No. 06-2295

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID E. WELCH,
Plaintiff-Appellant,

and

UNITED STATES OF AMERICA,
Intervenor/Plaintiff-Appellant,

v.

CARDINAL BANKSHARES CORP. et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Virginia

BRIEF FOR THE INTERVENOR/PLAINTIFF-APPELLANT UNITED STATES OF AMERICA

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this case pursuant to 18 U.S.C. 1514A (the whistleblower protection provisions of the Sarbanes-Oxley Act) and 28 U.S.C. 1331 (federal question). This Court has jurisdiction to review the October 5, 2006 Order of United States District Court Judge Glen E. Conrad, No. 7:06CV00407, pursuant to 28 U.S.C. 1291 (final decisions of

district courts). JA 225-36.[1] The Order is a final judgment that disposes of all claims. Timely notices of appeal from the district court's final order were filed by plaintiffs-appellants David E. Welch and the United States of America, which intervened on behalf of the Secretary of Labor ("Secretary"), on December 4, 2006. JA 237-39.

STATEMENT OF THE ISSUE

This case arises under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 ("SOX"), section 806, 18 U.S.C. 1514A, which requires the Secretary to issue a preliminary order providing relief, including reinstatement, upon finding that there is reasonable cause to believe that a violation of that Act has occurred. See 18 U.S.C. 1514A(b)(2)(A) (incorporating 49 U.S.C. 42121(b)(2)(A)). Section 806 also provides that a preliminary order of reinstatement is not stayed upon the filing of objections to the Secretary's findings and order. See id. The question presented in this case is whether a district court is authorized to enforce a preliminary reinstatement order issued by an administrative law judge under section 806.

[1] Documents contained in the Joint Appendix are cited "JA (Appendix page number(s))."

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

1. On December 19, 2002, plaintiff-appellant David E. Welch ("Welch") filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that his employer, Cardinal Bankshares Corporation ("Cardinal"), had terminated his employment in violation of section 806 of SOX.[2] OSHA dismissed Welch's complaint on February 4, 2003, and Welch requested a de novo hearing before an administrative law judge ("ALJ"), who issued a recommended decision and order ("RD&O") on January 28, 2004, in favor of Welch. JA 15-88.[3] Specifically, the ALJ found that Welch, Cardinal's chief financial officer, engaged in protected activity when he reported to his managers that certain improperly recorded entries on the company's financial statements were inflating its reported income, that his access to outside auditors was being improperly restricted, and that Cardinal's accounting controls were deficient because too many

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[2] The Secretary has delegated responsibility for receiving and investigating whistleblower complaints under SOX to the Assistant Secretary for Occupational Safety and Health. See Secretary's Order 5-2002, 67 Fed. Reg. 65,008 (Oct. 22, 2002).

[3] Under the regulations implementing section 806, either party may object to OSHA's findings by requesting a de novo hearing before an ALJ. See 29 C.F.R. 1980.106. Decisions of the ALJ are subject to discretionary review by the Administrative Review Board ("ARB" or "Board"), to which the Secretary has delegated responsibility for issuing final agency decisions under section 806. See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

employees without appropriate expertise were making entries without Welch's knowledge or approval. See id. The ALJ further found that Cardinal was aware of Welch's allegations and that his suspension and firing shortly after his having engaged in the protected activity established the requisite causal connection between the activity and the adverse actions taken. JA 76-80. The ALJ rejected as pretext Cardinal's contention that it terminated Welch's employment because he insisted on having his attorney present during meetings to discuss his allegations of fraud. See JA 81 ("As explained above, the purpose of the meeting arranged by [Cardinal] was not to conduct a legitimate inquiry into the various concerns raised by Welch regarding [Cardinal's] accounting deficiencies and improprieties. Rather, it was their intent to create a situation whereby Welch would not attend the meeting so they could use that act as a justification for terminating his employment.").

The ALJ ordered Cardinal to reinstate Welch and reimburse him for back pay, but did not specify the amount. Instead, the ALJ sought further written submissions on the calculation of damages.[4] On February 15, 2005, the ALJ issued a supplemental

[4] Although the ALJ had not issued a final order, Cardinal petitioned the ARB for review. After the ARB declined to accept Cardinal's interlocutory petition, Cardinal appealed to this

recommended decision and order ("SRD&O") awarding damages, fees, and costs. JA 105. The SRD&O again ordered that Welch be reinstated. Under a heading, "Recommended Order," the ALJ stated that "it is HEREBY RECOMMENDED that Respondent, Cardinal Bankshares Corporation, be ORDERED to: Reinstate Complainant David Welch[.]". JA 130. Cardinal filed a timely petition for review of the ALJ's RD&O and SRD&O with the ARB, but refused to reinstate Welch pending the Board's review.

