Case Nos. 11–16538, 11–16626

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHAWN VAN ASDALE AND LEANA VAN ASDALE,

Plaintiffs–Appellants,

v.

INTERNATIONAL GAME TECHNOLOGY,

Defendant–Appellee.

On Appeal from the United States District Court for the
District of Nevada

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

EIRIK CHEVERUD
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave. NW
Rm. N-2700
Washington, DC 20010
312.886.6954
312.353-5698 (Fax)
cheverud.eirik.j@dol.gov

Attorneys for the Secretary of Labor

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I. THE SECRETARY OF LABOR'S INTEREST IN THIS CASE

After this Court affirmed the district court's judgment in favor of plaintiffs Shawn and Lena Van Asdale on their Sarbanes-Oxley Act ("SOX") whistleblower claims, plaintiffs moved for postjudgment interest under Federal Rule of Appellate Procedure 37(a). Once the parties had fully briefed the issue, this Court invited the Secretary of Labor ("Secretary") to express his views as to three questions:

> (1) Is postjudgment interest in a Sarbanes-Oxley whistleblower case governed by 28 U.S.C. § 1961, the rate that applies to all civil cases in

federal district courts, or 29 C.F.R. 20.58(a), the interest rate for underemployment of federal taxes?

(2) What is the applicable prejudgment interest rate in a Sarbanes-Oxley whistleblower case that was litigated in federal district court rather than the Department of Labor?

(3) Must the applicable prejudgment interest rate be the same as the postjudgment interest rate?

Because the Secretary enforces 18 U.S.C. § 1514A, which is the SOX whistleblower protection provision, he has a substantial interest in ensuring that the remedies afforded to SOX whistleblower complainants are applied correctly, in accordance with the Department of Labor's regulations and federal law. The Secretary therefore responds to the Court's invitation by filing this *amicus curiae* brief.

II. SUMMARY OF THE ARGUMENT

The Secretary answers this Court's questions as follows:

(1) postjudgment interest in a SOX whistleblower case is governed by 28 U.S.C. § 1961 when tried in federal district court under 18 U.S.C. § 1514A(b)(1)(B);

(2) defendant waived its right to challenge the district court's prejudgment interest calculation by not challenging it below, and in any event the district court did not abuse its discretion by calculating prejudgment interest under 26 U.S.C.

§ 6621 in this case; and (3) prejudgment and postjudgment interest rates do not need to be the same.

III. ARGUMENT

a. The Competing Statutes at Issue

This case involves two competing statutes used to calculate interest: 28 U.S.C. § 1961 and 26 U.S.C. § 6621. Section 1961 states that courts shall calculate postjudgment interest on "money judgment[s] in a civil case recovered in a district court . . . . at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding." 28 U.S.C. § 1961(a). The section also applies to final judgments against the United States in the U.S. Circuit Court for the Federal Circuit and judgments of the U.S. Court of Federal Claims, but does not apply to internal revenue tax cases, and "shall not be construed to affect the interest on any judgment of any court not specified in this section." 28 U.S.C. § 1961(c).

By contrast, section 6621—which establishes the underpayment rate of interest for Internal Revenue Service ("IRS") purposes—instructs the IRS to apply an interest rate equal to the federal short-term rate plus three percentage points; in cases of a large corporate underpayment, i.e., an underpayment of tax exceeding $100,000, the rate equals the federal short-term rate plus five percentage points.

26 U.S.C. § 6621. Section 6621 provides a higher rate of interest than section 1961. *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 834 (9th Cir. 2012) ("The § 6621 rate is always higher than the § 1961 rate.").

b. Section 1961 Governs Postjudgment Interest Calculations in Cases Involving District Court Judgments and Appeals from Them

Section 1961 applies to postjudgment interest awarded "on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). In this case, the district court did not address postjudgment interest, and the Van Asdales moved for such relief in the Court of Appeals. Federal Rule of Appellate Procedure 37(a) provides that when "a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered." The Ninth Circuit has held that section 1961 provides circuit courts with the authority to order postjudgment interest under Rule 37. *See Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 754 (9th Cir. 1983), *abrogated on other grounds by Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990). Similarly, courts have held that section 1961 applies in instances when the district court did not address postjudgment interest. *See Travelers Prop. Cas. Ins. Co. of Am. v. Nat'l Union Ins. Co. of Pittsburg, Pa.*, 735 F.3d 993, 1007–08 (8th Cir. 2013); *Dunn v. HOVIC*, 13 F.3d 58, 62 (3d Cir.) (holding that "postjudgment interest is awarded by statute as a matter of law so it is automatically added, whether or not the district court orders it"), *cert. denied*, 510 U.S. 1031 (1993).

