In the Matter of:

JACK R. T. JORDAN, **ARB CASE NO. 06-105**

COMPLAINANT, **ALJ CASE NO. 2006-SOX-041**

v. **DATE: June 19, 2008**

SPRINT NEXTEL CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER GRANTING PETITION FOR INTERLOCUTORY REVIEW ESTABLISHING BRIEFING SCHEDULE AND DENYING, IN PART, MOTION TO PROCEED UNDER SEAL AND THE USE OF PSEUDONYMS

In April 2005, the Complainant, Jack R. T. Jordan, filed a complaint in which he alleged that the Respondents, Sprint Nextel Corporation, Claudia Toussaint, Tom Gerke, and Gary Forsee, retaliated against him because he engaged in protected activity under section 806 of the Sarbanes-Oxley Act of 2002 (SOX).[1] The Respondents have

[1] 18 U.S.C.A. § 1514A (West 2002). Title VIII of Sarbanes-Oxley is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806 covers companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78l, and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such companies. Section 806 protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be

petitioned the Administrative Review Board for interlocutory review of a Department of Labor Administrative Law Judge's Order Denying Respondents' Motion to Dismiss and/or for Summary Judgment, Granting Respondents' Request for Interlocutory Review, and Staying Proceeding (O.D.M.D.).[2] Sprint also filed a Motion for a Protective Order to Proceed under Seal and with the Use of Pseudonyms with the ALJ that the ALJ denied in part.[3] Sprint has filed a Motion for a Protective Order to Proceed under Seal and with Use of Pseudonyms with the Board requesting the Board to permit this matter to proceed before it under seal. In response, Jordan filed a Response of Complainant to Respondent Sprint Nextel's Petition for Interlocutory Review of Order Denying Motion to Dismiss or, Alternatively, for Summary Decision. In reply, Sprint filed a letter objecting to Jordan's filing of his response without obtaining leave to do so and requesting leave to submit a reply should the Board consider Jordan's response.[4]

Interlocutory Review

In *Plumley v. Federal Bureau of Prisons,*[5] the Secretary of Labor described the procedure for obtaining review of an ALJ's interlocutory order.[6] The Secretary determined that when an administrative law judge has issued an order, of which a party seeks interlocutory review, it is appropriate for the judge to follow the procedure established in 28 U.S.C.A. § 1292(b) (West 1993) for certifying interlocutory questions for appeal from federal district courts to appellate courts.[7] The ALJ has followed those

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filed against one of the above companies relating to any such violation or alleged violation. 68 Fed. Reg. 31,864 (May 28, 2003).

[2] The ALJ notes in this order that Sprint has contested Jordan's right to include the three individually named parties as respondents in this matter. Because the ALJ found that Jordan properly named the three individuals, the ALJ explained that any reference to "Sprint" or "Respondent" in his order should be construed as including both the corporate and individual respondents. Although the Board has not yet ruled on whether the individuals were properly named and because the three individuals do not appear to have obtained separate counsel, for present purposes references to "Sprint" or "Respondents" in this order include the three individually named parties.

[3] Order Denying in Part Respondent's Motion for a Protective Order to Proceed under Seal and Ordering Supplemental Briefing (O.D.P.O.).

[4] Given that the Board has granted Sprint's petition for interlocutory review, Sprint's request to respond to Jordan's opposition to it is denied as moot.

[5] 1986-CAA-006 (Sec'y April 29, 1987).

[6] Slip op. at 2.

[7] *Id.* 28 U.S.C.A. § 1292(b) provides:

> When a district judge, in making in a civil action an order not

procedures here, and the ALJ has so certified the case for interlocutory review. Nevertheless, an administrative law judge's certification is a relevant, but not the determinative, factor in the Board's decision whether to accept the interlocutory appeal for review.[8]

The Secretary of Labor and the Board have held many times that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals.[9] The Board's general rule against accepting appeals from interlocutory orders parallels the standard that the Federal courts have developed regarding Section 1291. Similar to the Federal appellate courts, the Board applies the finality requirement in the interest of "'combin[ing] in one review all stages of the proceeding that effectively may be reviewed and corrected if and when'" a decision on the merits of the case is issued by the administrative law judge.[10] The Board also applies the collateral order exception to the finality requirement that *Cohen* permits and will hear appeals from interlocutory orders rendered in the course of administrative law judge proceedings that meet certain criteria. Specifically, the collateral order exception allows the review of orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from

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> 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. *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

[8] *See Ford v. Nw. Airlines*, ARB No. 03-014, ALJ No. 2002-AIR-021, slip op. at 2-3 (ARB Jan. 24, 2003); *Greene v. EPA Chief Susan Biro, U.S. Envtl. Prot. Agency*, ARB No. 02-050, ALJ No.2002-SWD-001, slip op. at 2-3 (ARB Sept. 18, 2002).

