



Issue Date: 21 May 2013

CASE No: 2012-SOX-00036

In the Matter of:

ROBERT EVANS,
Complainant,

v.

**T-MOBILE USA, INC. &
DEUSTCHE TELEKOM AG,**
Respondents.

Order Granting Motion to Stay Reinstatement

T-Mobile USA and Deutsche Telekom AG (hereafter “T-Mobile”), the Respondents, moved to stay the preliminary order OSHA’s Regional Administrator entered on behalf of the Secretary of Labor¹ requiring T-Mobile to reinstate Robert Evans, the Complainant, to his job. Reinstatement takes immediate effect, despite the request T-Mobile made for a de novo hearing, unless I grant a stay. The motion is granted.

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (the “Sarbanes-Oxley Act”)² and the Secretary’s implementing regulations.³

¹ The statutory text instructs the Secretary of Labor to make a determination, and the determination letter in this case is titled “Secretary’s Findings.” *See* 18 U.S.C. § 1514A. The governing regulations, however, instruct the Assistant Secretary of Labor for OSHA to make such findings. *See* 29 C.F.R. § 1980.101. I refer to the findings as the Secretary’s Findings in this order in order to track the title of the letter.

² 18 U.S.C. § 1514A.

³ 29 C.F.R. Part 1980.

I. Summary Of Dispute

A. Uncontested Facts

The Complainant, Robert Evans, worked for T-Mobile USA analyzing, negotiating, and managing some of T-Mobile's international roaming agreements with other carriers in the Caribbean, agreements which allow T-Mobile's customers to use their cell phones while in foreign countries by routing calls through the local affiliate's network, and vice versa.⁴ That position is titled a "Partner Relationship Manager."⁵

He began on November 30, 2007.⁶ Shortly thereafter he applied for and was granted medical leave due to back surgery, so he was absent most of March and April 2008.⁷

His managers assigned him 2.8 out of 5 as his first performance review score, in July 2008, with comments that criticized his inability to change behavior in response to feedback, his late arrival at meetings, failure to meet deadlines, and action in unilaterally changing the terms of an agreement he negotiated without consulting his superiors.⁸

On the next performance review, in September 2008, his score dropped to 2.2 out of 5.⁹ The comments recognized his efforts to understand the business, and that he no longer arrived late for meetings, but continued to criticize his lack of understanding of the financial side of the business and ineffectiveness in negotiating new roaming agreements.¹⁰

Based on this second performance evaluation, he was placed on a performance improvement plan (PIP) in October 2008.¹¹ The PIP required him to improve his understanding of the business, particularly in terms of finance, and submit more thorough and accurate work.¹²

The Complainant responded with a written complaint that alleged his superiors were discriminating against him by setting

⁴ See Respondent's Motion for Stay of Preliminary Reinstatement (hereinafter "motion"), Ex.-13 at ¶ 3.

⁵ *Id.*, Ex.-2 at 00301.

⁶ *Id.*, Ex.-1 at 00068.

⁷ *Id.*, Ex.-4 at 00026. This exhibit is the Claimant's request for medical leave. The approval of that request doesn't appear to be part of the record so far, but the Complainant doesn't appear to contest that he was granted and took such leave.

⁸ *Id.*, Ex.-5 at 00003-00007.

⁹ *Id.*, Ex.-6 at 00490-00496.

¹⁰ *Id.*, at 00495.

¹¹ *Id.*, Ex.-7 at 00488.

¹² *Id.*

unrealistic performance goals, because he had taken medical leave for his March 2008 back surgery.¹³ He also apparently took a second medical leave during this period for chronic stress.¹⁴

When the T-Mobile Human Resources department investigated his complaint, that department concluded no discrimination occurred.¹⁵ That investigation led Human Resources to disapprove of the management styles of his supervisor and manager, Chander Chawla and Jim Martinek, and both left T-Mobile soon thereafter.¹⁶

Shortly after his second return to work in March 2009, on March 13, 2009, the Complainant attended a meeting to discuss T-Mobile's "Virtual Home Environment" ("VHE"). VHE, a feature implemented in 2008 for all of T-Mobile's international partners, automatically corrects numbers that appear to be misdialed based on the caller's past dialing history.¹⁷ T-Mobile doesn't charge a fee specifically for use of the VHE feature, but bills calls made through VHE's autocorrect feature at the same rate it bills other successfully connected calls.¹⁸ Although they are billed at the same rate as normally dialed calls, these autocorrected calls are recorded in a slightly different way using a different billing protocol that goes by the acronym CAMEL.¹⁹

