RECORD NOS. 08-1970(L), 08-2196

In The
United States Court of Appeals
For The Fourth Circuit

DAVID R. STONE,

Plaintiff – Appellant,

v.

INSTRUMENTATION LABORATORY COMPANY; BRIAN DURKIN; ANN DEFRONZO; RAMON BENET,

Defendants – Appellees,

and

INSTRUMENTATION LABORATORY SPA,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

REPLY BRIEF OF APPELLANT

R. Scott Oswald
Adam Augustine Carter
THE EMPLOYMENT LAW GROUP, P.C.
888 17th Street, N.W., Suite 900
Washington, D.C. 20006
(202) 331-2883

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statute

Federal Regulations

Federal Rule

Legislative Materials

Restatements of the Law

Miscellaneous

INTRODUCTION

Without any support or authority, other than the Department of Labor's *ultra vires* comments to the SOX regulations, the Appellees argue boldly[1] that the United States District Court for the District of Maryland (the "District Court") below was free to apply the doctrine of collateral estoppel, and thus deny the Plaintiff-Appellant-employee David Stone ("Stone") his unequivocal statutory right to "de novo review" in federal district court. The District Court should be reversed and this matter should proceed with discovery in the District Court for the following reasons discussed more fully below. First, contrary to Appellees' assertions, Stone has tremendous authority for his position and it is both more

[1] In the Opposition Brief, Appellees also assert that the *amicus curiae* the National Whistleblower Center ("Center") "lacks objectivity," and demand that this Court "not give credit to its claim to a special ability to divine the intent of Congress concerning SOX." Opp. Br. at 7. The Center, however, is a well-respected public interest organization that has played an important role in protecting whistleblowers. In 2002, the Center worked closely with the Senate Judiciary Committee and strongly endorsed its efforts to "prevent recurrences of the Enron debacle and make similar threats to the nation's financial markets." 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (remarks of Senator Leahy, quoting from letter signed by the Center as well as the Government Accountability Project). The Center has participated as an *amicus curiae* in numerous cases, including *Taylor v. Sturgell*, 553 U.S. __, 128 S. Ct. 2161 (2008); *Doe v. Chao*, 540 U.S. 614 (2004); *EEOC v. Waffle House, Inc*., 534 U.S. 279 (2002); *Beck v. Prupis*, 529 U.S. 494 (2000); *Haddle v. Garrison*, 119 U.S. 489 (1998); *English v. General Electric Co.*, 496 U.S. 72 (1990); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008); *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006) (per curiam); and *Citizen's Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004). While Appellees disagree with the Center's mission to protect whistleblowers, Appellees should be able to respond to *amicus curiae's* arguments without attacking its impartiality.

persuasive and more authoritative than either an agency comment about a regulation entitled to no deference, or an unpublished district court opinion touting the usual platitudes in favor of collateral estoppel: ***the language and plain meaning of a federal statute***. Second, there is significant authority to support the proposition that arbitral adjudication (which is very similar to the administrative adjudication performed by the DOL's Office of the Administrative Law Judges in this case below) is not entitled to preclusive effect where, as here, Congress expressed an intention for judicial determinations. Moreover, the United States Code is filled with examples of the federal district courts having review of various agency decisions (judicial and non-judicial in nature), but only in six whistleblower protection statutes is the term "de novo review" used. If Congress intended preclusive effect to be given to administrative litigation, a new term would not have been necessary. Third, briefing on the pleadings in an employment case without the opportunity to take any discovery, issue a single subpoena, or obtain any documents from the employer is not – under any possible, fair, construction of what is needed to apply collateral estoppel – a full, fair, opportunity to litigate the matter vigorously. In addition, the Administrative Law Judge's ("ALJ") decision was not final and therefore cannot meet this Circuit's test for application of the doctrine of collateral estoppel. And fourth, if all that "de novo review" means is that the District Court was justified in using its equitable powers

to force the Secretary of Labor to render its determination more quickly, then what meaning is to be given to Stone's right to bring "***an action at law*** or equity for de novo review in the appropriate district court of the United States . . . ?" 18 U.S.C. § 1514A(b)(1)(B) (emphasis added).

