

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID E. WELCH, et al.,)	
)	
Appellants)	
)	
v.)	
)	No. 06-2295
CARDINAL BANKSHARES)	
CORPORATION et al.,)	
)	
Appellees.)	

MOTION TO PERMIT AMERICAN ASSOCIATION OF
BANK DIRECTORS TO FILE BRIEF AS AMICUS CURIAE

The American Association of Bank Directors (“AABD”), by counsel, moves the Court for permission to file a brief as amicus curiae urging that this Court affirm the District Court’s opinion. A copy of AABD’s proposed brief is annexed to this Motion.

MOVANT’S INTEREST

AABD is an organization which represents the interests of directors of financial institutions. It serves the information, education and advocacy needs of directors of financial institutions. Specifically, one of the missions of AABD is to represent the interests of directors of financial institutions before judicial bodies in order to advance the cause of eliminating directors’ personal liability for damages resulting from events that are beyond the

control of directors. To that end, it seeks to minimize limitations on the authority of boards of directors to supervise their institutions effectively.

REASONS FOR PERMITTING AABD TO FILE AMICUS BRIEF

AABD should be permitted to file an amicus brief because judicial enforcement of preliminary orders of reinstatement would substantially impact its members. AABD is interested in administrative and judicial interpretations of the Sarbanes-Oxley Act of 2002 (“SOX”) generally. The particular issue presented in this appeal—whether to reinstate SOX whistleblower claimants pursuant to an ALJ’s preliminary order of reinstatement—is one of importance to its members.

AABD is concerned that the arguments of the Department of Labor (“DOL”), if accepted by this Court, could result in indefinite judicial enforcement of preliminary orders without any judicial review of such orders. In its regulations and in its brief to this Court, the Department of Labor apparently takes the position that preliminary orders of reinstatement issued by ALJs must be enforced by the court without any accompanying judicial review. But in this case, the agency has ignored the Congressional mandate that it render a final decision within 120 days of the completion of the hearing. Arguably, then, the Department of Labor believes it has the power to convert an interim order of reinstatement into a final order for all

practical purposes. AABD is very concerned that this could impose a CFO on an objecting Board of independent directors indefinitely without any judicial review of the merits of the decision or the reasons for the Board's objections.

The case at hand illustrates the point well. If this preliminary order of reinstatement in this case (as the Department of Labor now says that it is) was enforced shortly after it was issued (February 15, 2005), this period of administrative imposition would be continuing to this day with no end in sight. In its amicus brief, AABD argues the public policy considerations against such unrestrained administrative authority affecting the governance of public corporations by its Board of directors.

Judicially enforcing preliminary orders of reinstatement would be problematic even if the DOL processed whistleblower claims promptly. There are at least three distinct levels of administrative review within the DOL: the initial review by the OSHA investigator, the formal evidentiary hearing conducted by the ALJ, and appellate review by the ARB. Each of these steps could result in different decisions vis-à-vis employer liability. If—rather than awaiting a final order of the Secretary—the orders issued at each of these interim stages could be enforced in federal court, then an employer might be presented with a rapid succession of orders compelling

it to reinstate the employee, permitting it to discharge the employee, and then compelling it to re-reinstate the employee.

Constantly shuffling employees in and out of their positions would be detrimental to the employer. This is particularly the case with claimants who occupy senior management or accounting positions—precisely the individuals who are likely to bring SOX whistleblower claims. These sensitive posts cannot be filled overnight. The constant turnover created by conflicting administrative decisions would deprive a public company of an effective employee in such a post for the duration of the administrative review. This would have a detrimental effect on the company—ultimately causing harm to its shareholders. Of particular concern to AABD, instability in key positions would impair the ability of boards of directors to oversee management. AABD submits that this would frustrate, not advance, the objectives of Congress in enacting SOX.

CONCLUSION

For the reasons stated the American Association of Bank Directors moves the Court for permission to file a brief amicus curiae.

AMERICAN ASSOCIATION OF BANK
DIRECTORS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 13, 2007, the foregoing Motion to Permit American Association of Bank Directors to File Brief as Amicus Curiae was mailed to the following counsel of record:

List counsel