Prior to that meeting, two of T-Mobile's partners – Orange Dominicana and Vodafone Ireland – had demanded credits for calls made using T-Mobile's VHE autocorrect feature because they were unable to process the CAMEL records and therefore unable to bill their own customers for those calls.²⁰ An initial investigation into the demand for credits indicated T-Mobile might owe a lot of money—as much as \$100 million—if every one of its partners requested similar credits for VHE-connected calls.²¹ The Complainant was involved at least to some degree with handling Orange Dominicana's complaint and request for reimbursement credits; all parties agree he attended the meeting.²² What contribution he made to that meeting (if any) is

¹³ *See* Motion, Ex.-8 at 00113–00115.

¹⁴ *See* Motion at 4, Ex.-8 at 00114.

¹⁵ *Id.*, Ex.-3.A at 94–95.

¹⁶ *Id.*, Ex.-3.A at 155–156 (Complainant's Deposition).

¹⁷ *Id.*, Ex.-11 at ¶ 3.

¹⁸ *Id.*, Ex.-12 at ¶ 5.

¹⁹ *Id.*

²⁰ *Id.*, Ex.-11 at ¶ 4, 6; Ex.-12 at ¶ 5.

²¹ *Id.*, Ex.-11 at ¶ 4.

²² *Id.*, Ex.-13 at ¶ 8.

disputed, and both accounts are related below in the section on disputed facts.

The Complainant's PIP remained in effect during this time, and on March 25, 2009, his new manager proposed to put him on a new, second PIP, largely replicating the concerns and objectives found in the PIP his now-departed managers had expressed.²³ The Complainant responded by asking the T-Mobile human resources department to take him off his earlier PIP and transfer him to another department. He stated in his email to human resources that he did not "feel comfortable or welcome[]" in his current department and job.²⁴ In a follow up email on March 31, he alleged he was being "punished, harassed, retaliated and discriminated against for filing a discrimination against disability, harassment and hostile work claim."²⁵

As a result of these allegations, Kristen Hagen, the Senior Human Resources Director at T-Mobile, met with the Complainant on April 2, 2009.²⁶ She promised to investigate his allegations of discrimination and placed him on administrative leave in the meantime.²⁷ The Complainant mentioned at this meeting T-Mobile's VHE program, asserting doubt about whether the way T-Mobile was charging its partners for the VHE service was legal or ethical.²⁸

In an April 14, 2009 email, the Complainant told Human Resources that James Lai, a former employee of T-Mobile the he had contacted, had told him not to return to work because he would be retaliated against by his managers if he did.²⁹ HR investigated this allegation as well.³⁰

T-Mobile's Human Resources department completed its investigation into the Complainant's claims of discrimination 20 days later, finding no evidence of discrimination.³¹ The Complainant was terminated the next day.³²

²³ *Id.*, Ex.-17 at 00585.

²⁴ *Id.*, Ex.-18.A at 00870.

²⁵ *Id.*, Ex.-18.B at at 00873.

²⁶ *Id.*, Ex.-18 at ¶ 7.

²⁷ *Id.*, Ex.-18.C at 00927.

²⁸ *Id.*, Ex.-18 at ¶ 7.

²⁹ *Id.*, at ¶ 11.

³⁰ *Id.*

³¹ *Id.* at ¶ 10.

³² *Id.* at ¶ 14.

B. Facts to be Contested at Final Hearing

The Complainant alleges he spoke up during the March 13, 2009 meeting discussing VHE, asking detailed questions and expressing concern about automatically billing partners for VHE autocorrected calls.³³ T-Mobile disputes the Complainant's version of events, presenting affidavits from several of those who attended the meeting denying he asked about the VHE situation in particular.³⁴ However, one employee did remember the Complainant "asking questions . . . aggressively" about Orange Dominicana's request for a credit at that meeting.³⁵

The parties also disagree about whether the Complainant ever alleged T-Mobile's handling of the VHE billing issues was fraudulent. The Complainant claims he "blew the whistle" to Ms. Hagan, the Human Resources supervisor he spoke with on April 2, along with Loretta Guerra³⁶ and Brain Kirkpatrick, T-Mobile's CFO.³⁷ T-Mobile admits the Complainant mentioned his qualms about the legality of the VHE billing issue to Ms. Hagan,³⁸ but asserts the Complainant's other purported whistleblowing really had nothing to do with the VHE dispute and instead related to his general allegations of retaliation for disability discrimination.³⁹

