ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, DC 20210

DERRICK JOHNSON, Complainant, v. U.S. BANCORP/U.S. BANK NATIONAL ASSOCIATION, Respondent.	ARB Case No. 13-014 ALJ Case No. 2010-SOX-037

RESPONSE FOR THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH IN OPPOSITION TO RESPONDENT'S MOTION TO STAY THE ORDER OF REINSTATEMENT

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MOTION TO STAY THE ORDER OF REINSTATEMENT

I. INTRODUCTION

Pursuant to 29 C.F.R. 18.6(b) and 1980.108(a), the Assistant Secretary of Labor for Occupational Safety and Health ("Assistant Secretary") files the instant opposition to Respondent's motion to stay the order of reinstatement in this matter arising under the whistleblower provisions of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), Section 806, 18 U.S.C. 1514A ("SOX" or the "Act"). On August 15, 2007, Respondent U.S. Bancorp and U.S. Bank National Association ("Respondent" or "U.S. Bank") terminated Complainant

Derrick Johnson ("Complainant" or "Johnson") from his position as a bank branch manager, following Johnson's reports to management regarding fraudulent activities by U.S. Bank's employees. *Johnson v. U.S. Bank*, ALJ Case No. 2010-SOX-037, Slip. Op. at 12 (ALJ Oct. 29, 2012) [hereinafter, "ALJ's Oct. 29 Dec."]. Johnson filed a complaint with the Occupational Safety and Health Administration ("OSHA") on November 13, 2007. On May 7, 2010, OSHA issued findings that U.S. Bank had violated Section 806 of SOX, and ordered reinstatement and back pay. *Id.* at 1. Subsequently, the Administrative Law Judge ("ALJ") denied Respondent's motion to stay the preliminary reinstatement order. On October 29, 2012, following a hearing, the ALJ found Respondent had retaliated against Johnson in violation of SOX, and ordered reinstatement, back pay, compensatory damages, and attorney's fees. *Id.* at 21-22. On November 14, 2012, Respondent petitioned the ARB for review of the ALJ's decision and filed a Motion for Stay of Preliminary Order of Reinstatement Pending Appeal, to which the Board invited the Assistant Secretary to respond.

II. FACTUAL BACKGROUND

In early 2007, Johnson reported to several U.S. Bank management employees that bank employees at the Renton, Washington branch he managed had opened credit card and Demand Deposit Accounts ("DDAs," most commonly checking and savings

accounts) for customers who did not request them, a practice termed "account slamming." ALJ's Oct 29 Dec. at 4-6. In particular, Johnson reported to managers Kimberley Thompson, Helen Eaton, Cindy Jurado, and Pete Selenke incidents of account slamming by branch banker Tim Adams, and raised concerns about such activities being condoned or encouraged by regional manager Chris Heman. *Id.* at 4-5; CX-3, 4, 5, 11, 15, 19.[1] Johnson indicated to several U.S. Bank managers, including Ross Carey, that he believed bank employees carried out these improper sales to inflate product sales numbers and fraudulently gain additional income from the bank's employee bonus system. ALJ's Oct. 29 Dec. at 5; CX-16. Johnson also reported that he found consumer loans, particularly secondary mortgages, that bankers issued with improper loan to value ratios, meaning the loan amount was greater than the value of the property. ALJ's Oct. 29 Dec. at 5; CX-16. After Tim Adams was terminated for account slamming in March 2007, Johnson continued to report concerns about illegal conduct in his district and specific complaints he received from customers. ALJ's Oct. 29 Dec. at 6.

On April 13, 2007, Complainant sent a message to the CEO of U.S. Bank describing his concerns about patterns of unethical banking and improper loans in his region, his contact with the

[1] The Complainant's Trial Exhibits are referred to throughout as CX-#.

