UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF VIRGINIA

DAVID E. WELCH, Plaintiff, v. CARDINAL BANKSHARES CORPORATION, Defendant.	:	Civil Action No. 7:06cv00407

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The United States of America, on behalf of the United States Department of Labor ("Department" or "DOL"), hereby files its Memorandum in Opposition to Defendant Cardinal Bankshares' ("Defendant" or "Cardinal") Motion to Dismiss ("Motion") for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Based upon the following reasons, the United States submits that this Court has jurisdiction to hear the merits of, and has authority to enforce, Plaintiff David E. Welch's Petition to Enforce the preliminary reinstatement order of a DOL Administrative Law Judge ("ALJ") issued pursuant to section 806 of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A. Therefore, the United States respectfully requests that the Court deny Defendant's Motion.

ISSUE PRESENTED

The sole issue before this Court is whether it has authority to enforce a preliminary reinstatement order issued by a DOL ALJ pursuant to the whistleblower protection provisions of SOX, 18 U.S.C. § 1514A.

BACKGROUND

The procedural history to this case is set forth in the United States' Motion to Intervene and is restated in the United States' Reply to Defendant's Memorandum in Opposition to the United States' Motion to Intervene in this case.

ARGUMENT

SECTION 806 OF THE SARBANES-OXLEY ACT PROVIDES A CAUSE OF ACTION IN U.S. DISTRICT COURT FOR ENFORCEMENT OF AN ADMINISTRATIVE LAW JUDGE'S PRELIMINARY REINSTATEMENT ORDER ISSUED UNDER THE WHISTLEBLOWER PROTECTION PROVISIONS OF THAT ACT

A. Statutory Language and Regulatory Background

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. See Procedures for Handling Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act; Final Rule, 69 Fed. Reg. 52,104 (Aug. 24, 2004). To further these purposes, section 806 of SOX provides whistleblower protection to employees of publicly traded companies who report corporate fraud.[1] See 148 Cong. Rec. S7420 (daily

[1] Section 806 prohibits publicly traded companies from "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an employee in the terms and conditions of employment" because of any protected

ed. July 26, 2002) (statement of Senator 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 the Secretary. See 18 U.S.C. § 1514A(b)(1)(A); 29 C.F.R. § 1980.103. SOX incorporates the rules, procedures, and burdens of proof of the aviation safety whistleblower provisions contained in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121. See 18 U.S.C. §§ 1514A(b)(2)(A) and (b)(2)(C).[2]

Upon the filing of a complaint, the Secretary, through the Occupational Safety and Health Administration ("OSHA"),[3] will notify the employer of the allegations contained in the complaint and the substance of the evidence supporting the complaint. See 49 U.S.C. § 42121(b)(1); 29 C.F.R. § 1980.104(a). OSHA then conducts an investigation to determine whether reasonable cause exists to believe 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

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whistleblowing activity. 18 U.S.C. 1514A(a). Activities protected under the Act include providing to "a person with supervisory authority over the employee" (among others), 18 U.S.C. 1514A(a)(1)(C), information that an employee reasonably believes constitutes a violation of federal mail, wire, bank or securities fraud statutes (18 U.S.C. 1341, 1343, 1344, and 1348), or a violation of any securities rule or any other provision of federal law relating to fraud against shareholders. See 18 U.S.C. 1514A(a)(1) and (a)(2).

[2] This memorandum frequently refers only to AIR21, 49 U.S.C. 42121, rather than to AIR21 and SOX, for ease of reference and to eliminate recurrent cross-referencing.

[3] The Secretary delegated responsibility for receiving and investigating whistleblower complaints under SOX to the OSHA Assistant Secretary. See Secretary's Order No. 5-2002, 67 Fed. Reg. 65,008 (Oct. 22, 2002). References to the Secretary or OSHA Assistant Secretary are used interchangeably throughout this brief.

the information gathered, OSHA believes there is reasonable cause that a violation has occurred, OSHA must 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); and 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 a DOL ALJ. See 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1980.106(b)(1). 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). 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." 29 C.F.R. § 1980.106(b)(1).

Section 806 ALJ hearings are conducted de novo. 29 C.F.R. § 1980.107(b). If the ALJ finds 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 may 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 that person's former position, and is effective upon receipt of the decision. See 29 C.F.R. § 1980.109(b)-(c). As with an OSHA preliminary order of reinstatement, the section 806 implementing regulations specifically provide that an ALJ's preliminary order of reinstatement is not stayed while

on appeal unless the reviewing body, the Department's Administrative Review Board ("ARB"), grants a motion to stay the ALJ's order based on exceptional circumstances. See 29 C.F.R. § 1980.110(b); 69 Fed. Reg. 52109 (Preamble).

