# APPENDIX A

# United States Court of Appeals
## For the First Circuit

No. 19-1970

THOMAS RIMINI,

Petitioner,

v.

US DEPARTMENT OF LABOR,

Respondent.

Before

Howard, Chief Judge,
Thompson and Kayatta, Circuit Judges.

**JUDGMENT**

Entered: February 22, 2021

This is one of several appeals by Thomas Rimini, pro se, stemming from Rimini's claims that he was subjected to retaliation by his former employer, J.P. Morgan Chase & Co. LLC ("JPMC"), in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A. In this case, Rimini seeks review of a final decision by the U.S. Department of Labor's Administrative Review Board ("ARB"), which consolidated an administrative complaint Rimini filed in 2019 with two appeals of ALJ decisions dismissing complaints filed in 2017 and 2018, and concluded that none of the complaints alleged any actionable adverse employment action. Although this matter has been fully briefed for some time, Rimini has filed a motion seeking to transfer the petition to the Second Circuit under 28 U.S.C. § 1631. The Secretary of Labor has filed a response in which it concedes that venue in this circuit is improper but opposes the transfer request and argues that the petition should instead be dismissed. For the reasons that follow, we conclude that there is at least an arguable basis for finding that venue is proper in this circuit, but even assuming the petition should have been filed in the Second Circuit, transfer would not be in the interest of justice.

**DISCUSSION**

A petition for review of a final administrative decision brought under the whistleblower protection provisions of SOX must be filed in the court of appeals for the circuit in which the

violation allegedly occurred or in the circuit in which the complainant resided on the date of the violation. 49 U.S.C. § 42121(b)(2)(A) (incorporated into SOX under 18 U.S.C. § 1514A(b)(2)(A); 29 C.F.R. § 1980.112(a). Here, Rimini asserts that the petition should have been filed in the Second Circuit because all of the "initial" violations alleged in the underlying administrative complaints occurred in New York, while Rimini was a resident of New York and was working in New York. But the record suggests that Rimini has resided in Massachusetts since at least July 2016 and, although one of the three administrative complaints addressed in the ARB decision was based on an alleged negative employment reference contained in emails from 2011, when Rimini presumably still lived in New York, the allegations in the other two complaints were based on conduct that occurred when Rimini resided in Massachusetts. More specifically, those two complaints were premised in part on allegations that JPMC made misstatements of fact and allegedly disparaging remarks in the course of administrative proceedings and prior litigation in or after July 2016. Thus, there is at least an arguable basis for finding that we have jurisdiction over the petition.

Even if venue more properly lies in the Second Circuit, transfer is not automatic. The transfer statute authorizes a federal court lacking jurisdiction over a proceeding to either dismiss it or transfer it to a federal court of competent jurisdiction if doing so "'is in the interest of justice.'" Britell v. United States, 318 F.3d 70, 72 (1st Cir. 2003) (quoting 28 U.S.C. § 1631). While there is a presumption in favor of transfer, the presumption is rebutted if the court determines that a transfer is not in the interest of justice. Id. at 74; see Fed. Home Loan Bank of Boston v. Moody's Corp., 821 F.3d 102, 119-20 (1st Cir. 2016), abrogated on other grounds by Lightfoot v. Cendant Mortg. Corp., 137 S.Ct. 553 (2017). Courts "must undertake case-specific scrutiny to ferret out instances in which the administration of justice would be better served by dismissal." Britell, 318 F.3d at 74. Transfers that would unfairly benefit a proponent or burden the judicial system, or that clearly lack merit are sufficient to overcome the presumption and warrant dismissal. See id.

Upon consideration of all the circumstances, we conclude that transfer would not be in the interest of justice. Rimini has been litigating largely the same issues in this court and elsewhere for years -- before filing the instant petition for review, Rimini filed at least five administrative complaints, some of which overlapped with pending administrative appeals, as well as an action in the U.S. District Court for the District of Massachusetts, which led to four separate appeals in this court, all of which were found to be without merit. Rimini's filings indicate that he has also attempted to seek relief in New York state court. Moreover, Rimini concedes he has been aware of a potential venue issue since he filed the petition, but he did not provide enough facts at the time of filing for the DOL or the court to assess whether venue here was proper, and in the meantime he has been submitting a steady stream of motions and notices in this and other appeals filed in this court, effectively deflecting attention from this central issue. Allowing transfer at this late date and stage of the proceedings would prolong the burden of litigation on JPMC and the judicial system.

Finally, the legal issues presented are straightforward and the petition is plainly meritless. The only questions presented are whether the ARB erred in concluding that Rimini had failed to adequately allege any adverse employment action that occurred or was discovered within 180 days of filing the underlying administrative complaints, see 18 U.S.C. § 1514A(b)(2); Day v. Staples, Inc., 555 F.3d 42, 52-53 (1st Cir. 2009), and whether the administrative proceedings deprived

Rimini of due process. The ARB's determinations are "reviewable in federal court under the standards stated in the Administrative Procedure Act, 5 U.S.C. § 706." Lawson v. FMR LLC, 571 U.S. 429, 437 (2014). Under the APA, an appellate court may disturb the ARB's decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or was "[u]nsupported by substantial evidence . . . reviewed on the record of an agency hearing provided by statute." 5 U.S.C. §§ 706(2)(A), (E).