Finally, and most significantly, the parties disagree vigorously about why the Claimant was terminated. The Complainant believes he was terminated in retaliation for voicing concerns about how T-Mobile billed its partners for VHE transactions that the partners were unable to bill their customers for in turn.⁴⁰ He emphasizes that before the Human Resources investigation that culminated in his termination, he was scheduled to be placed on a second PIP, not fired outright. He says this suggests his complaint to Human Resources about the VHE system lead at least in part to his being fired.⁴¹

T-Mobile says it fired the Complainant for reasons that had nothing at all to do with what it regards as exaggerated claims about

³³ See Complainant's Opposition to Respondents' Motion for Stay of OSHA Preliminary Order of Reinstatement (hereafter "Opposition"),

³⁴ See Motion, Ex.-11-16.

³⁵ See *id.*, Ex.-14 at ¶ 10.

³⁶ It doesn't appear clear from the parties' submissions who Loretta Guerra is or her relationship to the Complainant.

³⁷ See Evans Deposition, at 147.

³⁸ See Motion, Ex.-18 at ¶ 7.

³⁹ See Reply in Support of Motion for Stay of Preliminary Reinstatement (hereafter "reply"), at 5.

⁴⁰ See Opposition, at 13-14.

⁴¹ *Id.*

“blowing the whistle” on something that was a non-issue: the VHE billings. It asserts the only time the Complainant specifically made any claims about the legality of T-Mobile’s VHE billing issue was in his meeting with Ms. Hagan on April 2, and that Ms. Hagan neither properly understood the allegations at that time nor followed up on them, because what she was really investigating was the Complainant’s claims of disability discrimination, not the VHE billing issues.⁴² It also believes no reasonable person could have believed the VHE billing issue involved any sort of fraud. These sorts of issues are “typical and routinely resolved in the ordinary course of business.”⁴³

According to T-Mobile, it became clear during the course of its investigation the Complainant was refusing to return to work in the same department, without reasonable grounds.⁴⁴ It points to an email from the complainant on April 14, 2009, that, in its view, shows the Complainant was unwilling to return to work.⁴⁵ It also points to emails where the Complainant seems to actively argue that he isn’t suited to or capable of performing the analytic work of his job (*i.e.*, Partner Relationship Manager).⁴⁶

T-Mobile also asserts that it learned as it investigated the discrimination claim that the Complainant had lied to the HR investigator about what the former employee, James Lai, supposedly said: that Lai had heard the Complainant would be retaliated against if he returned to work.⁴⁷ T-Mobile says that it contacted Mr. Lai, who denied making any such statement.⁴⁸ Lai said he had been contacted by a T-Mobile employee named “Chris Harting,” not Robert Evans.⁴⁹ According to Christina Jones, the investigator, Mr. Lai was angry he had been deceived about the Complainant’s identity, but her statement is unclear about whether Lai knew he was speaking to the Complainant, not some fictitious person, during their phone conversation.⁵⁰

T-Mobile argues it terminated the Complainant’s employment because he refused to return to work in the same department with no valid reason for doing so, and because he made up Mr. Lai’s statements

⁴² See Motion, at 7–8, Ex.18 at ¶ 7.

⁴³ See Reply, at 2.

⁴⁴ See Motion at 8, Ex.18 at ¶ 14, Ex.19 at ¶ 10.

⁴⁵ See *id.* at 8, Ex.-19.B at 01003.

⁴⁶ See, *e.g.*, *id.* Ex.-19.A at 00578; Ex.-3.C at 00577.

⁴⁷ See *id.* at 8, Ex.19 at ¶ 11.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See *id.* at ¶ 11–12.

in an effort to corroborate his retaliation claims that T-Mobile was investigating.