ARGUMENT

I. THE PLAIN LANGUAGE OF § 1514A CLEARLY PROVIDES A KICKOUT THAT ALLOWS STONE AN OPPORTUNITY FOR *DE NOVO* REVIEW IN DISTRICT COURT.

Section 1514A of SOX clearly and plainly states that a complainant may "bring[ ] an action at law or equity for *de novo* review in the appropriate district court of the United States" if the Secretary of Labor "has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant . . . ." 18 U.S.C. § 1514A(b)(1)(B).[2] Practitioners in the field have taken to calling this feature of the statute a "kickout." The Appellees argue that the plain language allowing a complainant to kickout and obtain a *de novo* review in district court is trumped by

[2] The DOL implementing regulations are consistent with the statutory language. *See* 29 C.F.R. § 1980.114(a) ("If the Board has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.").

the Secretary of Labor's comments in the regulations governing the whistleblower provisions of SOX. *See* Opp. Br. at 26. This position is untenable.

It is well established that in statutory construction, where Congress has spoken directly on an issue and Congress's intent is clear, courts "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In recognizing the judiciary as the final authority on issues of statutory construction, the Supreme Court noted that it "must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. Thus, for the Secretary's comments to govern judicial interpretation of SOX, Congress must not have clearly expressed its intent on the issue in question.

Moreover, SOX does not explicitly delegate authority to DOL to interpret the statute. This is dissimilar from *Long Island Care at Home, Ltd. v. Coke*, where the Supreme Court recognized that the Fair Labor Standards Act "provides the Department of Labor with the power to fill these gaps through rules and regulations." 551 U.S. ___, 127 S. Ct. 2339, 2346 (2007). The statute at issue in *Long Island* exempts employees working in domestic service employment to provide companionship services "as such terms are *defined and delimited by regulations of the Secretary* [of Labor]." *Id.* at 2345 (quoting 29 U.S.C. § 213(a)(15)) (emphasis added). SOX, by contrast, has no such explicit grant of

authority to the DOL. Thus, the Secretary of Labor's implied authority to interpret SOX's statutory language in administering the program is limited to "the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

Where Congress has not left a gap in statutory language, but has expressed clear intent by specifying how the statute should be applied, the agency has no authority to proffer its own, different interpretation of the statute's meaning. *See id.* Section 1514A makes Congress's intent clear by providing a remedy for complainants who have not received a final decision from DOL within 180 days of filing the complaint. *See* 18 U.S.C. § 1514A(b)(1)(B). If the Secretary, or the Secretary's designee, fails to act within the specified 180 days, the complainant may kickout and proceed to a appropriate district court for *de novo* review. *See id.* Congress's intent is clear. By including the "*de novo*" language, Congress created a special avenue for complainants to have their case heard when DOL does not act in a timely fashion.

The Appellees have not argued that § 1514A(b)(1)(B) is unclear or ambiguous. Instead, the Appellees have simply argued that the Court should defer to the Secretary's comments in interpreting the statutory language. But, if the plain language of the statute is not ambiguous, there is no need to look beyond the statute to the agency's implementing regulations. Moreover, the Secretary's

comments recognize a complainant's right to a *de novo* review, before later suggesting that a district court still has the authority to apply preclusion principles to guard against unnecessary and wasteful, duplicative litigation. *See* 29 C.F.R. § 1980.114. In his opposition to the Appellees' motion to dismiss before the District Court, Stone conceded that the District Court generally has the power to apply preclusion principles. The Appellees have seized on this argument and asserted that it is a damning admission. *See* Opp. Br. at 33. Again, Appellees are mistaken. Stone recognized only that district courts usually have the authority to apply preclusion principles, but he never conceded that the ALJ's decision should be accorded preclusive effect. *See* J.A. at 125. Stone argues that applying preclusion principles to SOX would render the plain language of the statute unnecessary and ineffectual, and thus concludes that this cannot be the proper interpretation of the statute.

