WHISTLEBLOWERS: WHAT PROTECTIONS AND FORMS OF RELIEF ARE AVAILABLE FOR FOREIGN-BASED EMPLOYEES

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Introduction

Whistleblowers play a critical role in exposing financial fraud, threats to public health and safety, and fraud on the Government. Indeed, a recent study concluded that whistleblowers played a bigger role than external auditors, government regulators, self-regulatory organizations, or the media in detecting fraud.[1] Congress has recognized the critical role of whistleblowers in protecting the public fisc and combating corporate fraud by enacting numerous robust whistleblower reward and protection laws and strengthening existing whistleblower protection statutes. For example, the Dodd-Frank Act includes two whistleblower reward provisions, three new whistleblower retaliation causes of action, and strengthens the whistleblower retaliation provisions of the False Claims Act ("FCA") and the Sarbanes-Oxley Act ("SOX"). In addition to the expansion of whistleblower protection law at the federal level, several states have strengthened their whistleblower protection statutes and the common law wrongful discharge tort continues to expand. While there is a presumption against extraterritorial application of United States law, foreign-based employees using federal whistleblower protection laws to remedy retaliation have largely succeeded in getting around that presumption. Moreover, whistleblower reward laws, such as the *qui tam* provisions of the False Claims Act and the new whistleblower rewards provisions of the Dodd-Frank Act, do not contain any exception for individuals disclosing unlawful or fraudulent conduct by a United States company that transpired abroad. Indeed, it is anticipated that the whistleblower reward provisions of the Dodd-Frank Act will result in increased enforcement of the Foreign Corrupt Practices Act ("FCPA") by providing a strong financial incentive to foreign-based employees to report violations of the FCPA. This article summarizes the primary whistleblower reward and protections available to foreign-based employees.

I. The Sarbanes-Oxley Act, 18 U.S.C. § 1514(A)

A. Overview

In the wake of several corporate fraud scandals in the early 2000s, including the collapse of Enron, Congress enacted the Sarbanes-Oxley Act of 2002 ("SOX"), also known as the Corporate and Criminal Fraud Accountability Act.[2] Section 806 of SOX provides a robust private right of action for retaliation, including preliminary reinstatement for employees who prevail at the investigative stage of the action. To prevail in a SOX whistleblower action, an employee must prove by a preponderance of the evidence that: (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 (5th Cir. 2008).

[1] Alexander Dyck, Adair Morse, and Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" http://www.afajof.org/afa/forthcoming/4820p.pdf.
[2] Pub. L. No. 107-204, 116 Stat. 745 (2002).

1. Scope of Coverage

Section 806 of SOX applies to any "officer, employee, contractor, subcontractor or agency" of a company that has securities registered under § 12 of the Securities Exchange Act or is required to file reports under section 15(d) of the same Act. *See* 18 U.S.C. § 1514(A). SOX also applies to employees of "any subsidiary whose financial information is included in the consolidated financial statements of such company" and employees of nationally recognized statistical rating organizations. *See* Dodd-Frank §§ 922, 929A.[3]

2. Protected Conduct

SOX protects an employee who provides information, causes information to be provided, or otherwise assists in an investigation regarding any conduct which the employee reasonably believes constitutes mail fraud, wire fraud, bank fraud, or securities fraud; or a violation of any rule or regulation of the Securities and Exchange Commission ("SEC"); or any provision of Federal law relating to fraud against shareholders. The Act protects internal reports as well, including disclosures to a supervisor. *See* 18 U.S.C. § 1514(A). Indeed, merely requesting that a company investigate potential shareholder fraud constitutes protected conduct. *See Van Asdale v. Int'l Game Tech*, 577 F.3d 989, 997 (9th Cir. 2009).

Protected conduct is not limited to disclosures about shareholder fraud. It includes a disclosure about a violation of *any* SEC rule or regulation. *See* 18 U.S.C. § 1514(A) (emphasis added). For example, SOX protects a disclosure about deficient internal accounting controls[4] or non-compliance with Generally Accepted Accounting Principles ("GAAP"). *See Smith v. Corning Inc.*, 496 F. Supp. 2d 244 (W.D.N.Y. 2007); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008). There is, however, an important limitation on SOX protected conduct that both the Department of Labor ("DOL") Administrative Review Board ("ARB")[5]and federal appeals courts have read into SOX. The complainant's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1). *See Platone v. FLYi, Inc.*, ARB No. 04-154, *slip op.* at 17 (Sept. 29, 2006); *Allen*, 514 F.3d at 476. Accordingly, it is critical to plead SOX protected conduct with specificity, including the link between the protected disclosure and one of the six categories of fraud enumerated in Section 806. There are, however, no "magic words" that an employee must utter to trigger the protections of Section 806. *See Van Asdale*, 577 F.3d at 997 (employee need

[3] Prior to the enactment of the Dodd-Frank Act, ALJs and federal courts were inconsistent in the application of SOX to privately held subsidiaries of publicly traded companies. *See Johnson v. Siemens Blg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Apr. 15, 2010) (ARB solicited amicus briefs discussing proper scope of SOX and various tests used to determine whether SOX should apply to subsidiaries).

[4] *See Klopfenstein v. PPC Flow Technologies Holdings, Inc.*, ARB 04-149, 2004-SOX-11 (ARB May 31, 2006).

[5] The ARB issues final agency decisions for the Secretary of Labor and its decisions are binding on ALJs.

not use words "SOX," "fraud," "fraud on shareholders" or "stock fraud" to satisfy the heightened burden widely adopted by federal courts); *Welch*, 536 F.3d at 276 (SOX whistleblower "need not 'cite a code section he believes was violated' in his communications to his employer.").

3. Reasonable Belief Requirement

A SOX retaliation plaintiff need not demonstrate that she disclosed an actual violation of securities law; only that she reasonably believed that her employer was defrauding shareholders or violating an SEC rule. *See Van Asdale*, 577 F.3d at 992. SOX even protects reasonable but mistaken beliefs. *See Kalkunte v. DVI Fin. Servs.*, ARB Nos. 05-139, 05-140 at 11, ALJ No. 2004-SOX-56 at 11 (ARB Feb. 27, 2009); *see also Halloum v. Intel Corp.*, 2003-SOX-7 at 10 (ALJ Mar. 4, 2004), *aff'd* (ARB Jan. 31, 2006) ("belief that an activity was illegal may be reasonable even when subsequent investigation proves a complainant was entirely wrong…").

Courts and ALJs scrutinize an employee's reasonable belief under both a subjective and objective standard. *See Welch*, 536 F.3d at 275. The objective reasonableness of a complainant's belief depends on "the knowledge available to a reasonable person in the same factual circumstances, with the same training and experience as the aggrieved employee." In *Allen*, the court held that a certified public accountant ("CPA") did not engage in protected conduct when she complained about her employer overstating gross profits in violation of SEC Staff Accounting Bulletin 101 ("SAB-101"). The *Allen* Court held that this disclosure was not protected because the whistleblower identified improper accounting practices in accounting reports that had not yet been filed with the SEC and a CPA should know that SAB-101 applies only to financial reports that have been filed with the SEC. The implication of this flawed decision is that a whistleblower should allow the violation to occur before reporting it, thereby ensuring that the whistleblower is disclosing an actual violation. Adopting this rule would defeat the intent of SOX, which is to prevent the carrying out of the underlying crime. *See Getman v. Southwest Secs., Inc.*, 2003-SOX-8 at 13 n.8 (ALJ Feb. 2, 2004), *reversed on other grounds*, ARB No. 04-059 (ARB July 29, 2005). Judge Levin pointed out in *Morefield v. Exelon Servs., Inc.*, 2004-SOX-2 at 5 (ALJ Jan. 28, 2004):

> The value of the whistleblower resides in his or her insider status...[T]heir reasonable concerns may, for example, address the inadequacy of internal controls promulgated in compliance with Sarbanes-Oxley mandates or SEC rules that impact on procedures throughout the organization, or the application of accounting principles, or the exposure of incipient problems which, if left unattended, could mature into violations of rules or regulations of the type an audit committee would hope to forestall.

Moreover, requiring a SOX complainant to demonstrate that she disclosed an actual violation is contrary to Congressional intent in that the legislative history of Section 806 specifically states that the reasonableness test "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), available at 2002 WL 32054527 (*citing Passaic Valley Sewerage Commissioners v. DOL*, 992 F.2d 474, 478 (3d Cir.

1993) (setting forth broad definition of "good faith" protected disclosures under analogous whistleblower protection statutes)). In sum, limiting protected conduct to disclosures of actual violations of SEC rules is contrary to the plain meaning and intent of SOX. A SOX plaintiff, however, must prepare at the outset of the case to meet a high standard of objective reasonableness. For example, the complaint should plead how the plaintiff's disclosures implicate violations of specific SEC rules or fraud statutes.

4. Scope of Actionable Adverse Actions

Under Section 806, the scope of actionable adverse actions is broad and includes discharging, demoting, suspending, threatening, harassing or discriminating against an employee who engages in protected conduct. *See* 18 U.S.C § 1514A(a). The ARB and federal courts have held that the *Burlington Northern*[6] standard applies to SOX whistleblower claims. *See Melton v. Yellow Transp. Inc.*, ARB No. 06-052, 05-140, ALJ No. 2005-STA-002 (ARB Sept. 30, 2008); *Schlicksup v. Caterpillar, Inc.*, No. 09-CV-1208, 2010 WL 2774480 at *3 (C.D. Ill. July 13, 2010). Under this broad standard, an employment action is adverse if it would dissuade a reasonable person from engaging in the protected conduct.

5. Burden of Proof

A SOX complainant need not prove that her protected conduct was the motivating or determining factor in the employer's adverse action. She need only prove that the protected conduct was a "contributing factor." The ARB defines a contributing factor as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). This standard is "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Id.* Once an employee satisfies this minimal causation standard by a preponderance of the evidence, an employer can avoid liability only where it proves by "clear and convincing evidence" that it would have taken the same action absent the employee's protected conduct. *Kalkunte*, ARB Nos. 05-139, 05-140 at 13.