The Complainant has acknowledged he posed as a fictitious employee “Chris Harting” initially, when he contacted Mr. Lai, but insists he revealed his true identity to Mr. Lai as soon as they spoke on the phone.⁵¹

II. Procedural History and OSHA’s Findings

The Complainant submitted a complaint to OSHA on July 21, 2009 alleging he had been discharged in violation of the employee protection provisions of the Sarbanes-Oxley Act.⁵² OSHA investigated for more than three years, ultimately issuing its findings in a determination letter dated August 7, 2012.⁵³

OSHA’s Regional Administrator determined that T-Mobile discharged the Complainant in violation of the Act.⁵⁴ After reciting a similar version of the uncontested and contested facts found above, OSHA generally adopted the Claimant’s version of events. It found he had met the four elements required to prove a *prima facie* case of whistleblower retaliation under the Act.⁵⁵

Because the most disputed element was whether the Complainant’s objections relating to the VHE feature had any relationship to his discharge, OSHA detailed the reasons it took the Complainant’s side.⁵⁶ It noted the close temporal proximity between the Complainant’s objections to Human Resources in March 2009, and his discharge in April 2009 immediately after it concluded its investigation, as proof of a causal relationship.⁵⁷ It noted his previous complaint relating to disability discrimination he filed in 2008, involving his prior supervisors, didn’t result in discipline.⁵⁸ It contrasted this with his March 2009 complaint, which involved similar claims in addition to his objections to the VHE feature, and noted that T-Mobile responded differently to the second complaint, by firing the Complainant at the conclusion of the investigation.⁵⁹

⁵¹ *See id.*, Ex.-3A at 112–114.

⁵² *See* Secretary’s Findings & Preliminary Order (hereafter “Findings”), OSHA No. 0-1960-09-029, at *2.

⁵³ *See* Findings, at *1.

⁵⁴ *Id.*, at *1, 8.

⁵⁵ *Id.* at *6, 29 C.F.R. § 180.104(b)(1).

⁵⁶ *See* Findings, at *6–8.

⁵⁷ *Id.*, at *6.

⁵⁸ *Id.*, at *6–7.

⁵⁹ *Id.*

OSHA considered but rejected the reasons T-Mobile gave for the firing—the Complainant’s refusal to return to work and his lie to the HR investigator about how he contacted Mr. Lai—finding them “not believable.”⁶⁰ It found the Complainant’s refusal to return to work in the same department, based on his belief that work there would force him to engage in fraudulent behavior, “inextricably intertwined with the protected activity itself” and therefore was not a legitimate reason to fire him.⁶¹ OSHA rejected T-Mobile’s explanation that it fired the Complainant for lying about having contacted Mr. Lai because it believed T-Mobile hadn’t offered convincing evidence it was the Complainant, not Mr. Lai, who lied about the content of their conversation.⁶²

OSHA’s Regional Administrator determined the Complainant had made out a *prima facie* case, but that T-Mobile hadn’t shown by clear and convincing evidence it would have fired him if he never had complained about the VHE feature.⁶³ OSHA recited that T-Mobile had the opportunity to submit more evidence in November 2011, and that OSHA considered the evidence T-Mobile submitted.⁶⁴ OSHA did not, however, discuss what that evidence was, or why it wasn’t persuaded T-Mobile would have fired the Complainant in any case.

The findings and preliminary order OSHA entered on the Secretary’s behalf required T-Mobile to reinstate the Complainant to his former position (or to a comparable one within T-Mobile that he was qualified to do) where he wouldn’t be compelled to engage in what he reasonably believed to be fraudulent activity. The preliminary order states that “reinstatement is not stayed by an appeal of this order.”⁶⁵

III. Legal Analysis

The text of the Sarbanes-Oxley Act does not address a motion to stay preliminary reinstatement. The Department’s implementing regulations allow a public company to move to stay preliminary reinstatement.⁶⁶ The recent revisions to the regulation of November 3, 2011 emphasize that a stay should be granted only in “exceptional circumstances,” and the explanation that accompanies the changes when published in the Federal Register explain that the Secretary

⁶⁰ *Id.*, at *7–8.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*, at *8; 29 C.F.R. § 1980.11(b).

⁶⁶ *See* 29 C. F. R. § 1980.106(b)(1).

meant this revision to codify the view that a motion for a stay of preliminary reinstatement should be granted only if the moving party satisfies the conditions for a preliminary injunction.⁶⁷ To prevail, T-Mobile must establish the traditional four factors a preliminary injunction demands: likely irreparable injury; likelihood of success on the merits; the balancing of hardships favors a stay, and the public interest favors a stay.⁶⁸ As the moving party, under § 7 of the APA the burden is on T-Mobile to prove entitlement to the stay.⁶⁹

What T-Mobile has submitted satisfies the test. Each condition is discussed in more detail below.

