



**In the Matter of:**

**DERRICK JOHNSON,**

**ARB CASE NO. 11-018**

**COMPLAINANT,**

**ALJ CASE NO. 2010-SOX-037**

**v.**

**DATE: March 14, 2011**

**U.S. BANCORP/U.S. BANKNATIONAL  
ASSOCIATION,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Chellie M. Hammack, Esq., *C.M. Hammack Law Firm*, Seattle, Washington**

***For the Respondents:***

**Kandis M. Sells, Esq.; Jennifer C. Berry, Esq.; and Stephanie L. Beers, Esq.; *Dorsey & Whitney LLP*, Seattle, Washington**

**BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*.**

**ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW**

U.S. Bancorp and U.S. National Association (U.S. Bank) have filed a Petition for Interlocutory Review and Motion for Stay Pending Appeal pursuant to 28 U.S.C.A. § 1292(b) (Thomson/West 2006). U.S. Bank seeks review of an Order “Granting Complainant’s Motion to Compel Additional Discovery,” issued on October 20, 2010, and an Order Denying “Respondents’ Motion for Certification of Interlocutory Appeal under 28 U.S.C. 1292(b),”

issued on November 18, 2010, by a Department of Labor Administrative Law Judge (ALJ). This case involves a complaint filed pursuant to the whistleblower protection provisions at Section 806 of the Sarbanes-Oxley Act of 2002 (SOX).<sup>1</sup> Because U.S. Bank failed to follow the certification procedure for obtaining interlocutory review under 28 U.S.C.A. § 1292(b), we deny its interlocutory appeal.

## BACKGROUND

Johnson, while employed by U.S. Bank, reported to U.S. Bank officials that other U.S. Bank employees had engaged in fraudulent activities under the SOX.<sup>2</sup> U.S. Bank hired an attorney to independently investigate Johnson's allegations. The investigation determined that Johnson's allegations were not supported, and instead indicated that Johnson himself had committed ethics violations. As a result, U.S. Bank terminated Johnson's employment.<sup>3</sup> Subsequently, Johnson filed a complaint alleging that U.S. Bank violated the SOX's whistleblower protection provisions when it terminated his employment.<sup>4</sup>

Before the ALJ, Johnson filed a motion to compel full discovery responses from U.S. Bank in support of his complaint.<sup>5</sup> The ALJ noted that Johnson's discovery request was for relevant information that U.S. Bank asserted was protected from disclosure pursuant to both the attorney-client privilege and the work product privilege.<sup>6</sup> Because the attorney that U.S. Bank hired to investigate Johnson's allegations "played a dual role of an attorney and investigator" in the investigation leading to Johnson's termination, the ALJ found that U.S. Bank put at issue the entire investigation including the attorney's role in it. Thus, the ALJ concluded that U.S. Bank had waived any attorney-client privilege regarding the investigation and its decision to terminate Johnson. Similarly, the ALJ determined that U.S. Bank waived the work product privilege when it placed its investigation at issue by asserting it as an affirmative defense.<sup>7</sup>

Consequently, the ALJ ordered U.S. Bank to provide him, for in camera inspection, those documents it had withheld as protected from disclosure pursuant to the attorney-client privilege and the work product privilege. In addition, the ALJ ordered that where U.S. Bank has a

---

<sup>1</sup> 18 U.S.C.A. § 1514A (West Supp. 2010). Implementing regulations appear at 29 C.F.R. Part 1980 (2010).

<sup>2</sup> ALJ's Oct. 20, 2010 Order at 2.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 4-5.

<sup>7</sup> *Id.* at 6.

legitimate need to protect the identity of its third-party customers or employees, it should draft a protective order in conjunction with Johnson that will protect their identities while permitting Johnson to review the documentation U.S. Bank relied upon in investigating Johnson's allegations.<sup>8</sup>

### INTERLOCUTORY REVIEW

In response to the ALJ's order, U.S. Bank filed a motion with the ALJ requesting that the ALJ certify the issue of whether it had waived the attorney-client privilege to the Administrative Review Board (ARB or Board) for interlocutory review under 28 U.S.C. 1292(b).<sup>9</sup> The ALJ determined that the issue did not involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order would not materially advance the ultimate termination of the litigation. Thus, the ALJ did not find sufficient grounds to certify an interlocutory appeal to the Board and, therefore, denied U.S. Bank's motion to stay the ALJ's proceedings pending an interlocutory appeal.<sup>10</sup>

