JONES DAY

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IMMEDIATE REINSTATEMENT OF TERMINATED EMPLOYEES UNDER THE FEDERAL WHISTLEBLOWER STATUTES

When an employee complains of retaliation under a federal whistleblower law with the Occupational Safety and Health Administration ("OSHA"), OSHA may issue a preliminary order requiring the employer to reinstate the employee as a remedy. Generally, for remedies other than reinstatement, if the employer appeals OSHA's preliminary order to an administrative law judge ("ALJ"), all relief is stayed pending a final order. An appeal does not stay reinstatement, however. What happens if an employer refuses to reinstate the employee pending appeal of the preliminary order to an ALJ or to the Administrative Review Board ("ARB"), whose decision is considered the final order of the Secretary of Labor in whistleblower cases? An interesting and developing issue is whether the Department of Labor ("DOL") or the employee can seek an order from a federal district court compelling reinstatement pending further proceedings before the ALJ or ARB.

The debate over whether federal district courts have jurisdiction over non-final orders focuses on the statutory language in the Wendell H. Ford Aviation Investment & Reform Act for the 21st Century ("AIR 21"), which is incorporated into several federal whistleblower statutes, including the Sarbanes-Oxley Act, the Federal Rail Safety Act, and the Surface Transportation Assistance Act. For these purposes, the relevant provisions of AIR 21, 49 U.S.C. § 42121(b), are as follows:

(2) Investigation; preliminary order. –

(A) In general. - . . . 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) . . . *The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order* . . .

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(3) Final order. –

(B) Remedy. – If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to – . . .

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment . . .

(5) Enforcement of order by Secretary of Labor. – Whenever any person has failed to comply with an order issued under paragraph (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 . . .

(6) Enforcement of order by parties. –

(A) Commencement of action. – A person on whose behalf an order was issued under paragraph (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.

AIR 21, 49 U.S.C. § 42121(b) (emphasis added).

The reinstatement question was most recently addressed in *Solis v. Tennessee Commerce Bancorp, Inc.*, No. 3:10-00472, 2010 WL 2010944, at *1-2 (M.D. Tenn. May 19, 2010). *Solis* involved a Sarbanes-Oxley Act of 2002 ("SOX") whistleblower complaint. The Secretary of Labor brought the court action against Tennessee Commerce Bancorp, Inc. and Tennessee Commerce Bank ("Defendants") for their refusal to reinstate an employee, George Fort, after OSHA issued its preliminary order to do so. After an investigation, OSHA had found that Mr. Fort's protected activity of complaining of SOX violations was a contributing factor in Defendants' decision to place him on administrative leave and then ultimately terminate him. *Id*. at *1-2, 5. OSHA ordered immediate reinstatement among other relief. The Defendants asked for an ALJ hearing and refused to reinstate Mr. Fort until a final resolution of the matter. *Id*. at *1-2. The Secretary moved for a temporary restraining order and a preliminary injunction while the Defendants moved to dismiss the action for lack of jurisdiction and because such relief would violate Defendants' due process rights, in that OSHA did not provide them adequate notice of the allegations. *Id*. at *1.

The court found that it did have jurisdiction to enforce OSHA's preliminary orders under AIR 21 and that Defendants' due process rights were not violated. Therefore, it granted the Secretary's motions and denied Defendants' motion to dismiss. *Id*. at *7.

In its analysis, the court heavily referenced *Bechtel v. Competitive Technologies, Inc*., 448 F.3d 469 (2d Cir. 2006), a case that also involved a SOX complaint. In *Bechtel*, the Second Circuit vacated the district court's enforcement of OSHA's preliminary order of reinstatement. The Second Circuit three-judge panel, however, failed to reach consensus on any issue. Judge Jacobs concluded that federal courts do not have jurisdiction over preliminary orders. He reasoned that the plain text of 49 U.S.C. § 42121(b)(2)(A) only incorporates the remedial provisions of (b)(3)(B) and "nowhere suggests that the two subparagraphs are to be treated identically for federal jurisdictional purposes." *Id*. at 473. He argues that this conclusion is further supported by the fact that (1) the statute provides for de novo review in district court if the Secretary has not issued its ruling within 180 days of filing; (2) the preliminary order is based "on no more than 'reasonable cause,'" which "is a tentative and inchoate basis for present enforcement;" and (3) if the results were to change on each level of affairs, it would cause a "rapid sequence of reinstatement and discharge, and a generally ridiculous state of affairs." *Id*. at 474.