The District Court ignored Congress's clearly expressed intent and did not review Stone's claim *de novo*. *See id.* at 161-71. Instead, the District Court deferred to the ALJ's decision and relied wholly upon the doctrine of collateral estoppel. *See id.* There is no argument by the Appellees that the Secretary of Labor issued a final decision within 180 days of when Stone filed his complaint, and there is no argument that Stone's bad faith caused the delay. Thus, there is no possible reason why Stone should be disallowed from having his case reviewed

"de novo" in federal district court. Whatever "de novo" review means, it cannot possibly mean that the District Court can do what it did in this case below and slough off its duties under SOX by simply mandating that the DOL perform its review in a more timely fashion. Again, the plain meaning here is evident: Stone is entitled to a plenary, de novo, opportunity to litigate his claim in the District Court.

II. THE KICKOUT OPTION MAKES SENSE AND IS NOT ABSURD.

A. This Case is More Like *Hanna*, and Less Like *Allen*.

To support their position, the Appellees assert that in reaching its decision the District Court properly analyzed and applied two decisions from other district courts that allowed the application of collateral estoppel to ALJ decisions in SOX cases. *See* Opp. Br. at 28. However, this position ignores some of the most basic facts about the two cases and also continues to ignore the plain meaning of the statute in favor of the administrative regulations.

The Appellees argue that *Allen v. Stewart Enterprises, Inc.* is similar to the instant case because of the procedural postures of the cases. *See* No. 05-4033 (E.D. La. Apr. 6, 2006);[3] *see also* Opp. Br. at 28-29. However, this is not true; the cases are quite dissimilar. The plaintiff in *Allen* had a full opportunity to litigate his case before the ALJ, unlike Stone. *See* J.A. at 109-16. Before the ALJ in *Allen*

[3] The text of the *Allen* decision is included in the Joint Appendix at 109-16.

granted summary decision in favor of the employer, the *Allen* plaintiff litigated the case vigorously, moving through the regular phases of litigation (including discovery). The ALJ in *Allen* held a "six day hearing in which all parties were afforded a full opportunity to adduce testimony, offer documentary exhibits, submit oral argument and file post-hearing briefs" and finally issued a 109 page decision and order. *See Allen generally*, J.A. at 113. Stone received none of these benefits of full litigation. His case was dismissed by the ALJ at the pleading stage, before any discovery in the matter. *See* J.A. at 69-94. Stone conducted no discovery, had no hearing at all (much less six days to offer testimony), was able to obtain no documentary exhibits from his former employer, engaged in no oral argument, and there were no post-hearing briefs. Stone did receive a 24 page final decision from the ALJ, but this one factor alone cannot constitute a "full opportunity to litigate the issues" as the Appellees suggest. *See* Opp. Br. at 30. Stone's case is clearly distinguishable *Allen*.

On the other hand, Stone's case is very similar to *Hanna v. WCI Communities, Inc.*, where collateral estoppel was not applied because the plaintiff had not had an opportunity to litigate his claims. *See* 348 F. Supp. 2d 1322, 1328 (S.D. Fla. 2004). In *Hanna*, the plaintiff had not yet appealed the DOL findings to an ALJ, and had received none of the benefits of litigating before the ALJ. *See id.* Admittedly, Stone did have an opportunity to institute his appeal to an ALJ, but it

was over before it began as his appeal was dismissed prior to the beginning of the discovery process, and without a hearing. Stone was given less than full opportunity to brief his case and to engage in the benefits of active, vigorous litigation. The Appellees attempt to discredit *Hanna* by highlighting that court's statement that "when a case reaches the administrative law judge … rules or principles designed to assure production of the most probative evidence will apply," and thus concluding that the ALJ's decision is sufficiently judicial to warrant preclusive effect. *Id.* (citing 29 C.F.R. § 1980.107). However, as Stone's case before the ALJ never reached discovery, Stone had no opportunity to receive "production of the most probative evidence." Stone received no evidence in the ALJ's review of his case. Like the *Hanna* plaintiff, Stone did not fully litigate his case before the ALJ. Thus, allowing Stone to proceed to a *de novo* review by the District Court would hardly lead to an absurd result, and instead would serve to allow him the full rights afforded by § 1514A(b)(1)(B) of SOX.