Federal Deposit Insurance Corporation, and his plans to seek legal advice. *Id.* at 6. In response, the vice president of U.S. Bank, Richard Hartnack, placed Complainant on immediate indefinite administrative leave while the bank conducted an internal investigation, directed by attorney Michael Droke of the firm Dorsey & Whitney and Kevin Kreb of PwC, LLC. *Id.* at 6-7. After a nearly four-month investigation, U.S. Bank told Johnson that it could not confirm any of his allegations of fraud, although records of the investigation revealed that at least some of his allegations were likely true regarding account slamming by U.S. Bank employees. *Id* at 11-12.

On August 15, 2007, U.S. Bank officials terminated Johnson, alleging that Droke's investigation concluded that Johnson himself had violated bank policy by improperly opening accounts in the names of four of his children to cheat the bonus system, and by failing to properly manage his branch employees, particularly Tim Adams. *Id.* at 12. However, testimony showed that Johnson opened the accounts in January 2007 to teach his youngest children about banking, and account records showed withdrawals and deposits correlating to birthdays and holidays. *Id.* at 13. In addition, U.S. Bank granted an "amnesty" to other employees who had opened similarly "suspect" accounts. *Id.* at 12. Only one other supervisor, William Yu, was terminated allegedly for engaging in similar activities. *Id.* at 13, 15.

Yu had also complained of discrimination in U.S. Bank's promotion practices. *Id.* at 19. As for Johnson's management of Adams, Johnson repeatedly filed complaints and requested assistance regarding Adams' actions, and some of the conduct that precipitated Adams' termination took place while Johnson was away at a U.S. Bank Pinnacle award conference. *Id.* at 12.

II. SUMMARY OF THE ARGUMENT

Respondent's motion should be denied because Respondent fails to meet its burden of showing entitlement to the "exceptional" relief of a stay of the reinstatement order pending appeal. *See* 29 C.F.R. 1980.110(b). Reinstatement is the default remedy under SOX, and Complainant has not waived the remedy because Respondent has failed to make an offer of reinstatement. Furthermore, a stay is not warranted because Respondent has not established the elements of a preliminary injunction. First, Respondent has not shown that it is likely to succeed on the merits of its appeal because the ALJ's factual findings are supported by substantial evidence, the ALJ applied the correct standard to find protected activity under SOX, and the ALJ's decision that Respondent waived attorney-client and work product privileges in connection with Droke's investigation is unlikely to be overturned. Second, Respondent has not shown that it will suffer irreparable harm absent a stay because the conflict between the parties is not substantially greater than

that typically found in whistleblower litigation. Finally, the balance of hardships and the public interest strongly favor upholding Congress's intent to provide the presumptive remedy of immediate reinstatement during this appeal.

III. ARGUMENT

A. Reinstatement is the Presumptive Remedy in SOX Whistleblower Cases and Complainant Cannot Waive Reinstatement Absent a Bona Fide Offer from Respondent.

Sarbanes-Oxley indicates that reinstatement is the intended presumptive remedy for retaliation and is essential to the enforcement of the SOX whistleblower protections. Congress enacted the whistleblower provisions of the Sarbanes-Oxley Act to shield investors and the financial markets from corporate fraud by protecting employees who report fraudulent activity that can mislead innocent investors in publicly traded companies. *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. 52104, 52104 (Aug. 24, 2004); 18 U.S.C. 1514A(a). In accordance with Congress's aim of providing a robust remedy for whistleblowers, SOX provides that relief ordered by OSHA and the ALJ "*shall* include – (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination . . . ." 18 U.S.C. 1514A(c)(2)(A)

(emphasis added); 29 C.F.R. 1980.105(a)(1) and 1980.109(d)(1).[2]

Consistent with this statutory mandate, the regulations provide that an ALJ's reinstatement order, which follows a hearing on the record, will be effective while review is conducted by the ARB. 29 C.F.R. 1980.110(b). The respondent may file a motion to stay the reinstatement order, which shall be granted only based on "exceptional circumstances." *Id*.