1. Success on the Merits

The party who seeks a preliminary injunction must demonstrate a likelihood of success on the merits.⁷⁰ Yet the party need not prove itself certain to prevail at trial, or that it is overwhelmingly likely to do so. It must show some likelihood of success on the merits,⁷¹ for the Ninth Circuit (in whose area the events took place and where the Complainant resides) uses a “sliding scale” approach currently.⁷² This allows the moving party to obtain a preliminary injunction by showing “serious questions going to the merits’ and a balance of hardships that

⁶⁷ See *id.*; 76 F. R. 68084, 68089 (Nov. 3, 2011).

⁶⁸ See 76 F.R. 68084; see also *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008) (clarifying the traditional four-element test for a preliminary injunction requires proof of *likely* irreparable injury in the absence of an injunction, not just the possibility of such injury); *Harris v Bd. Of Supervisors, L.A. County*, 366 F.3d 754, 759 (9th Cir. 2004) (repeating the list of elements, and quoting *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir.1995) (citation and internal quotation marks omitted)); *Bailey v. Consolidated Rail. Corp.*, ARB Case. Nos. 13-030, -033, ALJ Case No. 2012-FRS-00012, slip op. at *2–3 (ARB March 27, 2013); *Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2003-SOX-00015, slip op. at *4 (ARB June 9, 2006).

⁶⁹ 5 U.S.C. § 556(d); see also, *Dep’t of Labor v. Greenwich Collieries, Inc.*, 512 U.S. 267 (1994) (describing how the APA allocates the burden of persuasion, while also discussing intermediate burdens to go forward with proof); *SEC v Steadman*, 450 U.S. 91, 100–103 (1981) (holding the APA requires no more than a preponderance of evidence to take action).

⁷⁰ See *Winter*, 555 U.S. at 20.

⁷¹ See *Developmental Svcs. Network v. Douglas*, 666 F.3d 540, 545 (9th Cir. 2011) (explaining that although the moving party must show some chance of prevailing on the merits to obtain a preliminary injunction, a “sliding scale” allows a moving party to obtain an injunction as long as “serious questions going to the merits” can be demonstrated, if the other elements of the test are firmly in the moving party’s favor).

⁷² An earlier en banc decision of the Ninth Circuit frankly questioned the use of a “sliding scale” metaphor: “nothing ‘slides’” and it is “unnecessary and potentially confusing.” *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 968 (9th Cir. 2006) (en banc).

tips sharply towards the [movant]... so long as the [movant] also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.”⁷³ If the moving party can’t show some chance on the merits, however, that ends the matter.⁷⁴

In a SOX whistleblower retaliation case, to prevail on the merits a complainant must show:

1. The employee engaged in a protected activity or conduct;
2. The employee suffered an unfavorable personnel action; and
3. The protected activity was a contributing factor in the unfavorable decision.⁷⁵

When a complainant successfully establishes those elements, an employer can still avoid liability if it “demonstrates by clear and convincing evidence” that it would have done the same thing “in the absence of any protected behavior.”⁷⁶ Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.”⁷⁷

T-Mobile can show likely success on the merits by disproving one of the three necessary elements of the Complainant’s case, or by showing it can likely establish by clear and convincing evidence it would have terminated the Complainant’s employment even if the VHE controversy had never arisen.

The evidence now before me suffices to show it likely T-Mobile can prevail at trial. The preliminary order of the OSHA Regional Director gave short shrift to T-Mobile’s argument that it would have fired the Complainant whether he reported the VHE situation or not. What T-Mobile currently offers on the point, however, seems strong. All parties agree the Complainant had been on a PIP before he had heard of the VHE system, or made any statements about it to his managers or to Human Resources about it. He was scheduled to be placed on a

⁷³ *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

⁷⁴ *Global Horizons, Inc. v. U.S. Dep’t of Labor*, 510 F.3d 1054, 1058 (9th Cir. 2007).

⁷⁵ See *Leon v. Securaplane Technologies, Inc.*, ARB Case No. 11-069, ALJ Case No. 2008-AIR-00012, at *10 fn. 3 (ARB April 15, 2013).

