Recent Developments in Whistleblower Law

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Introduction

SEC Chair Mary Jo White recently lauded the invaluable public service whistleblowers provide while acknowledging that employers receive that service with "mixed feelings." This persistent dichotomy has caused the field of whistleblower law to be one of the most dynamic in the profession. Just two decades ago, whistleblower protections were few and far between. Now, especially within the past few years, laws protecting and rewarding whistleblowers have become widespread. Legislatures have passed new statutes, and rarely used laws already on the books have found vitality, strengthened by statutory amendments or just a renewed understanding of the important role whistleblowers can play.

This proliferation of whistleblower protections and rewards has produced a quickly growing body of case law. Indeed, the legal landscape has shifted dramatically year-to-year as administrative tribunals and federal courts grapple with key issues such as the scope of protected conduct, the burden of proof, and the causation standard. Though cases cut both ways, the unmistakable trend has been the broadening of protections for employees who blow the whistle. This paper surveys recent developments in whistleblower law from a whistleblower attorney's perspective.

Sarbanes-Oxley Developments

Federal Courts Are Adopting the ARB's Broad Interpretation of SOX Protected Conduct

Congress enacted the Sarbanes-Oxley Act of 2002's ("SOX") whistleblower protection provision to combat a "corporate code of silence," a code that "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the Federal Bureau of Investigation and the SEC, but even internally." S. Rep. No. 107-146, at 4–5 (2002). Responding to the Enron scandal, Congress sought to ensure that whistleblowers could serve as an effective early warning system for companies and help prevent future scandals. To do this, Congress provided statutory protection for a broad range of disclosures. Whistleblowers need only complain about conduct that they "reasonably believe[]" violates federal criminal prohibitions against bank fraud, mail fraud, or wire fraud; any rule or regulation of the Securities and Exchange Commission ("SEC"); or any provision of federal law relating to fraud against shareholders. The statute's plain meaning does not limit protected conduct to disclosures of actual shareholder fraud.

But less than four years after Congress enacted SOX, the Department of Labor ("DOL") Administrative Review Board ("ARB") appointed by Secretary of Labor Elaine Chao significantly weakened Section 806 of SOX by imposing onerous burdens on whistleblowers that were contrary to the statute's plain meaning and intent. In *Platone v. FLYi, Inc.*, the ARB set forth the following requirements for SOX protected conduct:

1. A SOX complainant's disclosure must "definitively and specifically" relate to one of the six enumerated categories found in 18 U.S.C. § 1514A.

2. The disclosure must "approximate . . . the basic elements" of the kind of fraud or violation alleged. For example, a disclosure about securities fraud must allege "a material misrepresentation (or omission), scienter, a connection with the purchase, or sale of a security, reliance, economic loss, and loss causation."

Platone v. FLYi, Inc., ARB Case No. 04-154, 2006 WL 3246910 (ARB Sept. 29, 2006).

Under *Platone*, SOX whistleblower protection was limited almost only to employees who were familiar with the intricacies of federal securities law. Many cases were dismissed on summary judgment based on the failure to meet the onerous *Platone* standard.

And to compound *Platone*, some federal courts imposed an unduly high standard of objective reasonableness. For example, a Fifth Circuit decision concluded that an internal complaint about a company's overstating gross profits in violation of SEC Staff Accounting Bulletin 101 did not qualify as protected conduct because the company's financial reports had not yet been filed with the SEC. *See Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008). The apparent logic of *Allen* is that the whistleblower should wait until shareholders have been defrauded before making an internal complaint. That reasoning, however, is contrary to the prophylactic purpose of Section 806.

In May of 2011, the ARB appointed by Secretary of Labor Hilda Solis issued a seminal decision in *Sylvester v. Parexel*, which expressly abrogated *Platone* and adopted the following broad construction of SOX protected conduct:

- SOX complainants need only show that they reasonably believed the conduct complained about violated a relevant law. *Sylvester v. Parexel Int'l LLC*, ARB Case No. 07-123, at 14 (ARB May 25, 2011).

- An employee need not wait until misconduct occurs to make a protected disclosure, so long as the employee "reasonably believes that the violation is likely to happen." *Id.* at 16.

- A complainant need not allege shareholder fraud to receive SOX's protection. SOX was enacted to address "corporate fraud generally," and so a reasonable belief that a violation of "any rule or regulation of the Securities and Exchange Commission" could lead to fraud is protected, even if the violation itself is not fraudulent. For example, SOX would protect a disclosure about deficient internal controls over financial reporting, even though there is no allegation of actual fraud. *Id.* at 19.

- The reasonable belief standard does not require complainants to tell management or the authorities why their beliefs are reasonable. *Id.* at 42.
- SOX complainants no longer need to show that their disclosures "definitively and specifically" relate to the relevant laws. *Id.* at 41.
- SOX complainants do not need to establish criminal fraud. Requiring a complainant to allege, prove, or approximate the elements of fraud would be contrary to the purpose of the whistleblower protection provision. *Id.* at 47.

Sylvester also held that the *Platone* standard was in conflict with "the plain language of the SOX whistleblower protection provision, which protects 'all good faith and reasonable reporting of fraud.'" *Id.* at 14–15, 30 (quoting 148 Cong. Rec. S7418-01, S7420). When the ARB issued *Sylvester*, the key battleground in SOX litigation in federal court became whether federal courts would continue deferring to the prior ARB's *Platone* decision or would instead adopt the current ARB's *Sylvester* decision. Five years later, we know the answer, and it is decisively positive for whistleblowers. In particular, the Second, Third, Sixth, and Eighth Circuits and several district courts have adopted the *Sylvester* standard of SOX protected conduct, and no federal court has rejected the reasoning in *Sylvester*. *See Beacom v. Oracle America, Inc.*, No. 15-1729, 2016 WL 3144730, at 3 (8th Cir. June 6, 2016) (expressly adopting the *Sylvester* standard); *Rhinehimer v. U.S. Bancorp Invs., Inc*., 787 F.3d 797 (6th Cir. 2015); *Nielsen v. AECOM Tech. Corp*., 762 F.3d 214, 220–21 (2d Cir. 2014) (granting *Skidmore* deference to *Sylvester*); *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013) (according *Chevron* deference to *Sylvester*); *Stewart v. Doral Fin. Corp*., 997 F. Supp. 2d 129, 135–36 (D.P.R. 2014) (adopting the *Sylvester* standard); *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 443 (S.D.N.Y. 2013).

Recently the Sixth Circuit issued an opinion in *Rhinehimer v. U.S. Bancorp Investments, Inc.*, adopting the *Sylvester* standard and affirming a jury verdict for a whistleblower who disclosed unsuitability fraud. *Rhinehimer*, 787 F.3d at 811–13. *Rhinehimer* agrees with the ARB's observation in *Sylvester* "that an interpretation demanding a rigidly segmented factual showing justifying the employee's suspicion [referring to *Platone*] undermines this purpose and conflicts with the statutory design, which turns on employees' reasonable belief rather than requiring them to ultimately substantiate their allegations." *Id.* at 810. In addition, *Rhinehimer* suggests that the issue of objective reasonableness is rarely amenable to summary disposition:

> "[T]he issue of objective reasonableness should be decided as a matter of law only when no reasonable person could have believed that the facts [known to the employee] amounted to a violation" or otherwise justified the employee's belief that illegal conduct was occurring. If, on the other hand, "reasonable minds could disagree about whether the employee's belief was objectively reasonable,

> the issue cannot be decided as a matter of law."

Id. at 811–12 (citations omitted).

At trial, the jury found that U.S. Bancorp Investments ("USBII") disciplined and fired Michael Rhinehimer in retaliation for alerting one of his superiors to unsuitable trades a coworker made to the detriment of an elderly client. Rhinehimer's manager expressly admitted that he gave Rhinehimer a written warning for opposing the unsuitable trades because Rhinehimer's complaint "prompted a FINRA investigation . . . and anybody associated with this was really feeling the heat." *Id.* at 804. In addition, the manager warned Rhinehimer that if he were to sue the bank, his career in the city would be over. The bank placed Rhinehimer on a performance improvement plan requiring him to increase his revenue to $40,000 per month. Shortly thereafter, the bank terminated his employment.

On appeal, USBII argued that, under *Platone*, Rhinehimer was required to establish facts from which a reasonable person could infer each of the elements of an unsuitability fraud claim, including the misrepresentation or omission of material facts and that the broker acted with intent or reckless disregard for the client's needs. The Sixth Circuit held that the evidence was more than sufficient to sustain the jury's finding that Rhinehimer reasonably believed that certain trades constituted unsuitability fraud. *Id.* at 812. And the court noted that the "employee's reasonable belief is a simple factual question requiring no subset of findings that the employee had a justifiable belief as to each of the legally-defined elements of the suspected fraud." *Id.* at 806.

Rhinehimer is an important development for corporate whistleblower rights and protections in that it restores the original intent of SOX whistleblower protection. A whistleblower's reasonable belief is now assessed in a manner consistent with similar anti-retaliation statutes; i.e., the employee must subjectively believe that there is a violation, and the belief must be objectively reasonable. And as federal courts continue to adopt or defer to the ARB's construction of SOX protected conduct as articulated in *Sylvester*, SOX whistleblowers are more likely to survive summary judgment.

This decision is part of a trend,[1] both at the DOL and in federal courts, of broadly construing SOX's protection of whistleblowers and rejecting prior decisions that imposed a heightened standard of objective reasonableness.

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[1] *See, e.g.*, *Wiggins v. ING U.S., Inc.*, No. 3:14-CV-01089-JCH, 2015 WL 8779559 (D. Conn. Dec. 15, 2015). In *Wiggins*, a U.S. district court in Connecticut held that the heightened Rule 9(b) pleading standard for fraud claims does not apply to SOX retaliation claims. *Id.* at *3. The court held, furthermore, that a whistleblower can plead that she had a reasonable belief that her employer violated one of Section 1514A's enumerated fraud provisions without alleging

In May 2016, the Fourth Circuit held that a SOX whistleblower can establish the reasonableness of his or her belief by proffering corroborating testimony from coworkers. *See Deltek, Inc. v. Dep't of Labor, Admin. Review Bd.*, No. 14-2415, 2016 WL 2946570 (4th Cir. May 20, 2016). Dinah Gunther began working for Deltek, Inc., as a financial analyst in 2008. Gunther, whose position was within Deltek's IT department, lacked a college degree but had experience as an executive assistant and workflow manager. Soon after beginning work at Deltek, Gunther noticed a lack of clear procedure and documentation for Deltek's billing disputes with Verizon Business ("Verizon"). She suspected Deltek employees were obscuring the IT department's financial condition by subjecting Verizon to unfounded billing disputes, thereby concealing a shortfall in Deltek's telecommunications budget. Gunther's coworker, who was responsible for managing the billing relationship between Deltek and Verizon, agreed with her concern. Gunther reported the situation to her immediate supervisor, after which she faced hostility in the workplace. She then expressed her concerns of ongoing fraud in a letter to Deltek's general counsel, which she copied to the SEC. Deltek's general counsel met with Gunther and asked her to gather information about her concerns. Following their meeting, the general counsel investigated Gunther's report and found no improper activity had occurred, but Gunther noticed her coworkers shredding documents.

After continuing to experience mistreatment at work, Gunther informed Deltek's vice president of human resources that she was experiencing stress-related medical issues that were affecting her work. Gunther accepted Deltek's offer of paid leave, conditioned on Gunther's being able to return to work with 24 hours' notice. Upon taking leave, Gunther filed a SOX complaint with the Occupational Safety and Health Administration ("OSHA"). Later, Gunther attempted to return to work on a Monday after having given notice of her return the prior Saturday. But a Deltek attorney and the vice president of human resources met her at the office to say she could not yet return to work, although they assured her she still had a job. The following day, Deltek fired Gunther for being confrontational and disruptive in that meeting.

OSHA concluded that there was no violation of SOX. Gunther appealed, and an administrative law judge ("ALJ") held Deltek liable for retaliating against her. The ARB affirmed, and Deltek appealed. The Fourth Circuit determined that Gunther's belief that Deltek was violating securities laws was reasonable. *Id.* at *7.

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specifically that she believed that the employer's conduct satisfied all of the elements of the federal statute or SEC rule that allegedly was violated. *See id.* at *5–7. The court found that the plaintiff's complaint sufficiently "tethered" her subjective belief to a violation of Section 1514A's enumerated provisions, where the plaintiff was trained in federal securities laws and her complaint identified specific federal statutes and regulations, the responsibilities the employer had pursuant to those laws, and the specific actions that formed the basis of the plaintiff's belief that the employer was breaching those responsibilities. *Id.*

Deltek argued that Gunther's belief was not objectively reasonable because she lacked the education and experience necessary to recognize securities fraud. The Fourth Circuit rejected this argument, stating that consideration of the "factual circumstances," including information Gunther learned from coworkers, was warranted. *See id.* The Fourth Circuit agreed with the ALJ's determination, which the ARB affirmed, that "in forming her belief Gunther reasonably relied on her close dealings with [her coworker], who did have extensive experience in Verizon invoicing . . . [and] who was himself a 'credible, convincing witness at the hearing.'" *Id.* Therefore, Gunther's belief was reasonable, and her activity was protected under SOX. *Id.*

In another broad interpretation of SOX protected conduct, the ARB held in March 2016 that disclosures relating to violations of state wage laws constitute protected conduct under SOX whenthey implicate the federal mail or wire fraud statute. *See Dietz v. Cypress Semiconductor Corp.*, ARB Case No. 15-017, 2016 WL 1389927, at *5–6 (ARB Mar. 30, 2016). Timothy Dietz worked for a company that was acquired by Cypress Semiconductor Corp. ("Cypress") in 2012. Following the acquisition, Cypress hired Dietz as a program manager. Cypress required certain employees to participate in a bonus plan but did not disclose this plan to employees of the acquired company until they accepted jobs with Cypress. After receiving complaints about the bonus plan from subordinates, Dietz internally reported concerns that the plan violated state laws and that important aspects of the plan, such as compulsory salary deductions, had not been disclosed to employees of the acquired company. Thereafter, Dietz was given a disciplinary memo and was constructively fired. After a hearing, an ALJ held Cypress liable for retaliation, and the company appealed.

Cypress argued that Dietz's disclosures were not protected under SOX because the state laws Cypress allegedly violated are not enumerated in SOX's whistleblower protection provision. The ARB rejected this argument, reasoning that the plaintiff's disclosures constituted protected activity because they related not only to his employer's violation of state law, but also to the employer "knowingly misrepresenting or concealing material facts." *Id.* at *6–7. Without determining whether Dietz's complaints revealed actual fraud, the ARB held they were protected under SOX because they evidenced a violation of the federal statute prohibiting mail and wire fraud. *See id.*

Dietz clarifies, therefore, that SOX protects a broad range of disclosures, including any fraud that is reasonably believed to involve the use of interstate mail, wires, or banks.[2]

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[2] Another notable takeaway from *Dietz* is that constructive discharge can be established not only where the employer has created "working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign," but also where the employer "acts in a manner so as to have communicated to a reasonable employee that [he] will be terminated, and the . . . employee resigns." *See Dietz*, 2016 WL 1389927, at *7 (alterations in original). Under

However, some courts go against the tide and continue to construe SOX protected conduct narrowly. For example, in *Diaz v. Transatlantic Reinsurance Co.*, the Southern District of New York held that disclosing a violation of an employer's conflict-of-interest policy is not protected under SOX because "the conduct reported by a whistleblower must deal with a violation of . . . federal *securities* law or the enumerated crimes of mail and wire fraud." *Diaz v. Transatlantic Reinsurance Co.*, No. 1:16-cv-01355, slip op. at 10 (S.D.N.Y. June 22, 2016) (emphasis in original). Ileana Diaz was assistant manager of Transatlantic Reinsurance Co.'s ("Transatlantic") claims department when she reported a potential conflict of interest arising from the executive vice president's control over the Transatlantic's litigation matters. Specifically, the executive vice president was responsible for assigning work to, and approving invoices from, her husband's law firm, which received more than $13 million in legal fees from Transatlantic in 2014. The court held that Diaz's disclosure was not protected, stating that her "bald assertions that she 'expressed concern about . . . the effect [the purported conflicts of interest] could have on Alleghany's shareholders' and 'on Defendant's reputation in the reinsurance industry' are precisely the type of conclusory statements that cannot sustain a § 1514A claim." *Id.* at 10–11 (alterations in original) (citation omitted).

