In the Matter of:

JACK R. T. JORDAN, **ARB CASE NO. 06-105**

COMPLAINANT, **ALJ CASE NO. 2006-SOX-041**

v. **DATE: September 30, 2009**

SPRINT NEXTEL CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jack R. T. Jordan, Esq., *pro se*, Parkville, Missouri

For the Respondent:
Eugene Scalia, Esq., Joshua D. Hess, Esq., Jennifer J. Schulp, Esq., *Gibson, Dunn & Crutcher LLP*, Washington, District of Columbia

For the Acting Assistant Secretary of Labor for Occupational Safety and Health, as Amicus Curiae:
Carol A. De Deo, Esq., Steven J. Mandel, Esq., Ellen R. Edmond, Esq., *United States Department of Labor*, Washington, District of Columbia

For The United States Securities and Exchange Commission, as Amicus Curiae:
David M. Becker, Esq., Mark D. Cahn, Esq., Richard M. Humes, Esq., Thomas J. Karr, Esq., Woo S. Lee, Esq., *United States Securities and Exchange Commission*, Washington, District of Columbia

ORDER OF REMAND

Jack R. T. Jordan filed a complaint alleging that Sprint Nextel Corporation (Sprint) retaliated against him because he engaged in protected activity in violation of the whistleblower protection provisions at Section 806 of the Sarbanes-Oxley Act of 2002 (SOX).[1] A Department of Labor Administrative Law Judge (ALJ) denied Sprint's Motion to Dismiss or, Alternatively, for Summary Decision, but granted Sprint's motion to certify to the Administrative Review Board for interlocutory review the issue of whether Jordan may rely, in whole or in part, on information covered by the attorney-client privilege to prove his case. After granting Sprint's petition for interlocutory review, we hold that Jordan may rely on statements or documents covered by the attorney-client privilege, as an exception to the privilege, in support of his SOX Section 806 whistleblower complaint.

BACKGROUND

Sprint employed Jordan as an in-house attorney with its Corporate Secretary and Corporate Governance group in Kansas from January 2003 until April 2005.[2] Sprint is a company whose shares are publicly traded on the New York Stock Exchange.[3] Jordan's responsibilities included providing legal advice to ensure that Sprint's public and corporate filings complied with relevant securities laws and regulations, and Jordan also provided advice regarding the administration of Sprint's own ethics policies.[4]

In April 2005, Jordan filed a complaint with OSHA in which he alleged that Sprint retaliated against him in violation of the whistleblower protection provisions at SOX Section 806.[5] Specifically, Jordan alleges that he engaged in SOX-protected activity when he:

> opposed his supervisor's attempt to grant a waiver of Sprint's ethics policy for a senior officer, opposed the filing

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[1] 18 U.S.C.A. § 1514A (West Supp. 2008). Implementing regulations appear at 29 C.F.R. Part 1980 (2008).

[2] Jordan Brief Regarding the Attorney-Client Privilege, Exhibit J (Feb. 27, 2006).

[3] Jordan Mar. 26, 2006 Letter to the Occupational Safety and Health Administration (OSHA) at 2; OSHA's Dec. 21, 2005 Findings at 1. In August 2005, Sprint merged with Nextel Corporation to form Sprint Nextel. Jordan Mar. 26, 2006 Letter to the OSHA at 1.

[4] Jordan Brief Regarding the Attorney-Client Privilege, Exhibit J (Feb. 27, 2006).

[5] Jordan's Apr. 11, 2005 Complaint.

> of inaccurate information with the Securities and Exchange Commission (SEC), reported to his supervisor of Sprint's alleged disregard of SEC rules regarding the disclosure of executive compensation, opposed his supervisor's conduct in allegedly causing a senior executive to violate Sprint's Securities Law Compliance Policy, and reported his concerns to Sprint's General Counsel, Chief Executive Officer and Board of Directors pursuant to SOX Section 307.[6]

As a result of his alleged protected activities, Jordan contends that his supervisor threatened to terminate him and denied him a raise and promotion.[7] OSHA dismissed Jordan's complaint on December 21, 2005.[8] On December 28, 2005, Jordan filed a hearing request with the Department of Labor's Office of Administrative Law Judges.[9]

On February 10, 2006, Sprint filed a Motion to Dismiss or, Alternatively, for Summary Decision with the ALJ, arguing that Jordan's case should be dismissed because he cannot establish his claim of retaliation without relying on statements or documents covered by the attorney-client privilege.[10] On March 14, 2006, the ALJ denied Sprint's motion, finding that Jordan is not precluded from relying on information covered by the attorney-client privilege in pursuit of his SOX whistleblower complaint.[11] But the ALJ granted Sprint's motion to certify to the Administrative Review Board for interlocutory review the issue whether Jordan may rely, in whole or in part, on information covered by the attorney-client privilege to prove his case.[12] Sprint then petitioned the Board for interlocutory review of the ALJ's order denying summary decision.[13]

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6 Jordan's Apr. 11, 2005 Complaint at 2; *see also* 15 U.S.C.A. § 7245 (West Supp. 2008); 17 C.F.R. § 205.3(b)(1), (3)-(4) (2008).