⁷⁶ 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); see also *Williams v. American Airlines, Inc.*, ARB No. 09-018, OALJ No. 2007-AIR-0004, slip op. at 8 (ARB Dec. 29, 2010); *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 6 (ARB Dec. 30, 2004);

⁷⁷ *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004); BLACK’S LAW DICTIONARY at 577.

second PIP when he returned to work under new supervisors. Learning this prompted him to return to Human Resources to complain again.

The evidence offered with the motion to stay reinstatement supports T-Mobile's contention had valid reasons to place the Complainant on the first PIP. The Complainant himself wrote in more than one email that he isn't an analytic person and can't do the sort of financial analysis his specific job at T-Mobile demanded.⁷⁸ He argues T-Mobile changed his job responsibilities to require more financial analysis in retaliation for medical leave he took in 2008, but assuming this is true, a failure to accommodate a disability is not an issue the Secretary of Labor adjudicates in a SOX complaint. The only protected activity in this SOX matter is the Complainant's objection to how T-Mobile was handling the VHE issue with partner mobile network carriers. T-Mobile has made a cogent argument that the Complainant's objections had little if anything to do with its decision to terminate his employment and that T-Mobile would have made the same choice whether or not he had objected. It also seems to have a reasonable basis for terminating his employment based on his admitted lie to Human Resources about how he came to contact Mr. Lai in the course of the investigation.⁷⁹

T-Mobile's proof calls for some response. A 1945 Senate Judiciary Committee Report on the Administrative Procedure Act emphasized that evidence the party with the burden of proof offers can't just be ignored, using as an example proof offered by an applicant for some sort of federal license. It said:

“That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence. For example, credible and credited evidence submitted by the applicant for a license may not be ignored except upon the requisite kind and quality of contrary evidence. No agency is authorized to stand mute and arbitrarily disbelieve credible evidence.”⁸⁰

⁷⁸ See, e.g., Motion, Ex.-19.A at 00578; Ex.-3.C at 00577.

⁷⁹ See *id.*, at 12; Ex.-3A at 112–114.

⁸⁰ S. Rep. No. 752, 79th Cong., 1st Sess., 22 (1945), quoted in *Dep't of Labor v. Greenwich Collieries, Inc.*, 512 U.S. at.

To counterbalance the evidence T-Mobile has presented, the Complainant relies on the findings the OSHA Regional Administrator made in his determination letter.⁸¹ The Complainant argues that as long as the letter is facially sound and free of obvious procedural or factual errors, I should reject T-Mobile's motion to stay preliminary reinstatement.⁸² The Complainant believes "the primary task of the reviewing authority . . . is to review the reinstatement decision itself and determine if it is procedurally and analytically sound."⁸³

But that isn't the legal standard the Secretary chose in the regulations. The Complainant cites to no authority to support his argument. Nor can I find any legal authority that restricts an evaluation of a motion to stay preliminary reinstatement to the findings OSHA made, unless the order is facially deficient. What I have before me is, on the one hand, an apparently convincing evidentiary presentation from T-Mobile, and, on the other, not much more than a summary of OSHA's order from the Complainant. Because I review OSHA's order *de novo*,⁸⁴ the factual findings and legal conclusions of that order don't have evidentiary weight on their own.

Under § 7 of the APA, as the moving party T-Mobile bears the burden of persuasion.⁸⁵ In adjudicating whether T-Mobile has met its burden, I have to look at the evidence offered now, not as it might have existed before OSHA or as it may change when the Complainant has cross-examined at trial witnesses whose declarations T-Mobile offered on this motion. After that full presentation, including evidence the Complainant may have chosen not to introduce at this stage of the proceedings, I may join in the conclusion of the Regional Administrator for OSHA and find in the Complainant's favor. On the evidence available now, however, T-Mobile is the party more likely to prevail.

I find T-Mobile has met its burden on this evidentiary record. Because it has shown a greater likelihood of success than not, I need not balance this factor against the others as would be required if T-Mobile could show only "serious questions going to the merits."⁸⁶

⁸¹ *See* Opposition, at 2, 5–14.

⁸² *See id.*, at 2 ("T-Mobile fails to cite significant procedural factual, or legal error by OSHA"), 5 ("the OSHA order is sound on its face and consistent with the evidence in the record").

⁸³ *Id.*

⁸⁴ 29 C.F.R. § 1980.107(b).

⁸⁵ 5 U.S.C. § 556(d).