B. The Plain Language of the Statute Creates a Cause of Action to Enforce an ALJ's Preliminary Reinstatement Order.

The primary question in this case is not, as Cardinal appears to argue, whether this Court has jurisdiction over this action, but whether SOX creates a cause of action in federal district court for enforcement of an ALJ's preliminary reinstatement order. If, as we argue below, SOX creates such a cause of action, this Court clearly has jurisdiction under the unequivocal terms of 49 U.S.C. § 42121(b)(6)(A) ("The appropriate United States district court shall have jurisdiction . . . to enforce such order.") and 28 U.S.C. § 1331. See, e.g., Whitman v. Department of Transportation, 126 S. Ct. 2014, 2016 (2006) (per curiam).[4]

The plain language of SOX establishes a cause of action for enforcement of an ALJ's preliminary reinstatement order. See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 236 (1986) ("The starting point in statutory construction is, of course, the language of the statute itself."). AIR21 explicitly authorizes the district courts to enforce a preliminary reinstatement order as if it were a final order. See 49 U.S.C. § 42121(b)(2)(A) ("the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B) [i.e., the section governing final orders]"). See also 49 U.S.C. § 42121(b)(5) and (b)(6).[5]

[4] Similarly, this Court would have jurisdiction to enforce a preliminary reinstatement order at the behest of the Secretary of Labor. 49 U.S.C. § 42121(b)(5).

[5] Subsection (b)(5) states:

AIR21 plainly maps out the method by which preliminary orders issued pursuant to the statute can be enforced in district court. Subsection (b)(6) of 49 U.S.C. § 42121 provides for enforcement of orders issued under subsection (b)(3). 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) ("[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), including reinstatement. This subsection also specifically states that any (b)(3)(B) relief of reinstatement contained in a preliminary order is not stayed upon the filing of objections. 49 U.S.C. § 42121(b)(2)(A). Thus,

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> 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 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.

49 U.S.C. § 42121(b)(5). Subsection (b)(6) 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).

under the plain meaning of the statute, enforceable orders issued under subsection (b)(3) include preliminary orders, which contain the relief of reinstatement prescribed by subsection (b)(3)(B).

Notwithstanding this plain reading of the statute, Cardinal argues, Motion at 3, 21, that district courts only have jurisdiction under 49 U.S.C. § 42121(b) to enforce final orders issued by the ARB.[6] Cardinal relies on the reference in subsection 42121(b)(6) to orders issued under subsection 42121(b)(3), which in turn is captioned "Final order." This reliance is misplaced because it ignores the well-settled rule of statutory construction that the title of a statutory section generally cannot be used to constrict the plain language of the statute. See U.S. v. Buculei, 262 F.3d 322, 331 (4th Cir. 2001); Bersio v. U.S., 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 extend or restrict the language contained in the body of the statute."); 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).

Indeed, by focusing on the heading of subsection (b)(3), Cardinal fails to read the subdivisions of section 42121 as a coherent whole. See Hedin v. Thompson, 355 F.3d 746, 748 (4th Cir. 2004) (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

[6] As noted above, the more apt question in this case is whether AIR21 creates a cause of action for enforcement of an ALJ's preliminary reinstatement order. However, we apply defendant's jurisdictional arguments to that question.

as a whole.") (citation and internal quotation marks omitted); 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."). It is evident from the language and structure of section 42121 that the statute provides for enforcement of preliminary reinstatement orders, not only final orders issued by the ARB.

