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SUBCOMMITTEE ON THE WHISTLEBLOWER PROVISIONS OF THE SARBANES-OXLEY ACT OF 2002

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TABLE OF CONTENTS

I. OVERVIEW

On July 30, 2002, President George W. Bush signed into law the Sarbanes-Oxley Act of 2002 ("SOX"), Pub. L. 107-204. Enacted in the wake of the Enron and WorldCom scandals, the Act was designed to restore investor confidence in the nation's financial markets by improving corporate responsibility through required changes in corporate governance and accounting practices and by providing whistleblower protection to employees of publicly traded companies who report corporate fraud.

Section 806 of SOX, codified at 18 U.S.C. §1514A, created a civil cause of action for employees who experience retaliation for corporate whistleblowing. Under Section 806, publicly traded companies may not "discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment" because of any protected whistleblowing activity. 18 U.S.C. § 1514A(a). Section 806 addressed Congress's concern that corporate whistleblowers had been subject to a "patchwork and vagaries" of state laws, with a whistleblowing employee in one state being more vulnerable to retaliation than a similar employee in another state. *See* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy). Section 806 was intended to set a national floor for employee protections and not to supplant or replace state law. *Id.*

In 2010, the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") significantly expanded SOX's civil whistleblower protections, including by doubling the statute of limitations period, barring pre-dispute arbitration agreements for SOX claims, guaranteeing a right to a jury trial in federal district court, and clarifying that the law applies to private subsidiaries of publicly traded companies. Dodd-Frank also created additional, stand-alone anti-retaliation requirements for employers and established a whistleblower incentive program to encourage the reporting of securities violations to the Securities and Exchange Commission ("SEC").

Section 806 of SOX has been among the most heavily litigated federal whistleblower statutes in the 17 years since its passage. Courts and the Department of Labor ("DOL"), which administers the statute, have grappled with questions such as what individuals and entities the law covers, what sorts of activity it protects, the appropriate causation standard, whether the law applies extraterritorially, and whether an individual may use confidential and even privileged information to establish a retaliation claim. Because decisions by DOL Administrative Law Judges ("ALJs") and the appellate Administrative Review Board ("ARB") are not binding on federal courts, an established body of case law within the DOL on a given issue is not always predictive of how a court will decide the same issue. Nor does a trend in the courts necessarily bear on how an ALJ or ARB will rule. The result is an ever-evolving, sometimes unpredictable maze of jurisprudence that makes it particularly important for practitioners to closely track developments in order to advise their clients.

This paper provides a basic outline of the protections of SOX 806 and identifies settled and open questions. Additionally, because the same underlying conduct that grounds a SOX whistleblower claim may also form the basis for a Dodd-Frank retaliation claim or be relevant to an SEC whistleblower tip, the paper addresses also addresses both Dodd-Frank and the SEC

whistleblower program. Finally, the paper describes new and emerging issues in SOX and Dodd-Frank litigation.

II. SARBANES-OXLEY SECTION 806 AS AMENDED BY DODD-FRANK

A. Scope of Coverage

Section 806 applies primarily to publicly traded companies subject to the registration or reporting requirements of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. § 78l) and certain individuals and entities related to these public companies. As amended by Dodd-Frank, covered employers under Section 806 include companies with securities registered under Section 12 of the Exchange Act and companies required to file reports under Section 15(d) of the Exchange Act. Officers, employees, and agents of these public companies are also covered under Section 806. The fact that a company may own or even issue securities, alone, is insufficient to qualify it for Section 806 coverage.[1]

1. Subsidiaries

Prior to the enactment of Dodd-Frank in 2010, there was disagreement in the courts and within the DOL as to whether SOX, as originally enacted, applied to subsidiaries. Section 929A of Dodd-Frank provided clarity by amending SOX to expressly cover "any subsidiary or affiliate (of a publicly-traded company) whose financial information is included in the consolidated financial statements of such company." Pub.L. 111-203, §929A (July 21, 2010).

In the years immediately following the enactment of Dodd-Frank, courts and the DOL reached inconsistent conclusions regarding whether Section 929A applied retroactively to protect employees of subsidiaries whose claims arose before Dodd-Frank was passed. *Compare Leshinsky v. Telvent GIT, S.A*., 873 F. Supp. 2d 582, 605 (S.D.N.Y. 2012) (holding that Dodd-Frank merely clarified the scope of coverage of SOX 806 and thus applied to pre-Dodd-Frank conduct) *with Mart v. Gozdecki, Del Giudice, Americus & Farkas LLP*, 910 F. Supp.2d 1085, 1095 (N.D. Ill. 2012) (holding that Dodd-Frank altered the scope of SOX 806, and thus the substantive rights and liabilities of subsidiaries and their employees, and refusing to apply the law retroactively). The majority view that emerged was that the provision was a clarification to SOX 806 with retroactive application, such that the law applied to conduct arising before 2010. Many of these opinions conclude that prior to Dodd-Frank, SOX 806 was ambiguous and that the

[1] *See, e.g., Hylton v. The Seminole Tribe of Fla.*, ARB No. 10-078, ALJ No. 2010-SOX-14 (ARB Oct. 31, 2011) (despite allegations that respondent sovereign Indian tribe purchased a publicly traded company and entered into business relationships with publicly traded companies, respondent is not a company covered under Section 806); *Hudes v. Aetna Life Ins. Co.*, Civil Action No. 10-1444, 2011 WL 3805679 (D.D.C. Aug. 30, 2011) ("the World Bank is not a 'company' within the meaning of § 1514A"; although it issues securities, those securities "are explicitly 'deemed to be exempted securities' under both the Securities Act and the Exchange Act"); *Sherman v. Dall. ISD*, No. 3:10-CV-1146-B-BH, 2011 U.S. Dist. LEXIS 13143 (N.D. Tex. Jan. 24, 2011) (holding that Plaintiff cannot state a SOX claim against Defendant because it is a local government entity and not a publicly traded company); *see also Chin v. Chinatown Manpower Project*, 2014 U.S. Dist. LEXIS 72573 (S.D.N.Y. May 23, 2014) (holding that SOX does not apply to CMP because it is a not-for-profit organization).

amendment was a reasonable interpretation of previous law and therefore should apply to pre-enactment conduct. *See, e.g., Trusz v. UBS Realty*, No. 3:09-cv-00268 (JAM), 2016 U.S. Dist. LEXIS 51427 (D. Conn. Apr. 18, 2016) (applying the *Leshinsky* factors of (1) whether the enacting body declared the amendment was clarifying; (2) whether a conflict or ambiguity existed prior to the amendment; and (3) whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history to rule in accordance with the majority view); *Ashmore v. CGI Grp., Inc.*, 2012 U.S. Dist. LEXIS 82598 (S.D.N.Y. June 12, 2012); *Gladitsch v. Neo@ogilvy, Ogilvy, Mather, WPP Grp. USA, Inc.*, 2012 U.S. Dist. LEXIS 41904 (S.D.N.Y. Mar. 21, 2012); *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-15 (ARB Mar. 31, 2011). With Dodd-Frank now nearly a decade old, the question has become increasingly irrelevant.

2. Statistical Rating Organizations

The 2010 passage of the Dodd-Frank statutory amendments expanded the whistleblower protection provisions to mandate that "nationally recognized statistical rating organizations (as defined in section 3(a) of the Securities Exchange Act of 1934)," or credit rating issuers, would be held to the same non-retaliation standards. (18 U.S.C. § 1514A(a)). The inclusion of these organizations in SOX 806 protections are arguably intended to address credit agencies, whose reports of misconduct could possibly have lessened the severity of the 2008 housing crisis. Examples of NRSROs include Standard & Poor's and Moody's Investors Service. *See Ulrich v. Moody's Corp*., 2014 U.S. Dist. LEXIS 145898 (S.D.N.Y. Mar. 31, 2014) for an example of a case with an NRSRO defendant.

3. Contractors, Subcontractors, and Agents

SOX civil whistleblower provisions apply to "any officer, employee, contractor, subcontractor or agent" of a covered company. 18 U.S.C. § 1514A(a). The terms "officer," "employee," "contractor," "subcontractor," and "agent" are not defined in the Act and were the subject of frequent litigation. Federal courts generally limited SOX coverage over contractors or agents to cases where the complainant was employed by the publicly-traded company, not by the agent or contractor. The ARB adopted a broader interpretation, holding that SOX protected individuals employed by private companies that contracted with publicly traded companies. This disagreement among the interpretations of SOX coverage culminated in the Supreme Court's decision in *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014), which found that the statutory language supported the broader construction of SOX's coverage.

a. Retaliation Against Employees of Contractors, Subcontractors, and Agents

i. The *Lawson* Decision

In *Lawson*, the Supreme Court held that SOX protects employees of private contractors of publicly traded companies and their subsidiaries, overturning a decision by the Court of Appeals for the First Circuit. The plaintiffs were employees of a company that performed accounting and financial-reporting functions for the Vanguard Group of mutual funds, which

itself had no employees. *Lawson*, 134 S.Ct. 1158, 1161. A divided Supreme Court upheld the plaintiffs' right to whistleblower protections. Noting that "[c]ontractors are not ordinarily positioned to take adverse actions against employees of the public company with whom they contract," it found that a restrictive interpretation would render insignificant SOX's ban on contractor retaliation. *Id.* at 1161. The majority also reasoned that other provisions of the statute were indications of Congressional presumption of "an employer-employee relationship between the retaliator and the whistleblower." *Id.* For example, it cited language from § 1514A(a)(1) stating that "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct." *Id.* In addition, Justice Ginsburg wrote that the remedies made available under § 1514A(c)(2), including reinstatement, could not be provided by a private contractor found to have retaliated against a public company employee. *Id.* at 1171.

The majority expressed the view that ruling otherwise would have denied millions of mutual-fund shareholders the protection against a key protection against fraud that SOX was intended to prove, namely reports by whistleblowers. *Id.* at 1169. Justice Ginsburg, writing for the majority, relied heavily on legislative history, specifically those reports noting the context in which SOX was initially drafted – in the wake of the Enron-Arthur Andersen accounting scandal – and reflecting Congress's concern with the role of Enron's outside contractors in facilitating the fraud. *Id.* at 1169-1170. In his concurrence, Justice Scalia focused solely on the text of SOX, finding it to be clear that the majority's interpretation was correct. *Id.* at 1176-77.

The Court in *Lawson* declined to recognize any limiting principle in SOX's coverage of contractor employees, for now leaving the lower courts to answer key questions regarding the bounds of SOX's coverage. For example, the Court did not make clear whether the contractor must be engaged in accounting and reporting functions for the publicly traded company, or whether an employee's protected activity must have some connection to fraud on the publicly traded company's shareholders. Not surprisingly, the *Lawson* decision has attracted a great deal of attention from both sides of the bar and more widely because it portends a new wave of litigation from employees, including lawyers, accountants and other professionals whose firms provide advisory and other services to publicly traded companies. In fact, the dissenting justices in *Lawson*, and later corporate interests and the defense bar, warned that the Supreme Court opened the door to lawsuits that have nothing to do with the activities of publicly traded companies, including from babysitters, nannies and gardeners who get fired for reporting to their boss, who happened to work for a public company, that the boss's teenager had engaged in perceived Internet fraud. *Id.* at 1183. While they disagreed about the likelihood of such hypothetical cases, both the majority and the dissent expressed the opinion that Congress might have to amend SOX if it wished to limit the reach of the statute's coverage as interpreted by the Court. *Id.* at 1184.

ii. Defining the Bounds of *Lawson*

Federal district courts are beginning to make clear that the types of cases feared by the dissent in Lawson will not easily make it through the courts. In *Reyher v. Thornton*, 262 F. Supp. 3d 209 (E.D. Pa. 2017), a fired certified public accountant sued her former employer under SOX after she complained that the partners of the company knowingly included inaccurate

information in client tax documents. The plaintiff argued that she qualified as a whistleblower under SOX because her former employer was a contractor to publicly traded companies. However, the court granted defendants' motion to dismiss and held the plaintiff was not a whistleblower under SOX. The *Reyher* court reasoned that a purported whistleblower employed by a private company cannot invoke the protections of SOX simply because her employer happens to contract with public companies on matters unrelated to the alleged whistleblowing. *Id.* at 217. In *Gibney v. Evolution Mktg. Research, LLC*, No. 14-1913, 2014 WL 2611213 (E.D. Pa. June 11, 2014), a fired employee sued his former employer under SOX after the employer fired him for complaining that it was overbilling a publicly traded company for which it provided marketing services. Pointing to the Supreme Court's emphasis in *Lawson* on SOX's goal of preventing fraud by public companies on shareholders, the district court dismissed the employee's claim of retaliation for reporting his employer's billing fraud on the public company as having little, if any, impact on shareholders. *Id*. at *7. The facts in *Gibney* present at least a tangible connection between the former employees' complaints, the private-contractor recipient of the complaints, and the business relationship with a publicly traded company, who was affected by the complaints. Reyher, in contrast, does not assert that her complaints had any effect whatsoever on any publicly traded client of her former employer. The *Reyher* court noted that it is perhaps a mere "coincidence" that her former employer contracts with publicly traded clients. *Reyher*, 262 F. Supp. 3d at 217.

In *Baskett v. Autonomous Research LLP*, No. 17-CV-9237 (VSB), 2018 U.S. Dist. LEXIS 169633 (S.D.N.Y. Sep. 28, 2018), an employee of a contractor of publicly traded companies was denied protection under SOX 806 as a whistleblower. The court noted that since *Lawson*, federal courts that have addressed the scope of § 806's "contractor" provision have found that it does not cover situations where, as there, the plaintiff did not allege fraud related to or engaged in by a public company. In other words, the contractor provision does not apply where a public company has no involvement in the conduct Congress sought to curtail by passing SOX. *Id.* at *19. In *Baskett*, Plaintiff's allegations concerned her employer's failure to follow SEC and FINRA rules pertaining to supervision of information and failure to include appropriate disclaimers on reports. The court reasoned that those complaints had no relationship to public companies or their shareholders. Therefore, plaintiff was not a whistleblower covered by SOX.

Numerous other courts have reached similar conclusions. *See, e.g., Brown v. Colonial Sav. F.A.*, No. 4:16-CV-884-A, 2017 U.S. Dist. LEXIS 40165, 2017 WL 1080937, at *4 (N.D. Tex. Mar. 21, 2017) (relying on *Lawson* and *Gibney* and concluding that "Plaintiff's allegations of fraud are too far removed from potentially harming the shareholders of a public company to be covered under § 1514A"); *Anthony v. Nw. Mut. Life Ins. Co.*, 130 F. Supp. 3d 644, 652 (N.D.N.Y. 2015) (finding that "§ 1514A only covers contractors insofar as they are firsthand witnesses to corporate fraud at a public company").

b. Retaliation By Contractors, Subcontractors, and Agents Against Employees of Publicly Traded Companies

The Court in *Lawson* engaged in a statutory interpretation debate regarding the term "contractors" in the new Dodd-Frank amendments. The majority opinion denies the prominence

of "ax-wielding specialists," employed by publicly traded companies to bear the brunt of whistleblower complaints in order to shield the employing company from liability. In this type of situation, an employee of a publicly traded company would be retaliated against by the hired contractor rather than the public company. The whistleblower claims would therefore be directed at the contractor rather than the company itself. *See Lawson*, 571 U.S. at 441. The majority continues its discussion of this scenario and denies that the addition of the word "contractor" in the amendments was intended to address a situation so infrequent as this one. *Id.* at 442 n.9. The Court denied the applicability of *Kalkunte v. DVI Financial Services, Inc*., ARB Nos. 05-139, 05-140, 2004-SOX-56 (ARB Feb. 27, 2009) in this situation.

In *Kalkunte,* a non-publicly traded "turnaround specialist" company, which was hired to manage a publicly traded company through bankruptcy and dissolution, was held liable for the termination of complainant, an employee/attorney of the publicly traded company. The ARB concluded that the turnaround specialist company was acting as a "contractor, subcontractor, or *agent*" of the publicly traded company because its main principal acted as the publicly traded company's CEO, had the power to affect the complainant's employment, and made the decision to fire the complainant. The ARB also expressed that the main principal who acted as CEO was an "officer" under SOX, and could have been held personally liable, but found that the issue of his personal liability was not before it.

The dissenting opinion in *Lawson* referenced *Tides v. Boeing Co.*, 644 F.3d 809 (9th Cir. 2011) in order to establish that in fact, independent contractors may possess managerial authority over employees of the publicly traded company, thus rendering the additional word "contract" useful in the statute. However, the majority is quick to identify that in *Tides*, while the contractor may have been given certain authority of the company's employees, the alleged retaliation was by the public company itself. *Tides*, 644 F.3d at 811; *Lawson*, 571 U.S. at 442 n.9.

4. Individual Liability

a. Scope of Individual Liability

Overall, individual liability under Section 806 has been limited to persons who have the authority to affect the terms and conditions of the complainant's employment and who have knowledge of the protected activity. Yet, there is scant case law that addresses whether directors who engage in retaliatory conduct may be held individually liable under SOX in the first place. The uncertainty stems from the apparent ambiguity in the statute. The grappling question is whether the word "agent" as used in § 1514A(a), encompasses directors. Courts have considered dictionary definitions, provisions in the Restatement of Agency, case law, and legislative intent.

In *Wadler v. Bio-Rad Labs.*, Inc., 141 F. Supp. 3d 1005 (N.D. Cal. 2015), the court determined that corporate directors of an employer could be held individually liable under SOX for retaliation against a whistleblower who reported possible misconduct in the employer's dealings to upper management because the express liability of an agent of the employer is reasonably construed to include a director. The *Wadler* court engaged in a lengthy discussion about the term "agent" and the ultimate purpose of SOX. By looking into the Enron scandal, a

major catalyst for the passing of SOX, and a Congressionally approved central purpose of SOX, "to protect whistleblowers against retaliation by their employers," it was determined that a director acting as an agent of an employer can be liable.

In one instance, as highlighted by the plaintiff in *Wadler*, a court of appeals affirmed a jury award imposing individual liability under SOX on the chairman of the board of directors on the basis that he was "involved in the decision to terminate" the plaintiff. *Jones v. Southpeak Interactive Corp.*, 777 F.3d 658, 675 (4th Cir. 2015). In *Jones*, a video game publishing company fired its chief financial officer after she raised concerns about a misstatement on one of the company's filings with the SEC. After finding that the company was liable for violating SOX, the court also declared that "it is not unreasonable to conclude that [individual directors] bear responsibility for Appellee's emotional distress. Both were involved in the decision to terminate Appellee." *Id.*

Ultimately, the *Wadler* court somewhat balked at the issue by referencing the underlying administrative proceeding's difficulty with this essential question. The Department of Labor asked for supplemental briefing on the question of whether a member of the Board of Directors of a company covered under SOX was necessarily an "officer, employee, contractor, subcontractor, or *agent*" of that company as contemplated by § 1514A(a). *Wadler*, 141 F. Supp. 3d, at 1016 n.5.

Under the assumption that courts generally do find directors able to be found liable for SOX violations, the boundaries of determining liability remain the same for corporate and individual defendants. In *Wiest v. Lynch*, 15 F. Supp. 3d 543 (E.D. Pa. 2014), a veteran accountant was retaliated against for internally reporting improper expenses and financial recording. The court extended the language of SOX, which requires that the complaining employee show that the defendant "knew or suspected that the employee engaged in the protected activity" under "circumstances […] sufficient to raise the inference that the protected activity was a contributing factor in the adverse action." *Id.* at 566 (quoting 29 C.F.R. § 1980.104(e)(2)). It only makes sense, reasons the court, that that language apply to those involved in the adverse employment action. It was found that the plaintiff in *Wiest* only made vague and cursory claims against the individual defendants, such as stating that one defendant was the CEO of the parent company while another was the CFO. These claims were not enough to create the necessary causal connection between knowledge of the plaintiff's protected activity and involvement in the adverse employment action.

Similarly, in *Bury v. Force Protection, Inc*., No. 2:09-1708, 2011 WL 2935916 (D.S.C. June 27, 2011), the district court dismissed Section 806 whistleblower claims against individual defendants because the allegations against them were pled in "only the most general and conclusory fashion." For example, the complaint ascribed conduct to unnamed "senior management," which included the individual defendants and sometimes lumped the individual defendants in with decisions taken by the employer. In *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 451-52 (S.D.N.Y. 2013), the district court granted summary judgment to a general manager where the employee could not point to any substantive evidence supporting an inference that the manager knew of the alleged protected activity. The court stated that the plaintiff could not rely solely on circumstantial evidence of the manager's knowledge as

evidence of causation, absent any substantive evidence to support the inference that the manager knew of the protected activity. *Id.* (citing *Murray v. Visiting Nurse Servs. of N.Y.*, 528 F.Supp.2d 257 (S.D.N.Y.2007)).

b. Administrative Exhaustion As To Individual Defendants

District courts continue to hold that plaintiffs must exhaust their administrative remedies against individual defendants in order to proceed against them in federal court. *See Newman v. Metro. Life Ins. Co.*, No. 12-cv-10078, 2015 U.S. Dist. LEXIS 7271, at *10 (D. Mass. Jan. 21, 2015) ("While the regulations implementing SOX may provide for individual liability, that does not obviate the need for the [p]laintiff to exhaust [her] administrative remedies for each claim [she] seeks to assert against each defendant.") (quoting *Bozeman v. Per-Se Techs.*, Inc., 456 F. Supp. 2d 1282, 1257 (N.D. Ga. 2006)); *Smith v. Psychiatric Solutions, Inc.*, 2009 WL 903624 (N.D. Fla. Mar. 31, 2009); *Bridges v. McDonald's Corp.*, No. 09-cv-1880, 2009 WL 5126962 (N.D. Ill. Dec. 23, 2009).

It is unsettled law, however, in order to fulfill the exhaustion requirements, whether a complainant must specifically name an individual defendant as a respondent in the OSHA complaint. *Contrast Jones v. Southpeak Interactive Corp.*, No. 3:12cv443, 2013 U.S. Dist. LEXIS 37999 (E.D. Va. Mar. 19, 2013) (denying a motion to dismiss where defendant was not listed in heading of OSHA complaint but complaint described defendant as a person "who the complaint is being filed against"); *Jones v. Home Federal Bank*, 2010 WL 255856 (D. Idaho Jan. 14, 2010) (although defendant was not named as respondent in plaintiff's OSHA complaint, he was sufficiently identified within the complaint); *Wadler v. Bio-Rad Labs., Inc*., 141 F. Supp. 3d 1005 (N.D. Cal. 2015) (OSHA complaint alleging that complainant was terminated from his employment by the CEO and gave the CEO fair notice that he was being charged with retaliation even where he was not named in the caption of the complaint, but complainant did not give fair notice to other company board members) *with Lutzeier v. Citigroup, Inc*., No. 4:14CV183 RLW, 2015 U.S. Dist. LEXIS 28231, at *5 (E.D. Mo. Mar. 9, 2015) (finding that plaintiff failed to exhaust his claims against defendant because he was not named as a respondent in plaintiff's OSHA complaint and that it is insufficient for exhaustion purposes to only name the defendant in the body of the administrative company); *Smith v. Psychiatric Solutions, Inc.*, No. 08cv3, 2009 WL 903624 (N.D. Fla. Mar. 31, 2009), *aff'd* 358 Fed. Appx. 76 (11th Cir. 2009) (finding plaintiff had not exhausted administrative remedies as to certain defendants because they were not named in the caption or the body of the administrative complaint); *Bozeman*, 456 F. Supp. 2d, at 1357 (granting summary judgment for failure to include defendants as respondents to OSHA complaint although defendants were identified as actors in body of complaint); *Hanna v. WCI Cmntys., Inc.*, No. 04-cv-80595, 2004 U.S. Dist. LEXIS 25652, at *7-9 (S.D. Fla. Nov. 15, 2004) (dismissing SOX claim against defendant mentioned in body of OSHA complaint but not named as respondent in complaint heading); *Smith v. Corning, Inc.*, 496 F. Supp.2d 244 (W.D.N.Y. 2007) (dismissing SOX claim against individual defendant not named as respondent in plaintiff's OSHA complaint).

The essential debate rests on intended formalism of the OSHA exhaustion rule. The rationale for requiring a plaintiff to list each defendant in the heading of her OSHA complaint is that it puts OSHA on notice of each defendant whom it must investigate to resolve the claim.

Yet, no particular form of complaint is required when filing with OSHA. Perhaps if a defendant is named in the body of the complaint rather than the heading, OSHA's investigation would not suffer from any lack of thoroughness. Nevertheless, the DOL generally is more lenient in allowing complainants to amend their pleadings to add as respondents parties who were not named in the OSHA complaint. *See Randall v. Bank of America Corp.*, 2011-SOX-34 (ALJ June 21, 2011) ("Pleadings may be liberally amended. Had Complainant offered a basis, it might have been possible to do so").

5. Covered Employee

The regulations implementing SOX 806 define a covered "employee" as "an individual presently or formerly working for a company or . . . an individual applying to work for a company or . . . whose employment could be affected by the company or company representative." 29 C.F.R. §1980.101. Courts and ALJs have addressed whether a number of categories of persons fall within Section 806's definition of "employee," including applicants, former employees, independent contractors, and shareholders and board members.

a. Applicants

The regulations state that an "employee" for purposes of SOX 806 includes "an individual applying to work for a company . . . ." 29 C.F.R. § 1980.101. It is clear, then, that applicants are covered, but not everyone seeking a job is an applicant. Rather, "in a case dealing with an applicant and prospective employer, the successful complainant must show that he properly applied to an open position for which the company was seeking applicants and that he was qualified." *Levi v. Anheuser Busch Companies, Inc*., ARB 08-086, 2008-SOX-28 (ARB Sept. 25, 2009). Similarly, when a plaintiff makes a failure to rehire claim in relation to SOX retaliation, the claim requires that the plaintiff apply for a position and be rejected for that position. *See Jordan v. Sprint Nextel Corp*., 3 F. Supp. 3d 917, 930 (D. Kan. 2014) (comparing SOX failure to hire cases to the Title VII standard in *Garrison v. Gambro, Inc.*, 428 F.3d 933 (10th Cir. 2005) and also in the SOX context in *Levi*).

b. Former Employees

Individuals who formerly worked for a covered employer and suffer retaliation after their employment has ended are covered employees under SOX 806. *See* 29 C.F.R. §1980.101. This is the case whether the protected activity at issue occurred before or after the termination of employment. The types of retaliation covered range include, among other things, harassment, failure to hire, outing, and blackballing. *See, e.g., Kshetrapal v. Dish Network, LLC*, 90 F. Supp. 3d 108 (S.D.N.Y. 2015) (holding that plaintiff's SOX claim is not limited to his pre-termination protected activity in part to avoid discouraging employees from exposing fraudulent activities of their former employers); *Portes v. Wyeth Pharmaceuticals, Inc*., No. 06 Civ. 2689, 2007 WL 2363356 (S.D.N.Y. Aug. 20, 2007) (permitting a SOX claim to proceed despite plaintiff being no longer employed by defendant when he filed his complaint with OSHA); *but see Feldman v. Law Enf't Assocs. Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011) (finding that plaintiff's complaint failed to demonstrate that an employer-employee relationship existed during the relevant time period for plaintiff's SOX claims).

An additional significant development in the status of former employees as whistleblowers is the holding of *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018). In *Digital Realty*, the plaintiff did not report any alleged law violation to the SEC before his termination. Therefore, he did not qualify as a whistleblower at the time of the alleged retaliation and was unable to seek relief under Dodd-Frank. This holding was confirmed in *Price v. UBS Fin. Servs.*, No. 2:17-01882, 2018 U.S. Dist. LEXIS 66200 (D.N.J. Apr. 19, 2018) (applying the "unequivocal" holding of *Digital Realty* to find that the plaintiff is not considered a whistleblower under Dodd-Frank because he did not allege that he reported any information to the SEC before his termination) and in *Wutherich v. Rice Energy Inc.*, No. 18-200, 2018 U.S. Dist. LEXIS 171113 (W.D. Pa. Oct. 2, 2018) (holding that *Digital Realty* is dispositive and that plaintiff is ineligible to seek relief under Dodd-Frank).

c. Independent Contractors

In evaluating whether a complainant who is ostensibly an independent contractor is a covered "employee" under SOX 806, ALJs have applied the common law agency test. As set forth in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), the agency test focuses on the hiring party's right to control the manner and means by which the work is accomplished. But the implementing regulations of SOX 806 arguably call for a broader interpretation. The language of the regulation refers to "an individual whose employment could be affected by a company or company representative," a description that may include individuals who would not be considered employees under the *Darden* analysis. It is important to note that Title VII authorizes a cause of action only against employers, employment agencies, labor organizations, and training programs, *see* 42 U.S.C. § 2000e-2, just as the ADA covers only employers, employment agencies, and labor organizations, *see* 42 U.S.C. § 12111(2). Neither of these statutes applies to independent contractors.

In *Collins v. Ameriprise Fin. Servs., Inc.*, 2016-SOX-00015 (ALJ June 6, 2016), an ALJ used federal regulation guidelines to determine that an employee is defined as "an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person." 29 C.F.R. § 1980.101(g). Then, by analyzing legislative intent and that SOX was intended to mainly protect investors, the ALJ found that protection is best served by an expansive interpretation. Therefore, a contractor or sub-contractor may be "an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.001. *See also, Lindner v. Citimortgage Inc.*, 2018-SOX-00001 (ALJ Mar. 22, 2018) (citing *Lawson* to include independent contractors as "employees" under SOX protections).

In *Deremer v. Gulfmark Offshore Inc*., 2006-SOX-2 (ALJ June 29, 2007), an ALJ took the broader view of SOX , applying the *Darden* principles, found that complainant was an independent contractor. Nonetheless, the ALJ found that the independent contractor was an "employee" as defined in 29 C.F.R. § 1980.101 because he was "an individual whose employment could be affected by a company or company representative." The ALJ observed that the regulation was purposely broad, and that the term "employment" "includes any service or activity for which an individual was contracted to perform for compensation. Therefore, a

contractor or subcontractor may be 'an individual whose employment could be affected by a company or company representative.'"

Similarly applying the *Darden* principles, in *Mara v. Sempra Energy Trading, LLC*, 2009-SOX-18, 2009 WL 6470478 (ALJ June 28, 2011), the ALJ held that an independent accounting consultant who maintained a separate business identity, set her own schedule, invoiced the company for payments, did not receive employee benefits, was not hired directly by the company and received a tax form 1099-MISC, might still be a covered employee because she worked at the company's physical office, was instructed on how to perform some of the work, and was assigned additional work after finishing the project she was originally contracted to complete. (The ALJ granted summary judgment on other grounds.)

d. Shareholders and Board Members

Shareholder-directors are not considered employees for most purposes, and thus would not enjoy anti-retaliation protection under SOX 806. In the context of the Americans with Disabilities Act ("ADA"), the U.S. Supreme Court in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 123 S. Ct. 1673 (2003) set forth six factors to consider when determining whether shareholder-directors are "employees" under the ADA. These factors are: (1) Whether the organization could hire or fire the individual or set the rules and regulations of the individual's work; (2) Whether and, if so, to what extent the organization supervised the individual's work; (3) Whether the individual reported to someone higher in the organization; (4) Whether and, if so, to what extent the individual was able to influence the organization; (5) Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) Whether the individual shared in the profits, losses, and liabilities of the organization. *Id.* at 449-50. The Court concluded that physician-shareholders who owned a medical clinic probably were not employees where they controlled the operation of the clinic, shared the profits, served on the corporation's board of directors and were personally liable for malpractice claims.

At least one ALJ has applied *Clackamas* to Section 806 claims. In *Cunningham v. LiveDeal, Inc*., 2011-SOX-4 (ALJ Apr. 1, 2011), the ALJ, observing that the issue of whether a corporate director is protected under Section 806 "appears to be an issue of first impression," held that an independent director who served on various board committees was not protected by Section 806. The ALJ, applying *Clackamas*, noted that complainant was an independent director for purposes of NASDAQ regulations, and that independent directors have a special role under the SOX and NASDAQ regulatory scheme. Specifically, corporate governance rules prohibit any person who, during the past three years, was employed by the Company from being an independent director. Thus, classifying an independent director as an "employee" for the purposes of SOX protection would directly conflict with the definition of the term as it is used in the NASDAQ rules and SOX filings.

6. Extraterritorial Application

The question of extraterritorial reach within SOX remains unsettled. At first glance, it seems that the statute clearly includes foreign companies as potential defendants of whistleblower

claims. Section 806 contains jurisdictional language that covers any company that has a class of securities registered under Section 12 of the Exchange Act or is required to file reports under Section 15(d) of the Exchange Act. Under the Exchange Act, foreign companies that issue debt or equity securities in the U.S. are not distinguished from U.S. companies. Yet, in the first few years after the passing of SOX in 2002, several decisions found that extraterritorial application does not apply. *See, e.g., Carnero v. Boston Scientific Corp*., 433 F.3d 1 (1st Cir. 2006); *Concone v. Capital One Fin. Corp.*, 2004 WL 3127233 (OSHA Dec. 3, 2004); *but see O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008) (establishing the first decision where SOX's protection was extended beyond the U.S.).

a. Morrison v. National Australia Bank

In *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), the U.S. Supreme Court held that U.S. securities laws do not apply extraterritorially to cover transactions by non-U.S. investors in securities of non-U.S. companies effected on non-U.S. exchanges (so-called "foreign-cubed cases"), even if the losses may arise from fraudulent conduct in the United States. The decision set aside the long-standing "conduct" and "effects" tests previously applied by the courts. In their place, the Court adopted a "transactional" test, under which Section 10(b) only applies to transactions in securities listed on domestic exchanges or domestic transactions in other securities. The Court reasoned that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."

One month after the *Morrison* decision, Dodd-Frank was signed into law. Section 929P amended the Exchange Act to provide U.S. district courts with jurisdiction over an action brought or instituted by the SEC alleging a violation of the antifraud provisions of the Exchange Act involving "[c]onduct occurring outside the United States that has a foreseeable substantial effect within the United States." Section 929Y(a) directed the SEC to prepare a study regarding whether the scope of the antifraud provisions should be extended to private rights of action to the same extent as that provided to the SEC by Section 929P. On April 11, 2012, the SEC released its study, providing a wide range of options for Congress to consider but no concrete recommendations.

The ARB, applying the *Morrison* analysis, has limited the extraterritorial application of Section 806. In *Villanueva v. Core Laboratories, NV*, ARB No. 09-108, ALJ No. 2009-SOX-6 (ARB Dec. 22, 2011), aff'd on other grounds, *Villanueva v. DOL*, 743 F.3d 103 (5th Cir. 2014), complainant, a foreign citizen working in Colombia for a Colombian company that was an indirect subsidiary of a Dutch company whose securities were publicly traded on the NYSE, alleged that his employer was violating Colombian tax evasion laws. The parent company had an office in Houston, where the complainant alleged that the retaliatory decision occurred. Applying the *Morrison* "transactional" test, the ARB found, even if executives in Houston directly controlled all aspects of the Colombian company's business, it would "not change the fact that the disclosures involved violations of extraterritorial laws and not U.S. laws or financial documents filed with the SEC. [The complainant] did not point to a U.S. law or domestic financial statement that was fraudulent. Therefore, under the facts presented in this case, [the complainant's] reporting of foreign tax law is beyond the reach of Section 806."

In another case decided after *Morrison*, the ALJ dismissed the complaint because the complainant was a foreign national who worked exclusively in Switzerland for a foreign company and did not complain to superiors in the United States. *Pik v. Credit Suisse AG*, 2011-SOX-6 (ALJ Mar. 3, 2011), *aff'd* ARB No. 11-034 (ARB May 31, 2012). The decision did not address the *Morrison* "transactional" test. Similarly, in *Ulrich v. Moody's Corp.*, 2014 U.S. Dist. LEXIS 138082 (S.D.N.Y. Sept. 30, 2014), the court dismissed SOX and Dodd-Frank whistleblower claims on the grounds that the statutes' respective anti-retaliation provisions do not apply extraterritorially. Here, plaintiff had little if any connection to the U.S. as part of his employment. While the plaintiff alleged that managers in New York orchestrated retaliation, the court rejected that assertion as speculative and insufficient on its own to make the conduct domestic. *See also Liu v. Siemens A.G.*, No. 13-4385, 2014 WL 3953672 (2d Cir. Aug. 14, 2014).

b. RGR Nabisco, Inc. v. European Community

In *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), the Supreme Court applied the *Morrison* two-step process and held that the Racketeer Influenced and Corrupt Organizations Act (RICO) applies extraterritorially because it incorporates a number of predicates that apply to foreign conduct, which signaled that Congress intended for RICO to apply extraterritorially. This decision was cited in *Blanchard* below and formed the basis for the courts to move away from the restrictive application holding in *Villanueva*. Based on *RGR Nabisco*, the ARB held in *Blanchard* that SOX "contains a clear indication that it applies extraterritorially to cover all publicly-traded domestic and foreign companies and their employees regardless of the location of the affected employer/employee." However, SOX does not necessarily cover all foreign conduct, as the misconduct must "affect [the U.S.] in some significant way." *Blanchard v. Exelis Systems Corporation/Vectrus Systems Corp.*, 2017 WL 3953474, at *7 (ARB Aug. 29, 2017).

c. Blanchard v. Exelis Systems Corp.

The ARB recently held in *Blanchard v. Exelis Systems Corporation/Vectrus Systems Corp.*, 2017 WL 3953474 (ARB Aug. 29, 2017) that a former employee of Exelis Systems Corporation who was employed in Afghanistan could bring a SOX claim even though he worked exclusively outside of the United States. The plaintiff was a security supervisor who assessed local or foreign nationals who sought access to a U.S. Air Force base in Afghanistan. He complained to human resources staff that his supervisors engaged in wire and mail fraud for covering up a security breach investigation and for falsifying compensation documents. He then filed a claim with the Department of Labor when he was terminated after making the allegations. The ALJ initially dismissed the complaint on the grounds that the plaintiff's concerns arose from conduct that occurred outside of the U.S. and that Section 806 does not apply extraterritorially. The ARB reversed, explaining that the issue of extraterritorial application is not applicable here because the allegations were violations of U.S. mail and wire fraud. The ARB held that because the complainant's alleged complaints involved a U.S-based corporation engaged in submitting false claims to the U.S. government in connection with U.S. security and military operation on a U.S. air force base, his complaints fall squarely within the type of malfeasance that both SOX and § 806 aimed to deter.

7. Pre-Dispute Arbitration Ban

Section 922 of Dodd-Frank, amending SOX, states that "no predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under [Section 806]." 18 U.S.C. § 1514A(e)(2). Therefore, a provision in an employment agreement or contract that purports to require an employee to arbitrate all claims against arising from his or her employment is unenforceable as to retaliation claims under SOX. Questions have arisen as to the ban's retroactive application and scope.

a. Retroactivity of Pre-Dispute Arbitration Ban

In decisions predating the Dodd-Frank Act amendments, courts in the Second, Fifth, and D.C. Circuits all concluded that SOX whistleblower claims may be arbitrated (*see, e.g., Guyden v. Aetna, Inc*., 544 F.3d 376 (2d Cir. 2008)). The Dodd-Frank Act, however, clearly prohibits mandatory arbitration of SOX whistleblower retaliation claims and Dodd-Frank Sections 748 and 1057 claims. Courts have reached inconsistent decisions regarding whether the pre-dispute arbitration ban applies retroactively to cover mandatory pre-dispute arbitration agreements employees signed prior to Dodd-Frank's enactment. While courts have come down on both sides of this issue, most courts have held that the ban is not retroactive. *Compare Taylor v. Fannie Mae*, 839 F. Supp. 2d 259, (D.D.C. 2012) (same) and *Blackwell v. Bank of America Corp.*, No. 7:11-2475, 2012 WL 1229673, at *3 (D.S.C. Mar. 22, 2012) (same), *report and recommendation adopted*, No. 11–2475, 2012 WL 1229675 (D.S.C. Apr. 12, 2012) and *Holmes v. Air Liquide USA LLC*, No. H-11-2580, 2012 WL 267194 (S.D. Tex. Jan. 30, 2012), *aff'd sub nom. Holmes v. Air Liquide USA, L.L.C.*, 498 Fed. App'x 405 (5th Cir. 2012) (same) and *Henderson v. Masco Framing Corp.*, No. 3:11-CV-00088, 2011 WL 3022535, at *3–4 (D. Nev. July 22, 2011) (same) *with Lysik v. Citibank, N.A*., No. 17 C 2277, 2017 U.S. Dist. LEXIS 152468 (N.D. Ill. Sep. 20, 2017); *Wiggins v. ING U.S., Inc.*, No. 3:14-CV-1089, 2015 WL 3771646 (D. Conn. June 17, 2015) (citing *Wong*, *infra*); *Santoro v. Accenture Fed. Servs., LLC,* 748 F.3d 217 (4th Cir. 2014); *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225 (D. Mass. 2011) (applying ban retroactively) and *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, (S.D.N.Y. Sept. 10, 2012) (same).

Each of these courts has evaluated the question of retroactive effect according to the framework established by the Supreme Court of United States in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37-38 (2006) and *Landsgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994). Under *Fernandez* and *Landsgraf*, in the absence of an express statement of Congressional intent, the court applies the normal rules of statutory construction to infer the intent of Congress as to the statute's temporal reach. If Congress's intent is unclear, the court then inquires "whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment." *Id.* If so, the court applies the presumption against retroactivity. All courts that have addressed the issue have determined that Congress did not state any express intent regarding the retroactive application of the pre-dispute arbitration provision and that Congress's intent with respect to the ban's retroactivity is unclear. Courts disagree, however, about whether retroactive application of the pre-dispute arbitration ban would affect the

substantive rights of the parties – prohibiting retroactive application – or procedural rights, in which case retroactive application is acceptable pursuant to *Landsgraf*.

In *Pezza v. Investors*, the first case to address the issue, the court held that the provision voiding pre-dispute arbitration bans, as applied to SOX whistleblower claims, applied retroactively. 767 F. Supp. 2d at 233-234. The *Pezza* court acknowledged that Section 922 affected contractual and property rights because it would effectively void a contractual provision agreed upon by the parties in the employment agreement, and conceded that the presumption against retroactivity would usually apply in such instances because these statutes related to "matters in which predictability and stability are of prime importance." *Id.* at 233 (quoting *Landsgraf*, 511 U.S. at 271 (1994)). However, the court determined that retroactive application was nonetheless appropriate because the arbitration ban was essentially a jurisdictional statute. *Id.* The court explained that the parties did not claim that the choice of venue – the Financial Industry Regulatory Authority or a court – would affect the substantive result of the case, and thus "conclude[d] that Section 922 of the Act should also be applied to conduct that arose *prior* to its enactment." *Id.*

Like the court in *Pezza*, the court in *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, (S.D.N.Y. Sept. 10, 2012), concluded that while that retroactive application of the arbitration ban could fall within the category of case that affects contractual and property rights, it "more appropriately falls within the second category because it . . . 'principally concerns the type of jurisdictional statute envisioned in *Landsgraf*,' and does not affect the substantive rights of either party." *Id.* at *9 (internal citation omitted). *Wong* relied on precedent from the Supreme Court stating that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute[,]" but rather submits "their resolution to an arbitral, rather than judicial forum." *Id.* At 9 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628)).