B. SOX and Other Whistleblower and Anti-Discrimination Statutes Provide Evidence of Congress's Intent to Prefer a Judicial Resolution.

When SOX is examined in the context of the other whistleblower protection and federal anti-discrimination statutes, Congress's intent to provide complainants with an opportunity for plenary, *de novo* review in district court makes sense.

In *Rosenfeld v. Department of the Army*, this Court recognized Congress's preference of providing discrimination complainants not only an avenue for

administrative review of their claims, but also an opportunity to receive de novo *judicial* review of their claims:

> Federal anti-discrimination statutes embody a strong presumption in favor of judicial resolution of disputed questions of fact. Prior administrative findings, whatever result may be reached, are ordinarily not entitled to preclusive effect in a subsequent discrimination suit, even though the same facts are in dispute. Whether the prior administrative findings be those of the Civil Service Commission, the EEOC, or any other federal agency is immaterial. The plain lesson of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Chandler v. Roudebush*, 425 U.S. 840 (1976), is that Congress entrusted the ultimate resolution of questions of discrimination to the federal judiciary.

Rosenfeld v. Dep't of the Army, 769 F.2d 237, 239 (4th Cir. 1985). In *Rosenfeld*, this Court followed the Supreme Court's guidance in deferring to Congress on this issue. The Supreme Court has held that "the resolution of statutory or constitutional issues is a primary responsibility of courts . . . ." *Alexander*, 415 U.S. at 57. This lends further credence to the argument, *see* Part I *supra*, that courts must follow the plain language of SOX, and not the Secretary's comments on agency regulations.

This Court recognized, however, that although there are times when it is appropriate to apply preclusion principles, the rule is inapplicable where Congress intended to provide an additional review of a complainant's claims. The *Rosenfeld* Court stated:

> Ordinarily *res judicata* and collateral estoppel may be invoked where an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. **This settled rule of administrative *res judicata,* however, is inapplicable where legislative policy favors an independent determination of the issue in question in another tribunal**.

Rosenfeld, 769 F.2d at 240 (emphasis added and indicated by boldface); *see also* Restatement (Second) of Judgments § 83(4)(b) (1982). The Supreme Court went even further and noted that *de novo* hearings must be granted where there is evidence of Congress's "unambiguous choice to grant federal employees the right to plenary trials in the federal district courts." *Chandler*, 425 U.S. at 853-54. This Court then confirmed that "[t]he holding in *Chandler*, permitting relitigation of the factual question of discrimination in federal court notwithstanding prior rejection of the identical claim by the Civil Service Commission, necessarily repudiates any *res judicata* or collateral estoppel effect for administrative findings." *Rosenfeld*, 769 F.2d at 240. This same conclusion must be drawn regarding the plain language of § 1514A of SOX.

Other circuits have come to a similar conclusion regarding arbitration proceedings. In *Gonzalez v. South Pacific Transportation Co.*, the Fifth Circuit analyzed the applicability of preclusion principles in arbitration proceedings and discussed the Supreme Court's guidance on this issue. *See* 773 F.2d 637, 643 (5th

Cir. 1985). In *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972), the Supreme Court found that "[e]ven if the same claim and factual allegations were determined by binding arbitration, the plaintiff is entitled to *de novo* review in a federal court and doctrines of *res judicata* or collateral estoppel are inapplicable." *Gonzalez*, 773 F.2d at 643.