Cardinal specifically argues, Motion at 21 n.21, that ALJ orders of reinstatement issued after an evidentiary hearing are not enforceable because they are not orders of the Secretary within the meaning of the statute.[7] The Second Circuit addressed this issue with respect to a very similar whistleblower provision under the Surface Transportation Assistance Act ("STAA"). Martin v. Yellow Freight Sys., Inc., 983 F.2d 1201 (2d Cir. 1993). At issue in Yellow Freight was whether an ALJ's interim order of reinstatement issued under the whistleblower provisions of the STAA was enforceable in district court, where the statute did not specifically provide for judicial review of such orders. Yellow Freight argued that the Secretary could not enforce the interim reinstatement order because the STAA section only referred to preliminary orders (those issued by OSHA after an investigation) and final orders (those issued by the Secretary on appeal from an ALJ). Id. at 1203; see 49 U.S.C. § 31105(b) and (d). The Second Circuit held that the ALJ's order was enforceable, finding it reasonable and anticipated under the statute that

[7] Cardinal's contention, Motion at 11, that the ALJ's supplemental recommended decision and order ("SRDO") does not "order," but only "recommends," reinstatement is specious. In denying Welch's request for sanctions, the ALJ clarified beyond cavil that his supplemental reinstatement order was immediately effective, a statement that was recently reinforced by the ARB. See, e.g., the ARB's March 31, 2006 Order, which found that the ALJ's January 28, 2004 recommended decision and order and the February 15, 2005 SRDO together constituted the ALJ's decision and order, and that they were immediately effective.

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 on that point, "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 can seek to enforce the order in district court pursuant to 49 U.S.C. § 42121(b)(6). A contrary interpretation would undermine the goals of AIR21 and SOX and would negate congressional intent to have whistleblowers under those statutes immediately reinstated once the agency finds that a violation has occurred, even if the finding is subject to further review. See 42 U.S.C. § 42121(b)(2)(A) ("The filing of such objection shall not operate to stay any reinstatement remedy contained in the preliminary order."). Furthermore, SOX's implementing regulations provide for enforcement of any preliminary reinstatement order (whether issued by OSHA after an investigation or an ALJ after a hearing) in district court. See 29 C.F.R. § 1980.113 ("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 district court.). As explained infra, these regulations are entitled to deference.

ALJs derive their authority from the Secretary. Therefore, if the Secretary's preliminary reinstatement order is enforceable, so is an ALJ's. See Yellow Freight, 983

F.2d at 1203 (recognizing that ALJ is vested with authority of the Secretary). The Administrative Procedure Act ("APA") authorizes agency ALJs to preside over hearings required by statute to be determined on the record, and to issue decisions and orders. See 5 U.S.C. §§ 554, 556-557, 3105. As AIR21 specifically contemplates agency hearings on the record, see 49 U.S.C. § 42121(b)(2)(A), the authority granted to ALJs under the APA, including the ability to issue orders after an administrative hearing, extends to SOX proceedings. Moreover, the Secretary's regulations implementing SOX delegate to the Office of Administrative Law Judges the authority to issue preliminary reinstatement orders that are immediately effective. See 29 C.F.R. § 1980.109(c) (an ALJ's decision "requiring reinstatement or lifting an order of reinstatement by [OSHA] will be effective immediately upon receipt of the decision by the [employer], and will not be stayed"). Therefore, an ALJ's preliminary reinstatement order issued under SOX is enforceable in the same way as an order issued by the Secretary or OSHA.

C. The Department of Labor's Reading of the Statute is Supported by SOX's Overall Structure and is Consistent with Congressional Intent.

The language and overall structure of AIR21, as well as the circumstances of SOX's enactment, clearly indicate that Congress intended to permit district courts to enforce preliminary reinstatement orders. A reading of section 42121(b) that does not allow for enforcement of preliminary reinstatement orders in district court is inconsistent with the legislative intent that these orders, especially when issued by an ALJ, be effective immediately. Moreover, such a crabbed reading would negate the plain words of the statute that preliminary orders of reinstatement are not automatically stayed pending appeal to the ARB.

As Judge Straub noted in Bechtel, the various provisions of AIR21's enforcement scheme, "taken together, reflect Congress's sense that timely reinstatement is essential to prevent the chilling effects of employer retaliation." Bechtel, 448 F.3d at 485. In drawing this conclusion, Judge Straub looked, inter alia, to the language of 42 U.S.C. § 42121(b)(2) (providing that when the Secretary finds reasonable cause to believe that a violation has occurred, she "*shall* accompany her findings with a preliminary order providing the relief prescribed by paragraph (3)(B)," and noting specifically that a remedy of reinstatement is not to be stayed by an objection to that order) (emphasis added), in conjunction with section 42121(b)(3)(B) (providing that the Secretary *must* order the employee's reinstatement if after a full investigation she concludes that there has been a violation). The emphasis on preliminary reinstatement remedies in this statutory scheme, Judge Straub stated, "makes clear that immediate reinstatement is paramount, which cuts against any interpretation that would allow an employer to ignore a reinstatement order with impunity." 448 F.3d at 484.

