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OALJ CASE №: 2009-SOX-00029
OSHA CASE №: 8-0740-08-006

In the matter of:

JOHN H. MALLORY,
Complainant,

v.

JPMORGAN CHASE & CO. *and*
JPMORGAN CHASE BANK, N.A.,
Respondents.

Order Denying Sanctions and Dismissal

I. Introduction

The Complainant, John Mallory, brought this whistleblower protection claim against the Respondents JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (collectively "the Bank") under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002[1] ("the Act"). Mallory alleges the Bank violated the Act when it terminated him in retaliation for reporting possible wire, bank, and mail fraud to his supervisors. I heard this case at a four-day trial in Denver from January 25 through 28, 2010, in Denver, Colorado. After trial, I granted the Bank's motion to reopen the record and submit additional evidence regarding three emails Mallory sent to the Bank's fraud department under the assumed name "Dr. Thomas Jones" before, during, and after trial. The Bank now moves to sanction Mallory's extra-judicial behavior by dismissing his complaint. The motion is denied, and the parties have 30 days to simultaneously submit proposed findings of fact and conclusions of law, as previously ordered.[2]

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[1] Pub. L. 107-204. The whistleblower protection provisions are codified at 18 U.S.C. § 1514A (2010).

[2] Order Setting Post-Trial Hearing, Denying Certification Under 29 C.F.R. § 18.29(b), and Clarifying Standard for Dismissal Under 29 C.F.R.§ 18.6(d)(2) and 29 C.F.R. § 18.29(a), at 2 [hereinafter Order Setting Post-Trial Hearing].

Mallory falsely claimed in the three "Dr. Jones" emails that his former supervisor, who testified for the bank, intentionally withheld damning information from internal auditors, and that another former supervisor knew of this deception. To corroborate his story Mallory referred to six confidential documents the Bank had disclosed during discovery (and so bore Bates numbers), all of which are subject to a stipulated protective order issued in this case. After an investigation, the Bank came to suspect Mallory had authored the emails and confronted Mallory's counsel. Mallory confessed to writing them soon after. The Bank argues the emails violated the stipulated protective order, interfered with the orderly conduct of this proceeding, had the potential to tamper with its witnesses, and jeopardized post-trial settlement negotiations.

Under the test applied by the Tenth Circuit and the Administrative Review Board, the situation doesn't justify outright dismissal. Mallory's writing and sending the "Dr. Jones" emails neither seriously prejudiced the Bank nor seriously interfered with the judicial process. Mallory's potential bad faith and willfulness alone don't demand the severe penalty the Bank urges; his motivations for sending the emails, and the act of sending them, will bear on his credibility when deciding the merits. Although the Bank's other preferred sanctions are unavailable, the circumstances don't justify dismissing Mallory's claim, especially without prior warnings.

II. Background

A. Before Trial

Mallory worked as an Operations Director / Assistant Vice President in the Funding department of the Bank's national construction loan home mortgage operation that was administered out of Denver.[3] He claims in early October 2007 he discovered one of the Bank's construction-to-permanent loans was out-of-balance between the Bank's records and those of it outside vendor that managed the loans.[4] Mallory says the loan officer handling the account attempted to withdraw approximately $17,000 more than was available on the loan, and disloyally threatened the Bank with an illegitimate mechanic's

[3] John. H. Mallory OSHA Complaint 1 (Jan. 8, 2008); Tr. at 20. This Decision and Order cites to the record this way: citations to the trial transcript are abbreviated as Tr. at [page number]; citations to the parties' Joint exhibits are abbreviated as Ex.-[exhibit number] at [page number]. All exhibits were submitted jointly; exhibit numbers up through 145 were submitted for the original January 2010 trial; exhibits 146 and higher were submitted for the October 2010 hearing.

[4] Tr. at 26–27, 185–86.

lien when Mallory refused to fund the draw.[5] Mallory says he reported the loan officer's threat to his direct supervisor, David Wicke, and raised concerns about the Bank's out-of-balance procedures.[6] On November 15, the Bank terminated Mallory.

The Bank claims Mallory knew the loan was out-of-balance for months and did nothing to correct it, and that it was the loan officer who alerted Mallory's supervisors of the situation.[7] The Bank investigated Mallory for fraud, but found no misconduct.[8] It claims it then fired him for not correcting the out-of-balance loan and for signing inaccurate reports stating no loans were out of balance.[9]

Mallory filed a complaint with OSHA in January 2008, alleging the Bank fired him in retaliation for reporting what he believed were the loan officer's attempts to defraud the Bank.[10] After OSHA dismissed his claim, Mallory requested a hearing, and the parties prepared for trial.