SOX Protected Conduct Does Not Require a Showing of Materiality

Recent DOL and federal court precedent declines to require SOX whistleblowers to prove they disclosed actual securities fraud. Consistent with this trend, the U.S. District Court for the District of Maryland held in late 2015 that there is no independent materiality element to establish protected whistleblowing under Section 806 of SOX. *Donaldson v. Severn Sav. Bank, F.S.B.*, No. JKB-15-901, 2015 WL 7294362, at *3 (D. Md. Nov. 18, 2015).

Vanessa L. Donaldson brought a SOX whistleblower action against her former employer, Severn Savings Bank ("Severn"), claiming she was unlawfully terminated after she reported to her supervisor her suspicions about an inaccurate bank report. In particular, Donaldson alleged that she informed her supervisor that the commercial/retail manager for Donaldson's branch falsified the retail production report for the third quarter of 2013 in a scheme to collect unearned bonus pay.

Severn argued that Donaldson failed to allege she engaged in protected activity because she failed "to allege any facts whatsoever that would indicate any material misrepresentations (or omissions) were reported to Severn's shareholders," and so she lacked an objectively reasonable belief that she was disclosing shareholder fraud. *Id.* at *2. The court rejected Severn's narrow construction of SOX:

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this standard, an employee facing "imminent discharge" can potentially establish a constructive discharge claim. *See id.*

> [T]he federal criminal fraud statutes . . . prohibit the scheme to defraud, not a completed fraud. . . .
>
> Materiality of falsehood . . . was a common-law element of actionable fraud at the time these fraud statutes were enacted and is an incorporated element of the mail fraud, wire fraud, and bank fraud statutes. . . . But § 1514A carries no independent materiality element. Consequently, Donaldson's objective belief need not be about a material matter, as Severn has argued. Rather, her objective belief must be based on facts permitting an inference that [the manager's] allegedly false representation was material to Severn's course of conduct.

Id. at *3 (citations omitted). The court found that Donaldson met this standard because the manager's alleged inflation of the retail production figures was intended to, and likely would, affect how large of a bonus Severn would award him. Therefore, the court concluded, "it may be inferred from Donaldson's complaint that she had an objectively reasonable belief that [the manager was] engaged in a scheme to defraud Severn." *Id.*

Donaldson is consistent with the ARB's holding in *Sylvester* that a SOX complainant need not allege shareholder fraud to receive SOX's protection. *See Sylvester*, ARB Case No. 07-123, at 20.

DOL ARB Clarifies Burden-Shifting Framework in Whistleblower Cases

The DOL ARB's September 30, 2016, decision in *Palmer v. Canadian National Railway* provides critical guidance on the two-stage burden-shifting framework that applies to whistleblower retaliation claims brought under the Federal Rail Safety Act ("FRSA"), SOX, and several other whistleblower retaliation laws enforced by DOL.[3] In particular, *Palmer* provides detailed instructions to DOL ALJs on how to assess "contributing factor" causation.

Palmer also overturned *Fordham v. Fannie Mae*, which held that ALJs should not consider the evidence supporting the employer's nonretaliatory reasons for an adverse action when determining whether a complainant has established contributing factor causation. *See*

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[3] Under this two-stage framework, a whistleblower need prove only that she made a protected disclosure and that the disclosure played any role whatsoever in a subsequent adverse employment action. If the whistleblower makes this showing by a preponderance of the evidence, the employer can avoid liability only by proving by clear and convincing evidence that it would have taken the same adverse employment action absent the employee's protected activity.

Fordham v. Fannie Mae, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014). Instead ALJs should assess that evidence under the same-action affirmative defense and its onerous "clear and convincing evidence" standard. *Id. Under Palmer*, all relevant causation evidence must be considered when determining whether protected activity was a contributing factor, regardless of which party offers the evidence.

Though all relevant evidence must be considered in assessing causation, the ARB admonished ALJs not to weigh the relative importance of the protected activity and the employer's non-retaliatory reasons when determining "contributing factor" causation. In addition, the ARB emphasized the low bar for proving "contributing factor" causation and held that a whistleblower need not prove pretext to establish causation. Further, knowledge and timing alone can suffice to prove causation in some cases. Although *Palmer* is favorable for whistleblowers in several respects, it could have the unintended consequence of lowering the burden for an employer to prove it would have taken the same adverse action absent the whistleblower's protected disclosure. Accordingly, whistleblower advocates should be vigilant to ensure that *Palmer* does not weaken the strong protection that Congress afforded whistleblowers.

Factual Background and Procedural Posture

In *Palmer*, the whistleblower worked for a railroad carrier, Illinois Central, from February 2006 to July 2013. In May 2013, the whistleblower made a mistake at work. *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 7 (ARB Sept. 30, 2016) (en banc). The whistleblower reported his error, and the railroad scheduled a formal investigative hearing for the following month, which could have resulted in disciplinary action against the whistleblower. *Id.* at 7–8. The whistleblower sought to negotiate a resolution, and the hearing was rescheduled. *Id*. Though no final deal was reached, the parties were nearing a settlement.

In June 2013, before the rescheduled hearing, the whistleblower injured his arm at work, which he promptly reported as required. The whistleblower's supervisor was hostile and tried to dissuade the whistleblower from reporting the injury. *Id*. Two days after the injury, the railroad scheduled a hearing for the new incident, and it withdrew from settlement negotiations regarding the May 2013 error. *Id.* at 9.

The May 2013 issue proceeded to hearing within a week. *Id.* After that hearing, railroad management confirmed that the whistleblower had an upcoming hearing into his recent injury and then fired him. *Id.* at 10.

The whistleblower brought a complaint alleging that he was unlawfully terminated in retaliation for reporting his injury. After a hearing, the ALJ concluded that the railroad had unlawfully retaliated. Relying on *Fordham* and similar case law, the ALJ did not consider the railroad's evidence of its reason for firing the whistleblower when analyzing the contributing factor element; he instead considered that evidence only when determining whether the railroad established its same-action affirmative defense. The railroad appealed the ruling to the ARB.

The Palmer Holding

In *Palmer*, the ARB reversed the decision below, overruled *Fordham*, and remanded the case to the ALJ for reexamination under the clarified standard. Primarily, the ARB held that ALJs can consider an employer's evidence of its reason for taking an adverse action in determining whether the whistleblower has proved "contributing factor" causation. However, the ARB held that such evidence will rarely be dispositive where there is any evidence that the complainant's protected conduct played any role in the adverse action. Because the whistleblower need show only that the protected activity played a role in the adverse action, "the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity." *Palmer v. Canadian National Railway*, ARB No. 16-035 at 53. The ARB then elucidated how ALJs should determine whether a whistleblower complainant has established "contributing factor" causation.

Contributing-Factor Causation Is a "Broad and Forgiving" Standard

The FRSA, like many of the whistleblower-protection provisions under DOL's jurisdiction, incorporates the standards used in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. Those standards apply a two-step framework: first, the factfinder must determine whether the employee has proved, by a preponderance of the evidence, that the protected activity was a contributing factor in the adverse action. *Id.* at 35. In other words, the ALJ assesses whether it is "more likely than not that the employee's protected activity played a role, any role whatsoever, in the adverse personnel action." *Id.* If the employee prevails at the first step, the factfinder must determine whether the employer has proved by clear and convincing evidence that it would have taken the same adverse action even if the employee had not engaged in protected activity. *Id*.

During the first step of the analysis, the ALJ can consider any relevant and admissible evidence offered by either party to determine whether the complainant has proved that protected conduct contributed to the adverse action. However, the ARB emphatically reiterated the core analysis at this first stage: "We want to reemphasize how low the standard is for the employee to meet, how 'broad and forgiving' it is. 'Any' factor really means any factor. It need not be 'significant, motivating, substantial or predominant'—it just needs to be a factor." *Palmer v. Canadian National Railway*, ARB No. 16-035 at 53 (citations omitted). This core analysis proceeds on the recognition that employees are often at a severe disadvantage in accessing relevant evidence.

A whistleblower may prove causation through circumstantial evidence. Such evidence can include "motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence." *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-3 (ARB Aug. 29, 2014).

<u>In Mixed-Motive Cases, Whistleblowers Will Always Prevail in Showing Contributing Factor Causation</u>

In cases where employers rely on both protected activity and legitimate reasons when deciding to take an adverse action, an employee will always be able to prove contributing factor causation. While *Palmer* permits an ALJ to consider the alleged non-retaliatory reasons for an adverse action at the causation stage, such evidence is inconsequential if it fails to show that the employer acted only for legitimate reasons. The ARB explained:

> Importantly, if the ALJ believes that the protected activity and the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question. Thus, consideration of the employer's nonretaliatory reasons at step one will effectively be premised on the employer pressing the factual theory that nonretaliatory reasons were the only reasons for its adverse action. Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity.

Palmer v. Canadian National Railway, ARB No. 16-035 at 56-57 (citations omitted).

<u>Whistleblowers Need Not Demonstrate Pretext</u>

Because a whistleblower will establish contributing-factor causation if she shows that her protected activity was one of many reasons for an adverse action, a whistleblower need not prove pretext. In other words, though an ALJ can consider the employer's alleged non-retaliatory reasons when determining causation, a whistleblower need not disprove those alleged non-retaliatory reasons.

The ARB reiterated that though whistleblowers are not required to prove pretext, they may choose to rely on evidence of pretext to establish contributing-factor causation. As the *Palmer* decision states, "Indeed, at times, the factfinder's belief that an employer's claimed reasons are false can be precisely what makes the factfinder believe that protected activity was the real reason." *Id.* at 54 (citations omitted).

<u>At the Causation Stage, ALJs Should Not Weigh the Employer's Non-Retaliatory Reasons Against the Employee's Protected Activity</u>

In *Palmer*, the ARB admonished ALJs not to weigh the relative importance of the protected activity and the employer's non-retaliatory reasons when determining contributing factor causation. As discussed above, the contributing factor standard is met if the protected activity was only one of many reasons for the adverse action. The protected activity need play only some role, however small, in the decision. *See id.* at 55. It is therefore inconsequential if the non-retaliatory reasons were of great importance to the decisionmaker, while the protected activity had little weight. *See id.* Under the contributing factor standard, the only question to be answered is whether the decisionmaker placed *any* weight whatsoever on the protected activity. *See id.* If so, the whistleblower will establish causation.

<u>The Same-Action Affirmative Defense in Whistleblower Cases Is Onerous</u>

Once a whistleblower establishes contributing-factor causation, the employer faces an onerous burden to prove an affirmative defense:

- It is not enough for the employer to show that it could have taken the same action; it must show that it would have. *Palmer v. Canadian National Railway*, ARB No. 16-035 at 57.
- ALJs must apply the "clear and convincing" standard of proof to employers' affirmative defense. *Id.* "Clear and convincing" is usually thought of as the intermediate standard between "a preponderance" and "beyond a reasonable doubt." *Id.*
- It requires evidence showing that it is "highly probable" that the employer would have taken the same adverse action in the absence of the protected activity. *Id.*
- "Clear and convincing" evidence can be quantified as establishing the probability of a fact at issue "in the order of above 70%." *Id.*

<u>*Palmer* Could Muddy the Waters</u>

By overturning *Fordham*, the ARB rejected a bright-line rule that barred ALJs from considering an employer's evidence supporting an adverse action when assessing whether a whistleblower has proved contributing factor causation. This rule ensured that, consistent with congressional intent, the employer's evidence is assessed under the more stringent "clear and convincing" evidence standard. Though *Palmer* provides specific guidance to ALJs that should preserve the favorable burden-shifting framework for whistleblowers, it also creates some potential confusion that could ultimately weaken whistleblower protection laws adjudicated by DOL.

For example, as noted previously, the ARB reiterated that whistleblowers need not prove pretext to establish contributing factor causation because whistleblowers will always prevail on the contributing factor issue in mixed-motive cases. *Id.* at 54–55. But as the ARB acknowledged in *Palmer*, employers more often than not argue that their non-retaliatory reasons are the *only* reasons an adverse action was taken. *Id.* at 55. Because a whistleblower must prove that his protected activity played *some* role in the adverse action, when an employer argues that its causation evidence shows that it acted based *solely* on non-retaliatory reasons, a whistleblower's evidence must convince the ALJ that the employer's explanation is more likely than not untrue. That would essentially require that the whistleblower prove pretext.

Likewise, *Palmer* invites confusion when analyzing an employer's motives. Under *Palmer*, an ALJ should consider the employer's evidence of a non-retaliatory reason for the adverse action, "but only to determine whether the protected activity played any role at all." *Id.* at 15. ALJs should not weigh the relative importance of the protected activity and non-retaliatory reasons for an adverse action, and a whistleblower need not prove retaliatory motive. Yet Judge Luis Corchado, arguably the ARB's most vocal critic of *Fordham*, demonstrated in an earlier case how this instruction could be difficult to apply. *See Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 43–44 (ARB Sept. 30, 2016) (en banc) (Corchado, J., dissenting) (reissued with full dissent Apr. 21, 2015). In Judge Corchado's example, a student named Leo alleges that classmate Johnny called him a "rat" and elbowed him because he is a school crossing guard. *Id.* Johnny says it was an accident during a basketball game, that the two are friends, and that previously he protected Leo from getting beaten up. *Id.*

Both accounts could simultaneously be true. For example, if Johnny were angry at Leo for being a crossing guard, tried to keep the ball away from him during the game as a result, and then tripped and accidentally elbowed Leo, then Leo's status as a crossing guard would be a contributing factor. Yet, according to Judge Corchado, the teacher may choose to believe Johnny that the elbow was an accident, and "[i]n the end, the teacher chooses which story to believe to resolve Leo's complaint." *Id.* That is, the teacher could resolve the claim by believing that Johnny placed no weight on Leo's crossing-guard status when elbowing him. Such a resolution would ignore the dispositive analysis of whether protected activity played *any* role (whether or not such impact was intentional on the decisionmaker's part). As this hypothetical shows, considering an employer's causation evidence while determining the contributing-factor issue will be susceptible to comparative weighing of mixed motives, as well as de facto requirements that whistleblowers prove pretext and retaliatory motive, all of which *Palmer* purports to prohibit.

If ALJs apply the guideposts that the ARB has provided in *Palmer*, then the burden-shifting framework will remain favorable for whistleblowers—a whistleblower will prove contributing-factor causation merely by showing that protected conduct played any role in the decision to take an adverse action, and an employer will avoid liability only by proving by clear and convincing evidence that it would have taken the same action absent the employee's protected conduct. But whistleblower advocates should remain vigilant to ensure that *Palmer* is not misapplied to impose additional requirements on whistleblowers or to permit employers to prove a same-action defense by a preponderance of the evidence, as opposed to clear and convincing evidence.

DOL ARB Sets a High Bar for Employers to Establish Same-Decision Defense

The whistleblower provisions of SOX, the Energy Reorganization Act ("ERA"),[4] and several other whistleblower protection statutes enforced by OSHA employ a burden-shifting framework that is favorable to whistleblowers.

Under the burden-shifting framework, once the complainant has demonstrated by a preponderance of the evidence that his or her protected conduct was a contributing factor[5] in the adverse action, the employer can avoid liability only by demonstrating, by clear and convincing evidence, that it would have taken the same adverse action in the absence of any protected activity. *See Menendez v. Halliburton, Inc.*, ARB Case Nos. 09-002, 09-003, 2011 WL 4915750, at 6 (Sept. 13, 2011).

In 2014, the ARB issued a critical decision defining the burden an employer must meet to establish the same-action affirmative defense. In comparison to the burden-shifting framework of most other anti-discrimination laws, the ARB's explanation of the "clear and convincing evidence" standard in *Speegle v. Stone & Webster Construction* places an onerous burden on employers. *See Speegle v. Stone & Webster Construction, Inc.*, ARB Case No. 13-074, 2014 WL 1758321 (ARB Apr. 25, 2014).