7 Jordan's Apr. 11, 2005 Complaint at 2.

8 OSHA's Dec. 21, 2005 Findings at 2.

9 ALJ's Mar. 14, 2006 Order at 2-3.

10 Sprint's Feb. 10, 2006 Motion to Dismiss or, Alternatively, for Summary Decision.

11 ALJ's Mar. 14, 2006 Order at 14.

12 *Id*. at 17.

13 Respondent's Petition for Interlocutory Review of Order Denying Motion to Dismiss or, Alternatively, for Summary Decision (Mar. 28, 2006).

On June 19, 2008, we granted the petition for interlocutory review on the question whether Jordan may rely on statements or documents covered by the attorney-client privilege in support of his complaint.[14] In granting Sprint's petition for interlocutory review, we expressed no opinion on the merits of Jordan's case and noted that our ruling is limited to one element of his case, allowing him to use otherwise privileged material to show that he made protected complaints and Sprint unlawfully retaliated against him.[15] But the Board denied Sprint's motions to proceed anonymously and for a blanket protective order to seal the entire record of the proceedings before the Board at that time.[16]

Subsequently, instead of filing purely legal arguments in their briefs and pleadings regarding the legal issue before the Board on interlocutory review, the parties also included in their pleadings a variety of exhibits as attachments containing potentially privileged materials that were not germane to the disputed legal issue. In addition, the parties filed numerous motions dealing with specific discovery and waiver issues. Although the Board does not "routinely" seal the record in a whistleblower case, the parties' conduct and abuse of process in their briefs and pleadings was far from routine. Thus, on May 20, 2009, we issued an Order Granting Temporary Protective Order to Seal the Record and Establishing Briefing Schedule.[17] The Board's order sealed the record and pleadings filed before the Board on interlocutory review to preserve any potentially privileged materials or evidence.[18]

In addition, Jordan filed a Motion to Remand to ALJ for Reconsideration to determine the extent Sprint waived the attorney-client privilege through its disclosures to OSHA or the SEC during the proceedings of this case. We denied Jordan's motion without prejudice, as it relates to an evidentiary issue that the ALJ should ultimately decide on remand and is not relevant to the disputed legal issue before the Board on interlocutory review.[19]

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[14] *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041 (Order Granting Petition for Interlocutory Review, Establishing Briefing Schedule and Denying, in part, Motion to Proceed Under Seal and the Use of Pseudonyms, June 19, 2008).

[15] *Id.* at 5.

[16] *Id.* at 8-14.

[17] *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041 (Order Granting Temporary Protective Order to Seal the Record and Establishing Briefing, May 20, 2009).

[18] *Id.* at 6-7; *see* 29 C.F.R. § 18.46(a)(2009) (ALJ may issue protective or other orders consistent with objective of protecting privileged communications).

[19] Jordan, Order Granting Temporary Protective Order to Seal the Record and Establishing Briefing at 7.

In response to our briefing order, Sprint filed an opening brief and a reply brief; Jordan filed a response brief; and the Acting Assistant Secretary for OSHA and the SEC filed amicus briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under SOX to the Administrative Review Board.[20] The Secretary's delegated authority to the Board includes "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute."[21] Pursuant to the SOX and its implementing regulations, the Board reviews an ALJ's conclusions of law de novo.[22]

DISCUSSION

1. The Legal Standards

a. SOX Section 806 Whistleblower Provision

SOX Section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)" or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders.[23] Employees are also protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed relating to a violation of the aforesaid fraud statutes, SEC rules, or federal law.[24]

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[20] Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[21] *Id*. at 64,273.

[22] *Levi v Anheuser Busch Cos.,* ARB Nos. 06-102, 07-020, 08-006, ALJ Nos. 2006-SOX-037, -108, 2007-SOX-055, slip op. at 6 (ARB Apr. 30, 2008).

[23] 18 U.S.C.A. § 1514A(a).