During discovery in July 2009 the parties stipulated to a protective order, which I approved, stating in part that confidential information related to the case "shall not be disclosed or used for any purpose except the preparation and trial of this case."[11] The order defines confidential information as "any information that is designated as sensitive by the disclosing party including, but not limited to, printed documents, computer disks, or other electronic media . . . ."[12] A party designates a document as confidential by "placing or affixing" on it "the following or other appropriate notice: 'CONFIDENTIAL.'"[13] The order itself prescribes no consequences for its violation.

I later denied the parties' cross-motions for summary decision[14] and the case proceeded to a four-day trial that began on January 25, 2010, in Denver.

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[5] Complainant's Memorandum Brief in Support of Motion for Summary Judgment, 2; Tr. at 32, 35–37, 187–89, 197–202.

[6] Tr. at 50–55, 207–08.

[7] Respondents' Motion for Summary Decision, 2.

[8] *Id.* at 13–14; Tr. at 1072–75, 1077–79.

[9] Respondents' Motion for Summary Decision, 3–4; Ex.-25.

[10] OSHA Complaint 1–3.

[11] Stipulated Protective Order, ¶ 4 (July 14, 2009).

[12] *Id.* at ¶ 3.

[13] *Id.* at ¶ 7.

[14] Order Denying Cross-Motions For Summary Decision, 45 (Nov. 20, 2009).

B. The "Dr. Jones" Emails

On January 6, 2010, nineteen days before trial, Mallory sent an email to the Bank's Fraud Prevention and Investigation Department from the email address drthomasjones1959@yahoo.com, signed "T Jones, PhD [sic]."[15] In the email Mallory claimed "a staff member deliberately withheld departmental procedures" from internal auditors that "would have exposed risk and financial losses" caused by the Bank's construction loan department.[16] He listed the Bates numbers the Bank had assigned six documents gathered for trial, and suggested the Fraud Department request copies from Wicke or the Bank's in-house counsel.[17] Someone at the Bank apparently confirmed with outside counsel on January 19, 2010, that the Bates numbers referred to documents produced for this case.[18] The Bank had marked all six documents "CONFIDENTIAL," and all six were covered by the July 2009 protective order.[19]

James Huston, the Bank's Vice President for Global Security and Investigations, responded to "Dr. Jones" on January 26, 2010, requesting more details and stating he hadn't yet contacted Wicke or anyone else at Mallory's former office.[20] Mallory responded as Dr. Jones on the morning of January 28, the last day of trial and the day after Wicke testified.[21] Mallory claimed to be a "business colleague" of Wicke's, and described a meeting in which Wicke admitted to withholding departmental procedures from the Bank's internal auditors to disguise his department's poor performance.[22] Mallory further claimed another former supervisor, Kathryn Damaskos, was present at the meeting and had commended Wicke for deceiving the auditors.[23]

Huston replied on February 4, after the end of trial, requesting an in-person meeting in Denver.[24] Mallory responded on February 9, again as Dr. Jones, saying he lived in Colorado Springs and was too busy to make a trip to Denver.[25] The last email made no new

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[15] Ex.-146 at 3–4.

[16] Ex.-146 at 3.

[17] Ex.-146 at 3.

[18] Ex.-147 at Ex.-A, p. 3 n.1.

[19] Ex.-146 at 3. The documents referenced appear at Ex.-149–51.

[20] Ex.-146 at 3.

[21] Ex.-146 at 2–3.

[22] Ex.-146 at 2.

[23] Ex.-146 at 2.

[24] Ex.-146 at 2.

[25] Ex.-146 at 1.

accusations or claims. Huston sent a final email to the Dr. Jones email address on March 1, 2010, again requesting a meeting, to which Mallory never responded.[26]

At some point after receiving the January 28 "Dr. Jones" email, the Bank began investigating the possibility Mallory was behind them.[27] The Bank hired a forensic IT company to investigate, who discovered the "Dr. Jones" email account was created the same day as the first email, and the second and third emails were sent from Littleton, Colorado, where Mallory lives.[28] The Bank also searched Mallory's work emails, and discovered he had a family friend named Thomas Jones.[29] At some point after trial Huston met with Wicke and Damaskos, both of whom said they had never met a Dr. Thomas Jones.[30]