On August 30, 2005, and September 14, 2005, respectively, Welch filed a complaint and request for preliminary injunction in district court seeking to enforce the ALJ's reinstatement order. On January 4, 2006, the district court granted Cardinal's motion to dismiss, agreeing with the bank's arguments that it was not clear whether the ALJ intended to order immediate reinstatement and that Cardinal had not been given an opportunity to petition the ARB for a stay. See Welch v. Cardinal Bankshares Corp., 407 F. Supp. 2d 773, 776-77 (W.D. Va. 2006).[5] Although the court denied Welch's subsequent motion to

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Court, which dismissed the appeal on September 13, 2004, on the ground that there was no final agency order. JA 102.

[5] Section 806's implementing regulations provide that an ALJ's decision requiring reinstatement will be effective immediately upon receipt of the decision by the respondent, see 29 C.F.R. 1980.109(c), and that "a preliminary order of reinstatement will be effective while review is conducted by the Board, unless the Board grants a motion to stay the order." See 29 C.F.R. 1980.110(b).

alter or amend the order, it clarified that its order was without prejudice to any new motion to enforce the preliminary reinstatement order should the ARB agree that the ALJ intended the SRD&O to include a preliminary order of reinstatement, enforceable in district court, and should the ARB deny a request by Cardinal to stay the order. See Welch v. Cardinal Bankshares Corp., No. 05-546, 2006 WL 197039, at *3 (W.D. Va. Jan. 26, 2006).

Welch returned to the Board seeking a definitive reinstatement order, which the ARB issued on March 31, 2006 ("2006 Order"). JA 153. The Board's 2006 Order found that the ALJ's January 28, 2004 RD&O and the February 15, 2005 SRD&O together constituted the ALJ's decision and order and that the preliminary reinstatement order was immediately effective. JA 156-57. Based on the district court's admonition, however, the ARB allowed Cardinal to move for a stay. JA 157. On June 9, 2006, the ARB denied Cardinal's motion for a stay, concluding that Cardinal had failed to establish either that it was likely to prevail on the merits of its appeal or that it would suffer irreparable harm by reinstating Welch ("Order Denying Stay"). JA 160. The Board also rejected Cardinal's contentions that Welch would not be harmed by the delay in reinstatement and that the public interest favored a stay. Id. Notwithstanding the

ARB's order denying Cardinal's motion for a stay, Cardinal failed to comply with the ALJ's preliminary reinstatement order.

2. On July 6, 2006, Welch brought a second action to enforce the ALJ's preliminary reinstatement order in district court, and the Secretary moved to intervene on his behalf. Cardinal filed a motion to dismiss Welch's petition to enforce on August 2 pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that the district court lacked jurisdiction to enforce the reinstatement order.[6] On October 5, 2006, the district court issued a decision granting Cardinal's motion to dismiss. See Welch v. Cardinal Bankshares Corp., 454 F. Supp. 2d 552 (W.D. Va. 2006).[7]

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[6] Cardinal's Board of Directors also moved to intervene on Cardinal's behalf. The court granted both motions to intervene at a September 25 motions hearing. The American Association of Bank Directors ("AABD") filed an amicus brief on behalf of Cardinal.

[7] In the time between the district court's first and second opinions, the Second Circuit issued Bechtel v. Competitive Techs., Inc., 448 F.3d 469 (2d Cir. 2006) (Jacobs, J., Leval, J., Straub, J.). Bechtel, which involved an appeal of a district court injunction enforcing a preliminary reinstatement order issued by OSHA under SOX, does not have a majority opinion. Each judge on the panel issued a separate opinion. Two judges ruled to vacate the court's injunction, but did so for different reasons. Judge Jacobs concluded that the plain language of SOX does not permit district court enforcement of preliminary reinstatement orders, and noted in particular his objection to the enforcement of preliminary orders issued by OSHA "based on no more than 'reasonable cause' to believe that the complaint has merit." 448 F.3d at 471-76. Without resolving that primary issue, Judge Leval concluded that the reinstatement order at issue in the case was unenforceable