6. Statute of Limitations and Forum

A SOX whistleblower must file a complaint with the DOL within 180 days of the date she becomes aware of the violation. *See* 18 U.S.C. § 1514A(b)(2)(D) (as amended by the Dodd-Frank Act § 922(c)(1)(A)(i)-(ii)). A SOX plaintiff must exhaust administrative remedies prior to litigating. Specifically, a SOX plaintiff must file her complaint with the DOL's Occupational Safety and Health Administration ("OSHA"). If new adverse actions take place while the claim is before OSHA, an employee must amend her complaint to include the subsequent adverse employment actions. *See, e.g., Willis v. Vie Fin. Grp., Inc.*, No. 04-435, 2004 WL 1774575

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[6] Adverse actions include oral or written reprimands, reassignment of duties, and other actions that "might well have dissuaded a reasonable person from making or supporting a claim" or otherwise engaging in protected conduct. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

(E.D. Pa. 2004) (dismissing complaint for termination in violation of SOX because it was never presented to DOL). After OSHA performs an investigation, either party can request a hearing before an ALJ and can appeal an ALJ decision to the ARB. If the DOL has not issued a final decision within 180 days of the filing of the complaint, the employee may remove the complaint to federal court for a jury trial. *See* 18 U.S.C. § 1514A(b)(1)(B)-(E) (as amended by the Dodd-Frank Act § 922(c)(1); *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 245 (4th Cir. 2009).

7. Remedies

A prevailing employee under the SOX retaliation provision is entitled to "all relief necessary to make the employee whole," including reinstatement, back pay, attorney's fees and costs. 18 U.S.C. § 1514A(c). An employee can also obtain special damages under SOX, such as damages for impairment of reputation, personal humiliation, mental anguish and suffering, and other non-economic harm resulting from retaliation. *See Kalkunte*, ARB Nos. 05-139, 05-140 (clarifying that "special damages" under SOX includes compensatory damages; upholding ALJ's award of damages for pain, suffering, mental anguish, humiliation, and effect on complainant's credit). If OSHA finds for the employee and the employer appeals, OSHA's preliminary order of relief, except for reinstatement, is stayed.

B. Extraterritorial Application of SOX

The Supreme Court has held that the presumption against extraterritoriality articulated in *Foley Bros. v. Filardo*, 336 U.S. 281 (1949), and reiterated more recently in *E.E.O.C. v. Arabian Am. Oil. Co*., 499 U.S. 244, 248 (1991), does not apply when Congress chooses "non-boilerplate" language that brings foreign conduct within the scope of the statute. Furthermore, "the presumption is not absolute," and can be overcome if (a) the statute's purpose, context or legislative history suggest otherwise; (b) the particular fact pattern of a case involving some extraterritorial elements does not actually pose a question of extraterritoriality because the tortious conduct was directed or organized domestically; or (c) the particular fact pattern of a case includes significant conduct or substantial effects in the United States (i.e., if the Conduct or Effects Tests is fulfilled). *Pfeiffer v. W.M. Wrigley Jr. Co*., 755 F.2d 554, 557 (7th Cir. 1985). In addition, "where there is no potential for conflict 'between our laws and those of other nations,' the purpose behind the presumption is eviscerated, and the presumption against extraterritoriality applies with significantly less force." *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993).

Section 806 of SOX applies to all companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that must file reports under Section 15(d) of the Securities Exchange Act (15 U.S.C. § 78o(d)). This also includes so-called "foreign private issuers"—foreign companies who voluntarily submit to United States securities regulations in order to gain access to investors in the United States' capital markets. Although SOX does not explicitly distinguish between United States and foreign companies listed on United States securities exchanges, Congress chose to define the statute's scope by using a precise and highly technical specification that unambiguously includes foreign companies. Congress certainly knew that its technical specification of the statute's scope would include foreign companies, since the SEC has regulated such foreign companies for decades. By choosing to define the statute's scope in this manner, Congress clearly expressed its intent for the statute to apply extraterritorially. Because foreign subsidiaries' operations contribute significantly to the financial performance of their parent companies listed on United States securities exchanges, a restrictive interpretation would frustrate the clear purpose of the statute and express intent of Congress. Moreover, Congress did not intend to induce companies to delegate more questionable activities from their United States headquarters to their foreign subsidiaries abroad, which would be the effect if these protections were only afforded to the domestic workforce.

1. The Whistleblower's Citizenship is Irrelevant to Enforcement

As noted in *Concone v. Capital One Financial Corp.*, 2005-SOX-00006 (2004), the citizenship of the complainant is not determinative of the viability of that individual's SOX claims:

> I see no reason why the Act should not protect foreign nationals working in the United States. Nor do I conclude that the District Court's decision in *Carnero* turned on the circumstances that the employee in that case was a foreign national as is Complainant in the instant case. Although the Court referred to the employee's foreign nationality, *Carnero* appears to be based solely on the fact that the employee was employed outside the United States.

Concone, 2005-SOX-00006 at 4 n. 4.

Moreover, federal appellate courts have consistently held that the complainant's citizenship has no bearing on the validity of his complaint. *See, e.g., United States v. Cook*, 573 F.2d 281, 283 (5th Cir. 1978) ("It is an absurd notion that Congress intended activity in the United States... to be exempt… simply because the victims are *not* American citizens."); *IIT v. Vencapp, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) ("We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.") In fact, citizenship of the victim is unimportant. *See, e.g., Cook*, 573 F.2d at 283 ("Indeed, it appears to us that if there are any unimportant factors in the scheme it is the fact that the investors are European and the contracts were physically executed in Europe.").

Both United States and non-United States citizens can report fraud. Therefore, any focus on citizenship is irrelevant and inapposite to Congress' intent in including the whistleblower provision. "[T]o limit [a statute's coverage to United States nationals] would…greatly…curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed [by foreign nationals] as [by United States nationals]." *United States v. Bowman*, 269 U.S. 94, 98 (1922); *see also United States v. Bin Laden*, 92 F. Supp. 2d 189, 193 (S.D.N.Y. 2000) ("In any event, the very fact that the [*Bowman*] Court found it unnecessary to mention the nationality of the defendant belies Odeh's repeated contention that the nationality of the defendant is important" for the extraterritorial application of the statute.").

2. Nexus to the United States – The Conduct and Effects Tests

Adverse actions defendants take from within the United States should not raise concerns regarding the extraterritorial application of domestic statutes. Though an employer may station a whistleblowing employee abroad, if the decision to terminate or otherwise retaliate against her occurs in the United States, the employee's cause of action is domestic in nature. The Department of Labor (DOL) declared in *Penesso v. LCC Int'l, Inc.*, 2005 SOX 00016 (2005), that because the complainant "alleges that the adverse action taken against him by Respondent...occurred in the United States, it is OSHA's position that the presumption against extraterritoriality is not implicated..." *Letter from the Office of the Solicitor of the Department of Labor to Judge Burke, December 20, 2004*; *see also Massey*, 986 F.2d at 528 ("Because the decisionmaking processes … take place almost exclusively in this country …, they are uniquely domestic… [T]he presumption against extraterritoriality does not apply to this case."); *P&L Int'l v. Halsey Publication Co*., 672 F. Supp. 429, 1432-1433 (S.D. Fla. 1987) (establishing jurisdiction if "part of an 'act' of infringement occurs within this country, although such act be completed in a foreign jurisdiction"); Sean A. Monticello, *Subafilms Revisited*, 1 Chi.-Kent J. Intell. Prop. 101, 101 (1999) ("The reason why holding a domestic authorizer of a foreign infringement liable does not violate the policies of the extraterritoriality doctrine is fairly simple…In such a case, a federal court would be holding liable under United States law a defendant who committed an infringing act within the territorial jurisdiction of the United States."); *Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.").

a. The Conduct Test

A state has jurisdiction to prescribe laws with respect to "conduct that, wholly or in substantial part, takes place within its territory" or to "the status of persons, or interest in things, present within in its territory." *Restatement (Third) of the Foreign Relations Law of the United States* § 402(1)(a) (1987). United States courts have consistently held that they have jurisdiction to determine if a statute generally applies extraterritorially, regardless of its precise wording and legislative history, if conduct within the United States played a part in the accomplishment of illegal activities occurring outside the United States (i.e., if the claim meets the so-called "Conduct Test"). *See Restatement (Third) of Foreign Relations Law of the United States*, § 402. The rationale is that Congress does not want the United States to become a haven for the export of illegal conduct and fraudulent decisions. *See Europe & Overseas Commodity Traders*, 147 F.3d at 125; *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983); *Zoelsch v. Arthur Andersen*, 824 F.2d 27, 32-33 (D.C. Cir. 1987).

The United States Department of Justice ("DOJ"), in its *United States Attorney v. Bulletin*, Vol. 55 No. 2 (March 2007), confirmed that there is no question of extraterritorial application of a statute if some conduct occurs in the United States:

> A statute does not, however, become extraterritorial, so as to require an assessment as to whether Congress intended to override the presumption of territoriality, simply because the legislation reaches activities that occur (or are intended to occur) outside the territorial jurisdiction of the United States. Thus, such an offense can be considered a domestic crime if a portion of the crime occurred in the United States.

In *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 515 (S.D.N.Y. 2008), the United States District Court of the Southern District of New York confirmed that acts within the United States provide sufficient jurisdiction for United States courts to review those acts:

> The Court need not decide whether Congress intended § 1514A to confer extraterritorial jurisdiction or whether any extraterritorial application of § 1514A that Congress may have authorized extends to the instant case. It suffices to state that, under the facts in this case, the Court has subject matter jurisdiction over Accenture LLP because the alleged wrongful conduct and other material acts occurred in the United States by persons located in the United States, and hence the exercise of jurisdiction by this Court to resolve the dispute before it would not implicate extraterritorial application of American law.