The record shows that Rimini has not worked at JPMC since 2006, and in 2008 he signed a settlement agreement releasing all claims arising from his employment. The administrative complaint filed in December 2017 was based on six-year-old emails Rimini discovered more than a year before he filed the complaint, and he failed to identify any basis for equitable tolling. The determination that the complaint failed to identify any adverse employment action that occurred within the 180-day statutory period is therefore unassailable. The April 2018 administrative complaint was based on statements JPMC made during the agency's investigation of the complaint and during litigation of prior administrative complaints, allegations of blacklisting unsupported by any specific facts, and a conclusory claim that JPMC was engaged in a pattern of willful securities law violations. And the April 2019 administrative complaint was based on statements made to the ARB in connection with pending appeals. The ARB properly found that the allegations were insufficient to state any actionable violation. Because the petition is doomed to fail, it is in the interest of justice to dismiss it. See Brittell, 318 F.3d at 75 ("If an action or appeal is fanciful or frivolous, it is in the interest of justice to dismiss it rather than to keep it on life support (with the inevitable result that the transferee court will pull the plug)").

Accordingly, the motion to transfer is denied, and the petition is dismissed. Rimini's motion for leave to proceed in forma pauperis is granted. All other pending motions are denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Thomas Rimini
US Department of Labor
US Department of Labor Administrative Review Board
Nicholas Charles Hall

**EXHIBIT A**

**U.S. Department of Labor**

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the attention of:

AUG 23 2016

MEMORANDUM FOR: REGIONAL ADMINISTRATORS;
WHISTLEBLOWER PROGRAM MANAGERS

THROUGH: DOROTHY DOUGHERTY
Deputy Assistant Secretary

JORDAN BARAB
Deputy Assistant Secretary

FROM: MARYANN GARRAHAN, Director
Directorate of Whistleblower Protection Programs

SUBJECT: New policy guidelines for approving settlement agreements in whistleblower cases

As part of OSHA's administration of whistleblower protection statutes, OSHA reviews settlement agreements between complainants and their employers reached during the investigative stage to ensure they are fair, adequate, reasonable, and in the public interest, and that the employee's consent was knowing and voluntary. In reviewing these agreements OSHA sometimes encounters provisions that prohibit, restrict, or otherwise discourage a complainant from participating in protected activity related to matters that arose during his or her employment. In those cases, OSHA must ensure that such clauses are removed or clarified so that the agreements are lawful and consistent with the underlying purposes of the whistleblower protection statutes. Accordingly, below are updated criteria that OSHA will use to evaluate whether a settlement impermissibly restricts or discourages protected activity.

This guidance supersedes the guidance in Chapter 6, paragraphs XII.E.2 and 3 of the OSHA Whistleblower Investigations Manual, but does not otherwise change OSHA's policies with regard to review of settlements:

**Criteria for Reviewing Private Settlements for Provisions that Restrict or Discourage Protected Activity**

OSHA will not approve a "gag" provision that prohibits, restricts, or otherwise discourages a complainant from participating in protected activity. Protected activity includes, but is not limited to, filing a complaint with a government agency, participating in an investigation, testifying in proceedings, or otherwise providing information to the government. These constraints often arise from broad confidentiality or non-disparagement clauses, which complainants may interpret as restricting their ability to engage in protected activity. Other times, these constraints are found in specific provisions, such as the following:



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a. A provision that restricts the complainant's ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on a respondent's past or future conduct. For example, OSHA will not approve a provision that restricts a complainant's right to provide information to the government related to an occupational injury or exposure.

b. A provision that requires a complainant to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer's past or future conduct.

c. A provision that requires a complainant to affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law. Such requirements may compromise statutory and regulatory mechanisms for allowing individuals to provide information confidentially to the government, and thereby discourage complainants from engaging in protected activity.

d. A provision that requires a complainant to waive his or her right to receive a monetary award (sometimes referred to in settlement agreements as a "reward") from a government-administered whistleblower award program for providing information to a government agency. For example, OSHA will not approve a provision that requires a complainant to waive his or her right to receive a monetary award from the Securities and Exchange Commission, under Section 21F of the Securities Exchange Act, for providing information to the government related to a potential violation of securities laws.[1] Such an award waiver may discourage a complainant from engaging in protected activity under the Sarbanes-Oxley Act, such as providing information to the Commission about a possible securities law violation. For the same reason, OSHA will also not approve a provision that requires a complainant to remit any portion of such an award to respondent. For example, OSHA will not approve a provision that requires a complainant to transfer award funds to respondent to offset payments made to the complainant under the settlement agreement.

OSHA occasionally encounters settlements that require a breaching party to pay liquidated damages. As liquidated damages are sometimes unenforceable, OSHA reserves the right not to approve a settlement where the liquidated damages are clearly disproportionate to the anticipated loss to the respondent of a breach. OSHA may also consider whether the potential liquidated damages would exceed the relief provided to the complainant, or whether, owing to the

[1] Other statutes that establish award programs for individuals who provide information directly to a government agency include the Commodity Exchange Act, 7 U.S.C. 26(b); Foreign Corrupt Practices Act, 15 U.S.C. 78u-6(b); Internal Revenue Act, 26 U.S.C. 7623(b); and the Motor Vehicle Safety Whistleblower Act, 49 U.S.C. 30172.

complainant's position and/or wages, he or she would be unable to pay the proposed amount in the event of a breach.

When the above types of provisions are encountered, or settlements have broad confidentiality and non-disparagement clauses that apply "except as provided by law," employees may not understand their rights under the settlement. Accordingly, OSHA will ask parties to remove the offending provision(s) and/or add the following language prominently positioned within the settlement: "**Nothing in this Agreement is intended to or shall prevent, impede or interfere with complainant's non-waivable right, without prior notice to Respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.**"