The Fifth Circuit then examined the reasons underlying this theory. *See id.* First, the Supreme Court had noted that because the statute in question did not mandate that federal courts provide full faith and credit to arbitration decisions, any preclusive effect would be of judicial origin. *See id.*; *McDonald v. City of W. Branch*, 466 U.S. 284, 288 (1984). Second, the federal statutes at issue had all created substantial rights that Congress intended to be judicially enforced, and even binding arbitration was not a substitute, because the "arbitrator's experience relates to the law of the shop, not the law of the land . . . ." *See Gonzalez*, 773 F.2d at 643 (quoting *Alexander*, 415 U.S. at 57) (internal quotation marks omitted). Importantly, the Supreme Court noted that arbitral factfinding was not equivalent to judicial factfinding because "the record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable." *McDonald*, 466 U.S. at 291 (quoting *Alexander*, 415 U.S. at 57-58).

Many of these same reasons are visible in the case at bar. SOX does not mandate that federal courts provide full faith and credit to interim, administrative decisions from DOL's Office of the Administrative Law Judges. To the contrary, SOX mandates that the district courts review complainant's claims *de novo*. *See* 1514A(b)(1)(B). It is not hard to imagine why review by an ALJ at the DOL is not a sufficient substitute for *de novo* review by a federal district court judge. Stone received none of the benefits common to district court actions such as the liberal Federal Rules of Civil Procedure, the Federal Rules of Evidence, a strong power to subpoena witnesses and documents, and the power of the court to sanction the parties for discovery abuses and other infractions.

For these reasons, this Court should follow Supreme Court precedent by analogizing this case and recognizing, as did the Sixth Circuit that, "[t]he whole point of *Alexander* and its progeny is to ensure that the federal courts' ability to decide federal civil-rights claims - even those that grow out of the same facts as the claims submitted to labor arbitration proceedings - are not controlled or handicapped by what happens in the arbitral forum." *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 552 (6th Cir. 2008). By analogy, the federal courts' ability to decide federal whistleblower claims – even those that grow out of the same facts submitted to the DOL's ALJ – are not controlled by what happens in the administrative forum. *Cf. id.*

C. Congress Has Not Used the Term "De Novo Review" Very Often.

The term "review" appears in the same sentence as the term "district court" a total of 297 times in the United States Code. Of those, only seven (7) times is the review denoted to be "de novo" review. Six (6) of the seven are whistleblower protection statutes (6 U.S.C. § 1142; 15 U.S.C. § 2087; 18 U.S.C. § 1514A; 42 U.S.C. § 5851; 49 U.S.C. § 20109; and 49 U.S.C. § 31105), and the seventh is Fed. R. Bankr. P. 9033 which gives the federal district courts "de novo review" of written objections to proposed findings of fact and conclusions of law entered by a bankruptcy court in a non-core proceeding.

In trying to glean what Congress may have meant by the use of the term "de novo" review in the various whistleblower statutes all modeled on one another, this Court can look to how the Eleventh Circuit interpreted the meaning of "de novo review" contained in Fed. R. Bankr. P. 9033. *See In re Toledo*, 170 F.3d 1340 (11th Cir. 1999). The type of review that the district court is to conduct when the proceeding before the bankruptcy court is a non-core matter is "plenary." *Id.* at 1342. Of course the first definition of "plenary" is "complete in every respect: absolute, unqualified." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/plenary *last visited on* Feb. 11, 2009. This is borne out in the advice that the Eleventh Circuit gave to the district court that was inclined to be deferential to the bankruptcy court with respect to its application of collateral

estoppel: "On remand, the district court should undertake *a fresh, independent analysis* of these issues." *In re Toledo*, 170 F.3d at 1350 n.12 (emphasis added).

The Appellees also attempt to distinguish SOX's grant of "*de novo*" review from other statutes that provide for a "trial *de novo*." *See* Opp. Br. at 36. This semantic argument is unavailing because it does not change the meaning of "de novo" here from fresh, independent, plenary, not limited in any respect, to limited by the doctrine of collateral estoppel.