Pezza, *Wong*, and *Wiggins* are outnumbered by decisions holding that a retroactive application of the pre-dispute arbitration ban would affect the parties' substantive, rather than procedural rights, and is therefore improper. In *Taylor v. Fannie Mae*, one of the only published cases on the issue, the U.S. District Court for the District of Columbia emphasized that, at the time the plaintiff signed the dispute resolution policy in 2010, "the parties had the right to contract for the arbitration of Sarbanes-Oxley claims." 839 F. Supp. 2d at 263. The agreement the plaintiff signed specifically provided that the arbitration clause applied to all claims associated with legally protected rights that directly or indirectly related to the termination of his employment. *Id.* The court thus "fail[ed] to see how a retroactive application would not impair the parties' rights possessed when they acted." *Id.*

The *Henderson* court likewise held that the Dodd-Frank Act's SOX provisions were not retroactive, disagreeing with the *Pezza* court's conclusion that retroactive application of Section 922 affected only the conferral of jurisdiction and not substantive contract rights. 2011 WL 3022535, at *3–4. Instead, the Nevada court found, the "retroactive application of Dodd-Frank's SOX provisions would not merely affect the jurisdictional location in which such claims could be brought; it would fundamentally interfere with the parties' contractual rights and would impair the 'predictability and stability' or their earlier agreement." *Id.* In contrast with *Wong*'s reliance on *Mitsubishi Motors*, *Henderson* emphasized that the Supreme Court "has explicitly

indicated on numerous occasions that the right of parties to agree to arbitration is a contractual matter governed by contract law." *Id.* at *4 (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740); *see also Blackwell*, 2012 WL 1229673, at *2 (quoting same).

b. Scope of Pre-Dispute Arbitration Ban

In addition to raising issues about retroactivity, Dodd-Frank's ban on pre-dispute arbitration agreements for SOX claims has generated questions regarding its scope, including its applicability to related anti-retaliation claims.

Where a common nucleus of operative facts existed between an employee's SOX claim and another claim, a few courts have held that SOX, as amended by the Dodd-Frank Act, barred arbitration of both the SOX claim and the intertwined state claim. *See Laubenstein v. Conair Corp.*, No. 5:14-CV-05227, 2014 WL 6609164, at *3 (W.D. Ark. Nov. 19, 2014). The District Court stated that "forcing SOX whistleblowers with entangled claims to choose between either engaging in duplicative and costly litigation in multiple forums or abandoning potentially meritorious claims" would frustrate the purpose of the anti-arbitration provision. *Id.* The *Laubenstein* court cited to another recent decision that had reached the same conclusion where the intertwined claim was for breach of contract based on alleged retaliation against the plaintiff for sending a memorandum to his company's Audit Committee in which he detailed concerns about potential violations of SOX's financial disclosure requirements. *Steward v. Doral Fin. Corp.*, 997 F. Supp. 2d 129, 139 (D.P.R. 2014); *see also Richards v. Gibson*, No. 1:15CV7-LG-RHW, 2015 U.S. Dist. LEXIS 10365 (S.D. Miss. Jan. 29, 2015). The *Laubenstein* court made clear, however, that its decision was limited to the facts of the case at hand, and should not be interpreted broadly for the proposition that Congress "intended to bar arbitration of every claim brought alongside a SOX claim." *Laubenstein*, at *3. However, at least one other court has decided a SOX claim – declining to stay proceedings – while sending an "entangled" state law claim to arbitration. *See Wiggins v. ING U.S., Inc.*, No. 3:14-CV-1089, 2015 WL 3771646 at *7-8 (D. Conn. June 17, 2015). Another federal district court stayed proceedings on a SOX claim pending the outcome of arbitration of several entangled claims, and deferred to the arbitrator to determine whether the plaintiff's SOX claim was arbitrable. *See Neal v. Asta Funding, Inc.*, No. 13-cv-3438, 2014 WL 131770 (D.N.J. Jan. 6, 2014).

Where a Dodd-Frank anti-retaliation action is brought alone, and not in conjunction with an intertwined SOX claim that *could* have been brought, the Dodd-Frank claim is likely arbitrable.[2] In *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, (3d Cir. 2014), the Court of Appeals for the Third Circuit held that a retaliation claim brought under the Dodd-Frank Act was not exempt from a pre-dispute arbitration ban. As the court noted, "The Anti-Arbitration Provision is expressly limited to a single category of disputes: those 'arising under this section,' meaning Section 1514A of the United States Code. That section contains the Sarbanes-Oxley cause of action for retaliation against whistleblowers." *Id.* at 492. The *Khazin* court rejected the plaintiff's argument that it would be "counterintuitive for Congress to treat Sarbanes–Oxley claims differently than Dodd–Frank claims, and that requiring the arbitration of his claim would

[2] Dodd-Frank's anti-retaliation provisions, codified at 15 U.S.C. §78u-6(h), are discussed in Section III, *infra*.

undermine Dodd–Frank's broader purpose of enhancing protections for whistleblowers." *Id.* The Third Circuit observed that the only two other courts to have addressed the issue directly also held that whistleblowers may be compelled to arbitrate Dodd-Frank retaliation claims. *See Pompliano v. Snap Inc*., No. CV 17-3664-DMG (JPRx), 2018 U.S. Dist. LEXIS 107357 (C.D. Cal. Apr. 11, 2018); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(KPF), 2014 WL 285093, at *10–11 (S.D.N.Y. Jan. 27, 2014); *Ruhe v. Masimo Corp.*, SACV 11–00734–CJC(JCGx), 2011 WL 4442790, at *4 (C.D. Cal. Sept. 16, 2011). More recently, the Southern District of New York, relying on *Khazin*, came to the same conclusion in *Citigroup Global Markets Inc. v. Preis*, No. 14 Civ. 08487, 2015 WL 1782135 at *4 (S.D.N.Y. Apr. 14, 2015), as did the Western District of Wisconsin in *Wussow v. Bruker Corp.*, 16-cv-444-wmc, 2017 WL 2805016 (W.D. Wis. June 28, 2017). The decision that standalone Dodd-Frank anti-retaliation claims are arbitrable is particularly significant because Dodd-Frank, unlike SOX, does not guarantee a jury trial for retaliation claims. *See Pruett v. BlueLinx Holdings, Inc.*, No. 1:13-cv-02607-JOF, 2013 WL 6335877 (N.D. Ga. Nov. 13, 2013).

B. *Prima Facie* Case

To make a *prima facie* case under Section 806(a), the employee-complainant must prove that (1) s/he engaged in protected activity, (2) the employer knew that s/he engaged in the protected activity, (3) s/he suffered an adverse action, and (4) the protected activity was a contributing factor to the adverse action. 29 C.F.R. §1980.104(e). *See also Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 259 (5th Cir. 2014); *Wiest v. Lynch*, 710 F.3d 121, 129 (3d Cir. 2013).

1. Summary of Standard – Preponderance of Evidence[3]

A complainant must prove each element of her claim by a preponderance of the evidence. 29 C.F.R. § 1980.109(a); *see also Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 448 (2d Cir. 2013); *Gallas v. Med. Ctr. of Aurora*, ARB Case Nos. 16-012, 15-076, ALJ Case Nos. 2015-SOX-013, 2015-ACA-005 (ARB Apr. 28, 2017); *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOC-051, 2014 WL 5511070, at *7 (ARB Oct. 9, 2014) (citing *Sylvester v. Parexel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011). Preponderance of the evidence means the complainant must present evidence that their claim is more likely true than not true.

2. Protected Conduct

Section 806 provides protection to employees for two general types of employee conduct. First, the Act protects employees "who provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee *reasonably believes* constitutes" securities fraud, bank fraud, wire fraud, or violation of "any rule or

[3] The preponderance of the evidence standard applies to a whistleblower's complaint. As discussed *infra*, if a complainant establishes a *prima facie* case, the burden of persuasion shifts to the respondent to demonstrate by clear and convincing evidence – a more exacting standard – that it would have taken the same action in the absence of the protected activity the complainant alleged.

regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. §1514A(a)(1) (emphasis added). The assistance must be provided to or the investigation must be conducted by: "(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. §1514A(a)(1)(A)-(C).

Second, the Act affords protection to employees who "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation" of the laws mentioned above. 18 U.S.C. §1514A(a)(2).

a. Opposition

The first broad category of protected conduct involves reporting or opposing conduct that an individual reasonably believes violates one of the categories of laws enumerated in the statute. The form and content of oppositional conduct as protected activity is a frequent subject of litigation. Key questions include what constitutes a reasonable belief, what a report must include, and to whom an internal report must be made in order to qualify for SOX 806 protection.

i. Reasonable Belief

Section 806 only protects an employee who "reasonably believes" the information he or she reports constitutes a violation of the enumerated provisions. Although the Act does not define "reasonable belief," remarks submitted by Senator Leahy explain that the "reasonable belief" standard

> is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts. Certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief. The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.

Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002 Cong. Rec. S7418, S7420 (daily ed. July 26, 2002).

The cases interpreting SOX's reasonable belief standard have established that, consistent with other anti-retaliation statutes, both subjective and objective components must be satisfied. The subjective component requires that the complainant or whistleblower make the allegations in good faith. The objective component requires that a "reasonable person" would have believed the reported conduct violated the relevant statute.

Cases requiring both a subjective and objectively reasonable good faith belief include: *Nielsen v. AECOM Tech. Corp.*, 2014 WL 3882488 (2d Cir. Aug. 8, 2014); *Lockheed Martin Corp. v. Admin. Review Bd.,* 717 F.3d 1121 (10th Cir. 2013); *Nance v. Time Warner Cable, Inc.*, 433 Fed. App'x 502 (9th Cir. 2011); *Pearl v. DST Sys., Inc*., 359 Fed. App'x 680 (8th Cir. Jan. 7, 2010); *Fraser v. Fiduciary Trust Co. Int'l*, 396 Fed. App'x. 734 (2d Cir. 2010); *Gale v. Department of Labor*, 384 Fed. App'x 926 (11th Cir. June 25, 2010); *Van Asdale v. International Game Tech.*, 577 F.3d 989 (9th Cir. 2009); *Harp v. Charter Comm., Inc.*, 558 F.3d 722 (7th Cir. 2009); *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009); *Erhart v. Bofi Holding, Inc*., 269 F. Supp. 3d 1059 (S.D. Cal. 2017); *Yang v. Navigators Grp., Inc.*, 2016 WL 67790 (S.D.N.Y. Jan. 4, 2016); Trusz v. UBS Realty, No. 3:09-cv-00268 (JAM), 2016 U.S. Dist. LEXIS 51427 (D. Conn. Apr. 18, 2016); *Wiggins v. ING U.S., Inc*., No. 3:14-CV-01089 (JCH), 2015 U.S. Dist. LEXIS 167362 (D. Conn. Dec. 15, 2015); *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432 (S.D.N.Y. 2013); *Guitron v. Wells Fargo Bank, N.A.*, 2012 WL 2708517 (N.D. Cal. July 6, 2012); *Feldman v. Law Enforcement Associates Corp.*, 779 F. Supp. 2d 472, 491 (E.D.N.C. March 10, 2011).

(1) Subjective Belief

The subjective belief component was addressed by the Eleventh Circuit in *Gale v. Department of Labor*, 384 Fed. App'x 926 (11th Cir. 2010), in which the court concluded that a subjective belief means that the employee "actually believed the conduct complained of constituted a violation of pertinent law." The court found that the plaintiff did not have a subjective, good faith belief where he merely felt "really uncomfortable" and "uneasy." Specifically, the complainant, when pressed at his deposition, admitted that while he was "uncomfortable" with certain accounting practices that he observed, he did not *actually believe* that his company was participating in illegal or fraudulent activities.

Several district courts have also addressed the issue of subjective belief. In *Gladitsch v. Neo@Ogilvy*, 2012 WL 1003513 (S.D.N.Y. Mar. 21, 2012), the court concluded that the evidence could support a finding that the complainant had a subjective belief that the activity she reported may have been unlawful, even though she conceded that she was not certain. In *Miller v. Stifel, Nicholas & Co.*, 812 F. Supp. 2d 975 (D. Minn. 2011), however, the court found that where the complainant testified that she was unsure whether the ethical lapses complained of constituted violations of any law or regulation covered by SOX, it could not be said that she "actually believed" the conduct complained of constituted such violations. In *Leshinsky v. Telvent GIT, S.A.,* 942 F. Supp. 2d 432, 437 (S.D.N.Y. 2013), the court found that there was sufficient evidence for a jury to find that the plaintiff questioned the legality of the defendant's actions. In this case, the plaintiff stated, "I thought… the overheard strategy… was unethical, certainly immoral, and may even be illegal but I wasn't sure since I'm not a lawyer." Similarly, in *Trusz v. UBS Realty*, No. 3:09-cv-00268, 2016 U.S. Dist. LEXIS 51427 (D. Conn. Apr. 18, 2016), the court found that the plaintiff produced sufficient evidence to overcome a summary judgment motion based on his subjective beliefs. Here, the plaintiff raised concerns about overvaluations to superiors and introduced testimony from himself and from clients who stated they would have considered the overvaluations important.

Courts evaluating whether a whistleblower's belief is in "good faith" sometimes look to the whistleblower's relevant experience and knowledge. For example, in *Gladitsch v. Neo@Ogilvy*, 2012 WL 1003513 (S.D.N.Y. Mar. 21, 2012), the court noted that the plaintiff's allegations were "based on her professional training and experience" as a member of her employer's Information Technology Planning Team for a major account. Likewise, in *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009), the court stated that, "[a]s to the subjective component, the law is not meant to protect those whose complaints are not undertaken in subjective good faith." The court agreed with the district court that a "plaintiff's particular educational background and sophistication [is] relevant to the subjective component. Subjective reasonableness requires that the employee 'actually believed the conduct complained of constituted a violation of pertinent law.'" The court found that there was no evidence that the Complainant did not make his complaints in subjective good faith.[4]

(2) Objective Belief and the "Definitively and Specifically" Standard

In addition to showing that she subjectively believed that the complained-of conduct constituted a violation of one of the categories enumerated in SOX, a complainant must also show that her belief was objectively reasonable. Objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the whistleblower. A key decision by the ARB in 2011 adopted a very broad view of "protected activity" under Section 806(a) – one that a number of federal appellate and district courts have embraced. Many federal courts, however, have yet to adopt the ARB's broader vision of "protected activity," and continue to require that plaintiffs show that their purported whistleblowing activity "definitively and specifically" related to one of the

[4] A plaintiff's relevant experience and knowledge are also relevant to the objective component. *See Wiest v. Lynch*, 710 F.3d 121, 145 (3d Cir. 2013) ("When an employee is a licensed CPA, and thus able to distinguish between violations of accounting rules and violations of SEC rules…, a failure to do so tends to show his asserted belief that a violation of the latter has occurred to be less than objectively reasonable."); s*ee also Allen v. Department of Labor* 514 F.3d 468 (5th Cir. 2008) (complainant's belief was unreasonable due to accountant's background and work experience and because potentially non-compliant financial statements were publicly available for verification); *Smith v. Chi. Bridge & Iron Co., N.V.*, No. 4:16-CV-1089, 2017 U.S. Dist. LEXIS 92860, at *12 (S.D. Tex. June 16, 2017) (plaintiff's belief was objectively reasonable in part because he was a licensed CPA and had familiarity with SOX and the "potential legal impact of billing errors"); *Lamb v. Rockwell Automation, Inc.*, 249 F. Supp. 3d 904 (E.D. Wis. 2017) (plaintiff's belief was unreasonable in part because of her training and experience) *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d 129, 138 (D.P.R. 2014) (plaintiff's belief was reasonable in part because of his position as Principal Accounting Officer); *Perez v. Progenic's Pharmaceuticals, Inc*., 965 F. Supp. 2d. (S.D.N.Y. 2013) (plaintiff chemist's belief that fraudulent activity was occurring was objectively reasonable in part because of his advanced professional degrees and significant professional experience, and his relative lack of experience with securities law and the use of "puffery" in corporate press releases); *Harkness v. C–Bass Diamond, LLC,* 2010 WL 997101 (D. Md. Mar. 16, 2010) (granting summary judgment where plaintiff was a lawyer with twenty years of experience, but failed to conduct any "legal research to ascertain the applicability of various laws"); *Welch v. Cardinal Bankshares Corp*., ARB 05-064, 2003-SOX-15 (ARB May 31, 2007) ("an experienced CPA/CFO like Welch could not have reasonably believed that the ... report presented potential investors with a misleading picture of Cardinal's financial condition"), *aff'd, Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008).

enumerated categories of SOX. Further, some courts have held that, in some cases, reported conduct can refer to an enumerated category of SOX, but may still be objectively unreasonable.

In *Sylvester v. Parexel Int'l LLC*, ARB 07-123 (ARB May 25, 2011), the ARB reversed the ALJ's dismissal of a complaint on grounds that complainants failed to allege that they had engaged in conduct protected under SOX. The two complainants were former employees of Parexel, a company that tests drugs for drug manufacturers. Parexel's contractual relationships with its clients played a significant role in determining its annual revenues, the importance of which the company communicated to its shareholders. Sylvester's job entailed ensuring that the company's research data complied with all applicable laws promulgated by the Food and Drug Administration. Neuschafer was a clinical research nurse.

Neuschafer first reported concerns to co-workers and supervisors in March 2006 when she observed that testing time data was missing from charts of drug study participants. In response, a Parexel employee simply inserted the then-current time into each chart. Neuschafer then approached the supervisor of the study, raising concerns that the missing data constituted reporting of false clinical data. After the supervisor dismissed the falsifications as "no big deal," Sylvester, who had witnessed the co-worker insert the false data, subsequently reported it to other supervisors. Sylvester claimed that the employee's insertion of false times violated the FDA's Good Clinical Practice ("GCP") standards. Sylvester submitted another similar complaint in May 2006.

Subsequent to their complaints, Sylvester and Neushafer claimed they were subjected to various forms of retaliation, such as verbal abuse, threatening letters, vandalism, and unwarranted warning letters issued by Parexel. Sylvester was discharged in June of 2006 because she was "not a team player." Neushafer was discharged in August of 2006 because her "personality did not fit in." The complainants filed complaints with OSHA, stating that Parexel terminated their employment in retaliation for complaining to Parexel managers about fraudulent acts. Parexel argued that complainants' allegations were not specifically related to a violation of any of the provisions of SOX, did not involve shareholder fraud or conduct otherwise adverse to shareholder interests, and did not constitute reasonable concerns about SOX violations. The ALJ agreed and dismissed their complaints.

The ARB reversed, holding that under the plain language of SOX, where the activity involves providing information to one's employer, "the complainant need only show that he or she 'reasonably believes' that the conduct complained of constitutes a violation of the laws listed in Section 1514." Further, the Board concluded that a whistleblower need not wait until the illegal conduct occurs to make a complaint, so long as the employee "*reasonably believes that the violation is likely to happen*." Finally, the ARB clarified that a complaint *does not have to allege shareholder fraud* in order to be protected by SOX. The ARB stated that the legislative history of the law indicates that it was enacted not solely to address securities fraud, but "corporate fraud generally." In issuing this decision, the ARB overruled prior authority that had required a complainant to establish that the activity or conduct for which protection is claimed "definitively and specifically" related to one or more of the laws listed under Section 806(a).[5]

[5] *See Jones v. First Horizon Nat'l. Corp*., ARB No. 09-005 (ARB Sept. 30, 2010) (letter appended to an EEOC complaint that included accusations of fraudulent conduct was not the "precise statement"

The ARB stated this standard was inconsistent with the statutory language of Section 806(a) and had been applied too strictly in prior decisions.

Similarly, in *Inman v. Fannie Mae*, ARB No. 08-060, ALJ No. 2007-SOX-47 (ARB June 28, 2011), the ARB held that "an allegation of fraud is not a necessary component of protected activity under Section 806." The complainant was a Senior Manager responsible for establishing and maintaining "appropriate internal controls with Controllers." He alleged that Fannie Mae fired him because he "discovered several irregularities in financial records that he attempted to correct or report to his superiors." Specifically, he reported that certain amortization figures were based on flawed and manipulated data, resulting in a $52.4 million expense overstatement and a $2.6 billion anomalous income result. The ALJ held that the complainant did not engage in SOX protected activity because he did not "definitely and specifically" complain that "the events he was reporting constituted evidence of fraud." The ARB reversed, finding that the "definitively and specifically" standard had been rejected in *Sylvester*. Moreover, the Board held that "an allegation of fraud is not a necessary component of protected activity under Section 806," because a reasonable belief about a violation of "any rule or regulation of the Securities and Exchange Commission" could encompass a situation in which the violation, if committed, is completely devoid of any type of fraud. *See also Vannoy v. Celanese Corp*., ARB Case No. 09-118 (Sept. 28, 2011) (an employee does not have to complain about shareholder fraud to state a claim under SOX. An employee who reports tax fraud to the IRS under the IRS Whistleblower Program would be covered as an employee who has provided information to a "Federal regulatory or law enforcement agency").

Some federal courts have rejected the "definitively and specifically" standard and have adopted the reasoning of *Sylvester* and its progeny. In *Nielsen v. AECOM Tech. Corp.*, 2014 WL 3882488 (2d Cir. Aug. 8, 2014), the Second Circuit affirmed the dismissal of a SOX whistleblower retaliation claim brought by a former AECOM Technology Corp. employee who alleged that the company terminated his employment after he reported a subordinate for approving fire-safety designs without actually reviewing the design, holding that he did not engage in protected activity because he lacked a "reasonable belief" that the alleged conduct of which he complained violated one of the enumerated federal provisions in Section 806 of SOX. The Second Circuit held that the ARB's revised interpretation of Section 806, which focuses on the "reasonable belief" of the whistleblower, more closely aligns with the text of the statute and is persuasive. In so holding, the court abrogated an earlier, non-precedential order in *Vodopia v. Koninklijke Philips Elecs., N.V.*, 398 Fed. App'x 659 (2d Cir. 2010), in which the court had adopted the "definitively and specifically" standard. In *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013), the Third Circuit reversed in a 2-1 decision the district court's holding, giving *Chevron* deference to the ARB's decision interpretation of "protected activity" in *Sylvester v. Parexel Int'l LLC*. The court concluded that the plaintiff's internal complaint to his former employer concerning the treatment of certain corporate expenses was protected activity under Section 806(a) because his internal complaints reflected a reasonable belief that the defendant's conduct violated Section 806. The court adopted the ARB's position that would-be whistleblowers

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necessary to engage in protected conduct under SOX); *Platone v. FLYi, Inc*., ARB 04-154, 2003-SOX-27 (ARB Sept. 29, 2006) (holding that the complainant did not engage in protected activity because she did not provide her employer with specific information regarding conduct she believed constituted fraud).

claiming retaliation need not identify fraud with specificity, but may engage in protected activity by making more general complaints.

Likewise, in *Leshinsky v. Telvent GIT, S.A.,* 942 F. Supp. 2d 432 (S.D.N.Y. 2013), the SDNY applied the standard set forth in *Sylvester* and rejected the defendant's motion for summary judgment. The defendant argued that because the plaintiff told only a single supervisor that a proposed bid overhead rate was "unethical, certainly immoral and may even be illegal," his complaint failed to "definitely and specifically" relate to one of the enumerated elements under fraud set forth under Section 806. The court, however, noted that the ARB had liberalized this standard to require only that a complainant show that he "had both a subjective belief and an objectively reasonable belief that the conduct he complained of constituted a violation of relevant law." Adopting the ARB's standard, the court concluded that the plaintiff's concern about the potential illegality of the overhead rate was sufficient for a jury reasonably to conclude that the company's conduct would violate relevant anti-fraud provisions. *See also Taylor v. Fannie Mae*, 2014 WL 4219553, at *3 (D.D.C. Aug. 25, 2014) (holding that *Sylvester* is entitled to *Chevron* deference); *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d. 129, 136 (D.P.R. 2014) (same).

The Sixth Circuit also rejected the "definitively and specifically" standard in *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797 (6th Cir. 2015), ruling that an employee who reported allegedly fraudulent conduct engages in protected activity under SOX because he had a reasonable belief that the activity he reported was prohibited under Section 806, even though his belief was mistaken. In doing so, the Sixth Circuit overruled its prior decision in *Riddle v. First Tennessee Bank, National Association*, 497 Fed. App'x 588 (6th Cir. 2012), and rejected the "definitely and specifically" standard. Adopting the ARB's decision interpretation of "protected activity" in *Sylvester v. Parexel Int'l LLC*, the Court held that "an employee need not establish the reasonableness of his or her belief as to each element of the violation." Instead, the Court explained, "the reasonableness of the employee's belief will depend on the totality of the circumstances known (or reasonably albeit mistakenly perceived) by the employee at the time of the complaint, analyzed in light of the employee's training and experience.

The Tenth Circuit similarly adopted the *Sylvester* standard. In *Lockheed Martin v. ARB*, No. 11-9254 (10th Cir. June 4, 2013), the complainant, who worked as a Director of Communications at one of Lockheed's facilities, reported to Human Resources her concerns that a Vice President was misusing the company's Pen Pal Program, which was created to facilitate communications between Lockheed employees and U.S. soldiers serving overseas. The complainant alleged the VP had developed sexual relationships with several soldiers participating in the Pen Pal program, purchased a laptop computer for one soldier, sent inappropriate e-mails and items via mail to soldiers in Iraq, and traveled to welcome-home ceremonies to visit soldiers on the pretext of business. The complainant contended that the VP was expending company funds for these activities and passing them on to the customer, presumably the federal government. The Tenth Circuit affirmed the ARB's ruling in *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-49 (ARB Feb. 28, 2011), that "an employee complaint need not specifically relate to shareholder fraud to be actionable under [SOX]." In so holding, the court endorsed both the ALJ and the ARB's conclusion that the complainant engaged in activity protected by Section 806 of SOX because she "reasonably

believe[d]" that the VP committed wire or mail fraud by mailing inappropriate items and improperly billing the U.S. government, by mail or wire, for her purchases with company funds. The Ninth Circuit has declined to adopt *Sylvester*. In *Nance v. Time Warner Cable, Inc.*, 433 Fed. App'x 502 (9th Cir. 2011), the court held that an "employee's communications must *definitively and specifically* relate to [one] of the listed categories of fraud or securities violations [in] 18 U.S.C. § 1514A(a)(1)." In *Nance*, the plaintiff communicated with his superiors about possible errors or inconsistencies in Comcast's subscriber count. The Ninth Circuit concluded that these communications did not constitute protected activity because "[n]one of Nance's statements linked the inconsistency to fraud or to a securities violation . . . . Nance was not required to use the word 'fraud' or to cite the code section he believed was violated, but his statements must still be related to fraudulent or otherwise illegal conduct in order to be protected."

Despite the broad view of protected activity that many courts have taken, not all complaints that might relate to an enumerated category of SOX are objectively reasonable. For example, in the Tenth Circuit declined to find a plaintiff was engaged in a protected activity when he reported his belief that his employer committed mail and wire fraud in neglecting to inform newly acquired employees of a bonus plan in their initial offer letters. *Dietz v. Cypress Semiconductor Corp*., 711 F. App'x 478, 484 (10th Cir. 2017). Noting that the mail and wire fraud statutes required a showing of the intent to deprive the victim of his property, the court found that the plaintiff did not reasonably believe the defendant intended to deprive the employees of their property, especially since the defendant later explained the bonus scheme.

Similarly, in *Feldman v. Law Enforcement Assocs. Corp.*, 955 F. Supp. 2d 528 (E.D.N.C. 2013), the district court held that the plaintiff failed to demonstrate an objectively reasonable belief where he had very little information on which to base his report of suspected insider trading. In *Harp v. Charter Comm., Inc.*, 558 F.3d 722 (7th Cir. 2009), the Court of Appeals held that the complained-of statements by the plaintiff's supervisor were ambiguous and failed to support an objectively reasonable belief that a fraudulent payment had been ordered. The district court in *Harkness v. C-Bass Diamond, LLC*, 2010 WL 997101 (D. Md. Mar. 16, 2010) focused on the plaintiff's expertise in evaluating the reasonableness of her belief, holding that the defendant's general counsel's belief that SEC regulations had been violated was not reasonable "[i]n light of [plaintiff's] professional experience and the legal resources available to her."

Recently, in *Grimm v. Best Buy Co*., Case No. 16-cv-1258, 2017 U.S. Dist. LEXIS 83394 (D. Minn. April 19, 2017), the court adopted a hard line approach to the plaintiff's claim that his reports of illegal wiretapping and fraud constituted a protected activity. Referencing the federal wire fraud statute, the court concluded that it was objectively unreasonable to believe that wiretapping constituted wire fraud without more. Moreover, the plaintiff's belief that his employer was engaged in fraud because it "employ[ed] looters to lower stock prices" was objectively unreasonable as the plaintiff relied on a rumor from his son as evidence.

In *Westawski v. Merck & Co.*, 739 F. App'x 150, 151 (3d Cir. 2018), the court found that the plaintiff failed to show that she objectively believed the defendant was violating one of Section 806's enumerated categories of fraud. Here, the plaintiff asserted that the defendant was paying a research firm in a way that amounted to some form of bribe or inducement. She claimed

she had a belief there was a fraudulent scheme taking place. The court found that because she had no reference to a theory of fraud, she fell short of showing her complaints relate to any part of Section 806, so her activity was unprotected.

ii. Content of Report

(1) Fraud on Shareholders versus Violation of Enumerated Category

To constitute protected activity, the subject matter of a SOX complaint must implicate a violation of "section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. §1514A(a). Courts and the DOL have wrestled with whether a report must relate to fraud against shareholders – the type of fraud that arguably prompted the enactment of SOX – or whether it is sufficient that the report implicate one of the enumerated categories.

In *Zinn v. American Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2012-SOX-025 (ARB March 28, 2012), the ARB reversed the ALJ's determination that "an allegation of 'shareholder fraud' is an essential element of a cause of action under SOX." The complainant, Angelina Zinn, was a former corporate attorney for American Commercial Lines, Inc. ("ACL"). She filed a complaint alleging that the defendant violated SOX when it discharged her after she contacted two supervisors to express her concerns that ACL had not properly vetted or audited a vendor. Because ACL's annual 10-K form reported that ACL was safety compliant, Zinn believed that the company misrepresented information to shareholders in light of her belief that ACL was using unlicensed personnel.

In *Sylvester v. Parexel Int'l LLC*, ARB 07-123 (ARB May 25, 2011), the ARB specifically held, "When an entity engages in … any of the six enumerated categories of violations set forth in Section 806, it does not necessarily engage in immediate shareholder fraud. Instead, the violation may be one which, standing alone, is prohibited by law, and the violation may be merely one step in a process leading to shareholder fraud . . . In sum, we conclude that an allegation of shareholder fraud is not a necessary component of protected activity under SOX Section 806." *See also Johnson v. The Wellpoint Companies, Inc.,* ARB No. 16-020; ALJ No. 2010-SOX-038 (ARB August 31, 2017) (referring to *Sylvester's* holding that "shareholder fraud is not a necessary component of protected activity under Section 806").

Subsequent ARB decisions cited and elaborated on the standard set forth in *Sylvester*. In *Prioleau v. Sikorsky Aircraft Corp*., ARB No. 10-060, ALJ No. 2010-SOX-3 (ARB Nov. 9, 2011), the ARB, relying on *Sylvester*, held that "whether activity is protected concerns whether a complainant has a reasonable belief that there is a violation [of one of the laws enumerated in SOX] when he makes the communication, *not whether he communicates that belief to the respondent or whether he puts the respondent on notice of protected activity*." Moreover, the Board stated that protected activity *does not have to relate to shareholder fraud*, if complainant "reasonably believes" the conduct complained of constitutes a violation of one of the laws listed in Section 806(a).

A number of federal courts have agreed that the allegations need not relate to fraud on shareholders, a view that aligns with the text of the statute. *See, e.g.*, *Gladitsch v. Neo@Ogilvy*, 2012 WL 1003513 (S.D.N.Y. Mar. 21, 2012) (noting that "courts in this district have found that violations of the statutes enumerated in Section 1514A are not limited by the phrase 'relating to fraud against shareholders'"); *Reyna v. Conagra Foods, Inc.*, 506 F. Supp. 2d 1363 (M.D. Ga. June 11, 2007) ("[t]he statute protects an employee against retaliation based upon that employee's reporting of mail fraud regardless of whether that fraud involves a shareholder of the company").

Some courts have reached the opposite conclusion, requiring that plaintiffs show specific allegations of fraud against shareholders. *See Brown v. Colonial Sav. F.A.*, No. 4:16-CV-884-A, 2017 U.S. Dist. LEXIS 40165, at *8-9 (N.D. Tex. Mar. 21, 2017) (plaintiff's claims were unrelated to harming the shareholders and thus not protected under SOX); *Safarian v. American DG Energy Inc.*, 2014 WL 1744989 (D.N.J. Apr. 29, 2014) (reports of overbilling, improper construction, and failure to obtain proper permits did not sufficiently relate to fraud against shareholders; declining to extend SOX's protection to "any fraudulent actions that might lead to misstatements in the accounting records or tax submissions"), *aff'd*, 622 F. App'x 149, 152 n.4 (3d Cir. 2015); *Gibney v. Evolution Mktg. Research, LLC*, 25 F. Supp. 3d 741, 748 (E.D. Pa. 2014) ("the specific shareholder fraud contemplated by SOX is that in which a public company . . . makes material misrepresentations about its financial picture in order to deceive its shareholders"); *Gauthier v. Shaw Group, Inc.*, 2012 WL 6043012 (W.D.N.C. Dec. 4, 2012) (noting split in authority but applying Fourth Circuit precedent requiring that "an employee's disclosures . . . be related to illegal activity that, at its core, involves shareholder fraud"); *Livingston v. Wyeth, Inc.*, 2006 U.S. Dist. LEXIS 52978 (M.D.N.C. July 28, 2006), *aff'd*, 520 F.3d 344 (4th Cir. 2008) (noting that the Fourth and Fifth Circuits, and a number of ALJs, have found that "[t]o be protected under Sarbanes-Oxley, an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud").

(2) Reporting a Foreign Corrupt Practices Act Violation

Whether or not the reporting of a violation of the Foreign Corrupt Practices Act (FCPA) is protected by SOX appears to be an open question. In one case, a court found that the reporting of an FCPA violation is not protected by SOX, because "the FCPA does not 'protect' or 'require' internal reporting of alleged bribery." *Prout v. Vladeck*, 316 F. Supp. 3d 784 (S.D.N.Y. 2018) (citing *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 U.S. Dist. LEXIS 89746, at *6 (S.D. Tex. June 28, 2012)). In another case, a court found that reporting FCPA violations could be protected by SOX in limited circumstances. *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325 (S.D.N.Y. 2013). Here, the court found that reporting FCPA violations "could only conceivably fall within 'fraud against shareholders,'" and, further, that such reporting could fall within that category only if the whistleblower alleged an "intent to defraud shareholders." *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 330 (S.D.N.Y. 2013). Recently, in *Wadler v. Bio-Rad Labs., Inc.*, No. 15-cv-02356-JCS, 2017 U.S. Dist. LEXIS 71532 (N.D. Cal. May 10, 2017), the court found broadly that reporting FCPA violations is protected activity under SOX. The court reached this conclusion because defendants had conceded "there is a rule or regulation of the SEC regarding the books and records provisions of the FCPA, and so reporting a books and

records violation could support a Sarbanes-Oxley claim." The court went on to note that the FCPA is an amendment of the Securities and Exchange Act of 1934 and is codified within it.

(3) Specificity of Report

While a complainant need not have used any specific words to trigger the protections of SOX 806, the DOL and courts have required that the alleged protected activity must be reasonably specific as to the conduct that implicates one of the enumerated categories of SOX 806. For example, in *Pik v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-0006 (ARB May 31, 2012), the ALJ held that the complainant's original OSHA complaint alleging "violations of Health & Safety rules at Credit Suisse, New York and Zurich" but containing no allegations of fraud failed to establish that the complainant had engaged in SOX-protected activity. The ALJ dismissed the complainant's conclusory contention that he was retaliated against for "reporting fraud" because he failed to sufficiently indicate what information he may have provided regarding conduct that he reasonably believed constituted a SOX violation or that might have constituted SOX protected activity. Similarly, the fact that the plaintiff was *pro se* did not excuse his failure to provide no more than a "blanket assertion" that he engaged in SOX protected activity.

Federal courts have generally held, contrary to the recent ARB cases, that a complaint must involve specific allegations. *See Verfuerth v. Orion Energy Sys.,* No. 16-3502, 2018 U.S. App. LEXIS 747, at *9 (7th Cir. Jan 11, 2018) (plaintiff's complaints of conflicts of interest and violations of internal company protocol were not "fraud" within the meaning of the statute); *Villanueva v. United States DOL*, 743 F.3d 103, 105 (5th Cir. 2014) ("employee seeking the statute's protection [must demonstrate] that he provided information regarding conduct that he or she reasonably believed violated one of the six enumerated provisions of U.S. law"); *Reamer v. Department of Labor*, 2012 WL 5503369 (6th Cir. Nov. 14, 2012) (email complaints to company officials did not constitute protected activity because they neither "stated nor suggested that [the employer] had committed fraud or violated securities laws"); *Nance, supra*; *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) ("employee must show that his communications to the employer specifically related to one of the laws listed in § 1514A"); *Van Asdale v. International Game Tech.*, 577 F.3d 989 (9th Cir. 2009) (employee's communications must "definitely and specifically" relate to one of the categories of fraud or securities violations listed under section 1514A(a)(1)); *Allen v. Department of Labor*, 514 F.3d 468, 476 (5th Cir. 2008) ("employee's complaint must definitively and specifically relate to one of the six enumerated categories found in § 1514A"); *Getman v. Department of Labor*, 2008 WL 400232 (5th Cir. Feb. 13, 2008) (no protected activity because plaintiff had never actually conveyed her belief that upgrading rating would violate a securities law); *Diaz v. Transatlantic Reinsurance Co*., 2016 U.S. Dist. LEXIS 83215 at *14-15 (S.D.N.Y. June 21, 2016) (complaints about a company's internal conflict of interest policy and the employment of the Executive Vice President's husband's relatives are unprotected, since "a plain reading of the relevant . . . SOX provisions clearly [shows] that the conduct reported by a whistleblower must deal with a violation of not any federal law, but of federal securities law or the enumerated crimes of mail and wire fraud."); *Andaya v. Atlas Air, Inc*., 2012 U.S. Dist. LEXIS 78654, at *12-16 (S.D.N.Y. April 30, 2012) (general complaints about mismanagement or violations of internal company policies are not sufficiently specific to trigger SOX protections); *Miller v. Stifel, Nicolaus & Co., Inc*., 812 F. Supp. 2d 975, 988 (D.

Minn. 2011) ("complaints about alleged violations of internal company polices are not protected activities under SOX.").

(4) Existing Violation versus Imminent Violation

Courts have held that a report of imminent misconduct can ground a SOX 806 retaliation claim, even if the anticipated violation ultimately does not occur. For example, in *Zulfer v. Playboy Enterprises*, No. 12-CV-08263 (C.D. Cal. Apr. 24, 2013), the United States District Court for the Central District of California ruled that the fact that the illegal conduct the plaintiff reported was contemplated but never carried out did not prohibit the plaintiff from pursuing a SOX whistleblower claim. The court, which credited the plaintiff's allegation that she reasonably believed her disclosures regarding certain executives' alleged attempts to circumvent internal procedures concerning discretionary bonuses were related to a violation of SEC rules and regulations, rejected the defendant's argument that the plaintiff could not pursue a retaliation claim for her termination because the bonuses at issue never actually occurred.

In *Barrett v. e-Smart Technologies, Inc.*, ARB Nos. 11-088, 12-013, ALJ No. 2010-SOX-31 (ARB Apr. 25, 2013), the ALJ held that the complainant engaged in protected activity because he reported concerns about misstatements and omissions in a draft SEC Form 10-K that he reasonably believed would mislead investors. The respondent claimed on appeal to the ARB that the complaints about the 10-K were not protected because they raised concerns about future SOX violations. The ARB rejected this argument, holding that "reporting an actual violation is not required. A complainant can engage in protected activity when he reports a belief of a violation that is about to occur or is in the stages of occurring." *See also Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013) (an employee's communications about a potential violation will constitute protected activity as long as the employee reasonably believes the violation is likely to happen); *Wiest v. Lynch*, 710 F.3d 121, 133 (3d Cir. Pa. 2013) (SOX protects an employee who reports a violation that he reasonably believes is likely to happen); *Murray v. Ubs Secs*, 2017 U.S. Dist. LEXIS 62978 (S.D.N.Y. Mar. 31, 2017) (the legal violation in question does not need to be completed in order for the plaintiff's belief in misconduct to be considered reasonable); *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d. 129, 136 (D.P.R. 2014) (it would be counterproductive to only allow SOX protection for whistleblowers who report existing violations); *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432 (S.D.N.Y. 2013) (imminent violations are protected under Section 806 of SOX).

(5) Reporting Information Already Known to Public or Management

There is authority under other whistleblower statutes for the proposition that a report of information that has already been made public or is already known to the company does not constitute protected activity. *Francisco v. Office of Pers. Mgmt*., 295 F.3d 1310 (Fed. Cir. 2002) (decided under the Whistleblower Protection Act); *Meuwissen v. Department of the Interior*, 234 F.3d 9 (Fed. Cir. 2000) (same). Courts and the Department of Labor have reached the conflicting conclusions under SOX 806.

In *Allen v. Department of Labor*, 514 F.3d 468 (5th Cir. 2008), the ALJ had rejected a respondent's argument that, to constitute protected activity, a complainant must provide

information that was not already known by the company. However, the ALJ concluded that, based on the facts at hand, the complainant could not have a reasonable belief that respondent was engaged in fraud, in part because respondent already knew about the problem before complainant reported it and was making it a priority to remedy it. The Fifth Circuit affirmed the ARB's decision upholding the ALJ.

However, in *Hillenbrand v. Coldwater Creek, Inc*., 2008- SOX-00010 (ALJ April 23 2010), the ALJ stated that in order to have protection as a whistleblower, "complainant must in some sense 'blow the whistle,' and raise an alarm, calling the employer's attention to conditions, errors, or manipulations that, so far as the employee knew at the time of the report, were as yet unknown by management or by the corporate community at large." Here, the court underscored that the complainants report was unprotected because she *knew* the concern had already been identified. The ALJ warned, "To hold otherwise would be to risk opening up the floodgates for meritless whistleblower claims."

(6) "Duty Speech"

Courts and the Department of Labor have wrestled with the question of the impact of a complainant's job duties on whether the employee engaged in protected activity under SOX 806. Under other whistleblower statutes, where an employee's job consists of investigating and reporting wrongdoing, courts have held that the performance of such job duties does not constitute protected activity. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Sasse v. Department of Labor*, 409 F.3d 773 (6th Cir. 2005) (U.S. attorney who alleged DOJ retaliated against him while investigating environmental crimes failed to show agency violated whistleblower provisions of environmental laws because performance of his job duties was not protected whistleblowing activity); *Langer v. Department of the Treasury*, 265 F.3d 1259, 1267 (Fed. Cir. 2001) (IRS employee, whose duty it was to review actions taken by the IRS's Criminal Division, did not engage in activity protected by the WPA by informing DOJ officials that their grand jury investigations disproportionately targeted African-Americans).