That Congress intended preliminary reinstatement orders to be enforceable merely effectuates the usual legal consequences of this statutory scheme. See, e.g., Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15, 20-21 (1982) ("[I]t is reasonable to conclude that Congress expected the [statutorily created] agreement and the collective-bargaining agreement, like ordinary contracts, to be enforceable by private suit upon a breach.") (citation omitted). In SOX, as Judge Straub correctly noted, "the statute's mandatory language and strict deadlines" reflect not only the importance of preliminary reinstatement but of "*effective* preliminary reinstatement," which, as this case illustrates, is impossible without an enforcement mechanism. Bechtel,

448 F.3d at 485; see also Id. at 478 (Leval, J.) ("[E]ven if Judge Jacobs is correct that there are good reasons why a preliminary order should not be enforced, these considerations do not explain why Congress would provide that a preliminary order is not stayed if despite the statute's denial of a stay, the employer without adverse consequence may effectively stay the order simply by declining to obey it.").

AIR21's legislative history provides further evidence that Congress intended preliminary reinstatement orders to be enforced. The AIR21 whistleblower provisions were modeled on STAA:

> There are currently over a dozen Federal laws protecting whistleblowers including laws protecting nuclear plant workers, miners, truckers, and farm laborers when acting as whistleblowers. For example, section 2305 of the Surface Transportation Assistance Act of 1978, 49 U.S.C. § 2305, prohibits retaliation for filing a complaint or instituting any proceeding relating to violations of motor vehicle safety rules or refusing to operate an unsafe vehicle. There are no laws specifically designed to protect airline employee whistleblowers.

H.R. Rep. 106-167(I), 106th Cong., 1st Sess. 1999, 1999 WL 355951, *85 (emphasis added).

Thus, when AIR21 was passed, Congress specifically referred to STAA as an example of an existing whistleblower protection statute. Congress was undoubtedly aware that STAA alone, among the many whistleblower statutes administered by the Department of Labor, authorized the Secretary to issue orders of preliminary reinstatement upon a finding of reasonable cause and that such preliminary orders were not stayed by the filing of objections. The inclusion of the very similar preliminary reinstatement provisions in AIR21 indicates that Congress intended AIR21 to provide aviation employees with the same protections that it previously had provided to employees operating motor vehicles in STAA.

There is also little question but that Congress envisioned preliminary reinstatement to be an important component of the SOX legislative scheme, and that immediate enforcement of such orders is necessary to effectuate the statute's purpose. As Judge Straub's opinion in Bechtel carefully details, in the wake of Enron and WorldCom, Congress was mindful that whistleblowers were essential both to uncovering corporate fraud and mismanagement and to alerting corporate or government officials of the same:

> In the 'Background and Need for Legislation of the Senate Report, which narrated the epic demise of Enron, the Committee explained that the cover-up efforts of Enron management included 'discourag[ing] at nearly every turn' attempts by 'employees at both Enron and [its auditor] Andersen . . . to report or 'blow the whistle' on fraud. . . . This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

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":

> Congress's preference, moreover, makes eminent sense. The Act's provision for *immediate* orders of preliminary reinstatement encourages whistleblowing, by assuring potential whistleblowers that they will remain employed, integrated in the workplace, professionally engaged, and well-situated in the job market; such orders also facilitate whistleblowing, by enabling whistleblowers to continue on as observers and potential witnesses to corruption. Moreover, 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 sudden (and to all appearances permanent) disappearance.

Id. at 486. 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 appropriate to conclude that the statute creates a cause of action for

enforcement of preliminary reinstatement orders issued under SOX. See Jackson v. Birmingham Board of Education, 544 U.S. 167, 179 (2005) (concluding that 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 loathe to report it.") (citations and internal quotation marks omitted).

D. The Secretary's Regulations Providing for District Court Enforcement of Preliminary Reinstatement Orders Reasonably Interpret AIR21 and Are Entitled to Deference.

The Secretary's regulations implementing SOX support the United States' position in this case. Based on the plain language of 49 U.S.C. § 42121(b) and its legislative history, the Secretary has interpreted section 42121(b) as providing district courts with the authority to enforce preliminary reinstatement orders. The regulations implementing section 806 provide:

> 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.