Reinstatement is the presumptive remedy for wrongful termination "not only because it vindicates the rights of the complainant who engaged in protected activity, but also because the return of a discharged employee to the jobsite provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective." *Hobby v. Georgia Power Co.,* ARB Nos. 98-166, 98-169, 2001 WL 168898, at *4-*5 (ARB Feb. 9, 2001) (applying Title VII case law to the Energy Reorganization Act), *aff'd sub nom. Georgia Power Co. v. United States Dep't of Labor*, 52 Fed. Appx. 490, 2002 WL 31556530 (table) (11th Cir. Sept. 30, 2002); *see also Kalkunte v. DVI Financial Svcs, Inc.*, 2004-SOX-00056, 2005 WL 4889006, at *52 (ALJ July 18, 2005) (SOX); *Dale v. Step 1 Stairworks, Inc.*, ALJ Case No. 02-STA-30, 2005 WL 767133, at *2-*3 (ALJ Mar. 31,

[2] Sarbanes-Oxley incorporates by reference the procedures and burdens under the aviation safety whistleblower provisions in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21") at 49 U.S.C. 42121(b).

2005) (labeling reinstatement as an “automatic remedy” under the Surface Transportation Assistance Act (“STAA”)).

Because reinstatement is the presumptive remedy for wrongful termination, a complainant employee is not in a position to waive reinstatement until the respondent employer has made a bona fide offer to reinstate. *See Dutile v. Tighe Trucking, Inc.*, Case No. 1993-STA-31 (OAA Oct. 31, 1994); *Chapman v. T.O. Haas Tire Co.*, 1994 STA-2 (OAA Aug. 3, 1994); *Asst. Sec’y & Burke v. C.A. Express, Inc.*, ARB Case No. 97-103, 1996-STA-5, 1997 WL 578328 (ARB Sept 17, 1997); *see also Platone v. Atlantic Coast Airlines Holdings, Inc*., ALJ No. 2003-SOX-027, 2004 WL 5030306, at *7 (ALJ July 13, 2004) (citing ARB decisions under STAA finding back pay awards continue to accrue until the employer has made an unconditional offer to reinstate, even if the employee has stated she does not wish to be reinstated). Thus, an employee’s statement to the ALJ that she does not intend to seek reinstatement does not constitute a waiver of the presumptive remedy because: (1) the Board does not want to allow an employee to seek a possible back pay windfall by rejecting reinstatement, and (2) a complainant employee’s statement cannot relieve an employer of its obligation to comply with the order by offering to reinstate. *See Dickey v. West Side Transp.*, ARB Case Nos. 06-151, 06-150, 2008 WL 2265211, at *5 (ARB May 29, 2008); *Dutile*, 1993-STA-31, at *2.

In this case, Respondent claims that its due process rights were violated because the ALJ ordered reinstatement even though Complainant did not explicitly state he was seeking reinstatement until his post-hearing statement, and Respondent presented no evidence against reinstatement in reliance on Complainant's representations that he did not seek reinstatement. Resp's Nov. 14, 2012 Mot. at 7, 9. Respondent's assertion is faulty for several reasons.

First, reinstatement is the presumptive remedy under SOX. The Secretary "shall" order reinstatement if she finds that retaliation in violation of SOX occurred. Neither an employer nor an employee has the right to an alternative remedy. *See 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, 68088-89 (Nov. 3, 2011)(outlining where front pay in lieu of reinstatement would be appropriate in the analogous circumstance of OSHA's preliminary order). However, an ALJ may order "economic reinstatement" or front pay where the parties demonstrate that reinstatement is inappropriate for some reason such as: (1) an employee's medical condition that is causally related to the retaliation, (2) manifest hostility between the parties that is greater than the hostility expected between parties involved in protracted litigation, (3) that the complainant's position no

longer exists, or (4) the fact that the employer is no longer in business. *See id.* (internal citations omitted). Thus, the ALJ may order reinstatement even if Complainant has not specifically requested it.