Section 1961 applies to postjudgment interest on the judgment in this case because it is "interest" on a "money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a); *see Exxon Valdez v. Exxon Mobil*, 568 F.3d 1077, 1079 (9th Cir. 2009) (§ 1961 applies to postjudgment interest in civil cases). Accordingly, section 1961, and not section 6621, governs the calculation of the Van Asdales' postjudgment interest award in this case, which was tried in district court.[1]

c. Defendant Waived Its Right to Challenge the District Court's Prejudgment Interest Calculation, and the District Court Did Not Abuse Its Discretion by Awarding Prejudgment Interest under Section 6621.

To pursue a retaliation claim under section 1514A in district court, as the Van Asdales did, a claimant must first file a complaint with the Secretary. "[I]f the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant," however, the complainant may bring "an action at law or equity for de

[1]By its terms, section 1961 does not apply to review of administrative agency determinations by a court of appeals. *See* 28 U.S.C. § 1961(a), (c) (§ 1961 applies to district-court judgments, judgments against the United States in the U.S. Court of Appeals for the Federal Circuit, and judgments of the U.S. Court of Federal Claims); *see also, e.g., Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588, 609–10 (3d Cir. 1977). When reviewing an award of postjudgment interest award in a SOX whistleblower case, the court of appeals reverses the Secretary's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Coppinger-Martin v. Solis*, 627 F.3d 745,748 (9th Cir. 2010).

novo review in the appropriate district court of the United States." [2] 18 U.S.C. § 1514A(b)(1)(B). "The purpose of the 'kick-out' provision is to aid the complainant in receiving a prompt decision." Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, Interim Final Rule, 76 Fed. Reg. 68084, 68091 (Nov. 3, 2011).

In the Ninth Circuit, section 1961 is used for prejudgment as well as postjudgment interest "unless the equities of a particular case demand a different rate." *In re Nucorp Energy, Inc.*, 902 F.2d 729, 734 (9th Cir. 1990); *In re Bloom*, 875 F.2d 224, 228 (9th Cir. 1989) (quoting *Columbia Brick Works, Inc. v. Royal Ins. Co.*, 768 F.2d 1066, 1071 (9th Cir. 1985)). Ultimately, district courts have broad discretion to set the appropriate rate for prejudgment interest. *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 555 (9th Cir. 1996); *see also Brotherhood of Locomotive Eng'rs & Trainmen v. Long Island R.R. Co.*, 371 F. App'x 198, 198–99 (2d Cir. 2010) (listing discretionary factors). This includes the discretion to calculate prejudgment interest using the rate of interest in section 6621. *See, e.g.*, *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1099 (9th Cir. 2010) (no abuse of discretion when district court calculated prejudgment interest under

[2]In the alternative, once OSHA issues a reasonable-cause determination, complainant may request an administrative law judge hearing; after that, she may appeal to the Administrative Review Board (which issues the Secretary's final decision), and then appeal to the appropriate U.S. Court of Appeals. 29 C.F.R. §§ 1980.103, .105–.110.

§ 6621); *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547, 1566 (3d Cir. 1996) (same).

In this case, the defendant has waived its right to challenge the district court's prejudgment interest award by not challenging it below. *See Van Asdale v. Int'l Game Tech.*, Nos. 11-16538, 11-16626, 2013 WL 5405712, at *1 (9th Cir. Sept. 10, 2013); *see also George v. Morris*, 736 F.3d 829, 837 (9th Cir. 2013) (issue is generally deemed waived if not raised below).

Even if not waived, the district court did not abuse its discretion by using section 6621's interest rate to calculate prejudgment interest. Remedies in SOX whistleblower cases, whether they are heard by the Department of Labor ("Department" or "DOL") or a district court, are governed by 18 U.S.C. § 1514A(c), which provides that the prevailing employee is entitled to "all relief necessary to make the employee whole," including "back pay, with interest." In the context of section 1514A, the Department has made a judgment that section 6621 provides the appropriate rate of interest to ensure that victims of unlawful retaliation are made whole. That judgment is embodied in a regulation that directs Department attorneys in court proceedings and administrative proceedings to seek interest on backpay awards using the rate specified in section 6621. *See* 29 C.F.R. § 20.58 (1985). The agency's judgment also is reflected in regulations specifying that section 6621 should be used to calculate interest on awards in SOX cases

adjudicated by the Department. *See* 29 C.F.R. §§ 1980.105, 108.–.110. The Secretary has long used section 6621 to calculate both prejudgment and postjudgment interest in whistleblower cases. *Doyle v. Hydro Nuclear Servs.*, Nos. 99-041, 99-042, 00-012, 2000 WL 694384, at *14–15, 17 (Admin. Rev. Bd. May 17, 2000); *see also Cefalu v. Roadway Express, Inc.*, ARB Case No. 09-070, 2011 WL 1247212, at *2 (Admin. Rev. Bd. Mar. 17, 2011); *Pollock v. Cont'l Express*, ARB Case Nos. 07-073, 08-051, 2010 WL 1776974, at *8 (Admin. Rev. Bd. Apr. 10, 2010); *Murray v. Air Ride, Inc.*, ARB Case No. 00-045, slip op. at 9 (Admin. Rev. Bd. Dec. 29, 2000).