In a number of decisions over the past decade, the DOL and courts have concluded that SOX does not place a similar "duty speech" restriction on protected activity. The Department of Labor first addressed the "stepping out of the role" argument under SOX in *Jordan v. Sprint Nextel Corp.,* ALJ No. 2006-SOX-041 (ALJ March 14, 2006). There, the Complainant was an in-house lawyer whose main duties were to ensure compliance with securities laws. The ALJ found that it was not counter to the purpose of SOX to permit a retaliation claim to proceed under such circumstances, stating:

> ". . . Congress could not have intended that attorneys employed by publicly traded corporations be required to report suspected wrongdoing, but that then they be denied the whistleblower protections of [SOX] because the wrongdoing they reported was discovered while performing legal work for their employer. Such an interpretation of the statute would mean that no attorney who complies with his or her statutory and regulatory obligation under the Act, and who is then discharged for having done so, will ever

> be able to prevail in a whistleblower proceeding initiated pursuant to [SOX]."

In *Robinson v. Morgan Stanley*, ARB No. 07-070, ALJ No. 2005-SOX-044, 2010 WL 348303, at 8 (ARB March 26, 2007), the ARB found the same. Here, complainant was a senior internal auditor responsible for identifying significant financial and securities issues related to SOX. Morgan Stanley terminated Complainant shortly after she reported potentially fraudulent conduct with respect to a bankruptcy reporting problem. The ALJ found that this activity was unprotected as it was within the scope of her job duties. On appeal, however, the ARB rejected this protected activity analysis, finding that the ALJ's application of non-SOX precedent was improper because SOX "does not indicate that an employee's report or complaint about a potential violation must involve actions outside the complainant's assigned duties."

Focusing on the purpose of SOX – encouraging the reporting of corporate fraud – courts and the DOL have continued to find that the nature of the reporting employee's job duties is irrelevant. *See, e.g., Wiest v. Lynch,* 710 F. 3d 121 (3d Cir. 2013) (an accountant who was performing his job duties when he raised questions about treatment of business expenses and put company on notice of possible violation of a "provision of Federal law relating to fraud against the Shareholders" had a viable SOX retaliation claim); *Yang v. Navigators Grp. Inc.,* 18 F. Supp. 3d 519, 530 (S.D.N.Y. 2014) (holding that the fact that the plaintiff was hired to report risk issues does not mean he cannot satisfy the SOX reporting requirement), *vacated on other grounds,* 674 F. App'x 13 (2d Cir. 2016); *Barker v. UBS AG*, 888 F. Supp. 2d 291 (D. Conn. 2012) (concluding that SOX "does not indicate that an employee's report or complaint about a protected violation must involve actions outside the complainant's assigned duties"); *See also Stroupe v. Branch Banking & Trust Co*., ALJ No. 2008-SOX-00047 (ALJ April 1, 2010) (bank investigator's reports of fraud were protected, even though doing so was an essential part of her job duties); *Deremer v. Gulf Coast*, ALJ No. 2006-SOX-2 (ALJ June 29, 2007) (restricting protected activity to exclude employee's job duties would be contrary to Congressional intent); *Leznick v. Nektar Therapeutics*, ALJ No. 2006-SOX-00093 (ALJ Nov. 16, 2007) (citing to *Deremer* and Ninth Circuit precedent for the principle that an employee whose own job duties encompass reporting illegal conduct may obtain whistleblower relief under SOX).

However, in 2011, a Tennessee District Court decision altered the landscape by declining to find protected activity where plaintiff's reports were made entirely in his role as a Corporate Security Investigator. In *Riddle v. First Tenn. Bank, Nat'l Ass'n,* No. 3:10-cv-00578, 2011 U.S. Dist. LEXIS 147006 (M.D. Tenn. Dec. 20, 2011), the court found that, although the plaintiff reported the employee's misconduct to his supervisors, he did not "step outside his role" as an investigator and take additional action, which was necessary to establish protected activity. This case is somewhat anomalous and notably relies on other anti-retaliation statutes rather than SOX to support its holding and the court did not reference any of the above case law.

iii. To Whom (and About Whom) an Employee Must Report

(1) <u>"Supervisory Authority" or "Authority to Investigate, Discover, or Terminate Misconduct"</u>

SOX provides protection to employees "who provide information [to], cause information to be provided [to], or otherwise assist in an investigation [by] . . . a person with *supervisory authority* over the employee, or such *other person working for the employer who has the authority to investigate, discover or terminate misconduct*." 18 U.S.C. § 1514A(a)(1)(C).

The term "supervisory authority" has been broadly construed. In *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004), the complainant, former chairman of the local bank advisory board, allegedly informed two local executive officers of the respondent bank that a lending company they had formed possibly violated banking laws. The respondent moved for summary decision, arguing that the complainant testified he had "actual authority" over the executives and therefore the complainant did not "provide information" to "a person with supervisory authority over the employees." Despite this testimony, the ALJ found a genuine issue of material fact existed as to whether the CEO had authority over the complainant, or *vice versa*.

The phrase "such other person working for the employer who has authority to investigate, discover, or terminate misconduct" also has been broadly construed. In *Smith v. Hewlett-Packard,* ARB No. 06-064 (ARB Apr. 29, 2008), the ARB concluded that a complaint to an outside agency was protected if the complaint addressed violations of any of the fraud provisions enumerated in Section 806. *See also Jayaraj v. Pro-Pharmaceuticals, Inc*., 2003-SOX-32 (ALJ Feb. 11, 2005) (comments to the company's COO, complainant's peer, were protected because the COO had the "authority to investigate, discover and terminate misconduct related to securities law"); *Deremer v. Gulfmark Offshore, Inc.*, 2006-SOX-2 (ALJ June 29, 2007) (disclosures to external audit firm and investigating law firm were protected since holding otherwise "would produce a result inconsistent with the purpose of the Act").

In contrast, in *Tides v. Boeing Co.*, 644 F. 3d 809 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 518 (2011), the Ninth Circuit held that leaking confidential documents to the outside media is not protected activity. The plaintiffs, members of the company's SOX Audit group, claimed to have found deficiencies in the company's auditing practices. After management allegedly did not respond to their concerns, the plaintiffs reported them to the *Seattle Post-Intelligencer*, which then published an article on the topic. Plaintiffs argued that going to the media "is a way of communicating a message" and thus constitutes protected activity under the statute. The Ninth Circuit rejected this argument, finding that it would lead to a "boundless interpretation of the statute." *See also Erhart v. Bofi Holding, Inc*., No. 15-cv-02287-BAS-NLS, 2017 U.S. Dist. LEXIS 20959, at *43 (S.D. Cal. Feb. 14, 2017) (plaintiff's disclosures to the press are not covered under SOX).

(2) Reporting Illegal Conduct of a Covered Third Party

The subject of a complainant's report of illegal conduct need not be his or her employer. Rather, if a complainant reports conduct of a third party that implicates one of the enumerated categories under SOX, an individual may still receive protection from retaliation.

For example, in *Funke v. Federal Express Corp*., ARB No. 09-004, ALJ No. 2007-SOX-43 (ARB July 8, 2011), the ARB held that complaints concerning third party conduct are

protected by SOX. Specifically, the ARB concluded that an employee engaged in protected activity when she reported suspicions that a third-party customer of her employer was using FedEx as a conduit for mail fraud, although there were no allegations that FedEx was complicit in the fraud. The ARB reasoned that Section 1514A protects an employee who provides information "regarding *any* conduct which the employee reasonably believes constitutes a violation" of one of six enumerated laws or regulations contained therein. In addition, the ARB held that the employee was protected by SOX when she made her report to local law enforcement.

Additionally, in *Spinner v. David Landau & Assoc., LLC*, No. 10-111, ALJ No. 2010-SOX-029 (ALJ May 31, 2012), accountant plaintiff was hired by David Landau & Associates (DLA) to provide auditing and consulting services to S.L. Green Realty (S.L. Green). DLA was not a publicly traded corporation, but S.L. Green was. Spinner reported internal control and reconciliation problems at S.L. Green, and was subsequently fired by DLA. The focus of the opinion is the finding that SOX protects whistleblowing by employees of contractors and subcontractors to the public company. It also serves as an example of an instance in which an employee was protected by SOX for making a complaint of a third party's illegal conduct, rather than that of his employer.

A number of federal courts have reached a similar conclusion regarding the scope of SOX. In *Sharkey v. J.P. Morgan Chase & Co.*, 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011), the plaintiff reported to her employer her belief that one of her clients had engaged in illegal activities including mail fraud, bank fraud, and money laundering. The court held that the plaintiff had properly pled that she engaged in protected activity under the SOX whistleblower provision by alleging that she reported her concerns about the client's illegal activity. The court reached a similar conclusion again in *Gladitsch v. Neo@Ogilvy*, 2012 WL 1003513 (S.D.N.Y. Mar. 21, 2012), citing *Sharkey* for the proposition that "SOX protects a plaintiff's complaint about misconduct committed by a third-party as well as that by the plaintiff's employer."

In *Feldman v. Law Enforcement Associates Corp.*, 779 F. Supp. 2d 472, 491 (E.D.N.C. March 10, 2011), the court agreed with *Sharkey*'s conclusion that "[SOX] by its terms does not require that the fraudulent conduct or violation of federal securities law be committed directly by the employer that takes the retaliatory action."

b. Participation

In addition to protecting employees who report possible fraud or assist in investigations, SOX contains a "participation clause" that explicitly protects employees who "file, cause to be filed, testify, participate in, or otherwise assist in" proceedings alleging violations of securities laws, SEC rules or regulations, or other federal laws relating to fraud against shareholders. Direct contact with the SEC seems to be likely, but not always, protected activity. Communication with others about suspicions, on the other hand, is more likely to be unprotected.

In *Romaneck v. Deutsche Asset Mgmt.*, 2006 WL 2385237 (N.D. Ca. Aug. 17, 2006), plaintiff claimed to be engaged in protected activity by anticipating testifying before the SEC in an investigation related to market-timing. The defendant claimed the plaintiff's general

statements that "he would tell the whole truth and let the chips fall where they may" lacked specificity because they did not reference a specific SOX violation. The Court tied the specificity requirement to the "provide information" language that appears only in one prong of the Act – 18 U.S.C. § 1514A(a)(1). The absence of "provide information" in the prong that relates to employee testimony – 18 U.S.C. § 1514A(a)(2) – enabled the Court to relax the specificity requirement in this circumstance.

In *Wutherich v. Rice Energy Inc.*, 2018 U.S. Dist. LEXIS 171113 (W.D. Pa. Oct. 2, 2018), the court found that a plaintiff brought enough evidence to overcome summary judgment on a SOX claim when he alleged that he handled data in a way that amounted to "providing information" under 18 U.S.C. § 1514A. Here, the plaintiff claimed he was fired in order to conceal a report he had made to the COO and President that he believed the Vice President was self-dealing and committing a securities violation. He also claimed that he told the Vice President about the defendant's failure to disclose particular information that plaintiff believed constituted an SEC violation. The court found that the plaintiff's evidence "reflected a reasonable belief that Defendant's conduct constituted a securities violation and thus was protected under the statute."

Additionally, in *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007), complainant called an SEC attorney to obtain information about the legality of certain agreements to which the respondent was a party. The SEC, however, did not file or pursue any proceeding against the respondent as a result of the complainant's inquiries. Even though a strict reading of the Act only protects contacts relating to proceedings, the ALJ noted that such an application of law "would require a narrow and overly technical reading of the Act that would run counter to the legislative history which reflects that the law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." Consequently, the ALJ ruled that "when an employee contacts the SEC in connection with a reasonable belief of a securities law violation within the scope of Sarbanes-Oxley . . . that action is protected even if no formal SEC proceeding is ever initiated."

In *Miles v. Wal-Mart Stores, Inc.,* 2008 U.S. Dist. LEXIS 5781 (W.D. Ark. Jan. 25, 2008), the district court ruled that an administrative employee engaged in protected activity by contacting an executive being investigated for mail and wire fraud regarding the shredding of potentially relevant documents. The defendant argued that the investigation had not yet matured into a proceeding at the time of plaintiff's contact. The court rejected that argument because the plaintiff had clearly identified the grand jury proceeding at issue and only eight months lapsed between her act and the executive's conviction.

However, in *Brookman v. Levi Strauss & Co*., 2006-SOX-36 (ARB July 23, 2008), the ARB, affirming an ALJ ruling, rejected the employee's argument that his cooperation with the SEC regarding potential violations was protected activity under the participation clause because the employee's allegations were "too vague to constitute a protected activity since it did not identify [the employer's] alleged misconduct."

Additionally, in *Hoptman v. Health Net of Cal*., 2017-SOX-00013 (ALJ June 7, 2017), the ALJ found that complainant's text message stating he was going to contact a friend to make

his friend aware of another's potential fraud is not protected activity, because "no reasonable fact-finder could find that Complainant's text messages provided 'any knowledge' that Complainant was planning to file a complaint with the SEC, or any other proceeding regarding one of the anti-fraud laws covered by SOX." Thus, the activity in this instance fell short of "participation."

c. Knowledge

i. Actual Knowledge Not Required

While a plaintiff need not show that the decision-maker had actual knowledge of the protected activity, a bare assertion of constructive knowledge is not sufficient. For example, in *Wood v. Dow Chemical Co.*, 72 F.Supp.3d 777, 790 (E.D.Mich. 2014), the court found that the plaintiff's assertions that the defendant's CEO knew of her protected activity because he had conducted investigations of plaintiff's activities were sufficient. The court noted that where a complaint lacks sufficient facts to justify an inference, then circumstantial evidence of knowledge is not enough. Similarly, in *Hall v. Teva Pharmaceutical USA, Inc.*, 214 F.Supp.3d 1281 (S.D.Fla. 2016), which applied a parallel analysis to a Dodd-Frank whistleblower retaliation claim, the court noted that although the plaintiff had not demonstrated actual knowledge by the defendants, there remained an issue of fact about the defendants' "general knowledge" of the protected activity and whether it was connected to her termination. There, the general knowledge consisted of knowing that the plaintiff had been interviewed in a government investigation and internal discussion about auditing her laptop and acknowledging "added risks" related to the plaintiff. Actual knowledge does not need be firmly established, but the inference cannot be pure speculation.

ii. Circumstantial Evidence of Knowledge

Where a plaintiff can show that it was more likely than not that a decision-maker knew of her protected conduct, she may be able to establish the knowledge element of a SOX retaliation claim. For example, in *Wallender v. Canadian National Railway Co.*, 2015 WL 10818741 (W.D.Tenn., Feb. 10, 2015), the court found that it was more likely than not that the employer had knowledge of Wallender's protected activity (aiding an HR investigation of his supervisor's misconduct), because the employer had ordered the investigation in the first place.

Similarly, in *Erhart v. BofI Holding, Inc.*, 269 F.Supp.3d 1059 (S.D.Cal. 2017), the court found that a factfinder could draw the inference that the employer knew of the protected activity due to allegations that the company had reviewed his work computer, looked through his cabinets, prepared a termination letter, and demanded to speak with him, among other things. However, there is a limit to how attenuated the circumstantial evidence can be. In *Wiest v. Lynch*, 15 F.Supp.3d 543 (E.D.Pa. 2014), for example, the court found that the fact that the CEO was personally involved in the potentially illegal activity that the plaintiff reported did not establish that the CEO had knowledge of the protected activity. On the other hand, another defendant who was alleged to have been involved in "management discussion" about the whistleblower's raised concerns did satisfy the knowledge requirement. Evidence of knowledge of the underlying misconduct is not circumstantial evidence of the protected activity; that must be separately established.

iii. Imputed Knowledge

In some instances, a supervisor's knowledge of protected activity can be imputed to the corporation. The general rule has been that "[o]nce an employee's supervisor has actual knowledge of the protected activity, that knowledge is attributed to the ultimate decision-maker." *Wallender v. Canadian National Railway Co.*, 2015 WL 10818741, at *17 (W.D.Tenn. Feb. 10, 2015) (quoting *Leznik v. Nektar Therapeutics, Inc.*, 2006–SOX–00094 (ALJ Nov. 16, 2007)). In *Erhart v. BofI Holding, Inc.*, 269 F.Supp.3d 1059 (S.D.Cal. 2017), the court found that the plaintiff satisfied this requirement by alleging that he reported the misconduct he discovered to members of management, including a vice president and senior vice president, because their knowledge was imputed to the corporation. Similarly, in *Wutherich v. Rice Energy Inc.*, 2018 WL 5724128 (W.D.Pa. Oct. 2, 2018), the court rejected the defendant's argument that knowledge of plaintiff's protected activity could not be imputed to other employees of the defendant.

This doctrine, in at least some courts, is limited to imputing knowledge to a corporate defendant. In *Wiest v. Lynch*, 15 F.Supp.3d 543 (E.D.Pa. 2014), the court found that actual knowledge by three of four individual defendants in management could not be established, so the SOX claims against them should be dismissed. The court in *Westawski v. Merck & Co., Inc.*, 2015 WL 463949 (E.D.Pa. Feb. 4, 2015), cabined the holding in *Wiest* to claims against individual defendants, finding that claims against corporations were different, and knowledge of corporate employees can be imputed to the corporation that terminated the plaintiff.

d. Adverse Employment Action

Section 806(a) prohibits an entity covered by the statute from retaliating against employees who report violations enumerated in the statute. Specifically, SOX 806 provides that no publicly traded company or individual may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee" to blow the whistle on a violation, including mail fraud, bank fraud or securities fraud, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a). In recent years, courts have expanded the interpretation of the types of conduct that constitute retaliation under SOX.

i. "Adverse Employment Action" under *Burlington Northern & Santa Fe Railway v. White*

The DOL and courts initially looked for guidance on how to analyze cases under Section 806(a) by looking at how retaliation was defined under Title VII. In 2006, the Supreme Court analyzed the meaning of "retaliation" under Title VII in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006). In *Burlington Northern*, the Supreme Court held that a plaintiff may pursue a retaliation claim under Title VII if the "employer's challenged action would have been material to a reasonable employee," and likely would have "dissuaded a reasonable worker from making or supporting a charge of

discrimination." In its analysis, the Supreme Court specifically rejected more restrictive standards of proof that had been used by several U.S. Courts of Appeals.

In *Burlington Northern*, the plaintiff, Sheila White, a track maintenance laborer, filed an internal complaint alleging that her foreman had sexually harassed and discriminated against her. Ten days later, the company suspended the foreman, but also removed White from her forklift duties and assigned her to more physically demanding and dirtier track work. White filed two EEOC charges, and seven days after her second charge, a supervisor suspended her without pay for alleged insubordination. After appealing the disciplinary action in accordance with her collective bargaining agreement, White was reinstated with full back pay, and the suspension was expunged from her personnel record. White nevertheless filed a complaint alleging sex discrimination, as well as retaliation based on the reassignment of duties and the suspension.

On appeal from an *en banc* Sixth Circuit decision in White's favor, the Supreme Court specifically adopted the standard which required plaintiff to prove that the "employer's challenged action would have been material to a reasonable employee," and likely would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern* at 2415 (citing *Washington v. Illinois Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) and *Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006)). The opinion stated that the requirement of "material adversity . . . is important to separate significant from trivial harms," and that the "reasonable employee" standard "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." The opinion also stated that the standard was phrased "in general terms because the significance of any given act of retaliation will often depend on the particular circumstances. Context matters."

In a potentially far-reaching statement, the opinion held that Title VII's anti-retaliation provision "does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." *Id.* at 2414. The opinion reasoned that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." The court cited as an example a decision in which the Tenth Circuit held that actionable retaliation could take the form of an employer's filing false criminal charges against a former employee. *Id.* (citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996)).

ii. Evolution of Application of *Burlington Northern* to "Adverse Employment Action" under Section 806(a)

(1) Initial Application

Initially, courts and the Department of Labor utilized the *Burlington Northern* standard to varying degrees when determining whether an employer had caused a complainant to experience an adverse employment action in violation of Section 806(a) of Sarbanes-Oxley. *See Rzepiennik v. Archstone Smith, Inc.*, 2004-SOX-26 (ALJ Feb. 23, 2007) ("Given the reliance upon Title VII by administrative authorities interpreting the Sarbanes-Oxley Act, it is unclear what, if any, effect the Court's decision [in *Burlington Northern*] will have on

retaliation claims under SOX."). Section 806(a) states that covered employers may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." However, as the body of law under Section 806(a) has evolved, DOL and court decisions have strayed from the *Burlington Northern standard*, adopting a distinct standard – with an even wider reach than the retaliation provisions of Title VII.

In *Allen v. Stewart Enters., Inc.*, ARB 06-081 (ARB July 27, 2006), the ARB applied two tests to determine whether the complainants had experienced adverse employment actions. The ARB explained that the ALJ had applied both the "tangible job consequences" test (a tangible job consequence is one that constitutes a significant change in employment status) and the "detrimental effect" test (an action is adverse if it is reasonably likely to deter employees from making protected disclosures). The ARB then reached its decision regarding whether a workspace relocation and the alleged improper attribution of error reports to the complainants' department constituted adverse employment actions. The ARB determined that neither action significantly changed the complainants' employment status or would have deterred others from protected activity. The ARB only mentioned *Burlington Northern* in the context of determining whether the complainants had suffered from a hostile work environment due to stonewalling, friction, and exclusion from notification of policy changes. The ARB cited *Burlington Northern* when it explained that some of the complained about conditions are similar to the "'petty slights, minor annoyances, and simple lack of good manners' that often take place at work and that all employees experience."

Similarly, in a federal district court case decided shortly after *Allen*, the district court did not connect *Burlington Northern* with the interpretation of a Sarbanes-Oxley claim. In *Bozeman v. Per-Se Techs., Inc.*, 456 F. Supp. 2d 1282 (N.D. Ga. 2006), the plaintiff alleged violations of Title VII and Sarbanes-Oxley. The court first addressed the Title VII claims. Although the plaintiff had asserted a constructive discharge claim as an adverse action in support of a retaliation claim under Title VII, the court addressed the constructive discharge claim separately. The court then acknowledged and applied the *Burlington Northern* standard to the retaliation claim. However, the court did not address *Burlington Northern* during its analysis of the constructive discharge claim. Further, when the court analyzed whether there was an adverse action to support the Sarbanes-Oxley claim, it referred to its prior analysis of the Title VII constructive discharge claim without addressing *Burlington Northern*.

Subsequently, in an ALJ decision decided after both *Allen* and *Bozeman*, the ALJ addressed *Burlington Northern* more squarely. In *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29 (ALJ Oct. 5, 2006), the ALJ explained that "[a]dministrative decisions have used different interpretations of what constitutes an adverse action under whistleblower law, but they generally agree that while Title VII case law influences whistleblower decisions, differences in statutory language signify that adverse action should be interpreted more broadly under whistleblower claims than under Title VII claims." Based on this rationale, the ALJ stated that the *Burlington Northern* decision serves as a starting point for analysis of potentially adverse actions in Sarbanes-Oxley cases. However, the ALJ cited *Burlington Northern* when the ALJ stated that "the test is whether a reasonable employee would be dissuaded from whistleblowing based on the alleged adverse action." The ALJ then found that a reasonable

employee would have been dissuaded from engaging in protected activity as a result of the complainant's transfer to a different department after receiving one day to decide whether to accept the transfer or face a lay-off. Also, the transfer significantly decreased his workload, and the scope of the new position varied unfavorably from the scope when past employees had filled the same position.

In *Deremer v. Gulfmark Offshore, Inc.*, 200-SOX-2 (ALJ June 29, 2007), the ALJ explained that *Burlington Northern* had relaxed the standard for an adverse employment action in retaliation cases, and that the complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities. However, the ALJ stated that *Burlington Northern* had not relaxed the standard that must be applied in whistleblower cases to hostile work environment claims. Instead, *Burlington Northern* had lowered the overall standard for conduct that constitutes retaliation under this standard. Despite the relaxing and lowering of these two standards, the ALJ did not find that a reduction in the complainant independent contractor's hours, a lack of additional assignments, or relocation of work-space into a supply room due to a need for space had caused the complainant to experience an adverse employment action, or that a hostile work environment had been created when certain employees, including the subject of the complainant's allegations, ceased speaking to the complainant.

In *Allen v. Administrative Review Bd.*, 514 F.3d 468 (5th Cir. 2008), the Fifth Circuit Court of Appeals affirmed the Administrative Review Board's decision in *Allen v. Stewart Enters., Inc.*, *supra*. Although the court did not go into detail discussing the standard for "adverse employment action" under Section 806(a), it noted that the Administrative Review Board has previously relied on the definition set forth in *Burlington Northern & Santa Fe Railway v. White* when deciding whistleblower cases under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). *Allen*, at 476, n. 2 (citing *Hirst v. Southeast Airlines, Inc.*, ARB 04-116 (ARB Jan. 31, 2007)). The court found that due to the similarity of the whistleblower protections afforded by both AIR 21 and SOX, the *Burlington Northern & Santa Fe Railway v. White* definition of "adverse employment action" applied to SOX whistleblower claims. *Id*.

(2) Tenth Circuit Expands Definition of Adverse Action

The Tenth Circuit has taken an expansive view of what constitutes "adverse employment action" under Section 806(a). *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121 (10th Cir. 2013). In *Lockheed*, Andrea Brown reported that her supervisor was having an inappropriate relationship with soldiers through a Company-run pen pal program. *Id*. at 1126. Brown thought that her supervisor's actions were potentially fraudulent and illegal because she might have been using Company and government funds. *Id*. at 1132. Brown worried that her supervisor's misuse of Company funds could lead to government audits, which could affect the Company's contracts and stock price. *Id*.

Brown reported her supervisor's conduct to the Vice President of Human Resources. *Id*. at 1126. After Brown reported these issues, her supervisor gave her lower performance ratings and began leveling threats that her job was being eliminated. *Id*. at 1127. Brown's new supervisor moved her office into a storage room/visitor's office. *Id*. The new supervisor also

wanted to move her to a cubicle and informed her that she was losing her leadership position, which would have entitled her to an office. *Id*. at 1127-28. Brown subsequently had a "breakdown" and went on medical leave. *Id*. at 1128. Later, she resigned and claimed constructive discharge. *Id*.

Brown filed a complaint with OSHA alleging violations of Section 806(a). *Id*. After OSHA denied her complaint, Brown sought review from the ALJ. *Id*. The ALJ found that "Brown had engaged in protected activity; she suffered materially adverse employment actions, including constructive discharge; and her engagement in protected activity was a contributing factor in the constructive discharge" and awarded reinstatement, back pay, medical expenses, and non-economic compensatory damages in the amount of $75,000. *Id*. Lockheed appealed to the Administrative Review Board, which affirmed the ALJ's decision. *Id*.

On appeal, the Tenth Circuit found that Brown had engaged in protected conduct because Section 806(a) does not require that the whistleblower report "violations [that] relate to fraud against shareholders to be protected from retaliation under the Act." *Id*. at 1131-32. Regarding the adverse action prong, the Court stated that Brown's allegation of constructive discharge satisfied this prong. Specifically, Brown was "kept in a constant state of uncertainty as to whether she had a job," and a reasonable person would determine that the working conditions were intolerable and forced Brown to resign. *Id*. at 1134-35. As to the contributing factor prong, the Court stated that this is a "broad and forgiving" standard, noting that the ARB defined "contributing factor" as "any factor, which alone or in combination with other factors, tends to affect *in any way* the outcome of the decision." *Id*. at 1136 (citing *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149 (ARB May 31, 2006)). It noted that "[t]emporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test." *Id*. In this case, Brown's poor treatment by her supervisors began shortly after her report of the ethics violations. *Id*. Despite the fact that Brown's constructive discharge occurred over one year after the ethics report and investigation, this passage of time was irrelevant because "the relevant time frame is not when the constructive discharge occurred, but when the conduct leading up to the discharge began." *Id*. at 1137.

Lockheed took a very broad view of two elements of the retaliation *prima facie* case. First, *Lockheed* agrees with other recent decisions that protected conduct does not require a claim of shareholder fraud. Second, it states that a claim for constructive discharge can be successfully alleged as a materially adverse action on the grounds that there was job uncertainty. District courts are following *Lockheed*'s holding that constructive discharge can be a materially adverse action under SOX. *Jordan v. Sprint Nextel Corp.*, No. 12-2573, 3 F. Supp. 3d 917, 929-30 (D. Kan. Mar. 11, 2014) (holding that plaintiff sufficiently alleged adverse action in a SOX retaliation claim by making claims of constructive discharge); *Wood v. Dow Chem. Co.*, No. 14-CV-13049, 2014 WL 7157100, at *13 (E.D. Mich. Dec. 15, 2014) (applying *Lockheed* and finding alleged conduct is sufficient to state a claim of constructive discharge within the context of SOX retaliation claims).

(3) Fifth Circuit Continues to Expand Definition of Adverse Action

The Fifth Circuit continues to expand of the definition of "adverse action" by upholding the ARB's decision that an employee suffered an adverse action when the company disclosed his identity as a whistleblower to his colleagues. *Halliburton, Inc. v. Admin. Review Bd*, 771 F.3d 254 (5th Cir. 2014).

Menendez had been employed by Halliburton as Director of Technical Accounting Research and Training. *Id*. at 256. Shortly after beginning his employment, Menendez raised concerns about Halliburton's accounting concerning revenue recognition practices. *Id*. Menendez was concerned that the defects in the recognition practices could have a major impact on Halliburton's financial statements. *Id*. Menendez took his concerns to his supervisor, the Chief Accounting Officer ("CAO"). *Id*. In addition, Menendez circulated a memorandum detailing his position on the revenue recognition practices. *Id*. The CAO subsequently met with Menendez and told him that the memorandum was good, but that he was not being a "team player." *Id*.

Menendez then contacted the Securities and Exchange Commission ("SEC") and made a confidential complaint stating that Halliburton was engaging in "questionable" accounting practices with respect to revenue recognition. *Id*.

After submitting his complaint to the SEC, Menendez sent an e-mail to the Audit Committee addressing the same concerns he had brought to the SEC's attention. *Id*. Menendez was under the impression that his identity would be kept confidential in accordance with corporate policy. *Id*. Despite corporate policy ensuring confidentiality, Menendez' e-mail was forwarded to the Audit Committee members and various other employees, including the CAO, Menendez's direct supervisor, who was implicated by Menendez's complaint. *Id*. Several days later, in an e-mail pertaining to document retention, required as a result of the SEC complaint, the General Counsel identified Menendez as the source of the SEC complaint to several of the same individuals, as well as other executives. *Id*.

"Menendez was horrified when he saw the email disclosing his identity as the SEC complainant, and he described that day as one of the worst in his life. Colleagues began to treat him differently, generally avoiding him." *Id*. at 257. Menendez missed work frequently, requested and was granted a paid leave of absence. He then found other employment. *Id*. Menendez subsequently filed a complaint under Section 806(a) with the Department of Labor, alleging that Halliburton had retaliated against him by disclosing his identity. "The Administrative Judge concluded, among other things, that, although Menendez's reports to the SEC and the company were protected conduct, the disclosure of his identity was not an 'adverse action' (a required element of an anti-retaliation claim under SOX) because none of the workplace harm Menendez suffered as a result of being identified as the whistleblower rose to the level of being 'materially adverse.'" *Id*. Menendez appealed to the ARB.

The Board reversed the ALJ's decision, holding that the procedures required by SOX for the confidential submission of employee complaints are a "term and condition of employment" for employees covered by SOX, and therefore protected under Section 806(a).

Menendez v. Halliburton, Inc. ARB 09-002, 09-003 at *57 (ARB Sept. 13, 2011). The Board stated that the language of Section 806(a) is broader than Title VII, and therefore requires a broader interpretation of "adverse action" than the standard set forth by the Supreme Court in *Burlington Northern*. *Id*. at *36. The Board adopted the standard for "adverse action" that it had recently set forth in *Williams v. American Airlines, Inc.*, ARB 09-018, (ARB December 29, 2010) for whistleblower cases brought under AIR 21, based on the similarity between the two statutes. *Id*. at *37. Under the *Williams* standard, the term adverse action applies to any "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Id*. at *37-38. The Board noted that *Burlington Northern* remains a helpful guide for the analysis of adverse actions under SOX, but SOX's statutory language controls. *Id*. at *38.

The 2011 *Menendez* decision significantly broadened the standard for determining what constitutes an "adverse employment action" for purposes of establishing a *prima facie* claim under Section 806(a). District courts followed this broader interpretation by the Board. *See Guitron v. Wells Fargo Bank, N.A.*, No. C 10-3461 CW, 2012 WL 2708517, at *15 2 (N.D. Cal. July 6, 2012) (applying *Menendez* adverse employment action standard).

After the ARB remanded to the ALJ and revisited the issues in 2013, finally, in 2014, the *Menendez* decision reached the Fifth Circuit. The Fifth Circuit concluded that the ARB's conclusion that Halliburton's disclosure of Menendez's identity as the whistleblower amounts to a "materially adverse" action was not reversible legal error. *Halliburton, Inc.*, 771 F.3d at 262. In explaining its decision and relying on *Burlington Northern*, the Fifth Circuit stated:

> in a workplace environment such as Menendez's where collaboration is an important part of the job, the employer's targeted disclosure to the whistleblower's colleagues that the whistleblower had reported them to the authorities for alleged wrongdoing and has caused them to become the subject of an official investigation, thus creating an environment of ostracism, well might dissuade a reasonable employee from whistleblowing[.]

Id. Thus, under Fifth Circuit precedent, an employer reporting a whistleblower's identity to his/her colleagues is a materially adverse employment action under SOX 806.

iii. Hostile Work Environment

A hostile work environment may constitute adverse action, but ALJs have typically required proof that first, the harassing conduct was sufficiently severe or pervasive to alter the conditions of employment *See Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 975 (7th Cir. 2004). To establish hostile work environment, "the plaintiff must establish more than the occurrence of isolated or sporadic acts of intentional discrimination, but instead a persistent, on-going pattern." *Miller v. Stifel, Nicolaus & Co*., 812 F. Supp. 2d 975, 985 (D. Minn. 2011) (*citing* Carpenter v. Con–Way Cent. Express, Inc., 481 F.3d 611, 618 (8th Cir. 2007)).

Further, the harassment must also have detrimentally affected a reasonable person and did so affect the complainant. *Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1045 (7th Cir.2002).

In contrast, "[d]iscourtesy or rudeness should not be confused with harassment." H*endrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23, at 17 (ALJ Dec. 9, 2004)

iv. Constructive Discharge

Constructive discharge – when a resignation is treated as a termination – is a recognized adverse action under SOX, but as with most employment statutes, the bar for demonstrating constructive discharge is high.

In *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121 (10th Cir. 2013), the Tenth Circuit upheld the ALJ's finding that an employee had been constructively discharged. Though the standard for constructive termination requires a "substantial" burden on the plaintiff, the Court defined constructive damage as occurring "when an employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign. The plaintiff's burden is substantial." *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121 (10th Cir. 2013). The Court cited to several facts indicative of constructive discharge. Prior to her complaint, the employee held a leadership position, had her own office and received high performance ratings. *Id*. at 1134. Following her complaint, she received low performance ratings, was told she or another employee were considered for a layoff. *Id.* She lost her title, office and supervisory responsibilities; she was made to work from home or a storage room doubling as a visitor's office. *Id.*

The Sixth Circuit has applied an identical standard to those applied in *Lockheed* in other contexts. *See McKelvey v. Sec'y of U.S. Army*, 450 Fed.Appx. 532, 535 (6th Cir.2011) (applying same intolerableness standard in Rehabilitation Act context). The Third Circuit had held that stress felt from an internal investigation stemming from complaints from employees did not rise to the level of constructive discharge. *Wiest v. Tyco Elecs. Corp.*, 812 F.3d 319, 331 (3d Cir.), cert. denied, 137 S. Ct. 82, 196 L. Ed. 2d 198 (2016)

v. Post-Termination Acts of Retaliation

Post-termination employer conduct can give rise to SOX liability. In *Kshetrapal v. Dish Network, LLC,* the Court found that an individual's SOX claim is not limited to pre-termination activities. *Kshetrapal v. Dish Network, LLC* 90 F. Supp. 3d 108, 112 (S.D.N.Y. 2015). SOX does not include a temporal definition of "employee" therefore, an "employee" may refer to current or former employees. *Id*. The Court in *Kshetrapal* points to the statute's remedies of "reinstatement with the same seniority status that the employee would have had, but for the discrimination" and reasons that current employees cannot be reinstated, the Section must include "former employees." *Id.* SOX liability may be extended to activities occurring towards former employees.

e. Causation: Contributing Factor Standard

Both the ARB and many federal courts have taken a broad view of the contributing factor standard for causation under SOX. The Fifth Circuit, for example, has held that "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.'" *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 269 (5th Cir. 2014) (emphasis in original) (quoting *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008)). The Tenth Circuit has noted that "[c]ontributing factor" is "broad and forgiving." *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136. The ARB echoed these sentiments in a 2016 *en banc* decision, emphasizing "how low the standard is for the employee to meet." *Palmer v. Canadian Nat'l Rwy.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (en banc).[6] The ARB noted that the factor need not be "significant, motivating, substantial a predominant" – it just needs to be a factor that plays some role, and even an insignificant or insubstantial role suffices.

Courts and the DOL have considered the following factors in determining whether the complainant's protected activity was a contributing factor for the adverse employment action.

i. Temporal Proximity

Most SOX retaliation claims – and most retaliation claims in general – are based not on direct evidence of retaliatory intent, but on circumstantial evidence. The most frequently cited form of circumstantial evidence in retaliation cases is temporal proximity. "Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation . . . ." *Feldman v. Law Enforcement Associates Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (quoting *Tice v. Bristol–Myers Squibb Co.*, 2006–SOX–20, 2006 WL 3246825, at *20 (Dep't of Labor Apr. 26, 2006)).

The mere fact that the adverse action follows protected activity is not necessarily sufficient to prove causation, however, and courts have differed on what level of temporal proximity is sufficient. In *Erhart v. BofI Holding, Inc.*, 269 F.Supp.3d 1059 (S.D.Cal., 2017), the court noted, "The Ninth Circuit has held that causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity. . . . It also has made clear that a specified time period cannot be a mechanically applied criterion, and . . . cautioned against analyzing temporal proximity without regard to its factual setting." (internal quotations and citations omitted) In *Erhart*, the court found that the adverse action occurring in the days and weeks after the employee's protected activity, culminating in his termination after 2-3 months, was sufficient to establish causation. Various district courts have found similar temporal proximity sufficient circumstantial evidence to establish causation, or at least create a genuine factual dispute about it. In *Wallender v. Canadian National Railway Co.*, 2015 WL 10818741 (W.D. Tenn. Feb. 10, 2015), for example, the court found that one-month temporal proximity was sufficient circumstantial evidence to create a genuine factual dispute. The court in *Hall v. Teva Pharmaceutical USA, Inc.*, 214 F.Supp.3d 1281, 1291 (S.D.Fla., 2016) noted, "The Eleventh Circuit has held that 'a period as much as one month between the protected expression and the adverse action is not too protracted,'" though the *Hall* court found that this did not justify a finding of causation when the temporal proximity between alleged protected activity and adverse action was, at a minimum, six months. *Id.* (quoting *Higdon v. Jackson*, 393

[6] Although *Palmer* was decided under the Federal Railroad Safety Act, the same evidentiary standard applies in SOX 806.

F.3d 1211, 1220 (11th Cir. 2004)).

Similarly, the Administrative Review Board of the U.S. Department of Labor found in *Dietz v. Cypress Semiconductor Corp.*, 2016 WL 1389927, 2014-SOX-002 (ARB), at *11 that a little more than a month between the protected activity and the adverse actions represented a "strong inference connecting the two." In fact, as noted by the court in *Wallender v. Canadian National Railway Co.*, 2015 WL 10818741, at *21 (W.D. Tenn. Feb. 10, 2015), the Administrative Review Board has "been more lenient and has held that a longer temporal proximity may be sufficient circumstantial evidence to prove that the protected activity contributed to the adverse action." The *Wallender* court cited to administrative decisions indicating temporal proximity of seven to eight months and ten months to be sufficient. *Id.* (citing *Zinn v. Am. Commercial Lines Inc.*, ARB No. 10–029, 2012 WL 1143309, at *7 (Dep't of Labor Mar. 28, 2012); *Brown v. Lockheed Martin Corp.*, ARB No. 10–050, slip op. at 3–4, 11 (Dep't of Labor Feb. 28, 2011)).

The Fourth Circuit in *Deltek, Inc. v. Department of Labor, Administrative Review Bd.*, 649 Fed. Appx. 320, 330 (4th Cir. 2016), found that temporal proximity can still be found with these longer periods of time, by more closely examining what was happening during the delay between protected activity and alleged retaliation. For instance, in *Deltek*, the court found temporal proximity of six months between whistleblowing and termination was sufficient because the termination came soon after negotiations between the company and the employee about her whistleblowing had failed.

Other circuits have taken a more restrictive view of temporal proximity. In *Riddle v. First Tennessee Bank, Nat. Ass'n*, 497 Fed. Appx. 588, 596 (6th Cir. 2012), the Sixth Circuit found that four months between the plaintiff's last alleged protected activity and the plaintiff's termination meant that temporal proximity "is not so strong here to carry the day by itself." According to the court in *Leshinsky v. Telvent GIT, S.A.*, 942 F.Supp.2d 432, 450 (S.D.N.Y. 2013), "[W]hile the Second Circuit has declined to 'draw[ ] a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action,' where a plaintiff relies solely on temporal proximity to prove causation, the protected activity and the plaintiff's termination must be 'very close.'" *Id.* (citing *Gorman–Bakos v. Cornell Co-op. Extension of Schenectady Cnty.*, 252 F.3d 545, 554 (2d Cir. 2001); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001)). Along these lines, in *Yang v. Navigators Group, Inc.*, 2016 WL 67790 (S.D.N.Y. Jan. 4, 2016), the Southern District of New York granted summary judgment in favor of the employer despite the fact that the plaintiff was terminated two weeks after her complaint about risk sub-committees. The court noted evidence linking the termination in whole or in part to her complaint "conspicuously absent," and plaintiff failed to refute defendant's contention that she was terminated for performance problems. By contrast, in *Leshinsky*, the court found that even though there were five months between the protected activity and termination, the plaintiff had proffered evidence that he was marginalized "directly after his report" up until his termination, and therefore, there was sufficient temporal proximity to survive summary judgment.

ii. Cat's Paw

The "cat's paw" theory provides that causation can be inferred even when the supervisor who terminates the employee has no retaliatory motive or even knowledge of the protected activity, if the supervisor's decision has been influenced by a biased employee who does have knowledge of the protected activity and poisons the supervisor's opinion of the employee. The "cat's paw" theory prescribes that "[w]hen a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a 'factor' or a 'causal factor' in the decision." *Staub v. Proctor Hosp.*, 562 U.S. 411, 418–19 (2011) (applying the theory to an action under the Uniformed Services Employment and Reemployment Rights Act).