James Speegle worked as a journeyman painter for Stone & Webster ("S&W"), repairing the paint at a nuclear power plant in Alabama. Speegle complained that many of the other employees hired by S&W for journeyman paintwork were inexperienced apprentice painters and that using apprentice painters was a safety risk and violated federal regulations. S&W ignored Speegle's concerns, leading to a heated confrontation between Speegle and his supervisor. Two days after the confrontation, S&W terminated Speegle's employment allegedly for insubordination.

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[4] Section 211 of the ERA protects whistleblowers in the nuclear power industry. *See* 42 U.S.C. § 5851.

[5] The ARB defines "contributing factor" as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enters., Inc.*, ARB Case No. 06-081, slip op. at 17 (U.S. Dep't of Labor July 27, 2006). This standard is "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Id.*

Speegle filed a complaint with OSHA, alleging that he was fired in retaliation for raising nuclear safety concerns. In a roundabout manner[6] the claim arrived at the ARB, which issued a decision establishing a three-part framework that ALJs must apply in determining whether an employer can establish the same-action affirmative defense: (1) whether the employer's evidence meets the plain meaning of "clear" and "convincing"; (2) whether the employer's evidence indicates subjectively that the employer "would have" taken the same adverse action; and (3) whether facts that the employer relies on would change in the absence of the protected activity. *Id.* at 7.

In the first prong of the analysis, the employer must present (1) an unambiguous explanation for the adverse action in question and (2) evidence demonstrating that a proposed fact is "highly probable." *Id.* at 8. Adopting a 1984 Supreme Court definition[7] of "clear and convincing evidence," the ARB found that evidence is clear and convincing only if it "'immediately tilts' the evidentiary scales in one direction." *Id.* at 6.

In the second prong of the *Speegle* framework, an employer must prove that it ***would have*** taken the same action, as opposed to proving just that it ***could have*** taken the same action. *Id.* at 8. For S&W, that meant proving that it would have in fact fired Speegle due solely to the one heated confrontation, as opposed to proving merely that a heated exchange could justify termination.[8]

Finally, the ARB analyzed what is required for an employer to show that it would have acted similarly "in the absence of" the protected activity. *Id*. The ARB held that in assessing what would have happened in the absence of protected activity, the ALJ should consider how the facts would have been different in the absence of the that activity. *Id*. For example, Speegle's repeated internal disclosures that using apprentice painters was unsafe engendered tension with

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[6] After a hearing, the ALJ held that Speegle had engaged in protected activity but that his protected activity was not a contributing factor to S&W's decision to terminate his employment. On appeal, the ARB held that Speegle's protected conduct was a contributing factor in his termination. S&W appealed to the Eleventh Circuit, which held that the ARB erred in its analysis of the ALJ's factual findings and failed to consider additional arguments from Speegle that his termination was pretextual. The case was remanded to the ARB, which found that Speegle's protected conduct was a contributing factor in S&W's decision to fire him and remanded the case to the ALJ to determine whether S&W had demonstrated, by clear and convincing evidence, that it would have terminated Speegle in the absence of his protected activity. On remand, the ALJ again dismissed the complaint, and Speegle appealed to the ARB.

[7] *Colorado v. New Mexico*, 467 U.S. 310 (1984).

[8] For example, a company policy stating that a heated confrontation warrants termination would, by itself, be insufficient.

management; therefore, the ALJ erred by considering these tensions as evidence supporting the same-action defense.

Fifth Circuit *Halliburton* Decision Emphasizes the Broad Scope of SOX Adverse Actions and Remedies

In November 2014, the Fifth Circuit held that (1) "outing" a whistleblower is a prohibited adverse action; (2) the "contributing factor" causation standard does not require a showing of a retaliatory motive; and (3) SOX affords noneconomic compensatory damages, including emotional distress and reputational harm. *See Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254 (5th Cir. 2014).

Anthony Menendez raised concerns internally about questionable accounting practices while working as a director in Halliburton's Finance and Accounting department. In particular, Menendez disclosed to his supervisor his belief that Halliburton's practices involving revenue recognition did not conform with generally accepted accounting principles. The supervisor initially responded by telling Menendez that he was not a "team player" and should try harder to work with colleagues to resolve accounting issues.

After Halliburton failed to address his concerns, Menendez filed a confidential disclosure with the SEC about Halliburton's accounting practices. In addition, Menendez sent a memo to Halliburton's Board of Directors raising the same issues he disclosed to the SEC, and that memo was forwarded to Halliburton's general counsel ("GC"). When Halliburton received a notice of investigation from the SEC requiring Halliburton to retain documents, Halliburton's GC inferred from Menendez's internal disclosures that he was the source of the SEC inquiry. The GC sent an email to Menendez's colleagues instructing them to retain certain documents because "the SEC has opened an inquiry into the allegations of Mr. Menendez."

After the GC outed Menendez as a whistleblower, Menendez's colleagues began treating him differently, refusing to work and associate with him. Within a year, Menendez resigned. Menendez described the day that he saw the GC's email outing him as a whistleblower as one of the worst in his life.

The main issue on appeal was whether Menendez suffered an "adverse action" when Halliburton disclosed his identity as a whistleblower. *See id.* at 259. In affirming the decision below, the Fifth Circuit applied the Supreme Court's *Burlington Northern* material adversity standard, i.e., whether a company's actions well might have dissuaded a reasonable worker from engaging in protected conduct. *See id.* at 259–62 (citing *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)).

The court reasoned that Halliburton's outing Menendez to his colleagues and informing them that the whistleblower caused them to be the subject of an SEC investigation "creat[ed] an environment of ostracism," which "well might dissuade a reasonable employee from whistleblowing." *Id.* at 262. The court continued:

> It is inevitable that such a disclosure would result in ostracism, and, unsurprisingly, that is exactly what happened to Menendez following the disclosure. Furthermore, when it is the boss that identifies one of his employees as the whistleblower who has brought an official investigation upon the department, as happened here, the boss could be read as sending a warning, granting his implied imprimatur on differential treatment of the employee, or otherwise expressing a sort of discontent from on high. . . . In an environment where insufficient collaboration constitutes deficient performance, the employer's disclosure of the whistleblower's identity and thus targeted creation of an environment in which the whistleblower is ostracized is not merely a matter of social concern, but is, in effect, a potential deprivation of opportunities for future advancement.

Halliburton, Inc. v. Admin. Review Bd., 771 F.3d at 262.

On appeal, Halliburton asserted that a SOX whistleblower must prove a "*wrongfully-motivated* causal connection." *Id.* at 263. The Fifth Circuit rejected this argument by relying on precedent that held a "contributing factor" is "*any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Id.* (quoting *Allen v. Admin. Review Bd.*, 514 F.3d at 476 n.3). In addition, the court relied on a Federal Circuit decision holding that "a whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the [employer] in order to establish that his [protected conduct] was a contributing factor to the personnel action." *Id.* at 263 (alterations in original) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993)).

The Fifth Circuit also rejected Halliburton's contention that SOX does not authorize noneconomic compensatory damages, i.e., emotional distress and reputational harm. *Id.* at 266. The court—relying on the statutory text (identifying "special damages" as a remedy for a prevailing SOX whistleblower), the Tenth Circuit's recent decision in *Lockheed Martin Corp. v. Admin. Review Bd*., and cases construing "special damages" under the False Claims Act's anti-retaliation provision—concluded that SOX affords noneconomic compensatory damages. *Id.* (citing *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1138 (10th Cir. 2013)).

By clarifying the broad scope of actionable adverse actions and the low burden to establish causation, *Halliburton* establishes very helpful precedent for whistleblowers.

Implied Rights in SOX Whistleblower Policies Can Give Rise to Contract Liability

In early 2015, a federal district court held that an employer's anti-retaliation policy created legally enforceable rights. *See Leyden v. Am. Accreditation Healthcare Comm'n*, 83 F. Supp. 3d 241, 247–48 (D.D.C. 2015). In *Leyden*, the trial court held that the plaintiff had a valid claim based on the employer's alleged violation of its internal anti-retaliation policy. The court relied on law construing whether employee handbooks created implied contractual rights.

In *Leyden*, the plaintiff was the Chief Accreditation Officer at the American Accreditation Healthcare Commission, a nonprofit offering accreditation and certification programs to healthcare entities. The defendant had an anti-retaliation policy, which stated: "No URAC employee who in good faith reports any Improper Activities in accordance with this policy shall suffer, and shall be protected from threats of harassment, retaliation, discharge, or other types of discrimination." The plaintiff voiced concerns that new management was mistreating female executives and that two board members were engaged in conduct that she thought jeopardized the organization's independence. The defendant then terminated the plaintiff's employment.

The defendant moved to dismiss the complaint, arguing in relevant part that the anti-retaliation policy did not create contractual rights. Even if it did, the defendant contended, it had disclaimed any such rights in its employee handbook.

However, the court held that the anti-retaliation policy created an implied contract. *Id.* The court began by reviewing *Strass v. Kaiser Foundation Health Plan*, a case holding that an employee handbook created an implied contract. *Id.* at 247 (citing *Strass v. Kaiser Found. Health Plan*, 744 A.2d 1000 (D.C. 2000)). The court discussed how a manual could create rights, and how an employer could effectively disclaim those rights. *Id.* The court also rejected the defendant's argument about the disclaimer, noting that a disclaimer that was "rationally at odds" with the other language in the document may not cut off an implied contract. *Id.*

In finding an implied contract, the court focused on the employer's invitation to report "Improper Activities" internally and on the language of the anti-retaliation policy. *Id.* The court also concluded that the employer's disclaimer, which was found in a different document, was rationally at odds with the anti-retaliation policy. *Id.* The reasoning in *Leyden* may be persuasive in other jurisdictions and provide an important remedy to whistleblowers that are not covered under federal or state whistleblower protection statutes.

However, this year another federal district court rejected *Leyden*'s reasoning. On June 22, 2016, the U.S. District Court for the Southern District of New York held that an employer's code of conduct was not a contract because it "states that it is 'not a contract of employment' and that nothing in the company's policies 'should be construed as a promise of any kind, or creating a contract regarding wages or other working conditions.'" *Diaz v. Transatlantic Reinsurance Co.*, No. 1:16-cv-01355, slip op. at 12–13. The court held that the employer's senior officer code of conduct, by extension, was not a contract because the code of conduct, which included an adequate disclaimer, applied to the entire "Corporation and its subsidiaries worldwide." *Id.*

In *Diaz*, similar to *Leyden*, the defendant's manuals contained anti-retaliation provisions. Specifically, its code of conduct stated that the company was obligated to "prevent retaliation against any employee who, in good faith, voices concerns, reports violations, or participates in an investigation," and its senior officer code stated that the company "will not tolerate retaliation for violations of this Code made in good faith." *Id.* at 11. Furthermore, according to the plaintiff, the senior officer code "encourage[d] employees to report potential violations, including conflicts of interest." *Id.* at 5.

As discussed above,[9] Ileana Diaz reported a potential conflict of interest involving the executive vice president. Diaz alleged that she suffered harassment and adverse actions after making this report. *Id.* at 5–6.

In addition to alleging retaliation under SOX, Diaz alleged a breach of contract based on Transatlantic's violations of the anti-retaliation provisions in its code of conduct and senior officer code. Transatlantic moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Diaz failed to state a claim. The district court agreed with Transatlantic, turning to New York precedent that "employment guides or codes of conducts [sic] may not provide the basis for breach of contract claims when they contain language of disclaimer." *Id.* at 12 (citing *Lobosco v. N.Y. Tel. Co./NYNEX*, 751 N.E.2d 462 (N.Y. 2001)). The court accepted Transatlantic's disclaimer and concluded that its code of conduct and senior officer code were not contracts. Therefore, those codes could not form the basis of Diaz's breach of contract claim, and the court granted Transatlantic's Rule 12(b)(6) motion. *See id.* at 12–13.

SOX Whistleblowers Are Obtaining Substantial Jury Verdicts

Although SOX was enacted fourteen years ago, very few SOX claims have been tried before juries, and, until recently, SOX whistleblowers had not obtained large verdicts. This is due in part to the ambiguity that existed prior to 2010 as to whether SOX whistleblowers are entitled to a jury trial. The Dodd-Frank Act ("Dodd-Frank") amendments to Section 806 of SOX clarify the right to try a SOX whistleblower claim before a jury. *See* 18 U.S.C. 1514A(b)(2)(E) ("A party to an action brought under [Section 806] shall be entitled to trial by jury."). Some recent verdicts suggest that SOX whistleblowers can obtain large damages, which may prompt more SOX whistleblowers to remove their claims from the DOL to district court.

Most recently, in August 2015, a New York federal jury awarded $1.6 million in compensatory damages to a whistleblower in a SOX retaliation lawsuit. Progenics Pharmaceuticals, Inc. ("Progenics"), employed Julio Perez as a senior manager of

[9] *Supra* at 8.

pharmaceutical chemistry. Perez worked with representatives from Progenics and another pharmaceutical company, Wyeth Pharmaceuticals Division ("Wyeth"), to develop Relistor, a drug that treats post-operative bowel dysfunction and opioid-induced constipation.

Perez saw a confidential memo from Wyeth executives to Progenics executives. Contrary to the companies' public statements, the memo stated that Relistor underperformed during the second phase of clinical trials and did not warrant a third phase of trials. The Wyeth memo specifically stated, "Do not pursue immediate initiation of Phase 3 studies with either available oral tablets or capsule formulations."

On August 4, 2008, Perez disclosed his belief to Progenics executives that the company was "committing fraud against shareholders since representations made to the public were not consistent with the actual results of the relevant clinical trial, and [Plaintiff] think[s] this is illegal." *See Perez v. Progenics Pharm., Inc.*, 965 F. Supp. 2d 353, 359 (S.D.N.Y. 2013) (alterations in original). The next day, Progenics's General Counsel questioned Perez about the confidential Wyeth memo. Progenics then terminated Perez's employment, claiming he had refused to reveal how he had obtained the Wyeth memo.

Perez brought suit under SOX. Progenics claimed that it terminated Perez's employment because he refused to explain how he got the memo, which Perez denied. Though the memo's intended recipients denied giving Perez a copy, Perez argued that the memo was distributed widely within Wyeth and that he had not "misappropriated" it.

OSHA did not substantiate Perez's complaint, and so Perez removed his SOX claim to federal court in November 2010. The matter was hard fought, but the jury decided in favor of Perez and attributed the full amount of the $1.6 million verdict to compensatory damages. The jury's willingness to make a large award absent substantial economic loss is significant because the whistleblower provision of SOX places no cap on compensatory damages.

As another example, on March 5, 2014, a California jury awarded $6 million to Catherine Zulfer in her SOX whistleblower retaliation action against Playboy, Inc. ("Playboy"). *Zulfer v. Playboy Enters. Inc.*, JVR No. 1405010041, 2014 WL 1891246 (C.D. Cal. Mar. 5, 2014). Zulfer, a former accounting executive, alleged that Playboy had terminated her in retaliation for raising concerns about executive bonuses to Playboy's chief financial officer ("CFO") and chief compliance officer ("CCO"). She contended that she had been instructed by Playboy's CFO to set aside $1 million for executive bonuses that had not been approved by the board of directors. Zulfer refused to carry out this instruction, warning Playboy's General Counsel that the bonuses were contrary to Playboy's internal controls over financial reporting. After Zulfer's disclosure, the CFO retaliated by ostracizing Zulfer, excluding her from meetings, forcing her to take on additional duties, and eventually terminating her employment. After a short trial, a jury awarded Zulfer $6 million in compensatory damages and also ruled that Zulfer was entitled to punitive damages. *Id*.[10] Zulfer and Playboy reached a settlement before a determination of punitive damages. The $6 million compensatory damages award is the highest award to date in a SOX anti-retaliation case.