On March 19, 2010, the Bank confronted Mallory's counsel with the emails and a draft motion describing the results of their investigation.[31] Mallory admitted to his lawyer that he had written the "Dr. Jones" emails; this confession came about five or six weeks after sending the third email.[32] Mallory's counsel relayed the admission to the Bank on March 22, 2010.[33]

On April 1, 2010, the Bank moved to reopen the record and depose Mallory about the emails. After the deposition and additional briefing from both sides, an order dated June 25, 2010 established Mallory's undisputed authorship of the emails.[34]

The Bank also moved to dismiss Mallory's claim as a sanction under 29 C.F.R. §§ 18.29(a) and 18.6(d)(2) and to certify the case to the U.S. District Court for the District of Colorado for further sanctions.[35] After a telephone conference with the parties, I clarified the standard for dismissal that applies to the Bank's motion,[36] denied the motion for

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[26] Ex.-146 at 1.

[27] Tr. at 1228; Ex.-147 at Ex.-A, p. 6.

[28] Ex.-147 at Ex.-A, p. 8.

[29] Ex.-147 at Ex.-A, p. 8; *Id.* at Ex.-O.

[30] Tr. at 1230; Ex.-147 at Ex.-A p. 6.

[31] Tr. at 1140; Ex.-147 at Ex.-A, p. 2.

[32] Tr. at 1163–64.

[33] Ex.-147 at Ex.-A, p. 2.

[34] Order Establishing Complainant's Authorship of E-Mails, Denying the Admission of the Complainant's Deposition, Returning Sealed Psychological Evaluation and Setting Agenda for Post-Hearing Conference, 4.

[35] *Id.* at 1–2.

[36] Order Setting Post-Trial Hearing at 11; *see* Section IV, *infra*.

certification to the district court, and scheduled a post-trial hearing for October 5, 2010.

III. The Post-Trial Hearing

At the October 5, 2010, hearing Mallory reaffirmed there is no Dr. Thomas Jones, and the conversation described in the emails between himself, Wicke, and Damaskos never occurred.[37] Mallory claimed he falsely accused Wicke because he felt trial documents confirmed his longstanding suspicion Wicke had withheld information from auditors.[38] Mallory further attested he knew the documents he cited to the fraud department were marked "confidential," but claimed he didn't fully understand the details and import of the protective order.[39] He didn't discuss the emails with anyone until his lawyer confronted him with them after trial.[40]

Mallory wrote the emails during what he described as a "mental breakdown" caused by the stress of the trial.[41] His witness, forensic psychologist John Bradley, Ph.D., opined Mallory wrote the "Dr. Jones" emails during a major depressive episode brought on by a number of environmental stressors.[42] Dr. Bradley hadn't treated Mallory, and based his opinion on two post-trial interviews with Mallory, a phone interview with Mallory's psychotherapist, two personality tests, and a partial review of the record in this case.[43] Mallory said he created the fake name and email address as a result of his depression.[44]

William Daley, former assistant general counsel to the Bank, testified regarding the legal and forensic expenses the Bank incurred investigating the "Dr. Jones" emails, and the Bank's concerns about how Dr. Jones knew about confidential documents the Bank had prepared for trial.[45] Direct costs to the Bank included approximately 104.5 hours billed by outside counsel and $2,000 spent on the forensic

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[37] Tr. at 1129–31.

[38] Tr. at 1125–26.

[39] Tr. at 1120–21, 1160.

[40] Tr. at 1163–64.

[41] Tr. at 1160, 1162–63.

[42] Tr. at 1181–82, 1185–86, 1189.

[43] Tr. at 1202; Ex.-148 at 2.

[44] Complainant's Response to Respondent's Post-Hearing Brief for Sanctions, 5–6.

[45] Tr. at 1133; Ex.-147 at 1–4. The Bank did not provide the hourly rate being charged by counsel, or indicate whether those bills have been paid, so the magnitude of the Bank's legal costs is unknown. It is also unclear if the 104.5 hours quoted are limited to those additional hours the Bank's counsel spent as a result of Mallory's deception.

IT services they received.[46] Daley said the Bank did not approach the trial differently as a result of the emails, and did not raise the accusations in the emails with Wicke until after the trial ended.[47]

The Bank urges me to sanction Mallory on a number of grounds. It argues Mallory directly violated the July 2009 protective order when he referenced the Bates numbers assigned to protected documents in the "Dr. Jones" emails.[48] It further argues Mallory interfered with the proceedings and attempted to tamper with a witness by leveling false accusations against Wicke[49] and tainted the negotiation process by continuing to pose as Dr. Jones until the day after the parties began discussing a possible settlement.[50] The Bank moves that I strictly sanction this misconduct by dismissing Mallory's complaint.

