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**ISSUE DATE: 25 JUNE 2010**

OALJ CASE №: 2009-SOX-00029

OSHA CASE №: 8-0740-08-006

*In the Matter of:*

JOHN H. MALLORY,
Complainant,

*vs.*

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

## 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

The Respondents (hereafter collectively the Bank) moved to reopen the record to take additional trial testimony and admit exhibits that relate to three e-mails the Complainant, using the alias "Dr. Thomas Jones," sent to the Bank before, during, and after the hearing. He falsely claimed in them that one of the Bank's key witnesses perjured himself (hereinafter Respondents' Supplemental Motion[1]). The Bank also alleges that attachments to the e-mails misused documents a protective order covered. The Bank's Supplemental Motion will be the subject of a Post-Hearing conference.[2] The Supplemental Motion asks me to:

1. Reopen the record under 29 C.F.R. § 18.54(c);

2. Dismiss the Complainant's claim as a sanction under 29 C.F.R. § 18.6(d)(2); and

[1] Respondents' Supplemental Motion to Reopen Hearing and Motion for Dismissal of Complainant's Claim and Certification to the District Court for Imposition of Sanctions at 1–2.

[2] A Post-Trial Conference is set later in this order.

3. Certify the facts to the U.S. District Court for the District of Colorado under 29 C.F.R. § 18.29(b) for that court to impose additional monetary penalties.

The motion acknowledged that the Complainant would oppose that relief.[3] The Complainant filed his response,[4] the Bank replied,[5] and the Complainant went so far as to file a sur-reply. The unusual claims and defense lead me to permit all these filings. This order addresses some issues and arguments those filings raise.

The Complainant's Response of June 11, 2010, raised several new matters:

1. he admits he wrote and sent the e-mails in question;[6]
2. he objects to the claim that the misconduct the Bank uncovered damaged or prejudiced the Bank; nothing explains how the steps taken to investigate the e-mails resulted in recoverable investigation costs, or that those costs were reasonable;[7]
3. after admitting to the e-mails, there is no point to gathering for another hearing—but in the event I disagree he asks:
    a. to admit the transcript and video recording of the deposition he gave at the Bank's behest;[8] or in the alternative
    b. to limit the scope of a reopened hearing to examining the Complainant's psychological status, which may have been impaired as explained in the psychological report he submitted under seal;[9]
4. he argues dismissing his claim and certifying his actions to the District Court to impose additional sanctions are unduly harsh and unnecessary because:

[3] *Id.* at 2.

[4] Complainant's Response to Respondents' Supplemental Motion to Reopen Hearing, Stay Posthearing Briefing, and Allow Additional Discovery [hereafter Complainant's Response].

[5] Respondents' Reply in Support of Supplemental Motion to Reopen Hearing and Motion for Dismissal of Complainant's Claim and Certification to the District Court for Imposition of Sanctions [hereafter Bank's Reply].

[6] Complainant's Response at ¶ 4.

[7] *Id.* at ¶ 2–3.

[8] *Id.* at ¶ 7; it took place on April 26, 2010.

[9] *Id.* at ¶ 8.

a. he never violated the protective order entered during the discovery phase of the case, and the Bank hasn't offered evidence of the severity of the Complainant's actions,[10] and

b. the Bank can offset any prejudice suffered during settlement negotiations.[11]

To address these contentions, the Bank moved on June 14, 2010, for leave to file a reply, which is granted.