[9] *See e.g., Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 2003-SOX-015 (ARB May 13, 2004); *Hibler v. Exelon Generation Co., LLC*, ARB No. 03-106, ALJ No. 2003-ERA-009 (ARB Feb. 26, 2004); *Amato v. Assured Transp. & Delivery, Inc.*, ARB No. 98-167, ALJ No. 1998-TSC-006 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.*, ARB No. 99-097; ALJ No. 1999-ERA-017 (ARB Sept. 16, 1999); *Carter v. B & W Nuclear Techs., Inc.*, ALJ No.1994-ERA-013 (Sec'y Sept. 28, 1994).

[10] *See Greene*, slip op. at 4 (quoting *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541, 546 (1949)).

a final judgment."[11] In determining whether to accept an interlocutory appeal, we strictly construe the *Cohen* collateral appeal exception to avoid the serious "'hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.'"[12]

Sprint argued to the ALJ that he should dismiss Jordan's complaint or grant summary judgment because, in accordance with the Board's decision in *Willy v. The Coastal Corp.*,[13] the case cannot proceed, as Jordan cannot establish a prima facie case of protected activity without introducing privileged and confidential attorney-client information and work product. The ALJ rejected this argument.[14]

As an initial matter, the ALJ found that Sprint's blanket assertion of the privilege was inadequate and that instead, the privilege must be asserted statement-by-statement and document-by-document so that a court considering its application may rule with specificity.[15] The ALJ also questioned whether the Board's *Willy* decision remained a viable precedent given the Fifth Circuit's decision vacating it. But, in any event, the ALJ found the Fifth Circuit's *Willy* decision to be persuasive, and thus, he denied Sprint's Motion to Dismiss and/or for Summary Judgment. Nevertheless, he did find that Jordan is "obligated to take care not to disclose [statements or documents covered by the attorney-client privilege] beyond that reasonably necessary to establish his claim, and that, at least at this juncture, the parties' pleadings filed in this case must remain sealed."[16]

The ALJ next considered Sprint's request that he certify the issue whether Jordan may rely on statements or documents covered by the attorney-client privilege in support of his complaint that Sprint has retaliated against him in violation of the SOX's whistleblower protection provisions. Applying the collateral order exception to finality

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[11] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see Greene,* slip op. at 4.

[12] *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 961 n.2, (5th Cir.1980) (quoting *Nissan Motor Corp. Antitrust Litig.,* 552 F.2d 1088, 1094 (5th Cir. 1977)).

[13] ARB No. 98-060, ALJ No. 1985-CAA-001 (ARB Feb. 27, 2004), *rev'd sub nom., Willy v. Admin. Review Bd.,* 423 F.3d 483 (5th Cir. 2005).

[14] O.D.M.D. at 9-14.

[15] In support of this proposition, the ALJ cited: *Foster v. Hill,* 188 F.3d 1259, 1264 (10th Cir. 1999); *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992); *United States v. Rockwell Intern'l*, 897 F.2d 1255 (3d Cir. 1990); *In re Walsh*, 623 F.2d 489, 493 (7th Cir. 1980).

[16] O.D.M.D. at 14.

to this issue, the ALJ found that the issue met the criteria for interlocutory review. We agree.

The disputed question in this appeal is whether Jordan may rely on statements and documents subject to the attorney-client privilege to prosecute his complaint. Our decision whether the attorney-client privilege precludes such use will conclusively determine this question. We note that in addressing this criterion, the ALJ decided that should the Board find in Sprint's favor on the privilege issue, the Board's decision would conclusively dispose of the case because Jordan would be unable to allege sufficient facts upon which relief may be granted.[17] In so finding, the ALJ misapplied this criterion.