[24] *Id*.

b. The Elements of and Procedures for Filing a SOX Complaint

To prevail on his SOX complaint, Jordan must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) Sprint knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[25] Sprint can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[26]

The employee must ordinarily complain about a material misstatement of fact or omission concerning a corporation's financial condition on which an investor would reasonably rely. The protected complaint must "definitively and specifically" relate to the SOX subject matter, be specific enough to permit compliance, and support a complainant's reasonable belief.[27]

A person alleging discrimination pursuant to the whistleblower provisions at SOX Section 806 may file a complaint with the Secretary of Labor, or, more specifically, with OSHA.[28] Pursuant to the procedures the Department of Labor (DOL) implemented for handling discrimination complaints under SOX Section 806, "proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges [OALJ], codified at subpart A, part 18 of title 29 of the Code of Federal Regulations."[29] The DOL's rule for administrative hearings regarding privileges at 29 C.F.R. § 18.501 states, in relevant part:

> Except as otherwise required by the Constitution of the United States, or provided by Act of Congress, or by rules or regulations prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order, the privilege of a witness, person, government, State,

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[25] *See* 18 U.S.C.A. § 1514(b)(2); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 8 (ARB July 29, 2005).

[26] *Getman*, slip op. at 8; *cf.* 29 C.F.R. § 1980.104(c); *see* 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv)(West 2007).

[27] *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-088, -092, slip op. at 9 (ARB Apr. 29, 2008).

[28] 18 U.S.C.A. § 1514A(b)(1)(A); 29 C.F.R. § 1980.103(c).

[29] 29 C.F.R. § 1980.107(a).

> or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

c. SOX Section 307 Rules of Professional Responsibility for Attorneys

SOX Section 307 required the SEC to "issue rules … setting forth minimum standards of professional conduct for attorneys appearing and practicing" before the SEC "in any way in the representation of issuers," including requiring an attorney "to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company" to the chief legal counsel or chief executive officer of the company, or, if that is unsuccessful, to the audit committee of the board of directors.[30]

d. SEC's Part 205 Rules Implementing SOX Section 307

Pursuant to the mandate of Section 307, the SEC implemented rules at 17 C.F.R. Part 205 (2009) setting forth minimum standards of professional conduct for attorneys appearing and practicing before the SEC in the representation of an issuer company.[31] The regulations at 17 C.F.R. § 205.3(b)(1), (3)-(4) require an attorney to "report" "evidence of a material violation" by the issuer to the chief legal counsel or chief executive officer of the company, or, if that is unsuccessful, to the audit committee of the board of directors.[32] A "material violation" is defined as "a material violation of an applicable United States federal or state securities law, a material breach of a fiduciary duty arising under United States federal or state law, or a similar violation of any United States federal or state law."[33] A "report" is defined as meaning "to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing."[34] Section 205.3(b)(1) notes that "[b]y communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer."[35]

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30 15 U.S.C.A. § 7245; *see also* 17 C.F.R. § 205.3(b)(1), (3)-(4).

31 17 C.F.R. § 205.1.

32 17 C.F.R. § 205.3(b)(1), (3)-(4).

33 17 C.F.R. § 205.2(i).

34 17 C.F.R. § 205.2(n).

35 17 C.F.R. § 205.3(b)(1).

But the SEC's regulation at 17 C.F.R. § 205.3(d)(1) permits an attorney to use any Part 205 report of a "material violation" or response thereto "in connection with any investigation, proceeding, or litigation in which the attorney's compliance" with SOX Section 307 and its implementing regulations is in issue.[36] In addition, the regulation at 17 C.F.R. § 205.3(b)(10) provides that:

> An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

2. The *Willy* Decisions

In *Willy v. The Coastal Corp.*,[37] Donald J. Willy was an in-house lawyer who had drafted a report advising that Coastal was not in compliance with various environmental statutes. Seeking redress under the whistleblower protection provisions of federal environmental statutes, Willy alleged that the company discharged him for whistleblowing, while the company claimed it was for lying on an unrelated matter. In our *Willy* decision, we applied the "breach of duty" or "self-defense" exception to the attorney-client privilege rule under the federal common law. We held that an in-house attorney whistleblower cannot use privileged material offensively to prove an attorney's retaliatory discharge claim under the whistleblower provisions of the federal environmental statutes.[38]

Willy appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit determined that the Board's application of the "breach of duty" exception was contrary to law and vacated our decision in *Willy*.[39] The court held that an attorney

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[36] 17 C.F.R. § 205.3(d)(1) specifically provides:

> Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

[37] *Willy v. The Coastal Corp.*, ARB No. 98-060, ALJ No. 1985-CAA-001 (ARB Feb. 27, 2004), *rev'd in part sub nom. Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005).

