UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JENNIFER SHARKEY,	:	10cv3824 (DLC)
Plaintiff,	:	JURY CHARGE
-v-	:	
J.P. MORGAN CHASE & CO., JOE KENNEY, ADAM GREEN, and LESLIE LASSITER, in their official and individual capacities,	:	COURT EXHIBIT 5 11-6-2017
Defendants.	:	

November 6, 2017

Role of the Court and the Jury

I will now instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them. If an attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow. You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate.

Your role is to decide the fact issues that are in the case. You are the sole and exclusive judges of the facts. You must determine the facts based solely on the evidence received in this trial. You must weigh and consider the evidence without regard to sympathy, prejudice, or passion for or against any party.

I remind you also that nothing I have said during the trial or will say during these instructions is evidence. Similarly, the rulings I have made during the trial are not any indication of my views of what your decision should be. What has been said in the opening statements, closing arguments, objections, or questions is not evidence.

The evidence before you consists of the answers given by the witnesses and the exhibits that were received in evidence. You may not consider any testimony that I have told you to

disregard or that was stricken from the record.

The Parties

The plaintiff in this case is Jennifer Sharkey. The defendants are J.P. Morgan Chase & Co., which I will refer to as J.P. Morgan, Joe Kenney, Adam Green, and Leslie Lassiter. All litigants, including corporations, are equal under the law and entitled to a just verdict.

In reaching a verdict you must bear in mind that each of the defendants is to be considered separately. Your verdict must be reached solely on the evidence or lack of evidence presented against each defendant, without regard to the liability of the other defendants.

For the purposes of the corporate defendant, J.P. Morgan, it has knowledge of all of the matters of which its officers or employees are aware.

The Claim

Sharkey claims that each of the defendants violated her rights under the Sarbanes Oxley Act of 2002, which I will refer to as the Act, by discharging her on August 5, 2009 in retaliation for her engaging in "protected activity." In addition to disputing Sharkey's claim, the defendants assert an affirmative defense that J.P. Morgan would have discharged her even in the absence of any protected activity.

Burdens of Proof

There are two different standards under which you will decide whether a party has met its burden of proof on a particular issue. Sharkey has the burden of proving her claim of retaliation by a preponderance of the evidence. To establish by a preponderance of the evidence means that the evidence of the party having the burden of proof must be more convincing and persuasive to you than the evidence opposed to it. The difference in persuasiveness need not be great: it requires only that you find that the scales tip, however slightly, in favor of the party with the burden of proof -- that what that party claims is more likely than not true.

By contrast, the defendants have the burden of proving their affirmative defense -- that they would have discharged Sharkey even in the absence of any protected activity -- by clear and convincing evidence. To be clear and convincing, the evidence must give you an abiding conviction that the truth of that position is highly probable. This involves a greater degree of persuasion than is necessary to meet the "preponderance of the evidence" standard.

What is important for either standard is the quality of the evidence and not the number of witnesses, or the number or variety of the exhibits, or the length of time spent on a subject. In determining whether any fact has been proved under

either standard, you may consider the testimony of all of the witnesses and all of the exhibits.

Simply because I have permitted certain evidence to be introduced does not mean that I have decided on its importance or significance. That is for you to decide.

The Act

The Act provides in pertinent part that:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 . . . or any officer [or] employee of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

> (1) to provide information, cause information to be provided . . . regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission . . . when the information . . . is provided to—
>
> . . .
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.

The Elements

To establish her claim under the Act, Sharkey must prove by a preponderance of the evidence each of the following elements of her claim:

(1) that she engaged in protected activity;

(2) that the defendant you are considering knew on or before August 5, 2009, the date J.P. Morgan discharged Sharkey, that Sharkey had engaged in the protected activity;

(3) that she suffered an unfavorable personnel action on August 5, 2009; and

(4) that her protected activity was a contributing factor in the unfavorable personnel action.

The parties agree that Sharkey was discharged from her employment on August 5, 2009, and that this constituted an unfavorable personnel action.

Element One: Protected Activity

Protected activity occurs when an employee

(1) works for a covered employer;

(2) provides information or causes information to be provided regarding conduct which the employee reasonably believes constitutes a violation of one of the statutes enumerated in the Act, and;

(3) provides that information to a person with supervisory authority over the employee or to another person with the authority to investigate, discover, or terminate misconduct.

It is undisputed that J.P. Morgan is an employer covered by the Act. It is also undisputed that each of the three individual defendants had supervisory authority over Sharkey.