Under the ALJ's analysis, if the Board found in Jordan's favor, the Board's decision would not conclusively dispose of the case and therefore the criterion would not be satisfied. Accordingly, the determinative question is not whether if the Board decides the issue raised on interlocutory appeal one way or the other, the Board's decision would dispose of the entire case; the question is whether if the Board decides the certified question, the Board will conclusively dispose of that disputed issue, i.e., the Board will conclusively dispose of the issue whether Jordan may rely on the privileged communications.[18] Consequently, in deciding whether to consider the privilege issue on interlocutory appeal, it is unnecessary for the Board to consider or decide whether a decision holding that Jordan cannot rely upon the attorney-client communications would resolve this case in Sprint's favor, and we do not do so at this juncture.

We also find that the disputed issue whether Jordan may use the attorney-client communications to prove his case is completely separate from the merits of this case, i.e., whether Sprint unlawfully retaliated against Jordan.[19] To determine whether an issue is "important," we must weigh the "interests that would potentially go unprotected without immediate appellate review of that issue" against "the efficiency interests sought to be

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[17] *Id.* at 15.

[18] *Accord United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003)("The first [*Cohen*] requirement is satisfied because the district court's order conclusively and finally determined that the Foyle Memorandum is not protected by the attorney-client privilege. In no way does the record suggest that the district court's conclusion is tentative or subject to revision."); *In re Ford Motor Co.*, 110 F.3d 954, 958 (3d Cir. 1997)("It is beyond cavil that the first element is satisfied here. The district court's December 18 order requiring the production of the disputed documents leaves no room for further consideration by the district court of the claim that the documents are protected.").

[19] *Accord Philip Morris*, 314 F.3d at 617 ("Clearly the privilege question is separable from the merits of the underlying case."); *Ford*, 110 F.3d at 958 ("We can resolve the privilege and work product issues without delving into the disputed facts about Ford's knowledge and actions [i.e., the merits]."

advanced by adherence to the final judgment rule."[20] In *Phillip Morris*, the Court of Appeals for the District of Columbia Circuit explained the importance of the attorney-client privilege:

> The attorney-client privilege rests at the center of our adversary system and promotes "broader public interests in the observance of law and administration of justice: and "encourages[s] full and frank communication between attorneys and their clients." The privilege promotes sound legal advocacy by ensuring that the counselor knows all the information necessary to represent his client. Only by ensuring that privileged information is never disclosed will these important interests by advanced. Even though enforcement of the privilege often results in the suppression of probative evidence, our jurisprudence has determined that its value outweighs these costs.[[21]]

Therefore the court concluded, "[T]he institutional benefits of allowing interlocutory review of attorney-client privilege claims outweigh the costs of delay and piecemeal review that may result."[22] We agree.

Finally we also concur in the ALJ's conclusion that once Jordan is allowed to rely on the communications, the issue whether they are subject to the privilege is effectively unreviewable because Sprint will suffer irreparable injury by the publication of the communications regardless whether the Board ultimately reverses the ALJ's decision permitting Jordan to rely on the communications.[23] The appellate courts have split on the issue whether interlocutory appeal is appropriate to challenge attorney-client privilege assertions. *Id.* at 619-620. Some courts have held that the privilege issue is not effectively unreviewable because a party could obtain effective review of an adverse privilege order by

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[20] *Philip Morris,* 314 F.3d at 617.

[21] *Id.* at 618 (citations omitted).

[22] *Id. Accord Ford*, 110 F.3d at 961 ("[W]e believe that the attorney-client question before us also satisfies the importance criterion because the interests protected by the privilege are significant relative to the interests advanced by adherence to the final judgment rule.").

[23] *Id.* at 619. ("In this case, the right sought to be protected – BATCo's privilege – would be destroyed if interlocutory appeal is not allowed."). *Contra Boughton v. Cotter Corp.,* 10 F.3d 746, 751 (10th Cir. 1993)("The rulings [ordering production of documents allegedly subject to attorney-client privilege] can be reviewed upon appeal after a final judgment"). *But see In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1183 (10th Cir. 2006)("'Any subsequent review [of documents subject to attorney-client privilege], even after limited disclosure, would be for naught, because the damage would already be accomplished. Thus, appellate review of the claim would be meaningless.' *Boughton* did not address this principle." (Citation omitted).