The Bank offered counter-arguments and raised several new ones:

5. the Complainant's demand for proof about the extent of any prejudice it suffered from investigating the emails is premature; the proof should come at the hearing rather than in pre-hearing filings;[12]

6. admission of the Complainant's deposition would be impractical because the "transcript is replete with non-responsive answers and volunteered information, comments on the trial evidence, hearsay, and other testimony that would be inadmissible at a reopened hearing."[13] Using it would require page and line designations and counter-designations, objections to many answers (and questions), rulings on those objections, and an edit of the videotape to reflect the rulings;

7. admission of the sealed expert report without affording the Bank the opportunity to assess the expert's qualifications and to cross-examine him is improper;[14]

8. dismissal is an appropriate remedy because the Complainant violated the protective order, prejudiced the Bank, and demonstrated an egregious pattern of deceit;[15] and

9. potential offset of damages during settlement discussions is not a remedy since the parties may never settle the case, yet the Respondents have suffered quantifiable losses.[16]

The principal matters that may be resolved now are addressed in turn.

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[10] *Id.* at ¶ 9–12.

[11] *Id.* at ¶ 13.

[12] Respondents' Reply at 1.

[13] *Id.* at 2.

[14] *Id.* at 3.

[15] *Id.* at 3–4.

[16] *Id.* at 4.

## I. The Complainant Authored the Emails

The Complainant admits he authored the three "Dr. Thomas Jones" e-mails; this undisputed fact is established.

## II. The Complainant's Demands for Proof are Premature

The Bank's Reply correctly points out that the demand for proof of the extent of the prejudice the e-mails caused is premature. Evidence precedes argument. The Bank seeks to reopen the record to offer proof about the prejudice the Complainant's misconduct caused.[17] The Complainant's claim that as a precondition to reopening the record the Bank should prove prejudice has the chronology backward.

## III. The Complainant's Request to Admit his Post-Hearing Deposition is Denied

As discussed in the Order Denying Cross-Motions for Summary Decision,[18] employment protection claims brought before the Office of Administrative Law Judges under Section 806 of the Sarbanes-Oxley Act (SOX) are not governed by the Federal Rules of Evidence. The applicable regulation tells judges to exclude "immaterial, irrelevant, and unduly repetitious" evidence while applying "rules or principles designed to assure the production of the most probative evidence."[19] The SOX Act also incorporates by reference a portion of the AIR 21 regulations and procedures; hearsay is admissible in AIR 21 cases, and it is admissible in SOX cases too.[20]

No jury is involved. In the course of reviewing the deposition I could deal with the objections raised. The designations and counter-designations the Bank envisions likely aren't necessary, given the broad admissibility of hearsay and the liberal evidentiary principles that guide SOX adjudications. The Bank deposed the Complainant to establish that he wrote and sent the "Dr. Thomas Jones" e-mails and inquire into what he hoped they would accomplish. Their author has been established. The procedural rules of this forum permit the Bank to use the deposition to impeach the Complainant's credibility.[21] But the Bank doesn't ask to admit the deposition, the Complainant does. A party isn't entitled to offer its

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[17] Respondents' Supplemental motion at ¶ 1.

[18] Order Denying Cross-Motions for Summary Decision, 2009-SOX-00029, at 33 (Nov. 20, 2009).

[19] 29 C.F.R. § 1980.107(d); *see also* 29 C.F.R. §§ 18.1–18.59 (Subpart A).

[20] 18 U.S.C. § 1514A(b)(2)(A) (incorporating by reference a portion of the AIR 21 statute); *Weil v. Planet Airways, Inc.*, ARB No. 04-074, ALJ No. 2003-AIR-00018, slip op. at 4 (ARB Oct. 31, 2005).

[21] A party's deposition "may be used by any other party," 20 C.F.R. § 18.23(a)(1).

deposition. Therefore, Complainant's motion to admit the transcript and video of his deposition is denied.