The Ninth Circuit also recently affirmed a SOX jury verdict awarding $2.2 million in damages, plus $2.4 million in attorney's fees, to two former in-house counsel. *Van Asdale v. Int'l Game Tech.*, 549 F. App'x 611, 614 (9th Cir. Sept. 27, 2013). Shawn and Lena Van Asdale, both former in-house counsel at International Game Technology ("IGT"), alleged that they had been terminated in retaliation for disclosing shareholder fraud related to IGT's merger with rival game company Anchor Gaming ("Anchor"). Specifically, the Van Asdales alleged that Anchor had withheld important information about its value, causing IGT to commit shareholder fraud by paying above market value to acquire Anchor. *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 992 (9th Cir. 2009). When the Van Asdales discovered the issue, they brought their concerns about the potential fraud to their boss, who had served as Anchor's general counsel prior to the merger. IGT terminated both plaintiffs shortly thereafter.

Additionally, the plaintiff in *Rhinehimer*[11] obtained a $250,000 jury verdict in the Eastern District of Kentucky. *Rhinehimer v. U.S. Bancorp Invs., Inc.*, No. 2:11-CV-136-WOB, 2013 WL 9235343 (E.D. Ky. Oct. 8, 2013), *aff'd*, 787 F.3d at 813.

Zulfer, *Van Asdale*, and *Rhinehimer* highlight the importance of the removal or "kick out" provision in SOX, which authorizes SOX whistleblowers to remove their claims from the DOL to federal court for *de novo* review 180 days after filing the complaint with OSHA. Although SOX does not authorize punitive damages, a SOX complainant in federal court can add claims for which punitive damages can be recovered. For example, when Zulfer and the Van Asdales removed their SOX claims to district court, they added a common-law claim of wrongful discharge in violation of public policy. While the ability to add claims can make a SOX claim more valuable after removal, that interest should be balanced against the increased time commitment and cost of litigating in the courts as opposed to the more streamlined DOL administrative process.

Prior to removing a SOX claim to federal court, plaintiff's counsel should carefully assess whether the jurisdiction to which the claim would be removed has adopted or deferred to the current ARB's broad construction of protected conduct as articulated in *Sylvester*, ARB Case

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[10] SOX does not provide punitive damages; however, Zulfer also brought claims for age discrimination under the California Fair Employment and Housing Act (Cal. Gov. Code § 12940(a)) and for wrongful termination in violation of public policy.

[11] Discussed *supra* at 4-5.

No. 07-123. Not all circuits have adopted or deferred to *Sylvester*, and some may apply the prior ARB's narrow construction of SOX.

SOX Protects Post-Employment Whistleblowing

A U.S. district court in New York recently adopted the ARB's view that former employees can engage in protected activity under SOX. *Kshetrapal v. Dish Network, LLC*, 90 F. Supp. 3d 108, 112–14 (S.D.N.Y. 2015).

In *Kshetrapal*, the court took the following allegations as true in deciding the defendant's motion to dismiss: Tarun Kshetrapal, an associate director for Dish Network ("Dish"), disclosed that a marketing agency with which Dish had contracted was submitting fraudulent bills. Kshetrapal disclosed the fraud, but initially his supervisors ignored him. When Kshetrapal pressed the issue, Dish investigated and then terminated Kshetrapal's supervisor and its contract with the marketing agency. The next month, Dish forced Kshetrapal to resign.

The marketing agency sued Dish for breach of contract. Kshetrapal was deposed in that matter, and he testified that he had discussed the marketing agency's fraud with his supervisors, who repeatedly dismissed his complaints. Shortly after the deposition, the plaintiff began working for a music streaming service. Dish had advertised with the streaming service, but Dish pulled its business after the plaintiff joined. Sometime later, a potential employer rescinded an offer of employment to the plaintiff, explaining that Dish had instructed the new employer to do so.

The court held that SOX covered Kshetrapal's protected activity, even though it occurred after the employment relationship ended. *Id.* at 114. In reaching this conclusion, the court first looked at the statutory language and found it ambiguous. *Id.* at 113. Applying *Skidmore* deference, the court looked to the regulations and ARB precedent to resolve the ambiguity in favor of the plaintiff. *See id.* at 113–14.

To hold an employee's post-termination disclosures are not protected would undercut the purpose of SOX, the court observed, in that such a result would "discourage employees from exposing fraudulent activities of their former employers for fear of retaliation in the form of blacklisting or interference with subsequent employment." *Id*. at 114.

Kshetrapal indicates that the ARB's interpretations of SOX will continue to receive widespread support in the federal courts. Further, the case is a cautionary tale for any employer that contemplates an aggressive response to statements made by former employees.

Duty Speech Defense Inapplicable to SOX Claims

A consensus is emerging that the duty speech doctrine does not apply to SOX whistleblower claims. The duty speech defense asserts that disclosures made while performing routine job duties are outside the ambit of protected conduct. The defense became increasingly popular in the wake of the Supreme Court's 2006 decision in *Garcetti v. Ceballos*, which held that government employees cannot not bring First Amendment whistleblower retaliation claims based on work-related speech if the speech is part of their job duties. *See Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006).

Most DOL ALJs addressing this issue have declined to apply *Garcetti* to SOX claims. For example, Judge Lee Romero Jr. concluded that "one's job duties may broadly encompass reporting of illegal conduct, for which retaliation results. Therefore, restricting protected activity to place one's job duties beyond the reach of the Act would be contrary to congressional intent." *Deremer v. Gulfmark Offshore, Inc.*, ALJ Case No. 2006-SOX-2, 2007 WL 6888110, at *42 (June 29, 2007). The ARB has also declined to apply the duty speech defense to SOX claims. *See Robinson v. Morgan Stanley*, ARB Case No. 07-070, 2010 WL 348303, at *8 (Jan. 10, 2010) ("[Section 1514A] does not indicate that an employee's report or complaint about a potential violation must involve actions outside the complainant's assigned duties.").

Recently, a New York district court held that the duty speech defense is inapplicable to SOX claims. *See Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 530 (S.D.N.Y. May 8, 2014). Jennifer Yang worked as the chief risk officer for Navigators Group ("Navigators"), an insurance company. Yang alleged that Navigators terminated her employment for disclosing to her supervisor deficient risk management and control practices. Navigators moved to dismiss Yang's SOX claim in part on the basis that Yang's disclosures about risk issues were "part and parcel of her job." *Id.* The court rejected this duty speech argument, relying on a 2012 district court decision holding that "whether plaintiff's activity was required by job description is irrelevant." *See id.* at 531 (citing *Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012)).

Another recent decision, which arose under New Jersey's robust whistleblower protection statute, provides a detailed analysis of why the duty speech doctrine is contrary to the purpose of whistleblower protection laws. *See generally Lippman v. Ethicon, Inc.*, 119 A.3d 215 (N.J. 2015).

Joel Lippman worked at Ethicon, a manufacturer of medical devices used for surgical procedures, from July 2000 until his termination in May 2006. Ethicon is a subsidiary of Johnson & Johnson ("J&J"). During the ten years before he was transferred to Ethicon, Lippman worked at Ortho-McNeil Pharmaceutical ("OMP"), another J&J subsidiary, as director of medical services and then vice president of clinical trials.

At Ethicon, Lippman began as vice president of medical affairs, until Ethicon promoted him to worldwide vice president of medical affairs and chief medical officer in 2002. As vice president of medical affairs, Lippman was "responsible for safety, ensuring that safe medical practices occurred in clinical trials of [Ethicon's] products; . . . medical reviews, information from a medical standpoint; [and] medical writing." *Id.* at 218 (alterations in original) (citation omitted). Consistent with those responsibilities, Lippman served on multiple internal review boards for Ethicon. Generally, those boards addressed strategic product activities and evaluated the health and safety risks of products. As a member of those boards, Lippman was to provide medical and clinical expertise and opinions. In short, Lippman contributed to Ethicon's high-level policy decision-making.

The court noted that Lippman served on a quality board that assessed the health risks posed by Ethicon's products and provided "medical input" regarding whether corrective measures were required for any products already in the field. The quality board could take various corrective actions. At times, a product recall became necessary because of regulatory requirements, Ethicon policy, patient health and safety concerns, or a combination thereof. Ethicon gave the quality board the final say in what, if any, corrective actions to take—even when there was no government directive. Members of the quality board were "expected to express their view points from their" area of knowledge or expertise.

During his employment, and arguably within the course of his ordinary job duties, Lippman objected to several of OMP's and Ethicon's pharmaceutical products on safety and compliance grounds. When Lippman was terminated, he brought suit under New Jersey's Conscientious Employee Protection Act ("CEPA"), alleging that he was fired for his objections.

The trial court granted summary judgment for Ethicon, holding that the law's protection does not extend to disclosures made pursuant to an employee's ordinary job duties. The appellate division reversed, based largely on an interpretation of the statutory text.

The New Jersey Supreme Court affirmed, concluding that, based on the statute's purpose and text, an employee is entitled to protection regardless of his or her duties or title, including compliance or "watchdog" employees. *See id.* at 228. After stating that its primary goal was to implement legislative intent, the court emphasized CEPA's settled "public policy purpose to protect whistleblowers from retaliation by employers having been long recognized by the courts of this State." *Id.* at 224 (citations omitted). The court reiterated that "[a]fter nearly two decades of implementation, it is beyond dispute that the legislative purpose animating CEPA is . . . to 'protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct.'" *Id.* at 225 (quoting *Abbamont v. Piscataway Twp. Bd. of Educ.*, 650 A.2d 958, 971 (N.J. 1994)).

Within that context, the statute's plain meaning extends protection to all disclosures that otherwise meet the requirements for protection, regardless of the whistleblower's job duties. *See id.* at 228. Holding to the contrary would improperly "engraft language that the Legislature has not chosen to include" and deny the remedial legislation a liberal construction. *See id.* at 226. The court approvingly cited the appellate panel's observation that "watchdog employees are the most vulnerable to retaliation because they are 'uniquely positioned to know where the problem areas are and to speak out when corporate profits are put ahead of consumer safety.'" *Id.* at 220 (citation omitted). But the New Jersey Supreme Court went even further than the appellate division and rejected any additional requirement on "watchdog" employees under CEPA. *See id.* at 231.

These recent decisions suggest that courts are likely to reject the duty speech defense in statutory whistleblower retaliation cases.

SOX Authorizes Front Pay

A prevailing SOX whistleblower can recover "all relief necessary to make the employee whole," including reinstatement, back pay, attorney's fees, and costs. 18 U.S.C. § 1514A(c). "Special damages" include damages for impairment of reputation, personal humiliation, mental anguish and suffering, and other noneconomic harm resulting from retaliation. *See Kalkunte v. DVI Fin. Servs., Inc.*, ARB Case Nos. 05-139, 05-140, at 11 (ARB Feb. 27, 2009). Although reinstatement is the preferred and presumptive remedy to make an employee whole, some ALJs have awarded front pay in lieu of reinstatement. *See, e.g.*, *Hagman v. Washington Mutual Bank, Inc.*, ALJ Case No. 2005-SOX-00073, at 26–30 (ARB Dec. 19, 2006), *appeal dismissed*, ARB Case No. 07-039 (ARB May 23, 2007) (awarding $640,000 in front pay to a banker whose supervisor became verbally and physically threatening when the banker disclosed concerns about the short funding of construction loans). But, until recently, there was some ambiguity as to whether district courts would award front pay.

In October 2013, Judge Robert Payne held that front pay is an appropriate remedy in lieu of reinstatement in SOX actions. *See Jones v. SouthPeak Interactive Corp.*, 986 F. Supp. 2d 680 (E.D. Va. 2013), *aff'd*, 777 F.3d 658 (4th Cir. 2015). Andrea Jones worked at SouthPeak Interactive Corp. ("SouthPeak") as its chief financial officer, and SouthPeak terminated her employment two days after she disclosed accounting irregularities to the SEC. Following a four-day trial, a jury found for Jones and awarded nearly $700,000 in damages. Jones then filed a motion seeking front pay in lieu of reinstatement and in addition to compensatory damages. Judge Payne's decision to award front pay under SOX was based on DOL regulations implementing SOX, which authorize the award of front pay in lieu of reinstatement, and on Fourth Circuit precedent affirming awards of front pay in lieu of reinstatement under similar remedial statutes, such as the ADEA and FMLA.

SouthPeak appealed Judge Payne's decision. The DOL filed an *amicus curiae* brief arguing that front pay is an appropriate remedy under SOX, and the Fourth Circuit affirmed. *See* 777 F.3d at 663. Following *Jones*, other circuits will likely hold that SOX authorizes front pay in lieu of reinstatement. Large awards of front pay to highly compensated employees, such as corporate officers, could result in very large recoveries under SOX.

Courts Are Affirming Large Compensatory Damage Awards in Whistleblower Retaliation Cases Based Solely on Whistleblowers' Testimony

Most of the whistleblower retaliation statutes adjudicated at the DOL, including SOX, authorize compensatory damages. Until recently, awards of compensatory damages by the DOL were fairly nominal absent expert witness testimony concerning the whistleblower's emotional distress damages or diminished career prospects. However, two recent decisions, one from the Eighth Circuit and the other from the ARB, indicate that a whistleblower can obtain substantial compensatory damages based solely on his or her testimony.

In *Maverick Transportation v. U.S. Department of Labor*, the Eighth Circuit affirmed an ARB decision holding that Maverick Transportation ("Maverick"), a trucking company, had retaliated against Albert Brian Canter, one of its drivers, for refusing to drive a truck that he believed was unsafe. *Maverick Transp., LLC v. U.S. Dep't of Labor, Admin. Review Bd.*, 739 F.3d 1149, 1157 (8th Cir. 2014). The truck in question had a chaffing brake hose and leaked steering fluid, conditions that substantially increased the likelihood of a catastrophic failure of the service brakes.

Canter sued Maverick under the whistleblower protection provision of the Surface Transportation Assistance Act ("STAA"), which protects truck drivers who refuse to drive due to a reasonable apprehension that a vehicle is unsafe and may cause serious injury to the driver or the public. The ALJ awarded Canter $75,000 in compensatory damages for emotional distress, despite the fact that Canter offered no corroborating expert testimony. *See* ALJ Case No. 2009-STA-054 (ARB Oct. 28, 2010). In doing so, the ALJ noted that "the ARB has awarded damages for emotional and mental distress where the claims were unsupported by medical evidence." *Id.* at 15. The opinion indicates that Canter's testimony regarding his emotional distress was compelling:

- Canter lost his appetite and experienced suicidal thoughts so severe that, on one occasion, he put a pistol to his head; as he started to pull the trigger, he moved his head out of the way and put a bullet hole through the ceiling and roof.

- Canter's receipt of debt-collection notices and calls from collection agencies caused him great distress.

- Canter's checking accounts were closed due to insufficient funds, and he owed bank fees and charges for overdrafts.

- Canter was forced to vacate his home in Alabama and move in with his sister in Colorado in July 2008.

- Canter could not visit his stepchildren because he could not afford to travel.

Id.

Maverick appealed to the ARB, which affirmed the ALJ's determinations "as supported by substantial evidence and prevailing law." ARB Case No. 11-012, 2012 WL 2588598, at *4 (ARB June 27, 2012). In petitioning the Eighth Circuit for review, Maverick argued that the award of compensatory damages for emotional distress was excessive because it was supported only by Canter's testimony. The Eighth Circuit denied Maverick's petition for review, noting that "[a] plaintiff's own testimony can be sufficient for a finding of emotional distress, and medical evidence is not necessary." 739 F.3d at 1157 (quoting *Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1097 (8th Cir. 2007)). The Eighth Circuit also suggested that the ARB properly awarded compensatory damages based on the severity of the injuries, rather than on the type of evidence used to prove those injuries. *See id.* at 1157–58.