The Conduct Test applies regardless of where the effects of the conduct take place, as "[t]he conduct test does not center its inquiry on whether domestic investors or markets are affected, but on the nature of conduct within the United States as it relates to carrying out the alleged fraudulent scheme." *Psimenos*, 722 F.2d at 1045; *see also Leasco Data Processing Equip. Corp. v. Maxwell,* 468 F.2d 1326, 1337 (2d Cir. 1972). Moreover, it is not necessary that the acts within United States themselves are illegal or fraudulent so long as they relate to the misconduct. *See Psimenos*, 722 F.2d at 1046; *Tamari v. Bache Co.*, 730 F.2d 1103, 1108 (7th Cir. 1984). The necessary amount of contacts with the United States in order to satisfy the Conduct Test is minimal. Courts consider a single letter sent or a single phone call made from or to the United States as sufficient conduct to derive jurisdiction. *See, e.g., Robinson v. TCI/US West Tele-communications Inc*., 117 F.3d 900, 904 (5th Cir. 1997); *Continental Grain v. Pac. Oilseeds,* 592 F.2d 409, 420 n.18 (8th Cir. 1979); *Doll v. James Martin Assocs*., 600 F. Supp. 510, 520 (E.D. Mich. 1984). The contacts need not directly relate to the elements of a cause of action or crime. United States courts, therefore, have jurisdiction if "at least some activity designed to further a fraudulent scheme occurs within this country." *Securities & Exch. Comm'n v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977). It is also not necessary that all respondents engage in this conduct; it is sufficient if only one has. *See Grunenthal v. Hotz*, 712 F.2d 421, 425 (9 Cir. 1983) (jurisdiction over foreign national defendants under conduct test even though not all defendants engaged in United States conduct).

In *D'Agostino v. Johnson & Johnson, Inc.,* 628 A.2d 305, 309 (1993), Johnson & Johnson's Swiss subsidiary allegedly discharged an employee at the direction of the parent company in the United States for having engaged in protected conduct. The New Jersey Supreme Court denied Johnson & Johnson's motion for summary judgment and declared that it would not follow the rule that "the place where the wrong occurred controls." Instead, the Court noted that it has an obvious interest "in providing a forum to allow legal redress to a plaintiff who may have been the victim of a conspiracy masterminded in New Jersey by a New Jersey corporation." The Court further explained:

> [T]his case is not about regulating just Swiss employment relationships. It is as much about regulating the conduct of parent companies in New Jersey that engage in corrupt practices through a subsidiary's employees. For the "particular issue" here is the tort liability of a domestic corporation for ordering and directing the discharge of a subsidiary's employee for the refusal to participate in corrupt practices.

Id. at 311. Thus, illicit conduct within the United States is sufficient to provide jurisdiction regardless of the whistleblower's place of employment.

b. The Effects Test

In addition, United States courts also rule that they have jurisdiction to determine whether a statute generally applies extraterritorially "where the failure to extend the scope of the statute to a foreign setting will have adverse effects within the United States." *Environmental Defense Fund, Inc.*, 986 F.2d at 531; *see also Restatement (Third) of Foreign Relations Law of the United States*, §403(2)(a). The Second Circuit in 1945 first adopted this so-called "Effects Test" in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"). The *Alcoa* Court found the domestic effects of the foreign conduct, rather than the *loci* of the offensive conduct, were controlling when the defendant organized a Canadian corporation through which it joined a Swiss aluminum cartel that controlled, in violation of the Sherman Act, the amount of aluminum delivered to the United States. *See Alcoa*, 148 F.2d at 443-44. The specific test articulated was that if the conduct had "intended and actual" or "substantial and foreseeable" effects within the state, then domestic jurisdiction applied. *Id.*

The Effects Test provides jurisdiction to United States courts when conduct overseas has an effect on the United States. *See, e.g., McBee v. Delica Co. Ltd.*, 417 F.3d 107, 119 (1st Cir. 2005) ("One can easily imagine a variety of harms to American commerce arising from wholly foreign activities by foreign defendants… there is a risk that absent a certain degree of extraterritorial enforcement, violators will either take advantage of international coordination problems or hide in countries without efficacious antitrust or trademark laws, thereby avoiding legal authority.”). Courts have applied the Effects Test in all areas of law, including antitrust law,[7] the Commodity Exchange Act,[8] the Lanham Act,[9] labor and employment law,[10] RICO[11] and securities laws.[12]

The Supreme Court acknowledged the Effects Test in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (“*Aramco*”). In *Aramco*, the Supreme Court explicitly distinguished its holding that Title VII did not apply extraterritorially from its holding in *Steele* on the basis that in *Steele* “the allegedly unlawful conduct [] had some effects within the United States.” *Aramco* at 252-53. In *Aramco*, however, the Effects Test did not lead to an extraterritorial application of the statute because the unfair dismissal of a cook in Saudi Arabia unconnected with the United States did not have any adverse effect in the United States for all practical purposes. This is, however, not at all the case with the SOX whistleblower provision, where a fraud case like Enron can have a potentially gigantic impact on the United States. *See* Mindora D. Vancea, *Exporting U.S. Corporate Governance Standards through the Sarbanes-Oxley Act*, 53 Duke L. J. 833, 854. Moreover, since the whistleblowing provision is “largely a prophylactic measure,” it even applies to “seemingly paltry sums” “insignificant in dollar value.” *Morefield v. Exelon Services*, 2004-SOX-00002, 9 (2004).

On March 23, 2009, Administrative Law Judge Stuart A. Levin found for Complainant Joseph Walters in the matter of *Walters v. Deutsche Bank AG, et al.*, 2008 SOX 70 (2009). In *Walters* Judge Levin noted that Mr. Walters had alleged that the problems abroad had been “misrepresented to American investors by Deutsche Bank officials.” *Id.* at 29. “Consequently,

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[7] *See, e.g.*, Hartford *Fire Ins. Co. v. California*, 509 U.S. 764, 796-97 (1993); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997); *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986).

[8] *See, e.g.*, *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1107-08 (7th Cir.1984).

[9] *See, e.g.*, Steele *v. Bulova Watch Co.*, 344 U.S. 280 (1952).

[10] *See, e.g.*, *Dowd v. Int’l Longshoremen’s Ass’n*, 975 F.2d 779, 789 (11th Cir. 1992) (on NLRB application for injunction); *International Longshoremen’s Ass’n* 313 NLRB 412, 416 18 (1993); *Local 553, Transport Workers Union v. Eastern Air Lines*, 544 F. Supp. 1315 (E.D.N.Y.); Stephen B. Moldof, *The Application of U.S. Labor Laws to Activities and Employees Outside the United States*, 17 Lab. Law. 417 (2002).

[11] *See, e.g.*, *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991).

[12] *See also, e.g.*, *Itoba Ltd. v. Lep Group, Inc.*, 54 F.3d 118, 122 (2d Cir. 1995) (Channel Islands purchaser on London Stock Exchange of shares of U.K. company); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983) (Greek purchaser of U.S. and foreign securities based on misrepresentations by Greek and French brokers); *Rohrer v. FSI Futures, Inc.*, 981 F. Supp. 270 (S.D.N.Y. 1997)(German purchasers of commodity futures marketed in Germany by three German firms); *Pyrenee, Ltd. v. Wocom Commodities Ltd.*, 984 F. Supp. 1148 (N.D. Ill. 1997) (Liberian purchasers of commodity futures marketed in Hong Kong by various Hong Kong corporations); *Sloane Overseas Fund, Ltd. v. Sapiens Int’l Corp.*, 941 F. Supp. 1369 (S.D.N.Y. 1996) (Virgin Islands purchaser of convertible debt securities sold in Europe by Netherlands Antilles corporation); and *Ohman v. Kahn*, 685 F. Supp 1302 (S.D.N.Y. 1988) (Swedish purchasers of shares of Panamanian company on European exchange).

while the underlying circumstances in Frankfurt were extraterritorial, Deutsche Bank AG is publicly traded in the U.S.; and the alleged ripple effects were reaching, and potentially misleading, U.S. shareholders and investors." *Id.* Judge Levin also noted that this conveyance of misleading information was "precisely the type of situation Sarbanes-Oxley was intended to address and Section 806 was intended to forestall." *Id.* This administrative decision, again, reiterates that when the effects of actions from abroad reach the United States, domestic courts have jurisdiction to review and pass judgment on those actions.

3. General Applicability Abroad – The *Carnero* Carve-Out

When determining whether Congress has afforded a statute extraterritorial effect in general, courts must consider all available evidence about the meaning of the statute, including its text, structure, legislative history and purpose. *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993).[13] Courts have also established that all securities laws are generally held to apply extraterritorially as a matter of principle. *See, e.g., Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) ("Congress intended [securities laws] to have extraterritorial application in order to protect . . . the domestic securities market from the effects of improper foreign transactions in American securities."); *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.) (holding that the Securities Exchange Act of 1934 applies extraterritorially even though it "is silent as to its extraterritorial application").

The Supreme Court has repeatedly emphasized that remedial laws such as SOX need to be interpreted broadly. *See, e.g., Securities & Exch. Comm'n v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963) (laws should be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes"); *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264, 267-271 (5th Cir. 1986) ("To hold that the Act ceased to apply merely because Reynolds was injured while [outside the territorial waters of the U.S.] would be to impart an exceedingly parochial meaning to a statute which is to be construed liberally to protect injured maritime workers…Indeed, such a construction is appropriate for this remedial legislation."); *United States v. Noriega*, 746 F. Supp. 1506, 1517 (S.D.Fla. 1990) ("Keeping in mind Congress's specific instruction that RICO be applied liberally to effect its remedial purpose, the Court cannot suppose that RICO does not reach such harmful conduct simply because it is extraterritorial in nature. As long as the racketeering activities produce effects or are intended to produce effects in this country RICO applies."); *Parsons v. United Technologies*, 243 Conn. 66, 700 A.2d 655 (1997) ("We do not find support for the trial court's conclusion that… the policy only applies to a workplace that is: (l) located in Connecticut; and (2) controlled, maintained, or owned by the employer. Such a narrow conception of a safe workplace ignores both the underlying purposes of the statutes upon which the public policy of workplace safety is predicated as well as the modern day realities of our global economy and increasingly mobile society.")