The theory did not originate in SOX case law, and many courts of appeals have not addressed whether the theory applies to SOX retaliation cases, though they have allowed it in other employment discrimination contexts -- in particular, Title VII retaliation cases. *See Vasquez v. Empress Ambulance Service, Inc.*, 835 F.3d 267, 272 (2d Cir. 2016); *Zamora v. City of Houston*, 798 F.3d 326, 332–33 (5th Cir. 2015); *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1069–70 (6th Cir. 2015); *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 551–52 (8th Cir. 2013); *Hicks v. Forest Preserve Dist. of Cook Cty., Ill.*, 677 F.3d 781, 789–90 (7th Cir. 2012); *McKenna v. City of Philadelphia*, 649 F.3d 171, 180 (3d Cir. 2011).

The Tenth Circuit, however, has found that the theory can be applied to SOX cases. *See Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121 (10th Cir. 2013). In *Lockheed*, the court found that if the "cat's paw" theory is applied in other employment statutory schemes, then it should be applied in SOX retaliation cases where the required showing to establish causation is "less onerous." The court found that an inference could be made that a former disgruntled supervisor had a hand in the new supervisor's decision to terminate based on evidence that the new supervisor had a high opinion of the old supervisor and consulted with her on the employee before terminating the employee. At least one district court has agreed with the Tenth Circuit's reasoning and applied the theory to SOX retaliation. *See Smith v. Chicago Bridge & Iron Company, N.V.*, 2017 WL 2619342 (S.D. Tex. June 16, 2017).

iii. Intervening Events

Even where the evidence suggests that a complainant's protected activity contributed to an employer's decision to take an adverse action, intervening events may sever the causal connection. The Fourth Circuit held in 2014 that a plaintiff failed to establish a *prima facie* case because he failed to show that his protected activity was a contributing factor in the employer's decision to terminate his employment. *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339 (4th Cir. 2014). In *Feldman*, 20 months prior to the plaintiff's termination, he reported to the Department of Commerce information about potentially illegal exports. The lack of temporal proximity between the report and his firing weighed strongly against a finding that the plaintiff's alleged protected activities were a contributing factor in the company's decision to discharge him. *Id*. at 348. The Fourth Circuit, however, placed

particular importance on "a legitimate intervening event [that] further undermin[ed] a finding that his long-past protected activities played any role in the termination[.]" *Id.* at 349. Specifically, plaintiff criticized outside board members in meetings with a major shareholder. Feldman admitted that the outside board members viewed his actions as "throw[ing] them under the bus." *Id*. The Court construed this action as a legitimate intervening event severing the causal connection.

As in *Feldman*, the persuasiveness of the intervening event increases when temporal proximity is lacking. For example, in *Miller v. Stifel, Nicolaus & Co., Inc.*, 812 F. Supp. 2d 975 (D.Minn. 2011), the plaintiff was a financial advisor who alleged that she engaged in protected activity occurring in 2003, 2005, and 2007, but was terminated in 2008. The court found there was a lack of causal connection to her termination due in part to intervening events in May 2008. In particular, her most profitable customer had removed all accounts from the company and submitted a complaint that the plaintiff had engaged in trading that caused substantial losses.

Intervening events can be considered collectively, which together weaken the causal connection between protected activity and alleged retaliation, and do not necessarily need to be acts of misconduct by the employee. In *Wiest v. Tyco Electronics Corp.*, 812 F.3d 319 (3d Cir. 2016), the Third Circuit found that there were "legitimate intervening events" severing any possible causal connection between protected activity and retaliation. These included that the plaintiff "received praise and commendation" during and after his protected activity; the plaintiff's colleagues who were even more involved in the protected activity did not receive negative treatment; an investigation of the plaintiff which led to his termination was commenced by individuals who did not know of his protected activity; and the person allegedly annoyed by the protected activity was no longer with the company when the investigation of the plaintiff was initiated.

At the *prima facie* stage, it may be difficult for employers to contend that other unrelated misconduct by the employee was a singular, determinative intervening event. According to at least one court, "[A]t this prima facie stage, '[a]n employer's legitimate business reasons may neither factually nor legally negate an employee's proof that the protected activity contributed to an adverse action.'" *Wallender v. Canadian National Railway Co.*, 2015 WL 10818741, at *22 (W.D.Tenn. Feb. 10, 2015) (quoting *Fordham v. Fannie Mae*, ARB Case No. 12–061 (Dep't of Labor Oct. 9, 2014)). In *Wallender*, the court rejected the employer's argument at the *prima facie* stage that evidence of Wallender's history of workplace misconduct severed the causal connection between his protected activity and his termination a month later, and indicated that such argument should be made once the burden had shifted to the defendant after the plaintiff's *prima facie* case had been made. Such argument by an employer can be determinative at the summary judgment stage, however. *See Hartzman v. Wells Fargo Advisors*, LLC, 2017 WL 2982997 (M.D.N.C. July 12, 2017) ("[T]his court finds that Wells Fargo has presented clear and convincing evidence detailing the rationale behind the unfavorable personnel actions . . . and that such actions would have occurred in the absence of any protected activity."); s*ee also Sharkey v. JPMorgan Chase & Co.*, 660 Fed. Appx. 65, 67 (2d Cir. 2016) ("Assuming without deciding that a legitimate intervening basis can defeat an inference of causation from temporal proximity" on summary

judgment); *Yang v. Navigators Group, Inc.*, 674 Fed. Appx. 13, 15 (2d Cir. 2016) (same).

f. Affirmative Defense

Even under the demanding clear and convincing standard, there are many legitimate reasons that a company can offer to rebut a complainant's *prima facie* case. An obvious example is when a company can establish that it had already decided to take an adverse action against an employee prior to knowing that an employee had engaged in protected activity. *See, e.g.*, *Richards v. Lexmark Int'l Inc.*, 2004-SOX-49 (ALJ June 20, 2006) (holding that termination one day after employee expressed concerns about accounting issues was not retaliatory where employer proved that it had decided to terminate the employee several weeks prior).

Another common affirmative defense is that an employee exhibited significant performance problems prior to engaging in any protected activity, and that the employer would have (or intended to) terminate the employee for these independent reasons unrelated to his or her protected activity. In *Zinn v. American Commercial Lines Inc*., ARB Case No. 13-021 (ARB Dec. 17, 2013), the ARB affirmed an ALJ's decision that the Company did not violate the whistleblower protection provision in Section 806 of SOX where the Company demonstrated by clear and convincing evidence that its decision to discharge the complainant, who was an in-house attorney, was based on her insubordination. *See also Pardy v. Gray*, 2008 U.S. Dist. LEXIS 53997 (S.D.N.Y. July 15, 2008) (employee who had been placed on probation twice before her complaint was terminated for legitimate reasons unrelated to her complaint); *Giurovici v. Equinox, Inc.*, ARB No. 07-027 (ARB September 30, 2008) (employee had deteriorating work performance, repeated incidents of insubordination, and refused to work with other employees); *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007) (employer changed its decision to discharge complainant for failing to attend a mandatory training once the employer learned about the complainant's protected activity, but later discharged the complainant for insubordination because the complainant had stopped working and failed to cooperate with the employer's lawful investigation of the complainant's allegation); *Robinson v. Morgan Stanley*, 2005-SOX-44 (ALJ Mar. 26, 2007) (well-documented pre-existing performance issues regarding work product and accepting adverse performance feedback); *Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004) (complainant's history of conflict and difficulty with interpersonal relations due to "military style"); *Taylor v. Wells Fargo, Texas*, 2004-SOX-43 (ALJ Feb. 14, 2005), *aff'd* ARB 05-062 (ARB June 28, 2007) (complainant engaged in series of unprofessional and contentious actions that resulted in final written warning for breach of ethics, and ultimately termination); *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005) (complainant's violation of e-mail policy by sending vulgar message to company executive); *Stojicevic v. Arizona-American Water Co.*, 2004-SOX-73 (ALJ Mar. 24, 2005), *aff'd* ARB 05-081 (ARB Oct. 30, 2007) (complainant's inappropriate comments, hostile attitude, and insubordination, resulting in suspension, and, ultimately, discharge for coming into work while suspended and refusing to leave the work premises); *Trodden v. Overnite Transp. Co.*, 2004-SOX-64 (ALJ Mar. 29, 2005) (complainant violated company policy by providing information about a subordinate to a third party outside the company); *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Apr. 1, 2005) (complainant's repeated refusal to work for assigned supervisor constituted insubordination

justifying non-renewal of contract).

g. Enforcement

Section 806 provides that a SOX action will be governed by "the rules and procedures set forth in AIR21. 18 U.S.C. § 1514A(b)(2)(A). AIR21, in turn, has been analyzed in accordance with the ERA, so that both statutes may be looked to for guidance in interpreting SOX. On November 3, 2011, OSHA issued interim final regulations that clarified the procedures to be applied in SOX whistleblower retaliation actions. *See* U.S. Dep't of Labor, Occupational Safety and Health Admin. Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as amended, 76 Fed. Reg. 68084 (Nov. 3, 2011). OSHA's Whistleblower Investigations Manual, (OSHA Instruction CPL 02-03-005) ("OSHA Manual"), issued January 28, 2016, provided further guidance as to how such retaliation actions will be handled by the agency.

i. Filing of Complaint

A complainant asserting a SOX retaliation claim must exhaust administrative remedies by filing a charge with OSHA. The procedures and standards for a SOX charge are detailed below.

(1) With Whom the Complaint Must be Filed

Whistleblower complaints must first be filed "with the Secretary of Labor." 18 U.S.C. § 1514A(b)(1)(A). In turn, the Secretary has delegated to the Assistant Secretary for OSHA responsibility for receiving and investigating complaints. 29 CFR § 1980 n.1 (citing Secretary's Order 5-2002, 67 FR 65008 (Oct. 22, 2002)). The pertinent DOL regulation instructs that the complaint should be filed with the OSHA Area Director responsible for the area where either the complainant resides or the alleged wrongful acts occurred, but may be filed with any OSHA officer or employee. 29 CFR § 1980.103(c).

Note that one federal court has held that where a common law wrongful discharge claim is premised on the public policy articulated in Section 806 of SOX, the plaintiff need not comply with the statutory enforcement scheme and may file the claim in accordance with state law. *Romaneck v. Deutsche Asset Mgmt.*, 2006 WL 2385237 (N.D. Cal. Aug. 17, 2006). However, any claim brought under SOX itself is subject to the administrative exhaustion requirement.

(2) 180-Day Statute of Limitations

In 2010, the Dodd-Frank Act changed the statute of limitations for SOX from "no later than 90 days after the date the violation occurred" to "no 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). "Filed" has been interpreted as meaning when the complaint is received by the Labor Department. *Murray v. TXU Corp*., 279 F. Supp. 2d 799, 802 (N.D. Tex. 2003). However, the regulations state that, for complaints sent by mail, the date of

the postmark will be the date of filing. 29 CFR § 1980.103(d); *see also Reddy v. Medquist, Inc*., 2004-SOX-35, ARB 04-123 (ARB Sept. 30, 2005) (SOX complaints may be filed by e-mail).

Complaints need not be in writing, and OSHA will reduce oral complaints to writing. 29 CFR § 1980.103(b). OSHA will accept a SOX complaint in any language. *Id.* The 180-day limitation period commences on either the date the alleged violation occurs or the date the employee becomes aware of the violation. 29 CFR § 1980.103(d). The regulations define the phrase "date the alleged violation occurs" as "when the discriminatory decision has been both made and communicated to the complainant." 29 CFR § 1980.103(d). A complaint is filed on the date that it is mailed, rather than the date on which it is received by OSHA. *Barrett v. e-Smart Technologies, Inc.*, ARB Nos. 11-088, 12-013, ALJ No. 2010-SOX-31 (ARB Apr. 25, 2013).

In *Corbett v. Energy East Corp*., ARB 07-044, 2006-SOX-65 (ARB Dec. 31, 2008), the ARB clarified that the statute of limitations under § 1514A(b)(2)(D) starts to run from the date an employee receives "final, definitive, and unequivocal notice" of a discharge or other discriminatory act. "'Final' and 'definitive' notice is a communication that is decisive or conclusive, *i.e.*, leaving no further chance for action, discussion, or change." *Coppinger-Martin v. Nordstrom, Inc.*, ARB 07-067, 2007-SOX-019 (ARB Sept. 25, 2009). "'Unequivocal' notice means communication that is not ambiguous, i.e., free of misleading possibilities." *Id.* at 4.

If the notice of termination is ambiguous, the statute of limitations may start to run upon the actual date of termination as opposed to notice of termination. In *Snyder v. Wyeth Pharmaceuticals*, ARB 09-008, 2008-SOX-055 (ARB April 30, 2009), an employee was informed that he was being terminated but was also given an opportunity to present information countering the basis for the termination of his employment. During an ensuing three-month investigation, he was suspended without pay. Finding that the initial notice of termination was ambiguous, the ARB held that the statute of limitations began to run from the effective date of his termination.

In *Murray v. TXU Corp*., 279 F. Supp. 2d 799 (N.D. Tex. 2003), the court held that a federal district court lacks jurisdiction over a SOX retaliation complaint if the plaintiff failed to file the original complaint with DOL within the statute of limitations.

(a) Tolling Agreements

There is some ambiguity as to whether tolling agreements in SOX matters are valid. In 2016, OSHA issued a memorandum clarifying that "OSHA will accept an otherwise untimely whistleblower complaint where the complainant and respondent have made a private agreement that tolls (extends) the deadline for filing a whistleblower complaint." *DOL Memorandum Tolling of Limitation Periods under OSHA Whistleblower Laws by Private Agreements and for Other Reasons* (Jan. 28, 2016), available at https://www.whistleblowers.gov/memo/2016-01-28. In addition, the ARB's decision in *Turin v. AmTrust Financial Svcs., Inc*., ARB No. 11-062, ALJ No. 2010-SOX-018 (ARB March 29, 2013) suggests that it is open to extensions of the filing deadline based on private agreements. The OSHA memo notes situations in which equitable modification is not appropriate: 1) ignorance of the statute of limitations; 2) participation in the

employer's internal complaint or grievance process, unless the employer induces the employee to reasonably forego filing; and 3) an employee's ignorance of the employer's retaliatory motive. Notably, no federal court has adopted OSHA's guidance on tolling agreements.

(b) Equitable Tolling

OSHA opines that the 180-day filing period may be equitably tolled for "certain extenuating circumstances." OSHA Manual, at 2-6. For example, valid extenuating circumstances could include:

- Concealment by the employer of the existence of the adverse action or the discriminatory grounds for the adverse action;
- Inability of the employee to file within the statutory time period due to debilitating illness or injury;
- Inability to timely file due to natural disaster; or
- The employee mistakenly filed a timely discrimination complaint with another agency.

According to a January 2018 OSHA memorandum, "[w]hen an employee mistakenly files a timely retaliation complaint relating to a whistleblower statute enforced by OSHA with another agency that does not have the authority to grant relief, and OSHA receives the complaint from the other agency or the complainant after the filing period has expired under the relevant whistleblower statute, it may consider the complaint timely-filed under equitable tolling principles." *DOL Memorandum IMIS Recording of Whistleblower Complaints Initially Filed with Agencies Other Than OSHA* (Jan. 9, 2018), available at https://www.whistleblowers.gov/memo/2018-01-09.

OSHA also specifies certain conditions which will not justify extension of the filing period, including:

- Ignorance of the statutory filing period;
- Filing of unemployment compensation claims;
- Filing a workers' compensation claim;
- Filing a private negligence or damage suit;
- Filing a grievance or arbitration action; or
- Filing a discrimination complaint with a state or another agency that has the authority to grant the requested relief.

OSHA Manual, at 2-7, 8.

Several ALJ decisions also have addressed whether the 180-day filing period may be equitably tolled. In *Taylor v. Express One Int'l., Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002), an ALJ held that filing the complaint with the wrong agency (the FAA) was a sufficient basis for tolling the time limit for filing a complaint under AIR21. The ALJ noted that the improperly filed complaint raised the statutory claim at issue and the complainant had filed his complaint without the assistance of legal counsel.

In *Barrett v. Shuttle America*, ARB No. 12-075, ALJ No. 2012-AIR-10 (ARB Feb. 28, 2014), the ARB held that filing a collective bargaining grievance did not toll the 90-day AIR21 statute of limitations. The ARB stated: "The grievance procedure by its very nature is a remedy for a prior decision, not an opportunity to influence that decision." *Barrett,* ARB No. 12-075 at 5-6.

In *Hyman v. KD Resources*, ARB No. 09-076, ALJ No. 2009-SOX-20 (ARB Mar. 31, 2010), the ARB applied the equitable tolling doctrine where the employer "lulled" the employee into reasonably believing that he would be returned to his former employment or alternatively given a one-year consulting contract, he would be financially compensated for having been wrongfully terminated, and that his employer would resolve the SOX compliance issues he had disclosed. The ARB, however, has continued to hold that an employer is not required to inform the complainant of the existence of, or deadlines for, potential causes of action under SOX. *Daryanani v. Royal & Sun Alliance*, ARB No. 08-106, ALJ No. 2007-SOX-79 (ARB May 27, 2010).

In *Ubinger v. CAE Int'l.*, ARB 07-083, 2007-SOX-036 (Aug. 27, 2008), the ARB affirmed the ALJ's decision that there was no basis for equitably tolling the filing time limit where the complainant's primary basis for such waiver was that his complaints were legitimate and that he had no knowledge of Section 806. The ARB held that the severity of an alleged violation does not warrant tolling of the limitations period and that ignorance of the law will not generally support a finding of equitable modification.

The 2010 amendment to Section 806 clarifying that the statute of limitations begins to run when the employee "becomes aware of the violation" likely overturns the ARB's 2009 decision, *Coppinger-Martin v. Nordstrom, Inc.*, ARB 07-067, 2007-SOX-19 (ARB Sept. 25, 2009), in which the ARB previously held that "[c]oncealing the reason for an adverse employment action does not toll the statute of limitations . . . nor does it estop the employer from asserting timeliness as a defense" *Id.*

(c) Continuing Violation Theory

In *Daly v. Citigroup Inc*., Civ. No. 16-cv-9183, 2018 WL 741414 (S.D.N.Y. Feb. 6, 2018), the court held that the ongoing harm caused by an employer filing a negative U5 is not a continuing violation and instead is a discrete act subject to the 180-day SOX statute of limitations. *Daly* relies on a Fifth Circuit decision holding that "'continuing violation' theory has no application to th[e] discrete act" of the filing of an allegedly retaliatory U5 form. *Judy*

Chou Chiung-Yu Wang v. Prudential Ins. Co. of Am., 439 Fed.Appx. 359, 366 & n.6 (5th Cir. 2011).

In *Ford v. Northwest Airlines, Inc*., 2002-AIR-21 (ALJ Oct. 18, 2002), the ALJ held that discrete retaliatory acts are not actionable if they occurred outside the statute of limitations, even if they were related to acts that fall within the prescriptive period. Citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the ALJ reasoned that a discrete retaliatory act "occurs" on the day it happens and the complaint must be filed within the statutory time frame based on the happening of that event. *See also Dolan v. EMC Corp*., 2004-SOX-1 (ALJ Mar. 24, 2004) (applying *Morgan* to SOX claims and holding that retaliatory acts outside the statute of limitation period are actionable only in hostile work environment claims).

In *Walker v. Aramark Corp*., 2003-SOX-22 (ALJ Aug. 26, 2003), the ALJ held that OSHA's dismissal of the complaint as untimely was proper because the complainant's first contact with OSHA regarding his termination was beyond the statute of limitations. Following OSHA's determination, the complainant attempted to argue another retaliatory act, to wit, the respondent's contesting of his application for unemployment benefits. The ALJ held that, even if this new alleged act of retaliation was timely filed, it would not make the complaint regarding termination timely because, under *Morgan*, these retaliatory actions constitute "discrete acts" and therefore the continuing violation doctrine would not apply.

By contrast, in *Brune v. Horizon Air Industries, Inc*., 2002-AIR-8, at 10 (ALJ Dec. 16, 2003), the ALJ held that, consistent with *Morgan*, claims of retaliatory conduct earlier than occurring outside the statute of limitations and prior to the complaint's filing may be timely where such conduct takes the form of an ongoing hostile work environment. The ALJ found the unlawful "practice" was management's ongoing attempt to constrain the employee's discretion by threats and by singling him out, and requiring justification for his actions. Although some of the acts occurred outside the statute of limitations, the ALJ found the actions collectively created a hostile work environment and "should be viewed as one unlawful employment practice."

(3) Pleading Standard and *Prima Facie* Case

The regulations require OSHA to dismiss the complaint prior to its investigation if the complainant fails to make a *prima facie* showing that the protected activity was a "contributing factor" in the adverse employment action. 49 U.S.C. § 42121(b)(2)(B)(i); 29 CFR § 1980.104. SOX regulations set forth what elements must be satisfied to make this *prima facie* showing. 29 CFR § 1980.104(e)(1). Generally, the complaint must allege the existence of facts and evidence to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a "contributing factor" in the adverse employment action. 29 C.F.R. § 1980.104(e)(2). Normally, this burden will be satisfied if the adverse action occurred "shortly after" the protected activity. 29 C.F.R. § 1980.104(e)(3). Thus, a significant gap in time between the complainant's protected conduct and the adverse action may result in dismissal. *See Heaney v. GBS Properties LLC*, 2004-SOX-72 (ALJ Dec. 2, 2004) (dismissing complaint for failure to make a *prima facie* case where the complainant engaged in protected conduct several years prior to his termination).

To establish a *prima facie* SOX case, the employee must demonstrate: (1) the employee engaged in protected activity; (2) the employer knew of the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. *Livingston v. Wyeth, Inc*., 520 F.3d 344, 351 (4th Cir. 2008) (granting summary judgment because the complainant failed to demonstrate that he made a complaint to employer about conduct that he reasonably believed constituted a violation of an SEC rule or regulation); *Van Asdale v. International Game Technology*, 498 F. Supp. 2d 1321, 1329 (D. Nev. 2007).

In *Sylvester v. Parexel Int'l. LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 & 42 (ARB May 25, 2011), the ARB held that the heightened pleading requirements established in *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S .Ct. 1937 (2009) do not apply to SOX claims. Noting that SOX claims are rarely suited for Rule 12 dismissals because they involve inherently factual issues such as "reasonable belief" and issues of "motive," the ARB concluded that OSHA's duty to interview the complainant and attempt to supplement the complaint is fundamentally incompatible with requiring SOX complainants to meet a plausibility pleading standard.

In *Johnson v. The Wellpoint Companies, Inc*., ARB No. 11-035, ALJ No. 2010-SOX-38 (ARB Feb. 25, 2013), the ARB reversed the ALJ's decision granting the Respondent's motion to dismiss and held that the appropriate standard for deciding whether a complaint survives a motion to dismiss in an administrative proceeding is whether the complaint provides "fair notice" of the claim. In particular, fair notice requires a showing that the complaint contains: "(1) some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes in the [DOL's] jurisdiction; (2) some facts about the adverse action; (3) an assertion of causation, and (4) a description of the relief that is sought." *Id.* at 6 (citing *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 6 (ARB July 31, 2012)).

In *Pik v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-6 (ARB May 31, 2012), the ARB affirmed the ALJ's dismissal of a complaint that lacked factual allegations showing that the complainant engaged in SOX protected activity. The ARB noted that a *pro se* complaint is entitled to some leeway, "a complainant must at least point to facts that fairly identify the activity protected by the SOX statute, particularly where the issue of extraterritoriality must be resolved."

In *Klopfenstein v. PCC Flow Technologies Holdings, Inc*., ARB 04-149, 2004- SOX-11 (ARB May 31, 2006), the ARB held that a SOX complainant need not show that protected activity was a *primary* motivating factor in order to establish causation, only that protected activity was a *contributing* factor. The ARB held that 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." The ARB noted this test is specifically intended to overrule the existing case law, which required a whistleblower to prove his protected activity was a "significant," "motivating," "substantial," or "predominant" factor in an employment action.

(4) Burdens of Proof

SOX provides that a whistleblower action "shall be governed by the legal burdens of proof set forth in [AIR21]." 18 U.S.C. § 1514A(b). The burden-shifting framework of *McDonnell Douglas* and other cases decided under federal anti-discrimination statutes applies generally to SOX cases, but the quantum of proof imposed on the parties is changed. Under SOX and AIR21, a complainant may prevail merely by showing that an improper motive was a "contributing factor" in the employment decision. Once this relatively low quantum of proof is established by the complainant, a respondent seeking to avoid liability using a "same decision" defense must show by "clear and convincing evidence" (rather than a simple "preponderance of the evidence") that it would have taken the same employment action even in the absence of complainant's protected activity.

In *Halliburton v. Admin. Review Bd.*, 13-60323, 2014 WL 5861790 (5th Cir. Nov. 12, 2014) (per curiam), the court held that a SOX whistleblower need not prove a "wrongfully-motivated causal connection." Instead, "contributing factor" causation merely requires a showing that protected conduct affected in any way the outcome of the decision.

In *Feldman v. Law Enforcement Associates Corp*., 752 F.3d 339 (4th Cir. 2014), the court held that at the evidentiary stage, a SOX whistleblower is required to prove by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action, and not merely that the circumstances were sufficient to raise an inference. The court affirmed the district court's order granting summary judgment on causation because: 1) there was a gap of twenty months between complainant's primary protected activity and the termination of his employment; and 2) there was a legitimate intervening event, wherein the complainant told shareholders who sought to sue the employer that the employer's outside directors were not loyal to the company and "basically worthless."

In *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 ARB articulated in detail the two-stage framework that ALJs should employ to determine whether a complainant has met their burden. 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, but ALJs should not weigh the relative importance of the protected activity and the employer's non-retaliatory reasons when determining "contributing factor" causation. 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*, ARB No. 16-035 at 53.

Palmer underscores the low burden of establishing "contributing factor" causation: "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." *Id.* at 53 (citations omitted). A whistleblower may prove causation through circumstantial evidence, including "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). In cases where employers rely on both protected activity and legitimate reasons when deciding to take an adverse action, an employee will almost 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, ARB No. 16-035 at 56-57 (citations omitted).

"Contributing factor" causation is established 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.

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. *Id.* at 57. "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.*

h. Preliminary Response

i. Notice of Receipt

"Upon receipt of . . . a complaint, the Secretary of Labor shall notify, in writing [the person named in the complaint and the employer] of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, . . ." and provide them the opportunity to respond and meet with the Secretary. 49 U.S.C. §42121(b)(2).

When a case is opened for investigation, the Supervisor will prepare a letter notifying the respondent that a complaint alleging discrimination has been filed by the complainant and requesting that the respondent submit a written position statement. OSHA Manual, at 2-5. This suggests that the employer will not be notified until after the investigator already has made his or her decision regarding whether the complainant established a *prima facie* case.

The burden of giving notice to the employer and persons named in the complaint does not fall entirely upon the agency. For example, in *Steffenhagen v. Securitas Sverige*, *AR,* 2003-SOX-24 (ALJ Aug. 5, 2003), the complainant did not serve his complaint upon the multiple respondents and did not respond to OSHA's numerous requests for contact information regarding the respondents. The ALJ held that pursuant to the Rules of Practice and Procedure before the Office of ALJs, as well as Federal Rules of Civil Procedure 4(m) and 41(b), dismissal of the complaint was warranted, based on complainant's failure to serve the complaint.

ii. Notice to SEC

At its request, copies of all SOX 806 pleadings must be sent to the SEC. 29 CFR § 1980.108(b). Furthermore, the SEC may participate as *amicus curiae* at any time in the proceedings. 29 CFR § 1980.108(b).

i. Respondent's Position Statement

The respondent must be given the opportunity to submit a written statement, with affidavits or documents substantiating its position. 29 CFR § 1980.104(b). The respondent also may have the opportunity to meet with representatives of OSHA and present evidence in support of its position. *Id*.

At this stage, if the respondent demonstrates in its submission by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the complainant's protected activity, an investigation of the complaint will not be conducted. 49 U.S.C. § 42121(b)(2)(B)(ii); 29 CFR § 1980.104(e)(4). In one of the earliest SOX decisions on the merits, "clear and convincing" evidence was defined as an evidentiary standard that "requires a burden higher than 'preponderance of the evidence' but lower than 'beyond a reasonable doubt.'" *Getman v. Southwest Securities, Inc*., 2003-SOX-8, at 10 (ALJ Feb. 2, 2004) (*citing Yule v. Burns Int'l. Security Service*, 1993-ERA-12 (Sec'y May 24, 1995)); *see also Taylor v. Express One International, Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002). The ARB has relied on the Black's Law Dictionary definition: "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Peck v. Safe Air Int'l., Inc. d/b/a Island Express*, ARB 02-028, 2001-AIR-3 (Jan. 30, 2004).

Throughout the investigation, OSHA must provide to the complainant a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the agency will redact, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA must also provide the complainant with an opportunity to respond to such submissions. 29 CFR § 1980.104(c).

j. Investigation

If, during the preliminary complaint-and-response phase, the respondent does not demonstrate by clear and convincing evidence that it would have taken action against the employee in the absence of protected activity, OSHA must investigate the complaint within 60 days of receiving it to determine whether there is reasonable cause to believe that the respondent discriminated against the complainant in violation of the statute. 29 CFR § 1980.105(a). OSHA has delegated the overall responsibility for all whistleblower investigation activities to the Regional Administrators, who are authorized to issue determinations and approve settlement of whistleblower complaints. This authority may be re-delegated, but no lower than the Assistant Regional Administrator or Area Director level. OSHA Manual, at 1-12.

Statements made to DOL in the course of a SOX whistleblower investigation have been found to be protected by an absolute privilege from a state law defamation claim because they were statements to an administrative agency acting in a quasi-judicial capacity. *Morlan v. Qwest Dex, Inc.*, 332 F. Supp. 2d 1356 (D. Or. 2004), *aff'd*, 156 F. App'x 949 (9th Cir. 2005) (plaintiff's suit for defamation based, in part, on statements made by employer's attorney during DOL investigation of SOX whistleblower complaint; attorney wrote in letter to DOL that employer had terminated plaintiff for "enhancement of data" and "falsification of documents").

k. Confidentiality

SOX itself does not address confidentiality. However, the regulations state that "[i]nvestigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title." 29 CFR § 1980.104(d). Although this general policy may shield some materials from public disclosure, it has very significant limitations, especially as it applies to settlement agreements (discussed *infra*).

According to the December 5, 2003 *DOL OALJ Notice Regarding Public Access to Court Records and Publication of Decisions* ("Notice"), to protect personal privacy and other legitimate interests, parties should refrain from including (or should redact) social security numbers and financial account numbers from all pleadings filed with the court, including exhibits. Unredacted documents may be filed under seal.

In *Jordan v. Sprint Nextel Corp.*, ARB 06-105, 2006-SOX-041, at 2 (ARB Sept. 30, 2009), the ARB held that in-house counsel could pursue his SOX claim even though prosecuting the claim would entail using attorney-client privileged information. The ARB concluded that Section 307 of SOX, which requires an attorney to report a material violation, should be read in conjunction with the whistleblower protections provided in Section 806. Similarly, in *Van Asdale v. Int'l. Game Tech.*, 577 F.3d 989, 994 (9th Cir. 2009), the court held that SOX "expressly authorizes any 'person' alleging discrimination based on protected conduct to file a complaint with the Secretary." *Id.* at 996 (permitting in-house counsel to pursue complaint despite potential disclosure of attorney-client privileged information).

In *Thomas v. Pulte Homes, Inc*., 2005-SOX-9 (ALJ Aug. 9, 2005), the ALJ refused complainant's request that the entire record be sealed. "A request for the record to be sealed may be made by requesting a protective order pursuant to 29 C.F.R. § § 18.15 and 18.46 or requesting a designation of confidential commercial information pursuant to 29 C.F.R. § 70.26." Complainant failed to support the need for confidentiality by failing to identify a privacy interest, potential harm or embarrassment that could result from disclosure and failed to identify confidential commercial information. The ALJ, however, noted that confidential information can be subject to disclosure through FOIA requests. Thus, even if the record were sealed, in responding to FOIA requests, the DOL would determine whether or not to withhold the information and, if there were no applicable exemptions, it would be disclosed.

l. Determination

After OSHA completes an investigation and reaches a determination, the findings are required to be sent to all parties of record by certified mail, return receipt requested. 29 C.F.R. § 1980.105(b). Requests to be notified through regular mail or email have no legal effect. *Crosier v. Boeing Co.*, 2009-SOX-00056 (ALJ Dec. 2, 2009).

m. Preliminary Order of Reinstatement and Abatement

If, after the investigation, OSHA determines there is "reasonable cause" to believe the complaint has merit, with limited exceptions "it shall issue" a preliminary order restoring the complainant to his or her employment status and requiring the employer to take affirmative action to abate the violation. 49 U.S.C. § 42121(b)(3)(B); 29 CFR § 1980.105(a)(1).

Reinstatement orders are immediately effective and are not stayed pending the resolution of any objections or appeal. *See* 49 U.S.C. § 4212 (b)(2)(A). If preliminary, immediate reinstatement is to be ordered under SOX, the investigator first must contact the named party and provide, in writing, the "substance of the relevant evidence" supporting the finding. 29 CFR § 1980.104(f). The named party must be given an opportunity to provide a written response and to present rebuttal witness statements within 20 days. *Id*.; OSHA Manual, at 2-13.

The Department of Labor has broad authority to issue abatement orders, which can include, among other things, (1) an order that respondent take all reasonable "affirmative action" to abate discrimination which may discourage employees from raising concerns; (2) requiring the respondent to officially inform all employees of their right to contact the relevant authorities; (3) requiring the sealing of documents and an expungement of all negative information; and (4) requiring that orders of administrative law judges be prominently posted. *See, e.g.*, *Chase v. Buncombe County, N.C.*, 85-SWD-4 (Nov. 3, 1986); *Simmons v. Florida Power Corp.*, 89-ERA-28/29 (Dec. 13, 1989); *cf. supra* section VII(E) (discussing OSHA enforcement orders).

n. Objections and Review

Within 30 days of receipt of findings, either party may file objections and request a hearing on the record before an ALJ. If no objection is filed within 30 days, the preliminary order is deemed a final order that is not subject to judicial review. 49 U.S.C. § 42121(b)(2)(A);

29 CFR § 1980.106(b). The 30-day objection period starts to run when the notice is sent, rather than when it is received. *Croxier v. Boeing Co.,* 2009-SOX-00056 (ALJ Dec. 2, 2009).

Objections must be filed with the Labor Department's Chief ALJ and mailed to the OSHA official who issued the findings and the Associate Solicitor, Division of Fair Labor Standards. 29 CFR § 1980.106(a). In *Steffanhagen v. Securities Sverige, AB*, 2004-ERA-3 (ALJ Dec. 15, 2003), the ALJ held that the party seeking ALJ review also must serve its notice of hearing upon the non-moving parties and that failure to do so is grounds for dismissal.

The 30-day objection period is subject to equitable tolling. *See, e.g. Lotspeich v. Starke Memorial Hospital*, ARB 05-072, 2005-SOX-14 (ARB July 31, 2006) (applying equitable tolling principles and holding that complainant's untimely filing of her appeal due to her attorney's failure to timely provide her a copy of OSHA's findings did not warrant equitable tolling of the 30-day limitations period).

In *Lerbs v. Buca DiBeppo, Inc*., 2004-SOX-8 (ALJ Dec. 30, 2003), the ALJ held that the 30-day objection period is not a jurisdictional requirement and, therefore, is subject to equitable tolling. The ALJ in *Lerbs* decided that the complainant's failure to serve a copy of his objections on the respondent within 30 days of receipt of OSHA's determination was not grounds for dismissal. *See also Richards v. Lexmark Int'l, Inc*., 2004-SOX-49 (ALJ Oct. 1, 2004) (denying motion to dismiss where respondent was not prejudiced by complainant's failure to timely serve respondent with his request for a hearing).

Parties alleging that the complaint was frivolous or brought in bad faith must file requests for attorneys' fees within 30 days. 29 CFR § 1980.106(a).

i. Discovery and Hearing Before Administrative Law Judge

Upon receipt of an objection and request for hearing, the Chief ALJ assigns the case to an ALJ. 29 CFR § 1980.107(b). The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges apply to ALJ proceedings. *See* 29 CFR § 1980.107(a). When those Rules are inconsistent with a statute or regulation, the latter controls. 29 CFR § 18.1(a). Further, an ALJ may take any appropriate action authorized by the Federal Rules of Civil Procedure. 29 CFR § 18.29(a)(8). Moreover, in *In re Slavin*, 2002-SWD-1, ARB 02-109 (ARB June 30, 2003), the ARB found that the standards enunciated in the rules of professional conduct applicable within the state of the proceedings apply to proceedings before the ALJ. The hearing before the ALJ is *de novo*, and the respondent may raise defenses before the ALJ that were not raised during the OSHA investigation. *Rowland v. Prudential Equity Group, LLC*, ARB No. 08-108, ALJ No. 2008-SOX-4 (ARB Jan. 13, 2010).

The Secretary of Labor may participate as *amicus curiae* before the ALJ or ARB. 29 CFR § 1980.108(a)(1). The SEC also may participate as *amicus curiae* in SOX cases. 29 CFR § 1980.108(b).

At any time after the commencement of a proceeding, the parties jointly may move to defer the hearing to permit settlement negotiations. 29 CFR § 18.9. The parties have the option of using the OALJ settlement judge program for such negotiations. 29 CFR § 18.9(e).

(1) Stay of Preliminary Reinstatement Order

If, after the investigation, OSHA determines there is reasonable cause to believe the complaint has merit, "it shall issue" a preliminary order reinstating the complainant. 49 U.S.C. § 42121(b)(3)(B). Reinstatement orders are immediately effective and under DOL's interim SOX rule could not have been stayed pending appeal. However, the DOL's Final Rule provides a procedure for a respondent to file a motion with the OALJ for a stay of a preliminary order requiring immediate reinstatement, which requires a showing of "exceptional circumstances." *See* 29 CFR § 1980.106(b) (ALJ); 29 CFR § 1980.110(b) (ARB).

When evaluating a respondent's motion to stay a preliminary order of reinstatement, the ARB considers four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Board grants a stay; and (4) the public interest in granting a stay." *Welch v. Cardinal Bankshares Corp*., ARB 06-062, 2003-SOX-15 (June 9, 2006).

(2) Discovery

In general, standard discovery methods are available during ALJ proceedings; including depositions, written interrogatories, production of documents, and requests for admissions. 29 CFR § 18.13. *See also Davis v. United Airlines, Inc*., 2001-AIR-5 (ALJ Apr. 24, 2002) (*citing* 29 CFR §§ 18.22) (deposition discovery permitted). However, the ALJ has broad discretion to limit discovery in order to expedite the proceeding. 29 CFR § 1980.107(b).

The scope of discovery in SOX whistleblower cases is broadly construed. *Leznik v. Nektar Therapuetics, Inc.,* 2006-SOX-93 (ALJ Feb. 9, 2007). As the ALJ in that case noted, "[u]nless it is clear that the information sought can have no possible bearing on a party's claims or defenses, requests for discovery should be permitted." To allow the complainant to establish discrimination through inferences and circumstantial evidence, the complainant must have access to the employer's records.

Protective orders are not routinely granted. Instead, the movant must demonstrate good cause with specificity. 29 CFR § 18.15. In *Thomas v. Pulte Homes, Inc*., 2005-SOX-9 (ALJ Aug. 9, 2005), the complainant moved to seal the record, and the respondent consented to the motion. The ALJ denied this request on the ground that the complainant failed to identify a specific need for confidentiality, such as "a privacy interest or potential harm or embarrassment that could result from disclosure of the record . . . ." The ALJ noted that "[a]s the whistleblower provision in the Sarbanes-Oxley Act is involved, there is a public interest in the protection of investors, employees, and members of the public by improving the accuracy and reliability of financial disclosures by publicly traded corporations." *Id*. at 3 (*citing* S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002)). In *Koeck v. Gen. Elec. Consumer & Indus*., ARB 08-068, 2007-

SOX-073 (ARB Aug. 28, 2008), the respondent moved to seal the record of the proceedings before the ALJ. The ARB denied the motion to seal, holding that "there is no authority permitting the sealing of a record in a whistleblower case because the case file is a government record subject to disclosure pursuant to the Freedom of Information Act." *Id*. at 3. In *Cantwell v. Northrop Grumman Corp*., 2004-SOX-75 (ALJ Feb. 9, 2005), the ALJ granted a protective order covering the salary amounts and performance reviews of employees, but denied a requested protective order for compensation policies and procedures.

Sanctions, including dismissal of the complaint, are available for failure to participate in discovery. *See Butler v. Anadarko Petroleum Corp.,* ARB No. 12-041, ALJ No. 2009-SOX-1 (ARB June 15, 2012) (dismissing complaint due to complainant's failure to comply with discovery orders and refusal to appear for a deposition); *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Apr. 23, 2003) (ordering complainant to show cause why her complaint should not be dismissed for her failure to cooperate in discovery); *Powers v. Pinnacle Airlines, Inc*., 2003-AIR-12 (ALJ May 21, 2003) (disqualifying counsel based on conduct before the ALJ); *Reid v. Niagara Mohawk Power Corp*., 2002-ERA-3 (ALJ Dec. 26, 2002) (failure to appear at depositions without good cause warranted dismissal). In *Matthews v. LaBarge, Inc*., ARB 06-121, 2007-SOX-056 (ARB Nov. 26, 2008), the ALJ dismissed the complaint due to the complainant's failure to comply with discovery and pre-hearing orders, including complainant's failure to index and organize thousands of documents contained on a CD that he produced in discovery. The ARB affirmed the ALJ's decision, concluding that the ALJ had given the complainant adequate opportunity to comply with the discovery orders.

In *Leznik v. Nektar Therapuetics, Inc.,* 2006-SOX-93 (ALJ Nov. 16, 2007), the ALJ imposed an adverse inference instruction concerning the results of any investigation conducted by the employer regarding the complainant's allegations. After the ALJ granted complainant's motion to compel a response to an interrogatory concerning the employer's investigation, the employer failed to respond to the interrogatory and did not explain with specificity why the information requested was protected by the work product doctrine.

Although SOX is silent regarding an ALJ's authority to issue subpoenas and despite the fact that the Administrative Procedures Act, 5 U.S.C. § 555(d) (agency subpoenas "authorized by law shall be issued to a party on request"), and the OALJ Rules of Practice, 29 CFR § 18.24, both allow agencies to issue subpoenas only where authorized by statute or law, the ARB has found that ALJs have the authority to issue subpoenas, even in the absence of an express statutory authorization. *See Peck v. Island Express*, 2001-AIR-3 (ALJ Aug. 20, 2001) (ALJs have inherent power to issue subpoenas when a statute requires a formal trial-like proceeding). However, in *Bobreski v. EPA*, 284 F. Supp. 2d 67, 76-77 (D.D.C. 2003), the court held that there is no subpoena power under the whistleblower provisions of six environmental statutes where the relevant statutes (like SOX) did not explicitly provide for subpoena power.