Element One: Enumerated Statutes

The enumerated statutes in the Act are mail fraud, wire fraud, bank fraud, money laundering, securities fraud, the rules and regulations of the Securities and Exchange Commission, and fraud against shareholders. The mail and wire fraud statutes prohibit any person from devising a scheme to defraud another person or entity while using the mail or interstate wire facilities, such as the telephone or emails, to execute the scheme. Money laundering involves the transmission of money acquired from illegal activity, to conceal the source or nature of the money. The bank fraud statute prohibits fraud against a financial institution. The securities fraud statute prohibits fraud in connection with the trading of stocks, bonds, and other financial instruments. The rules and regulations of the Securities and Exchange Commission forbid manipulative or deceptive devices in connection with the purchase or sale of stocks, bonds, or other financial instruments.

Element One: Reasonable Belief

The reasonable belief requirement contains both subjective and objective components. For Sharkey to prove that she had a reasonable belief that a violation of one of the enumerated statutes had occurred or was occurring, she must show both (1) that she believed that the conduct she reported constituted a violation of one these laws, and (2) that a reasonable person in her position and with her responsibilities, training, and experience would have held the same belief. In providing information or causing information to be provided regarding conduct that constitutes a violation of one of these enumerated statutes, Sharkey need not have mentioned the specific law or its elements.

Element Four: Contributing Factor

Sharkey must show that the defendant you are considering was involved in the decision to terminate Sharkey's employment on August 5, 2009, and that her protected activity was a contributing factor to that defendant's decision. A contributing factor is any factor that tends to affect in any way the outcome of the decision. It need not be a significant or substantial factor in the termination decision to constitute a contributing factor.

When you consider the evidence of whether a defendant discharged Sharkey because of protected activity, the question is not whether the defendant showed poor or erroneous judgment; you are not to judge the wisdom of a defendant's decision. The issue is not whether the defendant's stated reasons for discharging Ms. Sharkey were unwise or unreasonable. An employer is entitled to make an employment decision for a good reason, a bad reason, or for no reason at all, so long as the decision is not affected by the employee's protected activity. Similarly, an employer is entitled to set its own expectations and requirements as to what constitutes satisfactory performance. You are not to judge a defendant's standards of expected performance. You may consider, however, whether a defendant's stated reasons for a decision are a cover-up or

pretext for retaliation against protected activity. If you find that the stated reasons for the decision to terminate Sharkey's employment were not the real reasons for the decision, then you may infer or not infer, as you choose, that the stated reasons were designed to conceal retaliation for protected activity.

Affirmative Defense

If you find that Sharkey has proven her claim of retaliation by a preponderance of the evidence against the defendant you are considering, then you must consider the defendant's affirmative defense. If you find that the defendant has shown, by clear and convincing evidence, that the defendant would have acted to discharge Sharkey in the absence of Sharkey's protected activity, then you must find in favor of the defendant. In making this determination, as before, you must not judge the wisdom of a decision to discharge Sharkey. Employers are entitled to set their own standards of expected performance. All you may consider is whether the defendant has shown that the defendant would have discharged Sharkey in the absence of the protected activity, not whether that decision would have been a good or bad one.

Damages

You should not infer that Sharkey is entitled to recover damages for her claim merely because I am instructing you on the elements of damages. It is exclusively your function to decide upon liability, and I am instructing you on damages only so that you will have guidance should you decide that Sharkey is entitled to recovery.

If you find that Sharkey was retaliated against for engaging in protected activity, and that the defendants have not shown their affirmative defense by clear and convincing evidence, then Sharkey is entitled to the relief necessary to make her whole. You may not award Sharkey damages caused by factors other than the retaliation committed by the defendants, if any. The damages must be fair and reasonable, neither inadequate nor excessive. You should not award damages for speculative injuries, but only for those injuries that the plaintiff has actually suffered because of the violation. It is the plaintiff's burden to prove the amount of damages and to prove that the damages were caused by retaliation based on protected activity.

Sharkey seeks compensatory damages for her emotional distress and back pay. The purpose of a damage award is to compensate Sharkey for the actual harm she has suffered, if any, as a direct result of retaliation. The purpose of such an award

is not to punish the defendants. Any award you make should be fair in light of the evidence presented at trial.

Back Pay

Sharkey is entitled, as compensation, to the back pay that she would have earned before today from J.P. Morgan if the retaliation had not occurred. This amount consists of the wages, including salary increases and any bonus, that Sharkey proves she would have obtained from J.P. Morgan from the date she was discharged.