The ARB also recently affirmed a substantial award of compensatory damages based solely on a whistleblower's testimony. In *Fink v. R&L Transfer, Inc.*, the ARB affirmed the ALJ's award of $100,000 in compensatory damages and $50,000 in punitive damages to a truck driver who was terminated for refusing to drive in unsafe winter weather. *Fink v. R&L Transfer, Inc.*, ARB Case No. 13-018 (ARB Mar. 19, 2014).[12] In awarding compensatory damages, the ALJ relied on Fink's testimony that, among other harms:

- he had to seek public assistance to pay basic living expenses;
- his family ultimately lost its home;
- he had to borrow money from family members; and
- he had difficulty sleeping, wondering how he would be able to support his family.

Id. In affirming the award of $50,000 in punitive damages, the ARB stated that "[a]n award of punitive damages may be warranted where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'" *Id*. (citation omitted).

In addition to obtaining large compensatory damages awards at trial that are affirmed on appeal, some whistleblowers are obtaining substantial compensatory damages awards from OSHA. For example, in September 2013, OSHA issued an order requiring Clean Diesel Technologies, Inc., to pay $1.9 million to its former chief financial officer, who was fired for warning the board of directors about ethical and financial concerns raised by a proposed merger.[13] In addition to awarding $486,000 in lost wages, bonuses, stock options, and severance pay, OSHA awarded the complainant more than $1.4 million in compensatory damages for pain

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[12] Unlike SOX, the STAA authorizes punitive damages.

[13] DOL press release available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=24915.

and suffering, damage to career and professional reputation, and lost 401(k) employer matches and expenses.

Supreme Court Holds that SOX Protects Employees of Privately Held Contractors and Subcontractors of Publicly Traded Companies

Section 806 of SOX, as amended by Dodd-Frank, prohibits an "officer, employee, contractor, subcontractor, or agent" of a publicly traded[14] company from retaliating against "an employee" for disclosing reasonably perceived potential or actual violations of the six enumerated categories of protected conduct in Section 806. *See* 18 U.S.C. § 1514A. Until recently, there was a split of authority as to whether SOX protects employees of contractors providing services to public companies. In March 2014, the Supreme Court clarified that employees of contractors of public companies, including the attorneys and accountants who prepare the SEC filings of public companies, are covered under Section 806. *See Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014). Subsequent interpretations of *Lawson*, however, suggest that the disclosures of a contractor's employee are protected only if those disclosures pertain to fraud perpetrated by a publicly traded company, as opposed to wrongdoing by a private contractor.

Jackie Lawson worked for Fidelity Brokerage Services, a private subsidiary of the private company FMR Corp., which manages the day-to-day operations of publicly traded Fidelity mutual funds.[15] As is common in the mutual-fund industry, the Fidelity investment company that files reports with the SEC (and is covered under Section 806) does not direct the personnel who operate the funds on a day-to-day basis. Lawson brought a SOX claim alleging retaliation for disclosing securities violations, including improper retention of advisory fees. The district court held that Lawson is a covered employee under Section 806, but the First Circuit reversed, holding that SOX protects only employees of publicly traded companies.

In a 6-3 decision, the Supreme Court reversed, holding that SOX protects employees of contractors, subcontractors, and agents of public companies. *Lawson*, 134 S. Ct. at 1176. The majority relied primarily on the plain meaning of SOX but also based its decision on an extensive examination of the legislative history and purpose of the statute. In particular, the Court focused on references in the legislative history to outside auditors and attorneys who suffered retaliation after blowing the whistle on accounting fraud at Enron. The Court concluded

[14] For purposes of SOX, a publicly traded company is defined as a company that has securities registered under § 12 of the Securities Exchange Act or that is required to file reports under § 15(d) of the same Act or "any subsidiary whose financial information is included in the consolidated financial statements of such company." *See* 18 U.S.C. § 1514A.

[15] Fidelity mutual funds are a collection of publicly traded companies that have no employees. All operations of the funds are performed by FMR.

that protecting employees of contractors of public companies is essential to preventing another Enron.

In the wake of *Lawson*, the U.S. District Court for the Eastern District of Pennsylvania interpreted a limiting principle for SOX coverage of employees of public companies' contractors and subcontractors. *See Gibney v. Evolution Mktg. Research, LLC*, 25 F. Supp. 3d 741 (E.D. Pa. 2014). Leo Gibney was employed by Evolution Marketing Research ("Evolution"), a private consulting company that contracted its services out to many publicly traded companies, including the pharmaceutical giant Merck. Evolution terminated Gibney's employment after he reported to his supervisor that Evolution was fraudulently overbilling Merck for its services. Gibney brought a SOX claim, and the district court held that even though Gibney was a protected employee and had reported securities fraud, SOX did not apply because it protects only disclosures aimed at preventing fraud perpetrated by, rather than against, publicly traded companies. *Id.* at 747–48. The court expressed concern that permitting Gibney's claim to proceed would transform SOX into a general retaliation statute that would apply to any private company that transacts business with a public company. While *Lawson* will probably generate an increase in SOX claims, *Gibney* suggests that courts will likely adopt limiting principles that narrow the scope of SOX coverage for employees of contractors and subcontractors of public companies.

Thereafter, the U.S. District Court for the Northern District of New York held, consistent with *Gibney*, that SOX does not protect employees of contractors whose disclosures concern only the contractors' violations of federal securities laws. *See Anthony v. Nw. Mut. Life Ins. Co.*, 130 F. Supp. 3d 644 (N.D.N.Y. 2015). That is, "[a] private company's fraudulent practices do not become subject to § 1514A merely because that company incidentally has a contract with a public company." *Id.* at 652. The court enunciated two limitations on the scope of SOX whistleblower protection:

> First, the whistleblowing must relate to the contractor's provision of services to the public company. Thus, § 1514A only covers contractors insofar as they are firsthand witnesses to corporate fraud at a public company—for example, the lawyers and accountants in the Enron scandal who facilitated and contributed to the fraud. It does not cover contractor employees who experience retaliation that is unrelated to the provision of services to a public company. The second limitation is that § 1514A is concerned with public company fraud, whether committed by the public company itself or through its contractors. . . . The effect of these limitations is to restrict § 1514A to situations where a contractor employee is functionally acting as an employee of a public company, and in that capacity, is a witness to fraud by the public company.

Id. (citations omitted).

A ruling by a U.S. district court in Wisconsin clarified that, for § 1514A to apply, an actual employment relationship must exist between the plaintiff and the alleged retaliator. *See Bogenschneider v. Kimberly Clark Glob. Sales, LLC*, No. 14-cv-743-bbc, 2015 WL 796672 (W.D. Wis. Feb. 25, 2015). Bret Bogenschneider, a former employee of Kimberly Clark, claimed that both Kimberly Clark and its law firm, Godfrey & Kahn, had retaliated against him after he reported alleged tax fraud by Kimberly Clark. Citing *Lawson*, Bogenschneider argued that Godfrey & Kahn was an "agent" of Kimberly Clark and so could be held liable under § 1514A for retaliation. The district court rejected this argument and dismissed the claim against the law firm, stating:

> Although the Court [in *Lawson*] listed "law firms" in its question, this was in the context of *an employee* of the law firm, so *Lawson* does not help plaintiff. . . . Regardless whether Godfrey & Kahn may have participated in any of the alleged retaliation, the law firm is not covered by § 1514A because the firm was not plaintiff's employer.

Id. at *6.

OSHA Clarifies Investigative Standard for Reprisal Claims

In spring 2015, OSHA issued a memo[16] clarifying the investigative standard for OSHA whistleblower investigations. OSHA enforces more than twenty whistleblower protection laws, investigating reprisal complaints and issuing merit findings where there is reasonable cause to believe that retaliation has occurred. Under most of these laws, a merit finding typically includes a preliminary order of relief to make the employee whole. Such relief can include reinstatement, lost wages, compensatory damages, and attorney's fees. Some statutes also provide for punitive damages.

The memo's essential message was that "the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies following a hearing," and that OSHA can issue a merit finding where an investigation reveals that the complainant ***could*** succeed in proving a violation.

The memo provides the following clarification of the "reasonable cause" standard:

- "The threshold OSHA must meet to find reasonable cause that a complaint has merit requires evidence in support of each element of a violation and consideration of the evidence provided by both sides during the investigation, but does not generally require as much evidence as would be required at trial. Thus, after evaluating all of

[16] Available at http://www.whistleblowers.gov/InvestigativeStandard20150420.html.

the evidence provided by the employer and the complainant, OSHA must believe that a reasonable judge could rule in favor of the complainant."

- "OSHA's investigation must reach an objective conclusion – after consideration of the relevant law and facts – that a reasonable judge could believe a violation occurred. The evidence does not need to establish conclusively that a violation *did* occur."

- "OSHA's responsibility to determine whether there is reasonable cause to believe a violation occurred is greater than the complainant's initial burden to demonstrate a prima facie allegation that is enough to trigger the investigation."

- "Although OSHA will need to make some credibility determinations to evaluate whether a reasonable judge could find in the complainant's favor, OSHA does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that a violation occurred."

OSHA's clarification of the reasonable cause standard is consistent with the ARB's precedent. And though the memo does not alter the law, it may increase the number of merit findings because investigators will understand that they need not obtain "smoking gun" evidence of retaliation to issue a merit finding.

<u>Dodd-Frank and SEC Whistleblower Reward Program Developments</u>

SEC Whistleblower Reward Program Gains Traction

Since its implementation in August 2011, the SEC's Whistleblower Reward Program has steadily gained momentum. Under this program, per Section 922(a) of Dodd-Frank ("Section 922"), a whistleblower who provides original information to the SEC that results in monetary sanctions exceeding $1 million shall be paid an award of ten to thirty percent of the amount recouped. *See* 15 U.S.C. § 78u-6.

Initially, there was a great deal of skepticism about the SEC whistleblower program, including concerns that it would not yield useful tips and that it would undermine corporate compliance programs by incentivizing whistleblowers to bypass them and go directly to the SEC. Five years later, however, these fears have proved to be unfounded. The program has generated tips that enabled the SEC to stymie ongoing fraud and has actually forced companies to strengthen their internal compliance programs. In a recent speech entitled "The SEC as the Whistleblower's Advocate," SEC Chair Mary Jo White characterized the program as a "game changer." White reported that the quality of tips has been very high and that the tips have spanned the full spectrum of securities law violations, including market manipulation, offering fraud, and shareholder fraud. As the SEC confronts significant resource challenges in policing the financial markets, high-quality tips that enable the SEC to build a case quickly are invaluable in helping the SEC protect investors.

Due to the whistleblower program, the SEC has received more than 18,000 tips from all fifty U.S. states and 103 foreign countries, including over 4,000 in FY2016, and has paid out more than $149 million in awards to fourty-one whistleblowers. Also, contrary to initial concerns, more than 80% of whistleblowers disclosed wrongdoing internally prior to blowing the whistle to the SEC, thereby incentivizing companies to bolster their internal compliance programs. A company that fails to properly investigate and correct disclosures of fraud or other securities violations runs the risk that the whistleblower will disclose the wrongdoing to the SEC, requiring the company to explain why it failed to take corrective action.

The SEC announced the Dodd-Frank whistleblower program's second-largest award, more than $22 million, on August 29, 2016 (the SEC's largest award to date was $30 million, issued in September 2014).[17] The whistleblower, a former financial executive with Monsanto Co., disclosed to the SEC that Monsanto was improperly booking its revenue, resulting in materially misstated earnings across three years. Specifically, the SEC found that Monsanto was issuing tens of millions of dollars in rebates to retailers and distributors but lacked the internal controls to account for those rebates. Monsanto thus failed to account for the costs of the rebate program on its books. Monsanto agreed to pay $80 million to settle the case with the SEC, more than 28% of which went to the whistleblower, who is anonymous. The whistleblower first attempted to resolve the issue internally but was unexpectedly "stymied."

The SEC's third-largest whistleblower award was announced just a couple of months earlier, on June 9, 2016.[18] The whistleblower disclosed information that "substantially advanced" an SEC investigation and enforcement action, resulting in an award of more than $17 million. June 2016 was a particularly active month for the program. The SEC's June 9, 2016, release quoted Sean McKessy (who was chief of the SEC's Office of the Whistleblower at the time) as saying, "In the past month, five whistleblowers have received a total of more than $26 million."

While most of the SEC whistleblower awards have been issued to corporate insiders, Dodd-Frank also authorizes payment of whistleblower awards for "independent analysis" that is not already known to the SEC from any other source. In other words, corporate outsiders are also eligible to receive bounties if they provide the SEC with sufficient "independent analysis," defined as "your own analysis, whether done alone or in combination with others[,] . . . your

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[17] SEC final order of award available at https://www.sec.gov/rules/other/2016/34-78719.pdf.

[18] SEC press release available at https://www.sec.gov/news/pressrelease/2016-114.html.

examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public." 17 C.F.R. § 240.21F-4(b)(3).

On January 15, 2016, the SEC announced a whistleblower award of more than $700,000 to a company outsider who conducted a detailed analysis that led to a successful SEC enforcement action.[19] This is likely the largest award to date for independent analysis of publicly available information, and it will probably encourage securities analysts and fraud examiners to disclose independent analyses to the SEC.

In addition to providing strong financial incentives to whistleblowers, the SEC is enforcing Dodd-Frank's prohibition against whistleblower retaliation and is barring companies from using confidentiality agreements and policies to silence whistleblowers. Although the whistleblower reward provisions are a small part of Dodd-Frank, they might be the most effective new tool to protect investors and promote market integrity.

Dodd-Frank's Coverage of Internal Whistleblowing

A split of authority has emerged regarding whether internal disclosures are protected under Section 922 of Dodd-Frank, 15 U.S.C. § 78u-6(h). The split stems from what appears to have been a drafting error. Under § 78u-6(a)(6), the term "whistleblower" means "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." The anti-retaliation provision in Section 922, however, defines protected conduct as lawful actions taken by a whistleblower:

> **(i)** in providing information to the Commission in accordance with this section;
>
> **(ii)** in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> **(iii)** in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. [§§] 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A).

While the definition of "whistleblower" appears to require a disclosure to the SEC, the "catch-all" provision in § 78u-6(h)(1)(A)(iii) encompasses conduct protected by Section 806 of

[19] SEC press release available at https://www.sec.gov/news/pressrelease/2016-10.html.

SOX, including internal disclosures made to supervisory personnel irrespective of whether those disclosures are made to the SEC.

The SEC has adopted the position that Dodd-Frank whistleblower protections cover those who make only internal disclosures. On August 5, 2015, the SEC released interpretive guidance reiterating that Dodd-Frank whistleblower protection is not limited to disclosures made to the SEC in accordance with the procedures for obtaining a whistleblower award. Rather, protection extends to whistleblowers who report potential securities law violations, whether internally or to the SEC. *See* Exchange Act Release No. 34-75592, 80 Fed. Reg. 47,829 (Aug. 10, 2015).

The SEC offered three reasons not to limit Dodd-Frank whistleblower protection to disclosures to the Commission:

First, the text of Rule 21F-2(b)(1) clarifies that Dodd-Frank whistleblower protection extends to the broad range of disclosures identified in Section 21F(h)(1)(A). This includes (i) providing information to the SEC through the whistleblower program; (ii) initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC based upon or related to a whistleblower submission to the SEC; or (iii) making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 or "any other law, rule, or regulation subject to the jurisdiction of the Commission." *Id.* The whistleblower protection provision of SOX includes internal disclosures about a violation of any SEC rule or regulation.

Second, Rule 21F-2(b)(1)(iii) expressly provides that "[t]he anti-retaliation protections apply whether or not [an individual] satisf[ies] the requirements, procedures and conditions to qualify for an award." *Id.*

Third, the SEC's construction of Dodd-Frank whistleblower protection is driven by the policy goals and intent of the SEC whistleblower reward program:

> Specifically, by providing employment retaliation protections for individuals who report internally first to a supervisor, compliance official, or other person working for the company that has authority to investigate, discover, or terminate misconduct, our interpretive rule avoids a two-tiered structure of employment retaliation protection that might discourage some individuals from first reporting internally in appropriate circumstances and, thus, jeopardize the investor-protection and law-enforcement benefits that can result from internal reporting. Under our interpretation, an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission. Providing equivalent employment retaliation protection for both situations removes a potentially serious disincentive to internal reporting by employees in

> appropriate circumstances. A contrary interpretation would undermine the other incentives that were put in place through the Commission's whistleblower rules in order to encourage internal reporting.