29 C.F.R. § 1980.113. The regulation reflects the Secretary's careful consideration of the language and context of the statute.[8] As Congress chose to vest the Secretary with authority to administer the whistleblower provisions under 49 U.S.C. § 42121(b), the

[8] Cardinal, Motion at 27, further objects that agencies cannot by regulation confer jurisdiction upon district courts. Cardinal misses the point. The Secretary is not attempting through regulation to confer jurisdiction upon district courts, but simply is interpreting the language of section 42121(b) as permitting the Secretary and employees to seek district court enforcement of preliminary reinstatement orders.

Secretary's interpretation of those provisions is entitled to deference. See United States v. Mead Corp., 533 U.S. 218, 234-35 (2001); Skidmore v. Swift & Co., 323 U.S. 140 (1944). See also Yellow Freight, 983 F.2d at 1203 (upholding the district court's authority to enforce an ALJ's reinstatement order as provided for in the regulations); but see Bechtel, 448 F.3d at 479 (Leval, J.) (finding that the Secretary's regulations inconsistently interpret AIR21's language concerning final orders).

E. The Second Circuit did not Issue a Dispositive Ruling in *Bechtel*, and this Case Arises in a Different Posture than *Bechtel*.

Defendant's reliance in its Motion to Dismiss, Motion at 22, on the Second Circuit's decision in Bechtel v. Competitive Technologies, Inc., 448 F.3d 469, which addresses the court's jurisdiction to enforce an OSHA preliminary reinstatement order issued under the SOX whistleblower statute, is misplaced for several reasons. First, Bechtel does not have a majority opinion. See 448 F.3d at 484 (Straub, J.) ("[T]here is no majority rule of law from which I need dissent."). Each of the three judges on the panel issued a separate opinion, and the two judges who ruled to vacate the preliminary injunction enforcing the preliminary reinstatement order did so for different reasons. Judge Jacobs concluded that section 806 does not confer jurisdiction on district courts to enforce preliminary reinstatement orders issued by OSHA. Without resolving the jurisdictional issue, Judge Leval concluded that the reinstatement order was unenforceable because OSHA's investigation did not give the defendant-appellant reasonable notice of the evidence against it. Judge Straub would have upheld the district court's injunction, concluding both that section 806 confers jurisdiction on the courts to enforce preliminary reinstatement orders issued by OSHA and that the defendant had been provided with sufficient evidence to satisfy its due process rights.

Second, whereas Bechtel addresses 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 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. 448 F.3d at 474.

Third, as explained above, the issue in this case is not whether this Court has jurisdiction to hear this claim, but whether the statute creates a cause of action in federal court for enforcement of a preliminary reinstatement order issued under SOX. The Bechtel decision supports the United States' position that a cause of action is gleaned from the language and structure of the statute and the overall congressional intent in enacting the SOX whistleblower provisions. Two of the three Bechtel judges acknowledged the statutory disconnect that would necessarily follow if the statute, which specifically provides for preliminary reinstatement orders and states that they are not to be stayed on appeal, did 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, thereby permitting employers to freely ignore them); id. at 485 (Straub, J.) (finding that the statute intended "*effective* preliminary reinstatement") (emphasis in original). As Judge Straub's opinion explains in great detail, there is significant evidence in SOX's legislative history that Congress believed whistleblower protection, including the right to immediate reinstatement, to be of paramount

importance. The viability of this right depends on the Secretary's and employee's ability to enforce it in district court.

CONCLUSION

The United States respectfully requests that this Court deny Defendant's Motion to Dismiss, issue a preliminary injunction enforcing the preliminary reinstatement order issued by the Department's Administrative Law Judge, and award all appropriate remedies. [9]

Respectfully submitted,

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[9] Defendant argues, Motion at 28 n.27, that SOX does not authorize this Court to award the monetary damages sought by Welch, which include back pay from the date of the ALJ's preliminary order of reinstatement, February 15, 2005, attorney's fees, and costs. The test for determining whether certain remedies are available under a statute is similar to the test for determining jurisdiction: if Congress has not provided to the contrary, all appropriate remedies are presumed to be available. See Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 66 (1992). As nothing in the statutory scheme indicates that Congress intended to preclude monetary remedies or other make-whole relief, those remedies may be awarded here. See Bell v. Hood, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of August, 2006, electronically filed the foregoing **United States' Memorandum in Opposition to Defendant Cardinal Bankshares' Corporation Motion to Dismiss** with the Clerk of the Court using the CM/ECF system, which will provide a copy to

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