B. The District Court's Decision

The district court concluded that it lacked authority to grant Welch's petition. The court held that the text of section 806 (i.e., 49 U.S.C. 42121(b)) cannot be interpreted to confer jurisdiction on federal courts to enforce preliminary orders issued under SOX.[8] The court believed that because the "enforcement" subsections (b)(5) and (b)(6)(A) of AIR21 refer only to subsection (b)(3) orders, and subsection (b)(3) describes only "final orders," only final orders of the ARB are enforceable. Although the court acknowledged that SOX's implementing regulations at 29 C.F.R. 1980.113 state that preliminary reinstatement orders are enforceable in district court, it declined to defer to the regulations on the grounds that an agency cannot interpret statutory provisions conferring federal jurisdiction and that the Secretary's interpretation conflicts with the plain language of the statute. See Welch, 454 F. Supp. 2d at 557.

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because OSHA's investigation had not given the defendant reasonable notice of the evidence against it. Id. at 479-82. Judge Straub would have upheld the district court's injunction, concluding both that section 806 confers authority on district courts to enforce preliminary reinstatement orders and that the company had been provided with sufficient evidence to satisfy its due process rights. Id. at 484-90.

[8] Section 806 of SOX incorporates the procedures, as well as the burdens of proof, of the whistleblower protection provision contained in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"). See 18 U.S.C. 1514A(b)(2)(A), (b)(2)(C) (incorporating 49 U.S.C. 42121(b)).

The court drew support for its reading of the statute from the general principle that only final decisions of administrative agencies are reviewable in federal court. The court also relied on what it perceived to be the congressional intent underlying the statute, noting that if Congress intended district courts to enforce preliminary reinstatement orders, it could have modeled AIR21 on the whistleblower provisions of the Surface Transportation Assistance Act of 1978 ("STAA"), 49 U.S.C. 31105, which explicitly provides for the enforcement of preliminary reinstatement orders. See Welch, 454 F. Supp. 2d at 558.

The district court also opined that its statutory interpretation provided for the "efficient administration of justice" by avoiding the situation where a preliminary order of reinstatement issued either by OSHA or an ALJ is enforced by a district court but then overturned by the ARB. To that end, the court stated that it "cannot have jurisdiction to enforce a preliminary order of reinstatement of the ALJ while a review of that order is pending before the ARB, as this procedure could lead to inconsistent and confusing results." Welch, 454 F. Supp. 2d at 558, 559.

While the court acknowledged that "the current situation represents a departure from the adjudication scheme envisioned by Congress," which intended whistleblowers to be immediately

reinstated in order to encourage the reporting of corporate fraud, it deemed the Secretary responsible for the delay in this case, characterizing the 18 months that the appeal of the ALJ decision had been pending with the ARB as an "inordinate" period of time. See Welch, 454 F. Supp. 2d at 559. And, finally, to the extent that an inability to enforce preliminary reinstatement harms a complainant, the court believed that the complainant is not "without recourse," because he could request de novo district court review under section 806's "kick-out" provision. Id.; see 18 U.S.C. 1514A(b)(1)(B) (permitting a complainant to bring an action de novo in district court if the Secretary has not issued a final order within 180 days of the filing of the complaint).

SUMMARY OF ARGUMENT

The district court erred in concluding that it lacked authority to enforce the ALJ's preliminary reinstatement order issued under section 806 of SOX. The plain meaning of 49 U.S.C. 42121(b), incorporated by reference into section 806, provides a cause of action for the enforcement of preliminary reinstatement orders. Any other interpretation undermines Congress's unequivocal directive that the Secretary order reinstatement if she finds reasonable cause to believe that a violation of section 806 has occurred and that such an order not be stayed pending the administrative adjudication. Moreover, the

Secretary interprets 49 U.S.C. 42121(b) as providing a cause of action to enforce preliminary reinstatement orders issued under section 806. See 29 C.F.R. 1980.113.