[38] *Willy*, ARB No. 98-060, slip op. at 35.

[39] *Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005).

has the right under federal common law, in light of the "breach of duty" exception to the attorney-client privilege rule, to affirmatively use privileged material to the extent necessary in a retaliatory discharge claim pursuant to the whistleblower provisions of the federal environmental statutes.[40]

In reaching its conclusion, the Fifth Circuit Court relied, in part, on Model Rule 1.6(b)(2) of the American Bar Association's (ABA) Model Rules of Professional Conduct and a subsequent ethics opinion the ABA issued interpreting the rule.[41] Model Rule1.6(b)(2) (now numbered 1.6(b)(5)) states:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (5) to establish a *claim or defense* on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[42]

In its subsequent ethics opinion, the ABA concluded "that a retaliatory discharge or similar claim by an in-house attorney against her employer is a 'claim' under Model

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[40] *Willy*, 423 F.3d at 496-501. *Cf. Willy*., ARB No. 98-060, slip op. at 35 (The "breach of duty" exception is tailored to the singular circumstances of the attorney-client relationship and is limited to a breach of a duty a lawyer owes a client, such as furnishing sound advice and effective representation, not the broader array of duties an employee owes to his employer, such as promoting harmony with co-workers and dealing honestly with supervisors), *rev'd in part sub nom. Willy v. Admin .Review Bd*., 423 F.3d 483 (5th Cir. 2005). Ultimately, *Willy* was resolved on remand to the Board pursuant to a settlement agreement approved by the Board. *See Willy v. The Coastal Corp*., ARB No. 06-090, ALJ No. 1985-CAA-001 (ARB Mar. 20, 2007).

[41] Model Rules of Prof'l Conduct R. 1.6(b)(2) (1983); American Bar Ass'n Formal Ethics Opinion 01-424 (Sept. 22, 2001). The ABA has since re-numbered Model Rule 1.6(b)(2), as originally set forth in 1983, and it is now Model Rule 1.6(b)(5). *See* Model Rules of Prof'l Conduct R. 1.6(b)(5) (2003).

[42] Model Rules of Prof'l Conduct R. 1.6(b)(5) (2003) (emphasis added).

Rule1.6(b)(2)" (now numbered 1.6(b)(5)).[43] The Model Rules of Professional Conduct are proposed or "model" rules offered as guidance for states to consider or adopt.[44]

3. The ALJ's Order

On March 14, 2006, the ALJ issued an Order Denying Respondent's Motion To Dismiss And/Or For Summary Judgment, Granting Respondent's Request For Interlocutory Review, And Staying Proceeding. The ALJ concluded that "Jordan is not precluded from relying on statements or documents covered by the attorney client privilege" in pursuit of his SOX whistleblower complaint.[45]

The ALJ relied on the Fifth Circuit's holding in *Willy v. Admin. Review Bd.*, noting that the court held that "questions of privilege which arise in the course of claims involving federal rights are governed by the principles of federal common law."[46] In addition, the ALJ determined that the ABA's Model Rule1.6(b)(5) and its subsequent ethics opinion supported his conclusion.[47]

Ultimately, the ALJ concluded:

> Congress created a statute which *requires attorneys* to report conduct the attorney reasonably believes constitutes a violation of federal securities laws, a breach of fiduciary duty, or any similar violation by the attorney's employer or an agent of the employer. 15 U.S.C. § 7245. At the same

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[43] American Bar Ass'n Formal Ethics Opinion 01-424 at 3 (Sept. 22, 2001).

[44] The equivalent of Model Rule 1.6(b)(5) has been adopted in Kansas, where Jordan worked for Sprint as an in-house attorney, and in Missouri, where the ALJ noted that Jordan resides. *See* Kan. Rule of Prof'l Conduct 1.6(b)(3) (2009); Mo. Sup. Ct. Rule 4-1.6)b)(3) (2007); *see also* ALJ's Jan. 27, 2006 Order Denying In Part Respondent's Motion for a Protective Order to Proceed Under Seal and Ordering Supplemental Briefing at 4 n.5. But Sprint alleges that Jordan was a member of the New York bar during the time Sprint employed him, and New York has not adopted the rule. *See* Petitioner Sprint Nextel Corporation's Opening Brief at 12.

[45] ALJ's Mar. 14, 2006 Order at 14. The ALJ also determined that Sprint had "failed to properly assert, and thus cannot rely on, the attorney-client privilege inasmuch as it has not identified any specific communication to which the attorney-client privilege applies." ALJ's Mar. 14, 2006 Order at 9.