IV. The Standard for Dismissal Under 29 C.F.R. §§ 18.6(d)(2) and 18.29(a)

29 C.F.R. § 18.29(a) gives administrative law judges "all powers necessary to the conduct of fair and impartial hearings." When a party fails to comply with an order, including a discovery order, the administrative law judge may also "[r]ule . . . that a decision of the proceeding be entered against the non-complying party."[51] The Board nevertheless cautioned that sanctioning a noncompliant party with dismissal "is a very severe penalty to be assessed in only the most extreme cases."[52]

To decide whether a party's misconduct warrants a sanction as harsh as dismissal, the Board considers five unweighted factors:

> (1) prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that dismissal of the action could be a [sanction] for failure to cooperate or noncompliance, and (5) . . . the efficacy of lesser sanctions . . . .[53]

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[46] Ex.-147 at 2–4.

[47] Tr. at 1228, 1232.

[48] Respondent's Post-Hearing Brief on Motion for Sanctions, 10.

[49] *Id.* at 10–11.

[50] *Id.* at 11. Ex.-147 at Ex.-A, p. 3–4.

[51] 29 C.F.R. § 18.6(d)(2)(v).

[52] *Howick v. Campbell-Elwald Co.*, ARB Case Nos. 03-156, 04-065, ALJ Case Nos. 2003-STA-00006, 2004-STA-00007, *slip op.* at 7 (ARB Nov. 30, 2004).

[53] *Id.* at 8.

The Tenth Circuit, where this case arises, applies basically the same test.[54] The Tenth Circuit recently reaffirmed, however, the factors are "a non-exclusive list of sometimes-helpful criteria or guide posts," and sanctioning a party "must always remain a discretionary function."[55] The Board similarly treats the factors as non-exclusive, and reviews an administrative law judge's imposition of sanctions for abuse of discretion.[56]

V. Discussion

The Bank argues the "Dr. Jones" emails prejudiced the proceedings by prompting an expensive investigation and additional litigation fees and causing "other immeasurable harm" including anxiety within the Bank and anger among its witnesses.[57] It asserts Mallory significantly interfered with the judicial process by using discovery documents for purposes other than trial preparation, violating the July 2009 protective order.[58] It additionally argues Mallory's actions interfered with the proceedings by wasting administrative resources and attempting to tamper with and harass the Bank's witness Wicke.[59] The Bank asserts Mallory wrote the emails in a malicious attempt to harm Wicke, and he knew or should have known his willful bad faith could result in dismissal of this case.[60] Mallory's willingness to fabricate makes his explanations unbelievable, and casts serious doubt on his credibility generally.[61] Because monetary sanctions and certification to District Court are unavailable, the Bank argues Mallory's case must be dismissed to punish his misconduct and deter future complainants from similar malfeasance.[62]

Mallory argues referencing the Bates numbers assigned to discovery documents didn't violate the protective order, and even if it did, his unfamiliarity with the details of the order makes the violation unintentional.[63] He claims he didn't send the emails in bad faith, because he reasonably believed Wicke had withheld documents from

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[54] *E.g., Garcia v. Berkshire Life Ins. Co. of America*, 569 F.3d 1174, 1179 (10th Cir. 2009) (citing *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920-21 (10th Cir. 1992)).

[55] *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1323 (10th Cir. 2011).

[56] *Howick*, *slip op.* at 6, 9.

[57] Respondent's Post-Hearing Brief on Motion for Sanctions, 11–12.

[58] *Id.* at 12.

[59] *Id.*

[60] *Id.* at 14–15.

[61] *Id.* at 1.

[62] *Id.* at 15.

[63] Complainant's Response to Respondent's Post-Hearing Brief for Sanctions, 3–4.

auditors, and knew the Bank would ignore his allegations if he used his real name.[64] He argues no sanctions are warranted, especially since he was never told he could be sanctioned for his behavior.[65]

In light of the five prescribed factors, I find the facts as a whole don't warrant dismissal. I will discuss each of the factors, in the order they are listed by the Tenth Circuit and the Board.

A. Prejudice Suffered by the Bank

The Bank employees may have suffered consternation after discovering the source of the "Dr. Jones" emails. The net result the Bank describes, however, doesn't reach the level of prejudice that would demand dismissal.