Id.

In September 2015, the U.S. Court of Appeals for the Second Circuit became the first federal appellate court to adopt the SEC's reasoning. *See Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015). *Berman* squarely addressed whether Dodd-Frank's anti-retaliation protection extends to an employee's internal disclosures to his employer. The *Berman* decision focuses on whether the conflicting provisions create an ambiguity requiring the court to defer to the SEC's interpretation pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Second Circuit held that *Chevron* deference is warranted and adopted the SEC's position that internal disclosures constitute protected activity under Dodd-Frank. *Berman*, 801 F.3d at 155.

The court began by noting that this case was much closer than similar cases involving statutory ambiguity because, here, the two provisions at issue created no "absolute conflict." *Id.* at 150. However, the anti-retaliation provision would have an "extremely limited scope" if the court were to apply therein the Dodd-Frank definition of whistleblower, which requires a disclosure to the SEC. *Id.* at 151. Pursuant to the Dodd-Frank definition of whistleblower, there would be "virtually no situation" where subsection (iii) would apply, except in rare cases where an employee reported internally and to the SEC at essentially the same time. *Id.* at 152.

The court examined the legislative history, statutory text, and other cases deciding the issue. It observed that only one other federal court of appeals had taken up the issue. *Id.* at 153 (citing *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013)). In *Asadi*, the Fifth Circuit reached the opposite conclusion, holding that Dodd-Frank's statutory language is not ambiguous and that Section 922 protects only disclosures to the SEC. *Asadi*, 720 F.3d at 627–31. The Second Circuit in *Berman*, however, sided with the majority of district courts, which have concluded that it is unclear whether Congress intended for the law's anti-retaliation provision to have such a narrow scope. *See Berman*, 801 F.3d at 153. Because of this uncertainty, the Second Circuit held, a statutory ambiguity exists and deference to the SEC's reasonable interpretation of "whistleblower" is appropriate. *See id.* at 155.

As noted above, most district court opinions on this issue have held that Section 922 protects internal disclosures. *See, e.g.*, *Lutzeier v. Citigroup Inc.*, No. 4:14CV183 (E.D. Mo. Nov. 19, 2015); *Somers v. Digital Realty Trust, Inc.*, 119 F. Supp. 3d 1088 (N.D. Cal. 2015); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149-SDW-MCA, 2014 WL 940703 (D.N.J. Mar. 11, 2014); *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519 (S.D.N.Y. 2014); *Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491 (S.D.N.Y. 2014); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141 (S.D.N.Y. 2013); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42 (D. Mass. 2013); *Murray v. UBS Sec., LLC*, No. 12-civ-5914, 2013 WL 2190084 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094 (D. Colo. 2013); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424-SRU, 2012 WL 4444820 (D. Conn. Sept. 25, 2012). These cases have consistently rejected *Asadi*, found ambiguity in the provisions at issue, and held that internal disclosures are protected.

For example, in an October 2013 decision, the U.S. District Court for the Southern District of New York disagreed with *Asadi* and found that the differing statutory definitions of "whistleblower" created an ambiguity that was best resolved by deferring to the SEC's implementing regulations. *See Rosenblum*, 984 F. Supp. 2d at 148. The U.S. District Court for the District of New Jersey took a similar approach in *Khazin v. TD Ameritrade Holding Corp.* In that case, an investment oversight officer at a securities firm was terminated after reporting a compliance violation to his supervisors. The court found that the statute was ambiguous and that it was therefore appropriate to defer to the SEC's interpretive guidance. *See Khazin*, 2014 WL 940703, at *6.

As another example, Judge Edward M. Chen recently issued an opinion concluding that *Asadi* is fatally flawed and that the SEC's implementing regulations should be afforded *Chevron* deference. *See Somers*, 119 F. Supp. 3d at 1106. Paul Somers was a vice president at Digital Realty, who was terminated after reporting to senior management that his supervisor had violated SOX.

Somers brought suit under Dodd-Frank, alleging that he was terminated in retaliation for internally reporting securities law violations. Digital Realty filed a motion to dismiss, arguing that Somers did not qualify as a "whistleblower" under Dodd-Frank because he reported his concerns internally and not to the SEC. Judge Chen denied Digital Realty's motion, finding that SEC Rule 21F-2(b)(1) is entitled to *Chevron* deference so that individuals like Somers, who report their suspicions only internally, are protected under Dodd-Frank. *See id.*

Applying the surplus-usage and harmonious-reading canons of statutory interpretation, in conjunction with the legislative intent behind Dodd-Frank, *Somers* rejected the *Asadi* court's reasoning and concluded that the statutory language is ambiguous. *See id*. at 1100–05. In *Asadi*, the court determined that an expansive reading of Dodd-Frank would make the anti-retaliation provision of SOX moot. In contrast, *Somers* reasons that individuals might file claims under SOX in addition to, or instead of, Dodd-Frank because they might prefer an administrative forum and because a prevailing plaintiff can recover monetary damages other than back pay, such as damages for noneconomic harms. *See id.* at 1103–04.

After finding sufficient ambiguity to invoke *Chevron* deference, the *Somers* court decided that SEC Rule 21F-2(b)(1) eliminates the tension between Dodd-Frank's narrow definition of whistleblower and the broad language of (iii) and so is a reasonable construction of the statute.

See id. at 1106. In addition, the SEC's rule is consistent with Dodd-Frank's purposes to improve accountability and transparency, encourage the internal reporting of potential illegal activities, and enhance the SEC's ability to bring actions against employers who engage in retaliatory action. *See id*. at 1105–06.

Other district courts declining to follow the Fifth Circuit's decision in *Asadi* include the U.S. District Court for the District of Kansas, *see Azim v. Tortoise Capital Advisors, LLC*, No. 13-2267-KHV, 2014 WL 707235 (D. Kan. Feb. 24, 2014) (determining that an anti-retaliation claim under Dodd-Frank is not futile solely because the whistleblower did not report to the SEC), and the U.S. District Court for the District of Nebraska, *see Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014) (concluding that the definition of "whistleblower" under Dodd-Frank's anti-retaliation provision unambiguously encompasses those employees who make internal disclosures and do not also report to the SEC).

In the wake of *Berman* and the SEC's August 2015 interpretive guidance,[20] more courts will likely be inclined to reject *Asadi*'s narrow construction of Dodd-Frank protected conduct. Notwithstanding, several district courts have expressly followed the Fifth Circuit's precedent in *Asadi*. *See, e.g.*, *Puffenbarger v. Engility Corp.*, No. 1:15-cv-188, 2015 WL 9686978, at *8–9 (E.D. Va. Dec. 31, 2015) ("[B]ecause 'the intent of Congress is clear,' as the statute directly and unambiguously limits whistleblower protection to individuals who report to the SEC, it is necessary to 'give effect to the unambiguously expressed intent of Congress,' and hence to reject the SEC's more expansive interpretation of the term 'whistleblower.'"); *Verble v. Morgan Stanley Smith Barney, LLC*, No. 3:15-CV-74-TAV-CCS, 2015 WL 8328561 (E.D. Tenn. Dec. 8, 2015); *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501 (M.D. Fla. May 12, 2014); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749 (N.D. Cal. 2013).

In *Englehart v. Career Education Corp.*, a U.S. district court in Florida held that an employee of an education services company, who internally disclosed material misrepresentations in budget forecasts to her supervisor, was not a whistleblower within Dodd-Frank's statutory definition. The court found that the restrictive statutory definition of whistleblower was unambiguous and, therefore, disregarded the SEC's guidance. *See Englehart*, 2014 WL 2619501, at *9. Rather, the court agreed with *Asadi* that only an employee who complains to the SEC can be a whistleblower under the law. *Id.*

In *Banko v. Apple Inc.*, the U.S. District Court for the Northern District of California also followed the Fifth Circuit's lead. Joshua Banko, an Apple engineer, reported to his supervisors

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[20] For a discussion of the SEC's interpretive guidance, see SEC Guidance on Dodd-Frank Whistleblower Protection Is a Win for Whistleblowers, Aug. 5, 2015, https://www.zuckermanlaw.com/sec-guidance-on-dodd-frank-whistleblower-protection-is-a-win-for-whistleblowers.

that a fellow engineer was embezzling money, an allegation that an internal investigation later confirmed. Apple then terminated Banko, who responded by bringing a claim for whistleblower retaliation under Dodd-Frank. The district court, citing *Asadi*, granted Apple's motion for summary judgment on the Dodd-Frank claim, on the grounds that Banko never reported his concerns to the SEC. *See Banko*, 20 F. Supp. 3d at 757.

The circuit split on this key issue will likely warrant Supreme Court review. But, until an authoritative ruling comes, whistleblowers who have suffered retaliation for internal disclosures should consider bringing SOX claims within the 180-day statute of limitations.

Important Procedural Distinctions Between Dodd-Frank and SOX Emerge

Assuming the holding in *Berman* becomes the law of the land, Section 922 of Dodd-Frank will likely provide a remedy that overlaps with SOX but offers a much longer statute of limitations,[21] double back pay, and the opportunity to proceed directly in federal court without exhausting administrative remedies. Recent decisions about procedural aspects of Section 922 claims, however, suggest that Section 922 could be a weaker remedy than SOX in some respects. In particular, Section 922 claims are not exempt from mandatory arbitration agreements, and Section 922 does not expressly provide the right to a jury trial.

In December 2014, the U.S. Court of Appeals for the Third Circuit held that whistleblower retaliation claims brought under Section 922 of Dodd-Frank can be subject to mandatory arbitration. *See Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488 (3d Cir. 2014). Dodd-Frank bars employers and employees from agreeing to mandatory arbitration for three whistleblower protection provisions: Section 806 of SOX and Sections 1057 and 748 of Dodd-Frank. However, the law failed to exempt Section 922 claims from mandatory arbitration. The Third Circuit reasoned that because Congress did not append an anti-arbitration provision to Section 922 while contemporaneously adding such provisions elsewhere, the omission was deliberate.

Khazin is the first appellate decision to hold that Section 922 whistleblower claims can be subject to mandatory arbitration, although this holding is consistent with prior district court decisions, including *Murray v. UBS Sec., LLC*, No. 12-civ-5914-KPF, 2014 WL 285093, at *8 (S.D.N.Y. Jan. 27, 2014), and *Ruhe v. Masimo Corp.*, No. SACV-11-00734-CJC-JCGx, 2011 WL 4442790, at *4 (C.D. Cal. Sept. 16, 2011).

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[21] SOX claims can be brought "not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation." 18 U.S.C. § 1514A(b)(2)(D). Section 922 claims can be brought up to six years after the violation occurred or three years after the material facts become known to the employee, but never more than ten years after the date on which the violation occurred. 15 U.S.C. § 78u-6(h)(1)(B)(iii).

In January 2014, the U.S. District Court for the Southern District of New York held in *Murray v. UBS Securities* that Section 922 claims are not exempt from mandatory arbitration agreements. *See Murray*, 2014 WL 285093, at *13–14. Trevor Murray, a former mortgage analyst at UBS, alleged that UBS terminated his employment because he refused to modify his research to report more favorable market conditions for commercial mortgage-backed securities, in which UBS was heavily invested. Murray filed a Dodd-Frank retaliation claim in federal court and also filed a SOX claim with OSHA.

Murray's employment agreement contained an arbitration clause covering any "dispute, controversy or claim" arising out of his employment. *Id.* at *1. Consistent with SOX, the arbitration clause had a carve-out for SOX claims. *See* 18 U.S.C. § 1514A(e)(2). UBS moved to compel arbitration of Murray's Dodd-Frank claim. Murray argued that his claim should proceed in court as a SOX claim because his complaints to his supervisor were protected conduct under SOX. The court disagreed, holding that Section 922 claims are not exempt from mandatory arbitration. *See Murray*, 2014 WL 285093, at *14. Therefore, Murray could proceed with his Section 922 claim only through arbitration. *Id.* The court subsequently relied on *Khazin* to reach the same conclusion in *Citigroup Global Markets Inc. v. Preis*, No. 14-civ-08487-LGS, 2015 WL 1782135, at *4 (S.D.N.Y. Apr. 14, 2015).

The availability of a jury trial is another important procedural distinction between SOX and Dodd-Frank whistleblower retaliation claims. As amended by Dodd-Frank, Section 806 of SOX includes an express right to a jury trial. *See* 18 U.S.C. § 1514A(b)(2)(E). Section 922 of Dodd-Frank, however, does not contain an express right to jury trial. In late 2013, a federal district court in Georgia held that Section 922 plaintiffs are not entitled to trial by jury. *Pruett v. BlueLinx Holdings, Inc.*, No. 1:13-cv-02607-JOF, slip op. at 7 (N.D. Ga. Nov. 12, 2013).

When Congress enacted Section 922 approximately six years ago, Section 922 appeared at first glance to provide a stronger remedy than SOX. Recent decisions highlighting important procedural differences between the statutes, however, suggest that SOX might offer a stronger remedy than Section 922. And if courts apply but-for causation to Section 922 claims, SOX will certainly be the stronger remedy in that a SOX plaintiff can prevail by showing that protected conduct was a contributing factor to the adverse action. In light of the ambiguity about whether internal disclosures are protected under Section 922 and recent decisions highlighting important procedural distinctions between SOX and Section 922 claims, whistleblower counsel should be careful to comply with the short 180-day SOX statute of limitations.

The following table summarizes key procedural distinctions between Section 806 of SOX and Section 922 of Dodd-Frank:

	SOX	Dodd-Frank
Administrative exhaustion	Must file initially at OSHA	No administrative exhaustion requirement
Statute of limitations	180 days	3-10 years
Right to jury trial	Y	N
Exempt from mandatory arbitration	Y	N
Causation standard	Contributing factor	"but for" causation (although not sole cause)
Double back pay	N	Y
Special damages (emotional distress and reputational harm)	Y	N

"Gag Clauses" in Settlement and Severance Agreements Under Scrutiny

In public remarks, Sean McKessy, former chief of the SEC's Office of the Whistleblower, has warned that the SEC is identifying and investigating confidentiality agreements that attempt to impede employees from reporting securities law violations to the SEC.[22] The SEC has made good on this promise and took administrative action against employers that required employees to sign confidentiality agreements that could impede them from reporting violations. This is an important development for employment attorneys and warrants a thorough review of corporate confidentiality agreements and policies.

<u>SEC Administrative Action</u>

On April 1, 2015, the SEC took administrative action against KBR for requiring witnesses in certain internal investigations to sign confidentiality statements with language warning that they could face disciplinary action, including termination of employment, if they discussed the subject of the interview with outside parties without the KBR legal department's prior approval. *See* Exchange Act Release No. 74619 (Apr. 1, 2015).[23] The SEC concluded that

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[22] *See* 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 8–9 (2014), https://www.sec.gov/about/offices/owb/annual-report-2014.pdf.

[23] Available at https://www.sec.gov/litigation/admin/2015/34-74619.pdf.

such agreements violate Rule 21F-17, which prohibits companies from using gag clauses in agreements or policies to prevent whistleblowers from providing information to the SEC: "No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications." *Id.* at 2 (alteration in original). Rule 21F-17 is one of the regulations implementing the Dodd-Frank SEC whistleblower program.

Significantly, the SEC brought this action absent any evidence that the agreement prevented a KBR employee from communicating directly with the SEC and without proof that KBR took any disciplinary action against an employee to enforce the form confidentiality agreement. Instead, the SEC found a violation because the threat of disciplinary action undermines the purpose of Rule 21F-17(a), which is to "encourage[] individuals to report to the Commission." *Id.* at 3.