## IV. The Complainant's Sealed Psychological Report is Returned

In paragraph 8 of his Response, the Complainant proposes another alternative to reopening the hearing:

> In the event that the Judge disagrees with Mallory's position in this regard and allows the reopening of the hearing, Mallory requests that its scope be limited to examining Mallory's psychological status at the time he sent these e-mails, and that he be permitted to present testimony in accordance with the topics included in Dr. Mac Bradley's report, which has been included in a sealed envelope, marked "CONFIDENTIAL TO BE OPENED ONLY PURSUANT TO ORDER OF JUDGE DORSEY", attached hereto as Exhibit 1. The report contains a complete psychological analysis of Mr. Mallory's actions, as well as references to matters delved into by Dr. Bradley that were not a part of the evidence in this case. It is therefore requested, that counsel for the Respondents be given the opportunity to state its position as to the opening of the envelope for the limited purpose set forth in responding to Respondents' Supplemental Motion to Reopen.[22]

I have not opened or read the Bradley report. It isn't clear if the Complainant wants to keep this psychological report sealed from examination by third parties or expects to keep its contents from the Bank. The Administrative Procedure Act forbids me from accepting a sealed report into evidence the Bank hasn't seen.[23] Things submitted to the Secretary of Labor are presumptively available to the public under the Freedom of Information Act,[24] something the Article III courts never need to consider.[25] The Bank also is entitled to determine Dr. Bradley's

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[22] Complainant's Response at ¶ 8.

[23] 5 U.S.C. § 557(d)(1)(C); 29 C.F.R. § 18.38.

[24] 5 U.S.C. § 552(a)(3)(A); 29 C.F.R. §70.3; *Koeck v. General Electric Consumer and Industrial*, ARB No. 08-068, ALJ No. 2007-SOX-73 (ARB Aug. 28, 2008); *Newport v. Calpine Corp.*, 2007-ERA-7 (ALJ Feb. 12, 2008).

[25] See 5 U.S.C. § 551(1)(B); *Brown & Williamson Tobacco Co. v. Federal Trade Commission*, 710 F.2d 1165, 1177 (6th Cir. 1983); *Warth v. Dep't of Justice*, 595 F.2d 521, 523 (9th Cir. 1979). *But see Andrade v. United States Sentencing Comm'n*, 989 F.2d 308, 309-10 (9th Cir. 1993) (finding the Sentencing Commission, an independent body within judicial branch, not subject to FOIA).

qualifications and cross-examine him before any re-convened hearing.[26] It might retain an expert to counter any opinions Dr. Bradley offered.[27] The Complainant also might be attempting to use the Bradley report to limit the contours of any further hearing.

Whatever the proposed use, the presumption is as strong here as in the Article III courts against deciding cases on secret or sealed evidence, or issuing secret opinions. The Seventh Circuit may have framed the issue best:

> What happens in the federal courts is presumptively open to public scrutiny. . . . The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.[28]

Rarely, when litigation involves sensitive national security matters, privileged information, or genuine trade secrets,[29] it becomes appropriate to redact information in a trial exhibit. When that happens the proponent files: (1) a copy of document for public view with the fewest redactions possible, plus (2) a sealed, unredacted copy. This keeps as much of the basis for decisions as possible in the public domain.[30] Any portions of written arguments that discuss the redacted information lead to similarly redacted public and unredacted sealed versions of those briefs.

The U.S. Courts of Appeals apply stringent standards to determine when evidence or pleadings may be redacted and sealed, including the Tenth Circuit, where this case arises. The decision to redact or seal information is ultimately reviewed,[31] using a robust, long-standing presumption granting public access to

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[26] 29 C.F.R. §§ 18.13, 18.14, and 18.22; Respondents' Reply at 3.

[27] See 29 C.F.R. § 18.19(a)(3), which mirrors Federal Rule of Civil Procedure 35 and specifies any medical examinations done under § 18.19(a)(3) shall have reports "made in accordance with Rule 35(b) of the Federal Rules of Civil Procedure . . . ." 29 C.F.R. § 18.19(c)(4).

[28] *Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) (overturning the decision of a magistrate judge to seal the entire substantive opinion issued on summary judgment in a case brought under Wisconsin's version of the Uniform Trade Secrets Act); *see also In the Matter of Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) (chambers opinion).