refusing to obey it and, if subject to a contempt citation or some other sanction, appealing the citation or sanction.[24] The regulations governing the conduct of hearing procedures by Department of Labor Administrative Law Judges provide that if a party

> disobeys or resists any lawful order or process . . . or neglects to produce, after having been ordered to so, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing . . . refuses to be examined according to law, the administrative law judge responsible for the adjudication, where authorized by statute or law, may certify the facts to the Federal District Court having jurisdiction in the place in which he or she is sitting to request appropriate remedies.[25]

But even if a party could get relief from an ALJ's discovery order in such a proceeding in federal district court, given the administrative nature of the proceedings before the Labor Department in whistleblower cases, we believe that it is more appropriate for the Board to consider and dispose of these limited attorney-client discovery issues in the first instance, rather than forcing the parties into district court. Other courts have held that a party seeking a review of a discovery order that implicates attorney-client privilege may do so through a mandamus action.[26] However, whether the Secretary of Labor's delegation to the Board includes mandamus authority has not yet been determined.[27] Accordingly, because we find that the certified issue meets the criteria for the collateral order exception to the finality rule, we **GRANT** Sprint's petition for interlocutory review.

We establish the following briefing schedule:

Sprint may file an initial brief, not to exceed thirty (30) double-spaced typed pages, on or before thirty (30) days following the date on which this Order is issued**.** Jordan may file a reply brief, not to exceed thirty (30) double-spaced typed pages, on or before thirty (30) days after the date on which Sprint files its initial brief. Sprint may file a rebuttal brief, exclusively responsive to the reply brief and not to exceed ten (10) double-spaced typed pages, on or before fourteen (14) days after Jordan files its reply brief.

All motions and other requests for extraordinary action by the Board (including, but not limited to, requests for extensions of time or expansion of page

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[24] *Id.* at 619-620 and cases cited therein.

[25] 29 C.F.R. § 18.29 (2006).

[26] *See e.g., Qwest Commc'ns,* 450 F.3d at 1182-1184; *In re Bieter Co.,* 16 F.3d 929, 931-934 (8th Cir. 1994).

[27] *Somerson v. Eagle Express Lines, Inc.,* ARB No. 04-046, ALJ No. 2004-STA-012, slip op. at 3, n.2 (ARB May 28, 2004).

limitations) shall be in the form of a motion appropriately captioned, titled, formatted and signed, consistent with customary practice before a court. *See, e.g.*, Fed. R. Civ. P. 7(b).

All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1.25 inch top and bottom margins, printed on 8½ by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted. If a party fails to file a brief that complies with the requirements of this briefing order, the Board may refuse to file the brief, and if the brief is an initial brief, the Board may dismiss the appeal. *See, e.g., Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-006 (ARB Dec. 30, 2004).

An original and four copies of all pleadings and briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-5220, Washington, D.C., 20210.

Protective Order Requiring Use of Pseudonyms

Sprint, in support of its motion to order the parties to proceed anonymously, contends:

> [C]ourts have determined that use of pseudonyms, in addition to sealing the proceedings, is necessary to protect the privileged information of clients when their former lawyer brings suit against them. In this case, to publicly disclose that Sprint has a "whistleblower" suit by a person formerly employed as a securities lawyer will be to disclose that a dispute has asserted [sic] between an attorney and client regarding (purported) securities advice: that is a privileged and confidential matter that would be harmful if disclosed.[28]

But, as the Eleventh Circuit wrote in *Doe v. Frank*,

> Generally, parties to a lawsuit must identify themselves in their respective pleadings. Fed.R.Civ.P. 10(a) requires a complaint to "include the names of all the parties." This rule serves more than administrative convenience. It

[28] Respondent's Motion for a Protective Order to Proceed under Seal and with Use of Pseudonyms at 3-4.

> protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties.[29]

The Seventh Circuit also recognized, "The public has an interest in knowing what the judicial system is doing, an interest frustrated when any part of litigation is conducted in secret."[30] And, "[i]dentifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts."[31] Accordingly, "it is proper to weigh the public interest in determining whether some form of anonymity is warranted."[32] The SOX serves a public purpose because it "protect[s] investors and build[s] confidence in U.S. securities markets."[33] Thus, there is a significant public interest that must be considered in determining whether to permit SOX litigants to proceed anonymously.