[46] ALJ's Mar. 14, 2006 Order at 11; *see Willy*, 423 F.3d at 495.

[47] ALJ's Mar. 14, 2006 Order at 12-14. The ALJ, however, did not cite to or rely on the SEC's regulation at 17 C.F.R. § 205.3(d)(1).

> time, Congress provided that individuals who report such violations are to be protected from retaliation by their employer for having undertaken the actions required by the Act. There is no exception in the statute for attorneys, and Congress could not have intended that attorneys employed by publicly traded corporations be required to report suspected wrongdoing, but that they then be denied the whistleblower protections of Sarbanes-Oxley because the wrongdoing they reported was discovered while performing legal work for their employer. Such an interpretation of the statute would mean that no attorney who complies with his or her statutory and regulatory obligation under the Act, and who is then discharged for having done so, will ever be able to prevail in a whistleblower proceeding initiated pursuant to 18 U.S.C. § 1514A.[48]

Thus, the ALJ held:

> [W]here Congress has expressly imposed a reporting duty on attorneys which compels them to disclose suspected wrongdoing by their client, the privilege must give way under the circumstances presented by this case. Any other interpretation of the statute would exclude an entire class of corporate whistleblowers from the protections afforded by the Act and undermine the interests of the investing public which Congress sought to protect.[49]

4. Parties Arguments

a. Sprint's Opening Brief

In its opening brief, Sprint contends that federal common law regarding the attorney-client privilege applies to cases arising under a federal law, such as the SOX. Moreover, Sprint argues that the Board's interpretation of the federal common law in *Willy* regarding the attorney-client privilege and its exceptions, which arose under the whistleblower provisions of the federal environmental statutes, is correct and is equally applicable to this case arising under the Section 806 whistleblower provisions of the SOX.

Because this case arises under a federal law, Sprint asserts that federal common law, as interpreted by the Board in *Willy*, applies and not the ABA's Model Rules of

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48 ALJ's Mar. 14, 2006 Order at 16.

49 *Id*.

Professional Conduct as adopted by a majority of states. According to Sprint, the ABA's Model Rules are only relevant in cases where state bar attorney-conduct rules based on the Model Rules are controlling. Furthermore, Sprint points out that nothing under SOX Section 307 or its implementing Part 205 regulations authorizes a cause of action for an attorney to use privileged information to sue his or her client, employer or an issuer. Consistent with Sprint's assertion, 17 C.F.R. § 205.7(a) states that "[n]othing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions." Finally, Sprint notes that the only recourse provided by SOX Section 307 or its implementing Part 205 regulations for an attorney who reports evidence of a "material violation" in accordance with the Part 205 regulations, and claims he or she was discharged in retaliation for doing so, is to "notify the issuer's board of directors or any committee thereof" in-house as set forth under 17 C.F.R. § 205.3(b)(10), thereby protecting the attorney-client privilege as enunciated at 17 C.F.R. § 205.3(b)(1).

b. Jordan's Response

In response, Jordan argues, in relevant part, that 17 C.F.R. § 205.3(d)(1) allows him to use any Part 205 reports he may have made in "any" investigation, proceeding, or litigation in which his compliance with the SOX Section 307 and its implementing regulations is at issue, such as his whistleblower claim. Moreover, Jordan cites to the comments accompanying the promulgation of section 205.3(d)(1), where the SEC stated that section 205.3(d)(1) is "effectively equivalent" to the ABA's present Model Rule 1.6(b)(3) (now numbered 1.6(b)(5)),[50] which allows an in-house attorney to use attorney-client privileged information to establish a retaliatory discharge claim against the attorney's employer.[51]

c. Acting Assistant Secretary for OSHA's Amicus Brief

Pursuant to the Assistant Secretary for OSHA's discretion as set forth at 29 C.F.R. § 1980.108(a)(1), under the regulations implementing the whistleblower provisions of SOX Section 806,[52] the Acting Assistant Secretary for OSHA filed a brief as amicus

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[50] When the SEC issued its comments accompanying the promulgation of 17 C.F.R. § 205.3(d)(1) in 2003, *see* 63 Fed. Reg. 6,296; 6,310 (Feb. 6, 2003), the ABA had re-numbered Model Rule 1.6(b)(2), as originally set forth in 1983, as Model Rule 1.6(b)(3). The ABA has since re-numbered Model Rule 1.6(b)(3), as originally set forth in 1983 as Model Rule 1.6(b)(2) and re-numbered in 2002 as Model Rule 1.6(b)(3), and it is now Model Rule 1.6(b)(5). *See* Model Rules of Prof'l Conduct R. 1.6(b)(5) (2003).