Both SOX and the OALJ Rules of Practice are silent as to the geographic scope of an ALJ's subpoena power, if any; however, it generally has been considered nationwide. *See, e.g., Taylor v. Express One Int'l., Inc*., 2001-AIR-2 (ALJ Dec. 6, 2001). Nonetheless, the scope of a subpoena is limited by the following principles: (1) it must be issued for a lawful purpose within the statutory authority of the issuing agency; (2) the documents requested must be relevant to

that purpose; and (3) the subpoena demand must be reasonable and not unduly burdensome. *See generally Peck v. Island Express*, 2001-AIR-3 (ALJ Aug. 20, 2001); *Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ Dec. 6, 2001).

The rules do not address whether applications for subpoenas may be made *ex parte*. However, the Manual For Administrative Law Judges (available at www.oalj.dol.gov) states that "to prevent evasion of service, the subpoena usually is granted *ex parte* and its signing is not disclosed until either service has been accomplished or the party who obtained the subpoena chooses to disclose it." OSHA Manual, at 43.

(3) Addition of Claims or Parties

One difficult issue that has arisen is whether a complainant is permitted to amend a complaint to add claims or additional respondents in federal court, or before the ALJ, after OSHA has issued its initial determination. In light of the differences in evidentiary restrictions and pleading requirements between federal district court and agency adjudications, a complainant's choice of forum could affect his or her ability to add claims or additional respondents and, therefore, could ultimately have substantive impact on a case.

In *Wallace v. Tesoro Corp*., 796 F.3d 468, 480 (5th Cir. 2015), the Fifth Circuit held that "[t]he scope of a judicial complaint is limited to the sweep of the OSHA investigation that can reasonably be expected to ensue from the administrative complaint." In particular, the court concluded that failing to reference a distinct category of protected activity in an OSHA complaint precluded the plaintiff from asserting that category of protected conduct in district court.

In *Wong v. CKX, Inc.*, No. 11 Civ. 6291, 2012 WL 3893609 (S.D.N.Y. Sept. 11, 2012) (case below ALJ No. 2010-SOX-36), the district court held that exhaustion of administrative remedies requires that "each separate and distinct claim [be] pled before [OSHA]." *Wong* at *4 (citing *Sharkey v. J.P. Morgan Chase & Co*., 805 F.Supp.2d 45, 53 (S.D.N.Y.2011)). The court clarified that while it is permissible for the plaintiff to include more specific allegations in a subsequent district court complaint, plaintiff must show that the specific claims, "including specific adverse employment actions, protected activity, and the general nature of the facts that formed [p]laintiff's belief in violations of the enumerated statutes giving rise to the protected activity, were timely presented in her OSHA Complaint." *Id.*

(a) Additional Claims

The scope of a SOX complaint filed in federal court after the expiration of 180 days without a final decision is generally limited to the claims identified in the initial OSHA complaint.

In *Newman v. Metro. Life Ins. Co.*, No. 12-10078-DJC, 2013 WL 951779 (D. Mass Mar. 8, 2013), the court granted the plaintiff leave to amend the SOX complaint that he had initially filed with OSHA. The court noted that a SOX claimant may seek *de novo* review in federal district court if the DOL has not issued a final decision on a complaint within 180 days of its

filing, and that "amendment of pleadings is generally permitted unless the opposing party makes a showing of undue delay, bad faith, undue prejudice, or futility."

In *Willis v. Vie Financial Group, Inc*., 2004 WL 1774575 (E.D. Pa. Aug. 6, 2004), the district court held that the administrative exhaustion requirement of the SOX whistleblower provision precluded recovery for a discrete act of retaliation which was never presented to OSHA for investigation. The court reasoned that the SOX administrative scheme, unlike Title VII's, "is judicial in nature and is designed to resolve the controversy on its merits . . . ." *See also McClendon v. Hewlett-Packard Co*., 2005 WL 2847224 (D. Idaho Oct. 27, 2005) (declining to adjudicate claims that had not been filed with OSHA).

The addition of claims in an ALJ proceeding after OSHA has issued its initial determination has been both rejected and allowed by ALJs.

Cases permitting addition include: *Ford v. Northwest Airlines, Inc*., 2002-AIR-21 (ALJ Oct. 18, 2002) (although "the substance of the [new claims was] based on the same core of operative facts that form[ed] the basis of [the original OSHA complaint]," OSHA was not given the opportunity to investigate the allegations "under the two-tiered scheme Congress provided for handling whistleblower claims"); *Kingoff v. Maxim Group LLC*, 2004-SOX-57 (ALJ July 21, 2004) (constructive discharge claims were of a drastically different type from those contained in the initial complaint and were deemed untimely); *Roulett v. American Capital Access*, 2004-SOX-78 (ALJ Dec. 22, 2004) (refusing to permit amendment to complaint after the expiration of the statute of limitations period to include an unfavorable compensation claim where the claim was not reasonably related to complainant's termination claim in original complaint); *Morefield v. Exelon Servs. Inc*., 2004-SOX-2 (ALJ Jan. 28, 2004) ("the scope of an OSHA investigation does not establish boundaries of the factual inquiry permitted in the subsequent adjudication," finding no transgression of the "two tiered" administrative scheme for handling whistleblower claims where an ALJ considers evidence not raised at the OSHA investigation phase).

Cases rejecting addition include: *Hooker v. Westinghouse Savannah River Co*., ARB 03-036, 2001- ERA-16 (ARB Aug. 26, 2004) (allowing amendment where *pro se* complainant failed to allege refusal-to-rehire claim in initial ERA discrimination complaint and respondent did not contest the motion).

(b) Additional Parties

In *Wadler v. Bio-Rad Laboratories, Inc.*, 2015 WL 6438670 (N.D. Cal. Oct. 23, 2015), the court held that pleading individual liability in a SOX complaint filed with OSHA merely requires putting individual defendants on notice that they are being charged with retaliation and will likely be named as defendants in any subsequent judicial proceeding. There is no requirement to name the individual respondents in the caption of the complaint that is filed with OSHA.

Adopting the ARB's decision in *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003 (ARB July 31, 2012), the court held that complaints in OSHA administrative proceedings are not expected to meet the pleading standards that govern claims filed in federal court, and

instead, a complaint is sufficient so long as it "give[s] an opposing party 'fair notice' of the charges against it." *Wadler,* 2015 WL 6438670, *11. As Wadler alleged in his OSHA complaint that he was "terminated from [his] employment at Bio-Rad by the CEO," the CEO was on notice that he was being sued under SOX. But because Wadler did not cite any specific conduct on the part of Board members in his SOX complaint, Wadler could not name them as individual defendants in his federal court complaint.

In *Tamosaitis v. URS Inc*., 771 F.3d 539 (9th Cir. 2014), an ERA whistleblower case, the court held that the failure to name a party in the original complaint filed with OSHA precludes the plaintiff from naming such party when filing the complaint in district court. The Ninth Circuit relied on three reasons to require a complainant to restart the ERA's one-year exhaustion clock before naming an additional respondent: 1) "the administrative exhaustion period is linked to a particular respondent, not to the substance of the claim alone"; 2) "DOL–OSHA regulations assume that every ERA whistleblower administrative complaint will name a particular respondent or respondents, and that the named individuals will have an opportunity to participate"; and 3) the opt-out provision "provision contemplates a basic level of similarity between an agency action and the corresponding federal suit." *Tamosaitis*, 771 F.3d at 547-549.

In *Hanna v. WCI Communities, Inc.*, 2004 U.S. Dist. LEXIS 25652 (S.D. Fla. 2004), the court held that the plaintiff could not add new defendants to a federal district court complaint which were not named in the initial OSHA complaint. The court reasoned that the plaintiff "failed to afford OSHA the opportunity to resolve [plaintiff's] allegations [against the newly-named defendants] through the administrative process. . . [and] never afforded the DOL the opportunity to issue a final decision within 180 days of filing his administrative complaint." *See also Bozeman v. Per-Se Tech., Inc*., 456 F. Supp. 2d 1282 (N.D. Ga. 2006); *Bridges v. McDonald's Corp.*, 2009 U.S. Dist. LEXIS 118597 (N.D. Ill. Dec. 21, 2009).

In *Genberg v. Porter*, No. 11-CV-02434, 2013 WL 1222056, *10 (D. Colo. Mar. 25, 2013), the court denied the plaintiff's motion to add respondents that were not named in the original complaint filed with OSHA on the ground that he failed to exhaust administrative remedies. The court noted: "OSHA is not charged with the task of deducing from a complaint every possible respondent. To a large extent, the OSHA complainant frames the OSHA investigation by naming certain respondents."

In contrast, complainants' attempts to add new respondents before the ALJ, subsequent to an initial determination by OSHA, have met with mixed results. In *Powers v. Pinnacle Airlines, Inc*., 2003-AIR-12 (ALJ Mar. 5, 2003), the complainant attempted to add the parent company of the originally named respondent, Pinnacle, to the ALJ complaint after OSHA dismissed her complaint on the basis that Pinnacle was not a publicly traded company. The ALJ ruled the complainant could not add the parent as a respondent because, *inter alia*, the complaint against the parent was untimely as it had been filed outside the statute of limitations. *But see Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 17, 2004) (permitting complainant to amend initial OSHA complaint to include as a respondent the publicly held parent company of employer); *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Oct. 19, 2004) (stating that "[i]ndividuals and entities may be added as parties when they were not joined below through error").

A complainant may not add a party following the conclusion of an evidentiary hearing. *Kalkunte v. DVI Financial Services, Inc*., 2004-SOX-56 (ALJ July 18, 2005) (denying complainant's motion to amend the complaint to name an individual as a respondent).

ii. Motions

29 CFR § 18.6 of the OALJ Rules of Practice authorizes the filing of motions with the ALJ. Answers to motions must be filed within ten (10) days of service of the motion, or 15 days if the motion is served by mail. 29 CFR § 18.6(b); 29 CFR § 18.4(c)(3); *Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office*, ARB 03-048, 2002-CAA-5 (ARB Aug. 31, 2004).

At least 20 days before the hearing date, parties may file motions for summary decision. 29 CFR § 18.41. Once a party that has moved for summary decision "has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The non-moving party may not rest upon mere allegations, speculation, or denials of his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof." *See Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office*, ARB 03-048, 2002-CAA-5 (ARB Aug. 31, 2004) (granting summary decision where complainant responded with "little more than conclusory statements").

The ARB has held that ALJs must give *pro se* complainants "fair notice" of the requirements of the summary decision rule and the right to file affidavits or "other responsive materials" when opposing a motion for summary decision. *Galinsky v. Bank of America, Corp.*, ARB No. 08-014, ALJ No. 2007-SOX-76 (ARB Jan. 13, 2010).

iii. Bench Trial Before ALJ

If a timely objection to OSHA's determination is made, a full hearing before an ALJ must be held "expeditiously." 29 CFR § 1980.107. The term "expeditiously" is not defined. Objections are heard *de novo* before the ALJ. 29 CFR § 1980.107(b); OSHA Manual, at 4-8. 29 CFR § 18.27(c) provides that "[u]nless otherwise required by statute or regulation, due regard shall be given to the convenience of the parties and the witnesses in selecting a place for the hearing." ALJs are required to issue findings on all contested issues. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB 04-149, 2004-SOX-11 (ARB May 31, 2006).

iv. Evidence

Formal rules of evidence do not apply, but ALJs will apply rules or principles designed to assure production of the most probative evidence. 29 CFR § 1980.107(d). The OALJ has adopted rules of evidence that are substantially similar to the Federal Rules of Evidence. *See* 29 CFR § 18.101 *et seq.*

In *Dolan v. EMC Corp*., 2004-SOX-1 (ALJ Mar. 24, 2004), the complainant sought to introduce into evidence a letter from the employer's counsel in which the employer refused to

remove a negative performance evaluation in order to show that a retaliatory act had occurred within the SOX limitations period. The letter was written in response to complainant's counsel's letter arguing that the evaluation was false and defamatory and suggesting the employer should settle. The employer contended that complainant's counsel's letter was inadmissible as part of settlement negotiations under FRE 408. The ALJ disagreed, finding that the policy favoring exclusion of settlement documents was to prevent chilling of non-litigious solutions to disputes, and that exclusion is not required where the evidence is offered for a purpose other than to prove liability or damages. The ALJ ruled the letter was proffered to establish the final retaliatory act against the complainant and was, therefore, admissible. In any event, the ALJ found the letter was not, in fact, an offer of settlement or compromise.

In *Leznik v. Nektar Therapeutics, Inc.,* 2006-SOX-93 (ALJ Feb. 9, 2007) (Order Granting Motion to Compel), the ALJ noted that "[u]nlike matters that may ultimately proceed to a jury trial, evidence is broadly admissible at Sarbanes-Oxley hearings under the Secretary's aegis, where formal rules of evidence play no role. The presiding administrative law judge may exclude only what is 'immaterial, irrelevant, or unduly repetitious,' taking care to see that 'the most probative evidence' is produced." *Id.* at 5 (citing 29 C.F.R. § 1980.107(d))

In *Zinn v. American Commercial Lines Inc*., ARB No. 10-029, ALJ No. 2009-SOX-25 (ARB Mar. 28, 2012), the ARB held that the ALJ abused his discretion in excluding a Congressional staff report proffered by the Complainant that was relevant to the question of whether the Complainant had a reasonable belief that the Respondent's Form 10-K may have misrepresented the safety of its operations by failing to disclose a subcontractor's use of unlicensed personnel to pilot tugboats. Respondent was in the business of transporting various industrial products by barges on waterways using its own or hired tugboats. While the Congressional report concerned an oil spill that occurred 15 days after the termination of complainant's employment, it is relevant because it corroborates her testimony that the tugboat subcontractor used unlicensed pilots to transport industrial products on behalf of Respondent.

v. Reconsideration

The SOX regulations suggest that ALJs have the authority to reconsider within ten days following issuance of the initial decision and order, and that a timely filed motion to reconsider tolls the time for appeal. 29 CFR § 1980.110(c). *See also Allen v. EG & G Defense Materials, Inc.*, 1997-SDW-8 & 10 (ALJ Aug. 21, 2001); *Macktal v. Brown & Root, Inc*., ARB 98-112, 86-ERA-23 (ARB Nov. 20, 1998). However, in *Negron v. Vieques Air Link, Inc*., ARB 04-021, 2003-AIR-10 (ARB Jan. 8, 2004), the ARB found that once a party files a petition for review with the ARB, the ALJ lacks jurisdiction to reconsider or amend his or her order. In *Steffenhagen v. Securitas Sverige, AR*, 2003-SOX-24 (ALJ Aug. 13, 2004), the ALJ found she lacked jurisdiction to rule on a motion to reconsider when the complainant also filed an appeal to the ARB on the same day.

The ARB employs the same principles that federal courts employ in deciding requests for reconsideration, including "(i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision,

and (iv) failure to consider material facts presented to the court before its decision." *McCloskey v. Ameriquest Mortgage Co*., ARB 06-033, 2005-SOX-093 (ARB Mar. 26, 2008) (denying reconsideration where complainant failed to meet provisions of the Board's four-part test for reconsideration, but instead rehashed arguments that the Board already considered); *Halpern v. XL Capital, Ltd.*, ARB 04-120, 2004-SOX-54 (ARB Apr. 4, 2006) (citations omitted). *See also Getman v. Southwest Securities, Inc*., ARB 04-059, 2003-SOX-8 (ARB Mar. 7, 2006) (applying same factors and denying reconsideration because complainant's motion for reconsideration did not raise new factual or legal arguments).

In *Henrich v. Ecolab, Inc*., ARB No. 05-030, ALJ No. 2004-SOX-51 (ARB May 30, 2007), the ARB held that a motion for reconsideration must be filed within a "reasonable time," and that 60 days is not a reasonable time. While the ARB did not set a specific deadline for filing a motion for reconsideration, it suggested that 14 to 30 days might be sufficiently short a time.

o. Appeal to Administrative Review Board

Within 10 business days following the ALJ's decision, either party may file a petition for review with the ARB. 29 CFR § 1980.110(a). *See Gooding v. ABB, Ltd.*, ARB No. 11-059, ALJ No. 2011-SOX-18 (ARB Dec. 12, 2011) (petition for review must be filed within 10 business days of the date of the decision of the ALJ, not within 10 days of the date upon which the decision was served upon a party). Review is discretionary.

A petition must specifically identify the findings, conclusions, or orders to which exception is taken. 29 C.F.R. § 1980.110(a). A "blanket objection to all of the ALJ's findings and conclusions clearly fails to satisfy the specificity requirement for a petition to the Board for review." *Brookman v. Levi Strauss & Co.*, 2006-SOX-036, ARB 07-074 (ARB July 23, 2008) (*pro se* complainant made blanket objection though ARB granted review, likely due to *pro se* status). If no petition is filed, the ALJ's decision becomes final within 10 days. If a petition for review is filed, but the ARB does not issue an order accepting the case for review within 30 business days of the ALJ's decision, the ALJ decision becomes final. 29 CFR § 1980.110(b). *See also Walker v. Aramark Corp*., 2003-SOX-22, ARB 04-006 (ARB Nov. 13, 2003). The ARB has been delegated the authority to act for the Secretary and issue final decisions under SOX and acts with all the powers the Secretary would possess in rendering a decision. 29 CFR § 1980.110(a). If the ARB accepts a case for review, the ALJ's decision becomes "inoperative," except that a preliminary order of reinstatement remains effective while review is conducted. 29 CFR § 1980.110(b). Unlike the Federal Rules of Appellate Procedure, the procedural regulations governing SOX claims do not provide for the filing of a cross-petition. Accordingly, a party that prevails before the ALJ but may later wish to appeal a portion of the decision must file a protective appeal within 10 days of the issuance of the ALJ's decision. *Henrich v. Ecolab, Inc*., ARB 05-036, 2004-SOX-51 (ARB Mar. 31, 2005).

The ARB acts in an appellate capacity and its decision is based only on evidence considered by the ALJ in the initial hearing. *Carter v. Champion Bus, Inc*., ARB 05-076, 2005-SOX-23 (ARB Sept. 29, 2006) (the ARB will not consider legal arguments or evidence raised for the first time on appeal). No discovery is available. *See Reid v. Constellation Energy Group,*

Inc., ARB 04-107, 2004-ERA-8 (ARB Oct. 13, 2004); *Halpern v. XL Capital, Ltd*., ARB 04-120, 2004-SOX-54 (ARB Oct. 13, 2004); *Cummings v. USA Truck, Inc*., ARB 04-043, 2003-STA-47 (ARB Sept. 15, 2004).

While a party's failure to present an argument on an issue or contest an element of a claim will generally result in a waiver of the issue, the ARB will not enforce that rule where it would result in a manifest injustice. In *Avlon v. American Express Co.*, ARB No. 09-089, ALJ No. 2008-SOX-51 (ARB Sept. 14, 2011), the ARB held that it has the authority to review an ALJ ruling on the timeliness of complaint even though the complainant failed to file an exception on this issue. The ARB stated: "Indeed, not reviewing that claim would render a manifest injustice as it would possibly cause her entire case to be dismissed as it is the central issue on which the ALJ's decision rests. Moreover, because no additional fact-finding is required and the parties fully litigated this issue before the ALJ . . . , we are well within the bounds of our discretion to address that issue on Avlon's petition for review." USDOL/OALJ Reporter at 5-6 (footnote omitted). The ARB has also held that it is not bound by the legal theories of the parties. *Funke v. Federal Express Corp*., ARB No. 09-004, ALJ No. 2007-SOX-43 (ARB July 8, 2011) (As long as an issue is adequately litigated below and part of the record, the ARB is not necessarily bound by the legal theory of any party in determining whether a violation has occurred.).

The ARB holds its proceedings in Washington, D.C., unless for good cause the ARB orders that proceedings in a particular matter be held in another location. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). The ARB reviews the ALJ's findings of fact under a substantial evidence standard (29 CFR § 1980.110(b)) and conclusions of law *de novo*. *Barron v. ING North America Insurance Corp*., ARB 06-071, 2005-SOX-051 (ARB Aug. 29, 2008); *Negron v. Vieques Air Link, Inc*., ARB 04-021, 2003-AIR-10 (ARB Jan. 8, 2004); *Hasan v. J.A. Jones, Inc*., ARB 02-123, 2002-ERA-5 (ARB June 25, 2003). An ALJ's recommended grant of summary decision, however, is reviewed *de novo*. *Reddy v. Medquist, Inc*., ARB 04-123, 2004-SOX-35 (ARB Sept. 30, 2005) (*citing Honardoost v. Peco Energy Co*., ARB 01-030, 00-ERA-36, (ARB Mar. 25, 2003)). Dismissals for failure to prosecute or to comply with the federal rules or any order of the court are reviewed under an abuse of discretion standard. *Howick v. Campbell-Ewald Co*., ARB 03-156 & 04-065, 2003-STA-6 & 7 (ARB Nov. 30, 2004).

> In a 2014 STAA retaliation case, the ARB defined substantial evidence review:
> [I]n conducting our review, we must uphold an ALJ's findings of fact to the extent they are supported by substantial evidence, even if there is also substantial evidence for the other party, and even if we justifiably disagree with the finding. *Bobreski v. J. Givoo Consultants*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 8 (ARB June 24, 2011). Substantial evidence is evidence that a reasonable person might accept to support a conclusion. *Id*. "[T]he determination of whether substantial evidence supports [an] ALJ's decision is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion." *Id*. (internal quotations and citations omitted). "A determination whether evidence is substantial on the record considered as a whole must 'take into account whatever in the record fairly detracts from its weight.'" *Id.* (quoting *Universal Camera Corp. v. NLRB*, 340

> U.S. 474, 488 (1951)). "'A single piece of evidence will not satisfy the substantiality test if the [adjudicator] ignores, or fails to resolve, a conflict created by countervailing evidence.'" *Id*. (quoting *Dorf v. Bowen*, 794 F.2d 896, 901 (3d Cir. 1986)).

Clark v. Hamilton Hauling, LLC, ARB No. 13-023, ALJ No. 2011-STA-7, at 4-5 (ARB May 29, 2014). And in a 2014 ERA retaliation case, the ARB established the following three-part analysis for substantial evidence review:

> Given these principles, the substantial evidence test requires us to apply a three-part analysis for each finding of fact relevant to the issues on appeal: (1) whether the ALJ and/or the parties have identified record evidence for each of the material fact findings; (2) whether the supporting evidence logically supports the fact finding; and, if so, (3) whether the record as a whole overwhelms the fact finding or contains factual disputes that expose the fact finding as still unresolved. We must be convinced that each fact finding has evidence allowing for a logical inference that arguably fits with the remaining record. We listed these three analytical steps in a self-evident progressive order, but we recognize that any one of these steps alone can expose the lack of substantial evidence and that no particular order is required.

Bobreski v. J. Givoo Consultants, Inc., ARB No. 13-001, ALJ No. 2008-ERA-3, at 13-14 (ARB Aug. 29, 2014).

Within 120 days of conclusion of the hearing (generally 130 days from ALJ decision), the ARB must issue a final decision. 29 CFR § 1980.110(c); 49 U.S.C. § 42121(b)(3)(A). The ARB has opined this 120-day period is directory and not jurisdictional. *Welch v. Cardinal Bankshares Corp*., ARB 04-054, 2003-SOX-15 (ARB May 13, 2004). A complainant can remove a SOX action to district court while an appeal of the ALJ's decision is pending before the ARB (as long 180 days have passed since the filing of the complaint). *Heaney v. GBS Properties LLC*, ARB 05-039, 2004-SOX-72 (ARB May 19, 2005); *Allen v. Stewart Enterprises, Inc*., ARB 05-059, 2004-SOX-60 (ARB Aug. 17, 2005).

However, there is district court precedent for returning fully-tried administrative cases to the ARB with an order of mandamus directing the ARB to issue a prompt decision. *See* "Removal to Federal Court on or after 180 days," *infra*.

i. Timeliness of Appeal

In *Svendsen v. Air Methods, Inc*., ARB 03-074, 2002-AIR-16 (ARB Aug. 26, 2004), the ARB decided that it is the date that the decision "was issued," not the date the ALJ signed his Recommended Decision and Order, that triggers the period for appealing the ALJ's decision.

The limitations period for filing a petition for review with the ARB is considered an internal procedural rule that is subject to equitable tolling. *See Stoneking v. Avbase Aviation*,

ARB 03-101, 2002-AIR-7, at 2 (ARB July 29, 2003); *Herchak v. America West Airlines, Inc*., ARB 03-057, 2002-AIR-12, at 5 (ARB May 14, 2003).

In *Patino v. Birken Manufacturing Co.*, ARB 09-054, 2005-AIR-023, at 3 (ARB Nov. 24, 2009), the ARB held that "[I]t is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review." Regarding reasons for tolling, "the ARB has consistently held that attorney error does not support equitable tolling because '[u]ltimately, clients are accountable for the acts and omissions of their attorneys.'") *Id.* at 4 (alternation in original) (citation omitted). Further, "'[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.'" *Id*. at 4 (citing *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 152 (1984)) (alteration in original).

In *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-21 (ARB Sept. 30, 2010), the ARB declined to apply equitable tolling where the complainant's attorney received the ALJ's decision two days before a petition for review was due and failed to request an enlargement of time to file the petition.

ii. Interlocutory Appeals

The ARB has "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute." Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct 17, 2002). However, the ARB, citing "a strong policy against piecemeal appeals," generally does not accept interlocutory appeals of non-final ALJ orders. *See, e.g., Jordan v. Sprint Nextel Corp*., ARB 06-105, 2006-SOX-41 (ARB June 19, 2008); *Welch v. Cardinal Bankshares Corp.*, ARB 04-054, 2003-SOX-15 (ARB May 13, 2004) (denying interlocutory appeal of ALJ order finding that respondent retaliated against claimant where the ALJ had bifurcated consideration of liability and damages and had not yet ruled on damages); *Hibler v. Exelon Generation Co., LLC*, ARB 03-106, 2003-ERA-9 (ARB Feb. 26, 2004) (denying interlocutory appeal of order denying respondent's motion to dismiss on basis that claimant failed to timely serve respondent with his hearing request); *Walton v. Nova Information*, ARB 06-100, 2005-SOX-107 (ARB Sept. 29, 2006) (denying interlocutory appeal of ALJ's order denying motion to dismiss).

To obtain review of an ALJ's interlocutory order, a party seeking review is generally required first to obtain certification of the interlocutory questions from the ALJ. *Somerson v. Mail Contractors of America*, ARB 02-118, 02-STA-44 (ARB Feb. 13, 2003); *Puckett v. Tennessee Valley Auth*., ARB 02-070, 2002-ERA-15 (ARB Sept. 26, 2002). The ARB has held that it will apply the procedure for interlocutory review set forth at 28 U.S.C. § 1292(b). *Jordan v. Sprint Nextel Corp.*, ARB 06-105, 2006-SOX-041 (ARB June 19, 2009). Under 28 U.S.C. § 1292(b), a district judge may certify an interlocutory order for appeal when: (1) the order "involves a controlling question of law as to which there is substantial ground for difference of opinion"; and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In *Hibler v. Exelon Generation Co., LLC*, ARB 03-106, 2003-ERA-9 (ARB Feb. 26, 2004), and *Welch v. Cardinal Bankshares Corp*., ARB 04-054, 2003-SOX-15 (ARB May 13,

2004), the ARB held that even if the ALJ certifies an issue for appeal under 28 U.S.C. § 1292, the ARB will evaluate whether interlocutory appeal is appropriate under the collateral order exception. In *Welch*, the ARB declined to decide whether the failure to obtain certification is fatal to a request for interlocutory review.

In *Gloss v. Marvell Semiconductor, Inc.*, ARB No. 10-033, ALJ No. 2009-SOX-11 (ARB Jan. 13, 2010), the ARB denied interlocutory review of an ALJ's decision that the respondent waived attorney-client privilege and work product doctrine objections base on the Supreme Court's holding in *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009). *See also Fernandez v. Navistar Int'l Corp.*, ARB No. 10-035, ALJ No. 2009-SOX-43 (ARB Mar. 4, 2010) (declining to review an ALJ's order finding that respondent waived any privilege that may have attached to a report summarizing an internal investigation and finding that "exercising jurisdiction over the issue . . . would not . . . expedite the litigation and resolution of this case").

In *Johnson v. U.S. Bancorp*, ARB No. 11-018, ALJ No. 2010-SOX-37 (ARB Mar. 14, 2011), the ALJ denied a motion requesting that the ALJ certify to the ARB for interlocutory review the issue of whether the respondent waived the attorney-client privilege when it relied on an internal investigation as an affirmative defense. The respondent then filed a petition for interlocutory review with the ARB, and the ARB denied the petition, citing *Mohawk Indus. Inc. v. Carpenter*, *supra*, and noting the availability of protective, in camera, and other orders to preserve potentially privileged material.

iii. Sanctions

Failure to adhere to ARB orders, such as briefing schedules, may be grounds for dismissal. *See Cunningham v. Washington Gas Light Co*., ARB 04-078, 2004-SOX-14 (ARB Apr. 21, 2005) (dismissing appeal for failure to file a brief and failure to file a response to the ARB's show cause order); *Reid v. Niagara Mohawk Power Corp*., ARB 04-181, 2000-ERA-23 (ARB Dec. 8, 2004) (dismissing appeal for failure to file a petition for review of ALJ's recommended decision within 10 business days of the date on which the ALJ issued the recommended decision and failing to respond to show cause order); *Reid v. Constellation Energy Group, Inc.*, ARB 04-107, 2004-ERA-8 (ARB Dec. 17, 2004) (dismissing appeal for failure to comply with briefing schedule); *Powers v. Pinnacle Airlines, Inc*., ARB 04-035, 2003-AIR-012 (ARB Sept. 28, 2004) (Board dismissed Powers' appeal for failure to file a conforming brief), *cert. denied,* 579 U.S. 917 (2006); *Melendez v. Exxon Chemical Americas*, ARB 03-153, 1993-ERA-6 (ARB Mar. 30, 2004); *Gass v. Lockheed Martin Energy Systems, Inc*., ARB 03-093, 2000-CAA-22 (ARB Jan. 29, 2004); *Steffenhagen v. Securitas Sverige, AR*, ARB 03-139, 2003-SOX-24 (ARB Jan. 13, 2004). In *Rowland v. NASD*, ARB 07-098, 2007-SOX-006, at 8 (ARB Sept. 25, 2009), the ARB held that while 29 C.F.R. § 18.6(b) allows for the discretionary filing of an answer in support or in opposition of a motion, it "does not negate the discretion given the ALJ . . . [to] call for the submission of briefs [in a briefing schedule] or to rule that a decision be rendered against a party who does not comply with an order." A party claiming extraordinary hardship as a reason for delayed filing or failure to comply with a briefing schedule should be prepared to show evidence of the hardship and should request an extension prior to the deadline. *Id*. at 7 (complainant blamed computer hacking for delay in submitting response to motions to dismiss).

iv. Enforcement of a Final Order

Proceedings to compel compliance with the Secretary's final order may be brought by a party in federal district court. 49 U.S.C. § 42121(b)(6)(A); 29 CFR § 1980.113. The court has jurisdiction without regard to the amount in controversy or citizenship of the parties. Additionally, the Secretary may file a civil action in federal district court to enforce a final order. 49 U.S.C. § 42121(b)(5).

p. Appeal to Court of Appeals

Within 60 days of issuance of the DOL's final decision, an aggrieved party may file a petition for review to the United States Court of Appeals in the circuit in which the alleged violation occurred, or the circuit in which the complainant resided on the date of the alleged violation. 49 U.S.C. § 42121(b)(4)(A); 29 CFR § 1980.112(a).

SOX does not set forth the standard of review for appeals to the Court of Appeals. Accordingly, the default standards provided in the Administrative Procedures Act ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law") should apply. *See Alaska Dep't. of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461 (2004). Under the APA, the court is bound by the ARB's factual findings if they are supported by substantial evidence. 5 U.S.C. § 706(2). *See UPS v. Administrative Review Bd*., No. 97-3544, 1998 U.S. App. LEXIS 24978 (6th Cir. 1998). In *Roadway Express, Inc. v. Admin. Review Bd*., 2004 U.S. App. LEXIS 25578 (6th Cir. Nov. 22, 2004), the Sixth Circuit stated the legal conclusions of the ARB are to be reviewed "*de novo*, with the proper deference due an agency interpreting the statute it is charged with administering."

q. Removal to Federal Court On or After 180 Days

If the DOL has not issued a *final* decision within 180 days and the delay is not a result of the complainant's bad faith, the complainant may withdraw his or her administrative complaint and file an action for *de novo* review in federal district court. 18 U.S.C. § 1514A(b)(1)(B). *See Kelly v. Sonic Auto. Inc*., ARB 08-027, 2008-SOX-003 (ARB Dec. 17, 2008) (affirming ALJ's decision that the DOL was deprived of jurisdiction over the complainant's SOX complaint once the complainant filed his action in district court seeking *de novo* review). The district court has jurisdiction without regard to the amount in controversy. Moreover, the same burdens of proof that apply before the ALJ apply in the district court. 18 U.S.C. § 1514A(b)(2)(C).

i. Issues Relating to Removal

The right to *de novo* review after a complaint has been pending before the DOL for over 180 days without a final decision is absolute. *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239 (4th Cir. 2009). In *Stone*, the Fourth Circuit defined "*de novo*" and found "the plain language of § 1514A(b)(1)(B) unambiguously establishes a Sarbanes-Oxley whistleblower complainant's right to *de novo* review in federal district court if the DOL has not issued a "final decision" and the statutory 180-day period has expired." *Id.* at 9. The *Stone* decision makes it clear that if the

administrative process at the DOL does not move quickly, a whistleblower has an unwavering right to start afresh in district court. Deferring to an administrative agency is in direct conflict with the language of SOX which provides for *de novo* review.

Section 806 does not specify a time limitation within which a SOX claim must be filed in district court after the complaint has been removed from DOL. In *Jones v. Southpeak Interactive Corp*, --- F.3d ----, 2015 WL 309626 (4th Cir. Jan. 26, 2015), the Fourth Circuit held that the four-year "catchall" time limit set forth in 28 U.S.C. § 1658(a) supplies the limitations period for removing a SOX claim to federal court. The court rejected Appellants' argument that a shorter 2-year limitation period for fraud claims should apply because a SOX whistleblower need not prove securities fraud.

In *Jordan v. Sprint Nextel Corp*., 3 F. Supp. 3d 917 (D. Kan. Mar. 11, 2014), the court held that neither 28 U.S.C. §1658(a) nor §1658(b) apply to a SOX whistleblower claim and that there is no limitations period within which a SOX complainant must initiate an action in district court after removing the claim from DOL.

In *Candler v. URS Corp.*, ARB No. 13-045, ALJ No. 2012-SOX-5 (ARB July 3, 2013), Candler removed her SOX claim to federal court after an ALJ had dismissed the case and she had filed a petition for review with the ARB. The respondent opposed the ARB's dismissal of Candler's SOX complaint on the ground that the complainant waived her right to go to district court in a representation to the ALJ and engaged in bad faith delay. The ARB held that, pursuant to 29 C.F.R. § 1980.114(b), a complainant exercising her right to seek *de novo* review in federal court need only give notice of her intent to obtain *de novo* review in district court within seven days after filing a complaint in federal court. As Candler notified the ARB that she filed a complaint in federal court, the ARB dismissed her complaint.

In *Trusz v. UBS Realty Investors, LLC*, 2010 WL 1287148 (D. Conn. Mar. 30, 2010), the court held that amending a SOX complaint to include additional acts of retaliation does not reset the 180-day period that a complainant must wait before removing the complaint from DOL to federal court.

Within seven days after filing an action in district court, the complainant must file a copy of the file-stamped complaint notice with the ALJ or ARB, and serve such notice upon various divisions in DOL. 29 CFR § 1980.114(b).

Standard pleading requirements apply in district court actions. For instance, in *Stone v. Duke Energy Corp*., No. 3:03-CV-256, slip op. (W.D.N.C. Feb. 11, 2004), the court dismissed the plaintiff's SOX complaint for failure to contain "a short and plain statement of the claim" and failure to present claims in separate counts for clear presentation of the matters set forth. The court reasoned that it would "not waste its time searching through Plaintiff's disorganized and indefinite Complaint for a *prima facie* case."

Complainants must exhaust their administrative remedies before filing a complaint in federal court. 18 U.S.C. § 1514A(b)(1)(A). Being an attorney does not exempt a plaintiff from this requirement. *Curtis v. Century Sur. Co.*, 320 F.App'x 546 (9th Cir. 2009). In *McClendon v.*

Hewlett-Packard Co., No. 05-Civ-087, 2005 WL 2847224 (D. Idaho Oct. 27, 2005), the district court determined that plaintiff's complaint alleging that defendant took away his job duties was untimely under OSHA's administrative filing period. Plaintiff opted out of the DOL forum and filed an action in the district court, alleging he was not time-barred from asserting other adverse employment actions. The court stated each discriminatory act starts the clock for filing an OSHA complaint. Since plaintiff's additional adverse employment actions were not asserted in his OSHA complaint, the court could not review them.

Where a party withdraws an appeal pending before the ARB, the ALJ's decision becomes the final decision of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). *Lowe v. Terminix Int'l. Co., L.P.*, ARB 07-004, 2006-SOX-89 (ARB Aug. 23, 2007); *Hagman v. Washington Mutual Bank, Inc.*, ARB 07-039, 2005-SOX-73 (ARB May 23, 2007). A withdrawal is not the same as removal to federal court. *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239 (4th Cir. 2009).

ii. Jury Trial

Section 922(c) of the Dodd-Frank Act expressly clarifies that Section 806 plaintiffs have the right to a jury trial. Under pre-Dodd-Frank law, it was unsettled whether plaintiffs were entitled to a jury trial. *See, e.g., Walton v. Nova Info. Sys.*, 514 F. Supp. 2d 1031 (E.D. Tenn. 2007); *Schmidt v. Levi Strauss & Co.*, 621 F. Supp. 2d 796 (N.D. Cal. 2008); *Murray v. TXU*, No. 3:03-cv-0888, 2005 WL 1356444, at *4 (N.D. Tex. June 7, 2005); *Fraser v. Fiduciary Trust Co. Int'l*, 417 F. Supp. 2d 310 (S.D.N.Y. 2006); *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332 (S.D. Fla. 2004).

iii. Recent Large Verdicts

Subsequent to the 2010 amendments to SOX clarifying the right to a jury trial, some SOX plaintiffs have obtained substantial recoveries. Most recently, on February 3, 2017, a California jury awarded approximately $11 million to former Bio-Rad Laboratories Inc. General Counsel Sanford Wadler in his whistleblower retaliation lawsuit. *See Wadler v. Bio-Rad Laboratories Inc. et al.,* No. 3:15-cv-02356, Dkt. No. 215 (N.D. Cal. Feb. 7, 2017). Wadler worked as GC at Bio-Rad for approximately 25 years. He blew the whistle internally by reporting potential violations of the FCPA. Bio-Rad investigated Wadler's disclosures and concluded that there was no evidence of either a violation or an attempted violation of the FCPA. In June 2013, Bio-Rad terminated Wadler's employment due to alleged poor work performance and behavior. At trial, Wadler offered proof that subsequent to the termination of his employment, Bio-Rad's CEO prepared a backdated evaluation of Mr. Wadler's performance for the ostensible purpose of justifying the termination of Wadler's employment. Bio-Rad has appealed the decision to the Ninth Circuit.

In 2015, a New York federal jury awarded $1.6 million in compensatory damages to a whistleblower in a SOX retaliation lawsuit against Progenics Pharmaceuticals. *See Perez v. Progenics Pharm.*, No. 1:10-cv-08278 (S.D.N.Y Aug. 5, 2015). In 2014, a SOX plaintiff received a record $6 million verdict. *See Zulfer v. Playboy Enterprises, Inc.* No. 2:12-cv-08263 (C.D. Cal. Mar. 5, 2014). The *Zulfer* jury concluded that the case also warranted punitive

damages, which were available under state law, but not SOX. The plaintiff and Playboy settled the claim before a determination of punitive damages was made.

In 2013, the Court of Appeals for the Ninth Circuit affirmed an award of $2.2 million in damages and interest and awarded $2.4 million in attorneys' fees and costs to an employee and his wife who brought claims under SOX and Nevada state law. *Van Asdale v. Int'l Game Tech.*, 549 F. App'x 611, 613 (9th Cir. 2013). Significantly, the lower court dismissed the Van Asdales' state-law claims, meaning that the entire award was based on their SOX claim. *Id.* at 614.

The large verdicts in *Wadler*, *Perez,* and *Zulfer* and the award of damages and fees in *Van Asdale* may encourage more plaintiffs – and their counsel – to utilize SOX's kick-out provision, forgoing an administrative determination from the backlogged DOL docket in favor of a jury trial in federal court.

r. Alternative Dispute Resolution

Prior to the enactment of the Dodd-Frank Act, the Department of Labor and federal courts consistently held that Section 806 claims are subject to mandatory arbitration. *Guyden v. Aetna, Inc*., 544 F.3d 376 (2nd Cir. 2008) (granting the employer's motion to compel mandatory arbitration of a SOX claim). The Dodd-Frank Act amended SOX by making unenforceable any predispute arbitration agreement or other attempt to condition employment on the employee's waiver of her rights and remedies under SOX.

Courts are divided as to whether the Dodd-Frank Act amendment to Section 806 barring arbitration of such claims should apply to claims in which the parties entered into an arbitration agreement prior to the July 2010 enactment of Dodd-Frank. In *Wong v. CKX, Inc.*, No. 11 Civ. 6291, 2012 WL 3893609 (S.D.N.Y. Sept. 11, 2012), the district court denied defendant's attempt to enforce an arbitration provision in an employment agreement that the plaintiff entered into prior to the enactment of Dodd-Frank. The court reasoned that because "the right to have a dispute heard in an arbitral forum is a procedural right that affects the forum that will decide the substantive rights of the parties" and does not affect the parties' substantive rights, applying the Dodd-Frank Act amendment would not have a disfavored retroactive consequence.

In *Taylor v. Fannie Mae*, 839 F. Supp. 2d 259 (D.D.C. 2012), the district court granted a motion to compel arbitration in a SOX case in which the parties entered into an employment agreement containing an arbitration provision prior to the enactment of the Dodd-Frank Act. Relying on *Henderson v. Masco Framing Corp.*, 2011 WL 3022535 (D.Nev. July 22, 2011) the court found that retroactive application of the Dodd-Frank Act amendment would "fundamentally interfere with the parties' contractual rights and would impair the 'predictability and stability' of their earlier agreement."

In *Neal v. Asta Funding, Inc*., No. 13-cv-2438 (D.N.J. Dec. 4, 2013), the district court stayed court proceedings pending arbitration proceedings and noted that courts have "nearly uniformly" held that the SOX exemption to mandatory arbitration does not apply to SOX whistle blower claims that were arbitrable at the time the law was enacted.

s. Settlement Agreements

i. General

At any time before issuance of a final order, a SOX proceeding may be terminated on the basis of a settlement agreement entered into by the parties and approved by the ALJ. 29 CFR § 1980.111(d)(2). It is OSHA's policy to seek settlement in all cases determined to be meritorious prior to completing the investigation. OSHA Manual 3-2, 3.