In concluding that it lacked authority to enforce the ALJ's reinstatement order, the court made several fundamental errors. It incorrectly framed the issue as jurisdictional, applying an unduly exacting standard of statutory interpretation. The court's analysis also totally ignores the language of 49 U.S.C. 42121(b)(2)(A) -- "[t]he filing of such objections [to the Secretary's preliminary findings and order] shall not operate to stay any reinstatement remedy contained in the preliminary order." And the court erred in relying on its own policy considerations to justify its failure to heed Congress's statutory mandates, because policy judgments properly are the province of Congress, not the courts.

ARGUMENT

THE DISTRICT COURT HAS THE STATUTORY AUTHORITY TO ENFORCE A PRELIMINARY REINSTATEMENT ORDER ISSUED BY AN ADMINISTRATIVE LAW JUDGE UNDER SOX'S WHISTLEBLOWER PROTECTION PROVISIONS

A. Standard of Review

A district court's dismissal of a case for lack of subject matter jurisdiction is reviewed de novo. See Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999).

B. Section 806 of SOX Creates a Cause of Action for District Court Enforcement of Preliminary Reinstatement Orders.

SOX was enacted in the wake of the Enron and WorldCom scandals to restore investor confidence in the nation's financial markets by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. To further these purposes, section 806 provides whistleblower protection to employees of publicly traded companies who report corporate fraud. See 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy) ("U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies.").

Section 806 of SOX, together with the Secretary's implementing regulations, provide that an employee who believes that he or she has been subject to retaliation for lawful whistleblowing may file a complaint with OSHA. See 18 U.S.C. 1514A(b)(1)(A); 29 C.F.R. 1980.103. Upon receipt of a SOX complaint, OSHA conducts an investigation to determine whether there is reasonable cause to believe that a violation has occurred. See 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.104(e). If, on the basis of the information gathered, OSHA believes there is reasonable cause that a violation has occurred, it will issue findings and a preliminary order providing the relief

prescribed under the statute, including reinstatement of the employee. See 49 U.S.C. 42121(b)(2)(A); 18 U.S.C. 1514A(c)(2)(A); 29 C.F.R. 1980.105(a).

Either the employer or the complainant may file objections to OSHA's findings and preliminary order within 30 days and request a hearing before an ALJ. See 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.106(a). However, the filing of such objections "shall not operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. 42121(b)(2)(A).[9] Section 806's implementing regulations similarly provide that "[t]he portion of the preliminary order requiring reinstatement will be effective immediately upon the [employer's] receipt of the findings and preliminary order, regardless of any objections to the order," unless a stay is granted. 29 C.F.R. 1980.106(b)(1).

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[9] 49 U.S.C. 42121(b)(2)(A) (emphasis added) states, in pertinent part:

> If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order.

ALJ hearings under section 806 are conducted de novo. 29 C.F.R. 1980.107(b). If the ALJ finds that a complainant has "demonstrated that protected behavior or conduct was a contributing factor in the [adverse action] alleged," and the respondent does not subsequently establish by "clear and convincing evidence" that it would have taken the same adverse action despite the protected activity, the ALJ must order "all relief necessary to make the employee whole." 29 C.F.R. 1980.109(a), (b). This relief includes reinstatement of the complainant to his former position, which is effective upon receipt of the decision. See 29 C.F.R. 1980.109(b)-(c). As with an OSHA preliminary order of reinstatement, section 806's implementing regulations specifically provide that an ALJ's preliminary order of reinstatement is not stayed while on appeal unless the reviewing body grants a motion to stay the ALJ's order. See 29 C.F.R. 1980.110(b). To ensure compliance with orders issued by the Secretary, Congress authorized the Secretary and the employee on whose behalf the order was issued to seek enforcement in district court. See 49 U.S.C. 42121(b)(5), (b)(6)(A); 29 C.F.R. 1980.113.[10]

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[10] 49 U.S.C. 42121(b)(5) states:

> Whenever any person has failed to comply with an order issued under paragraph [(b)](3), the Secretary of Labor may file a civil action in the United States district court for the district in

The language of 49 U.S.C. 42121(b), read in the statutory context, unquestionably creates a cause of action in federal court for the enforcement of an ALJ's preliminary reinstatement order. Specifically, reinstatement orders issued under subsection (b)(3) are immediately enforceable in district court under 49 U.S.C. 42121(b)(5) and (b)(6)(A). Subsection (b)(3)(B)(ii) provides that the Secretary shall order the person who has committed a violation to reinstate the complainant to his or her former position. 49 U.S.C. 42121(b)(3)(B)(ii)

