with a difference, in the *Murray* Court specified that the employee did not have to prove that the decisionmaker had a retaliatory animus or motive. In the case on appeal like *Murray*: 1) the decisionmaker claimed no retaliatory motive was animus toward the employee; 2) the decisionmaker had no prior knowledge of the employees whistleblowing activities or other protected activity prior to the adverse action; 3) the Federal Circuit failed to see the connection in this case and the Supreme Court's decision in *Murray*; and claimed that *Murray* was inapplicable in the WPEA context, and allowing federal agencies to get a loophole, where the statute nor Congress intended.

II. This Court Raises an Exceptionally Important Question this Court Has Never Decided.

The question before this Court is whether the decision in the *Murray* is or is not applicable under

the WPEA, whether or not the employee has to prove "retaliatory intent" under the WPEA, where a decisionmaker claims no bias, animus, or had a retaliatory motive to take an adverse action. This Court stated that the Sarbanes-Oxley Act of 2002, not covered employer may discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment because of "protected whistleblowing activity," 18 U.S.C. §§ 1514(a). In contrast, the WPEA does not include a specific "retaliatory intent" clause. However, it generally protects employees from retaliation for disclosures that may lead to a violation of law or gross mis-management. While the WPEA safeguards federal employees from retaliation when they expose wrongdoing it does not explicitly mention retaliation intent as a protected category.

In the case at bar, Petitioner's case like others were waiting a review by the full MSPB Board. However, the Board did not have a quorum for several years. When it did more than 3,000 cases were shuffled through the system with the MSPB requiring more than Congress intended in the WPA, as amended in the WPEA, which was to strength protection for federal whistleblowers, and not create loopholes for federal agencies to slip through at the expense of the employee and deviate from the statute, as this was justice delayed and justice denied. Consequently, the Federal Circuit followed suit despite the general mandates in Courts decision in *Murray*, regarding "retaliatory intent." As evidenced above, several circuits have applied the *Murray* decision in several instances outside of the § 1514(a) Act in other whistleblower statutes; however, the MSPB and the Federal Circuit

held fast that the decision was inapplicable, but current law says it is. The Supreme Court's holding in *Murray* is correct, but did conflict with any decision of different circuit, but the MSPB and Federal Circuit.

Even though the employee must go through the first hurdle in proving by preponderance evidence that the whistleblowing was a "contributing factor" in the decisionmaker's adverse action, loopholes making it conversely difficult to do so.

The Courts decision will settle a split between the circuits, the MSPB, and the Federal Circuit on the correct application of its decision in *Murray*, which will impact how employers defense against all whistleblower Acts in retaliation claims, this Courts review is warranted. Moreover, whichever way this Court rules will have substantial effects on employees defending against WPEA retaliation claims. Because Petitioner has identified several circuits decisions including the Federal Circuit and MSPB has reached a contrary result with respect to the statutory claims before it, this case does warrant further review.

III. This Case is an Ideal Vehicle to Settle this Exceptionally Important Question.

Presently, appellants are in the same precarious position as described above regarding there was no quorum, in which, to get resolution for their petitions for review of ALJ decisions at the Merit Systems Protection Board. Now, there is only an Acting Chairman with no other Board members at this writing; thereby holding in abeyance thousands of cases. It will months to play out a full Board, in the meantime appellant will still not have their reviews argued on the merits; thereby making the situation an "intolerable state of

affairs” that will endure for years. As argued above, the Federal Circuit ran through these cases cited above. These long delays due to big back logs threaten to reduce most civil service laws, such as whistleblower protections in dead letters.

After, the *Murray* decision, other circuits regardless of what whistleblower statute was appealed, the Courts implemented and discussed the issue of “retaliatory intent,” but not the MSPB nor the Federal Circuit, to whom they look for guidance, who deemed it inapplicable under the WPEA.

As of May 24, 2025, the MSPB received 11,166 appeals, which is twice its typical workload in a fiscal year. Whistleblowers in the federal sector can ill afford to eventually appeal to an MSPB that does not follow Supreme Court precedent, and have the Federal Circuit to follow suit. The Courts intervention here will settle the split of the circuits and the Federal Circuit as to the correct application regardless of what statute is used to adjudicate whistleblower protections as it relates to “retaliatory intent” cases.

In the case on appeal, the Federal Circuit erred in two ways: First, it stated that the Petitioner had not brought up that she had an EEO complaint that included the decisionmaker. In fact, the record reveals that she had in the hearing before the AJ, her petition for review before the full Board, thus she did not waive this issue. Second, the Federal Circuit refused to allow the Petitioner, to not only show “retaliatory intent” when the decisionmaker claimed no animus, bias or retaliation for the adverse action as in *Murray*, but claimed it is inapplicable.



CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

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