If you find that Ms. Sharkey is entitled to back pay, please award only your calculation of the amount of the back pay: do not make any adjustments for inflation or other factors owing to the passage of time between the events at issue and today.

Mitigation of Damages

If you decide to award back pay damages to Sharkey, you must take into account that she had a duty to use reasonable diligence to mitigate, or lessen, her damages by seeking other employment. Other employment need not be comparable to the job she had at J.P. Morgan, but it must be employment that was suitable to Sharkey. It is the defendants' burden to prove, by the preponderance of the evidence, that other suitable work was available to Sharkey and that Sharkey did not take reasonable steps to find it. If the defendants show, however, that Sharkey left the job market and/or made no reasonable efforts to seek comparable employment, then they have no obligation to show that substantially comparable employment was available, and you may not award Sharkey back pay from that day forward.

Emotional Distress

Compensatory damages may include damages for pain, suffering, humiliation, mental anguish, or emotional distress. Pain and suffering means any mental suffering, including emotional suffering, or any resultant physical ailment caused by the wrongful act of the defendants. The plaintiff must present credible testimony with respect to the claimed distress, but psychiatric or other medical treatment is not a precondition to recovery. Nor is the plaintiff required to prove her claim through expert medical testimony. There is no requirement that evidence of the monetary value of such intangible things as mental anguish be introduced into evidence.

Nominal Damages

If you find after considering all the evidence that the plaintiff is entitled to recover damages but is not entitled to either back pay or damages for emotional distress, you must award the plaintiff "nominal damages." Nominal damages are awarded as recognition that the plaintiff's rights have been violated. You would award nominal damages of up to one dollar if you concluded that the only injury that a plaintiff suffered was the retaliation, without any actual damages.

You also may award nominal damages of up to one dollar if, upon finding that some injury resulted from the retaliation, you find that you are unable to compute monetary damages except by engaging in pure speculation and guessing. You may not award both nominal and actual damages to the plaintiff for a violation of the Act; either she experienced actual damages, in which case you must award compensatory damages, or else she did not, in which case you must award nominal damages. Nominal damages may not be awarded for more than a token sum.

Direct and Circumstantial Evidence

There are two types of evidence that you may properly use in reaching your verdict. One type of evidence is direct evidence. One kind of direct evidence is a witness's testimony about something he or she knows by virtue of his or her own senses -- something the witness has seen, felt, touched or heard. Direct evidence may also be in the form of an exhibit.

The other type of evidence is circumstantial evidence. Circumstantial evidence is evidence that tends to prove one fact by proof of other facts. There is a simple example of circumstantial evidence that is often used in this courthouse.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds are drawn and you cannot look outside. As you are sitting here, someone walks in with an umbrella that is dripping wet. Somebody else then walks in with a raincoat that is also dripping wet.

Now, you cannot look outside the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of the facts that I have asked you to assume, it would be reasonable and logical for you to conclude that between the time you arrived at the courthouse and the time these people walked in, it had started to rain.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from an established fact the existence or the nonexistence of some other fact.

Many facts, such as a person's state of mind, can only rarely be proved by direct evidence. Circumstantial evidence is of no less value than direct evidence; the law makes no distinction between direct and circumstantial evidence, but simply requires that you, the jury, decide the facts in accordance with the preponderance of all the evidence, both direct and circumstantial.

Expert Testimony

You have heard what is called expert testimony from Anne Marchetti. An expert is allowed to express an opinion on those matters about which she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing an expert's testimony, you may consider the expert's qualifications, opinions, reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept a witness's testimony merely because she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Deposition

The testimony of one witness was presented through the reading of her deposition. A deposition is pretrial testimony given under oath. You may consider the testimony of a witness given at a deposition according to the same standards you would use to evaluate testimony given in person at trial.

Credibility of Witnesses

Now for the important subject of evaluating testimony. How do you evaluate the credibility or believability of the witnesses? The answer is that you use your plain common sense. Common sense is your greatest asset as a juror. You should ask yourselves, did the witness impress you as honest, open, and candid? Or did the witness appear evasive or as though the witness were trying to hide something? How responsive was the witness to the questions asked on direct examination and on cross-examination?

If you find that a witness is intentionally telling a falsehood, that is always a matter of importance that you should weigh carefully. If you find that any witness has lied under oath at this trial, you should view the testimony of such a witness cautiously and weigh it with great care. It is, however, for you to decide how much of the witness's testimony, if any, you wish to believe. Few people recall every detail of every event precisely the same way. A witness may be inaccurate, contradictory, or even untruthful in some respects and yet entirely believable and truthful in other respects. It is for you to determine whether such inconsistencies are significant or inconsequential, and whether to accept or reject all or to accept some and reject the balance of the testimony of any witness.