However, the possibility of settlement in any given case is often complicated by factors such as the possibility of subsequent or parallel litigation between the parties. Another consideration impacting settlement is that any settlement agreement between the parties must be approved by DOL. 49 U.S.C. § 42121 (b)(3)(A); 29 CFR § 1980.111(d); *DOL Memorandum of Review of Whistleblower Settlements* (July 10, 2003) (settlements reached during the investigative stage must be reviewed and approved by OSHA and settlements reached after OSHA issues its findings must be approved by the ALJ or ARB).

OSHA issued new policy guidance on August 23, 2016, regarding provisions in settlement agreements that restrict whistleblowing. *See DOL Memorandum New policy guidelines for approving settlement agreements in whistleblower cases* (Aug. 23, 2016), available at https://www.whistleblowers.gov/memo/2016-08-23. 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 referred to in settlement agreements as a 'reward') from a government-administered whistleblower award program for providing information to a government agency."

Employers have an incentive to settle SOX claims where a general release of other existing and potential claims between the parties can be obtained from the complainant. In furtherance of its policy to seek settlement in all cases, the DOL has generally approved settlement agreements containing a general release of claims. *See Moore v. Cooper Cameron,*

2004-SOX-37 (ALJ July 21, 2004) (ALJ accepted settlement agreement containing general release as fair and reasonable).

However, in *Coker v. Wal-Mart Stores, Inc*., 2004-SOX-33 (ALJ June 4, 2004), an ALJ opined that a settlement agreement containing a general release including unstated claims under other laws for which the DOL lacked jurisdiction and potential claims arising in the future should be rejected as not fair, reasonable or in the public interest. The ALJ reasoned that the DOL's authority over settlement agreements "is limited to such statutes as are within the Secretary's jurisdiction and is defined by the applicable statute."

In *Michaelson v. OfficeMax, Inc*., 2004-SOX-17 (ALJ June 21, 2004), an ALJ rejected a settlement agreement because it contained an overly broad general release and confidentiality provision and proposed modification of those provisions. Regarding the general release, the ALJ found that to the extent the provision could be interpreted to include a waiver of complainant's rights based upon future actions, the provision was contrary to public policy. Although the ALJ noted that the DOL's authority over settlement agreements is limited to those statutes which are within the Secretary's jurisdiction, he did not (unlike the ALJ in *Coker*) find that the waiver of claims involving multiple other state and federal laws necessarily rendered the agreement unfair or unreasonable, but he did explain that his review of the agreement was limited to a determination whether the terms of the agreement represented a fair, adequate and reasonable settlement of the complainant's allegations concerning the SOX violations.

Parties sometimes may seek to circumvent the DOL settlement approval requirement. For example, in *Wallace v. Routeone, LLC*, 2005-SOX-4 (ALJ Jan. 25, 2005), the complainant had filed claims against respondent under both SOX and state law. The parties settled the state law claim and executed a written settlement and release agreement. The complainant, satisfied with the relief obtained, then moved to dismiss as moot his objections to OSHA's determination. While 29 CFR § 1980.111 requires an ALJ's approval of settlements if a complainant seeks to withdraw his or her objections because of a settlement, the ALJ held that this provision refers only to a settlement of the SOX case, not the settlement of a contemporaneous state claim. Therefore, the complainant was permitted to dismiss the SOX case as moot.

The ARB held in 2012 that the regulations implementing the STAA whistleblower protection provision do not allow the Secretary, Board, or ALJ to dismiss a whistleblower complaint on the basis of a severance agreement executed before a whistleblower complaint was filed. *Gilbert v. Bauer's Worldwide Transportation*, ARB No. 11-019, ALJ No. 2010-STA-22 (ARB Nov. 28, 2012). In *Gilbert*, both the OSHA and the ALJ dismissed the STAA complaint on the ground that the Complainant had signed a severance agreement. The Complainant argued that the severance agreement was invalid because it was signed under duress. The ARB noted the absence of any statute or regulation expressly empowering or requiring the ARB to adjudicate pre-filing severance agreements, and also noted that it had held in an ERA whistleblower case that an employer should not be allowed to rely on a severance agreement as a waiver of the employee's rights to recover damages, citing *Khandelwal v. Southern Calif. Edison*, ARB No. 98-159, ALJ No. 1997-ERA-6 (ARB Nov. 30, 2000).

Another issue to consider regarding settlement is confidentiality. In *Doherty v. Hayward Tyler, Inc*., ARB 04-001, 2001-ERA-43 (ARB May 28, 2004), the ARB found that the parties' submissions, including a settlement agreement, may become part of the record of the case and may be subject to disclosure under FOIA. Therefore, the ARB denied a joint motion requesting an order that the settlement agreement not be disclosed, except as set forth in the agreement. Likewise, in *Michaelson v. OfficeMax, Inc*., 2004-SOX-17 (ALJ June 21, 2004), the ALJ found that the agreement's confidentiality provision could not prevent disclosure to governmental agencies, and that the agreement could be subject to disclosure pursuant to a FOIA request. *See also Jacques v. Competitive Technologies, Inc*., 2005-SOX-34 (ALJ June 14, 2005); *Bahr v. Mercury Marine and Brunswick Corp*., 2005-SOX-18 (ALJ June 13, 2005); *Hogan v. Checkfree Corp*., 2005- SOX-7 (ALJ May 10, 2005).

Parties settling at the appellate stage before the ARB may be able to avoid submitting a settlement agreement to the Labor Department and risking disclosure of settlement terms under FOIA by withdrawing the appeal. As a practical matter, however, it should be noted that the ALJ's decision then becomes the Labor Department's final (and enforceable) order. In *Concone v. Capital One Financial Corp*., ARB 05-038, 05-SOX-6 (ARB May 13, 2005), respondent's attorney sent the ARB a letter stating the parties had reached a settlement. The parties filed a Joint Stipulation of Dismissal agreeing to dismiss the action with prejudice and the ARB issued an Order Requiring Clarification ordering the parties to either: (1) withdraw their objections or (2) submit a copy of the settlement for the Board's approval. The parties filed a Joint Motion to Withdraw Joint Stipulation of Dismissal and complainant filed a Notice of Withdrawal of Objections which the Board approved and dismissed the appeal.

In *Walker v. Pacificare Health Systems, Inc*., 2005-SOX-43 (ALJ July 15, 2005), the ALJ approved the settlement agreement and agreed to place it in a separate envelope marked confidential. The court reasoned the agreement contained confidential commercial information which could be exempt from disclosure under FOIA requests.

In *Vannoy v. Celanese Corp.*, ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 27, 2013), the ARB denied the parties' motion to vacate the ALJ's decision as a prerequisite for the settlement. And the ARB rejected the parties' request to remove the ALJ's decision "from any website or database affiliated with the United State Department of Labor or record of published opinions." The ARB held that the Settlement Agreement is part of the record of the case and is therefore subject to FOIA.

ii. Issues Associated with Settlements

In *Gonzalez v. J.C. Penney Corp., Inc.*, ARB No. 10-148, ALJ No. 2010-SOX-045, (ARB Sept. 28, 2012), the ARB held that ALJ review of OSHA's approval of the settlement was warranted because there were "legitimate concerns as to OSHA's approval process that could invalidate the finality of the Secretary's order." *Id.* at 8. After reaching a settlement with the respondent, complainant Gonzalez withdrew her complaint from OSHA. OSHA reviewed the agreement, pursuant to 29 C.F.R. § 1980.111(e), and approved it as "fair, adequate, and reasonable" despite the fact that respondent J.C. Penney had provided OSHA a copy of the agreement with the settlement amount redacted. *Id.* at 4. The ARB found that "OSHA erred in

approving a settlement agreement that redacted the monetary settlement amount" because terms of a settlement agreement, including the monetary terms, are a matter of public concern. *Id.* at 9. However, the ARB held that this error did not warrant withdrawal of approval, in part because the ALJ had reviewed the non-redacted agreement and determined that it was fair and reasonable. *Id.* Gonzalez's argument that the agreement should be rescinded because her attorneys pressured her to sign it also failed. *Id.* at 10-11. The ARB relied on *Macktal v. Brown & Root, Inc.*, 923 F.2d 1150 (5th Cir. 1991), which likewise would not invalidate an agreement on this basis. Although in *Macktal* and in the instant case there was evidence of attorney pressure on the complainant to sign, the ARB explained that the complainant was free to get another attorney and, therefore, the complainant and not the respondent should bear the risk of the complainant's attorney's misconduct. *Id.* at 10-11.

In *Michaelson v. Officemax, Inc.*, 2004-SOX-17, at 3 (ALJ June 11, 2004), the ALJ refused to approve a settlement agreement because it included a broad confidentiality provision that "could be construed as restricting Complainant from communicating voluntarily with or providing information to any federal or state governmental agency." Likewise, an administrative record cannot be sealed in order to maintain confidentiality of a settlement. *See, e.g., Kacques v. Competitive Technologies, Inc.*, 2005-SOX-34, at 2 (ALJ June 14, 2005); *Thomas v. Pulte Homes, Inc.,* 2005-SOX-9 (ALJ Aug. 9, 2005) (denying motion to seal agreement).

iii. Enforcement

In any case where the employer fails to comply with the terms of a settlement agreement, OSHA opines that it may treat such failure as a new instance of retaliation and require the opening of a new case. Alternatively, direct enforcement of the agreement may be sought in court. OSHA Manual 6-24.

In *Chao v. Alpine, Inc*., No. 04-Civ-102, 2004 WL 2095732 (D. Me. Sept. 20, 2004), the DOL had filed a complaint seeking to enforce back pay, interest and attorney fees awarded by the ARB. While pending before the district court, the attorneys for the employee and the defendant entered into a verbal settlement agreement, the defendant sent a check to the employee's attorney to hold, and the employee's attorney sent a settlement agreement to the defendant for signature and return for signing by the employee. Upon return, however, the employee refused to sign. The check was not returned to the defendant. The defendant then sought enforcement of the settlement agreement by the district court. The court granted enforcement, reasoning that the employee was bound by the agreement of her counsel to the settlement, the counsel having not expressly conditioned the agreement on the employee's signature or on the employee's acceptance of the terms of the agreement.

t. Effect of Bankruptcy Proceedings

In *Davis v. United Airlines, Inc*., ARB 02-105, 2001-AIR-5 (ARB May 30, 2003), the ARB held that whistleblower actions brought pursuant to AIR21 are subject to the automatic stay of the Bankruptcy Code, 11 U.S.C.A. § 362(a)(1), and are not exempt from the stay pursuant to § 362(b)(4), which applies to actions and proceedings by a governmental unit to enforce its police and regulatory authority. In contrast, in *Briggs v. United Airlines*, 2003-AIR-3 (ALJ Feb.

13, 2003), the ALJ held that a DOL proceeding pursuant to AIR21 was exempt from the automatic stay provision under the regulatory and police powers exception.

In *Bettner v. Crete Carrier Corp*., 2004-STA-18 (ALJ Oct. 1, 2004), the complainant filed a voluntary petition in bankruptcy. Earlier, he had filed objections to the Secretary's determination denying him relief under the STAA whistleblower provision. The ALJ held that the automatic stay provision of the Bankruptcy Act does not apply to suits by the debtor in the Seventh Circuit and, therefore, the STAA proceeding would proceed.

C. Remedies

Although SOX does not authorize punitive damages or double back pay, recent cases construing SOX remedies suggest that it provides robust remedies to successful complainants.

SOX provides for the following remedies to a prevailing whistleblower:

1. IN GENERAL. An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

2. COMPENSATORY DAMAGES. Relief for any action under paragraph (1) shall include:

   (i) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

   (ii) the amount of back pay, with interest; and

   (iii) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

3. RIGHTS RETAINED BY EMPLOYEE. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

18 U.S.C. § 1514A(c). This language is comparable to the remedies provisions found in other whistleblower statutes administered by the DOL. *See, e.g.,* the Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(b)(3)(B); the National Transit Systems Security Act, 6 U.S.C. § 1142(d); and the Federal Railroad Safety Act, 49 U.S.C. § 20109(e).

In addition to civil liability, the Act contains criminal penalties for those interfering with the employment of certain whistleblowers. 18 U.S.C. § 1513(e). The criminal provision is discussed in Section III, *infra.*

1. Reinstatement

The Act expressly includes reinstatement with the same seniority as a remedy available to a prevailing SOX claimant. 18 U.S.C. § 1514A(c)(2)(A). Reinstatement is a standard component of a "make whole" remedy. *Hobby v. Georgia Power Co.,* ARB No. 98-166, at 7-8 (ARB Feb. 9, 2001); *Hagman v. Washington Mutual Bank, Inc.,* 2005-SOX-00073, at 33 (ALJ Dec. 19, 2006); *Brown v. Lockheed Martin Corp.*, 2008-SOX-49, at 51-52 (ALJ Jan. 15, 2010).

In addition to mandating reinstatement, the Act (through its incorporation of AIR21's procedural provisions) and the SOX implementing regulations empower OSHA to require the reinstatement of a complainant-employee even prior to the *de novo* hearing on the merits before an ALJ. 29 C.F.R. § 1980.105(a)(1). The regulations further provide that an employer's request for a hearing before an ALJ does not stay the preliminary reinstatement order. 29 C.F.R. § 1980.105(b)(1). Additionally, the regulations provide that a preliminary order of reinstatement is to remain effective while the ALJ's recommended decision is reviewed by the ARB. 29 C.F.R. § 1980.110(b).

OSHA has ordered a number of reinstatements in the past few years, and significantly increased the frequency with which it reinstated whistleblowers in 2012 under the various whistleblower-protection statutes it administers. On September 5, 2013, OSHA ordered MGM Resorts to reinstate a SOX whistleblower and pay damages of approximately $325,000. OSHA also ordered MGM to post a notice informing employees of SOX whistleblower protections, required the employer to expunge the employee's personnel record of references to the termination, and ordered the company provide the employee with a neutral job reference. *See* Press Release, OSHA Orders MGM Resorts To Reinstate Whistleblower Immediately and Pay More Than $325,00 in Damages (Sept. 5, 2013), *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=24744. According to OSHA's "News Releases – Whistleblower" page on its website, OSHA ordered 40 whistleblower reinstatements in 2012, up from 27 in 2011, and 26 in 2010.[7] On September 10, 2012, OSHA ordered Dana Holding Corporation to reinstate a SOX whistleblower, in addition to an award of $275,000 in back pay, vacation pay, pension and 401(k) contributions, compensatory damages, and attorneys' fees. OSHA also ordered that any negative references be expunged from the whistleblower's record, that Dana Corp. post a notice about Sarbanes-Oxley whistleblower provisions for all employees, and that the company provide training on non-retaliation to employees. *See* Press Release, US Dep't of Labor Orders Dana Holding Corp. to Pay Whistleblower Nearly $275,000 in Back Wages, Damages (Sept. 10, 2012), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=22971.[8] OSHA has ordered a number of reinstatements under

[7] *See* OSHA, News Releases – Whistleblower, http://www.osha.gov/pls/oshaweb/owanews_releases.level_subject?p_keyvalue=Whistleblower.

[8] A month earlier OSHA ordered T-Mobile to pay a SOX whistleblower an award of nearly $346,000, provide a neutral reference, and train employees on the provisions of Sarbanes-Oxley. OSHA found that the whistleblower was terminated in retaliation for blowing the whistle on the company's practice of fraudulently billing roaming charges. *See* Press Release, US Department of Labor Orders T-Mobile and Deutsche Telekom to Pay Whistleblower Nearly $346,000 in Back Wages, Damages (August 9, 2012), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=22830.

statues it enforces other than SOX.[9]

In *Stroupe v. Branch Banking & Trust Co.*, 2008-SOX-00047 (ALJ Apr. 1, 2010), the ALJ ordered BB&T to reinstate a former BB&T corporate investigator who claimed that she had been fired after she had uncovered and reported a $100 million Ponzi scheme, which had been funded in part by fraudulent BB&T loans. Stroupe was also awarded approximately three years of back pay. BB&T argued that Stroupe had been terminated for missing work without permission, for being insubordinate, and for discussing the investigation of the development scam with other employees. The ALJ rejected BB&T's defense, holding that BB&T had failed to prove by clear and convincing evidence that Stroupe would have been terminated absent her protected activities.

Orders of "preliminary reinstatement" under Section 806 have been contested and even ignored by some employers, who have refused to reinstate complainant employees before the exhaustion of the administrative process. Such actions by employers have prompted some employees to file suit in federal district courts seeking injunctions to enforce OSHA's preliminary orders of reinstatement. In two prominent decisions, courts have held they lack the power to enforce OSHA's preliminary orders of reinstatement.

In 2006, a divided panel of the Second Circuit vacated a district court injunction to reinstate a complainant employee and ordered the district court to dismiss the complainant. *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006). The court held that the district court lacked jurisdiction to enforce a preliminary order. *Id.* at 472. Judge Jacobs observed that three provisions of § 1514A provided for federal power to enforce actions related to complaints under the Act, but none of the provisions authorized enforcement of preliminary orders. *Id.* Furthermore, Judge Jacobs found that none of the provisions of § 1514A that authorized judicial enforcement referred to AIR21's subparagraph (b)(2)(A), the source of the Secretary's power to issue a preliminary order of reinstatement. *Id.* Judge Jacobs observed that 18 U.S.C. § 1514A(b)(1)(B) provided for *de novo* review in the district court if the Secretary has not issued a final decision within 180 days, thereby reducing the need for a judicial order, that preliminary orders of reinstatement were based on no more than "reasonable cause to believe that the complaint has merit," and that immediate enforcement at each level of review could cause a rapid sequence of reinstatement and discharge, and a "generally ridiculous state of affairs." *Id.* at 474.

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[9] *See, e.g.*, Press Release: Core-Mark International Must Reinstate, Pay More than $230k to Employee Fired for Voicing Driver Safety Concerns (Mar. 4, 2015), (STAA) *available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=27519;* Press Release: Burlington Northern Santa Fe Railway Must Reinstate Injured Conductor and pay $536K in Damages for Retaliation (June 17, 2015), (Federal Railroad Safety Act) *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=28164 ; Press Release: OSHA Orders Hanford Nuclear Facility Contractor to Reinstate Worker Fired For Raising Environmental Safety Concerns (Aug. 20, 2014) (Energy Reorganization Act), *available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=26571.*

Judge Leval concurred, but expressed the view that the court should vacate the district court's injunction because the employer was denied due process. *Id.* at 476-483. Judge Straub, in dissent, noted that the failure to enforce a preliminary reinstatement order negated congressional intent to provide a quick remedy for whistleblowers. *Id.* at 483-490.

Subsequently, in *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006), *vacated and appeal dismissed*, 536 F.3d 269 (4th Cir. 2008), a district court adopted Judge Jacobs' opinion in *Bechtel* and granted the defendant employer's motion to dismiss. *Id.* at 559. The court concluded that the regulations conflicted with the plain language of the statute, which did not grant judicial authority to enforce preliminary orders. The court also noted that the efficient administration of justice requires that the administrative process be final before federal courts begin adjudication. *Id.* at 558-59. This ensured that appeals go through "all levels of the administrative process before reaching federal court." *Id.* at 558. Later, the ALJ's decision in the complainant's favor, ALJ No. 2003-SOX-15 (ALJ Feb. 15, 2005), was reversed by the ARB, No. 05-064 (ARB May 31, 2007), and the Fourth Circuit thereafter vacated the district court's order and dismissed the appeal.

The Sixth Circuit considered, but did not rule upon, the issue of the enforceability of such preliminary reinstatement orders in a case involving a charge filed against Tennessee Commerce Bank by its former CFO. On March 18, 2010, OSHA announced that it had "ordered Tennessee Commerce Bank in Nashville to reinstate the CFO, [Mr. Fort] and pay more than $1 million in back wages, interest, attorney's fees, compensatory damages, and other relief." *Fort v. Tennessee Commerce Bancorp, Inc.*, 4-1760-08-017 (OSHA Mar. 17, 2010). In total, the bank was ordered to (1) reinstate Fort as CFO immediately; (2) pay Fort's back pay; (3) pay for a bonus which Fort missed; (4) pay interest; (5) pay for seven missed Board meeting fees; (6) reinstate Fort's stock options; (7) pay Fort's medical expenses, car allowance, insurance, and job hunting expenses; (8) pay attorneys' fees; (9) expunge Fort's employment records; (10) refrain from further retaliation; and (11) post a notice to employees about their SOX rights.[10]

After the bank refused to reinstate Fort, both Fort and the Secretary of Labor filed separate actions in the Middle District of Tennessee, seeking a preliminary injunction, requiring the bank to comply with OSHA's order. The Secretary of Labor was successful in obtaining injunctive relief, *Solis v. Tennessee Commerce Bancorp. Inc. ("Solis I")*, 713 F. Supp. 2d 701 (M.D. Tenn. 2010), and the court denied the bank's motion to stay enforcement of the injunction. *Solis v. Tennessee Commerce Bancorp., Inc. ("Solis II")*, 2010 U.S. Dist. LEXIS 49827, 2010 WL 2025785 (M.D. Tenn. May 20, 2010). Five days later on appeal, the Sixth Circuit stayed enforcement of the injunction, pending expedited briefing on the issue of whether the district court had authority to issue the preliminary injunction. *Solis v. Tennessee Commerce Bancorp, Inc. ("Solis III")*, No. 10-5602, 2010 WL 11187001 (6th Cir. May 25, 2010). In so ruling, the

[10] United States Department of Labor, Press Release, US Labor Department Orders Tennessee Commerce Bank to Reinstate Whistleblower and Pay More than $1 million in Back Wages and Other Relief (Mar. 18, 2010), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17283; Letter from Cindy Coe, OSHA Regional Administrator, to Waverly Crenshaw, Attorney for Tennessee Commerce Bancorp, Inc. (Mar. 17, 2010), *available at* http://www.whistleblowers.org/storage/whistleblowers/documents/blogdocs/fortsigned%20secretarys%20findings %20and%20order%20fort%20v%20tncc2.pdf

Court stated:

> We find that the defendant's motion for a stay raises a substantial question as to the authority of the district court to issue the preliminary injunction. The defendants assert that they will suffer irreparable harm if Fort is physically reinstated immediately. They argue that Fort's reinstatement will cause disruption to the bank's personnel and operations that cannot be undone if this court finds the district court lacked authority to issue the injunction. By contrast, if the reinstatement order was properly issued, Fort can be made whole with compensatory damages, back pay, and interest. A balancing of the harms supports the issuance of a stay.

Id. at *2.

The Sixth Circuit did not rule on the matter because the case which Fort brought separately in district court was dismissed. Fort subsequently terminated the underlying administrative proceedings, and the case brought by the Secretary of Labor was therefore dismissed as moot. *See Solis v. Tennessee Commerce Bancorp, Inc. ("Solis IV")*, No. 3:10-cv-472 2010 U.S. Dist. LEXIS 114071 (M.D. Tenn. Oct. 26, 2010).

Two years after *Solis IV*, the ARB declined an interlocutory review of an ALJ's denial of a preliminary reinstatement order during remand. *See Prioleau v. Sikorskey Aircraft Corp*., ARB No. 12-089, ALJ No. 2010-SOX-3 (ARB Aug. 30, 2012). The ARB determined that the appeal was neither a proper interlocutory appeal nor an appeal of a collateral order. Further, the ARB held that the request for reinstatement was premature.

In a 2013 decision, the U.S. District Court for the District of Idaho held that it lacked jurisdiction to enforce a preliminary order of reinstatement that OSHA had issued after finding that the respondent railroad had fired the complainant in violation of the whistleblower-protection provisions of the Federal Railroad Safety Act, which, like SOX, provides for preliminary reinstatement of a prevailing complainant. *See Solis v. Union Pacific Railroad Co.,* No. 4:12-cv-00394, 2013 WL 440707 (D. Idaho Jan. 11, 2013). Looking to the AIR21 aviation-safety whistleblower law for the rules governing enforcement actions under the FRSA, the court found that "AIR21 does not empower federal district courts to enforce preliminary reinstatement orders." The court interpreted the statute to empower it to review only final orders, not preliminary ones, despite the fact that a preliminary order of reinstatement prescribes the same relief as a final order. "Although the relief may be the same," the court noted, "Congress did not indicate that preliminary and final orders should be treated the same for federal jurisdictional purposes." *Id.*, slip op. at *5. The court found a "strong presumption that judicial review will be available only when agency action becomes final" and saw that nothing in the statutory language overcame this presumption. *Id.*, slip op. at 6 (internal citation and quotations omitted).

2. Front Pay in Lieu of Reinstatement

The OSHA Manual provides that front pay is appropriate when reinstatement is not feasible. *See* OSHA Manual, at 6-2. It states that it "should be awarded from the date of

discharge up to a reasonable amount of time for the complainant to obtain another job." *Id.* The ARB has indicated that reinstatement – and not front pay – is the favored remedy under the whistleblower statutes enforced by the Department:

> "[W]histle-blower" provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes . . . . If the regulatory scheme is to effectuate its substantial goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute. Quite simply, reinstatement is important not only because it vindicates the rights of the complainant who engaged in protected activity, but also because the return of a discharged employee to the jobsite provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective.

Hobby v. Georgia Power Co.,, ARB No. 98-166, slip op. at 7-8 (ARB Feb. 9, 2001) (citations omitted).

A recent case from the Eastern District of Virginia made clear that while front pay is available under SOX, it will only be awarded when reinstatement would be inappropriate and the likelihood of harm from reinstatement requires minimal speculation. *Jones v. Southpeak Interactive Corp. of Delaware*, No. 3:12cv443, 2013 WL 6092186 (E.D. Va. Nov. 19, 2013) (denying front pay in lieu of reinstatement). Interestingly, the *Jones* court also noted that granting an award of front pay would not necessarily be a windfall to a plaintiff where the defendant had essentially ceased operations and no longer employed a CFO (the plaintiff's former position). The court held that "[i]f a plaintiff has been diverted onto a less profitable career path through the unlawful actions of his former employer, an award of front pay to compensate the plaintiff until such time as he can regain his former career track is not a windfall," and that "[t]his is true without regard to whether the former employer continues to operate and to maintain comparable opening within the company." Slip op. at 12. The court noted, however, that a plaintiff seeking front pay in the case of a defunct company or eliminate position will need to produce clear data about the impact of the termination on future earnings and the market for jobs of the type the plaintiff held at the time the defendant ceased operations. In *Jones*, the plaintiff would have been seeking an open CFO position, of which there were few.

In *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-9 (ARB Jan. 31, 2012), the ARB remanded the case to the ALJ because the ALJ "failed to provide sufficient reasons and basis for the Monthly Pay Award," which included front pay. *Id.*, slip op. at 9 (ARB Jan. 31, 2012). In particular, the ARB emphasized that front pay is appropriate only where reinstatement is not possible. In *Luder*, the plaintiff was a former pilot who suffered from a medical condition that he argued was causally linked to his employment with Continental Airlines. The ARB determined that while it was clear that the plaintiff could not return to work as a pilot, there could be other "suitable, alternative" jobs available at Continental. *Id.*, slip op. at 13. The ARB determined that the ALJ had not sufficiently explored the availability of other suitable positions making an award of front pay. *Id.* The ARB also admonished the ALJ for failing to set parameters on the front pay remedy, noting that it "must be awarded for a set

amount of time and must be based on factors that the complainant proves are reasonable." *Id.*

In *Hagman v. Washington Mutual Bank,* 2005-SOX-00073, at 33 (ALJ Dec. 19, 2006) (internal citations omitted), the ALJ noted the following in connection with awarding front pay as opposed to reinstatement:

> Although reinstatement is the preferred and presumptive remedy to make whole employees who have been discharged in violation of the Act, front pay may be awarded instead where reinstatement would be inappropriate. Front pay may be awarded as a substitute when reinstatement is inappropriate due to: (1) an employee's medical condition that is causally related to her employer's retaliatory action; (2) manifest hostility between the parties; (3) the fact that claimant's former position no longer exists; or (4) the fact that employer is no longer in business at the time of the decision. Thus, while front pay exists as a potential remedy in a SOX case, it must be determined whether it is an appropriate remedy to which Complainant is entitled.

As noted in *Hagman*, where the employer is no longer in business at the time of the decision, a plaintiff-employee who is awarded back pay or front pay, or both, will only be entitled to such compensation up to the point in time when the employer went out of business – the rationale being that, in any event, the employee would have been out of a job by that time. *See Kalkunte II,* ARB Nos. 05-139, 05-140, at 15 (ARB Feb. 27, 2009), (holding that "dissolution of the company is a superseding intervening cause that cuts off [complainant's] entitlement to back or front pay"). The ALJ in *Hagman* expounded upon that point as follows:

> Under whistleblower case law, it may be appropriate to award front pay in lieu of reinstatement where the employer has closed or restructured its business such that it cannot offer Complainant a comparable position. However, because reinstatement is generally the favored remedy, the ARB and the courts have generally required employers to find a comparable position.

2005-SOX-00073, at 37.

In *Brown v. Lockheed Martin Corp.*, 2008-SOX-49 (ALJ Jan. 15, 2010), the ALJ refused to order front pay in lieu of reinstatement. The ALJ indicated a strong inclination towards reinstatement instead of front pay, even though the complainant tried to avoid being reinstated. While the ALJ found some hostility between the parties, he held that it did not rise to the level of "irreparable animosity" under which "a productive and amicable working relationship would be impossible" as required to justify a front pay award:

> [T]he presence of some hostility between parties, which is attendant to many lawsuits, should not normally preclude a plaintiff from receiving reinstatement. Defendants found liable of intentional discrimination may not profit from their conduct by preventing former employees unlawfully terminated from returning to work on the grounds that there is hostility between the parties.

The ALJ also rejected the complainant's argument that she was entitled to front pay because she had suffered emotional distress during her employment which would make her unable to resume her prior employment. The ALJ noted that the complainant had not submitted any medical records which would substantiate a claim that she was medically unable to perform her job. Finally, the ALJ rejected the complainant's argument that reinstatement was not possible because there was no longer a position in the company comparable to the one which she once held, because reinstatement does not require placement in the exact position the complainant once held.

In *Barrett v. E-Smart Technologies, Inc.*, 2010-SOX-00031 (ALJ Sept. 9, 2011), front pay was also denied because, the ALJ found, "Complainant chose a vocational path as an entrepreneur at some unspecified time prior to trial." The ALJ went on to state: "Complainant . . . chose to take himself out of the labor market to engage in business venture with little or no current remuneration but with the potential for very large future profits. That is his right and his choice, but where, as here, it occurred prior to the date of this Order, which is when front pay otherwise would take, it precludes front pay." *Id.* at 47.

3. Back Pay

a. Basic Entitlement

The general rule regarding back pay awards for SOX violations has been described as follows:

> [T]he back pay award should therefore be based on the earnings the employee would have received but for the discrimination. A complainant bears the burden of establishing the amount of back pay that a respondent owes. However, because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, unrealistic exactitude is not required in calculating back pay, and uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating party.

Platone v. Atlantic Coast Airlines Holdings, Inc., 2003-SOX-27, at 2 (ALJ July 13, 2004) (internal citations omitted), *rev'd on other grounds sub nom. Platone v. FLYi, Inc.,* ARB 04-154 (ARB Sept. 29, 2006), *aff'd sub nom. Platone v. Dep't of Labor,* 548 F.3d 322 (4th Cir. 2008) (internal citations omitted), *cert. denied*, *Platone v. U.S. Dept. of Labor*, 558 U.S. 1024 (2009).

The ARB has read the word "pay" broadly in interpreting other statutes. "The back pay award should reflect not just lost base earnings; it should reflect losses such as 'interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay.' " *Tipton v. Ind. Mich. Power Co.*, ARB No. 04-147, ALJ No. 02-ERA-30, at *7 (ARB Sept. 29, 2006) (decided under the Energy Reorganization Act) (quoting *Hobby v. Georgia. Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 90-ERA-30, at 12 (ARB Feb. 9, 2011), *aff'd sub nom. Ga. Power Co. v. U.S. Dep't of Labor*, 52 Fed. Appx. (11th Cir. 2002) (unpublished table decision)). *Tipton* elaborated that the back pay amount should not be reduced for an employee who is paid by the hour and works overtime because to do so would penalize the innocent employee while

benefiting the employer. *Id.* Many of these specific components of back pay noted in *Tipton* are discussed in more detail below

An ALJ need only reach a reasonable approximation of back pay owed to the complainant. *See Ferguson v. New Prime, Inc.*, ARB No. 12-053, ALJ No. 2009-STA-47, at 4 (ARB Nov. 30, 2012)(decided under the Surface Transportation Assistance Act). In *Ferguson*, the ARB affirmed the ALJ's back pay award, finding that the ALJ used a formula supported by the evidence in the record. *Id.*

In *Barrett v. e-Smart Technologies*, 2010-SOX-31 (ALJ Sept. 9, 2011), the ALJ held that where the complainant had been removed from his management responsibility for technology, he was thus deprived of the opportunity to meet specified production goals that were linked to the company's incentive pay program. Accordingly, the ALJ held that "the effect was to excuse Complainant from meeting that condition; [and] it entitled him to the incentive pay." *Id.* at 43. This holding increased the complainant's back pay award by over $130,000. *Id.* The ARB upheld the award calculated based on the higher compensation level, noting that the complainant had voluntarily taken a cut in his base pay from $377,000 to $245,000, and that the higher amount was a fair basis on which to ground a back pay calculation. *See Barrett v. e-Smart Technologies*, ARB Case Nos. 11-088, 12-013 (ARB Apr. 25, 2013).

b. Promotions and Salary Increases

Back pay awards for SOX violations may include all promotions and salary increases the complainant would have received in the absence of retaliation. *See, e.g.*, *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15, at 17 (ALJ Feb. 15, 2005) (holding that a prevailing complainant "is entitled to all promotions and salary increases that he would have obtained but for the illegal discharge") *rev'd on other grounds*, 536 F.3d 269 (4th Cir. 2008). In calculating the amount of a salary increase which the complainant would have received in *Welch*, the ALJ noted that "the average raise for employees at [the employer] for [the relevant year] is shown to be 2.25%," and held that "[w]hile [the complainant] could have, in fact, received a greater or lesser raise, it is reasonable to conclude that the average raise awarded to other employees is the best approximation of what [the complainant] would have received." *Id.*

c. Fringe Benefits

i. Valuating Fringe Benefits

Back pay awards include the value of fringe benefits lost as a result of an unfavorable personnel action. *Hobby v. Georgia Power Co.,* ARB Nos. 98-166, 98-169, ALJ No. 1990-ERA-30, at 33 (ARB Feb. 9, 2001)*, aff'd sub nom. Georgia Power Co. v. Dep't of Labor,* 52 Fed. Appx. 490 (11th Cir. 2002); *Kalkunte I*, 2004-SOX-56, at 54 (ALJ July 18, 2005). Uncertainties in calculating the amount of back pay are to be resolved in favor of the complainant. *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-19, at 10 (ARB Nov. 13, 2002).

The valuation of fringe benefits as part of the back pay award to a successful plaintiff can

be both controversial and complicated. Courts that have faced the challenge of valuating fringe benefits have placed the burden on the plaintiff to prove that a fringe benefit existed, and to establish the value of the benefit. Generally, this has resulted in the use of experts who employ complex formulas to demonstrate the value of lost benefits.

For an example of a SOX case in which expert witnesses for both parties debated the issue of complainant's entitlement to fringe benefits, *see Hagman v. Washington Mutual Bank, Inc.*, 2005-SOX-00073, at 26-30 (ALJ Dec. 19, 2006), *appeal withdrawn by employer and dismissed*, 07-039 (ARB May 23, 2007).

Examples of SOX cases in which the complainant was awarded reimbursement for fringe benefits include *Gunther v. Deltek, Inc.*, ARB Nos. 13-068, 13-069, ALJ No. 2010-SOX-049 (ARB Nov. 26, 2014) (upholding ALJ's award of tuition reimbursement); *Fort v. Tennessee Commerce Bancorp. Inc.*, 4-1760-08-017 (OSHA Mar. 17, 2010) (ordering that employer reimburse SOX complainant for, among other things, a bonus, seven board meeting fees, stock options, medical expenses, car allowance, insurance, and job hunting expenses).

ii. Examples of Recoverable Fringe Benefits

(1) Accrued Vacation

Back pay awards for SOX violations can under some circumstances include the value of accrued vacation lost as a result of the employer's discrimination. The standard for recovering accrued vacation has been stated as follows:

> [T]he purpose of the Act is to make the Complainant whole. In determining whether a complainant is entitled to be paid for accrued vacation that she lost as a result of her employer's discrimination, the Administrative Review Board (ARB) has found that, where it is the practice of the employer to pay an employee for vacation time not taken, it is equitable for the complainant to receive both wages and vacation pay for the same period.

Platone, 2003-SOX-27, at 5-6 (ALJ July 13, 2004)*; see also Kalkunte v. DVI Fin. Servs.* ("*Kalkunte I"*), 2004-SOX-56 (ALJ July 18, 2005), *aff'd but modified*, 05-139, 05-140 (ARB Feb. 27, 2009).

(2) Health Insurance Coverage

Prevailing employees are entitled to damages for health care costs incurred as a result of loss of coverage caused by termination. This may include the value of health insurance premiums or out-of-pocket medical expenses. *See, e.g.*, the following cases:

- *Lockheed Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121, (10th Cir. 2013) (affirming ARB's award of medical expenses and remanding for those expenses to be quantified).

- *Hobby,* ARB Nos. 98-166, 98-169, ALJ No. 1990-ERA-30, at 37 (ARB Feb. 9, 2001) (upholding ALJ's award of the actual cost of health and life insurance premiums since the date of complainant's unlawful termination, as well as interest on those amounts, because complainant "would have enjoyed the use of these monies if [he] had not been terminated").

- *Platone*, 2003-SOX-27, at 6 (ALJ July 13, 2004) (holding that a successful SOX complainant is entitled to reimbursement "for medical expenses she incurred that would have been covered under the company [health insurance] plan").

- *Kalkunte I*, 2004-SOX-56, at 54 (ALJ July 18, 2005) (holding that back pay and benefit considerations may include lost pension and health benefit losses and contributions to those plans for hours that would otherwise have been worked).

In *Kalkunte I*, 2004-SOX-56, at 54 (ALJ July 18, 2005), the ALJ held that back pay and benefit considerations may include lost overtime, lost vacation and other chargeable pay remedies such as compensatory time and sick time, and may include lost pension and health benefits and contributions to those plans for hours that would otherwise have been worked. However, the complainant failed to request reinstatement of fringe benefits.

In *Tipton v. Ind. Mich. Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-30, at 10 (ARB Sept. 29, 2006), *aff'd sub nom. Ind. Mich. Power Co. v. Dep't of Labor*, 278 Fed. Appx. 597 (6th Cir. May 20, 2008), the ARB ruled that a complainant may recover the value of health insurance fringe benefits paid by his former employer or the cost of purchasing substitute coverage, but not both.

In *Jackson v. Butler & Co.*, ARB No. 03-116, ALJ No. 2003-STA-26, at 9 (ARB Sept. 2, 2004), the complainant was awarded recovery of lost health insurance benefits, valued as the actual and direct expenses resulting from his loss of respondent's health plan. This included both the costs of premiums for replacement health insurance and out-of-pocket medical expenses.

(3) Bonuses

In *Barrett v. E-Smart Technologies, Inc.*, 2010-SOX-31 (ALJ Sept. 9, 2011), *aff'd*, *Barrett v. e-Smart Technologies*, ARB Case Nos. 11-088, 12-013 (ARB July 11, 2013), the ALJ found that, where bonuses were discretionary, complainant's contention that he should be awarded a performance-based bonus, was too speculative as his employment agreement lacked any mandatory language or quantifiable basis for a bonus award. *Id.*, at 44-45.

(4) Stock Options

The value of stock options is recoverable in whistleblower cases before the Department of Labor. *See, e.g.*, *Stroupe v. Branch Banking & Trust*, ALJ No. 2008-SOX-00047 (ALJ Apr.1, 2010) (reinstating stock options forfeited on termination); *Hobby v. Georgia Power Co.,* ARB

No. 98-166, 98-196, ALJ No. 1990-ERA-30, at 37 (ARB Feb. 9, 2001). In *Jayaraj v. Pro-Pharmaceuticals, Inc*., 2003-SOX-32 (ALJ Feb. 11, 2005) the ALJ explicitly stated that the economic loss recoverable by the plaintiff may include the value of lost stock options. However, because the complainant raised her request for recovery of the lost stock options for the first time in a post-hearing submission, rather than during the hearing itself, recovery was denied. *Id.* at 30-32.

In *Barrett v. E-Smart Technologies, Inc.*, 2010-SOX-00031 (ALJ Sept. 9, 2011),), *aff'd*, *Barrett v. e-Smart Technologies*, ARB Case Nos. 11-088, 12-013 (ARB Apr. 25, 2013) while complainant had the option to buy 10,000,000 shares of stock in the company, neither the stock option agreement nor the company's option policy was in the record, and thus the ALJ found any award to be entirely speculative. The ALJ did allow complainant to exercise his vested options as if his last date of employment was the date of the ALJ's decision. *Id.* at 45-46.

(5) Tax Bump Relief

The ARB has suggested that the tax consequences of an award may be considered if there is sufficient evidentiary groundwork. *Doyle v. Hydro Nuclear Servs.*, ARB No. 99-041, ARJ No. 89-ERA-22 (ARB May 17, 2000). The issue of "tax bump up" has been addressed by the courts in employment discrimination cases arising under other statutes. In *Blaney v. Int'l. Ass'n of Machinists*, 87 P.3d 757 (Wash. 2004), in an action under the state anti-discrimination law, the Supreme Court of Washington allowed for an offset of the tax consequences to the plaintiff flowing from the lump sum payment of damages. However, the court refused to characterize the offset of additional federal income tax consequences as "actual damages" because the tax consequences were too attenuated. Instead, the court characterized the offset as "any other appropriate remedy authorized by [Title VI]." *Id.* at 762-63.

The federal courts are split as to whether tax bump relief is available under the 1991 Civil Rights Act. *Compare Fogg v. Gonzales*, 492 F.3d 447, 455-56 (D.C. Cir. 2007) (absent an agreement between the parties, "gross up" relief was not appropriate relief) *and Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 548 n.5 (4th Cir. 2003) (district court did not abuse its discretion in refusing to enhance the plaintiff's back pay award to compensate for the higher income tax burden incurred as a result of receiving the payment in a lump sum) and *Taylor v. Brennan*, No. 13-cv-2216, 2015 WL 3466272 at *3 (W.D. Tenn. June 1, 2015) (declining to award a gross-up) *with Sears v. Atchison, Topeka & Kansas City Ry. Co*., 749 F.2d 1451, 1456 (10th Cir. 1984) (allowing an increase in award for back pay in order to compensate for the resultant tax burden from receiving a lump sum of more than 17 years in back pay) *and Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1101 (3d Cir. 1995) (in order to fulfill the make-whole purpose of remedies in ADEA cases the plaintiff was entitled to prejudgment interest to compensate the plaintiff for the lost time value of money) *and O'Neill v. Sears Roebuck & Co.*, 108 F. Supp. 2d 443, 446 (E.D. Pa. 2000) (plaintiff was entitled to "an award for negative tax consequences, but limit[ed] the award to the increased tax liability on the award of front and backpay, only").