To settle the charges, KBR agreed to pay a $130,000 penalty and to amend the confidentiality statement to clarify that employees are free to report possible violations to the SEC and other federal agencies without KBR's approval. In announcing this enforcement action, Andrew J. Ceresney, Director of the SEC's Division of Enforcement, pledged that the SEC "will vigorously enforce" Rule 21F-17 to ensure that whistleblowers are not silenced.[24]

Although the SEC's administrative action against KBR stemmed from a specific prohibition against disclosure of information related to an internal investigation, the SEC has also targeted clauses in severance agreements that indirectly impede an individual from communicating with the SEC. For example, in August 2016, the SEC issued a cease-and-desist order against BlueLinx Holdings Inc. for using overly broad confidentiality provisions in severance agreements that likely deterred employees from blowing the whistle. Specifically, the severance agreements stated that (1) employees were barred from disclosing confidential information to anyone outside BlueLinx unless legally compelled to do so; (2) employees were required to waive a whistleblower award as a condition of receiving severance; and (3) employees were required either to provide written notice to the company or to obtain written consent from the company's legal department before providing confidential information pursuant to legal process. BlueLinx agreed to pay a $265,000 penalty and to revise the unlawful provisions of its severance agreements to clarify that employees entering into those agreements retain the rights to communicate with government agencies, to participate in a government

[24] *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements (Apr. 1, 2015), https://www.sec.gov/news/pressrelease/2015-54.html.

agency's investigations, to receive an award for information provided to a government agency, and to do the foregoing without notifying BlueLinx.

Other clauses that may similarly impede communications with the SEC include, for example, conditioning severance benefits on a certification that an employee has not made any disclosure to the SEC. Such a clause could be construed as interfering with an employee's right to make a confidential disclosure to the SEC.[25]

Impact of the SEC's Administrative Action

In light of the SEC's demonstrated commitment to combat gag clauses that undermine the SEC Whistleblower Reward Program, employers should revise their agreements and policies to ensure that they do not dissuade current or former employees from making lawful disclosures to the SEC. The SEC Order suggests that a disclaimer similar to the following modification, which KBR made to its confidentiality statement, will likely suffice:

> Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

Id.

Note, though, that these enforcement actions are not an attack on confidentiality agreements and policies serving legitimate business interests. As SEC Chair Mary Jo White pointed out in a speech on April 30, 2015, Rule 21F-17 is not "a sweeping prohibition on the use of confidentiality agreements. . . . Companies may continue to protect their trade secrets or other confidential information through the use of properly drawn confidentiality and severance

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[25] In 2015, the *ABA Journal of Labor and Employment Law* published an article that discussed *de facto* gag provisions that significantly reduce or eliminate the congressional incentives for SEC whistleblowing. *See* Richard Moberly, Jordan Thomas & Jason Zuckerman, *De Facto Gag Clauses: The Legality of Employment Agreements that Undermine Dodd-Frank's Whistleblower Provisions*, 30 ABA J. LAB. & EMP. L. 87 (2014).

agreements."[26] The SEC whistleblower program is not a license to engage in unfair competition or to use an employer's proprietary information to benefit a competitor. Instead, Rule 21F-17 is designed to ensure that whistleblowers can provide information to the SEC so as to enable the SEC to investigate and enforce violations of federal securities laws.

Gag Provisions Under Scrutiny at Other Agencies

The SEC is not alone in combatting gag provisions that restrict whistleblowing to law enforcement and regulatory agencies or that interfere with National Labor Relations Act ("NLRA") concerted activity. Other agencies, including the Equal Employment Opportunity Commission ("EEOC"), National Labor Relations Board ("NLRB"), and DOL, are scrutinizing gag provisions in confidentiality agreements and policies. And Congress recently renewed a ban on government contractors' use of gag provisions in confidentiality agreements that bar disclosures about violations of law, gross mismanagement, a gross waste of funds, or an abuse of authority.

OSHA issued new policy guidance on August 23, 2016, regarding provisions in settlement agreements that restrict whistleblowing.[27] The guidance states that "OSHA will not approve a 'gag' provision that prohibits, restricts, or otherwise discourages a complainant from participating in protected activity," and defines "protected activity" to include "filing a complaint with a government agency, participating in an investigation, testifying in proceedings, or otherwise providing information to the government." OSHA also reserves the power to deny a settlement where the liquidated damages are clearly disproportionate to the anticipated loss to the respondent in the event of a breach. Unlawful "gag clauses" include not only express prohibitions on providing information to the government, but also indirect restrictions on protected conduct that could dissuade whistleblowing, including broad confidentiality or non-disparagement clauses. The guidance enumerates four types of settlement provisions that can constrain whistleblowing, including those that: (1) "restrict[] 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"; (2) "require[] 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"; (3) "require[] 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"; or (4) "require[] a complainant to waive his or her right to receive a monetary award (sometimes

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[26] *See* Speech from Mary Jo White, "The SEC as the Whistleblower's Advocate" (Apr. 30, 2015), https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html.

[27] Available at https://s3.amazonaws.com/zldev/wp-content/uploads/2016/09/OSHA-new-policy-guidelines-for-approving-settlement-agreements-in-WB-cases-8.23.16.pdf.

referred to in settlement agreements as a 'reward') from a government-administered whistleblower award program for providing information to a government agency."

Further, OSHA's Whistleblower Investigations Manual prohibits investigators from approving settlement agreements that include gag clauses. OSHA also recently obtained a preliminary injunction barring an auto parts company from telling any current or former employee not to speak to, or cooperate with, representatives of DOL, and enjoining the company from obstructing any OSHA investigation. In addition, the EEOC has issued guidance that bars provisions in settlement agreements that interfere with an employee's right to file a charge or cooperate with an investigation. The EEOC, moreover, has sued employers under Section 707 of Title VII of the Civil Rights Act of 1964 for conditioning the receipt of severance benefits on the waiver of the right to file discrimination charges or to communicate with the EEOC.

SEC Takes Enforcement Action for Whistleblower Retaliation

The SEC recently brought its first enforcement action ever to be based solely on retaliation against a whistleblower. On September 29, 2016, the SEC ordered International Game Technology ("IGT") to pay a $500,000 penalty for terminating the employment of a whistleblower because he reported to senior management and to the SEC that the company's financial statements might be distorted. *See* Exchange Act Release No. 78991 (Sept. 29, 2016).[28] During an internal investigation into the whistleblower's allegations, IGT removed him from opportunities that were integral to his ability to perform his job successfully. IGT then fired the whistleblower the same day as the internal investigation concluded that IGT's cost-accounting model was appropriate and did not cause its financial statements to be distorted. The whistleblower was protected under the SEC whistleblower program, despite being mistaken, because he reasonably believed that IGT's cost-accounting model constituted a violation of federal securities laws.

The action against IGT was the SEC's first standalone retaliation case. However, it is consistent with a 2014 enforcement action that indicated, for the first time, that retaliating against a whistleblower can result not only in a private suit brought by the whistleblower but also in a unilateral SEC enforcement action. On June 16, 2014, the SEC announced that it was taking enforcement action against Paradigm Capital Management, Inc. ("Paradigm"), a hedge fund advisory firm, for engaging in prohibited principal transactions and for retaliating against the whistleblower who disclosed the unlawful trading activity to the SEC. *See* Exchange Act Release No. 72393 (June 16, 2014).[29] This was the first case in which the SEC exercised its authority under Dodd-Frank to bring enforcement actions based on retaliation against whistleblowers.

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[28] Available at https://www.sec.gov/litigation/admin/2016/34-78991.pdf.

[29] Available at https://www.sec.gov/litigation/admin/2014/34-72393.pdf.

According to the order, Paradigm retaliated against its head trader for disclosing, internally and to the SEC, prohibited principal transactions with an affiliated broker-dealer while trading on behalf of a hedge fund client. The transactions were a tax-avoidance strategy under which realized losses were used to offset the hedge fund's realized gains.

When Paradigm learned that the head trader had disclosed the unlawful principal transactions to the SEC, it retaliated against him by removing him from his position as head trader, changing his job duties, placing him on administrative leave, and permitting him to return from administrative leave only in a compliance capacity, not as head trader. The whistleblower ultimately resigned his position.

Paradigm settled the SEC charges by consenting to the entry of an order finding that it violated the anti-retaliation provision of Dodd-Frank and committed other securities law violations; agreeing to pay more than $1 million to shareholders and to hire a compliance consultant to overhaul their internal procedures; and entering into a cease-and-desist order.

The SEC's press release[30] accompanying the order includes the following statement by Enforcement Director Andrew Ceresney: "Those who might consider punishing whistleblowers should realize that such retaliation, in any form, is unacceptable." The Paradigm enforcement action suggests that whistleblower retaliation can result in liability far beyond the damages that a whistleblower can obtain in a retaliation action and that retaliation can invite or heighten SEC scrutiny.

<u>Developments in Whistleblower Protection for Government Contractors</u>

Government Contractor Employees Afforded Enhanced Whistleblower Protections

The 2013 National Defense Authorization Act ("NDAA") contains two robust whistleblower protection provisions that apply to employees of government contractors. *See* 10 U.S.C. § 2409. These provisions, however, exclude employee disclosures that relate to an activity of any element of the intelligence community.

Section 827 of the NDAA protects employees of contractors and subcontractors of the Department of Defense ("DoD") and National Aeronautics and Space Administration ("NASA"), while Section 828 applies to employees of federal contractors, subcontractors, grantees of other agencies, and others employed by entities that receive federal funds. It also applies to personal services contractors working on both defense and civilian grant programs. Both provisions protect disclosures evidencing:

- gross mismanagement of a federal contract or grant;

[30] Available at https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542096307.

- a gross waste of federal funds;
- an abuse of authority relating to a federal contract or grant; or
- a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract.

See 10 U.S.C. § 2409, National Defense Authorization Act for Fiscal Year 2013 §§ 827–828. Furthermore, disclosures are protected only if made to:

- a member of Congress or a congressional committee;
- an Inspector General;
- the Government Accountability Office ("GAO");
- a federal employee responsible for contract or grant oversight;
- management at the relevant agency;
- an authorized official of the DOJ or other law enforcement agency;
- a court or grand jury; or
- a management official or other employee of the contractor or subcontractor, who has the responsibility to investigate, discover, or address misconduct.

See 10 U.S.C. § 2409(a)(2); 41 U.S.C. § 4712(a)(2).

The burden of proof and causation standard in NDAA whistleblower cases are very favorable to employees. A complainant need only demonstrate that the protected disclosure was a contributing factor in the personnel action, which often can be met by showing knowledge and temporal proximity. Remedies include reinstatement, back pay, compensatory damages, and attorney's fees and costs. Compensatory damages are uncapped. *See* 10 U.S.C. § 2409(c)(1); 41 U.S.C. § 4712(c)(1).

An NDAA reprisal claim must be filed initially with the Office of Inspector of General ("OIG") of the agency that awarded the contract or grant about which the employee disclosed wrongdoing. The statute of limitations is three years after the date of the reprisal. The OIG will investigate the complaint and make a recommendation to the agency head, who can order the contractor to provide relief, including reinstatement, to the NDAA complainant. If the agency head fails to provide the requested relief within 210 days, the whistleblower may bring an action in federal district court and try the case before a jury.

Section 827 of the NDAA is a permanent amendment to 10 U.S.C. § 2409, which previously provided far narrower protections to employees of DoD contractors and did not protect internal disclosures.

Section 828 was a pilot program set to expire on January 2, 2017. On December 5, 2016, Congress enacted S. 795, which made Section 828 permanent and expanded protected whistleblowers include subgrantees and personal services contractors for both defense and civilian contractors.

The enactment of the 2013 NDAA has resulted in a substantial increase in whistleblower retaliation complaints brought by employees of government contractors. Prior to August 2013, the DoD averaged just four to six whistleblower complaints per month. After the 2013 NDAA went into effect, those numbers jumped considerably. Between January and July 2014, more than 200 whistleblower complaints were filed.[31]

Courts Broadly Construing FCA Protected Conduct

Due to relatively recent amendments to the anti-retaliation provision of the False Claims Act ("FCA"), courts are increasingly broadening their view of what constitutes protected activity under the FCA. In 2009, Congress passed the Fraud Enforcement and Recovery Act of 2009 ("FERA"). Before the amendment, the FCA protected only "lawful acts done by the employee on behalf of the employee or others in furtherance of [a *qui tam* action], including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section."

Now, the FCA protects "lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h)(1). And a series of recent decisions have shown the broad latitude courts are willing to give employees under the newly amended FCA. The cases demonstrate that the FCA's whistleblower retaliation provision protects:

- internal reporting of fraudulent activity to a supervisor;
- claims where the subject of the plaintiff's disclosures would not necessarily have supported a full *qui tam*;
- steps taken in furtherance of a potential or actual *qui tam* action; and
- steps taken to remedy fraudulent activity or to stop an FCA violation.

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[31] *See* Jill Aitoro, *New Law Drove Whistleblower Complaints Against DOD Contractors Up*, WASH. BUS. J., (July 21, 2014), http://www.bizjournals.com/washington/blog/fedbiz_daily/2014/07/new-law-drove-whistleblower-complaints-against.html.

In *United States ex rel. Lee v. Northern Adult Daily Health Care Center*, No. 13-CV-4933-MKB, 2016 WL 4703653 (E.D.N.Y. Sept. 7, 2016), former employees of Northern Adult Daily Health Care Center, a day-care center for elderly and low-income people, alleged that Northern Adult retaliated against them for their complaints about several deficiencies, including Northern Adult's unsanitary handling of food, lack of training for food-service staff, provision of alcohol to registrants, failure to provide physical therapy to residents, and disparately poor treatment of Black and Latino residents. Northern Adult took several retaliatory actions against the whistleblowers, including terminating their employment, for their attempts to stop the perceived fraud. In denying Northern Adult's motion to dismiss, the court clarified that a plaintiff need not plead an FCA retaliation claim with particularity because no showing of fraud is required. *Id.* at *5–6. The FCA protects conduct including "lawful acts done by the employee . . . in furtherance of an action under the FCA," as well as "other efforts to stop one or more violations of the FCA." *Id.* at *13. Furthermore, complaining of regulatory violations may qualify as an "effort[] to stop 1 or more violations" under the 2009 amendments to the FCA. *Id.* at *14. Such efforts to stop a violation of the FCA are protected "even if the employee's actions were not necessary in furtherance of an FCA claim." *Id.* at *13 (quoting *Malanga v. N.Y.U. Langone Med. Ctr.*, No. 14-CV-9681, 2015 WL 7019819, at *2 (S.D.N.Y. Nov. 12, 2015)). And finally, temporal proximity of less than five months is sufficient to plead causation. *Id.* at *15.

In *Marbury v. Talladega College*, Andrea Marbury sued her former employer, Talladega College, under the FCA's whistleblower protection provision. *Marbury v. Talladega Coll.*, No. 1:11-cv-03251-JEO, 2014 WL 234667 (N.D. Ala. Jan. 22, 2014). Marbury alleged that Talladega terminated her employment because she opposed requests to allocate Title III funds to advertising expenses, which is an unlawful use of Title III funds. Talladega argued that Marbury did not engage in protected conduct under the FCA because she never took any concrete steps toward bringing a *qui tam* action, could not point to a specific false claim that Talladega had submitted to the government, and made only internal complaints to her supervisor rather than filing a formal grievance or initiating a *qui tam* action.

The court rejected Talladega's narrow construction of the FCA's whistleblower protection provision. Marbury's internal opposition to using Title III funds for advertising and her refusal to complete requisition forms for unauthorized uses of Title III funds, the court found, could qualify as protected whistleblowing. *See id.* at *8. The court also rejected Talladega's argument that Marbury could not be deemed to have engaged in protected conduct because she failed to show that Title III funds were misapplied. The court noted that the whistleblower-protection provision of the FCA does not require a showing that federal funds actually were expended for an unlawful purpose—after all, the whistleblower protection provision is "intended to prevent the filing of false claims and to discourage fraud." *Id.* at *10. Had the court adopted

Talladega's argument, employees who stick their necks out to stop fraud would not be protected against reprisal.[32]

In *Mikhaeil v. Walgreens Inc.*, plaintiff Mervat Mikhaeil worked as a staff pharmacist at Walgreens in July 2012, and she alleged that her employment was terminated for raising concerns about potential Medicare fraud. *Mikhaeil v. Walgreens Inc.*, No. 13-14107, 2015 WL 778179 (E.D. Mich. Feb. 24, 2015). Walgreens moved for summary judgment, and, in an opinion denying the motion in part, Judge Edmunds held that the FCA's current retaliation provision "now protects two categories of conduct": lawful acts taken in furtherance of an action under the FCA, and "other efforts to stop violations of the Act, such as reporting suspected misconduct to internal supervisors." *Id.* at *7 (internal quotations and citations omitted). The "other efforts" language, the judge observed, explicitly encompasses internal reporting, which therefore constitutes protected conduct. *Id.* Mikhaeil told her supervisor the specific prescription numbers that she was concerned about, she testified. And so her disclosure about potential Medicare fraud was sufficiently specific to constitute an internal report alleging fraud on the government. *Id.* at *8.