Second, the pre-hearing and hearing transcripts cited by Respondent indicate that the parties negotiated to limit the period of money damages at issue in this case based on the ALJ's request that those damages not overlap with Complainant's second OSHA complaint against U.S. Bank (currently pending in district court), regarding his allegations that U.S. Bank contributed to his leaving the employ of KeyBank in 2010. Resp's Nov. 14, 2012 Mot. at 4. However, the agreement to limit the backpay period in this case did not, and could not, relinquish Johnson's right to reinstatement. Even if Complainant implicitly or explicitly indicated he did not seek reinstatement, *Dutile* provides that Complainant could not waive reinstatement until Respondent had made a bona fide offer that Complainant could reject.

Finally, Respondent had notice that reinstatement was a remedy available to the ALJ because OSHA had issued the preliminary order of reinstatement, and it continued in effect during the ALJ proceedings because the ALJ denied Respondent's motion to stay that order. ALJ's July 8, 2010 Order. The regulations also provide notice by stating clearly that where the ALJ finds respondent has violated the law, "the order will

provide all relief necessary to make the employee whole, including reinstatement . . . .” 29 C.F.R. 1980.109(d).

B. Respondent Fails to Meet Its Burden of Showing Entitlement to the Exceptional Relief of a Stay.

An order of reinstatement is stayed pending appeal only if the ARB grants such a motion “based on exceptional circumstances.” 29 C.F.R. 1980.110(b). “[A] stay is only available in ‘exceptional circumstances’. . . where the respondent can establish the necessary criteria for equitable injunctive relief.” 76 Fed. Reg. at 68090 (preamble to 29 C.F.R. 1980.110(b)) (emphasis added); *Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, 2006 WL 3246906, at *2 (ARB June 9, 2006). To obtain a stay, a respondent employer must show: (1) a likelihood it will prevail on the merits on appeal; (2) a likelihood it will be irreparably harmed absent a stay; (3) the balance of hardships tips in favor of a stay; and (4) the public interest favors granting a stay. *Welch*, 2006 WL 3246906 at *2 (citing *Ohio ex rel. Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1987)); 69 Fed. Reg. at 52111.

The Supreme Court has held that a stay pending appeal is a question of judicial discretion, and “is not a matter of right, even if irreparable injury might otherwise result.” *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (citing *Virginian R. Co. v. United States*, 272 U.S. 658, 672-73 (1926)). The moving party

must “demonstrate that irreparable injury is *likely* in the absence of an injunction,” not merely possible. *Winter v. N.R.D.C.*, 555 U.S. 7, 22 (2008); *see Nken*, 556 U.S. at 435. Furthermore, the movant is required to show “more than a mere possibility of relief” on the merits. 556 U.S. at 434 (internal quotations removed). Under this standard, reinstatement of an aggrieved employee pending appeal is the presumptive remedy, and an employer seeking to stay reinstatement must meet an extremely high burden to overcome the presumption. *See* 18 U.S.C. 1514A(c)(2); 69 Fed. Reg. at 52111. Respondent fails to show a stay of reinstatement is warranted.

1. Respondent Has Not Shown a Likelihood of Success on the Merits.

The ALJ found that (1) Johnson engaged in activity protected by SOX when he raised specific concerns to his managers regarding conduct he reasonably believed constituted fraud, including bank and shareholder fraud; (2) U.S. Bank placed Johnson on administrative leave and later terminated him; and (3) Johnson’s SOX-protected complaints were a contributing factor in his termination. 49 U.S.C. 42121; 18 U.S.C. 1514A(b)(2)(C); 29 C.F.R. 1980.104(e). The ALJ further found that U.S. Bank failed to show by clear and convincing evidence that it would have terminated Johnson in the absence of his protected complaints. *See* 49 U.S.C. 42121(b)(2)(B); 18 U.S.C.

1514A(b)(2)(C); 29 C.F.R. 1980.104(e).