> which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

Subsection (b)(6)(A) similarly states:

> A person on whose behalf an order was issued under paragraph [(b)](3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

49 U.S.C. 42121(b)(6)(A). 29 C.F.R. 1980.113 provides:

> Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

("[i]f, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation [of SOX] has occurred, [she] shall order the person who committed such violation to . . . reinstate the complainant to his or her former position"). Subsection (b)(2)(A) instructs the Secretary to accompany any reasonable cause finding that a violation occurred with a preliminary order containing the relief prescribed under subsection (b)(3)(B), including reinstatement. 49 U.S.C. 42121(b)(2)(A). Subsection (b)(2)(A) also declares that the subsection (b)(3)(B)'s relief of reinstatement contained in a preliminary order is not stayed upon the filing of objections. 49 U.S.C. 42121(b)(2)(A) ("The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order."). Thus, under the statute, enforceable orders issued under subsection (b)(3) include preliminary orders that contain the relief of reinstatement prescribed by subsection (b)(3)(B).

This analysis is not altered by the fact that subsection (b)(3) bears the heading "Final order." It is well settled that the title of a statutory section generally cannot be used to constrict the plain language of the statute. See United States v. Buculei, 262 F.3d 322, 331 (4th Cir. 2001) (a statute's title cannot limit the plain meaning of its text and is "of use only when it sheds light on some ambiguous word or phrase") (internal

quotation marks and citation omitted), cert. denied, 535 U.S. 962 (2002); Bersio v. United States, 124 F.2d 310, 314 (4th Cir. 1941) ("[T]he heading of a statute, or section thereof, may not be used to create an ambiguity or to extend or restrict the language contained in the body of the statute itself."); see also Lyons v. Ga.-Pac. Corp. Salaried Employees Retirement Plan, 221 F.3d 1235, 1246 (11th Cir. 2000) ("We have previously observed that 'reliance upon headings to determine the meaning of a statute is not a favored method of statutory construction.'" (citation omitted)), cert. denied, 532 U.S. 967 (2001).

Focusing on the title to subsection (b)(3) instead of reading section 42121(b) as a coherent whole negates the congressional directives that preliminary reinstatement must be ordered upon a finding of reasonable cause and that such orders not be stayed pending appeal. In interpreting a statute, a court "determines whether the language at issue has a plain and unambiguous meaning by looking to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Hedin v. Thompson, 355 F.3d 746, 748 (4th Cir. 2004) (internal quotation marks and citation omitted); see also Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2003) ("The text's plain meaning can best be understood

by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.").

Rather than analyzing the statute as a whole, the district court here focused only on the references in subsections (b)(5) and (b)(6) to "orders issued under paragraph (b)(3)." This approach ignored the rule of statutory construction that exhorts courts to read a section of a statute not in isolation but in conjunction with the provisions of the entire Act, considering both its object and policy. See, e.g., Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 162 (4th Cir. 1998), aff'd, 529 U.S. 120 (2000). Significantly, the court's interpretation gave no consideration whatsoever to the statutory language in subsection (b)(2) that "[t]he filing of . . . objections shall not operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. 42121(b)(2)(A). Thus, the court ignored another rule of statutory construction, namely that courts must "give effect, if possible, to every clause and word of a statute." Williams v. Taylor, 529 U.S. 362, 404 (2000) (internal quotation marks and citation omitted). The court's failure properly to consider all of the relevant statutory language critically undermines its analysis, since the language and structure of section 42121(b) provides ample support for the conclusion that the statute provides for enforcement of preliminary reinstatement orders.

Indeed, the Secretary has interpreted section 42121(b) as providing district courts with the authority to enforce preliminary reinstatement orders. See 29 C.F.R. 1980.113. In Bechtel, Judge Leval stated that the regulations were internally inconsistent. See 448 F.3d at 478-79. Apparently, in his view, the regulations interpret the phrase "order issued under paragraph (3)" under 49 U.S.C. 42121(b)(4) to be limited to final orders, while they interpret the same phrase under subsection 42121(b)(5) to include both final and preliminary orders. This argument, however, fails to recognize that additional language of subsection 42121(b)(4) ("petition for review must be filed not later than 60 days after the date of the issuance of the final order" and "[r]eview shall conform to chapter 7 of title 5, United States Code") demonstrates that the phrase "order issued under paragraph (3)" as used in subsection (b)(4) is limited to final orders. Similar language limiting the phrase "order issued under paragraph (3)" does not appear in subsection 42121(b)(5).