⁸⁶ *See Developmental Svcs.*, 666 F.3d at 545.

2. Irreparable Injury

A party seeking a preliminary injunction must demonstrate irreparable harm.⁸⁷ Possible harm isn't enough; the moving party must demonstrate that such harm is likely without the injunction.⁸⁸

T-Mobile has raised two interrelated harms. First, it emphasizes the Complainant's long history of performance problems and difficulty working with supervisors and other employees. It sees him as "an undeniably incapable employee" who, if reinstated, could not be held accountable for his incompetence and who would be a chronic disruption to its business operations.⁸⁹

Second, it argues his inability to perform his job duties, leave it literally irreparably harmed because it would be required to pay him wages for no benefit to T-Mobile; these wages are not recoverable even if T-Mobile prevails at trial. Reinstatement represents a financial loss T-Mobile can never recover.

T-Mobile's arguments initially sound much like the generic arguments regarding competence and animosity often made by employers seeking to avoid reinstatement. Unlike the generic case, however, T-Mobile has submitted proof that on its face backs up its claims. It is undisputed the Complainant received generally negative performance reviews the whole time he worked at T-Mobile. The Complainant's negative performance evaluations and PIPs include detailed notes about deficient performance, including that on one occasion he unilaterally changed the terms of the partnership agreement he was negotiating, without authority to do so, which led to millions of dollars of additional risk exposure for T-Mobile.⁹⁰ The Complainant also admits he used a false name to contact former T-Mobile employee James Lai in an attempt to support his disability retaliation allegations, which gives some reason to doubt his honesty and trustworthiness.⁹¹ And it is apparently uncontested that the Claimant negotiated only a single partnership agreement, where his successor has negotiated twenty in a similar amount of time.⁹²

In such circumstances, requiring T-Mobile to reinstate the Complainant to a position where negotiates partnership agreements or

⁸⁷ *See Winter*, 555 U.S. at 20.

⁸⁸ *Id.* at 376.

⁸⁹ *See Motion*, at 2.

⁹⁰ *See id.*, Ex.-5 at 00006 ("Furthermore, after specific instructions on terms of the Orange Dominican Republic agreement terms [sic], Rob unilaterally changed the terms of the agreement without informing anyone in the management. The changed terms increased T-Mobile liability and risk with the partner in millions of \$.").

⁹¹ *Id.*, Ex.-3A at 112-114.

⁹² *Id.*, Ex.-11 at ¶ 8.

otherwise represents T-Mobile in its dealings with other carriers leaves T-Mobile open to very real harm: having an employee it has specific reason to distrust negotiating contracts on its behalf. T-Mobile has shown likely irreparable injury.⁹³

3. Balance of Hardships

A party seeking a stay of reinstatement must show the balance of hardships favors a stay.⁹⁴ That balance usually favors the employee, not the employer. An employer generally has less to lose from reinstating an employee than the employee stands to lose financially from loss of wages.⁹⁵ More than money is involved in this particular balance, however.

T-Mobile has presented well-documented proof tending to show that the Complainant was struggling to perform his job in the months before he became aware of the VHE feature. The Complainant himself has admitted he was ill-suited to perform the financial analysis this job requires.⁹⁶ He also admitted to lying to human resources about how he contacted Mr. Lai, which has an element to it of scheming for self-benefit.⁹⁷ And, as described above, the Complainant changed the only partnership agreement he negotiated on T-Mobile's behalf unilaterally, to T-Mobile's disadvantage.⁹⁸

These apparently uncontested facts alter the normal balance of hardship calculus. They increase the hardship T-Mobile would face if it reinstates an employee who has acknowledged himself ill-suited to analyze the financial data the job entails, who has in the past changed the terms of T-Mobile's contracts without approval from his managers, and who also has engaged in some degree of deception in his contact with James Lai. Nor has the Complainant responded with proof about specific financial distress he has faced either immediately after his termination, since the findings and reinstatement order the Assistant

⁹³ Neither party raised the possibility of economic reinstatement, *i.e.*, paying the Complainant what his wages would be, without reinstating him to active work at T-Mobile. See note 100, *below*.

⁹⁴ See *Welch*, slip op. at *4; *Bailey*, slip op. at *2–4. *Bailey* recites the normal four-element test but then appears to elide the balance of hardships inquiry with its irreparable harm inquiry. See *Bailey*, at 2–4. I do not follow *Bailey* in merging the two elements because I do not believe the Board intended to alter well-settled law on injunctions—a form of equitable that is the peculiar province of Article III courts.