As outlined below, the ALJ found that Johnson made numerous communications to his U.S. Bank managers regarding conduct that he reasonably believed constituted fraud, including fraud against shareholders. *See infra*. at 17-19. The evidence further showed that U.S. Bank singled out Johnson in its investigation by granting amnesty to other managers whose personal accounts were identified as potentially suspect, without further inquiry, while using Johnson's accounts as a basis to terminate him, ALJ's Oct. 29 Dec. at 14, and by obtaining information about Johnson's private life and finances, *id.* at 10. Additionally, the ALJ noted that only one other employee was disciplined for opening family accounts to meet sales quotas and that employee, like Johnson, had engaged in activity protected by federal law. *Id.* at 19. While Johnson had raised various concerns regarding illegal conduct during his three-year tenure with U.S. Bank, *id.* at 3-4, the frequency and urgency of his reports increased in the two months prior to his suspension in April 2007, *id.* at 4-6. The ALJ also noted that Johnson had never been disciplined and the fact that he was sent to the Pinnacle conference indicated he was a valued manager prior to lodging his concerns. *Id.* at 12-13. These combined facts provide substantial evidence supporting the ALJ's finding that U.S. Bank terminated Johnson as a result of his reports of

fraud. *Id.* at 14, 19.

In addition, the ALJ readily rejected U.S. Bank's two proffered reasons for terminating Johnson—that he opened a suspicious number of checking accounts in his young children's names just prior to the sales deadline for the bank's bonus incentive system, and that he failed to better manage branch banker Adams and prevent him from pressuring tellers to open accounts that customers did not need. *Id.* at 12. The ALJ credited Johnson's explanation that he opened the accounts for his children to teach them about banking, based on testimony that Johnson had done the same with his older children and records showing withdrawals from the accounts on holidays for gift purchases. *Id*. at 13. And furthermore, the ALJ found Johnson gained little advantage by opening personal accounts rather than business accounts which would have earned him more points toward a bonus. *Id.* at 13–14. Regarding the management of Adams, the ALJ credited the testimony of U.S. Bank employees showing that much of Adams' misconduct occurred while Johnson was away being awarded by the bank for his performance, that Johnson disapproved of Adams' behavior, and that Johnson promptly reported the customer complaints he received about Adams. *Id.* at 12. Based upon a review of all the evidence, the ALJ determined that Respondent did not have a legitimate nondiscriminatory reason to terminate Complainant.

These findings are reviewable for substantial evidence both before the Board and before a Court of Appeals. *See* 18 U.S.C. 1514A(b)(2)(A) incorporating 49 U.S.C. 42121(b)(4), 29 C.F.R. 1980.110(b). Substantial evidence is “more than a mere scintilla,” meaning “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Robinson v. Morgan Stanley*, ARB Case No. 07-070, 2010 WL 2148577, at *6 (ARB Jan. 10, 2010) (internal quotations omitted); *see Richardson v. Perales*, 402 U.S. 389, 401 (1971) (considering substantial evidence under the NLRA). The Board “must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we ‘would justifiably have made a different choice had the matter been before us de novo.’” *Robinson*, 2010 WL 2148577, at *6 (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951)). The ALJ’s specific factual findings are based on ample evidence in the record as a whole, including the ALJ’s consideration of both the documentary evidence and credible testimony of Johnson and others. For this reason alone, Respondent fails to demonstrate a likelihood of success on the merits of its appeal to the Board.

Nonetheless, Respondent argues that it is likely to succeed on the merits for two additional reasons. First, Respondent argues that the ALJ erred by applying the standard for protected

activity under SOX set forth in *Sylvester v. Parexel Int'l, LLC*, ARB 07-123 (May 25, 2011), rather than the more stringent standard for protected activity enunciated in *Platone v. FLYi, Inc.*, ARB No. 04-154, 2006 WL 3246910 (ARB Sept. 29, 2006), and adopted by the Ninth Circuit in *Van Asdale v. Int'l Game Tech.,* 577 F.3d 989, 996-97 (9th Cir. 2009). Second, Respondent argues that many of the ALJ's factual findings are based on evidence that should have been excluded as covered by attorney-client and work product privileges. Respondent fails to show a likelihood of success on the merits of either argument.

a. The ALJ properly found that Johnson engaged in protected activity both under *Sylvester* and under Ninth Circuit Case Law.

The ALJ correctly followed the standard for protected activity under SOX enunciated in this Board's *Sylvester* decision. The ARB is delegated the authority of the Secretary of Labor to issue final agency decisions under SOX. Secretary's Order 2-2012, 77 Fed. Reg. 69378, 69378-79 (Nov. 16, 2012); 29 C.F.R. 1980.110. Thus, this Board has the authority, through its adjudications of SOX complaints, to issue interpretations of the SOX whistleblower provision that carry the force of law. ALJ's Oct. 29 Dec. at 17-18 (explaining basis for deference to ARB's interpretation of SOX in *Sylvester*); *Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008) (explaining ARB's authority to speak with the force of law). As a result, to find Johnson

engaged in protected activity, the ALJ was required to find that Johnson reported conduct to U.S. Bank that Johnson reasonably believed violated any of the categories of law enumerated in SOX. *See* ALJ's Oct. 29 Dec. at 18 (summarizing the *Sylvester* decision). Alternatively, the ALJ noted that Johnson's communications fulfilled the more stringent standards of *Platone* and *Van Asdale*, which required that "to constitute protected activity under Sarbanes-Oxley, an employee's communications must 'definitively and specifically' relate to [one] of the listed categories of fraud or securities violations under 18 U.S.C. 1514A(a)(1)." *Id*. at 17 (quoting *Van Asdale*, 577 F.3d at 996-97 (internal quotations omitted)).

The ALJ found specific facts demonstrating that Johnson's communications to his employer more than met the standards for protected activity under either *Sylvester* or *Platone* and *Van Asdale*. Substantial evidence supports the ALJ's finding that Complainant subjectively believed that bank employees defrauded U.S. Bank and in turn the bank defrauded its shareholders by engaging in credit card and DDA account slamming while using the mail and wire services, and by issuing loans with improper loan value ratios. *Id.* at 19. The evidence also supports the ALJ's finding that Complainant's belief was objectively reasonable. *Id.* In particular, the ALJ pointed to no fewer than six individual communications to management that the ALJ found

"specifically relate[] to instances of potential fraud." ALJ's Oct. 29 Dec. at 20. Johnson made specific reports to U.S. Bank management including Helen Eaton, Kimberley Thompson, Ross Carey, and Pete Selenke, as well as U.S. Bank's ethics phone line, naming particular bankers and customers who complained of having credit cards and accounts opened without requesting them, indicating what Complainant believed to be a regional pattern of "fraud" and employees "stealing from U.S. Bank." CX-16; *see* CX-3, 5, 8, 10, 19. The ALJ's finding of Johnson's subjective belief is also supported by testimony from U.S. Bank's investigator Kevin Kreb that Complainant was cooperative with the investigation, *id.* at 7; CX-34, and Complainant's testimony that he believed he was helping to protect shareholders by assisting the investigators, because fraud was committed against shareholders if the bank reported inflated sales figures based on unethical practices, ALJ's Oct. 29 Dec. at 9.

The evidence cited by the ALJ also shows that Johnson's complaints were definite and specific. *Id.* at 20. The court in *Van Asdale* emphasized that the complaining employee does not need to know or communicate what specific section of the law he believes was violated, rather his complaints must be specific as to the conduct that he believes may violate the law. *See* 577 F.3d at 997. Johnson's complaints did identify the specific conduct that he believed was illegal. Furthermore, unlike the

employee in *Platone*, whose communications were limited to concerns about internal policies, 2006 WL 3246910, at *8-*12, Johnson's complaints regarded not only cheating of the bank's bonus system, but also related to what he believed to be fraud against shareholders through the bank's padding of sales numbers with accounts opened without customers' agreement and improperly approved loans, ALJ's Oct. 29 Dec. at 4-6. Accordingly, the ALJ properly found that Johnson's communications to U.S. Bank constituted protected activity under SOX applying either the *Sylvester* or the *Platone* and *Van Asdale* standards.

b. Respondent Is Unlikely to Prevail in the Appeal of the ALJ's Discovery Order Finding Waiver of Privilege.