III. THE DISTRICT COURT ERRED IN APPLYING COLLATERAL ESTOPPEL TO STONE'S CLAIM BECAUSE THE ALJ'S DECISION WAS NOT FINAL AND STONE DID NOT HAVE A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS CLAIMS BEFORE THE ALJ.

The Appellees aver that because the ALJ issued a 24-page opinion, Stone must have received a full and fair opportunity to litigate his claims, and that the District Court correctly applied collateral estoppel. The first thing to note in rejecting this argument is that the case at bar involves a whistleblower protection statute specifically and employment law generally. Such cases are fact-intensive inquiries, and do not lend themselves to summary disposition on a bare record. *Cf. Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008) (unanimous decision).

Second, the ALJ's decision was not final. The ALJ's decision becomes "final" only if the parties do not request review by the Administrative Review Board. *See* 29 C.F.R. § 1980.110; 49 U.S.C. § 42121(b). In this Circuit

"[c]ollateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *United States v. Fiel*, 35 F.3d 997, 1005-06 (4th Cir. 1994) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). This Circuit went on to adopt what is now commonly referred to as the *Fiel* test for collateral estoppel:

> To determine whether the issue should be precluded, the court must decide (1) whether the issue in question is identical to the previous issue, (2) whether it was actually determined in the prior adjudication, (3) whether it was necessarily decided in that proceeding, (4) *whether the resulting judgment settling the issue was final and valid*, and (5) whether the parties had a full and fair opportunity to litigate the issue in the prior proceeding.

Fiel, 35 F.3d at 1006 (emphasis added).

This argument has particular force and power when it is considered in the context of 18 U.S.C. § 1514A(b)(1)(B) and the other whistleblower protection statutes that are like it giving claimants the power to bring their claims into federal district court for "de novo review." We know that Congress could not have intended that non-final decisions of the ALJs be given any preclusive effect in cases brought to district court because they would be, of necessity, non-final decisions. To put it a slightly different way, every case that is allowed to kickout meets two requirements: a) there is no final decision from the Secretary within 180 days of filing, and b) there is no bad faith on the part of the claimant in causing the

delay. Congress is deemed to know the caselaw with respect to the need for a "final" decision to be given preclusive effect when it drafts a statute, and thus must have determined that any efforts spent by the DOL (or the parties) in a SOX case prior to the Secretary issuing a final decision are entitled to no preclusive effect if not done in a timely manner such that a final decision was made inside of 180 days. This emphasis on speed is a unique characteristic of SOX and the statute on which it was modeled, the AIR 21[4] (e.g. requirement of filing with OSHA within 90 days of adverse action).

There are plenty of procedural rules that are designed to give one side an advantage and are part of the normal give-and-take in any statute. The remarkably short statute of limitations in a SOX case (90 days) decidedly favors employers. Why should it come as a surprise that the kickout option puts an arrow in the quiver of the employee to force a re-litigation if the result before the DOL is not favorable and timely, and to afford SOX plaintiffs the option of prosecuting their claims in federal court? For example, the Commonwealth of Virginia maintains a nonsuit rule which gives the civil plaintiff in Virginia a powerful weapon (and an engine to settlement) to dismiss the case once and bring it again anew against the same defendant on the same subject matter within six months. *See* Va. Code § 8.01-380. Such a nonsuit may be taken after discovery and even during trial if

[4] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. 106-181, *codified at* 49 U.S.C. § 42121.

taken before the jury retires from the bar or before a motion to strike the evidence is sustained. *See id.* The kickout in SOX is a similar device.