Adjudicators who have imposed dismissal as a sanction describe litigants who faced extreme prejudice, left unable to effectively prepare for trial or defend themselves. The Tenth Circuit found sufficient prejudice in *Garcia v. Berkshire Life Ins. Co. of America*, for example, where the defendant had to "defend a lawsuit pervaded by false evidence" that the plaintiff forged and submitted to the court over several years.[66] The Board analogously upheld a finding of prejudice based on a party's obstructive behavior in *Howick v. Campbell-Elwald Co.*, a Surface Transportation Assistance Act whistleblower case.[67] There the complainant repeatedly delayed scheduling and completing his deposition, delayed answering discovery requests, filed frivolous motions, and made last-minute subpoena requests, among other misconduct.[68] The complainant's course of "delay and malfeasance" prevented the respondent from "developing evidence and mounting a meaningful defense," which supported the administrative law judge's decision to dismiss.[69] Adjudicators have noted delay and expense as elements contributing to this factor, but primarily when other prejudicial factors are present.[70]

Unlike the sanctioned parties in other cases, Mallory's conduct as a litigant for the two years before sending the "Dr. Jones" emails was unobjectionable. And unlike the parties seeking relief in those

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[64] *Id.* at 13.

[65] *Id.* at 14.

[66] *Garcia*, 569 F.3d at 1179

[67] *Howick*, *slip op.* at 8.

[68] *Id.*

[69] *Id.*

[70] *See, e.g., Garcia* 569 F.3d at 1176–79 (falsifying evidence); *see also Ehrenhaus* 965 F.2d at 921 ("[T]he delay involved in this case, by itself, would not be sufficient to warrant dismissal absent other justifying circumstances.")

cases, the Bank doesn't contend that the emails actually hampered its ability to litigate or affected its trial strategy—Mr. Daley testified that they didn't.[71] Instead the Bank asserts the emails caused angst and expense by delaying final resolution of the case, throwing the strength of its case briefly into doubt, angering witnesses, and affecting settlement negotiations.[72] What little detail the Bank has provided to support these assertions, however, doesn't amount to extreme prejudice.

The vague timeline the Bank has provided suggests it suspected Mallory was "Dr. Jones" soon after the end of trial, if not earlier. Three weeks after receiving the first email and eight days after confirming it referred to discovery documents, the Bank still retained the confidence to call Wicke as a witness, suggesting any doubt the email caused was minimal. The justifiable distress Wicke may have suffered because of the allegations against him in the second email also necessarily took place after trial and can't have affected his testimony, since he wasn't interviewed or informed of the emails until later. Settlement negotiations began a day before Mallory sent the third "Dr. Jones" email, and continued even after he admitted his responsibility.[73] Mallory's evasive response in his third email and failure to respond to the Bank's follow up email only a week later would tend to lead the Bank to doubt "Dr. Jones'" assertions, very early in the settlement negotiation process, assuming the Bank didn't already harbor doubts. It's unlikely the emails had any prejudicial effect on the parties' settlement negotiations, and I infer that they did not. If anything, the revelations the Bank made during that period strengthened its bargaining position.

Without any evidence the emails actually impaired the Bank's defense, the Bank doesn't appear to have faced the kind of overwhelming prejudice in the case law described.

B. Interference with the Judicial Process

1. Violating the July 2009 Protective Order

As the Bank asserts, Mallory did violate paragraph 4 of the July 2009 protective order by using the documents referenced in the "Dr. Jones" emails for purposes other than trial preparation.[74] Mallory's argument that citing the Bates numbers of confidential discovery

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[71] Tr. at 1228.

[72] Respondent's Post-Hearing Brief on Motion for Sanctions, 10–12.

[73] Ex.-147 at Ex.-A, p. 3–4.

[74] *See* Respondent's Post-Hearing Reply in Support of Motion for Sanctions, 9.

documents in an email isn't a violation until one actually attaches the documents is unconvincing. Referencing Bates numbers back to the opposing party, however, is among the least egregious of the myriad ways the protective order could be violated; no third-party obtained any confidential information, and as Mallory notes, he didn't quote or describe in detail the documents' contents.

The Bank cites monetary and labor expenses it incurred investigating and dealing with the emails, but the only expense it quantified was the $2,000 spent on forensic IT services. That harm is not great in the litigation context, especially when compared to the serious penalty the Bank would have me impose. The expense is also not tightly related to the protective order violation itself, since the Bank likely would have investigated "Dr. Jones'" allegations whether or not he included the Bates numbers.[75]

In context, dismissal isn't the appropriate method for remedying any interference caused by the relatively minor protective order violation represented in the emails.