Despite the ALJ's order, U.S. Bank has filed a petition for interlocutory review under 28 U.S.C. 1292(b) with the Board on the issue of whether it waived the attorney-client privilege. In response, Johnson filed a Motion to Dismiss U.S. Bank's petition for interlocutory review as untimely filed. Alternatively, Johnson asserts that the Board should not accept U.S. Bank's interlocutory appeal as it failed to obtain certification of the order appealed from the ALJ.

### ANALYSIS

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under SOX to the Administrative Review Board.<sup>11</sup> Because the ALJ has not issued his final recommended decision and order in this matter, U.S. Bank's request that the Board review the ALJ's orders is an interlocutory appeal. The Secretary's delegated authority to the Board includes the "discretionary authority to review interlocutory rulings in exceptional circumstances provided such review is not prohibited by statute."<sup>12</sup> In this case, for reasons that follow, we deny U.S. Bank's petition for interlocutory review pursuant to 28 U.S.C.A. § 1292(b).

---

<sup>8</sup> *Id.* at 10.

<sup>9</sup> ALJ's Nov. 18, 2010 Order at 2.

<sup>10</sup> *Id.* at 4-5, 9.

<sup>11</sup> Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

<sup>12</sup> *Id.* at 3,925. *See Johnson v. Siemens Building Techs.*, ARB No. 07-010, ALJ No. 2005-SOX-015, slip op. at 2 (ARB Jan. 19, 2007); *see also Caraballo-Seda v. Municipality of Hormigueros*, 395

Where an ALJ has issued an order of which the party seeks interlocutory review, the ARB has elected to look to the procedures set forth in 28 U.S.C.A. § 1292(b) to determine whether to accept for review an interlocutory appeal.<sup>13</sup> According to these procedures:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.<sup>[14]</sup>

Because the ALJ has not certified the questions of law raised by U.S. Bank in its interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), we decline to accept this appeal for review.<sup>15</sup> In doing so, we note that it is within an ALJ's discretion to issue, as the ALJ did in this case, "such protective, in camera, or other orders as in his or her judgment may be consistent with the objective of protecting privileged communications" pursuant to 29 C.F.R. § 18.46(a) (2010) to preserve any potentially privileged materials or evidence.<sup>16</sup>

---

F.3d 7 (1st Cir. 2005)(the decision to accept an interlocutory appeal rests within the "discretion" of the court of appeals).

<sup>13</sup> *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138, ALJ No. 2005-SOX-065, slip op. at 5 (ARB Oct. 31, 2005); *Plumley v. Federal Bureau of Prisons*, 1986-CAA-006 (Sec'y April 29, 1987).

<sup>14</sup> 28 U.S.C.A. § 1292(b) (West 1993).

<sup>15</sup> *Powers*, ARB No. 05-138, slip op. at 6, quoting *Plumley*, 1986-CAA-006, slip op. at 3 (citation omitted). Some courts have held that district court certification is a jurisdictional prerequisite to interlocutory review under section 1292(b). In *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002), the court explained:

The whole point of § 1292(b) is to create a dual gatekeeper system for interlocutory appeals: Both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden.

<sup>16</sup> See *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. \_\_\_, 130 S. Ct. 599, 608 (2009)("protective orders are available to limit the spillover effects of disclosing sensitive information").

Accordingly, U.S. Bank's Petition for Interlocutory Review and Motion for Stay Pending Appeal are **DENIED**, and we **REMAND** this case to the ALJ for adjudication.<sup>17</sup> We emphasize that our denial of U.S. Bank's petition for interlocutory review should in no way be construed as expressing an opinion on the merits of the issue raised regarding waiver of the attorney-client and work product privileges in this case.

**SO ORDERED.**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

---

<sup>17</sup> Because we deny U.S. Bank's interlocutory appeal, we need not address Johnson's Motion to Dismiss U.S. Bank's petition for interlocutory review as untimely filed.