Significantly, in Martin v. Yellow Freight Sys., Inc., 983 F.2d 1201, 1203 (1993), the Second Circuit applied the Secretary's regulations providing that the district court has authority to enforce an ALJ's reinstatement order. Yellow Freight addressed whether a district court has authority to enforce an ALJ's interim order of reinstatement issued under the

whistleblower provisions of the STAA -- a statute that does not specifically provide for the enforcement of such orders. Yellow Freight argued that the Secretary could not enforce the interim reinstatement order because STAA only referred to enforcing preliminary orders issued by OSHA after an investigation, and final orders issued by the Secretary, but not to orders issued by an ALJ. See 983 F.2d at 1203; 49 U.S.C. 31105(b), (d). The Second Circuit held that the ALJ's order was enforceable, viewing it as reasonable and anticipated under the statute that an ALJ vested with the authority of the Secretary would issue orders of reinstatement. See 983 F.2d at 1203. Moreover, the court noted that notwithstanding the statute's silence, "enforcement of an ALJ's reinstatement order is consistent with congressional intent to protect whistle-blowers, and . . . failure to enforce such an order undermines the goal of the legislation." Id. Similarly, here, it is reasonable and anticipated that an ALJ will issue preliminary orders of reinstatement under SOX, and that whistleblowers faced with an employer's refusal to comply with an ALJ's reinstatement order will seek to enforce those orders in district court.

C. The District Court's Decision Is Based Upon Several Significant Errors.

The district court made several errors when ruling that section 806 does not authorize the enforcement of preliminary

reinstatement orders. First, the court mischaracterized the issue as jurisdictional, i.e., concluding that it lacked subject matter jurisdiction to enforce a preliminary reinstatement order. The court, however, clearly had subject matter jurisdiction over this enforcement action under 28 U.S.C. 1331, giving district courts jurisdiction over federal questions, and 49 U.S.C. 42121(b)(5) and (b)(6)(A), giving district courts jurisdiction to enforce orders of the Secretary under section 806. See Verizon Md., Inc. v. Public Serv. Comm'n, 535 U.S. 635, 642 (2002).

The court's proper inquiry should have been whether section 806 authorizes a cause of action to enforce preliminary reinstatement orders. See, e.g., Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 89 (1990) (the absence of a valid cause of action does not implicate subject matter jurisdiction); Cobb v. Contract Transport, Inc., 452 F.3d 543, 549-50 (6th Cir. 2006) (noting Supreme Court's recent "instruct[ion] [to] courts of appeals to properly distinguish between subject-matter jurisdiction and other limits on a court's authority") (citing Arbaugh v. Y&H Corp., 126 S. Ct. 1235 (2006), Eberhart v. United States, 126 S. Ct. 403, 405 (2005) (per curiam), and Kontrick v. Ryan, 540 U.S. 443, 453-54 (2004)).

Mischaracterizing the issue as one of jurisdiction led the court to apply an unduly demanding statutory construction

standard. See, e.g., Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 480 (4th Cir. 2005) ("Because subject-matter limitations 'serve institutional interests,' they 'must be policed by the courts on their own initiative even at the highest level.'" (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999))); Bailey v. West, 160 F.3d 1360, 1363 (Fed. Cir. 1998) (courts "must construe jurisdictional statutes narrowly and 'with precision and with fidelity to the terms by which Congress has expressed its wishes'" (quoting Cheng Fan Kwok v. INS, 392 U.S. 206, 212 (1968))).