[51] *See* Model Rules of Prof'l Conduct R. 1.6(b)(5) (2003); American Bar Ass'n Formal Ethics Opinion 01-424 at 3 (Sept. 22, 2001).

[52] 29 C.F.R. § 1980.108(a)(1) ("Assistant Secretary may participate as a party or as amicus curiae at any time at any stage of the proceedings.").

curiae. The Assistant Secretary urges the Board to apply the Fifth Circuit's holding in *Willy* that an attorney has the right under federal common law, pursuant to the "breach of duty" exception to the attorney-client privilege rule, to affirmatively use privileged material to the extent necessary in a retaliatory discharge claim, such as Jordan's SOX claim.[53] Consistent with the Fifth Circuit's *Willy* decision, the Assistant Secretary notes that the ABA's Model Rule 1.6(b)(2) "breach of duty" exception to the attorney-client privilege rule (now numbered 1.6(b)(5)), and the SEC's corresponding regulation at 17 C.F.R. § 205.3(d)(1), also now allow an in-house attorney to use attorney-client privileged information to establish a retaliatory discharge claim against the attorney's employer.

d. SEC's Amicus Brief

Pursuant to the SEC's discretion as set forth at 29 C.F.R. § 1980.108(b), under the regulations implementing the whistleblower provisions at SOX Section 806,[54] the SEC also filed a brief as amicus curiae. The SEC argues that 17 C.F.R. § 205.3(d)(1), as an express provision of federal law, governs whether an attorney may rely on his or her reports of a "material violation" in accordance with the Part 205 regulations to establish a claim under the whistleblower provisions at SOX Section 806. Although the ALJ did not rely on section 205.3(d)(1), the SEC contends that section 205.3(d)(1) is consistent with the federal common law applied by the ALJ, reflected in the Fifth Circuit's *Willy* decision and the ABA's Model Rule 1.6(b)(5), which allow an in-house attorney to use attorney-client privileged information to establish a retaliatory discharge claim against the attorney's employer.

The plain language of 17 C.F.R. § 205.3(d)(1), the SEC argues, allows an attorney to use any Part 205 reports he or she may have made in "any investigation, proceeding, or litigation in which" the attorney's compliance with SOX Section 307 and its implementing regulations is "in issue," including, the SEC asserts, to establish a whistleblower claim under SOX Section 806. Moreover, the SEC also notes that its own comments accompanying the promulgation of section 205.3(d)(1) state that section 205.3(d)(1) is "effectively equivalent" to the ABA's Model Rule 1.6(b)(5), which allows an in-house attorney to use attorney-client privileged information to establish a retaliatory discharge claim against the attorney's employer.[55] The SEC urges the Board to defer to its interpretation of its own regulation implementing the SOX.

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[53] *See Willy*, 423 F.3d at 496-501.

[54] 29 C.F.R. § 1980.108(b) ("The Securities and Exchange Commission may participate as amicus curiae at any time in the proceedings, at the Commission's discretion.").

[55] *See* Model Rules of Prof'l Conduct R. 1.6(b)(5) (2003); American Bar Ass'n Formal Ethics Opinion 01-424 at 3 (Sept. 22, 2001).

e. Sprint's Reply Brief

But in a reply brief, Sprint responds that the Part 205 regulations, which SOX Section 307 authorized the SEC to implement, only regulate the conduct of attorneys appearing and practicing before the SEC,[56] but do not establish evidentiary standards for SOX Part 806 whistleblower proceedings adjudicated before a DOL ALJ. In addition, Sprint argues that the plain terms of 17 C.F.R. § 205.3(d)(1) only permits an attorney to use a Part 205 report he or she may have made defensively in "any investigation, proceeding, or litigation" to determine whether the attorney was in "compliance" with SOX Section 307 and its implementing Part 205 regulations, but not offensively to establish a whistleblower claim before the DOL under the separate SOX Section 806. Otherwise, Sprint asserts, section 205.3(d)(1) would be inconsistent with 17 C.F.R. § 205.3(b)(1), which states that the intent of in-house Part 205 reporting of a "material violation" is to "not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer."[57]

5. Analysis

Two related factors not present in *Willy* direct us to a contrary result here. First, Congress gave the SEC enforcement authority over SOX Section 307. We defer to the SEC's regulations and interpretative guidance implementing that Section to the extent that they would permit Jordan's use of otherwise privileged matters. Second, the SOX contains both a mandatory reporting requirement for attorneys (Section 307), and a whistleblower protection section (Section 806). They should be read together to provide a remedy.