In a recent case arising out of a labor dispute, a three-member National Labor Relations Board panel unanimously took the position that tax bump relief was necessary in order to make

employees whole when they received back pay in a lump sum. In *Latino Express, Inc.,* 359 N.L.R.B. 44 (Dec. 18, 2012), the Board ordered the employer to compensate two bus drivers whom it had fired for union activities for the additional tax burden they would face when receiving more than one year's back pay in a lump sum. The Board's reasoning – that the additional relief was needed to "serve the remedial purposes of the National Labor Relations Act by ensuring that discriminatees are truly made whole" – could also apply to Section 806, which by its terms is designed to "make the employee whole." 18 U.S.C. § 1514A(c)(1).

(6) Interest

Plaintiffs prevailing under Section 806 are entitled to interest as part of their back pay awards. As in other employment cases wherein the plaintiff is awarded back pay, the prejudgment interest is determined in accordance with Section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621. Interest is not awarded on compensatory damages. *See, e.g.*, *Kalkunte*, 2004-SOX-56, at 65 (ALJ July 18, 2005) (citing *Smith v. Littenberg,* 92-ERA-52 at 5 (Sec'y Sept. 6, 1995)). The ALJ in *Welch*, 2003-SOX-15 (ALJ Feb. 15, 2005), stated the appropriate standard for awarding interest as follows:

> Given the remedial nature of the employee protection provisions of Sarbanes-Oxley, and the "make whole" goal of back pay, prejudgment interest on Complainant's back pay award is appropriate. *See, e.g., Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042 (ARB May 17, 2000), *slip op*. at 18, n.18. Such interest should be compounded quarterly. *Id*. With respect to computing such interest, the ARB, in Doyle, wrote that the interest rate is that charged on the underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points. The Federal short-term interest rate to be used is the so-called "applicable federal rate" (AFR) for a quarterly period of compounding. *See, e.g.*, Rev. Rul. 2000-23, Table 1. *Id.* at 18-19 (citations omitted). Since the total amount of the back pay award will depend on the date upon which Welch is reinstated, the parties will be required to follow the procedures outlined by the ARB in *Doyle* for computing prejudgment interest owed on Complainant's back wages owed in this case.

Id. at 21-22.

The court retains the discretion to determine the applicable prejudgment interest rate. *See, e.g., Loesch v. City of Phila*., No. 05-cv-0578, 2008 WL 2557429, at *8 (E.D. Pa. June 19, 2008). Interest on back pay and benefits continues to the date of reinstatement or other remedy, and is usually calculated at the rate then in effect under 26 U.S.C. 6621(a)(2), the underpayment rate. *See, e.g., Clinchfield Coal Co. v. Federal Mine Safety and Health Comm'n*, 895 F.2d 773, 778-780 (D.C. Cir. 1990); 26 CFR 301.6621-1(a)(3) (rate compounded daily). The IRS publishes these rates in its Revenue Rulings, which are in turn published in the Internal Revenue Bulletin.

At least one district court used the rate contained in the federal post-judgment interest rate statute, 28 U.S.C. § 1961(a). *Parexel Intern. Corp. v. Feliciano*, No. 04-cv-3798, 2008 WL

5194299, at *2 (E.D. Pa. Dec. 4, 2008). That statute provides that "such interest shall be calculated from the date of the entry of the judgment, at a rate equal to weekly 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding." The court noted that many other courts had used the same method for calculating prejudgment interest in Title VII cases, and reasoned that this method of calculation is also appropriate in SOX cases because it adequately "serves to compensate a plaintiff for the loss of the use of money that the plaintiff otherwise would have earned had he not been unjustly discharged." *Id.*

In *Barrett v. E-Smart Technologies, Inc.*, *supra*, the ALJ awarded over $108,000 in interest using the IRC § 1274(d) rate plus three percent. *Id.* at 44.

(7) Seasonal Employment

In *Young v. Park City Transportation*, ARB No. 11-048, ALJ No. 2010-STA-65 (ARB Aug. 29, 2012), the ALJ found for the complainant, a seasonal driver, and awarded damages that included the gratuities the complainant would have received from passengers during the ski season. The complainant appealed the award to the ARB, arguing that she was entitled to wages and gratuities that she would have received for the following season as well. *Id.* at 4. The ARB stated that a seasonal worker may receive a back pay award that extends beyond the season during which he is terminated but that "credible evidence must exist indicating that the complainant would either have continued in his employment beyond the seasonal work or that he would otherwise have been rehired for the next season." *Id.* Young had presented no such evidence and had in fact testified that she was not interested in returning to work for the respondent. *Id.*

(8) Mitigation of Damages

Under the Act, a victim of employment discrimination is not specifically required to mitigate damages. However, the ARB has found such a requirement to be implicit, following the general common-law rule of "avoidable consequences." *Kalkunte I*, 2004-SOX-56, at 55-56 (ALJ July 18, 2005). This standard has been stated as follows:

> Although the SOX employee protection provision does not explicitly require victims of employment discrimination to attempt to mitigate damages, the ARB has consistently imposed such a requirement, in keeping with the general common law "avoidable consequences" rule and the parallel body of damages law developed under other anti-discrimination statutes. The respondent bears the burden of proving that the complainant did not properly mitigate . . .
> To meet this burden, the respondent must show that: (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. The benefit of the doubt ordinarily goes to the complainant.

Kalkunte I, 2004-SOX-56, at 55-56 (ALJ July 18, 2005) (internal citations omitted).

If an employee refuses an offer by the employer to return to a past position, this fact alone may support the employer's failure-to-mitigate claim. In addition, an offer of a position that previously was denied often will toll the back-pay liability of an employer who is charged with employment discrimination. The employee's rejection of the offer will end the employer's back pay liability. *See id.*, at 55-57 (ALJ July 18, 2005).

In *Barrett v. e-Smart Technologies*, 2010-SOX-31 (ALJ Sept. 9, 2011), the ALJ found that, following her termination, the complainant founded a company from which he took no salary but rather was compensated in stock. The ALJ concluded that "by making this choice, he has ceased to function in the economy as an employee and has instead become a business owner. As of the time he exited the labor market, he failed to mitigate his lost wages." Accordingly, the ALJ ruled that the complainant was not entitled to back pay or front pay for that period of time. *Id.* at 44.

The amount of any back pay award may be reduced by the total amount of wages received by the complainant during any interim employment the complainant held since his termination from the respondent employer. *See, e.g., Brown v. Lockheed Martin Corp.*, 2008-SOX-49, at 54 (ALJ Jan. 15, 2010); *Barrett v. e-Smart Technologies*, at 43 ("Were I to disregard this alternate employment, it would afford Complainant a double recovery; it would go beyond the make-whole relief that the statute affords"). However, any reduction in back pay for interim earnings must reflect the complainant's *net* interim earnings. For example, in *Smith v. Lake City Enterprises, Inc.*, ARB No. 11-987, ALJ No. 2006-STA-32 (ARB Nov. 20, 2012), the ARB reversed the ALJ's reduction in back pay award because the complainant offered evidence, including his income tax returns, demonstrating that although he had earned $46,000 working as an owner-operator, he had suffered a net loss over the same period. *Id.* at 4-7. *See also Madden v. Transam Trucking, Inc.*, ARB No. 13-031, ALJ No. 2010-STA-210 (ARB Nov. 24, 2014) (affirming ALJ's decision not to reduce backpay to reflect interim earnings where complainant's earnings were as an independent contractor, not employee, and business expenses outstripped earnings).

In *Gilmore v. Parametric Tech.*, 2003-SOX-1, at 18-21 (ALJ July 18, 2005), the ALJ held that living and travel expenses were included in back pay when the complainant was forced to accept employment nearly 150 miles from him home, live in an apartment during the week, and travel home on weekends to his wife, because the complainant's "duty to mitigate his damages did not require that he ask his wife to quit her job and move himself and his wife to another location."

4. Special Damages

Under SOX 806, a successful complainant may recover "special damages." One court has suggested that special damages, *e.g.*, reputational harm or emotional distress, must be specifically stated in the complaint. *Murray v. TXU Corp.*, No. 303-cv-0888, 2005 WL 1356444, at *2-3 (N.D. Tex. June 7, 2005). However, it is unlikely the Labor Department would require this kind of specificity in its pleading requirements. *See* OSHA Manual at 6-5 ("Compensatory damages may be awarded under all OSHA whistleblower statutes").

a. Emotional Distress/Pain and Suffering

Complainants may recover for emotional pain and suffering, mental anguish, embarrassment, and humiliation in DOL whistleblower cases. *See, e.g.*, *Feldman-Boland v. Stanley*, No. 15 Civ. 6698, 2016 WL 3826285, at *6 (S.D.N.Y. July 13, 2016); *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d. 658, 672 (4th Cir. 2015); *Halliburton, Inc. v. Administrative Review Board*, 771 F.3d 254, 266 (5th Cir. 2014); *Lockheed Martin Corp. v. Administrative Review Board*, 717 F.3d 1121, 1138 (10th Cir. 2013); *Kalkunte v. DVI Financial Services, Inc.*, ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-56 (ARB Feb. 27, 2009), *remanded to ARB for settlement approval*, No. 09-2221, 09-2233 (3rd Cir. 2009), *settlement approved and case dismissed,* 05-139, 05-140 (ARB Oct. 15, 2009). Expert medical or psychiatric testimony is not strictly necessary, but such damages must be supported by evidence of the physical or mental consequences caused by the adverse employment actions proven by the employee. *Brown v. Lockheed Martin Corp.*, 2008-SOX-49, at 54-55 (ALJ Jan. 15, 2010) (*citing Thomas v. Arizona Public Service Co.*, 1989-ERA-19 (Sec'y Sept. 17, 1993)).

In *Kalkunte,* ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-056, at 15 (ARB Feb. 27, 2009), the ARB affirmed the ALJ's award of $22,000 in damages for "pain, suffering, mental anguish, the effect on [plaintiff's] credit [due to losing her job], and the humiliation she suffered."

In *Brown v. Lockheed Martin Corp.*, 2008-SOX-49, slip op. at 54-55 (ALJ Jan. 15, 2010), the ALJ awarded $75,000 in compensatory damages for "emotional pain and suffering, mental anguish, embarrassment, and humiliation," despite the fact that plaintiff provided no medical evidence to support such a claim. The ALJ found the claim credible based on testimony of plaintiff, her son, and others. Specifically, the ALJ stated:

> Complainant has testified that she suffered from depression and loss of self-esteem during and following her employment and constructive discharge from Respondent. Although no medical evidence has been presented in support, Complainant's son testified in confirmation of Complainant's emotional distress and depression with the resulting effects on both the family and their economic situation. Moncallo, Asbury, and Colditz all confirmed the Complainant's distress over what the undersigned has found to be unlawful discriminatory employment actions while in Respondent's employ. Accordingly, I find Complainant's testimony regarding her emotional pain and suffering, mental anguish, embarrassment, and humiliation to be generally credible.

Id., slip op. at 54-55. The ARB and the Tenth Circuit affirmed the ALJ's award of emotional distress damages without the testimony of a medical or psychiatric professional. *See Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-00049 (ARB Feb. 28, 2011); *Lockheed Martin Corp. v. Administrative Review Board*, 717 F.3d 1121, 1138-39 (10th Cir. 2013).

Like claims for emotional distress in other employment litigation, proving the extent of emotional distress and its causal relationship to the unlawful conduct can be problematic. For

example, in *Kalkunte I*, 2004-SOX-56 (ALJ July 18, 2005), the ALJ observed that "compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation," but found that some elements of the plaintiff's alleged emotional distress injury were not proved to be causally related to the respondent's conduct. *Id.* at 62.

Brown was significant for its holding that emotional distress damages could be recovered without testimony on complainant's medical condition. The more recent case of *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-9 (ARB Jan. 31, 2012), attempted to clarify when medical testimony was required. *Luder* noted that the ARB had previously held "that while the testimony of medical or psychiatric experts 'can strengthen the case for entitled to compensatory damages, it is not required.' " *Id.* at 16 (internal citations omitted). However, in other cases, "where the claim for an award of damages for emotional distress is based solely on the complainant's testimony that he suffered a specific and diagnosable medical condition, the ARB has reasonably required 'medical or other competent evidence.' " *Id.* at 17 (citing *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-19, at 11 (ARB Nov. 13, 2002)). The ARB remanded the case to the ALJ because the ALJ did not adequately explain his findings with respect to causation. *Id.* at 19-21. The ARB noted that while two doctors submitted reports supporting the complainant's depression, neither expressed a conclusion on the question of causation. *Id.* While the speculative nature of compensatory damages has given judges pause, the ARB, like the ALJ in *Kalkunte I*, recently concluded that it was appropriate to look to awards made in similar cases. *See Menendez v. Halliburton, Inc.*, ARB No. 12-026 ALJ No. 2007-SOX-5 (ARB Mar. 15, 2013).

More recently, OSHA signaled a willingness to award significant non-wage damages. On September 30, 2013, the agency found in favor of the former CFO of Clean Diesel Technologies, Inc. and awarded a total of $1.9 million, $1.4 million of which was for compensatory damages for pain and suffering, reputational damages and lost retirement account contributions. In the press release announcing the award, OSHA quoted the Assistant Secretary of Labor for OSHA, Dr. David Michaels, as saying, "This order should send a clear message to publicly traded companies that silencing those who try to do the right thing is unacceptable."[11] Following this award, the case resolved. *See Ruple v. Clean Diesel Tech., Inc.*, ALJ No. 2014-SOX-00006 (ALJ. Mar. 24, 2014) (approving settlement and dismissing complaint).

b. Reputational Damage

As with emotional distress, SOX does not expressly provide for an award of damages for loss of reputation, but the ARB has routinely sustained awards for reputational damage under whistleblower statutes. *See Leveille v. New York Air Nat'l. Guard*, ARB 98-079, ALJ 94-TSC-3 (ARB Dec. 16, 2003); *Van Der Meer v. Western Kentucky Univ.*, ARB 97-078, 95-ERA-38 (Apr. 20, 1998).

[11] *See* U.S. Dept. of Labor, "US Labor Department's OSHA orders Clean Diesel Technologies Inc. to pay over $1.9 million to former CFO fired for reporting a conflict of interest; Company violates Sarbanes-Oxley Act whistleblower protection provisions" (Sept. 30, 2013), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=24915.

In several SOX cases, courts have held that reputational damages were allowed. *See Rutherford v. Jones Lang LaSalle Am.*, No. 12-14422, 2013 WL 4431269 at *5 (E.D. Mich. Jan. 29, 2013) (damages for emotional distress, mental anguish, humiliation and reputational injury are allowable). In *Hanna v. WCI Communities., Inc*., 348 F. Supp. 2d 1332 (S.D. Fla. 2004), a district court held that reputation damages are allowed under the Act, finding that a plaintiff's reputation is damaged by termination, therefore diminishing their future earning capacity, and that accordingly plaintiff must be compensated for this loss in earnings in order to be made whole as the statute requires. *Id.* at 1334. The court relied on the Seventh Circuit's decision in *Williams v. Pharmacia, Inc.*, 137 F.3d 944 (7th Cir. 1998) in which that court held that Title VII's remedies, as amended by the Civil Rights Act of 1991, allowed for an award for reputation damages. *Mahony v. Keyspan Corp.*, No., No. 04-cv-554, 2007 WL 805813, at *7 (E.D.N.Y. Mar. 12, 2007), adopted the reasoning of *Hanna* and denied the defendant's request to strike the plaintiff's demand for damages to his reputation.

In contrast, in *Murray v. TXU Corp.*, No. 303-cv-0888, 2005 WL 1356444, at *2-3 (N.D. Tex. June 7, 2005), a district court held that non-pecuniary damages such as reputational injury are not allowable under SOX, finding the remedies under SOX analogous to the remedies under Title VII prior to the passage of the 1991 amendments. Similarly, in *Walton v. Nova Information Systems*, 514 F. Supp. 2d 1031, 1034 (E.D. Tenn. 2007), the court, relying on the Court's Title VII decision in *United States v. Burke*, 504 U.S. 229 (1992), held that non-pecuniary remedies including "injury to reputation, emotional, mental and physical distress and anxiety, or punitive damages" were not recoverable under SOX.

Jones v. Home Federal Bank agreed with *Murray* and *Walton* that "general non-pecuniary damages for reputational injury would be akin to damages for emotional distress and allowance for such damages would expand the scope of remedies articulated in and intended by SOX." 2010 WL 255856, at *6 (D. Idaho 2010). But the court found "the *Hanna* court's more specific definition of reputational injury for which damages would be pecuniary in nature plausible, in that allowing a plaintiff to claim damages for a reputational injury that caused a decrease in the plaintiff's future earning capacity could be consistent with SOX's goal of making the plaintiff whole." *Id.*

c. Damage to Credit Rating

In *Kalkunte* ("*Kalkunte II*"), ARB Nos. 05-139, 05-140, at 16 (ARB Feb. 27, 2009), the ARB noted that the ALJ had awarded the complainant damages for, among other things, "the effect on her credit [because of her loss of employment] and the humiliation that she suffered." The ARB continued: "[a]lthough we agree with [the employer] that the damage to credit may not be legally compensable, the balance of the award is supported by the evidence, is not clearly erroneous, and within the ALJ's discretion. Accordingly, we affirm it."

5. Punitive Damages

The statute does not authorize punitive damages as they are not considered "relief necessary to make the employee whole." *Murray v. TXU Corp.*, No. 3:03-cv-0888, 2005 WL

1356444, at *4 (N.D. Tex. June 7, 2005) (punitive damages not allowed as the statutory omission of punitive damages is clear and unequivocal, and, in any event, the fact that the original draft of the Act explicitly provided for punitive damages and subsequent drafts removed that language, reinforced the court's conclusion decision to read the statute as written); *see also Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332, 1332 (S.D. Fla. 2004) (plaintiff conceded that punitive damages are unavailable under SOX). Additionally, the ARB has held that the Labor Department cannot award exemplary or punitive damages without express statutory authorization. *See Berkman v. U.S. Coast Guard Academy*, ARB 98-056, 1997-CAA-2 (ARB Feb. 29, 2000).

Due to the unavailability of punitive damages, a federal district court in Oregon found that "SOX does not provide an adequate statutory remedy to preclude" a common law wrongful discharge claim. *Willis v. Comcast of Oregon II*, 2007 WL 3170987, at *2 (D. Or. Oct. 25, 2007) (denying defendant's motion to dismiss plaintiff's wrongful discharge claim). However, in *Repetti v. Sysco Corp.*, 730 N.W.2d 189, 193 (Wis. 2007) the Wisconsin Court of Appeals held that SOX affords adequate relief to employees wrongfully discharged because the Act entitles employees to "all relief necessary" to make the employee whole.

6. Attorneys' Fees

SOX expressly allows a complainant to recover expert witness fees and litigation costs, including attorney fees. 18 U.S.C. § 1514(c)(2)(C). The ALJ in *Hagman* stated the applicable standard for calculating recoverable attorneys' fees as follows:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. Hours not "reasonably expended" or which are excessive, redundant or otherwise unnecessary should be excluded, according the principle that "[h]ours that are not properly billed to one's client are not properly billed to one's adversary pursuant to statutory authority." *Id*. at 434. A petition for attorney's fees must specify the date on which the attorney's time was expended, the amount of hours expended, and a specific description of the tasks undertaken by the attorney during that time.

2005-SOX-00073, slip op. at 42.

The ARB applies the "lodestar" method for calculating reasonable attorney fees. *See Negron v. Vieques Air Link, Inc.*, ARB 04-021, 2003-AIR-10, at *2 (Mar. 7, 2006). The "lodestar" figure is the reasonable rate multiplied by the reasonable number of hours expended. *See Hensley*, 461 U.S. 424, 433 (1933). This figure may then be adjusted in accordance with other factors; however there is a "strong presumption" in favor of the lodestar figure and upward adjustments are allowed only in exceptional cases that are supported by specific evidence.

A "reasonable" hourly rate is usually the market rate of attorneys within the community where the case is tried, of reasonably comparable skill, experience, and reputation. *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 11-061, ALJ No. 2004-AIR-11, at 4-5 (ARB

Apr. 27, 2012); *Murray v. Air Ride, Inc.*, ARB 00-45, 99-STA-34, at 9-11 (Dec. 29, 2000); *Platone*, 2003-SOX-27, at 10 (ALJ July 13, 2004). In *Hagman,* the ALJ awarded $305,748 of the requested $500,000 in attorney fees and costs. *See id.* at 42, 52. The ALJ in *Hagman* refused to consider New York rates in its determination of the fee award, finding that the plaintiff could have found representation in Southern California where the case was heard. In so holding, the ALJ stated:

> At the outset, I note that the relevant geographic market or legal community for purposes of determining the appropriate hourly rate for attorney's fees is normally the locality of the hearing. The specialized nature of the case and the unavailability of local counsel may be grounds for exception to that rule. However, I do not find special circumstances exist in this case to warrant changing the relevant legal market from the Los Angeles area, the proper location of the hearing and witnesses, to New York, the location of only Complainant's counsel.

Id. at 44 (citations omitted).

The ALJ awarded attorneys' fees at the *Altman Weil Survey of Law Firm Economics* rate for Los Angeles. The ALJ in *Platone*, 2003-SOX-27 (overruled on other grounds) also used the *Altman Weil Survey*. Additionally, *Platone* identified other, more subjective factors to consider in determining appropriate rates for attorneys' fees awards: the complexity of the issues presented; the lead attorney's experience; and the quality of the attorneys' performance at trial. *Id.* The ALJ applied a rule of "reasonability," taking into account these particular factors and the totality of the circumstances in determining that the rates requested in the fee petition were objectively reasonable and within the market range. *Id.*

Similarly, in *Clemmons v. Ameristar Airway, Inc.,* the ARB affirmed the ALJ's refusal to award non-local Washington, DC rates in a case in which the relevant legal market for determining hourly rates was the Dallas-Fort Worth area. ARB No. 11-061, ALJ No. 2004-AIR-11, at 4-5. The ALJ concluded that the complainant had not demonstrated the unavailability of competent local attorneys to handle the claim. *Id.* As a result of this decision, the ALJ also refused to reimburse the attorneys' travel expenses. *Id.* at 8-9. However, the ALJ rejected the suggestion by respondents' counsel that their hourly rate of $255 was the best evidence of local rates, relying instead on a recent federal district court case that awarded $355 per hour as the standard rate in the area, and noting the high caliber of complainant's attorneys. *Id.* at 4-5.

The second step in the calculation of the lodestar figure is to ascertain the reasonable number of compensable hours expended by the complainant's attorneys. A reasonable amount of compensable hours is equivalent to the reasonable amount of time that complainant's counsel should have expended to reach a positive result, given the nature and circumstances of the case. *See Platone*, 2003-SOX-27, at 9-10 (ALJ July 13, 2004). A judge has discretion in determining the reasonableness of the compensable hours. *Id*.

Attorneys litigating SOX cases should be careful to ensure that their billable time entries are described in adequate detail, and should avoid the practice of block billing. *Hagman*

explained:

> Entries such as "review documents," "depositions," "trial preparation," or "legal research" are too vague to provide a meaningful opportunity for review of whether the hours were reasonably expended. Where the billing descriptions do not afford a meaningful opportunity to determine the reasonableness of the time expenditures, an ALJ need not engage in an item by item reduction of the hours, but rather, may make reductions based upon a percentage basis.

Id. at 47 (internal citations omitted); *see also Clemmons*, ARB No. 11-061, ALJ No. 2004-AIR-11, at 7 (reiterating disfavor of block billing).

Costs, including copying, computer research fees, mailing, and facsimile, are reimbursable damages where attorneys document, for example, through a retainer agreement, that such costs were billed to the complainant rather than being overhead costs. *See Clemmons*, ARB No. 11-061, ALJ No. 2004-AIR-11 at 8-9.

The ARB "has routinely declined to reduce attorneys' fee awards solely because the amount requested is larger than the damages recovered." *Id.* at 7-8. In *Clemmons*, the ALJ rejected respondents' request to reduce the attorneys' fee award from $230,085.69 because it was disproportionate to the $37,995.09 plus interest on damages awarded to complainant, noting that the complainant had requested only back pay, had mitigated his damages, did not seek compensatory damages, and was successful on each issue raised. *Id.* The ALJ additionally noted that the respondents' "aggressive litigation strategy" had increased the costs for both sides. *Id.* ALJs have also awarded attorneys' fees in amounts exceeding the damages awarded to the complainant. *See, e.g., Platone v. FLY, Inc.*, 2003-SOX-27 (ALJ July 13, 2004), *rev'd on other grounds*, ARB No. 04-154 (ARB Sept. 29, 2006) (awarding $169,000 in attorneys' fees and $62,000 to complainant).

A prevailing employer may be awarded up to $1,000 in attorneys' fees if the complaint is found to be frivolous or brought in bad faith, *see* 49 U.S.C. § 42121(b)(3)(C), but such awards are extremely rare. In *Pittman v. Siemens AG,* 2007-SOX-15, at 8 (ALJ July 26, 2007) the ALJ denied the respondents' request for attorney fees even though the *pro se* complainant's case was not strong because case was not completely frivolous and the complainant had demonstrated a deep belief in his claims).

In *Greene v. Omni Visions, Inc.*, ARB No. 09-109, ALJ No. 2009-SOX-44 (ARB March 9, 2011), *pet. for review denied,* No. 11-1550, 2011 WL 5532064 (4th Cir. Nov. 15, 2011) the respondent moved for an award of $1,000 in attorney's fees under 29 C.F.R. § 1980.110(e). *Id.* at 8 n.35. The Board denied the request, stating that "[w]hile we agree that there is some merit to Omni's position given that Greene filed her complaint 3 years after the period for such filing had expired, with no recognized basis for doing so, given Green's pro se status, we are not prepared to find that the complaint was totally baseless or brought in bad faith." *Id.*

In *Reamer v. Ford Motor Co*., ARB No. 09-053, 2009-SOX-3 (ARB July 21, 2011), a panel of ALJs denied the company's request for attorney's fees and costs, which the company

made based on its allegations that the complaint and appeal were frivolous or brought in bad faith. *Id.* at 7. The panel noted that the complaint "contains at least an arguable basis in law because it is based on [the complainant's] contention that Ford Credit retaliated because of SOX-protected activity." *Id.*

7. Sanctions

In *Windhauser v. Trane*, ARB 05-127, 2005-SOX-17 (ARB Oct. 31, 2007), the ARB held that an ALJ did not have the power to sanction an employer that declined to obey the Judge's order to reinstate the plaintiff in a SOX case. According to the ARB, without statutory authority, DOL has no power to impose monetary sanctions. Rather, this enforcement remedy must be imposed by the federal district court.

In *Boyd v. Accuray, Inc.*, No. 11-CV-01644, 2012 WL 4936591 (N.D. Cal. Oct. 17, 2012), the District Court for the Northern District of California declined to award attorneys' fees to the defendant as a sanction, finding that there was no evidence that the claim was brought in bad faith. The court stated that "the grant of summary judgment establishes only that Plaintiff had not marshaled enough evidence to support his claim—not that the claim was so lacking in merit as to be frivolous." *Id.* at *4.

III. DODD-FRANK ACT SECTION 922 ANTI-RETALIATION PROVISION

In addition to amending Section 806 of SOX to provide broader whistleblower protections, Dodd Frank also created a new cause of action, Section 21F(h)(1)(A) of the Securities Exchange Act of 1934, that complements–and in some cases overlaps–the anti-retaliation provisions of SOX.[12] In particular, the Dodd-Frank anti-retaliation provision prohibits an employer from taking an adverse action against a "whistleblower" for:

(1) Providing information to the U.S. Securities and Exchange Commission in accordance with the Dodd-Frank whistleblower incentive program;

(2) Initiating, testifying in, or assisting in any investigation, judicial action, or administrative action of the SEC based on or related to such information, or;

(3) Making disclosures that are required or protected under SOX, the Exchange Act, 18 U.S.C. § 15139(e) or any other law, rule, or regulation subject to the jurisdiction of the Commission.

Unlike SOX, the Dodd-Frank anti-retaliation provision does not require an individual to exhaust administrative remedies before seeking relief in federal court. The claim carries a three-year statute of limitations and provides for reinstatement, double back pay with interest, and attorneys' fees and costs.

[12] Section 922 of the Dodd-Frank Act amended the Securities Exchange Act of 1934 to add Section 21F, which establishes the SEC whistleblower award program. Citations herein are to the Exchange Act, in accordance with the practice of the SEC. These rules also appear at 17 C.F.R. pt. 240 and 249 (2012).

While ostensibly intended to expand protections afforded to individuals who report possible securities violations, divergent interpretations of the interplay of the first and third categories of protected activity created significant confusion about the Dodd-Frank anti-retaliation provision's precise reach in the first several years after its enactment. As discussed in more detail below, this debate centered around whether an individual who engaged in protected activity under SOX by reporting potential violations of SOX internally could bring a retaliation claim under SOX and Dodd-Frank, or whether the individual must report the potential violations of SOX externally to be protected under Dodd-Frank.

On February 21, 2018, the U.S. Supreme Court unanimously resolved this issue with its decision in *Digital Realty Trust, Inc. v. Somers*. *Digital Realty* settled the legal divide, but understanding the legal background on this issue is nevertheless important to understand the interplay between the two statutes and distinct remedies available under each.

A. Scope of Coverage

The Dodd-Frank anti-retaliation provides that "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly or in any other manner discriminate against, a whistleblower in the terms and conditions because of any lawful act done by the whistleblower." By its express terms, this provision only applies to "whistleblowers." As discussed below, the scope and content of the meaning of the term "whistleblower," particularly as it related to individuals who engaged in protected activity under SOX Section 806, was, until very recently, a point of significant contention amongst courts.

The Dodd-Frank anti-retaliation provision protects "whistleblowers" who engage in protected activity through external reporting to the SEC. Under the final rule promulgated to clarify the meaning of the term "whistleblower" for purposes of the SEC anti-retaliation provision, an individual is considered a whistleblower if she possess a reasonable belief that she is providing information that relates to a possible securities law violation and reports that information in a manner provided for under the Exchange Act. Courts applying this definition of whistleblower have interpreted it as requiring proof of the following three elements:

1. Reasonable Belief

As noted above, the Dodd-Frank anti-retaliation provision complements similar protections under SOX. While discussed at greater length elsewhere in this report, the definition and complexion of a whistleblower's reasonable belief under SOX has been the subject of much litigation both at the administrative and judicial levels. *See* Section II.B.2.i.a, *supra*.

In quantifying what constitutes sufficient "reasonable belief" to qualify a potential whistleblower for protection under the Dodd-Frank anti-retaliation provision, both the SEC and courts have looked to existing SOX litigation on the topic for helpful analysis. A prime example, in its implementing regulations for the Dodd-Frank anti-retaliation provision, the SEC cited to *Livingston v. Wyeth, Inc.*, 520 F.3d 344 (4th Cir. 2008), a SOX whistleblower case, to explain,

> The "reasonable belief" standard requires that the employee hold a subjectively genuine belief that the information demonstrates a possible violation, *and* that this belief is one that a similarly situated employee might reasonably possess."

Implementation of the Whistleblower Provisions of Section 21f of the Sec. Exch. Act of 1934, SEC Release No. 64545, 2011 SEC LEXIS 1816, 2011 WL 2045838, at 16 (May 25, 2011) (emphasis in original). In other words, to have sufficient "reasonable belief" under Dodd-Frank, not only must the employee believe his or her own report, but the reasonableness of that belief will be measured against the expected analysis of someone in a similar position and/or with similar education, experience, or training (i.e., not just a vague "someone else" off the street).

In interpreting whistleblower claims, courts are regularly called upon to address both SOX and Dodd-Frank retaliation claims together. For example, in *Beacom v. Oracle Am., Inc.*, 825 F.3d 376, 2016 U.S. App. LEXIS 10183 (8th Cir. 2016), the Eighth Circuit Court of Appeals examined the reasonableness of a SOX and Dodd-Frank whistleblower plaintiff's beliefs regarding his reports that Oracle was falsely projecting sales revenues. After discussing the evolution of the standard for measuring "reasonable belief" under SOX, in affirming the grant of summary judgment to the employer, the Court concluded, "Beacom—an Oracle salesperson and shareholder—would understand the predictive nature of revenue projections. And, he would understand that $10 million is a minor discrepancy to a company that annually generates billions of dollars. These facts compel the conclusion that Beacom's belief that Oracle was defrauding its investors was objectively unreasonable[.]" *Beacom*, 825 F.3d at 381, 2016 U.S. App. LEXIS at 9. Then, turning to the parallel Dodd-Frank claim, the *Beacom* Court summarily found, "Since Beacom did not make a disclosure protected under Sarbanes-Oxley, his claim under Dodd-Frank fails." *Id.*

Various district courts have addressed claimant's subjective and objective "reasonable belief" under the Dodd-Frank anti-retaliation provision through similar analysis—with and without explicitly leveraging SOX jurisprudence. *See, e.g., Ott v. Fred Alger Mgmt. Inc*., U.S. Dist. LEXIS 143339, (S.D.N.Y. Sep.27, 2012) (denying motion to dismiss Dodd-Frank whistleblower claim where the plaintiff "plausibly alleged that a similarly situated employee might reasonably possess a belief that the [reported activity] violated the securities laws."); *Williams v. Rosenblatt Sec. Inc.,* 136 F. Supp. 3d 593 *; 2015 U.S. Dist. LEXIS 137338 (S.D.N.Y 2015) (Denying employer's motion to dismiss the Dodd-Frank claim noting the subjective and objective belief components of reasonability and finding, "The plaintiff is not required to prove that a securities law violation had occurred, but only that he possessed a good faith reasonable belief that such a violation had occurred [] for purposes of the current motion."); *Kuhns v. Ledger*, 202 F. Supp. 3d 433, 2016 U.S. Dist. LEXIS 118928 (S.D.N.Y. 2016)(Denying motion to dismiss attempting to apply the prior SOX "definitively and specifically" standard and finding instead that the claimant "sufficiently alleges that Kuhns subjectively believed that defendants' conduct violated the securities laws, and such a belief is not unreasonable as a matter of law."); *McManus v. Tetra Tech Constr., Inc.*, 260 F. Supp. 3d 197, 2017 U.S. Dist. LEXIS 71838 (N.D.N.Y 2017) (Denying employer's motion to dismiss finding Plaintiff met the standard "because his allegations are plausible and similar to those upheld by other courts at the motion-to-dismiss stage."); *Van Elswyk v. RBS Sec., Inc.*, 2017 U.S. Dist. LEXIS 125886 (D. Conn.

2017) (Denying motion for summary judgment on Dodd-Frank claim based solely on SOX analysis finding subjectively and objectively reasonable belief because the "Dodd-Frank claim is coextensive with his SOX claim: the claims rise or fall together[.]").

2. Possible Securities Law Violation

In order to qualify for protection under the Dodd-Frank anti-retaliation provision, the report made must actually relate to a possible securities law violation. Nevertheless, this is not always a nexus successfully pleaded to meet this foundational element. *See, e.g., Egan v. TradingScreen, Inc.*, 2011 U.S. Dist. LEXIS 47713 (S.D.N.Y. 2011) (In the context of a motion to dismiss, rejecting argument that reporting a violation of FINRA rules constituted protected whistleblower activity under Dodd-Frank.); *Erhart v. Bofi Holding, Inc.*, 2016 U.S. Dist. LEXIS 131761 (S.D. Cal. 2016) (Granting motion to dismiss Dodd-Frank claim for failing to "allege anywhere in his Complaint that he believed any of the information related to a possible securities law violation or the violations covered by Sarbanes-Oxley" and only general allegation of belief of "'illegal conduct and/or conduct Plaintiff reasonably believed to be illegal'"); *Diaz v. Transatlantic Reinsurance Co.*, 2016 U.S. Dist. LEXIS 83215 (S.D.N.Y 2016) (Granting motion to dismiss Dodd-Frank claim where allegations are "solely premised upon a purported non-compliance with the company's internal conflict of interest policy and the employment of the Executive VP's husband's relatives[.]"); *Polite v. Khan Funds Mgmt. Am., Inc.*, 2018 U.S. Dist. LEXIS 19606 (S.D.N.Y. 2018) (Granting motion to dismiss Dodd-Frank claim because "Plaintiff's complaint does not contain any allegation that he made a disclosure relating to a possible violation of any securities law" or that items complained of actually violated any securities law.).

3. Manner of Reporting: Internal vs. External

By its terms, the Dodd-Frank anti-retaliation provision provided a new cause of action only to "whistleblowers," which Section 21F(a)(6) of the Act defines as individuals who provide information to the SEC. As noted herein, however, an apparent ambiguity in the law led to a split – since resolved – in the federal courts as to whether the anti-retaliation provision of Dodd-Frank also protects individuals who only have reported internally. The disagreement arose from the anti-retaliation provision's reference to individuals who make disclosures "required or protected" under SOX, the Securities Exchange Act of 1934, or any other law, rule or regulation subject to the jurisdiction of the SEC. It is well-established that SOX protects individuals who make internal disclosures of issues that implicate the categories of fraud and securities violations enumerated in SOX 806, and that it does not require reporting to the SEC or any other government agency.

On June 13, 2011, the SEC issued guidance that interpreted Dodd-Frank to protect individuals who only report internally suspected violations of securities law. The Commission stated: "[T]he statutory anti-retaliation protections [of Dodd-Frank] apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the [SEC]." Securities and Exchange Commission, Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300-01 (June 13, 2011) (codified at 17 C.F.R. pts. 240-49). Despite this SEC guidance, however, courts reached

conflicting results before the Supreme Court resolved the dispute with a finding that external reporting is required.

a. Pre-*Digital Realty*

In the earliest anti-retaliation cases decided under Dodd-Frank, several District Courts reached holdings consistent with the SEC's guidance. *See, e.g., Murray v. UBS Secs., LLC*, No. 12 Civ. 5914, 2013 WL 2190084 at *3-7 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1105-07 (D. Colo. 2013); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 992-95 (M.D. Tenn 2012); *Kramer v. Trans-Lux Corp.*, No. 3:11-cv-1424, 2012 WL 4444820, at *3-5 (D. Conn. Sept. 25, 2012); *Egan v. TradingScreen, Inc.* (*Egan I*), No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011). These courts explained that while the first two categories of protected activity under the anti-retaliation provision, by their own terms, protect only whistleblowers who work with the SEC directly, the third category is silent as to whom the disclosure must be made and that it would be rendered meaningless by a construction requiring contact with the SEC. *See Murray*, 2013 WL 2190084, at *5; *Genberg*, 935 F. Supp. 2d 1094 at 1106; *Nollner*, 852 F. Supp. 2d 986 at 993; *Kramer*, 2012 WL 4444820, at *3-5; *Egan I*, 2011 WL 1672066, at *5.

The Court of Appeals for the Fifth Circuit firmly rejected this line of reasoning, holding that "[u]nder Dodd–Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC." *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013). In *Asadi*, the court held that the third category of protected activity does not broaden the definition of "whistleblower" to include those who make internal reports, that it is unambiguous, and that it does not create a conflict or ambiguity in the law. The court stated that any other construction of the provision would render SOX's anti-retaliation provision, and the accompanying administrative scheme, moot.

After *Asadi*, federal courts continued to issue divergent decisions, culminating in the Second Circuit's creation of a formal circuit split in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015). The *Berman* court held, consistent with SEC guidance and the majority of federal courts to decide the issue, that Dodd-Frank protected both internal and external whistleblowers. While the *Berman* court created the formal circuit split, the employer, Neo@Ogilvy, ultimately chose not to appeal the decision to the Supreme Court. As a result, federal courts continued to issue divergent decisions without Supreme Court guidance until the Ninth Circuit issued its opinion in *Digital Realty Trust, Inc. v. Somers* in June 2017 and the employer appealed.

b. *Digital Realty Trust v. Somers*

Digital Realty Trust, a real estate investment trust specializing in properties for data centers, employed and, later, terminated Paul Somers. Somers later sued Digital Realty in the federal court in Northern California alleging retaliatory termination in violation of the Dodd-Frank anti-retaliation provision based upon his making internal complaints about alleged SOX violations. Digital Realty moved to dismiss Somers' claims based upon his failure to report his

complaint directly to the SEC as Dodd-Frank's definition of "whistleblower" requires. In May 2015, the federal district court denied Digital Realty's motion to dismiss and Digital Realty appealed.

In March 2017, with one dissent, the U.S. Court of Appeals for the Ninth Circuit affirmed the denial with a finding that the Dodd-Frank anti-retaliation provision "unambiguously and expressly protects" both whistleblowers who report matters to the SEC and those who only make internal reports to their employer and that that to apply 21F(a)(6)'s definition of a "whistleblower" as one who had provided information to the SEC to the anti-retaliation provision would narrow the disputed clause "to the point of absurdity." *Digital Realty Trust, Inc. v. Somers*, 850 F.3d 1045 (9th Cir. 2017), *cert. granted* (U.S. June 26, 2017). Digital Realty sought and, in June 2017, the Supreme Court granted certiorari.

On February 21, 2018, writing for a unanimous court, Justice Ginsburg found the Dodd-Frank anti-retaliation provision protects only those employees who complain directly to the SEC. *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018). The Court began its analysis, "'When a statute includes an explicit definition, we must follow that definition,'" even if it varies from a term's ordinary meaning. This principle resolves the question before us." *Id*. at 776-777. (internal citations omitted).

Applying that precept, the Court first found that the "unequivocal answer" for the definition of "whistleblower" is found in Section 21F(a)(6) and reads, "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*." *Id.* at 777 (quoting 21F(a)(6))(emphasis added). Despite the pre-existing 2-1 Circuit split to the contrary, it continued, "Leaving no doubt as to the definition's reach, the statute instructs that the 'definitio[n] shall apply' '[i]n this section,' that is, throughout [21F(a)(6)]." *Id.*

Proceeding from that foundation, the Court found that, by statutory design, individuals not meeting the threshold requirement of providing pertinent information to the SEC cannot avail themselves of Dodd-Frank's anti-retaliation protections. The Court stressed that Congress enacted Dodd-Frank "to motivate people who know of securities law violations to tell the SEC," and granted such individuals "immediate access to federal court, a generous statute of limitations (at least six years), and the opportunity to recover double backpay." *Id.* at 778. The Court also distinguished Dodd-Frank's narrow SEC-related objectives from SOX's "more far-reaching objective" to "disturb the 'corporate code of silence'" and embolden employees to report fraudulent behavior "not only to the proper authorities … but even internally." *Id.*

Accordingly, the Court reversed, finding that, given the statute's unambiguous definition of whistleblower, because Somers failed to provide information to the SEC prior to his termination, he did not qualify as a Dodd-Frank "whistleblower" at the time of the alleged retaliation.

d. Post-*Digital Realty*

Digital Realty's then-pending guidance on required external reporting to the SEC[13] loomed in the background for numerous other cases through briefing, argument, and ruling. As a result, despite being issued in late February 2018, federal district courts all over the country have already ruled on (or taken up previously reserved rulings) on parallel fact patterns. *See, e.g., Johnson v. AmeriGas Propane, L.P.*, 2018 U.S. Dist. LEXIS 84379, (N.D.N.Y. 2018) (Citing to and discussing *Digital Realty* to find plaintiff is not a covered whistleblower under Dodd-Frank anti-retaliation provision because "it is undisputed that Plaintiff did not make a complaint to the SEC until after his termination."); *Danon v. Vanguard Grp., Inc.*, 2018 U.S. Dist. LEXIS 188987 (E.D.PA 2018) (Granting a plaintiff's post-*Digital Realty* Motion for Leave to Amend to allege facts "that [he] was not terminated before he reported to the SEC" over the Defendant's objections, including "that Plaintiff should not be permitted to amend his complaint to assert facts that differ from those previously introduced."); *Wutherich v. Rice Energy Inc.*, 2018 U.S. Dist. LEXIS 171113 (W.D. Pa 2018) (granting motion to dismiss Dodd-Frank anti-retaliation claim citing *Digital Realty* because plaintiff did not report anything to the SEC until post-termination.); *Price v. UBS Fin. Servs.*, 2018 U.S. Dist. LEXIS 66200 (D.N.J. 2018) (Dismissing Dodd-Frank anti-retaliation claim because plaintiff complained only to FINRA rather than the SEC prior to being terminated.); *Neely v. Boeing Co.*, 2018 U.S. Dist. LEXIS 81771 (W.D. Wa. 2018)(Granting Motion to Dismiss because "Plaintiff does not allege that he reported any alleged misconduct to the SEC, therefore he cannot bring a claim of retaliation against Boeing under Dodd-Frank.")