The district court's second, related error was in ignoring the language and overall structure of SOX and AIR21, which clearly indicate that Congress intended courts to enforce preliminary reinstatement orders. In particular, the court failed to address the statutory mandate that preliminary orders of reinstatement are not automatically stayed pending the administrative adjudication. The court's restrictive reading of section 42121(b) thus negates the plain words of the statute and is inconsistent with legislative intent. Without an ability to enforce preliminary reinstatement orders, employers can defy the law with impunity, as Cardinal has done here. This undermines Congress's objective to encourage reporting of corporate fraud. See, e.g., Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 179 (2005) (Title IX's objective of preventing the use of federal

funds to perpetuate discrimination "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation. . . . If recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it." (internal quotation marks and citations omitted).[11]

As Judge Straub's dissenting opinion in Bechtel carefully describes, in the wake of the Enron and WorldCom scandals, Congress was mindful that whistleblowers were essential both to uncovering corporate fraud and mismanagement and to alerting corporate or government officials of the same. See Bechtel, 448 F.3d at 485-86 (citing S. Rep. No. 107-146, at 2 (2002)). Judge Straub found this legislative intent to "evince a strong Congressional preference for reinstatement as a means of encouraging whistleblowing." Id. at 486. Thus, immediate reinstatement encourages whistleblowing because it assures potential whistleblowers that "they will remain employed,

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[11] Indeed, two of the three judges on the Bechtel panel acknowledged the disconnect that follows if the statute, which specifically provides for preliminary reinstatement orders and states that they are not to be stayed on appeal, does not include a mechanism to enforce those orders. See 448 F.3d at 478 (Leval, J.) (questioning why Congress, on the one hand, would specifically provide that preliminary orders shall not be stayed if, on the other hand, it did not intend those orders to be enforceable); id. at 485 (Straub, J.) (concluding that the statute intended "effective preliminary reinstatement") (emphasis in original).

integrated in the workplace, professionally engaged, and well-situated in the job market." Id.[12]

Indeed, as the Supreme Court stated in Brock v. Roadway Express, Inc., 481 U.S. 252, 259 (1987) (plurality opinion), a case involving STAA's preliminary reinstatement provision, Congress recognized that the "longer a discharged employee remains unemployed, the more devastating are the consequences to his personal financial condition and prospects for reemployment. Ensuring the eventual recovery of backpay may not alone provide sufficient protection to encourage reports of safety violations." In light of the overwhelming evidence that Congress intended to implement a statutory scheme that would encourage whistleblowers to report corporate fraud without fear of reprisal, it is eminently clear that Congress intended the statute to create a cause of action for enforcement of preliminary reinstatement orders issued under SOX.

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[12] Judge Straub also recognized that:

> when a whistleblower is immediately reinstated, this assures his co-workers that they are protected and thereby encourages them to come forward as well. The alternative is likely to discourage initial whistleblowing and, where a whistleblower has been removed pending the administrative and judicial process, to send a chilling signal to co-workers who notice the whistleblower's sudden (and to all appearances permanent) disappearance.

448 F.3d at 486.

Third, the district court erred in concluding that it lacks authority to enforce preliminary reinstatement orders because deferring enforcement of such orders is consistent with the efficient administration of justice. It appears that the district court adopted this argument, among others, from Judge Jacobs' opinion in Bechtel. The Bechtel case, however, involves the enforceability of a preliminary reinstatement order issued by OSHA after a finding of reasonable cause. This case involves a preliminary reinstatement order of an ALJ, which is only issued after a full hearing on the merits. Judge Jacobs' opinion was influenced in large part by the fact that OSHA's preliminary reinstatement order was issued without the benefit of a trial, concluding that a preliminary order based on reasonable cause to believe that a complaint has merit was too "tentative and inchoate" to be enforced. Bechtel, 448 F.3d at 474. In any event, the district court incongruously failed to recognize that such temporary relief is routine in the legal system. For instance, courts grant enforceable temporary restraining orders and preliminary injunctions, even though those orders granting relief may be overturned when the underlying merits of the case are decided on appeal.[13]

[13] The district court's reasoning on this point also incorrectly assumed that orders must be final and appealable to be enforceable. See, e.g., MDK, Inc. v. Mike's Train House, Inc.,

Moreover, whether preliminary reinstatement is consistent with the efficient administration of justice is a policy consideration for Congress to make. See Sorenson v. Secretary of Treasury, 475 U.S. 851, 865 (1986) ("The ordering of competing social policies is a quintessentially legislative function."); Resolution Trust Corp. v. Fragetti, 49 F.3d 715, 718 (11th Cir. 1995) ("policy concerns are primarily the province of Congress, not the courts"); see also Bechtel, 448 F.3d at 478 (Leval, J.); id. at 487-88 (Straub, J.). Congress has expressly stated that an order of preliminary reinstatement is not to be automatically stayed while an employer's administrative appeal is being adjudicated. Thus, Congress clearly made the judgment that "the employee's protection against having to choose between [blowing the whistle] and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review." Roadway Express, 481 U.S. at 258-59; see also Bailey v. Gulf Coast Transp., Inc., 280 F.3d 1333, 1337 (11th Cir. 2002) ("Employees may be much less likely to stand up for their substantive rights under the statute if they know that months or years will pass before a court can act to halt prohibited intimidation by their employer.").