Pursuant to SOX Section 307, Congress gave the SEC authority to "issue rules … setting forth minimum standards of professional conduct for attorneys appearing and practicing" before the SEC.[58] In light of the mandate of Section 307, the SEC implemented rules at 17 C.F.R. Part 205 requiring, in part, that an attorney "report" in-house any "evidence of a material violation."[59]

Furthermore, the SEC promulgated the regulation at 17 C.F.R. § 205.3(d)(1), which states that an attorney may use a Part 205 report of a "material violation" or response thereto "in connection with any investigation, proceeding, or litigation in which

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[56] *See* SOX Section 307, 15 U.S.C.A. § 7245 (requiring the SEC to "issue rules … setting forth minimum standards of professional conduct for attorneys appearing and practicing before the [SEC]"); *see also* 17 C.F.R. § 205.1.

[57] 17 C.F.R. § 205.3(b)(1).

[58] 15 U.S.C.A. § 7245.

[59] 17 C.F.R. §§ 205.1, 205.3(b)(1), (3)-(4).

the attorney's compliance" with SOX Section 307 and its implementing regulations is in issue. As the contrary readings of this regulation from the SEC and Sprint demonstrate, the language of 17 C.F.R. § 205.3(d)(1) is ambiguous regarding whether its terms also permit an attorney to use attorney-client privileged communications in a Part 205 report of a "material violation" to establish a whistleblower claim under SOX Section 806.

In light of the ambiguity in the language of 17 C.F.R. § 205.3(d)(1), we look to the SEC's comments accompanying the promulgation of section 205.3(d)(1) to clarify the scope of the regulation. The SEC's comments note, as Jordan and the SEC point out in their briefs, that section 205.3(d)(1) is "effectively equivalent" to the ABA's present Model Rule 1.6(b)(3) (now numbered 1.6(b)(5)).[60] Model Rule 1.6(b)(5) allows an in-house attorney to use attorney-client privileged information (such as a Part 205 report) to establish a retaliatory discharge claim against the attorney's employer (such as a SOX Section 806 whistleblower claim).[61]

The Supreme Court has noted that when reviewing an agency's application of a regulation, an adjudicator:

> must give substantial deference to an agency's interpretation of its own regulations. . . . Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." . . . In other words, we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation."[62]

Because the language of the regulation at 17 C.F.R. § 205.3(d)(1) is ambiguous, we defer to the SEC's reasonable interpretation of the regulation.[63] Thus, we defer to the SEC's

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[60] 63 Fed. Reg. 6,296; 6,310 (Feb. 6, 2003); Model Rules of Prof'l Conduct R. 1.6(b)(5) (2003).

[61] Model Rules of Prof'l Conduct R. 1.6(b)(5) (2003); American Bar Ass'n Formal Ethics Opinion 01-424 at 3 (Sept. 22, 2001).

[62] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted).

[63] *Auer v. Robbins*, 519 U.S. 452, 457, 461-462 (1997) (agency's interpretation of its own regulation is controlling if reasonable, even if it is presented in an amicus brief); *Thomas Jefferson Univ.*, 512 U.S. at 512.

comments accompanying the promulgation of section 205.3(d)(1), which are reasonable, clarify the scope of the regulation, and eliminate any ambiguity found in its language.

Sprint contends, however, that the Part 205 regulations, including 17 C.F.R. § 205.3(d)(1), do not establish or control evidentiary standards for adjudicating SOX Part 806 whistleblower proceedings before a DOL ALJ. But the procedural regulations the DOL promulgated for handling whistleblower complaints under SOX Section 806 indicate that such proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the DOL's OALJ found at 29 C.F.R. Part 18.[64] More specifically, the DOL's rule regarding privileges at 29 C.F.R. § 18.501 states that the assertion of a privilege (such as the attorney-client privilege in this case) shall be governed by the principles of federal common law "[e]xcept as otherwise . . . provided by Act of Congress, or by rules or regulations prescribed by the administrative agency pursuant to statutory authority."

Thus, SOX Section 307, an "Act of Congress" which gave the SEC authority to "issue rules" regulating the professional conduct of attorneys, and the SEC's subsequent implementing regulation at 17 C.F.R. § 205.3(d)(1) provide a DOL ALJ the authority pursuant to 29 C.F.R. § 18.501 to follow the SEC's privilege rule at section 205.3(d)(1) in adjudicating a SOX Section 806 whistleblower claim.[65] Moreover, as the ALJ reasonably concluded, SOX Section 307 requiring an attorney to report a "material violation" should impliedly be read consistent with SOX Section 806, which provides whistleblower protection to an "employee" or "person" who reports such violations.[66]

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[64] 29 C.F.R. § 1980.107(a).