Respondent fails to demonstrate that it is likely to prevail in its arguments that the ALJ violated its due process rights by finding that U.S. Bank waived the attorney-client and attorney work product privileges in connection with Droke's investigation. Resp's Mot. at 8; *Johnson v. U.S. Bank*, ALJ Case No. 2010-SOX-037 (ALJ Oct. 20, 2010) [hereinafter, "ALJ's Oct. 20, 2010 Order"]. The ALJ's order granting complainant discovery related to Droke's investigation correctly recognized that both the attorney-client and attorney work product privileges could be impliedly waived where a party puts information at issue that is vital to the opposing party's case.

U.S. Bank did just that by relying on Droke's investigation as the basis for its decision to terminate Johnson.

In the Ninth Circuit, the attorney-client privilege can be impliedly waived "where a party raises a claim which in fairness requires disclosure of the protected communication." *Chevron Corp. v. Penzoil Co*., 974 F.2d 1156, 1162 (9th Cir. 1992); *see also Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995) (citing *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (stating the test for implied waiver where a party affirmatively puts privileged information at issue that is vital to the opposing party's defense)). An implied waiver should protect a party against whom a claim or defense has been made from the "manifestly unfair" restriction of the key information under the privilege. *See Hearn*, 68 F.R.D. at 581; see also *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989)). Similarly, to overcome the attorney work product privilege covering documents or tangible items, the party seeking the material must show substantial need and undue hardship or that the mental impressions of the attorney are at issue and the need for the information is compelling. *See* Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947); *Holmgren v. State Farm Mut. Auto Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (citing *Upjohn v. United States*, 449 U.S. 383 (1981)).

U.S. Bank based its affirmative defense—that it identified a legitimate non-discriminatory reason to terminate Johnson—upon information gained through Droke's investigation, and the advice received from the firm Dorsey & Whitney regarding Johnson's termination. ALJ's Oct. 29 Dec. at 12. Respondent also asserted that its investigation found Johnson's reports of fraud were unsubstantiated. By making the contents and conduct of the investigation material issues, Respondent placed Complainant in the position of needing that information to avoid a "manifestly unfair" inability to respond to the Respondent's allegations that he improperly opened checking accounts in his children's names, and that the investigation did not corroborate his reports. *Id.* at 14. Thus, the ALJ properly found that Complainant had a substantial need for the information relating to U.S. Bank's internal investigation, and it would be an undue hardship to make his case without it because denying the information would be "tantamount to requiring Complainant to meet an essential element of his case without sufficient information regarding the factual substance of that element." ALJ's Oct. 20, 2010 Order at 6.[3]

[3] Respondent likewise has not shown any due process violation based on the Board's denial of interlocutory appeal of the Oct. 20, 2010 discovery order. As the Board previously recognized, the ALJ acted well within his discretion in finding that interlocutory appeal was not warranted. ARB Case No. 11-018, at 3-4 (ARB Mar. 14, 2011).

2. Respondent Has Not Shown Irreparable Harm, That the Balance of Hardships Tips in Its Favor, or That the Public Interest Favors a Stay.

Respondent claims that it would suffer irreparable harm by reinstating Johnson because of the "extreme hostility between Johnson and U.S. Bank" and the ongoing litigation as a result of Johnson's whistleblowing and subsequent termination. Resp's Mot. at 9-10. However, "[a]ntagonism between parties occurs as the natural bi-product of any litigation. Thus, a court might deny reinstatement in virtually every case if it considered the hostility engendered from litigation as a bar to relief." *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1139 (8th Cir. 1981). As a result, the Board has consistently held that reinstatement is the appropriate remedy unless there is evidence of manifest hostility or animosity at the workplace, rising well above "friction" or "inconvenience," and that the irreparable harm is "actual and not theoretical." *See Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, 2006 WL 3246906, at *4 (ARB June 9, 2006)(quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)); *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 1993-ERA-24, 1996 WL 171403, at *7-*8 (AAB Feb. 14, 1996); *Dale v. Step 1 Stairworks, Inc.*, ALJ Case No. 02-STA-30, 2005 WL 767133, at *3 (ALJ Mar. 31, 2005).