In addition to the public interest in open legal proceedings, the courts have recognized a number of other factors judges should consider in analyzing whether the parties should be permitted to proceed anonymously, including whether the case involves "matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity."[34] Use of pseudonyms may also be appropriate to protect state secrets, trade

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29 951 F.2d 320, 322 (1992)(citations omitted).

30 *Doe v. Smith*, 429 F.3d 706, 710 (2005).

31 *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir. 1997).

32 *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000).

33 *Canero v. Boston Scientific Corp*., 433 F.3d 1, 8 (1st Cir. 2006).

34 *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992). *Accord Femedeer*, 227 F.3d at 1246. Although in most cases involving a motion to proceed using pseudonyms, the plaintiff is the moving party, the courts often speak generally in terms of the requirement that parties be named in pleadings. *See e.g., Femedeer*, 227 F.3d at 1246 ("the Federal Rules of Civil Procedure mandate that all pleadings contain the name of the parties"); *Doe v. Blue Cross & Blue Shield United*, 112 F.3d at 872 ("the privilege of suing or defending under a fictitious name should not be granted automatically. … Rule 10(a) of the Federal Rules of Civil Procedure, in providing that the complaint shall give the names of all the parties to the suit … instantiates the principle that judicial proceedings, civil as well as criminal, are to be conducted in public."); *Doe v. Frank*, 951 F.2d at 322 ("Generally, parties to a lawsuit must identify themselves in their respective pleadings."). In *Guerrilla Girls, Inc. v. Kaz*, 224 F.R.D. 571, 574 (S.D.N.Y. 2004), a case in which the defendants requested to proceed anonymously, the court held that in such cases a number of factors should be considered, including potential mental or physical injury to the moving party, but that it was not appropriate to proceed anonymously just to protect the moving party's professional or economic life.

secrets and informers, or when necessary to protect the privacy of children, rape victims and other particularly vulnerable parties or witnesses.[35]

As the ALJ astutely recognized in discussing Sprint's motion to proceed anonymously before the ALJ, in neither *Doe v. A. Corp.*, 709 F.2d 1043 (5th Cir. 1983), nor *X Corp. v. Doe*, 805 F. Supp. 1298 (E.D. Va. 1992), two cases Sprint cited in support of its argument for anonymity, did the courts analyze the question in terms of the public's interest in the proceedings or any other relevant factor. Instead, in a cursory footnote, the Fifth Circuit simply stated in *A. Corp*., "To prevent identification of the company and the possible disclosure of confidential information concerning its affairs, the district court granted the defendant corporation's motion to seal the record; [and] require the suit to be prosecuted without revealing the name of either the lawyer or the corporation; …."[36] Similarly, in *X Corp. v. Doe*, the district court summarily concluded, "To prevent identification of the parties and possible disclosure of confidential information, the Court has ordered that this matter proceed under seal, and, accordingly, pseudonyms are used here."[37]

The attorney-client privilege protects communications between attorney and client for the purpose of soliciting or providing legal opinions and advice. As the Sixth Circuit Court of Appeals held:

> The attorney-client privilege only precludes disclosure of *communications* between attorney and client and does not protect against disclosure of the facts underlying the communication. In general, the fact of legal consultation or employment, clients' identities, attorney's fees, and the scope and nature of employment are not deemed privileged.[[38]]

Sprint has failed to explain how disclosure of the parties' names could result in the disclosure of a confidential *communication* given that neither the fact that an attorney-client relationship exists, nor the identity of the client generally, is covered by the attorney-client privilege.[39]

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35 *Doe v. Blue Cross & Blue Shield United*, 112 F.3d at 872.

36 709 F.2d at 1044 n.1.

37 805 F. Supp. at 1300 n.1.

38 *Humphreys, Hutchinson & Moseley v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. Feb. 20, 1985)(citations omitted).

39 *See e.g., In re Grand Jury Subpoenas*, 906 F.2d 1485, 1488 (10th Cir. 1990) ("It is well recognized in every circuit, including our own, that the identity of an attorney's client

In analyzing Sprint's request under the factors enunciated in the Tenth Circuit's decision in *Femedeer,*[40] the ALJ concluded that Sprint had failed to establish the exceptional circumstances warranting anonymity. In particular the ALJ noted that the names of the parties to the litigation are already a matter of public record and that Sprint did not assert, nor did the record support that Sprint had made any attempt to protect its identity in investigatory proceedings before the Occupational Safety and Health Administration or when Jordan initially filed his request for a hearing.[41] Furthermore, the ALJ observed that the fact that Sprint might be embarrassed by the fact that one of its former attorneys sued it under the SOX does not justify anonymity, given the countervailing factors such as the public interest.[42]

We conclude that Sprint has failed to demonstrate that this case falls within the exception to the general rule that parties to litigation must identify themselves. Although a court's failure to analyze a motion to proceed anonymously in light of the relevant factors is grounds for reversal for abuse of discretion,[43] Sprint failed to address such factors or to rebut the ALJ's well-reasoned and cogent conclusions. Thus, we **DENY** Sprint's motion to proceed anonymously.

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and the source of payment for legal fees are not normally protected by the attorney-client privilege.")(citations omitted).

[40] *I.e.*, whether the case "'involves matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity.'" 227 F.3d at 1246 (quoting *Doe v. Frank*, 951 F.2d at 234). Although Sprint contended before the ALJ that this case arose in the Tenth Circuit Court of Appeals, O.D.P.O. at 4. n.5, Sprint has failed to discuss any Tenth Circuit precedent on the issue. As the ALJ recognized, any party adversely affected or aggrieved by a final disposition of the Board may obtain review either in the circuit in which the alleged violation occurred (in this case the Tenth Circuit) or in the circuit in which the complainant resided when the alleged violation was committed (in this case, the Eighth Circuit). O.D.P.O. at 4 n.5. *See* 18 U.S.C.A. § 1514A(b)(2); 49 U.S.C.A. § 42121(b)(4)(A)(West Supp. 2005).

[41] O.D.P.O. at 5. Once Jordan filed his request for a hearing before the Office of Administrative Law Judges (OALJ), the parties' names and case number became publicly available on the OALJ website. *Id.* at 5.

[42] *Id.*

[43] *James v. Jacobson,* 6 F.3d 233, 239 (4th Cir. 1993)(district court judge failed to properly exercise discretion in ruling on motion to proceed anonymously in case in which he neglected to adequately take into account judicially recognized factors constraining its exercise). *Cf. Doe v. Smith*, 429 F.3d at 710 (case remanded to district court to revisit question whether the plaintiff should be allowed to proceed anonymously in case in which the judge granted party's application to do so without discussing the circuit's decisions, "which disfavor anonymous litigation.").

Proceeding under Seal

The ALJ denied Sprint's request that all pleadings, evidence and orders be sealed and all hearings be closed to the public. He temporarily sealed Sprint's Motion for a Protective Order to Proceed under Seal, Jordan's complaint dated April 11, 2005, and the Secretary's findings contained in Assistant Regional Administrator Steve Carmichael's letter of December 21, 2005. The ALJ ordered Sprint to file a supplemental brief within 15 days of the date of his Order, in support of its motion for a protective order that at a minimum must identify specific statements and or documents that it contends the attorney-client privilege covers and ordered Jordan to file a supplemental brief responding to Sprint's motion within 15 days of the date on which Sprint supplied its brief. Before responding to the ALJ's O.D.P.O., Sprint filed its Motion to Dismiss or, Alternatively for Summary Decision.

Sprint now moves the Board to seal the record of the proceedings before it. The Board and the Secretary of Labor have routinely held that that there is no authority permitting the sealing of a record in a whistleblower case because the case file is a government record subject to disclosure pursuant to the Freedom of Information Act,[44] unless the record qualifies for an exemption to such disclosure.[45] Moreover, no assurances of confidentiality can be given in advance of an FOIA request because an agency "'promise of confidentiality [cannot] in and of itself defeat the right of disclosure"'[46] Sprint has failed to address this precedent or to present any argument supporting departure from it.

Nevertheless, even if the Board was willing to reconsider its position with the understanding that any such seal would be provisional only and subject to the requirements of the FOIA, Sprint has provided no basis for the Board to depart from the ALJ's well-reasoned denial of Sprint's motion. The ALJ cited three grounds for refusing Sprint's request that he seal the record in this case. First, relying on Tenth Circuit precedent,[47] the ALJ found that Sprint's request for a comprehensive protective order that would place under seal every aspect of this case including all pleadings, correspondence and other documents filed by the parties, any orders the ALJ issued, as well as the identities of the parties was not acceptable. As the Tenth Circuit held, "A party claiming the attorney-client privilege must prove its applicability, which is narrowly construed.