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27 F.3d 116, 119-20 (4th Cir. 1994) (discovery orders, while enforceable, are generally not appealable).

Fourth, the district court erroneously concluded that section 806's "kick-out" provision, 18 U.S.C. 1514A(b)(1)(B), evinces a congressional intent not to authorize enforcement of preliminary reinstatement orders. Section 806's 180-day "kick-out" provision, which allows a complainant to seek de novo review in district court if the Secretary has not issued a final decision within that time, was not intended to mitigate an employer's refusal to reinstate a complainant, nor would it adequately do so. The ability to bring a de novo action in an alternate forum does not provide the same relief that immediate reinstatement provides. See Bechtel, 448 F.3d at 487 (Straub, J.). Moreover, AIR21 does not have a similar "kick-out" provision, thereby leaving whistleblowers under AIR21 without any remedy under the district court's analysis. See id. Accordingly, there is no basis to suppose that Congress intended section 806's "kick-out" provision to replace the enforcement of preliminary reinstatement orders issued under the whistleblower protection provisions of SOX and AIR21.[14]

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[14] The district court below also relied in part on Stone v. Duke Energy Corp., 432 F.3d 320 (4th Cir. 2005). Stone, however, is inapposite. That case involved the question, on which section 806 is silent, whether DOL retains jurisdiction over a SOX complaint after the complainant exercises his or her rights under the 180-day "kick-out" provision. It does not in any fashion address whether a cause of action exists for enforcing preliminary reinstatement orders issued by the Secretary under section 806.

Fifth, the court was wrong to place responsibility for the delay in Welch's reinstatement on the Department of Labor. The court failed to acknowledge that the ARB has been required to rule on procedural matters in this case on three separate occasions, which would have been unnecessary if Cardinal immediately had reinstated Welch as SOX requires. See, e.g., JA 92-101 (ARB Order of May 13, 2004 dismissing Cardinal's petition for review as an interlocutory appeal); JA 153-59 (ARB Order of March 31, 2006 issuing an unambiguous reinstatement order); and JA 160-70 (ARB Order of June 9, 2006 dismissing Cardinal's motion for a stay). In any event, any delay on the part of the ARB in issuing a final order does not excuse Cardinal's flouting of the statutory command that preliminary orders not be stayed while an employer seeks an administrative appeal. While SOX provides that a final order shall be issued by the Secretary within 120 days after the conclusion of a hearing, see 49 U.S.C. 42121(b)(3)(A), this statutory provision is directory and not jurisdictional. See JA 96 (Welch v. Cardinal Bankshares Corp., ARB Case No. 04-054 (May 13, 2004), slip op. at 4 (citing Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1065 (5th Cir. 1991))). The length of time that the ARB has taken in issuing a final decision in this case simply has no relevance whatsoever to whether the statute authorizes a cause of action for the enforcement of a preliminary reinstatement order.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order and direct the court to enforce the ALJ's preliminary reinstatement order.

Respectfully submitted,

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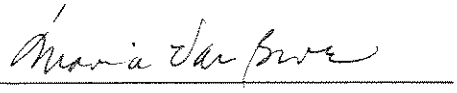

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REQUEST FOR ORAL ARGUMENT

The Secretary requests that oral argument be heard in this case which presents the question of the district court's ability to enforce orders of preliminary reinstatement issued by an Administrative Law Judge under the whistleblower protection provisions contained in section 806 of the Sarbanes-Oxley Act of 2002. District court enforcement of orders of preliminary reinstatement is critical to the Secretary's ability to implement the Sarbanes-Oxley whistleblower provisions. Thus, the Secretary believes oral argument would be advisable and helpful to the Court.

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(s) Maria Van Fossen

Attorney for the United States of America

Dated: March 7, 2007

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2007, two copies of the foregoing Brief for the United States of America as intervenor/plaintiff-appellant and one copy of the Joint Appendix were served, using Federal Express, upon the following counsel of record:

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