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[13] As the Supreme Court recently reiterated again in *Small v. U.S.*, 125 S.Ct. 1752, 1756 (2005), the presumption against extraterritoriality is not a "clear statement" rule that would "impose upon Congress a special burden of specificity", but "we stand ready to revise this assumption [against extraterritoriality] should *statutory language, context, history or purpose* show the contrary." (emphasis added).

This applies even more so to whistleblower provisions in remedial laws:

> Laws protecting whistleblowers are meant to encourage employees to report illegal practices without fear of reprisal by their employers. These statutes generally use broad language and cover a variety of whistleblowing activities. *Accordingly, when the meaning of the statute is unclear from its text, courts tend to construe it broadly, in favor of protecting the whistleblower. This is often the best way to avoid a nonsensical result and "to effectuate the underlying purposes of the law."*

Haley v. Retsinas, 138 F.3d 1245, 1250 (8th Cir. 1998) (emphasis added); *see also, e.g., Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932-33 (11th Cir.1995) (stating that a wide interpretation of whistleblower provisions best "promotes the remedial purpose of the statute"); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) (holding that a "narrow, hypertechnical reading" of whistleblower provisions would defeat their remedial purpose). Accordingly, SOX's plain, non-boilerplate language, its broad underlying purpose, and its remedial nature all mandate its general extraterritorial application.

The Court of Appeals for the First Circuit in *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006), addressed the applicability of the whistleblower provisions of SOX to extraterritorial situations. While finding the Act covered an employee of a subsidiary under its definition of "employee," the First Circuit found insufficient factors to support extraterritorial application of the whistleblower provision in general. The court noted, however, that it was deciding the *Carnero* case on its own facts and explicitly emphasized that there may be situations in which the Act might be applicable to employees working overseas:

> *We decide this case necessarily on its own facts*. One can imagine many other fact patterns that may or may not be covered by our reasoning in today's decision. We do not, *for example*, decide today whether Congress intended to cover an employee based in the United States who is retaliated against for whistleblowing while on a temporary assignment overseas. *That issue is not before us as Carnero was a resident of Argentina and Brazil directly employed by foreign companies operating in those countries*.

Carnero, 433 F.3d at 18 n. 17 (emphasis added).

Accordingly, the *Carnero* Court noted that its holding did not create a bar to individuals employed in other countries from bringing SOX claims. Rather, it specifically decided only the case at hand while, at the same, using a footnote to provide an example for one of many scenarios under which its holding did not apply. The Carnero Court also clarified that it clear that it did not limit the scope of the caveat to that one example set forth by the *Carnero* Court. Such a decision would have to be made on a case-by-case basis depending upon the discrete facts peculiar to each complainant.

4. Implications of Section 1107 – SOX's Criminal Provision

ALJs have ruled that Section 1107 somehow implies that Section 806 does not apply extraterritorially in general. Their reasoning is that Section 1107 provides explicit extraterritorial federal jurisdiction over violations of the criminal whistleblower provision of the Act, whereas Section 806 does not. This argument is inaccurate. Section 1107 of SOX amended 18 U.S.C. §1513 to include a criminal anti-retaliation provision for persons who provide law enforcement with information relating to the commission or possible commission of any Federal offense. *See* 18 U.S.C. §1513(e). It does not contain any language on extraterritoriality. The explicit extraterritorial application of that section, 18 U.S.C. §1513(d), existed prior to SOX's passing. Congress simply inserted Section 1107 into 18 U.S.C. § 1513 because Section 1107 relates to the same topic and logically best fits there. As Congress intended all of SOX to apply extraterritorially in general, there was certainly no need for Congress to create a new section of the U.S. Code just for Section 1107 to avoid this erroneous interpretation instead of inserting it where it logically best fits.

Furthermore, comparing Section 1107 to Section 806 is not an "apples-to-apples" comparison. Section 806 is a civil provision, whereas Section 1107 is a criminal provision. Criminal provisions require a more explicit statement on their geographic reach to apply extraterritorially. *See Restatement (Third) of the Foreign Relations Law (1987),* § 403 cmt. f. ("legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement") and n. 8 ("It is generally accepted by enforcement agencies of the United States Government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity.").

Courts have consistently held that all other sections of SOX apply extraterritorially despite the lack of specific language as to their geographical reach. Consequently, they should afford Section 806 the same global scope as they do the rest of the Act.

II. The Dodd-Frank Act, Pub.L. 111-203

A. Section 1057 – Whistleblower Protection for Employees in the Financial Services Industry

The Dodd-Frank Act creates a robust retaliation action for employees in the financial services industry.[14] *See* Dodd-Frank Act § 1057. The scope of coverage is quite broad in that Section 1057 applies to organizations that extend credit or service or broker loans; provide real estate settlement services or perform property appraisals; provide financial advisory services to consumers relating to proprietary financial products, including credit counseling; or collect,

[14] Employees of credit union and depository institutions may also have claims under the whistleblower provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and Federal Credit Union Act. *See* 12 U.S.C. § 1831j (2001); 12 U.S.C. § 1790b(a)(1) (2001).

analyze, maintain, or provide consumer report information or other account information in connection with any decision regarding the offering or provision of a consumer financial product or service.

Protected conduct includes providing to the Bureau of Consumer Financial Protection ("Bureau"), or any other Government or law enforcement agency, information that the employee reasonably believes relates to any violation of the consumer financial protection provision of the Dodd-Frank Act (Title X), or any rule, order, standard, or prohibition prescribed or enforced by the Bureau. Dodd-Frank also protects employees if they initiate any proceeding under federal consumer financial law or if they object to or refuse to participate in any activity, practice, or assigned task that the employee reasonably believes to be a violation of any law, rule, standard, or prohibition subject to the jurisdiction of the Bureau.

The procedures, remedies, and burden of proof are similar to those under SOX (i.e., the complainant must first file with OSHA). However, if the DOL does not issue a final order within 210 days (or within 90 days of receiving a written determination), the complainant may bring her case to federal court and either party may request a jury trial. *See* Dodd-Frank Act § 1057(c)(1)(A) to (c)(5)(D). A complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was a contributing factor in the employer's decision to take an adverse employment action. Remedies include reinstatement, back pay, compensatory damages, and attorney's fees and litigation costs, including expert witness fees.

B. Sections 748 and 922 – Rewards and Protections for Securities and Exchange Commission and Commodity Futures Trading Commission Whistleblowers

Under the Dodd-Frank Act, an individual who provides original information to the SEC or Commodity Futures Trading Commission ("CFTC") which results in monetary sanctions exceeding $1 million shall receive an award of 10 to 30 percent of the amount recouped. *See* Dodd-Frank Act § 748 (applying to CFTC whistleblowers) and § 922(a) (applying to SEC whistleblowers). The amount of the reward is at the discretion of the respective commission. Considered factors in calculating the amount of the award include the significance of the information provided the whistleblower provides, the degree of assistance the whistleblower provides, the interest of the respective commission in deterring violations by awarding to whistleblowers, and other factors that the each commission may establish by rule or regulation. *Id*. A whistleblower who has been convicted of a criminal violation related to the action for which she provided information; who gained the information by auditing financial statements as required under securities laws; who failed to submit information to the SEC as required by an SEC rule; or who is an employee of the DOJ or an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board, or a law enforcement organization cannot receive an award. *Id*. Sections 748 and 922 of Dodd-Frank are not *qui tam* provisions (i.e., the whistleblower cannot pursue an action if the SEC or CFTC declines to act on the whistleblower's disclosure).

1. SEC Whistleblower Protection Provision

Section 922(a) protects employees who have suffered retaliation "because of any lawful act done by the whistleblower — '(i) in providing information to the Commission in accordance with [the whistleblower reward subsection]; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act,'" the Securities Exchange Act of 1934, and "'any other law, rule, or regulation subject to the jurisdiction of the [SEC].'"

The employee may bring an action directly in federal court and remedies include reinstatement, double back pay with interest, litigation costs, expert witness fees, and reasonable attorneys' fees. The whistleblower must file a claim within three years from the date when the facts material to the right of action are known or reasonably should have been known to the whistleblower, but no more than six years after the violation occurred. *Id*.

2. CFTC Whistleblower Protection Provision

Section 748 contains a whistleblower protection provision that is substantially similar to § 922(a). Protected conduct includes providing information to the CFTC in accordance with the whistleblower incentive program or assisting "in any investigation or judicial or administrative action of the [CFTC] based upon or related to such information." *Id*. The statute of limitations is two years from the date of the violation. *Id.*

C. Extraterritorial Application of the Dodd-Frank Act

1. CFTC and SEC Whistleblower Rewards Claims

As outlined above, SEC rules and regulations apply both domestically and abroad. The test is whether a company trades shares in United States markets. The Dodd-Frank Act simply rewards whistleblowers who provide information to the SEC relating to violations of SEC laws and regulations. There can be no extraterritorial limitation on whistleblowers if none exists for the laws and securities regulations on which they blow the whistle.

One of the most important implications of the Dodd-Frank Act is that it provides both rewards and protections for employees who disclose information related to violations of the Foreign Corrupt Practices Act of 1977 ("FCPA"), 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff. The FCPA is a federal law that prohibits making payments to foreign officials for the purpose of obtaining or retaining business. It also requires publicly traded companies to maintain records that accurately represent the company's transactions and a system of adequate internal accounting controls. The FCPA applies broadly to United States companies and persons, to companies that have issued securities registered in the United States, to employees and agents of American companies, and to foreign nationals and companies that in any way permit prohibited payments to take place. While the DOJ enforces the criminal anti-bribery provisions of the FCPA, the SEC enforces the civil books and records provisions. More likely than not, employees assigned to locations outside the United States are the very same employees who are able to witness and report violations of the FCPA. If Congress or the courts were to limit extraterritorial application of Section 922 of the Dodd-Frank Act, they would eviscerate one of the Act's most potent provisions.