In the Department's judgment, section 6621 provides the appropriate measure of compensation under 18 U.S.C. § 1514A because it ensures the victim will be placed in the same position he or she would have been in if no unlawful retaliation occurred. *See Ass't Sec'y v. Double R. Trucking, Inc.*, ARB Case No. 99-061, slip op. at 5 (Admin. Rev. Bd. July 16, 1999) (interest awards pursuant to § 6621 are mandatory elements of complainant's make-whole remedy). The expert agency's judgment that section 6621 provides the appropriate interest rate to make victims of unlawful retaliation whole under 18 U.S.C. § 1514A provides sufficient reason, in the context of SOX whistleblower claims, for the district court to depart from the usual presumption that the section 1961 rate should apply in determining prejudgment interest. This Court need not address whether section 6621 would

provide an appropriate rate of interest in other contexts. Accordingly, the district court did not abuse its discretion by applying the same interest rate that the Secretary would have applied if this case remained pending before the Department.

d. Prejudgment and Postjudgment Interest Rates Need Not Be the Same

Because the rate of interest applied to prejudgment interest awards is within the district court's discretion, whereas the rate of postjudgment interest is set by statute for district-court judgments, examples of courts using different calculations for the two awards are plentiful. *See, e.g.*, *Taxman*, 91 F.3d at 1566 (noting that district court may use § 1961 to calculate prejudgment and postjudgment interest, but it is not compelled to do so, and may opt to use § 6621 to calculate prejudgment interest instead). Unlike postjudgment interest, which is collateral to the judgment, courts set prejudgment interest rates based on consideration of a variety of factors, including an evaluation of whether a higher interest rate is necessary to fully compensate the plaintiff. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175–76 (1989) (listing factors). There is no compelling need to ensure that prejudgment and postjudgment interest awards are always calculated in the same manner; to hold otherwise would hinder district courts' exercise of discretion when fashioning prejudgment interest awards. *See Jones v. UNUM Life Ins. Co. of Am.*, 223 F.3d 130, 139–40 (2d Cir. 2000) ("The suitability of [§ 1961] for an award of prejudgment interest will depend on the circumstances of the individual

case, and the court need not limit the award of prejudgment interest to the rate at which the injured party would have lent money to the government.").

IV. CONCLUSION

In conclusion, the Secretary believes that (1) postjudgment interest in a SOX whistleblower case is governed by section 1961 when tried in federal district court under 18 U.S.C. § 1514A(b)(1)(B); (2) defendant waived its right to challenge the district court's prejudgment interest calculation by not challenging it below, and in any event the district court did not abuse its discretion by calculating prejudgment interest under section 6621 in this case; and (3) prejudgment and postjudgment interest rates do not need to be the same.

Dated: May 9, 2014

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

s/ Eirik Cheverud
EIRIK CHEVERUD
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave. NW
Rm. N-2700
Washington, DC 20010
202.693.5516
cheverud.eirik.j@dol.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this motion is being filed electronically on May 9, 2014 and notice of such filing will be issued to all counsel of record through the Court's electronic filing system.

Deanne E. Maynard
Brian R. Matsui
Marc A. Hearron
Morrison & Foerster LLP
2000 Pennsylvania Ave., NW
Suite 6000
Washington, DC 20006
202.887.8740

Richard G. Campbell, Jr.
Daniel K. O'Toole
Armstrong Teasdale LLP
50 W. Liberty St. Suite 950
Reno, NV 89501
775.322.7400

Mark J. Lenz, Esq.
Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, Nevada 89509
Tel: (775) 329-0958
Fax: (775) 329-2666

Daniel P. Westman
Morrison & Foerster LLP
1650 Tysons Blvd. Suite 400
McLean, VA 22102
703.760.7795

Margo Piscevich, Esq.
Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, Nevada 89509
Tel: (775) 329-0958
Fax: (775) 329-2666

s/ Eirik Cheverud
EIRIK CHEVERUD
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave. NW
Rm. N-2700
Washington, DC 20010
312.886.6954
cheverud.eirik.j@dol.gov