2. Wasting Administrative Resources

Even if the violation is not a major one, adjudicators have found substantial interference where a party's misconduct squanders judicial resources with months of wasted breath and fruitless proceedings. *LaFleur v. Teen Help* provides a typical example: there the plaintiff's consistent failure to meet discovery deadlines over a seventeen-month period forced the magistrate judge to hold multiple hearings "in a futile attempt to accomplish discovery."[76] Similarly in *Creative Gifts, Inc. v. UFO*, a magistrate judge had to closely oversee several months of discovery and issue multiple orders compelling the participation of an "extremely disruptive and uncooperative" party who repeatedly refused to answer questions and turn over documents.[77]

Here, additional briefing and hearings were needed to assess the emails' impact on Mallory's claim. Although those proceedings were by definition only needed because Mallory posed as Dr. Jones, they were orderly and their results bear on the ultimate determination of the case on the merits. The efforts expended aren't of the repetitive and "futile" sort described by adjudicators granting dismissal.[78]

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[75] The description of facts incorporated into Mr. Daley's testimony says "[t]he Bank takes all such reports or complaints seriously, and investigates them." Ex.-147 at Ex.-A, p. 3.

[76] *LaFleur v. Teen Help*, 352 F.3d 1145, 1150–52 (10th Cir. 2003).

[77] *Creative Gifts, Inc. v. UFO*, 235 F.3d 540, 543–45 (10th Cir. 2000).

[78] *See LaFleur*, 352 F.3d at 1152.

3. Attempted Witness Tampering

The Bank also alleges Mallory sent the emails to rattle Wicke and possibly get him fired, which it argues amounts to attempted witness tampering.[79] The criminal statute the Bank refers to defining witness tampering, 18 U.S.C. § 1512, isn't referenced in any of the cases it relies on, and isn't instructive in applying the five-factor test. Witness tampering is nevertheless a gravely serious form of interference, and adjudicators have dismissed complaints upon finding similarly inexcusable behavior like perjury[80] and falsifying evidence.[81]

The Bank asserts only that the "Dr. Jones" emails "had the potential" to tamper with its witness, since its investigators didn't speak to Wicke about the allegations against him or the "Dr. Jones" emails generally until after trial.[82] It cites no case, however, in which an adjudicator dismissed a complaint based on the potential or intended effects of a party's behavior alone. Mallory of course claims he had no intention to tamper with or harass Wicke.[83] Without making a determination on Mallory's intentions, it is enough to point out that the focus of the test's interference branch is *actual* interference, not potential or intended, and there was little or no actual interference with any of the Bank's witnesses before trial ended.

C. Willfulness, Bad Faith, or Fault

The parties offer different theories of Mallory's ultimate motivations for writing the "Dr. Jones" emails. The Bank asserts Mallory "lashed out" and sent the emails "to get back at" the Bank and his coworkers after being terminated.[84] Mallory argues he wrote the emails based on good faith concerns about Wicke, so his accusations were not in bad faith, and claims he created the false identity as a result of his "mental breakdown," so the emails were also not sent entirely willfully.[85] Whatever his motivations may have been, the more appropriate time to consider them is when weighing his credibility. His potential culpability doesn't demand dismissal now.

Factfinders generally rest a finding of bad faith, willfulness, or fault under this branch on a party's "overall course of dilatory and

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[79] Respondent's Post-Hearing Brief on Motion for Sanctions, 10.

[80] *Chavez v. City of Albuquerque*, 402 F.3d 1039, 1042, 1044–45 (10th Cir. 2005).

[81] *Garcia*, 569 F.3d at 1181–82; *Archibeque*, 70 F.3d at 1173.

[82] Respondent's Post-Hearing Brief on Motion for Sanctions, 12; Tr. at 1230.

[83] Complainant's Response to Respondent's Post-Hearing Brief for Sanctions, 4.

[84] Respondent's Post-Hearing Brief on Motion for Sanctions, 14.