B. Procedure and Remedies

A Dodd-Frank retaliation claim may be filed directly in federal court within three years "after the date when facts material to the right of action are known or reasonably should have been known to the employee" (but subject to a maximum of six years). Section 21F(h)(1)(B)(iii). A whistleblower's remedies include reinstatement, double back pay with interest, attorneys' fees, and the reimbursement of other related litigation expenses. Section 21F(h)(1)(C). These remedies are exclusive and do not include "compensatory or punitive damages." *See, e.g., Kramer v. Trans-Lux Corp.*, 2012 U.S. Dist. LEXIS 136939 (D. Conn. 2012); *Rosenblum v. Thomson Reuters (Markets) LLC*, No. 13 CIV. 2219 SAS, 2013 WL 5780775, at *5 (S.D.N.Y. Oct. 25, 2013) (Punitive damages are not recoverable). Unlike SOX, Dodd-Frank does not authorize "special damages" such as emotional distress and reputational harm.

In *Pruett v. BlueLinx Holdings Inc.*, No. 1:13-cv-02607-JOF, 2013 U.S. Dist. LEXIS 185551 (N.D. Ga. Nov. 13, 2013), the district court held that a plaintiff is not entitled to a jury trial under Dodd-Frank after a Seventh Amendment analysis because, unlike SOX, Dodd-Frank's statutory language is silent as to the availability of a jury trial. In so holding, the *Pruett* Court assessed the nature of the available remedies and found that "reinstatement, hiring, and back pay

[13] Many companies routinely – often at the outset of employment or as part of a severance or settlement agreement – use confidentiality agreements to prevent employees and former employees from disclosing company confidential or privileged information, such as information generated as part of an internal investigation. SEC Rule 21F-17 specifically prohibits "enforcing, or threatening to enforce, a confidentiality agreement" or taking other actions, that would impede individuals from communicating with the SEC about possible securities law violations. 17 C.F.R. § 240.21F-17.

are generally considered equitable remedies." *Id*. at *5-6 (citations omitted). The Court went on to discuss the available double back pay under Dodd-Frank and found "automatic doubling [that] is a calculation that lacks the discretion generally associated with monetary damages awarded by a jury." *Id.* at *6. It went on to note that Dodd-Frank contains no requirement to prove "willfulness" to trigger availability and, therefore, found "to the extent that the doubling of the back pay would take such damages outside of a restitutionary or equitable nature, the court finds that those damages are otherwise intertwined with the reinstatement remedy." *Id.* at 7-8.

C. Extraterritorial Application

One month before Dodd-Frank's signing into law, in *Morrison v. National Australia Bank*, 561 U.S. 247 (2010), the U.S. Supreme Court held that U.S securities laws do not apply extraterritorially to cover transactions by non-U.S. investors in securities of non-U.S. companies effected on non-U.S. exchanges (so-called "foreign-cubed cases"), even if the losses may arise from fraudulent conduct in the United States. Setting aside the long-standing "conduct" and "effects" tests previously applied by courts, the Court instead adopted a "transactional" test, under which Section 10(b) only applies to transactions in securities listed on domestic exchanges or domestic transactions in other securities.

Dodd-Frank Section 929P amended the Exchange Act to provide U.S. district courts with jurisdiction over an action brought or instituted by the SEC alleging a violation of the anti-fraud provisions of the Exchange Act involving "[c]onduct occurring outside the United States that has a foreseeable substantial effect within the United States." Further, Section 929Y(a) directed the SEC to prepare a study regarding whether the scope of the anti-fraud provisions should be extended to private rights of action to the same extent as that provided to the SEC by Section 929P. However, the resulting SEC study, did not provide any concrete recommendations but rather provided a wide range of options for Congress to consider.

Shortly after the SEC's April 2012 study release, in *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012), *upheld on other grounds*, 720 F.3d 620 (5th Cir. 2013), the court, applying *Morrison*, refused to extend extraterritorial application of the anti-retaliation provision of the Dodd-Frank Act to a U.S. citizen working abroad for a U.S. public company, despite the fact that the company had expressly invoked the U.S. at-will employment law when dismissing the employee.

Following that decision, the Second Circuit held in 2014 that Dodd-Frank's anti-retaliation provisions do not apply extraterritorially, and dismissed a claim brought by a citizen and resident of Taiwan who was working in China for a subsidiary of a German corporation that listed its shares on the New York Stock Exchange. *See Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 183 (2d. Cir. 2014). In 2018, in an unpublished decision, the Second Circuit affirmed a district court in the following the *Liu* holding. *See Ulrich v. Moody's Corp.*, No. 17-1060-cv, 721 Fed. Appx. 17, 2018 WL 357539 (2d. Cir. Jan. 11, 2018) (affirming dismissal of SOX and Dodd-Frank claims brought by a U.S. citizen who worked for a U.S. company in Hong Kong and reported to a supervisor located in Australia).

IV. SEC AWARD PROGRAM

A. Background

In addition to amending SOX Section 806 and creating a cause of action for whistleblower retaliation, Dodd-Frank instituted a new SEC whistleblower award program which incentivizes the reporting of securities violations. Under the new program, the SEC is required to pay awards to eligible whistleblowers who voluntarily provide the commission with original information that leads to a successful enforcement action in which the SEC recovers monetary sanctions in an amount over $1 million. A whistleblower who meets this and other criteria is entitled to an award of 10% to 30% of the amount recovered by the SEC or by certain other authorities in "related actions."

B. Whistleblower Status

Dodd-Frank defines a "whistleblower" as an "individual . . . or two or more individuals acting jointly." Section 21(F)(a)(6).[14] The final rules make it clear that a corporation or other such entity is not eligible for whistleblower status. Rule 21-F2(a).

1. "Voluntarily Provide"

In order to qualify for a reward under Section 21F(b)(1) of the Act, [15] a whistleblower must "voluntarily provide" the SEC with "original information" concerning a securities violation. The SEC will view information provided as voluntary only if the whistleblower provides it to the Commission before he has received an official request, inquiry, or demand for it. Rule 21F-4(a)(1), (2). The SEC rules also made it clear that a whistleblower would be deemed to have submitted information "voluntarily" as long as an official inquiry had not been directed to him as an individual, so employees remain eligible even if an inquiry has been directed to their employer. *Id.* If a whistleblower is obligated to report information to the SEC as a result of a preexisting duty, it will not be considered voluntary. Rule 21F-4(a)(3). This disqualification is not triggered by an employee's contractual obligation to his employer or another third party or the receipt of a request for the same or related information as part of an internal investigation, so an employer cannot remove the incentives that are key to the effectiveness of the program by requiring all employees to sign agreements requiring them to

[14] Section 922 of the Dodd-Frank Act amended the Securities Exchange Act of 1934 to add Section 21F, which establishes the whistleblower award program. Citations herein are to the Exchange Act, in accordance with the practice of the Securities and Exchange Commission ("SEC"). These rules have been codified at 17 C.F.R. pt. 240 and 249 (2012), but this article, like most written on the subject, uses instead the numbering system used in the rules as issued by the and the Adopting Release that explains them.

[15] Section 922 of the Dodd-Frank Act amended the Securities Exchange Act of 1934 to add Section 21F, which establishes the whistleblower award program. Citations to the "Act" herein are to the Exchange Act.

report any perceived securities violations to the SEC. Adopting Release at 35-37.[16]

2. "Original Information"

In order to qualify as "original information" that will support a claim for an award, the whistleblower's tip must consist of information that is: 1) derived from the individual's "independent knowledge" or "independent analysis," 2) not already known to the SEC from any other source (unless the whistleblower is the original source of the information, such as where she has reported the information first to the Department of Justice, which passed the information to the SEC), and 3) not "exclusively derived" from certain public sources, including government reports, hearings, audits or investigation, or the news media, unless the whistleblower is a source of the information contained therein. Rule 21F-4(b)(1).

a. Independent Knowledge and Independent Analysis

Rule 21F-4(b)(2) defines "independent knowledge" simply as "factual information … this is not derived from publicly available sources." The whistleblower may have observed the facts first-hand, but may also come into possession of the knowledge through her "experiences" or communications. This suggests that the whistleblower can have "independent knowledge" of facts despite having learned them from someone else such as a co-worker, customer or client, as long as that third person is a company attorney, compliance officer or other representative who would be ineligible for a reward under Rule 21F-4(b)(4), discussed below.

In declining to heed the warning of business-side commentators that allowing tips based on third-party information would encourage frivolous claims, the SEC noted that excluding such information could deprive the Commission of highly probative information that could aid significantly in an enforcement action. Adopting Release at 47. The SEC noted that Congress had recently amended the False Claims Act to remove a similar requirement that a *qui tam* relator possess "direct" (or first-hand) knowledge of the facts. *Id.* n. 104.

"Independent analysis" refers to a whistleblower's "examination and evaluation," conducted by herself or with others, of information that might be publicly available if the analysis reveals information that is not "generally known or available to the public." Rule 21F-4(b)(3). This might include, for example, expert analysis of data that could significantly advance an investigation. Adopting Release at 51.

b. Exclusion from Independent Knowledge and Analysis

Consistent with its goal of promoting enforcement of securities laws while also respecting a company's efforts to build and maintain an effective internal compliance program, the SEC has designated information in the possession of certain categories of employees and other individuals as not being derived from independent knowledge or analysis, making these individuals presumptively ineligible for participation in the whistleblower-reward program. Two

[16] The Adopting Release and the final rules, a combined 305 pages, are available on the SEC's website at http://www.sec.gov/rules/final/2011/34-64545.pdf. The text of the rules themselves begins on page 241.

of the exclusions that are carved out apply specifically to attorneys, both in-house and retained, and to non-attorneys who possess privileged information. The rules exclude: Information obtained through a communication subject to attorney-client privilege, unless disclosure would be permitted due to waiver or by a rule of the SEC or state rules governing attorneys, Rule 21F-4(b)(4)(i); and information obtained in connection with the whistleblower's (or her firm's) legal representation of a client, unless disclosure would be permitted as described above, Rule 21F-4(b)(4)(ii).[17]

In addition, the rules make certain individuals ineligible to receive awards in most circumstances because of their roles, formal or otherwise, in the internal compliance functions that the SEC believes are critical to the overall goal of increased adherence to securities laws. The SEC deems information to lack "independent knowledge or analysis" where the person obtained the information because she was:

- An officer, director, trustee or partner who learned the information in connection with the entity's processes for identifying and addressing unlawful conduct, Rule 21F-4(b)(4)(iii)(A);

- An employee or contractor whose principal duties are in compliance or internal audit, Rule 21F-4(b)(4)(iii)(B);

- Employed by a firm retained to investigate possible violations of the law, Rule 21F-4(b)(4)(iii)(C); or

- Employed by a public accounting firm performing an engagement required by federal securities laws, who, through the engagement, obtained information about a violation by the engagement client, Rule 21F-4(b)(4)(iii)(D).

Other individuals who learn information from persons in any of these four categories will not be considered to be providing "original information" if they report the same information to the SEC. Rule 21F-4(b)(4)(vi). Persons who obtain information for a tip using methods that a court finds to have violated criminal laws are also excluded. Rule 21F-4(b)(4)(iv).

The four non-attorney exclusions described above – those for upper-level management, compliance personnel and auditors set forth in Rule 21F-4(b)(4)(iii) – do not apply in all circumstances. The wording of the rules suggests that these persons might have "independent knowledge" as long as they obtain their information outside their roles in compliance,

[17] Lawyers who are considering providing the SEC with information about securities violations need to be particularly careful, as they may run afoul of ethical prohibitions even if they would otherwise qualify under a rule of practice before the SEC. The Professional Ethics Committee of the New York County Lawyers Association has issued a bar opinion stating that New York's rules of professional conduct prohibit attorneys from collecting SEC awards, and presumably other "bounties," based on the confidential information of a client. *See* New York County Lawyers Association, Ethics Opinion 746, Ethical Conflicts Caused by Lawyers as Whistleblowers under the Dodd-Frank Act of 2010 (Oct. 7, 2013).

investigation or audit. In addition, the rules provide that these exclusions do not apply, and the person can be eligible for an award, where at least one of the following conditions is present:

- The would-be whistleblower "reasonably believes" that disclosure to the SEC is needed to prevent "substantial injury" to the entity or investors, Rule 21F-4(b)(4)(v)(A);

- The would-be whistleblower "reasonably believes" that the entity is acting in a way that would impede an investigation of the violations, Rule 21F-4(b)(4)(v)(B); or

- At least 120 days have passed since the whistleblower reported her information internally to the audit committee, chief legal officer of other appropriate official of the entity, or since she obtained the information under circumstance indicating that those officials were already aware of the information, Rule 21F-4(b)(4)(v)(c).

These exclusions are designed to promote internal reporting while still incentivizing individuals to come forward if a company does not self-report or take remedial action.

3. Rules Designed to Support Internal Compliance Programs

The SEC repeatedly makes it clear that the main purpose of the whistleblower program is to encourage individuals to provide high-quality tips to the Commission. The SEC notes in the Adopting Release at 105 that:

> …the broad objective of the whistleblower program is to enhance the Commission's law enforcement operations by increasing the financial incentives for reporting and lowering the costs and barriers to potential whistleblowers, so that they are more inclined to provide the Commission with timely, useful information that the Commission might not otherwise have received.

With this purpose in mind, the SEC rejected the business lobby's near-unanimous insistence that it require whistleblowers submit their complaints internally before filing them with the SEC. *Id.* at 103. "[W]hile internal compliance programs are valuable," the Commission observed, "they are not substitutes for strong law enforcement." *Id.* at 104. The Adopting Release recognizes that whistleblowers might reasonably fear retaliation for raising their concerns, and also notes that law enforcement interests are sometimes better served when the Commission can launch an investigation before the alleged wrongdoers learn about it and are able to destroy evidence or tamper with potential witnesses. *Id.* For these and related reasons, the SEC leaves it to each whistleblower to decide whether to report first internally or to the SEC. *Id.* at 91-92.

At the same time, the Commission has included several provisions in the new rules that are expressly designed to encourage whistleblowers to utilize internal compliance programs. These include:

- Affording whistleblower status to the individual as of the date he reports the information internally, as long as the he provides the same information to the SEC

within 120 days. This allows an employee to report internally while preserving his "place in line" for an award from the SEC for 120 days, even if another whistleblower provides the same or related information to the Commission in the interim. Rule 21F-4(b)(7).

- Giving a whistleblower full credit for information provided by his employer to the SEC where the employee reports the information internally and the employer investigates and "self-reports" that information (and even additional information that the whistleblower may not have had) to the SEC, and the information supplied by the employer "leads" to a successful enforcement action. Rule 21F-4(c)(3).

- Treating a whistleblower's participation in an internal compliance and reporting system as a positive factor in determining the amount of the award. Rule 21 F-6(a)(4). Conversely, a whistleblower's interference with internal compliance and reporting may decrease the amount of the award. Rule 21 F-6(b)(3).

These rules provide the whistleblower, who the SEC believes is in the best position to determine the effectiveness, or ineffectiveness, of the internal compliance system, flexibility in choosing how to report violations. *See* Adopting Release at 103. The rules enhance the SEC's law enforcement operations by encouraging people who may otherwise be deterred to report violations. This group includes those who will be persuaded to use the internal compliance programs because of new financial incentives who may not have done so otherwise, as well as those who will report directly to the SEC who may not have reported any violations at all if required to go to the company first. *Id.*

The SEC also points out that the rules' incentives to employees to report internally are likely to encourage companies to create and maintain effective internal compliance programs, as whistleblowers are more likely to participate in such a program. *Id.* at 104. Maintaining an effective program is in the best interests of a company because, as the SEC has in past enforcement actions, the Commission will often, upon receiving reports of a violation, notify the company and give it an opportunity to investigate the issue. In deciding whether to give a company that opportunity, the SEC will consider the company's "existing culture related to corporate governance," and, in particular, the effectiveness of the company's internal compliance programs. *Id.* at 92 n. 197.

4. Information that Leads to Successful Enforcement

The final SEC rules clarify the standard for determining when a whistleblower's information has led to a successful investigation, entitling her to an award if the action results in monetary sanctions exceeding $1,000,000. When information concerns conduct not already under investigation or examination by the SEC, it will be considered to have led to successful enforcement if:

- It is "sufficiently specific, credible, and timely" to cause the staff to commence an examination, open an investigation, reopen an investigation that the Commission had

closed, or to inquire concerning different conduct as part of a current examination or investigation, Rule 21 F-4(c)(1); and

- The Commission brings a successful judicial or administrative action based in whole or in part on the conduct identified in the original information. Rule 21 F-4(c)(1).

The standard is somewhat higher for information concerning conduct already under investigation or examination. Information will be deemed to have led to successful enforcement if it "significantly contributed" to the success of the action. Rule F-4(c)(2). In determining whether information "significantly contributed" to the success of an investigation, the Commission will consider whether the information allowed the SEC to bring a successful action in significantly less time or with significantly fewer resources, bring additional successful claims, or take action against additional parties. *See* Adopting Release at 100.

As discussed above, information reported by a whistleblower internally can also be credited to the whistleblower and deemed to have led to a successful investigation if it conforms to the criteria in Rule 21F-4(c)(1) or (2). Rule 21 F-4(c)(3).

5. Monetary Sanctions Totaling More than $1 Million

Under the final rule, in determining whether recovery in an enforcement action exceeds the $1,000,000 threshold, the word "action" generally means a single judicial or administrative proceeding. Rule 21F-4(d). However, in certain circumstances actions can be aggregated. The SEC adopted this broad interpretation of the term "action" in accordance with congressional intent to increase the incentives for employees to report violations. Actions may include cases from two or more administrative or judicial proceedings that arise out of a common nucleus of operative facts, and any follow-on proceedings arising out of the same nucleus of operative facts may be aggregated as well. Rule 21F-4(d)(1). Factors that may be taken into account when determining whether two or more proceedings arise from the same nucleus of operative facts include parties, factual allegations, alleged violations of federal securities laws, or transactions and occurrences. *See* Adopting Release at 110.

Where the SEC has brought a successful enforcement action, the SEC will also issue awards based on amounts collected in "related actions" brought by the Attorney General of the U.S., certain regulatory authorities and self-regulatory organizations, and state attorneys general under certain circumstances. Rule 21F-3. The rule regarding related actions is discussed in detail in the Adopting Release at 20-24.

6. Determining the Amount of an Award

The final rules reiterate that the amount of a whistleblower's award is within the sole discretion of the Commission as long as the award falls within the 10% to 30% range that Congress established in the Dodd-Frank Act. Rule 21 F-5. The total award cannot exceed 30% limit even where the Commission makes awards to more than one whistleblower. *Id.*

The final rules set forth a number of factors that the SEC may consider when calculating

the final award. Factors that might increase an award include participation by the whistleblower in an internal compliance system, the significance of information provided by the whistleblower, the degree of assistance provided by the whistleblower, and the SEC's programmatic interest in the particular securities violations at issue.[18] Rule 21 F-6(a)(1)-(4). Factors that might decrease an award include the culpability of the whistleblower, unreasonable reporting delay, or interference with internal compliance and reporting systems. Rule 21 F-6(b)(1)-(3). In short, the rules enable a whistleblower to maximize his or her award by reporting violations timely and effectively, to use internal channels where practical, and to assist the SEC as needed.

The rules also balance concerns about culpable whistleblowers receiving awards with the understanding that, at times, those with the best access to information may have participated in wrongdoing at some level. In order to incentivize such whistleblowers to come forward with securities violations, the rules do not exclude culpable whistleblowers from awards altogether, but they do prevent them from recovering from their own misconduct. In determining whether the whistleblower has met the $1,000,000 threshold and in calculating an award, the SEC will exclude any monetary sanctions that the whistleblower is ordered to pay individually or that an entity is ordered to pay based substantially on the conduct of the whistleblower. Rule 21F-16. The rule thus allows culpable whistleblowers, who may be uniquely situated to provide information regarding securities violations, to come forward while not creating incentives that would encourage them to engage in securities violations.

7. Proposed Rule Changes

In June of 2018, the SEC proposed the most significant rule changes in the ten-year history of the whistleblower program. The SEC commissioners voted along party lines to approve the proposed rules for public notice and comment, with the three Republican commissioners voting in favor of the revisions and the two Democrats opposing the changes. Many attorneys who represent whistleblowers have opposed rules that would allow the SEC discretion to lower the amount of an award based solely on its potential size, rather than on substantive factors. Commentators have rightly noted, however, that there are a number of pro-whistleblower changes as well. The changes are described briefly below.

a. Discretionary Adjustments to "Exceedingly Large" and Small Awards

The proposed amendments would permit the SEC to limit awards that would otherwise result in a whistleblower receiving over $30 million, if the Commission determines that such an "exceedingly large potential payout" was not "reasonably necessary to fulfill the purposes of the program." *See* Proposed Amendments at 43–56. Any adjustment would still require that the award fall between 10% and 30% of the proceeds collected. *Id.* Also importantly, this would impact a very small percentage of whistleblower awards; to date, the SEC has issued awards to

[18] The SEC's description of its law-enforcement interests provides some guidance to practitioners who are assessing the Commission's likely response to a given "tip." Key to the SEC's response will be, *inter alia,* whether the conduct at issue involves an industry-wide practice, Rule 21F-6(a)(3)(iii); the type, severity, duration and isolated or ongoing nature of the violations, *id.*; the danger to investors "and others," Rule 21F-6(a)(3)(iv); and the number of entities and individuals who have suffered harm. *Id.*

59 whistleblowers, just two of whom received awards of over $30 million. And even in those cases, the awards were only slightly over the threshold, at $33 million and $39 million. But it may give pause to whistleblowers to know that the SEC may cap their potential payouts for no other reason than the Commission has determined they are too large, particularly in light of the substantial risks and considerable efforts they expend to provide information to the SEC.

On the other hand, the SEC also included an amendment that would provide "a mechanism for the Commission to adjust upwards any awards that would potentially be below $2 million to a single whistleblower." *Id.* at 40–43. The SEC noted that "where the proposed rule is triggered, there would be a presumption in favor of some award enhancement[.]" *Id.*[19]

b. Clarifying the Scope of "Related Actions"

Elsewhere, the SEC clarified the scope of "related actions" for which it may reward whistleblowers. Related actions refer to actions brought by other regulatory agencies but which are based on the same original information the whistleblower provided to the SEC. Under the proposed amendments, related actions would include ones resulting in deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs") entered into by the Department of Justice or state attorneys general for which the government required an entity to pay monetary sanctions. *Id.* at 16–22. The SEC added that "[t]he same result would follow for a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws." *Id.*

However, the SEC also made clear under the proposed amendments that if the action forming the basis for the award is subject to a separate monetary award program, the SEC will deem it a "related action" only if it finds that the SEC whistleblower program has the "more direct or relevant connection to the action." *Id.* at 29–39. Under the proposed amendments, the SEC would also decline to pay an award, even if it does determine that there is a "related action," if another entity has already issued the whistleblower an award. *Id.* Finally, the proposed amendments will disallow a whistleblower whose award application was denied by another award program from "readjudicat[ing] any issues . . . that the authority responsible for administering the other whistleblower award program resolved against [the whistleblower] as part of the award denial." *Id.* The SEC noted that while the Commission has yet to pay an award on a matter where a second whistleblower program also potentially applied, there are a number of other whistleblower award programs, including those administered by the Department of Justice and the Internal Revenue Service, where such "double-dipping" could arise.

[19] The SEC also requested comments regarding whether the Commission could "at a future point" propose a rule that would enable it to, at its discretion, issue awards to whistleblowers who provide information that either did not result in an order for sufficiently large monetary sanctions or was publicly available. *Id.* at 110. The SEC also queried whether it could issue additional payments to otherwise meritorious whistleblowers in instances where the ordered monetary sanctions cannot be collected or the amount collected would result in a *de minimis* payment. *Id.* at 110–11. It is important to note, however, that the SEC merely requested comments regarding this additional discretion, and the change is not part of the proposed amendments.

c. Guidance on "Unreasonably Delayed" Reporting Issues

Another proposed amendment would provide the Commission with guidance regarding what it means for a whistleblower to have "unreasonably delayed" reporting issues to the Commission. *Id.* at 56–57. The SEC stated that "any delay in reporting to the Commission beyond 180 days is presumptively unreasonable" and added that short delays "may also readily qualify as unreasonable depending on the particular facts and circumstances at issue." *Id.* In justifying the proposed change, the SEC cited two Supreme Court decisions limiting the period within which the Commission must bring an enforcement action. *Id.* The SEC noted that "delay on the part of a whistleblower can have a debilitating impact on the Commission's ability to make a full recovery of ill-gotten gains and to obtain civil penalties." *Id.*

d. Defining Protections Against Whistleblower Retaliation

A couple of the proposed amendments relate to retaliation claims brought under the Dodd-Frank Act. The first is largely housekeeping: the SEC clarified that, in light of the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018), the term "whistleblower" shall be defined throughout the Dodd-Frank Act, including for the purposes of the statute's anti-retaliation provision, as:

> (i) an individual (ii) who provides the Commission with information "in writing" and only if (iii) "the information relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur."

Id. at 60–66. This revision reflects the Supreme Court's holding in *Digital Realty* that the protections against retaliation set forth in the Dodd-Frank Act do not protect those who only report violations of securities laws internally; instead, the Court held that individuals must file a whistleblower tip with the Commission in order to garner protections under the statute.

The proposed amendments also provide clarity regarding what actions on an employee's part constitute protected activity under the Dodd-Frank Act. The statute's anti-retaliation provision provides protection for internal whistleblowing for individuals who otherwise qualify as a "whistleblower," i.e., who have provided information to the Commission in the manner prescribed by the Commission. Under the proposed amendments, the SEC clarifies that such whistleblowers may garner protections under the Act even if they made the internal report that led to their retaliation prior to providing information to the Commission, so long as their report to the SEC occurred prior to the retaliatory act. *Id.* at 67–72. In other words, an individual is protected under Dodd-Frank if she reports an issue internally, then submits a written whistleblower tip on a related subject to the SEC – thereby becoming a "whistleblower" for the purposes of the Dodd-Frank Act – and then experiences retaliation.

e. Other Proposed Changes

The proposed amendments contain a number of other, less impactful changes, including:

- Clarifying the types of "monetary sanctions" that can form the basis of a whistleblower award, *id.* at 23–28;
- Adding flexibility in the form of whistleblower tips, *id.* at 74–76;
- Granting the Commission the ability to take measures to combat abusive or frivolous tipsters, *id.* at 76–80;
- Providing clarity regarding the method of submitting online tips, *id.* at 80–82;
- Limiting the manner in which a whistleblower may make supplemental submissions regarding a tip and/or award application, *id.* at 82–87;
- Clarifying the items needed to be included in the record on appeal of an award determination, *id.* at 88–90;
- Establishing a summary disposition process for award applications to provide a more timely resolution of relatively straightforward denials, which "could free up staff resources to concentrate on the meritorious claims," *id.* at 90–95; and
- Proposing an interpretive guidance regarding the meaning and application of "independent analysis" that gives rise to a whistleblower award, *id.* at 97–98.

The SEC Whistleblower Program continues to thrive. The SEC issued its most recent whistleblower award on September 24, 2018 and has now awarded approximately $326 million to 59 whistleblowers. If enacted, these Amendments will not cripple the Program. But overall, they represent a step backward. The SEC should not be in the business of limiting whistleblower incentives for reasons other than those expressly set forth in the statute. We encourage the Commission to reconsider that portion of the proposed amendments.

B. Confidentiality Agreements

Many companies routinely use confidentiality agreements to prevent employees and former employees from disclosing company confidential or privileged information, such as information generated as part of an internal investigation. Companies often have employees sign these agreements at the outset of employment, as part of an internal investigation, or as part of a severance or settlement agreement. The SEC promulgated Rule 21F-17 to prevent companies from using such agreements, or taking other actions, that would impede individuals from communicating with the SEC about possible securities law violations. The rule specifically prohibits "enforcing, or threatening to enforce, a confidentiality agreement" for this purpose. 17 C.F.R. § 240.21F-17.

On April 1, 2015, the SEC brought its first enforcement action against a company, KBR Inc., for using confidentiality agreements with its employees that impeded whistleblowers in violation of 17 C.F.R. § 240.21F-17. *See In the Matter of KBR, Inc.*, Rel. No. 34-74619 (Apr. 1, 2015). KBR Inc. had required witnesses participating in some internal investigations interviews, including interviews relating to potential securities law violations – to sign confidentiality agreements that would make them subject to discipline and even termination if they discussed information gained during such investigations with third parties without KBR Inc.'s prior approval. The SEC was not aware of particular instances where a KBR employee was prevented from communicating with the SEC about a potential securities law violation or of particular instances where KBR Inc. took action to enforce the confidentiality agreement, but the Commission nevertheless found that the agreement's language would impede such

communication and undermine the purpose of Section 21F and Rule 21F-17(a), which is to "encourag[e] individuals to report to the Commission." KBR ultimately agreed to pay a penalty of $130,000 to settle the charges, and to amend its confidentiality agreements to make clear that employees were free to report potential violations to the SEC and other federal agencies without KBR's approval.

The SEC's aggressive position on confidentiality agreements, along with similar positions taken by other federal agencies, will likely cause many employers to edit the confidentiality and nondisclosure agreements they use with their employees to make clear that such agreements do not prohibit employees from bringing information to the SEC or certain other federal agencies.

C. SEC Whistleblower Program Statistics and Trends

The SEC reports annually to Congress on the Dodd-Frank whistleblower program following the close of the Commission's fiscal year, which ends on September 30. As of the issuance of the FY2018 report in November 2018, the SEC had awarded $326 million in whistleblower awards to 59 individuals since its inception.[20] According to the Commission, enforcement actions based on whistleblower tips had led to more than $1.7 billion in monetary sanctions. The SEC received approximately 4,400 whistleblower tips in FY2017, more than twice the number it received in FY2012, the first full year of the program's existence. In total, the SEC has received more than 22,000 whistleblower tips.

In addition to actions based on violations of securities laws, the SEC has brought numerous enforcement actions based on retaliation against whistleblowers or a company's efforts to impede whistleblowers from providing information to the Commission. For example, in January 2017, the SEC concluded that HomeStreet, Inc., had engaged in unlawful retaliation by trying to uncover the identity of a whistleblower after the SEC sought information from the company and threatening to deny the whistleblower indemnification for legal costs. The Commission further found that HomeStreet had violated Rule 21F-17 by forcing employees to waive the right to receive a whistleblower award from the SEC, under penalty of forfeiting their severance and other benefits. The SEC issued a cease-and-desist order and fined HomeStreet $500,000.

V. EVOLVING ISSUES IN SOX WHISTLEBLOWER CLAIMS

A. Effect of *Digital Realty* and the Dodd-Frank External Reporting Requirement

1. Will the *Digital Realty* Decision Spawn a Significant Shift in Whistleblower Litigation?

The Supreme Court's opinion in *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018), stopped this potential source of Dodd-Frank whistleblower litigation in its tracks. In *Digital Realty*, the Supreme Court in an unanimous opinion, written by Justice Ginsburg, held

[20] The report is available at https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf.

that to be eligible for protection (and a bounty) under Dodd-Frank, an individual must first report a potential violation to the SEC.[21] Equally important, the Court's definition of a whistleblower, according to the Government which appeared in the amicus curia role, "jettison[ed] protection for auditors, attorneys, and other employees subject to internal reporting requirements; SOX for example, requires auditors and attorneys to report certain information within the company before making disclosures internally" thereby making these professional "vulnerable to discharge for not complying with their internal reporting obligations." Justice Ginsburg, and the rest of the Court, suggested that SOX already provided ample protection to this class of employees who are duty-bound to report internally. Moreover, the Court stressed Dodd-Frank's whistleblower provisions were designed to encourage SEC disclosure, and there was no language in Dodd-Frank, which included whistleblower protections for general counsel, auditors, and corporate compliance officers. This issue may not be exactly settled, because Section 21F-17 of the Securities and Exchange Act, which encourages disclosures, will certainly be a source for this class of whistleblowers to argue that it would be unlawful to wait until an internal investigation was completed before blowing the whistle to the SEC. SOX still provides a robust panoply of protection for whistleblowers, yet, SOX's protections fall far short of the enhanced remedies under the Dodd-Frank Act, such as double damages, jury trials, and an enhanced statute of limitations. Indeed, in *Bio-Rad*, for example, the plaintiff will lose almost $2,900,000 of the verdict because he has no Dodd-Frank claim and thus, his damages are not doubled.

The impact of *Digital Realty* is, however, broader than just a reduction in potential liquidated damages.

As an initial matter, many potential whistleblowers may be time pressed, because a failure to initially report to the SEC, means that there is a 180-day statute of limitations, under SOX, to file a complaint with OSHA. It is difficult to ascertain how many individuals will be caught in the cross-hairs of situations, but certainly time will be of the essence.

Corporate compliance programs may suffer. When Dodd-Frank was being debated by Congress, proponents, especially corporations, argued that Dodd-Frank should be drafted to encourage whistleblowers to internally report first to the corporation, before going to the SEC. Clearly, *Digital Realty* suggests otherwise. The consequence to corporations is that the corporation may be cut off from individuals, in the compliance sector, with the best knowledge of corporate malfeasance, and thus deprive corporations of the ability to "self-correct" by rectifying problems before they are reported and become lawsuits.

A third consequence is that employees will go to the SEC first before reporting internally. Once these employees have gone to the SEC, they may become insulated from termination because they have engaged in protected conduct. Although the company would still face this dilemma of dealing with an employee who has engaged in "protected activity" if the individuals have reported the information internally, battling with the SEC over a whistleblower, who has offered a potential adverse employment action, may create much more substantial problems in supervising these employees.

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[21] Dodd-Frank's retaliation provision states that a "whistleblower" may not be discharged "because of any lawful act done by the whistleblower . . . (i) in providing information to the [Securities and Exchange] *Commission*." 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added).

2. Impact of *Digital Realty* on the Volume and Value of Whistleblower Claims

As part of the Dodd-Frank Act, Congress implemented the Dodd-Frank Whistleblower Reward Program (the "Program"). Over the past six years, awards under the Program have increased. For example, in 2018, the SEC reported it awarded over $1,000,000,000 in financial remedies for whistleblowers. The SEC has indicated the whistleblower disclosures have led to recoveries in excess of $1,400,000, including a recovery of $415,000,000 from Merrill Lynch. The Program's encouragement of anonymous tips, even through corporate counsel, and substantial financial awards, has offset the risk to whistleblowing individuals involved in compliance.

Will the *Digital Realty* opinion increase the number of individuals who take advantage of the reward Program, thus increasing the number of awards for whistleblowers? At first blush, it would seem this may be likely, since as discussed, internal whistleblowers must first report to the SEC to reap the benefit of Dodd-Frank's bounty harvest. While, compliance officers' rights are severely curtailed under *Digital Realty*, the Court's black letter holding, requiring initial disclosure to the SEC by all individuals, may actually encourage whistleblowers to report to the SEC prematurely, in an effort to obtain the protections of Dodd-Frank. This may generate a spike in potential SEC bounties and whistleblower actions. The downside is that the SEC may not have the type of information it needs to combat deep-rooted corporate corruption.

Another potential factor, unrelated to *Digital Realty*, is the current Administration's efforts to promulgate regulations which would cap the awards under the Program. Under current regulations, a whistleblower's tip that leads to an SEC enforcement action receives 10 to 30% of the recovery by the SEC. The Program requires the SEC to pay a reward for individuals who provide original information to the SEC which results in monetary sanctions of at least $1,000,000. In 2018, the Securities and Exchange Commission announced its highest ever Dodd-Frank whistleblower awards, with two whistleblowers sharing a SEC bounty of nearly a $50,000,000 award and a third whistleblower receiving more than $33,000,000. These awards eclipsed the previous high of $30,000,000.

The SEC's proposed amendments to the whistleblower program could put a dent in these high awards. The new rule would eliminate the proportionality approach by giving the SEC the power to enlarge or reduce awards depending upon their analysis of a number of criteria. Commentators suggest that this may actually benefit whistleblowers with smaller claims, but not larger claims.

B. The Erosion of the Attorney-Client Privilege in Whistleblower Litigation

SOX, Dodd-Frank, and other whistleblower statutes like the False Claims Act ("FCA") have created tension between the state ethical rules and the attorney-client privilege, especially with respect to corporate counsel. These conflicting interests were laid bare in *Bio-Rad*, where General Counsel Sanford Wadler wrote a memo to Bio-Rad's audit committee claiming the company was guilty of Foreign Corrupt Practice Act ("FCPA") violations in China. As part of

the company's defense, outside counsel was engaged to investigate Wadler's allegations. The law firm's report was produced during the subsequent SEC investigation. Similarly, information about the General Counsel's report to the audit committee was shared with the Department of Labor through affidavits of attorneys and other individuals containing work-product information. Finally, plaintiff's own filings in the United States District Court contained the DOL complaint in its unredacted format containing "privileged" information. Despite these apparent waivers of the privilege, Bio-Rad's attorneys, on the eve of trial, moved to strike plaintiff's expert report which heavily relied on these materials, as an impermissible use of confidential information. Plaintiff's counsel argued that under SOX he had to show that he subjectively believed Bio-Rad had violated the FCPA and the only way to do so is based on evidence contained in Bio-Rad's reported privileged documents.

The issue came down to whether Wadler could use the alleged privileged information under federal common law relying primarily on *Van Arsdale v. IGT*, 577 F.2d 989, 1000 (9th Cir. 2009).[22] Plaintiff argued that SOX/Dodd-Frank preempts states ethical duties and statutes to the contrary. The SEC, by the way, agreed with this view at trial. Plaintiff also argued that Bio-Rad had either expressly or implicitly waived any privilege by not complaining about the public filing of privileged documents and also using privileged documents in its defense to the SEC and DOL.

The Court denied Bio-Rad's motion to strike and allowed the information to be used at trial. The Court relied primarily on Bio-Rad's failure to follow its rules in filing case dispositive motions, but, nevertheless, held that there was, at a minimum, implicit waiver, and that Plaintiff could use the erstwhile privileged information, because without it, he could not have a fair trial. Interestingly, in its appeal of the $11,000,000 verdict to United States Court of Appeals for the Ninth Circuit,[23] Bio-Rad did not appeal the waiver of the privilege issue. Thus, there will be no clarification on this issue by the Ninth Circuit.

What are the takeaways from *Bio-Rad* for corporations who have privileged information useful in the defense of whistleblower claims? At least for now, the takeaways are that a company claiming privilege would be well served to raise the issue in its Answer as an affirmative defense, and to use Federal Rule of Evidence 502 wherever appropriate. An early protective order raising the issue and attempting to guard privileged documents, at all stages, including complaint filing and administrative hearings, would be helpful. Perhaps an even early motion to dismiss based on plaintiff's use of privileged information to make his claim should be a consideration. Finally, reviewing potential waiver of internal investigations by outside counsel should be the first thing considered when providing those investigation materials to third parties, even the DOL.

C. The Evolving Interpretation of Objective Reasonable Belief under SOX

The *Bio-Rad* litigation may also have consequences beyond its effect on the attorney-

[22] In *Van Asdale*, the Ninth Circuit held, *inter alia*, that concerns about the potential disclosure of attorney-client privileged information would not bar in-house counsel from asserting SOX whistleblower claims.

[23] *Wadler v. Bio-Rad Laboratories, Inc., et al.*, No. 17-16193 (9th Cir. 2017).

client privilege. On appeal, *Bio-Rad* has argued that General Counsel Wadler could not have an objectively reasonable belief, based on what a reasonable person with the same training and experience as Wadler would believe, that his claim of FCPA violations had occurred, thus initiating his SOX claim.[24] Bio-Rad, apparently, is focused on the dearth of evidence by any witness at trial that there were any FCPA violations. In contrast, two prominent law firms, Steptoe & Johnson and Davis Polk, hired by Bio-Rad to investigate Wadler's claims, testified that they found no violation of the FCPA. Bio-Rad has also attacked Wadler's conclusion as "imaginary" that, certain documents, many written in Chinese, could have been FCPA violations (bribery) yet he never asked for any expert guidance in deciphering them or investigating his suspicions. Bio-Rad's attack that Wadler could not have an objective belief a SOX violation occurred, is belied, according to Wadler's counsel, by the fact that Bio-Rad spent over $1,300,000 in an investigation to conclude that Wadler's claims of a FCPA violation were frivolous. Further, there were detailed reports by the corporation to its audit committee on Wadler's allegations. Outside counsel hired to conduct the investigation concluded that Wadler's claims were frivolous, yet only reviewed a small fraction of the documents purportedly relevant. Finally, outside counsel contended that Wadler was incompetent, but outside counsel never advised Bio-Rad's Board of that fact in writing.

At oral argument, the Ninth Circuit apparently seemed skeptical of Bio-Rad's argument. Still, there is little law, from the federal courts of appeal, on what constitutes an objective belief. The Ninth Circuit might even create a Circuit split on this important prong of SOX claims.

[24] *Bio-Rad* relies heavily on *Livingston v. Wyeth*, 520 F.2d 344, 356 (4th Cir. 2008) and *Welch v. Chao*, 536 F.2d 269, 278 (4th Cir. 2008). S*ee also In re Sylvester*, ARB No. 07-123, 2011 WL 2165854, *12 (Dep't of Labor May 25, 2011) (objective reasonableness under Sarbanes-Oxley "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee"); *Beacom v. Oracle Am., Inc.*, 825 F.3d 376, 380 (8th Cir. 2016) (applying *Sylvester*); *Rhineheimer v. U.S. Bancorp. Inv., Inc.*, 787 F.3d 797, 811-12 (6th Cir. 2015) (same); *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 220-21 (2d Cir. 2014) (same); and *Wiest v. Lynch*, 710 F.3d 121, 131-32 (3d Cir. 2013) (same).