Looking at the language of the Dodd-Frank Act, Section 748 of the Dodd-Frank Act defines the term "whistleblower" as "any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of this Act to the Commission [CFTC], in a manner established by rule or regulation by the Commission." Similarly, Section 922(a) defines the term "whistleblower" as "any individual who provides, or 2 or 3 more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission [SEC], in a manner established, by rule or regulation, by the Commission." Neither of these definitions requires that the whistleblower be a United States citizen, let alone located within the country's borders. Furthermore, in both CFTC and SEC rewards cases, those respective agencies prosecute the claims against violating employers, not the employees themselves. The location of the whistleblower, therefore, is irrelevant.

2. Whistleblower Retaliation Claims

Section 929P of the Dodd-Frank Act amended the Securities Exchange Act to provide that United States district courts shall have jurisdiction over an action brought or instituted by the SEC alleging a violation of the antifraud provisions of the Securities Exchange Act involving "[c]onduct occurring outside the United States that has a foreseeable substantial effect within the United States." *See* Dodd-Frank Act at 929P. The SEC is also currently conducting a study to determine whether private rights of action should receive a similar extension. This provision could expand extraterritorial coverage for whistleblower claims, particularly claims brought by the SEC, but conceivably also for private whistleblower claims.

As stated above, neither Section 748 nor 922 limits the definition of "whistleblower" to employees located within the United States. Section 1057 defines the term ''covered employee'' as "any individual performing tasks related to the offering or provision of a consumer financial product or service." Under Section 1002, "covered person" means "any person that engages in offering or providing a consumer financial product or service; and…any affiliate of a person…if such affiliate acts as a service provider to such person." So long as the U.S. employer offers the products or services covered, than its employees, despite their geographic location, should enjoy the whistleblower protection Section 1057 provides. As with the other provisions of the Dodd-Frank Act, there is no requirement that whistleblowers be located within the United States.

III. False Claims Act, 31 U.S.C. § 3729, *et seq*.

The False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq*., imposes civil liability on any person, including a corporation, who knowingly uses a "false record or statement to get a false or fraudulent claim paid or approved by the Government," and any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2126 (2008). Section 3729(b) provides that the terms "knowing" and "knowingly" mean that a person, with respect to information, (1) has actual knowledge of the information, (2) acts in deliberate ignorance of the truth or falsity of the information, or (3) acts in reckless disregard of the truth or falsity of the information. The FCA does not require proof of specific intent to defraud. *Id.* at 2130.

A. FCA *Qui Tam* Relators, 31 U.S.C. § 3730(b)

The FCA contemplates two types of actions. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 477 (2007). First, under Section 3730(a), if the DOJ finds that a person has violated or is violating Section 3729, the Attorney General may bring a civil action under this section against the person. *See id.* Second, under § 3730(b), a private person, known as a relator or *qui tam* relator,[15] may bring an action for a violation of Section 3729 for the person and for the United States government. *See id.; see also Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 123 (2003). When a private person brings an action under Section 3730(b), the government may elect to proceed with the action, or it may decline to take over the action, in which case the person bringing the action shall have the right to conduct the action. *See Rockwell*, 549 U.S. at 477.

The *qui tam* relator must inform the DOJ of her intentions and keep the pleadings under seal for sixty days while the government decides whether to intervene and do its own litigating. *See Cook County*, 538 U.S. at 122-23; *see also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000) (If a relator initiates the FCA action, she must deliver a copy of the complaint, and any supporting evidence, to the Government, which then has sixty days to intervene in the action). If the government intervenes, it assumes primary responsibility for prosecuting the action, though the relator may continue to participate in the litigation. The relator is entitled to a hearing before voluntary dismissal of the case and to a court determination of reasonableness before any settlement. *See Vt. Agency*, 529 U.S. at 769. If the government declines to intervene within the 60-day period, the relator has the exclusive right to conduct the action, and the government may subsequently intervene only through a showing of "good cause." *See id.*

If the claim succeeds, the defendant is liable to the government for a civil penalty between $5,000 and $10,000 for each violation, treble damages (reducible to double damages for cooperative defendants), and costs. *See id.* The relator's share of the proceeds of the action or settlement may be up to 30 percent, depending on whether the government intervened and, if so, how much the relator contributed to the prosecution of the claim. *See id.* at 123. The relator may also get reasonable expenses, costs, and attorney's fees. *See id.* If the government does not intervene, the relator is entitled to 25 to 30 percent of the proceeds. *See id.* If the government chooses to intervene, the relator receives at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim. The relator's share depends on the extent to which she substantially contributed to the prosecution of the action. *See id.*

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[15] *Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who pursues this action on our Lord the King's behalf as well as his own." *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000).

Actions brought under the FCA are generally subject to a six-year statute of limitations (31 U.S.C.A. § 3731(b)(1)), which starts to run at the time a violation is committed. *See* 139 A.L.R. Fed. 645.

1. Elements of a *Qui Tam* Suit

The elements of an FCA claim are straightforward. *See United States ex rel. Sanders v. N. Am. Bus Industries, Inc.*, 546 F.3d 288, 297 (4th Cir. 2008). The plaintiff must prove: (1) that the defendant made a false statement or engaged in a fraudulent course of conduct; (2) that the defendant carried out such statement or conduct with the requisite scienter (or intent); (3) the statement or conduct was material; and (4) the statement or conduct caused the government to pay out money or to forfeit money due. *See id.* Under the FCA, a statement or course of conduct is material if it has a natural tendency to influence agency action or is capable of influencing agency action. *See id.*

To satisfy this first element of an FCA claim, the statement or conduct alleged must represent an objective falsehood. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008). As a result, mere allegations of poor and inefficient management of contractual duties are not actionable under the FCA. *See id.* at 377. Likewise, imprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA. *See id.*

While courts should construe the phrase "false or fraudulent claim" broadly, they cannot construe it to include a run-of-the-mill breach of contract action devoid of any objective falsehood. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 378 (4th Cir. 2008). An FCA relator cannot base a fraud claim on nothing more than her own interpretation of an imprecise contractual provision. *See id.*

Some courts strictly require relators to plead FCA claims with particularity under Fed. R. Civ. P. 9(b) to ensure that the relator's strong financial incentive to bring an FCA claim does not precipitate the filing of frivolous suits.[16] *See United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006). To plead fraud with the particularity required by Rule 9(b), an FCA plaintiff must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008). These facts are often referred to as the "who, what, when, where, and how" of the alleged fraud. *See id.*

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[16] **Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. *See* Fed. R. Civ. P. 9(b).

2. Fraud in the Inducement

When Congress amended the FCA in 1986, its legislative history recognized fraud-in-the-inducement liability under the Act. The FCA intends to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services. *See Senate Report No. 99-345*, S. Rep. 99-345, 9-10, 1986 U.S.C.C.A.N. 5266, 5274-75 (1986). Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided or provided in violation of contract terms, specifications, statute, or regulation. *See id.* Each claim submitted under a contract that a defendant originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim. *See id.*

Fraud in the inducement, like any fraud, compromises the legitimacy of a transaction. *Daewoo Eng'g & Const. Co., Ltd. v. United Sates*, 73 Fed. Cl. 547, 586 (2006). It permits a contractor to obtain a job other than on merit. *See id.* In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Supreme Court found contractors liable under the FCA for claims submitted under government contracts which the defendants obtained via collusive bidding. *See id.* at 542. The Court found that each claim submitted under the contracts constituted a false or fraudulent claim:

> This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the [Government].... The initial fraudulent action and every step thereafter taken, pressed ever to the ultimate goal payment of Government money to persons who had caused it to be defrauded.

See Id.

3. False Certification

False certification claims involve schemes where the receipt of federal funds is predicated on compliance with certain statutes. *See United States ex rel. Longhi v. Lithium Power Tech., Inc.*, 513 F. Supp. 2d 866, 874-75 (S.D. Tex. 2007). Under the "false certification" theory, the essential elements of FCA liability are the same as under "fraud in the inducement:" (a) a false statement or fraudulent course of conduct, (b) made with scienter, (c) that was material, causing (d) the Government to pay out money or forfeit moneys due. *See United States ex rel. Unite Here v. Cintas Corp.*, 2007 WL 4557788, at *2 (N.D. Cal. 2007).

B. FCA Retaliation, 31 U.S.C. § 3730(h)

The retaliation provision of the FCA provides robust protection to any employee, contractor, or agent who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h). Section 3730(h) plaintiffs must allege three things: (1) that they engaged in protected conduct (i.e., acted in furtherance of a *qui tam* action); (2) that the defendants knew that the relators engaged in this protected conduct; and (3) that the defendants were motivated, at least in part, to terminate the relators because of the protected conduct. *See Brandon v. Anesthesia & Pain Management Associates*, 277 F.3d 936, 944 (7th Cir. 2002). Section 3730(h) protects not only individuals who bring *qui tam* actions, but also individuals who take steps to expose fraud, including investigating a potential *qui tam* action or supplying information that could prompt an investigation. *See Neal v. Honeywell Inc.*, 33 F.3d 860, 864-65 (7th Cir. 1994).

In the past year and a half, Congress has twice strengthened the retaliation provision of the FCA. The Fraud Enforcement Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624-25 (2009), amended Section 3730(h) by expanding the scope of coverage to expressly protect independent contractors, and expanded the scope of protected conduct to cover "efforts to stop 1 or more violations" of the FCA. The Dodd-Frank Act enhanced Section 3730(h) by prohibiting associational discrimination, applying a uniform three-year statute of limitations, and broadening the scope of protected conduct.

1. Scope of Coverage

Section 3730(h) protects not only employees of Government contractors, but also contractors, agents, and associated others. *See* 31 U.S.C. § 3730(h). Expanding the scope of coverage under Section 3730(h) twice in the past two years, Congress clarified that any individual in the private sector who suffers retaliation for taking any action in furtherance of a potential *qui tam* action has a remedy under Section 3730(h).