[85] Complainant's Response to Respondent's Post-Hearing Brief for Sanctions, 4–5.

contemptuous behavior,"[86] or a party's making false statements under oath.[87] The sanctioned plaintiff in *Archibeque v. Atchison, Topeka & Santa Fe Railway Co.* swore once by signed verification and again during her deposition to the veracity of the medical history she provided, and offered a less than credible explanation when the history proved false.[88] The court therefore found her highly culpable.[89] In *Howick*, the complainant and his counsel consistently delayed and disrupted the discovery process, failed to meet deadlines for personal reasons, and "demonstrated a reckless disregard for the effect of [their] conduct on this proceeding."[90] The administrative law judge thus found "[c]omplainant and his counsel were both culpable."[91]

False accusations by definition can't be made in good faith. The "Dr. Jones" emails might therefore appropriately be considered acts in bad faith. On the other hand, Mallory wrote the three "Dr. Jones" emails over a relatively short period of time, and appears to have stopped the charade on his own. He also admitted writing the emails as soon as the Bank brought them to light. The allegations in the emails were never offered into evidence as fact, and the emails themselves were unsworn. These distinguish Mallory's conduct from those litigants sanctioned when they lied under oath and put perjured testimony and false evidence into the trial record. As questionable as his behavior may be, Mallory hasn't exhibited the flagrant disrespect for the proceedings that elsewhere has justified dismissal. If Mallory has seriously damaged his credibility, I can consider that when ruling on the merits of his claim.

D. Prior Warnings

The Tenth Circuit has dismissed complaints without prior warning under sufficiently egregious circumstances. But I don't find Complainant's conduct outrageous enough to support drastic sanctions without more explicit warnings than he received. In most cases adjudicators have used dismissal to sanction defiant parties who have

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[86] *Howick*, *slip op.* at 9.

[87] *Garcia*, 569 F.3d at1176–79 (repeatedly falsifying evidence); *Chavez v. City of Albuquerque*, 402 F.3d 1039, 1045 (10th Cir. 2005) (repeated perjury).

[88] 70 F.3d 1172, 1173–74 (10th Cir. 1995).

[89] *Id.* at 1174.

[90] *Howick v. Campbell-Ewald, Co.*, ALJ Case No. 2003-STAA-00006, *slip op.* at 27 (ALJ Sept. 18, 2003) (Recommended Decision and Order), *aff'd*, ARB Case Nos. 03-156 (ARB Nov. 30, 2004).

[91] *Id.* at 29.

already been warned repeatedly that they risk dismissal,[92] or whose apparent willingness to lie to the factfinder suggests warnings would be futile.[93]

The July 2009 protective order itself doesn't indicate the consequences of a violation, and no one suggested to Mallory that violating the order could get his claim dismissed.[94] The Bank argues Mallory either actually knew or should have had counsel explain that violating the order and lodging false complaints against a witness could result in dismissal, and warnings were therefore unnecessary.[95] Other than noting Mallory's "active involvement in every phase of the case," however, the Bank provides no support for that position. Its argument, moreover, misapprehends the factual situations that have justified immediate dismissal.

Adjudicators imposing dismissal sanctions without prior warnings have done so not because the sanctioned party should have known dismissal was imminent, but because warnings to that effect wouldn't do any good. For example, because the plaintiff in *Garcia* had already given false testimony under oath, the court found admonishing her not to lie or submit false evidence would be "'superfluous at best.'"[96] The Board also upheld the dismissal in *Bacon v. Con-Way Western Express*, where the administrative law judge warned the complainant his "repeated abusive, belligerent, and irate behavior" could prevent him from getting a full hearing, but did not mention dismissal.[97] Since the complainant gave no "indication whatsoever that he [was] either willing or able to conduct himself appropriately," the Board found the administrative law judge's indirect warning sufficient.[98]

With no evidence Mallory has fabricated documentary evidence or committed perjury before the Dr. Jones charade was unmasked, nor any record of outrageous antics on his part in the two years before he

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[92] *See, e.g.*, *Gripe v. City of Enid, Okla.*, 312 F.3d 1184, 1188 (10th Cir. 2002); *Howick*, *slip op.* at 8–9.

[93] *See, e.g.*, *Garcia*, 569 F.3d at 1180; *Chavez*, 402 F.3d at 1045; *Archibeque,* 70 F.3d at 1175.

[94] Tr. at 1160.

[95] Respondent's Post-Hearing Brief on Motion for Sanctions, 14–15; Respondent's Post-Hearing Reply in Support of Motion for Sanctions, 9.

[96] *Garcia*, 569 F.3d at 1180 (quoting *Chavez*, 402 F.3d at 1045).

[97] ARB Case No. 01-058, ALJ Case No, 2001-STA-00007, *slip op.* at 3, 5 (ARB Apr. 30, 2003). The complainant "hurl[ed] invective and verbal abuse" during his hearing and was eventually escorted from the courtroom by U.S. Marshalls. *Id.* at 3 (alteration in original).