In evaluating the credibility of the witnesses, you should take into account any evidence that a witness may benefit or suffer in some way from the outcome of the case. Such interest in the outcome creates a motive to testify falsely and may sway a witness to testify in a way that advances his own interests. Therefore, if you find that any witness whose testimony you are considering has an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of the testimony, and accept it with great care.

On some occasions during this trial, witnesses were asked to explain an apparent inconsistency between testimony offered at this trial and previous statements made by the witness. It is for you to determine whether a prior statement was inconsistent, and if so, how much (if any) weight to give to an inconsistent statement in assessing the witness's credibility at trial. You may consider evidence of a party's prior inconsistent statement for whatever light you find it sheds on the issues in this case. You may consider evidence of a non-party's prior inconsistent statement only to the extent it bears on the credibility of that witness, unless the previous statement consists of sworn testimony, in which case you may consider it for whatever light you find it sheds on the issues in this case.

There is no magic formula by which you can evaluate

testimony. You bring to this courtroom all your experience. You determine for yourselves in many circumstances the reliability of statements that are made by others to you and upon which you are asked to rely and act. You may use the same tests here that you use in your everyday lives. Among the factors you may consider are the witness's intelligence; the ability and opportunity the witness had to see, hear, or know about the things that the witness testified about; the witness's memory; any interest, bias, or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness's testimony in light of all the evidence in the case.

Special Verdict

Your verdict will be organized according to a Special Verdict form. This form will assist you in reaching a verdict. It lists the questions you must resolve based on the instructions that I have given you. When the foreperson has completed the form, each of you must sign your name, and the form will be marked as a Court Exhibit.

Verdict Based Solely on the Evidence Admitted at Trial

Your verdict must be based solely on the evidence admitted at trial. You may not discuss this case with anyone except the jurors with whom you are deliberating when all of you are gathered together in the jury room. You may not do any independent research about any of the people, facts, or issues in this case, using the internet or any other research tool.

Do not communicate with each other by telephone or computer during your deliberations. Moreover, you should not give anyone any information about your jury service on any social networking website. You should not update your "status" on any website to tell anyone that you are a juror on a trial, or to give any information about the trial at all during your deliberations.

Closing Comment

The most important part of this case, members of the jury, is the part that you as jurors are now about to play as you deliberate on the issues of fact. I know you will try the issues that have been presented to you according to the oath that you have taken as jurors. In that oath you promised that you would well and truly try the issues joined in this case and a true verdict render.

As you deliberate, please listen to the opinions of your fellow jurors, and ask for an opportunity to express your own views. Every juror should be heard. No one juror should hold the center stage in the jury room and no one juror should control or monopolize the deliberations. If, after listening to your fellow jurors and if, after stating your own view, you become convinced that your view is wrong, do not hesitate because of stubbornness or pride to change your view. On the other hand, do not surrender your honest convictions and beliefs solely because of the opinions of your fellow jurors or because you are outnumbered. Your final vote must reflect your conscientious belief as to how the issues should be decided.

Your decision must be unanimous. You are not to reveal the standing of the jurors, that is, the split of the vote, to anyone, including the Court, at any time during your deliberations. Finally, I say this, not because I think it is

necessary, but because it is the custom in this courthouse to say this: you should treat each other with courtesy and respect during your deliberations.

During your deliberations, you will have the exhibits available to you. You may also ask for portions of the testimony, but please try to be as specific as you can in requesting testimony.

If you have questions for the Court, just send me a note. As I said, you have a copy of this set of instructions to take with you into the jury room.

Your first task will be to select a foreperson. The foreperson has no greater voice or authority than any other juror but is the person who will communicate with the Court when questions arise.

All litigants stand equal in this room. All litigants stand equal before the bar of justice. All litigants stand equal before you. Your duty is to decide between these parties fairly and impartially, and to see that justice is done. Under your oath as jurors, you are not to be swayed by sympathy. You should be guided solely by the evidence presented during the trial and the law as I gave it to you, without regard to the consequences of your decision. You have been chosen to try the issues of fact and reach a verdict on the basis of the evidence or lack of evidence. If you let sympathy interfere with your

clear thinking, there is a risk that you will not arrive at a just verdict. All parties to a civil lawsuit are entitled to a fair trial. You must make a fair and impartial decision so that you will arrive at the just verdict.

Members of the jury, I ask your patience for a few moments longer. Please remain patiently in the jury box without speaking to each other.