2. Protected Conduct

Protected conduct under Section 3730(h) includes "lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h). Protected conduct includes internal complaints about what an employee, contractor, or agent reasonably believes to be a violation of the FCA. *See, e.g., Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469, 481 (7th Cir. 2004) (holding that employee's internal complaints about alleged misappropriations of federal funds to Government official can constitute protected conduct under the FCA); *Neal v. Honeywell Inc.*, 33 F.3d 860, 865 (7th Cir. 1994) (court specifically rejected argument that plaintiff must raise her concerns directly to the Government to qualify for protection, noting that it was appropriate for plaintiff to complain through corporate channels).

A "protected activity" includes any activity that reasonably could lead to a viable FCA action. *See McKenzie v. Bellsouth Telecomms., Inc.*, 219 F.3d 508, 516 (6th Cir. 2000) (citation omitted). A plaintiff "need not use formal words of 'illegality' or 'fraud,' but must sufficiently allege activity with a nexus to a *qui tam* action, or fraud against the United States Government." *Id.* Further, an employee need not have actual knowledge of the FCA for her actions to be considered "protected activity" under Section 3730(h). If so, the statute would only protect those with sophisticated legal knowledge. *United States ex rel. Yesudian v. Howard Univ.*, 332 U.S. App. D.C. 56, 153 F.3d 731, 741 (D.C. Cir. 1998) ("…only [lawyers] would know from the outset that what they were investigating could lead to a False Claims Act prosecution.").

There is both a subjective and an objective component for assessing whether an activity is protected conduct under the FCA. The relevant inquiry is whether "(1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the Government." *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002)). Employers have tried to apply an onerous standard of objective reasonableness under which the plaintiff must demonstrate that her disclosures would have resulted in a successful *qui tam* action. *See, e.g., Dookeran v. Mercy Hosp. of Pittsburgh*, 281 F.3d 105, 109 (3d Cir. 2002) (plaintiff's disclosure about false information in application to be designated clinical study research center is not protected because application was not claim for payment). Requiring a Section 3730(h) plaintiff to prove that she disclosed actual violations of the FCA, however, is contrary to the plain meaning of the section and well-established precedent. The Supreme Court specifically noted that "proving a violation of § 3729 is not an element of a § 3730(h) cause of action." *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 416 n.1 (2005) (citing *Yesudian*, 153 F.3d at 740). FCA litigation is a "distinct possibility" if plaintiff had a "good faith" belief, based on information she had "at the time of the retaliation," she could reasonably conclude that "there was a 'distinct possibility' [the plaintiff] would find evidence" showing the defendant had submitted false claims. *See Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 869 (4th Cir. 1999). As the D.C. Circuit held in a leading case construing the scope of Section 3730(h) protected conduct, Congress's "inclusion of an 'investigation for…an action filed or to be filed' within its protective cover…manifests Congress' intent to protect employees while they are collecting information about a possible fraud, *before they have put all the pieces of the puzzle together*." *Yesudian*, 153 F.3d at 740 (emphasis added). This apt metaphor—putting all the pieces of the puzzle together—should guide discovery. Specifically, a plaintiff should take discovery not only regarding the pieces of the puzzle that she gathered at the time she engaged in protected conduct, but also regarding the pieces of the puzzle she was not aware of or had not put together at the time she blew the whistle. Taking broad discovery about the plaintiff's protected conduct is important to demonstrate the objective reasonableness of plaintiff's disclosures and to show the employer's motive to retaliate against plaintiff.

The Eleventh Circuit's standard for assessing protected conduct should also guide discovery:

> If an employee's actions, as alleged in the complaint, are sufficient to support a reasonable conclusion that *the employer could have feared being reported to the Government for fraud* or sued in a qui tam action by the employee, then the complaint states a claim for retaliatory discharge under § 3730(h).

United States v. Lymphatx, Inc., 2010 WL 547499, at *2 (11th Cir. Feb. 18, 2010) (citation omitted) (emphasis added). In *Lymphatx*, the court concluded that the plaintiff has sufficiently alleged an FCA retaliation action by averring that "she complained about the defendants' 'unlawful actions' and warn[ing] them that they were incurring 'significant criminal and civil liability,'" which, if proven, suffices to show that the defendants were aware of the possibility of *qui tam* litigation. *Id. Lymphatx* underscores the importance of taking broad discovery about the employer's knowledge of and reaction to plaintiff's disclosures, including an investigation of those disclosures.

As employers vigorously try to narrow the scope of protected conduct, it is important to focus on the purpose of § 3730(h). The Senate report accompanying the 1986 amendments to the FCA states that Congress added a retaliation provision to the FCA "to halt companies…from using the threat of economic retaliation to silence 'whistleblowers'" and to "assure those who may be considering exposing fraud that they are legally protected from retaliatory acts." S. Rep. No. 99-345, at 34 (1986), U.S. Code Cong. & Admin. News 1986, at 5266, 5299. In addition, the legislative history expressly states that courts should interpret "[p]rotected activity…broadly," and protected conduct "includes any 'good faith' exercise of an individual 'on behalf of himself or other of *any option offered by this Act*, including…*an action filed or to be filed under this act*.'" *Id.* at 34-35 (emphasis added).

3. Scope of Actionable Adverse Actions

Section 3730(h) of the FCA prohibits any action that has a negative effect on the terms, conditions, or privileges of employment, including termination, demotion, suspension, harassment and any other act that would dissuade a reasonable person from reporting violations of the FCA. *See, e.g., McKenzie*, 123 F.3d at 943-44 (observing that purpose of Section 3730(h) is to prevent any retaliation that would prevent whistleblower from coming forward). Acts that constitute actionable retaliation under Title VII are generally actionable under the FCA. *See Moore*, 275 F.3d at 847. This includes oral or written reprimands, reassignment of duties, as well as other actions that "might well have dissuaded a reasonable person from making or supporting a claim" or otherwise engaging in protected conduct. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). For example, courts have construed Section 3730(h) to protect individuals who are constructively discharged. *See Neal v. Honeywell, Inc.*, 191 F.3d 827, 831 (7th Cir. 1999), *aff'd*, 995 F. Supp. 889 (N.D. Ill. 1998) (concluding that "a drastic diminution of duties might suffice as a 'constructive discharge.'").

4. Burden of Proof to Prevail in an FCA Retaliation Case under 3730(h)

To prevail in an FCA retaliation claim, a plaintiff must show that "the retaliation was motivated at least in part by the employee's engaging in protected activity." S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300. *See also Kakeh v. United Planning Org., Inc.*, 655 F. Supp. 2d 107, 119 (D.D.C. 2009) (holding that "a reasonable juror could easily conclude that the short duration—one day—between the OIG visit to the defendant office and the plaintiff's termination demonstrates that the defendant knew of the plaintiff's protected activity and that the termination was motivated by a desire to retaliate against him"). A § 3730(h) plaintiff need not prove "but for" causation. *Id.* at 125 n.13 (distinguishing *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009)).

5. Statute of Limitations and Forum

Prior to the passage of the Dodd-Frank Act, the statute of limitations for an FCA retaliation claim was the analogous state statute of limitations for wrongful discharge actions, which can range from as little as three months to three years. *See Graham County Soil,* 545 U.S. at 418. Under the Dodd-Frank Act, the statute of limitations for FCA retaliation claims is now three years from the date on which the retaliation occurred. Dodd-Frank Act § 1079B(c)(2); 31 U.S.C. § 3730(h)(3). A plaintiff can bring an FCA retaliation claim directly in federal court; there is no administrative exhaustion requirement. *See* 31 U.S.C. § 3730(h)(2).

6. Remedies

A prevailing whistleblower is entitled to "all relief necessary to make that employee, contractor, or agent whole," which includes reinstatement, double back pay, interest on the back pay, special damages, and attorney's fees and costs. *See* 31 U.S.C. § 3730(h)(2). Where reinstatement is not feasible, front pay is available. *See Wilkins v. St. Louis Housing Authority*, 314 F.3d 927, 934 (8th Cir. 2002). Courts have construed the term "special damages" to include damages for emotional distress and other non-economic harm resulting from retaliation. *See Neal*, 191 F.3d at 832 (awarding damages for emotional distress where manager threatened to physically injure whistleblower).

7. State False Claims Acts

Approximately 28 states and the District of Columbia have enacted false claims act statutes containing a *qui tam* provision, 27 of which contain an anti-retaliation provision. There is little case law interpreting state FCA retaliation provisions; therefore, judicial interpretations of Section 3730(h) will likely shape construction of the retaliation provision of state false claims act statutes.

C. Extraterritorial Application of the FCA

1. FCA *Qui Tam* Relator Suits

The language of 31 U.S.C. § 3730(b) provides, in a section headed "Actions by private persons," that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). The Act does not make explicit the class of "persons" eligible to file civil suits under the subsection. However, the purpose and intent of the FCA is to protect the Government from fraud, irrespective of the origination of that fraud. There is no requirement within the FCA that the relator be located within the United States at the time. Doing so would prevent the Government from recovering potentially millions, if not billions, of dollars lost to the fraudulent acts of multinational United States corporations. In *United States v. General Electric*, 808 F. Supp. 580, 581 (S.D. Ohio 1992), the United States District Court for the Southern District of Ohio held that relator Chester Walsh had good reason to wait to produce documents to the DOJ until his return from Israel and Switzerland for fear of threats to his life. However, the court found Walsh would have been entitled to a higher relator's share had he disclosed information relating to General Electric's fraud on the U.S. government earlier (i.e., when he was stationed in Israel). *See id*. at 584.

U.S. courts have held that the application of the FCA should not protect domestic companies with international operations from avoiding liability for their potential defrauding of the government. In *U.S. ex rel. Yannacopolous v. Gen. Dynamics*, 315 F. Supp. 2d 939, 948 (N.D. Ill. 2004), the court ruled that allowing a foreign hearing to foreclose a relator from classifying as the "original source" of information relating to fraud would create "too large a shield for multinational corporations accused of defrauding the U.S. Government."

When the DOJ decides to prosecute a defendant in its own right after receiving information relating to fraud on the Government, there is no extraterritoriality issue. Likewise, there should be no concern when a *qui tam* relator must litigate her action alone and without the assistance of the DOJ. The relator is suing the defendant on behalf of the United States. There is no bar or other concern when the United States files suit against a domestic corporation, even if the defendant corporation employs persons outside the county. Furthermore, in applying the Effects Test outlined above to *qui tam* suits, all FCA claims, by statute, must have some adverse effect within the United States. When an employer defrauds the government, even from abroad, the nexus is clearly apparent.

2. FCA Retaliation

As with FCA *qui tam* relator suits, the elements of an FCA retaliation claim necessitate a United States nexus (i.e., the disclosure of a good faith belief of fraud on the U.S. Government). The Act does not presuppose or require that the whistleblower be located within the United States. Again, doing so would conflict with the purpose of the FCA.

In *Shekoyan v. Sibley Int'l Corp.,* 217 F. Supp.2d 59 (D.D.C. 2002), an employee of a U.S. company working and based in the Republic of Georgia filed an FCA retaliation complaint against his employer. He alleged that his employer did not extend his time-limited employment contract in Georgia because he reported to officials at the company's U.S. headquarters of the misappropriation of funds by his immediate supervisor in Georgia. The *Shekoyan* Court denied a motion to dismiss for lack of jurisdiction, utilizing an analysis similar to the Conduct Test, and declared:

> This Court has subject-matter jurisdiction to entertain the plaintiff's FCA claim because the plaintiff's allegations, if proven true, demonstrate that the crux of the inappropriate conduct *occurred within the United States*. As the nature of the protection offered by the whistleblower provision of the FCA is to remedy retaliation for a false claims disclosure, it is noteworthy that the plaintiff allegedly notified Sibley's officials in Washington, D.C. of the fraudulent misappropriation of United States Government funds by its employees in the Republic of Georgia...

> The termination of the plaintiff's employment appears to have been initiated in the U.S....
>
> Although it appears to the Court that the whistleblower provision of the FCA may not apply to aliens and fraudulent conduct that occurs abroad, this issue is *not* before the Court because the conduct at issue in the plaintiff's FCA allegation *occurred within the United States*.

Shekoyan, 217 F. Supp.2d at 71-73, n. 12, n. 14, *aff'd sub nom. Shekoyan v. Sibley Int'l*, 409 F.3d 414 (D.C. Cir. 2005) (emphasis added). Under *Shekoyan*, the FCA covers disclosures from foreign-based employee to managers in the United States. Even if an employee abroad makes disclosures to other managers abroad, the Conduct or Effects Test should still secure federal jurisdiction over a retaliation claim. Some act by the defendant employer must relate to some false claim presented to the United States and incur some loss, or potential loss, to the Government. Both the presentment of the false statement or claim (i.e., conduct) and the consequential Governmental loss (i.e., effect) create the necessary nexus to the United States to avoid preclusion by the presumption against extraterritorial application of United States law.

IV. State Common Law Wrongful Discharge Suits

In addition to the relief available under Federal whistleblower laws, employees may have a common law claim for wrongful discharge in violation of public policy. This can be the best remedy for whistleblowers because employees can seek punitive damages in wrongful discharge cases.[17]

A. Overview

Approximately 46 states have adopted a public policy exception to the employment at-will rule. The elements for establishing a whistleblowing-based wrongful discharge claim, however, vary considerably from state to state. For example, some state courts have held that a

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17 Three recent verdicts reveal that punitive damages can be a significant component of damages in a common law wrongful discharge action. In *Carpenter v. Sandia Nat'l Laboratories,* a jury awarded Mr. Carpenter approximately $4.4 million in a common law wrongful termination action, which consisted of $36,000 for lost wages, benefits and other costs, $350,000 for emotional distress and $4 million in punitive damages. *See Carpenter v. Sandia Natl. Laboratories*, #D-202-CV-200506347, Bernalillo Co. NM Dist. Court (verdict 2/13/2007). Mr. Carpenter alleged that he was terminated in retaliation for cooperating with federal authorities that were investigating Chinese cyber intelligence efforts. In *Feliciano v. Parexel International,* No. 04-CV-3798 (E.D. Pa. verdict 9/15/2008), a jury awarded $1.8 million in punitive damages for wrongful termination, plus nearly $100,000 in compensatory damages, plus attorneys' fees. Mr. Feliciano alleged that he was terminated in retaliation for complaining to his supervisors that a company marketing database contained email addresses and other information that was illegally obtained.

statutory expression of public policy is required. *See, e.g.*, *Gantt v. Sentry Ins.*, 824 P.2d 680, 688 (Cal. 1992); *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 1059 (Ind. Ct. App. 1980). Other state courts, however, have held that administrative regulations, federal statutes, and case law can also define the public policy at issue. *See, e.g.*, *Lewis v. Nationwide Mut. Ins. Co.*, No. 3:02CV512 (RNC) 2003 WL 1746050 (D. Conn. 2003) (denying motion to dismiss claim by in-house insurance defense counsel who alleged that he had been discharged in violation of public policy expressed by Connecticut Rules of Professional Conduct relating to duty of loyalty owed to insureds); *see also Hubbard v. Spokane County*, 50 P.3d 602, 606 (Wash. 2002) (en banc) (Washington Supreme Court recognized county zoning code and state statute as source of public policy to support claim by county planning director who alleged that he had been discharged for questioning legality of issuing hotel building permit).

States also differ on the types of legal violations that can support a wrongful discharge claim. In Virginia, for example, only state statutes constitute public policy. An employee discharged in retaliation for reporting wrongdoing that violates federal law cannot make a wrongful discharge claim in Virginia. Other states, such as Maryland, take a broader approach and protect employees who report a violation of any state or federal statute. While courts do not uniformly interpret the types of protected activity that give rise to a tort claim for wrongful discharge, most courts have recognized a claim for the following types of protected activity: (1) refusing to engage in illegal activity, (2) performing a duty required by law, or (3) exercising a statutory right.

1. Refusing to Engage in Illegal Activity

The tort for wrongful discharge protects employees from termination because they refuse to engage in illegal activity. For example, courts will likely recognize a wrongful discharge claim where an employer terminates an employee for refusing to participate in an employer’s irregular accounting practices, including the recording of an asset purchased by one entity and placing it on the books of another entity. *See Rocky Mountain Hosp. & Medi. Serv. v. Mariani,* 916 P.2d 519, 527 (Colo. 1996) (recognizing wrongful discharge claim where company recorded assets purchased by one entity under books of another entity).

2. Fulfilling a Statutory Obligation

An at-will employee who is terminated for fulfilling a statutory obligation or reporting suspected criminal behavior to law enforcement is protected under public policy. Under this form of protected conduct, the employee must demonstrate that she had a legal obligation or duty to report the employer’s unlawful conduct. Thus, an employee terminated for blowing the whistle on her co-worker who distributed prescription medication to patients without authorization from a physician, but who had no statutory duty to report the misconduct, will likely have her claim dismissed. *See Austin v. HealthTrust, Inc.,* 967 S.W. 2d 400 (Tex. 1998) (declining to extend public policy tort doctrine to protect private whistleblower who reported another nurse for working while under the influence and distributing prescription medication to patients without authorization from a physician because the employee was under no duty to oppose such illegal conduct).

3. Exercising a Statutory Right or Privilege

Terminating an employee for exercising her statutory rights can give rise to a wrongful discharge claim. *Uylaki v. Town of Griffith*, 878 N.E. 2d 412, 414 (Ind. Ct. App. 2007) (holding that employee who has been fired for exercising statutory right or refusing to violate law has claim for wrongful discharge). In *Jackson v. Morris Commc'ns Corp.*, for example, a Nebraska court recognized a cause of action for wrongful discharge where a co-circulation manager for the York News-Times alleged that "she was discharged in retaliation for filing a [workers' compensation] claim." *Jackson*, 657 N.W.2d 634, 641 (Neb. 2003). In reaching its decision, the court reasoned that the "failure to recognize the cause of action for retaliatory discharge for filing a workmen's compensation claim would only undermine [the] Act and the strong public policy behind its enactment." *Id.* at 641 (citing *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984)). A California court reiterated this principle in *Grant-Burton v. Covenant Care, Inc.*, when it recognized a wrongful discharge claim for an employee who was terminated for participating in a group discussion with other employees about the fairness of the employer's bonus system, a statutory right available to employees under section 232 the California Labor Code. *See Grant-Burton*, 99 Cal. App. 4th 1361, 1371 (2002). Covenant Care argued that section 232 was not triggered because the marketing directors did not disclose the amount of their bonuses. The court, however, rejected Covenant's argument, stating that the employee can disclose the amount of wages without mentioning dollars and cents and concluding that the company wrongfully discharged the marketing director for exercising her statutory right to discuss compensation with her co-workers. In sum, "[an] employee must be able to exercise his [statutory] right in an unfettered fashion without being subject to reprisal." *Jackson*, 657 N.W.2d at 639.

4. Potential Sources of Public Policy

Sources of public policy for a common law wrongful discharge claim may include clear and particularized pronouncements of public policy in the United States Constitution, the State Constitution, and federal and state statutes and regulations. *See, e.g.*, *Island v. Buena Vista Resort*, 103 S.W.3d 671,679 (Ark. 2003) (sexual harassment statute established public policy against sexual harassment); *Ballinger v. Delaware River Port Auth.*, 800 A.2d 97, 108 (N.J. 2002) (sources of public policy include legislation, administrative rules, regulations or decisions, and judicial decisions, as well as professional codes of ethics under certain circumstances); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 575 S.E.2d 618, 622 (W. Va. 2002) (Code of State Regulations sets forth specific statement of substantial public policy, ensuring that hospital unit is properly staffed to accommodate regulation's directive, that patients are protected from inadequate staffing practices, and that medical care is provided to hospital patients); *Wholey v. Sears Roebuck*, 803 A.2d 482, 490 (Md. 2002) (constitutional provisions and principles provide clear public policy mandates under which a termination may be grounds for wrongful discharge claim); *Mitchem v. Counts*, 523 S.E.2d 246, 250 (Va. 2000) (common law cause of action for wrongful termination could be based on public policies expressed in statutes prohibiting fornication and lewd and lascivious behavior); *Faulkner v. United Tech. Corp.*, 693 A.2d 293, 295 (Conn. 1997) (wrongful discharge claim may be predicated solely on violation of federal as opposed to state statute); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1033 (Ariz. 1985) (public policy can be found in expressions of state's founders and state's constitution and statutes that embody the public conscience of people within that state).

The FCA itself can be a source of public policy in a wrongful discharge action. For example, a district judge recently denied a motion to dismiss a Missouri common law wrongful discharge action in which the plaintiff alleged his employer terminated him for disclosing to his supervisor a billing scheme in which his employer was spreading the cost of certain projects to other unrelated projects, thereby causing certain projects to be falsely over billed. *See McNerney v. Lockheed Martin Ops. Support, Inc.*, No. 4:10-cv-00704 (W.D.Mo. 10/22/10) (order denying motion to dismiss). Concluding that the billing scheme about which plaintiff complained was a fraudulent attempt to get the Government to pay out money it was not obligated to pay, the scheme violated the public policy embodied in the FCA and therefore terminating the plaintiff for complaining about the scheme violated Missouri law.

5. Pleading Requirements and Burden of Proof

While there is no heightened pleading requirement for a wrongful discharge claim, it is critical to plead with specificity the public policy that the employer violated by discharging the plaintiff. *See, e.g., Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 808 (Va. 1996) (no cause of action was stated where employee failed to specify statutory basis for claim that he was wrongfully discharged for refusing to perform auto repairs using method that he believed unsafe). Moreover, an employee should ensure that the specified public policy applies not only to him but also to the particular employer. *See, e.g., Edmondson v. Shearer Lumber Prod.*, 75 P.3d 733 (Idaho 2003) (employee cannot base wrongful discharge claim against private sector employer on exercise of constitutional right of free speech, because this right is protected only against government action).

To establish a *prima facie* case in most jurisdictions, an employee must establish the following:

1. That plaintiff was an at-will employee terminated by the defendant;
2. That the termination of the plaintiff's employment violates a specific public policy; and
3. That there is a causal nexus between the public policy violation and the employer's decision to terminate the plaintiff.

In attempting to establish that the employee's termination violates public policy, the employee's counsel should always try to emphasize the public and social importance of the rights or interests that the employee is attempting to defend. Courts are more apt to recognize a wrongful discharge claim of an employee discharged for supplying law enforcement with information about a co-worker's involvement in a crime than for an employee discharged for asserting his right to take a rest break. *Compare Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 846 (Ill. 1981) (employee stated cause of action for retaliatory discharge where employee alleged that he was discharged for supplying law enforcement agency with information that fellow employee might be involved in violation of criminal code) *and Miller v. SEVAMP, Inc.*, 362 S.E.2d 915 (Va. 1987) (court characterized employee-shareholder's statutory right to vote free from employer's coercion, right conferred by policy benefiting public rather than merely benefiting shareholder's private interest) *with Crawford Rehab. Serv's, Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997) (plaintiff's right to take rest breaks clearly did not implicate substantial public policy); *and City of Virginia Beach v. Harris*, 523 S.E.2d 239 (Va. 2000) (police officer terminated for obtaining warrants against his supervisor did not have claim against city for wrongful discharge in violation of public policy based on statute describing powers and duties of police officer; statute did not state any public policy and was not designed to protect any public rights pertaining to property, personal freedoms, health, safety, or welfare).

Additionally, an employee must identify a public policy expressed in a source acceptable and actionable within the state governing the action. For example, as discussed above, some states require that the public policy be a state statute rather than a federal source. *See, e.g., Clinton v. State ex rel. Logan County Election Bd.*, 29 P.3d 543 (Okla. 2001) (plaintiff must identify Oklahoma public policy goal that is clear and compelling and is articulated in existing Oklahoma constitutional, statutory, or jurisprudential law); *Torrez v. City of Scottsdale*, 13 IER 316 (Ariz. Super. Ct. 1997) (holding that neither federal statutes nor municipal ordinances are cognizable sources of public policy). Once the employee established an applicable public policy, the employee must demonstrate that her conduct furthered that particular public policy. This may require a showing that the employee took affirmative steps that required the employer to conform to the stated public policy.

There are challenges, however, to proving the causal relationship between the employee's conduct and the stated public policy violation. Some issues that arise in the context of wrongful discharge litigation include: (1) whether an employee must prove that the employer's conduct actually violated public policy or whether it is sufficient that the employee had a good faith belief that the employer's conduct violated public policy; and (2) whether the employee must demonstrate that she disclosed information about the employer's violations of public policy to regulatory or prosecutorial agencies or if it is sufficient to make complaints internally. While most courts hold that employees need not voice their concerns about their employer's public policy violations externally and that a reasonable belief that the employer's conduct violated public policy is sufficient to make a claim for wrongful discharge, employees should try to identify evidence that would show a colorable case of illegality (i.e., information about a regulatory action taken against the employer for malfeasance can provide a basis for the employee's belief that the employer was engaging in conduct that violated public policy).

6. Remedies

A prevailing plaintiff can recover back pay, front pay, damages for emotional distress, and punitive damages. In certain jurisdictions, punitive damages are available only upon a showing of malice, which can be inferred from circumstantial evidence. *See Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144, 1151 (Md. Ct. Spec. App. 1990). Other jurisdictions have awarded punitive damages where an employer formally requires an employee's adherence to the law but simultaneously requests that the employee engage in unlawful conduct. *See Smith v. Brown-Forman Distillers Corp.*, 196 Cal. App. 3d 503 (1987) (awarding punitive damages where liquor distiller consciously disregarded rights of employees by requiring that they engage in illegal activities).

7. An Alternative Statutory Remedy May Bar a Common Law Wrongful Discharge Action

In many states, where the source of public policy is a statute with its own remedy to vindicate the public policy objectives, the employee can pursue a retaliation action only through the statute. For example, in *Scott v. Topeka Performing Arts Ctr., Inc*., the court granted the employer's motion to dismiss, concluding that the statutory remedies available under the Fair Labor Standards Act ("FLSA") precluded the employee's state-law claim for retaliatory discharge. *Scott v. Topeka Performing Arts Ctr., Inc.*, 69 F. Supp. 2d 1325, 1330 (D. Kan. 1999). In *Scott*, the employee alleged that her employer wrongfully discharged her for asserting her rights under the FLSA. In her complaint, the employee argued that it was unclear whether relief on her FLSA retaliation claim would include all the remedies available under her state law claim and that the remedies under the FLSA were not adequate. The court rejected this argument, barring the employee from pursuing a wrongful discharge claim against her employer. Similarly, in *Korslund v. Dyncorp Tri-Cities Serv., Inc.*, a group of employees was unable to pursue wrongful discharge claims where the employees alleged that their employer retaliated against them for reporting safety violations, mismanagement, and fraud at a nuclear facility. *Korslund* 125 P.3d 119 (Wash. 2005) (en banc). According to the Washington court, the administrative process for whistleblower complaints in the federal Energy Reorganization Act ("ERA") adequately protected the public policy of protecting against waste and fraud in the nuclear industry. Thus, when attempting to bring a retaliation claim under the wrongful discharge tort, an employee should not rely on a statute with its own whistleblowing remedy as the source of public policy. The employee should, if possible, identify and cite another statue that lacks its own remedy.

B. Extraterritorial Application of Common Law Wrongful Discharge Claims -- *Haddad v. ITT Industries, Inc.*

There is at least one example of, from Indiana, where a federal court confirmed its ability to hear the common law wrongful discharge claim of a U.S. employee posted abroad. Indiana recognizes a public policy exception to the employment-at-will doctrine if an employee's termination contravenes a clear statutory expression of a right or duty, or when the employer discharges an employee for refusing to commit an illegal act for which she would be personally liable. *Coutee v. Lafayette Neighborhood Housing Services, Inc.*, 792 N.E.2d 907, 911 (Ind. App. 2003).

In *Haddad v. ITT Industries, Inc.*, 2007 WL 141949, at *8-9 (N.D. Ind. 2007), the Northern District of Indiana specifically held that an employer who fires an employee for refusing to violate the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, engaged in illegal retaliatory discharge. In 1997, Haddad conducted an internal investigation and discovered a scheme by which ITT's Fort Wayne management officials would pay bribes to Kuwaiti officials in return for a purchase contract. Haddad also rejected offers from ITT of cash bonuses if the contract went through. During negotiations in 2001, Haddad recommended to his division and corporate staff that a 3% commission included in the contract with the Kuwaiti agent be rescinded. He believed it to be a bribe to Kuwaiti officials. As the contract neared approval in February 2001, ITT recalled Haddad back to the United States from Kuwait where he could not monitor the activities with respect to the contract negotiations.

The district court noted that the FCPA prohibits employees of certain companies from giving valuable consideration to foreign officials to influence the decisions of the official. An employee who violates the section may be fined up to $100,000 and imprisoned for five years. Without addressing if extraterritorial application of Indiana's common law prohibition on wrongful discharge was an issue, *Haddad* confirmed that an employee who alleges that his employer fired him because he refused to participate in activities prohibited by the FCPA states a valid claim for retaliatory discharge under Indiana's common law.

As long as the plaintiff can cite to illegal acts within the United States, a negative impact upon persons or entities within the United States, or protected conduct directed toward the United States, she can take advantage of the Conduct and Effects Tests as support for her wrongful discharge claim. Her extraterritorial location at the time of either the illegal activity or her disclosure should not bar her complaint.

Conclusion

The substantial expansion of whistleblower law in recent years provides foreign-based employees substantial financial incentives to blow the whistle and robust protections against retaliation.