Respondent cites the ALJ decision awarding front pay in

Hagman v. Washington Mut. Bank, Inc., 2005-SOX-00073, 2006 WL 6105301 (ALJ Dec. 19, 2006), for the proposition that an alternative remedy to reinstatement may be appropriate where "discord and antagonism" pervade the relationship, or "undue friction or controversy" is likely. Resp's Mot. at 7-8. However, in *Hagman*, the employer had already made a bona fide offer of reinstatement, and the ALJ found that the employee reasonably declined the offer because a functional working relationship was "impossible" due to previous physical threats and uniformly uncooperative management. 2005-SOX-00073, at *34-*37. Similarly, in *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967 (9th Cir. 2003), the court did not order reinstatement of a doctor because it was a discretionary un-named remedy under the state statute and rancor could directly impact the health of transplant patients. 350 F.3d at 977-78.

Respondent fails to demonstrate that reinstatement of Johnson is impossible, or that it would suffer irreparable harm. In contrast to the employer in *Hagman*, U.S. Bank has not made any offer to reinstate Johnson and the tensions here do not rise to anything close to the pervasive hostility or physical threats made against Hagman. Respondent fails to prove that the lengthy litigation and tension between the parties make an employment relationship "untenable," Resp's Mot. at 9-10, because whistleblower litigation is often lengthy. Unlike in *Rabkin*, a

normal period of re-establishing a working relationship between Johnson and his supervisors will not impact the health or safety of customers. Finally, unlike the state statute in *Rabkin*, SOX specifically lists reinstatement as the presumptive remedy.

The balance of hardships weighs in Complainant's favor, as does the public interest. Johnson suffered harm to his reputation, humiliation, distress, and anxiety as a result of Respondent's retaliation against him and its refusal to comply with the order of reinstatement. ALJ's Oct. 29 Dec. at 21. Analyzing the enforceability of a preliminary reinstatement order under the closely analogous reinstatement provision in the Surface Transportation Assistance Act ("STAA"), the Supreme Court noted:

> Congress . . . recognized that the employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review. 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.

Brock v. Roadway Express, Inc., 481 U.S. 252, 258-259 (1987); *see Martin v. Yellow Freight Sys., Inc.*, 793 F. Supp. 461, 469 (S.D.N.Y. 1992), *aff'd* 983 F.2d 1201 (2d Cir. 1993) (enforcing ALJ's reinstatement order under STAA); *but see Welch v. Cardinal Bankshares*, 454 F. Supp. 2d. 552 (E.D.N.Y. 2006)(refusing to

enforce the ALJ's order of reinstatement under SOX). The same concerns weigh in favor of immediate reinstatement of an employee following a finding of retaliation by an ALJ under SOX. As in STAA, Congress expressly provided in the SOX procedures that "[t]he 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). The statute reflects a clear Congressional determination that reinstatement pending review is necessary to encourage reports of violations of the law. *See Roadway Express, Inc.*, 481 U.S. at 258-59. Thus, Johnson's immediate reinstatement is necessary not only to protect Johnson from the devastating economic and professional consequences of a retaliatory termination, but also to protect the public interests underlying SOX: ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. *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").

CONCLUSION

The Assistant Secretary respectfully requests that the Board deny Respondent's motion to stay the order of preliminary reinstatement pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this Response for the Assistant Secretary of Labor for Occupational Safety and Health in Opposition to Respondent's Motion to Stay the Order of Reinstatement have been served via United Parcel Service (UPS) on the following individuals this 11th day of January, 2013:

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