[65] As a DOL ALJ has the authority pursuant to 29 C.F.R. § 18.501 to follow the SEC's privilege rule at 17 C.F.R. § 205.3(d)(1) in adjudicating a whistleblower claim pursuant to SOX Section 806, we need not address the Board's decision in *Willy*, either to non-acquiesce in the Fifth Circuit's decision as Sprint requests, or to apply the Fifth Circuit's decision here as the Acting Assistant Secretary for OSHA argues. The ARB decision in *Willy* addresses the broader issue whether the federal common law permits an attorney to rely on attorney-client privileged information in support of a claim arising under the whistleblower provisions of the federal environmental statutes. Although the whistleblower provisions of the federal environmental statutes are comparable to the SOX Section 806 whistleblower provisions, the federal environmental statutes are distinguishable from the SOX as they do not contain minimum standards of professional conduct for attorneys requiring an attorney to report evidence of a company's material violation of law or breach of fiduciary duty or similar violation internally to company officials as SOX Section 307 provides.

[66] ALJ's Mar. 14, 2006 Order at 16. As the ALJ noted, there is no exception under the SOX Section 806 whistleblower provisions indicating that an attorney is not to be considered an "employee" or "person" entitled to file a complaint alleging discrimination. *See* 18 U.S.C.A. § 1514A(a), (b)(1)(A); 29 C.F.R. §§ 1980.100; 1980.101; 1980.103(a); *see also Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009) (in-house attorney considered a "person" entitled to file a SOX Section 806 complaint).

Thus, attorneys who undertake actions required by SOX Section 307 are to be protected from employer retaliation under the whistleblower provisions of SOX Section 806, even if it necessitates that attorney-client privileged communications be held admissible in a Section 806 whistleblower proceeding.

We are in accord, therefore, with the ALJ's rationale that having a mandatory reporting requirement under SOX Section 307 and whistleblower protection under SOX Section 806 in the same statute is strong evidence of congressional intent that attorneys alleging retaliation for reporting violations under Section 307 can use otherwise privileged materials in a Section 806 whistleblower proceeding, subject to protective, in camera, or other orders the ALJ may issue with the objective of protecting privileged communications.[67] In other words, whether or not the SEC's Part 205 regulations specifically apply to SOX Section 806 proceedings before the DOL, we are sufficiently confident that Congress intended that attorney-client privileged reports or communications be held admissible in a Section 806 whistleblower proceeding.

Consequently, we conclude that under 17 C.F.R. § 205.3(d)(1), if an attorney reports a "material violation" in-house in accordance with the SEC's Part 205 regulations, the report, though privileged, is nevertheless admissible in a SOX Section 806 proceeding as an exception to the attorney-client privilege in order for the attorney to establish whether he or she engaged in SOX-protected activity. Furthermore, in accord with the ALJ's rationale that SOX Section 307 should impliedly be read consistent with SOX Section 806, we similarly conclude that Congress also intended that any other relevant attorney-client privileged communication that is not a Part 205 report is also admissible in a Section 806 whistleblower proceeding in order for the attorney to establish whether he or she engaged in SOX protected activity.[68] Thus, although on different grounds, we affirm the ALJ's holding that Jordan is not precluded from relying on statements or documents covered by the attorney client privilege in pursuit of his SOX whistleblower complaint.

CONCLUSION

We reiterate that our ruling is limited to one element of Jordan's case, allowing him to use otherwise privileged material to show that he made protected complaints and Sprint unlawfully retaliated against him, but express no opinion on the merits of Jordan's case. We hold only that the ALJ did not err in denying Sprint's motion for summary

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[67] *See* 29 C.F.R § 18.46(a).

[68] Although we hold that attorney-client privileged communications are admissible in a SOX Section 806 whistleblower proceeding, we note that it is within an ALJ's discretion to issue, as the ALJ did in this case, such protective, in camera, or other orders as in his or her judgment may be consistent with the objective of protecting privileged communications pursuant to 29 C.F.R § 18.46(a).

decision because Jordan may rely on statements or documents covered by the attorney-client privilege, as an exception to the privilege, in support of his complaint that Sprint has retaliated against him in violation of the SOX Section 806 whistleblower protection provisions. Therefore we **REMAND** this case for further proceedings consistent with this opinion.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge