U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

DERRICK JOHNSON,

COMPLAINANT,

v.

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

RESPONDENT.

ARB CASE NO. 13-014

ALJ CASE NO. 2010-SOX-037

DATE: MAY 21 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Chellie M. Hammack, Esq.; *C.M. Hammack Law Firm*, Seattle, Washington

***For the Respondents*:**
Janie F. Schulman, Esq.; James Oliva, Esq.; and Stephanie L. Fong, Esq.; *Morrison & Foerster LLP*, Los Angeles, California

***For the Assistant Secretary of Labor for Occupational Safety and Health, as Amicus Curiae*:**
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Megan E. Guenther, Esq.; and Ann Capps Webb, Esq.; *United States Department of Labor*, Washington, District of Columbia

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

ORDER DENYING RESPONDENT U.S. BANK'S MOTION FOR STAY OF PRELIMINARY ORDER OF REINSTATEMENT PENDING APPEAL

This case is before the Administrative Review Board on appeal from a U. S. Department of Labor Administrative Law Judge's (ALJ) Decision and Order (D. & O.) ruling in favor of Complainant Derrick Johnson on his whistleblower complaint filed pursuant to the employee

protection provisions of the Sarbanes-Oxley Act of 2002 (SOX or the Act).[1] The ALJ found in Johnson's favor, holding that his employer, Respondent U.S. Bancorp/U.S. Bank National Association (U.S. Bank), violated the SOX when it suspended, and then terminated, his employment because Johnson engaged in whistleblower-protected activity. The ALJ's order of relief included, among other awards, an order that U.S. Bank immediately reinstate Johnson with the same seniority that he would have had but for the Respondent's SOX violation.[2]

On appeal, U.S. Bank has filed a motion for a stay of the ALJ's order requiring reinstatement of Johnson to his former position of employment while its appeal is pending. In support of its motion, the Respondent argues that it lacked fair notice regarding the potential for reinstatement as a remedy and that it was not afforded the opportunity to be heard or present evidence on reinstatement prior to the ALJ's order of reinstatement. Thus, U.S. Bank contends that the ALJ's order of reinstatement constitutes a violation of due process.[3] Moreover, U.S. Bank argues that it is likely to prevail on the merits of its appeal. Finally, U.S. Bank argues that it will suffer irreparable harm if the ALJ's order of reinstatement is not stayed due to the "hostility" that exists between the parties from the litigation of this and other cases Johnson has filed against U.S. Bank and because the order of reinstatement violated its due process rights.

One of the remedies a SOX whistleblower is entitled to as a matter of law upon successful conclusion of his or her litigation before an ALJ is an order of "reinstatement with the same seniority status that the employee would have had, but for the discrimination."[4] The ALJ's order requiring reinstatement becomes "effective immediately upon receipt of the decision by the respondent."[5]

Pursuant to 29 C.F.R. § 1980.110(b), a "preliminary order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay the order based on exceptional circumstances." In comments accompanying section 1980.110(b)'s promulgation, the Occupational Safety and Health Administration (OSHA) stated that only "in the *exceptional* case" may the Board grant a motion to stay a

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1 18 U.S.C.A. § 1514A (West Supp. 2012). Implementing regulations appear at 29 C.F.R. Part 1980 (2012).

2 D. & O. at 21-22.

3 Specifically, U.S. Bank contends that prior to the hearing, Johnson indicated to the ALJ that he only sought money damages for the period between his termination from U.S. Bank and his subsequent employment at another bank and that he sought reinstatement initially only after the hearing. Moreover, U.S. Bank alleges that Johnson never took any action to enforce OSHA's preliminary order of reinstatement after the initial determination in Johnson's favor in this case. *See* May 7, 2010 OSHA Administrator's Findings and Preliminary Order. Thus, in reliance on Johnson's indications that he was not seeking reinstatement, U.S. Bank states that it did not seek discovery or offer evidence regarding reinstatement before the hearing or challenge reinstatement at the hearing.

4 18 U.S.C.A. § 1514A(c)(2)(A); *see* 29 C.F.R. § 29 C.F.R. § 1980.109(d)(1).

5 29 C.F.R. § 1980.109(e).

preliminary order of reinstatement and that it "would only be appropriate where the [moving party] can establish the necessary criteria for equitable injunctive relief, i.e., irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public."[6] Even more telling, the comments accompanying the promulgation of 29 C.F.R. § 1980.105 regarding the issuance of preliminary orders note that "Congress intended that employees be temporarily reinstated to their positions" and that "the purpose of interim relief, to provide a meritorious complainant with a speedy remedy and avoid a chill on whistleblowing activity, would be frustrated if reinstatement did not become effective until after the administrative adjudication was completed."[7]

In essence, OSHA's comments mirror the four-part test applied by the Board to determine when agency action should be stayed.[8] The Board considers four factors in determining whether to grant a stay: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Board grants the stay; and (4) the public interest in granting a stay.[9] U.S. Bank fails to meet these criteria.

In its motion for stay, U.S. Bank fails to sufficiently demonstrate a likelihood of success on the merits for purposes of a stay. In support of its contention that it is likely to succeed on appeal, U.S. Bank raises two arguments that were not sufficiently supported. Our review of the merits may or may not lead to a different conclusion, but we focus only on the motion for stay at this time and are not persuaded of the likelihood of U.S. Bank prevailing.

