

Murphy Asks D.C. Circuit for En Banc Review

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Marrita Murphy on August 17 asked the full U.S. Court of Appeals for the District of Columbia to reconsider a ruling issued by a three-judge panel in July that concluded her award for nonphysical injury damages was subject to tax.

The appellate panel -- made up of Chief Judge Douglas Ginsburg, Judge Judith Rogers, and Judge Janice Rogers Brown -- in July reversed its earlier decision that found that a tax on the award was unconstitutional. (For the opinion in *Murphy II*, see *Doc 2007-15777* or *2007 TNT 129-4*. For prior coverage, see *Doc 2007-15780* or *2007 TNT 129-1*.) After a maelstrom of public criticism, the panel withdrew its original August 2006 opinion and heard new oral arguments in the case. (For the opinion in *Murphy I*, see *Doc 2006-15916* or *2006 TNT 163-6*.)

In a press release, Murphy's lawyers said they are requesting that the circuit take up the issue *en banc*. "The Court's reversal stands reality on its head," said David K. Colapinto, who argued on behalf of Murphy. "This is the first time that any court has construed the tax code to imply an 'excise' tax on the 'privilege' of utilizing the 'legal system' to vindicate a federal statutory right." (For the press release, see *Doc 2007-19241*.)

"Congress did not pass a special tax demanding payment from people who use the legal system to prevent retaliation against whistleblowers," Stephen M. Kohn, president of the National Whistleblower Center and cocounsel for Murphy, said in the release. "It was error for the Court to imply such a tax."

In her petition for rehearing *en banc*, Murphy said additional review was necessary to correct conflict with established Supreme Court precedent. (For the petition, see *Doc 2007-19246*.) Murphy cited the circuit panel's failure to apply the "accession to wealth" test laid out in *Glenshaw Glass*, as well as case law that prohibits extending a tax levying statute by implication, as reasons supporting her request for a rehearing by the full circuit court. She also said in the petition that the court's decision was an "unprecedented and unsupportable *sua sponte* holding . . . [that reached] the Article I constitutional issue that was not timely raised by the Government."

Murphy said her case is worthy of *en banc* review because it meets the standard for "exceptional circumstances" and also "affects the broad public interest."