[98] *Id.* at 5.

wrote the "Dr. Jones" emails, there's no suggestion warnings would be ineffective in curbing his misconduct. Since being confronted with the emails, Mallory hasn't participated in any similar extra-judicial behavior; he freely admitted his authorship, and has cooperated with all proceedings the Bank brought to rectify the situation. Absent specific warnings, the circumstances taken as a whole don't justify dismissal.

E. Efficacy of Lesser Sanctions

Lastly, because dismissal is appropriate "in only the most extreme cases,"[99] an adjudicator should sanction a party with dismissal only "as a weapon of last, rather than first, resort."[100] Because the plaintiff in *Garcia* had already fabricated evidence on multiple occasions, for example, the court found imposing monetary sanctions, excluding evidence, or excluding testimony would be insufficient to prevent future fabrications.[101] With no way to properly ensure a fair trial, the court dismissed the complaint.[102] The magistrate judge in *LaFleur* dismissed the plaintiffs' complaint only after lesser sanctions of monetary penalties and limiting the plaintiffs' expert witnesses didn't work.[103]

The Tenth Circuit recently recognized that general deterrence is part of the efficacy of a serious sanction like dismissal, but reiterated that sanctions decisions remain within the "special discretion" of the factfinder.[104] The Board has also held deterrence can weigh into an administrative law judge's decision to dismiss a claim based on a party's egregious conduct,[105] but has not cited general deterrence (as opposed to specific deterrence of the malfeasant party) as a basis for dismissal in cases applying the five factor test.

The Bank urges that because monetary sanctions and certification to District Court are unavailable, the only suitable remedy is dismissal, lest future litigants violate court orders and impugn witnesses without fear.[106] It doesn't follow, though, that absent

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[99] *Howick*, *slip op.* at 7.

[100] *Meade v. Grubbs*, 841 F.2d 1512, 1520 n.6 (10th Cir. 1988)

[101] *Garcia*, 569 F.3d at 1179.

[102] *Id.* at 1178-79.

[103] *LaFleur*, 352 F.3d at 1152.

[104] *Lee v. Max Int'l, LLC*, 638 F.3d at 1320.

[105] *See Somerson v. Mail Contractors of Am.*, ARB Case No. 03-055, ALJ Case No. 2002-STA-00044, *slip op.* at 8 (ARB Nov. 25, 2003); *In re Supervan, Inc.*, ARB Case No. 00-008, ALJ Case No. 1994-SCA-00047 *slip op.* at 5 (ARB Sept. 30, 2002).

[106] Respondent's Post-Hearing Brief on Motion for Sanctions, 15.

monetary penalties dismissal is the only remaining option; any sanction would be discretionary. The purpose of the five-factor test, moreover, is to aid factfinders in matching the severity of the sanction to the gravity of the offense. Dismissing Mallory's claim for deterrent reasons for misconduct that has caused such minimal harm would likely be an abuse of discretion. Following the Bank's logic, if monetary sanctions aren't available, a factfinder should dismiss a claim any time a complainant engages in misconduct, without first considering whether any prejudice had resulted. Such practice is diametrically opposed to the use of dismissal as a last resort.

The situation here is distinguishable from *Garcia* and similar cases in which the factfinder had "absolutely no confidence" it could issue a reliable final decision.[107] To the contrary, the reopened record includes the "Dr. Jones" emails and all the evidence and testimony associated with them, and I can consider Mallory's behavior and credibility when deciding the merits of the case.

VI. Conclusion

Taking into account the five factors used by the Board and the Tenth Circuit, I'm not persuaded Mallory's actions are egregious enough to warrant dismissal sanctions, and I decline to exercise my discretion to dismiss his claim. The "Dr. Jones" emails and the consequences following from them have not badly prejudiced the Bank or significantly interfered with the orderly proceedings in this case. Whatever Mallory's intentions may have been, his actions as a whole don't demonstrate the degree of bad faith and flagrant disregard for judicial order that would demand immediate dismissal, especially without any prior warnings. Considering the five factors individually and together as a whole, and in light of the evidence on the whole, I find dismissal inappropriate.

I will have to consider Complainant's credibility when ruling on the merits of his claim. Whatever impact the "Dr. Jones" emails have will come into play then. The Bank's Motion for Sanctions is denied.

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[107] *See Garcia*, 569 F.3d at 1179 (internal quotation marks omitted) (citations omitted).

The parties shall submit simultaneously on August 2, 2011 proposed findings of fact and conclusions of law pm on the Sarbanes-Oxley Act claim for employment protection.

So Ordered.

A

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California