U.S. Bank's argument that it was denied due process as it lacked fair notice regarding reinstatement as a remedy or the opportunity to be heard or present evidence on reinstatement at the hearing lacks merit. Both the SOX and its relevant implementing regulations state that relief under the SOX "shall include" or "will include" or "will provide" reinstatement, *see* 18 U.S.C.A. § 1514A(c)(2)(A); 29 C.F.R. §§ 1980.105(a)(1), 1980.109(d)(1), respectively. Also, when U.S. Bank filed a motion to stay OSHA's preliminary order of reinstatement with the Office of Administrative Law Judges,[10] both Johnson and OSHA's Administrator filed responses opposing the motion[11] and Johnson later filed a motion to compel reinstatement.[12] Moreover, a United

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6 69 Fed Reg. 52109, 52111 (Aug. 24, 2004) (emphasis added).

7 69 Fed Reg. 52109. *See Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2008-SOX-015, slip op. at 3-4 (ARB June 9, 2006) (Order Denying Stay).

8 *See Welch,* ARB No. 06-062, slip op. at 4; *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-055, slip op. at 2 (ARB May 12, 2006).

9 *Welch,* ARB No. 06-062, slip op. at 4; *Cefalu,* ARB Nos. 04-103, 04-161, slip op. at 2.

10 *See* June 7, 2010 Respondent's Motion To Stay.

11 *See* June 16, 2010 Response in Opposition To Employer's Motion For Stay; June 30, 2010 Secretary's Response.

States Department of Labor Administrative Law Judge denied the motion.[13] Consequently, we reject U.S. Bank's argument that it lacked fair notice of reinstatement in this case, as both the Act and its relevant implementing regulations, as well as OSHA's preliminary order of reinstatement,[14] provided such notice. In addition, the motion does not convince us that a waiver of reinstatement as a remedy occurred in this case, although we will give further consideration to this issue when we review the appeal on the merits.

U.S. Bank also fails to show that it will suffer irreparable harm if we do not stay the ALJ's order of reinstatement. Specifically, U.S. Bank argues it would suffer irreparable harm due to the "hostility" that exists between the parties from the litigation of this and other cases Johnson has filed against U.S. Bank. But any alleged irreparable harm "must be actual and not theoretical."[15] In addition, U.S. Bank argues that it is impossible to reinstate Johnson because another employee now holds Johnson's former position. However, U.S. Bank is not necessarily required to reinstate Johnson to his former position. SOX merely requires that Johnson be reinstated "with the same seniority status that [he] would have had but for the discrimination."[16]

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12 *See* July 27, 2010 Claimant's Motion For Contempt For Failure To Comply With Order Of Reinstatement.

13 *See* July 8, 2010 Order Denying Motion To Stay.

14 *See* 29 C.F.R. § 1980.105(a)(1).

15 *Welch*, ARB No. 06-062, slip op. at 6; *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

16 18 U.S.C.A. § 1514A(c)(2)(A). *See Welch*, ARB No. 06-062, slip op. at 6-7; *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169; ALJ No. 1990-ERA-030, slip op. at 6 (ARB Apr. 20, 2001) (arising under the Energy Reorganization Act); *see also Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-034 (ARB June 11, 1997)(*Dutkiewicz I)* (arising under the Surface Transportation Assistance Act).

U.S. Bank also argues that reinstatement is not an appropriate remedy based on evidence it "could" or "would" have presented to demonstrate the hostility between the parties and the irreparable harm it will suffer as a result, offering evidence before the Board that it acknowledges is not part of the record, but which it requests the Board to consider within its discretion. U.S. Bank argues that it did not have an opportunity to submit such evidence because it relied on Johnson's representation that he did not seek reinstatement. Such evidence was not, however, before the ALJ. When deciding whether to consider new evidence, the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, which provides that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c); *see Welch*, ARB No. 06-062, slip op. at 5-6; *see e.g., Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 6-7 (ARB Jan. 31, 2001) (regarding the comparable whistleblower protection provisions under the environmental whistleblower acts). U.S. Bank has not made such a showing.

U.S. Bank raises several additional arguments, all of which we reject, including the argument that both U.S. Bank and the public are irreparably harmed because the ALJ violated its due process in ordering reinstatement; that the public interest is served by upholding due process. We reject this argument for the same reasons we rejected U.S. Bank's contention that a due process violation had occurred. U.S. Bank also argues that a stay would harm no one else, including Johnson, as U.S. Bank alleges that Johnson is apparently employed elsewhere and does not want to work at U.S. Bank. But because Johnson has waited years to have his job, pay, and benefits restored, he may continue to suffer harm if we stay his reinstatement.[17] Johnson's reinstatement is therefore appropriate to prevent his further harm.

"The public interest militates against a stay" of the ALJ's order of reinstatement.[18] As the Department of Labor's comments accompanying the promulgation of 29 C.F.R. § 1980.105 explain, "the purpose of interim relief, to . . . avoid a chill on whistleblowing activity, would be frustrated if reinstatement did not become effective until after the administrative adjudication was completed."[19] Thus, we find that granting U.S. Bank's motion to stay reinstatement in this case would not serve the public interest.

CONCLUSION

For the foregoing reasons, U.S. Bank's motion to stay the ALJ's order of reinstatement pending appeal is **DENIED**.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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17 *See Welch*, ARB No. 06-062, slip op. at 7.

18 *Welch*, ARB No. 06-062, slip op. at 7, quoting *Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 97-90, ALJ No. 1995-STA-034, slip op. at 3-4 (ARB Sept. 23, 1997) (both Congress and the Department of Labor have determined that reinstatement should have immediate effect).

19 69 Fed. Reg. 52109.