[29] *Baxter International, Inc. v. Abbott Laboratories,* 297 F.3d 544, 546 (7th Cir. 2002) (denying motion to seal records during appeal; "very few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed").

[30] *See Hicklin Engineering, supra*, 439 F.3d at 348.

[31] *Mann v. Boatwright*, 477 F.3d 1140, 1149 (10th Cir. 2007).

judicial records.[32] "The 'presumption of access . . . can be rebutted if countervailing interests heavily outweigh the public interests in access. The party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption.'"[33] That a pleading, motion, or exhibit contains embarrassing or deeply personal information, including information about an individual's medical conditions and mental health, won't overcome this presumption. The Tenth Circuit denied a plaintiff's motion to seal her complaint and other documents even though they discussed the plaintiff's family's ongoing feud and detailed her father's diagnosis of Alzheimer's disease.[34]

Placing in the record of the Secretary's adjudication a report about the Complainant's psychological health may be embarrassing. When he points to his mental state as factor that mitigates what the Bank sees as misconduct, he places his condition in controversy. He undercuts any privacy interest he otherwise has in the information.[35] Indeed, the Complainant's mental health status may be key to determining his credibility or motivation in sending the Dr. Jones e-mails. To use a sealed psychological report as the basis for defending against a sanctions motion, or to rely on opinions found in a sealed report to limit what the Bank could inquire about at a reopened hearing would shield the reasons for significant actions from public scrutiny. I won't undermine the legitimacy of the proceedings or the Secretary's ultimate decision that way.

The Complainant's motion to submit the sealed psychological report is denied. The original sealed envelope is returned to the Complainant with this order.[36] If the Complainant intends to rely on this report, he should deliver a copy of it to the Bank and expect that in further proceedings, it will become part of the record for all purposes and be available to the public under the Freedom of Information Act.

If the parties wish to revisit the issue of submitting reports or other expert testimony regarding the Complainant's mental health, they can raise those issues at the Post-Hearing Conference.

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[32] *Id.*; *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).

[33] *Mann*, 477 F.3d at 1149 (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)) (internal citation omitted).

[34] *Id.* In *Mann v. Boatwright*, the plaintiff's privacy interests were further undermined because many of the details contained in the documents at the heart of her motion had been previously disclosed in state probate court proceedings. *Id.*

[35] *Herrera v. Lufkin Industries, Inc.*, 474 F.3d 675, 690 n.18 (10th Cir. 2007)("[A] party's own pleading may put his physical or mental condition 'in controversy.'" (quoting *Schlagenhauf v. Holder,* 379 U.S. 104, 119 (1964))). There the Tenth Circuit found the plaintiff had placed his mental condition in controversy by filing a claim for intentional infliction of emotional distress. *Id.*

[36] *Baxter International, Inc., supra,* 297 F.3d at 548. ("If documents have reached this court unnecessarily, the parties could have asked us to send them back.")

## V. Dismissal as a Remedy

The parties also argue the appropriateness of dismissal as a remedy in this case. The parties should raise these arguments after I make a final decision regarding reopening the record or holding a further in-person hearing.

## VI. Post Conference and Agenda

A post-trial conference will be held to discuss the Supplemental Motion and to determine whether to set additional in-person hearings in Denver. That telephonic conference will convene on July 27, 2010 at 10:00 a.m., P.D.T. My assistant will initiate the call. Unless a party requests in not less than 3 days in advance, the conference will not be stenographically recorded.[37]

Besides setting a time to hear additional testimony, the parties should be prepared to address at the conference these three matters[38]:

1. Whether 29 C.F.R. § 18.29(b) applies to misconduct during a proceeding brought under the employee protection provisions of the Sarbanes-Oxley Act; and

2. What are the standards in the Tenth Circuit for determining whether dismissal is an appropriate sanction.

So Ordered.

A

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

[37] 29 C.F.R. § 18.8(b).

[38] This notice is given under Fed. R. Civ. P. 16(c)(2)(P).