Judge Leval in his concurring opinion declined to rule on the jurisdictional question. Rather, he concluded that the Secretary's procedures failed to satisfy due process requirements because the Defendant did not have adequate notice. *Id*. at 479-83.

Judge Straub, on the other hand, in his dissenting opinion found the court to have jurisdiction over the preliminary order and that due process requirements were met. As to the jurisdictional issue, he found the statute to be internally unclear as to whether federal courts have jurisdiction over preliminary orders. Focusing on the statutory scheme, Judge Straub considered that the text of the statute makes immediate reinstatement "paramount" by requiring the Secretary to respond

promptly to a complaint, and ordering that "objections shall not operate to stay any reinstatement." 49 U.S.C. § 42121(b)(2)(A). *Bechtel*, 448 F.3d at 484-85. Moreover, this better protects whistleblowers, which was a primary concern of Congress, and reduces any chilling effect. *Id.* at 486.

The court in *Solis* adopted Judge Straub's reasoning. It found 49 U.S.C. § 42121(b)(5) ambiguous as to "whether [it]'s language authorizing actions to enforce 'an order' applies to a preliminary order and a final order of the Secretary." *Solis*, 2010 WL 2010944, at *9. The court determined that to apply the provision to both final and preliminary orders would be most consistent with the statutory scheme. *Id*. at *9. Otherwise, the statute's immediate reinstatement provision in preliminary orders would be effectively eliminated. *Id*. at *10. This would be contrary to Congress' intent to protect whistleblowers and avoid any chilling effect. *Id*. at *10-11. It also found that due process requirements were met in this case because Defendants had "prior notice of specific facts and an opportunity to present evidence and argument before issuance of a preliminary order." *Id*. at *13.

Contrary to the decision in *Solis* and the dissent in *Bechtel,* however, another district court found that it lacked jurisdiction to enforce an interim order of reinstatement. *Welch v. Cardinal Bankshare Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006), *vacated, appeal dismissed*, No. 06-2295, 2008 U.S. App. LEXIS 28045 (4th Cir. Feb. 20, 2008), involved another SOX complaint. Here, OSHA first denied the employee's complaint. The employee requested a hearing before an ALJ, who found in favor of the employee and ordered reinstatement. The employer appealed the ALJ decision to the ARB and refused to reinstate the employee pending a final order by the ARB. The employee brought an action in district court to enforce the ALJ's reinstatement order, and the employer moved to dismiss based on lack of jurisdiction.

Analyzing the plain language of the statute, § 42121(b)(5)-(6), the court found that the text "clearly fail[s] to grant jurisdiction to this court over preliminary orders of the ALJ." *Welch*, 454 F. Supp. 2d at 556. The court declined to give any effect to agency regulations, allowing for jurisdiction over preliminary orders, because it found them to conflict with the language of the statute. *Id*. at 557. It further reasoned that its decision is supported by the general principle that federal courts have jurisdiction only over *final* decisions of administrative agencies, the outcome is more judicially efficient, and the statute provides for quick relief by imposing time limits on the Secretary. *Id*. at 557-59. The employee appealed the district court's decision, but after an apparent settlement, the appeal was dismissed and the district court decision was vacated.

Thus, it is unsettled whether OSHA or an employee may use federal courts to enforce a preliminary order of reinstatement issued under the AIR 21 procedures. Employers should think carefully about whether or not to refuse reinstatement. If the employee ultimately prevails, the employer will have additional back pay liability. Refusing to comply with a preliminary order of reinstatement may be taken into account by OSHA in future cases that come before it involving the same employer and may color OSHA's actions in those cases. Also, if the employer chooses not to reinstate the employee, and the employee proceeds to federal court to enforce the preliminary reinstatement order and prevails on enforcement of the order, the employer may also be liable for the employee's attorneys fees in that court action, even if the employee does not prevail in the underlying whistleblower complaint. On the other hand, the employer is placed in a difficult situation if it complies with the preliminary order of reinstatement. Notwithstanding the statutory time limits in AIR 21 for issuance of the Secretary's final order, in reality, it can take months, and often years, for an ALJ or ARB decision. If the employer prevails at those levels, the employer will not likely be able to recover any of the monies paid to the employee in the meantime.

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