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44 5 U.S.C.A. § 552 (West 1996).

45 *See e.g., McDowell v. Doyon Drilling Servs.*, ARB No. 97-053, ALJ No. 1996-TSC-008 (ARB May 19, 1997); *Debose v. Carolina Power & Light Co.*, 1992-ERA-014, 1994 WL 897419 (Sec'y Feb. 7, 1994).

46 *Debose*, 1994 WL 897419 at 3 (citations omitted).

47 *Foster*, 188 F.3d at 1264.

The party must bear the burden as to specific questions or documents, not by making a blanket claim."[48]

Secondly, the ALJ found that, without any apparent objection by Sprint, there had already been numerous disclosures of purportedly privileged information when the parties litigated the case before OSHA. For example, Jordan's April 11, 2005 complaint filed with OSHA "is replete with descriptions of matters that Respondent now alleges are covered by the attorney-client privilege."[49] The ALJ concluded that if Sprint had failed to timely object to these disclosures, it had waived the attorney-client privilege in respect to them. Because the ALJ did not have a complete record of the OSHA proceedings, he ordered the parties to file relevant documentation regarding the possible waiver of the privilege in the proceedings before OSHA. It appears that because Sprint filed this interlocutory appeal, it did not respond to the ALJ's order, but Sprint has not disputed the ALJ's supposition, nor does it contend on appeal to the Board that it preserved the privilege by timely objecting to the disclosures.

Finally the ALJ concluded that even if Sprint had properly limited its request to specific matters and had timely asserted the privilege, it did not appear that it could meet its burden to show now that it is entitled to invoke the privilege as to all matters described in Jordan's complaint. Jordan and Sprint not only had an attorney-client relationship, they also had an employee-employer relationship. Thus the ALJ concluded that communications between Jordan and Sprint concerning personnel matters such as his place of employment, work schedule, salary, performance rating or authorization to work at home would not be communications for the purpose of soliciting or providing legal opinions and advice.[50] Therefore they would not be protected by the attorney-client privilege. In addition, since the privilege applies only to the substance of communications and not to the facts and circumstances surrounding those communications, the ALJ determined that Sprint could not legitimately invoke the privilege as to the dates, times, and places of meetings involving Jordan, the names of individual who participated in the meetings and the subject matter of the communications.[51]

On appeal to the Board, Sprint failed to even address the grounds for the ALJ's denial of the motion to seal the record, much less refute them. Furthermore, while Sprint cited six cases in support of its request for a blanket protective order, the court granted

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48 *Id.*

49 O.P.D.O. at 7.

50 *Id.* at 8.

51 *Id.*

such an order in only two cases and in only one, *Webster Groves Sch. Dist. v. Pulitzer*,[52] did the court explain why the entire record was sealed.

Unlike this case, *Webster Groves* did not involve a conflict between an attorney and his client; it involved the entitlement of a news organization to gain access to the file in a case involving a minor. The court determined that the child's privacy interest and the state's interest in protecting minors from the public dissemination of hurtful information clearly outweighed the news organization's interest in access to the records.[53] Even then, the court only sealed the entire record after it was demonstrated that "redaction of the file would be virtually impossible because it [was] 'replete with documentation, evaluations, and other information regarding [the child's] learning disabilities and other personal information.'"[54] Sprint has made no such showing in this case. Nevertheless, consistent with the ALJ's O.P.D.O., we will permit Sprint to identify in its brief to the Board specific statements and or documents that it contends are covered by the attorney-client privilege and Jordan to respond to Sprint's contentions. If Sprint identifies such statements and or documents, the Board will then, in the context of its decision of the issue whether Jordan may rely on statements or documents covered by the attorney-client privilege, consider whether it would be appropriate to permit redaction of the record to protect the alleged privileged communications. Accordingly, Sprint's motion for a blanket protective order to seal the entire record is **DENIED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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52 898 F.2d 1371 (8th Cir. 1990).

53 *Id.* at 1377.

54 *Id.*