In *Young v. CHS Middle East, LLC*, a husband-and-wife team of surgical nurses, who were working at a hospital in Iraq that ran on a State Department contract, made numerous complaints that the staffing levels on the installation were leading to employees' taking on assignments for which they were neither trained nor credentialed, in violation of CHS's contract with the State Department. *Young v. CHS Middle E., LLC*, 611 Fed. App'x 130 (4th Cir. May 27, 2015). After the Youngs lodged several complaints with their supervisors, company executives, and a State Department official, CHS terminated them both. The trial court granted CHS's

[32] *Marbury* is also a good illustration of how whistleblowers can use the "cat's paw" doctrine to prove causation. Using a common tactic designed to shield employers against liability for whistleblower retaliation, Talladega assigned an official who was unaware of Marbury's disclosures to make the decision whether to terminate her employment, and then argued in its motion for summary judgment that the decision to terminate Marbury's employment could not have been motivated by retaliation. Whistleblowers can surmount that tactic by using the cat's paw theory, i.e., by showing that the decision-maker followed the biased recommendation of a subordinate without independently investigating the reason or justification for the proposed adverse personnel action. In this case, the supervisor who initiated the recommendation to terminate Marbury's employment was aware of Marbury's protected conduct, and the decision-maker simply accepted that recommendation. Applying the cat's paw doctrine, the court concluded that there was sufficient evidence of causation to permit Marbury to prove to a jury that her whistleblowing motivated the decision to terminate her employment. *See Marbury*, 2014 WL 234667, at *11.

motion to dismiss, holding that the Youngs' complaints about staffing did not amount to contract fraud and, therefore, were not protected by the FCA. The Youngs appealed.

While the Youngs' appeal pended, the Fourth Circuit decided a key case involving FCA *qui tam* fraud claims. In *Badr v. Triple Canopy, Inc.*, the government alleged that a security contractor responsible for base security in a combat zone had knowingly hired guards who were unable to pass contractually required marksmanship tests, yet presented claims to the government for payment on those unqualified guards. *United States ex rel. Omar Badr v. Triple Canopy, Inc.*, 775 F.3d 628, 632–33 (4th Cir. 2015). The Fourth Circuit reversed the trial court's dismissal of the claim, holding that a plaintiff successfully "pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and 'withheld information about its noncompliance with material contractual requirements.'" *Id.* at 636 (quoting *United States v. Sci. Applications Intern. Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010)).

Applying that logic in *Young*, the Fourth Circuit reasoned that "if making false implied staffing certifications to the government can constitute a False Claims Act violation, acts undertaken to, for example, investigate, stop, or bring an action regarding such false implied staffing certifications can constitute protected activity for purposes of a retaliation claim." *Young*, 611 Fed. App'x at 133. The Fourth Circuit, therefore, reversed the trial court's dismissal of the Youngs' claim, noting that the FCA whistleblower provision, as amended, "protect[s] employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together." *Id.* at 132 (alteration in original) (citation omitted).

In *Ickes v. NexCare Health Systems, L.L.C.*, Joanne Ickes, a licensed physical therapist of nearly 30 years, was hired by Integrity Rehab Services ("Integrity") to provide physical therapy services at defendant South Lyon Senior Care and Rehab Center ("South Lyon") in Michigan. *Ickes v. NexCare Health Sys., L.L.C.*, No. 13-14260, 2016 WL 1275543 (E.D. Mich. Mar. 31, 2016). South Lyon received management services from defendant NexCare Health Systems, L.L.C. ("NexCare"), which was responsible for ensuring the nursing home's compliance with federal laws and regulations. Everyone who worked at South Lyon, whether employed by South Lyon, Integrity, or NexCare, was covered by NexCare's compliance program, under which employees could report violations to South Lyon's administrator.

Ickes discovered that South Lyon employees were routinely telling patients that there were no long-term beds available for them. That is because Medicare Part A covered only short-term care (i.e., up to 100 days), and it paid more than Medicaid, which covered long-term care. The practice of denying long-term beds to patients was prohibited because South Lyon's beds were "dual-certified," meaning that "once a patient was admitted to a bed, that patient could not be told that South Lyon did not have space to continue to accommodate the patient for a long-term stay." However, this practice abounded under a South Lyon administrator whose goal it was to maintain fifty percent of the beds as short-term. After consulting an elder-law attorney, Ickes met with Integrity's president and chief operating officer and reported the nursing home's unlawful practice. Ickes followed up several times with the president/COO and reported her concerns to her supervisor, the county ombudswoman, the South Lyon administrator, Integrity's HR representative, and NexCare's HR director. The unlawful practice ceased, but only for several months. Patients began telling Ickes and another physical therapist that they had been told that no long-term beds were available. At this point, Ickes and her colleague told their patients to "push back" because long-term beds were available and it was their right to stay. The South Lyon administrator called an emergency meeting with all physical therapists, at which she irately told them not to meddle in discharge decisions. But Ickes raised her concerns again, this time in front of the other physical therapists at the meeting. The South Lyon administrator emailed the president/COO of Integrity afterward to tell her that Ickes had been insubordinate. Ickes was subsequently suspended with pay, and, when she said she would continue to inform patients of their rights, she was terminated. Ickes filed suit against NexCare and South Lyon alleging, in part, retaliation in violation of the FCA.

Defendants NexCare and South Lyon argued that Ickes did not engage in protected conduct for two reasons: (1) "violations of patient transfer and discharge rules . . . are violations of a condition of participation not payment," and (2) "Plaintiff did not have a good-faith basis for her concerns." *Id.* at *11. The court rejected the first argument, stating in relevant part that "[t]he Act protects an employee who is punished for his or her 'efforts to stop' violations of the FCA; its protection is not limited to only those employees whose complaints turn out to prove a violation of the FCA by a preponderance of the evidence." *Id.* at *12. The plaintiff's raising the long-term-beds issue with her supervisors constituted attempts to stop the nursing home from violating the FCA by improperly discharging patients once Medicare Part A ceased to cover their therapy. The court similarly rejected the defendants' second argument, finding that Ickes clearly had a good-faith basis for her concerns given that the existence of the unlawful practice was confirmed by other therapists and patients, and Ickes spoke to an elder-law attorney and her county ombudswoman to confirm that the practice was unlawful.[33]

[33] A tangential takeaway from *Ickes* is the court's logic in finding that NexCare and South Lyon were proper defendants in the suit. NexCare and South Lyon argued that they were not covered by the FCA's anti-retaliation provision because they were not the plaintiff's direct employers. The court rejected that argument, noting that "in addition to an employee's actual employer, 'the current version of the statute also covers independent contractors and other *employment-like relationships*.'" *Ickes*, 2016 WL 1275543, at *9 (quoting *Tibor v. Mich. Orthopaedic Inst.*, 72 F. Supp. 3d 750, 759 (E.D. Mich. 2014)). Ickes was a contractor of South Lyon, so the nursing home is liable for any retaliation against her for protected conduct. *Id.* at *10. And because NexCare was in charge of Ickes's and other Integrity employees' 401(k)s, health benefits, and compliance with corporate regulations, and was integrally involved in Ickes's termination, Ickes had an "employment-like relationship" with NexCare. *Id.*

Courts Narrowing Duty Speech Defense

Traditionally, employees whose job duties involve investigating or reporting fraud were held to a heightened pleading standard under the anti-retaliation provision of the FCA. Cases following the 2009 FCA amendments, however, have cast doubt on the continued application of that standard for those so-called "fraud alert" employees who blow the whistle. *See, e.g.*, *United States ex rel. Mooney v. Americare, Inc.*, No. 06-CV-1806-FB-VVP, 2013 WL 1346022 (E.D.N.Y. Apr. 3, 2013).

In *Mooney v. Americare, Inc.*, Patricia Mooney was a staff development manager and then the director of quality improvement for defendant Americare Certified Special Services, Inc. ("Americare CSS"), which provided home health nursing services both in private residences and in elder-care facilities. Mooney's responsibilities included overseeing Americare's Medicare and Medicaid billings to ensure their compliance with applicable regulations, and in that capacity she became aware of the defendants' fraudulent referrals and the fraudulent alteration of documents submitted to Medicare and Medicaid. Mooney alerted her supervisors to the incidents in a memo, which described the incidents as "clearly Medicaid fraud." *Id.* at *8. Mooney pushed for more rigorous chart audits and, thereafter, received her first negative performance review. Mooney was "relieved of any duties involving the review of Medicare billing," and the billing cabinets were "double-locked." *Id.* Mooney was fired later that year. Mooney filed three *qui tam* claims and a retaliation claim under the FCA against Americare, Inc., Americare CSS, and Americare Therapy Services (collectively "Americare"), as well as three individual defendants,[34] alleging retaliation for disclosing kickbacks from fraudulent referrals and the fraudulent alteration of documents submitted to Medicare and Medicaid.

Americare moved to dismiss, arguing in relevant part that Mooney failed to allege she engaged in protected activity because she reported to her supervisors not in furtherance of an FCA action but rather in furtherance of her job duties. The court rejected this defense. When faced with a motion to dismiss, the court said, "it is sufficient for a plaintiff—even one employed to investigate her employer's financial practices—to allege that she was investigating matters which are calculated, or reasonably could lead, to a viable FCA action." *Id.* at *9 (internal quotation marks and citation omitted). Mooney's investigation had several components: she

[34] The court dismissed Mooney's claims against the individual defendants, finding that only "corporate defendants" can be the subject of FCA retaliation claims. *See Mooney*, 2013 WL 1346022, at *8. The defendants argued that the claims against everyone but Americare CSS should be dismissed because only Americare CSS was the plaintiff's employer. The court rejected this argument as applied to the Americare entities and accepted it as applied to the individual defendants. Based on the common definition of "employer," the court said, "only the corporation is the employer, and only the corporate defendants may be held liable for a retaliation claim." *Id.* (citation omitted).

reported the alleged Medicaid fraud to three administrators and sent two memoranda that advocated for more thorough chart audits. In response, the administrators promised to investigate, wrote memoranda about the issues, and procured external audits. And the reports led to two nurses' being fired. The court concluded, therefore, that Mooney was engaged in protected activity because a reasonable jury could find that Mooney was investigating issues that were "calculated or reasonably could lead to an FCA action." *See id.*

Two years later, the U.S. District Court for the Southern District of New York similarly rejected an employer's duty speech defense. *See Malanga v. NYU Langone Med. Ctr.*, No. 14-cv-9681, 2015 WL 7019819 (S.D.N.Y. Nov. 12, 2015). Michele Malanga was working at the NYU Langone Medical Center as director of research for the Department of Radiation Oncology when she discovered that NYU employees were unlawfully billing the federal government for tests performed on blood specimens, overcharging federal grants for patient clinic visits, and paying for the salary of a post-doctorate employee out of an unrelated federal grant. Malanga investigated these practices and disclosed them to her supervisor and other NYU employees. NYU terminated Malanga's employment, and Malanga sued under the FCA and anti-discrimination laws.

NYU moved to dismiss, contending that Malanga was subject to more stringent pleading standards because she was a "fraud alert" employee whose job duties required her to address the very billing problems she raised during the course of her employment. Applying the plain meaning of the FCA, Judge William Pauley III rejected NYU's "duty speech" defense:

> Certain courts have held employees whose jobs require investigating fraud against the government to higher pleading standards. However, it is doubtful that those heightened pleading standards survive FERA, which was enacted "to counter perceived judicial interpretations of the protected activity prong . . . ." Those decisions establishing a higher pleading standard for fraud alert employees were concerned with ensuring that the employer was on notice of an employee's "intentions of bringing or assisting in an FCA action." Under FERA, a retaliation claim can be stated so long as the employee was engaged in efforts to stop an FCA violation, even if the employee's actions were not necessarily in furtherance of an FCA claim. Moreover, even if a heightened pleading standard for so-called fraud alert employees exists, Malanga alleges that as a "Director of Research," "Defendants' billing practices were outside the scope of Plaintiff's job duties." Accepting her allegation as true, this Court cannot determine whether Malanga qualified as a "fraud alert" employee on this motion. Accordingly, Malanga has adequately pled an FCA retaliation claim.

Id. at *3 (citations omitted).

Courts Recognizing Public Policy Exception to Confidentiality Agreements

In a False Claims Act case in which the relators alleged that Mount Sinai Hospital and affiliated entities committed improper billing and wrongful payment retention misconduct, District Court Judge Richard Berman held that the relators could use confidential patient records as the basis for their *qui tam* action. *See United States ex rel. Ortiz v. Mount Sinai Hosp.*, No. 13-cv-4735-RMB (S.D.N.Y. Nov. 9, 2015).

In a motion to dismiss, the defendants asserted that the relators "may not rely on improperly obtained confidential patient records as the basis for their complaint." *Id.* at 6. Judge Berman rejected the defendants' request for preclusion of the patient records, stating that there is "strong public policy in favor of protecting those who report fraud against the government." *Id.* at 10 (citing *United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012) ("Relators sought to expose a fraud against the government and limited their taking to documents relevant to the alleged fraud. Thus, this taking and publication was not wrongful, even in light of nondisclosure agreements, given 'the strong public policy in favor of protecting whistleblowers who report fraud against the government.'")).

Judge Berman also noted the relators' contention that, consistent with the foregoing public policy considerations, HIPAA "carves out an exception that allows 'whistleblowers' to reveal such information to governmental authorities and private counsel, provided that they have a good faith belief their employer engaged in unlawful conduct." *Id.*

As Medicare fraud is estimated to cost taxpayers $60 billion to $90 billion each year, it is critical that the courts not permit health-care providers to use confidentiality agreements to immunize themselves from FCA liability. If confidentiality agreements were deemed to trump the FCA, then the government would lose its most effective tool in combatting health-care fraud.

Procedural Distinctions Between FCA and NDAA

The following table summarizes key distinctions between Section 3730(h) of the False Claims Act and Sections 827 and 828 of the NDAA:

	FCA	NDAA
Coverage	Employee, contractor, or agent	Employee of a contractor, subcontractor, or grantee

Protected Conduct	Lawful acts done by the employee, contractor, agent, or associated others (1) in furtherance of an action under the FCA or (2) other efforts to stop 1 or more violations	-Violation of law, rule, or regulation related to a federal contract -Gross mismanagement of a federal contract or grant -Gross waste of federal funds -Abuse of authority relating to a federal contract or grant -Substantial and specific danger to public health or safety
Administrative Exhaustion	File directly in federal court	Must file initially at OIG; can remove to federal court after 210 days
Causation Standard	But-for causation	Contributing factor
Jury Trial	Y	Y
Damages	Double back pay, reinstatement, special damages (emotional distress and harm to reputation), attorney's fees	Back pay, reinstatement, special damages, attorney's fees
Stat. of Limitations	3 years	3 years

Conclusion

The proliferation of whistleblower protection laws, in conjunction with favorable administrative and judicial decisions construing SOX and similar remedial statutes, provide whistleblowers with strong remedies to combat retaliation. But to effectively navigate the patchwork of claims available to whistleblowers, it is critical to focus on the significant differences in the scope of protected conduct, burden of proof, remedies, and procedural requirements. In addition, whistleblower counsel should carefully evaluate forum selection and potential whistleblower reward claims (and the impact of pursuing a retaliation claim while a reward claim is pending) and should take steps to avoid potential counterclaims (including claims arising from “self-help discovery”).