Third, "[c]ollateral estoppel is unavailable when a 'new determination of the issue is warranted by differences in the quality or extensiveness of the procedure followed in the two courts.' " *Copeland v. Merrill Lynch & Co., Inc.*, 47 F.3d 1415, 1423 (5th Cir. 1995) (citing Restatement (Second) of Judgments § 28(3)). There can be little doubt that the procedure followed in the federal district courts is a far cry from the procedure followed by the Office of Administrative Law Judges. For instance, DOL does not have express authority to issue subpoenas to witnesses who are not controlled by the parties in the case. *See* Stephen M. Kohn, Michael D. Kohn, and David K. Colapinto, *Whistleblower Law*: A Guide to Legal Protections for Corporate Employees 57 (Praeger 2004). Additionally, the DOL does not follow the Federal Rules of Civil Procedure, but looks to its own Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges. *See generally* 29 C.F.R. § 18. The Federal Rules of Civil Procedure only serve an advisory purpose in instances not specifically contemplated under the OALJ Rules. *See* 29 C.F.R. § 18.1. This alone constitutes a substantial difference in the quality or extensiveness of the procedures followed by the OALJ and the federal district courts.

Stone was severely impacted by this inequity, as his appeal was cut short after mere briefing before the ALJ at the pleading stage. He did not receive any of the common and usual benefits of litigation. Thus, Appellees' argument that Stone received a full and fair opportunity to litigate his claims fails.

IV. SOX GIVES STONE THE RIGHT TO BRING "AN ACTION AT LAW" WHICH THE DISTRICT COURT DENIED HIM.

Suppose that all district courts routinely mandate quicker action by the Secretary of Labor in response to whistleblowers who want to kickout of the administrative review process after some amount of administrative "litigation." Suppose, in short, that all district courts do what the District Court did in this case – issue a writ of mandamus to the agency to proceed on a more timely basis. Would that not render a part of SOX meaningless? What would then be made of the part of 18 U.S.C. § 1514A(b)(1)(B) which allows a claimant like Stone to bring "**an action at law** or equity?" 18 U.S.C. § 1514A(b)(1)(B) (emphasis added). When doing statutory construction this Court has said that it will attempt to read a statute in such a way as to give meaning to as much of the statute as possible, and so as to avoid surplusage. *See Etape v. Chertoff*, 497 F.3d 379, 384 (4th Cir. 2007) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). If district courts need not conduct "de novo review[s]" and can abdicate their duty under SOX by referring kickout cases back to the DOL with orders on moving the case more quickly, would it not make sense that the statute say as much, and why would the statute

make clear that the action brought could be one at law (for money damages) or equity (specific performance) if only the latter was true? Such a construction totally belies the language of the statute, and Stone's suggested reading is the only one that makes any sense at all: 18 U.S.C. § 1514A(b)(1)(B) means what it says and a complainant gets a plenary, de novo review in an appropriate federal district court if the Secretary has not issued a final decision within 180 days and regardless of how much litigation the parties have done up to that point.

CONCLUSION

WHEREFORE, and for all the foregoing reasons, Appellant David R. Stone respectfully requests that the decision of the District Court granting the Appellees' motion to dismiss be reversed and that the case be remanded to the District Court for further proceedings.

Respectfully submitted,

/s/

R. Scott Oswald
Adam Augustine Carter
The Employment Law Group, P.C.
888 17th Street, NW, Suite 900
Washington, D.C. 20006
(202) 261-2803
(202) 261-2835 (facsimile)
acarter@employmentlawgroup.net

Counsel for Appellant David R. Stone

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains *5,107* words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using *Microsoft Word 2000* in *14pt Times New Roman*; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: February 12, 2009

/s/ R. Scott Oswald
Attorney for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 12th day of February, 2009, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Robert M. Shea
Scott J. Connolly
MORSE, BARNES-BROWN & PENDLETON, P.C.
Reservoir Place
1601 Trapelo Road
Waltham, Massachusetts 02451
(781) 622-5930

Counsel for Appellees

Richard Randolph Renner
KOHN, KOHN & COLAPINTO, PC
3233 P Street, NW
Washington, DC 20007
(202) 342-6980

Counsel for Amicus

I further certify that on this 12th day of February, 2009, I caused the required number of bound copies of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

/s/ R. Scott Oswald
Attorney for Appellant