⁹⁵ See, *e.g.*, *Welch*, slip op. at *4; *Bailey*, slip op. at *2.

⁹⁶ See, *e.g.*, Motion, Ex.-19.A at 00578; Ex.-3.C at 00577.

⁹⁷ *Id.*, Ex.-3A at 112–114.

⁹⁸ See *id.*, Ex.-5 at 00006; fn. 90.

Secretary entered over two years later, or since T-Mobile's motion to stay reinstatement was filed.

If the Complainant prevails at trial, he will be of course entitled to back pay and interest as part of his award. He will be made whole financially for the time he would have been reinstated. Financial loss incurred in the interim between initiating a suit and obtaining a judgment or relief isn't ordinarily considered irreparable injury.⁹⁹

T-Mobile cannot recover any salary payments it makes to the Complainant, no matter the outcome at trial.¹⁰⁰ Its evidence tends to show it couldn't be confident in Complainant's honesty or competency if he were reinstated. In these circumstances, I find the balance of hardships favors T-Mobile.

4. Public Interest

T-Mobile must finally show the public interest favors a stay.¹⁰¹ In most situations where preliminary reinstatement is ordered, the public interest favors it. Congress wants to ensure that whistleblowers are adequately protected, to benefit the whistleblowing employee, and to demonstrate to other employees and employers that retaliation against whistleblowers is impermissible, intolerable, and promptly remediable.¹⁰²

Section 806 as drafted assumes that OSHA will promptly investigate the complaints it receives and, where warranted, order preliminary reinstatement promptly.¹⁰³ The message sent to other employees, other potential whistleblowers, and to the public as a whole, is strongest when an employee is promptly reinstated to the job held before termination.

⁹⁹ See, e.g., *California Pharmacists Assn. v. Maxwell-Jolly*, 563 F.3d 947, 951–52 (9th Cir. 2009) (“Typically, monetary harm does not constitute irreparable harm”); *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 471 (9th Cir. 1984) (“Mere financial injury will not constitute irreparable harm if adequate compensatory relief will be available in the course of litigation.”)

¹⁰⁰ The comments accompanying the latest revision to the governing regulations make clear the Department's position that economic reinstatement—*i.e.*, payments made instead of actually reinstating an employee— isn't recoverable if the employer prevails at trial. See 76 FR 68088–89. If economic reinstatement payments aren't recoverable, salary paid to an employee actually reinstated can't be recovered either. In that situation the employer receives contemporaneous value for the wages paid.

¹⁰¹ See *Bailey*, slip op. at *2. See also *Winter*, 555 U.S. at 20; 29 C.F.R. § 1980.106(b)(1); 76 F. R. 68084, 68089.

¹⁰² See *Bailey*, slip op. at *4–5.

¹⁰³ For example, the statute contains a “kick-out” provision that allows a complainant to file a civil complaint in U.S. District Court if the Secretary of Labor hasn't fully adjudicated his or her SOX employment discrimination claim within 180 days of filing.

This isn't paradigmatic situation. OSHA took three years to investigate the complainant and issue its findings.¹⁰⁴ After T-Mobile's timely motion to stay reinstatement, the Complainant's change of lawyers led to another 7-month delaying in filing his Opposition. I am left considering the merits of "preliminarily" reinstating an employee who had been fired four years ago.

From the evidence that has been offered, it appears T-Mobile had some valid reasons to terminate the Complainant's employment; the question is whether impermissible reasons also were in that mix. The Complainant's preexisting negative job reviews and performance problems have been recounted already.

The unusual lapse in time from the termination to the disposition of this motion attenuates the public interest in this reinstatement. In these particular circumstances, I find the public interest does not counterbalance the other factors that favor a stay.

The four factors, considered as a whole, tip in favor of a stay.

IV. Conclusion

What T-Mobile offered has persuaded me that exceptional circumstances make it appropriate to stay OSHA's order of preliminary reinstatement. If the Complainant prevails at trial he will recover back wages for the period he would have been reinstated, along with the other compensation and relief he is entitled to under the Act. T-Mobile need not reinstate him in the meantime.

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

¹⁰⁴ See Findings, at *1-2 (Findings issued August 7, 2012; complaint submitted July 21, 2009).