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SUBCOMMITTEE ON THE SARBANES-OXLEY ACT OF 2002

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I. INTRODUCTION

On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002 ("SOX" or "the Act"), Pub. L. 107-204, 116 Stat. 802. Enacted in the wake of the Enron and WorldCom scandals, the Act was designed to restore investor confidence in the nation's financial markets by improving corporate responsibility through required changes in corporate governance and accounting practices and by providing whistleblower protection to employees of publicly traded companies who report corporate fraud.

SOX contains both a civil and a criminal whistleblower provision. Section 806, codified at 18 U.S.C. § 1514A, is in Title VIII of SOX, entitled the Corporate and Criminal Fraud Accountability Act of 2002. Section 806 creates a civil cause of action for employees who have been subject to retaliation for lawful whistleblowing. Senator Leahy, one of the authors of the Section, stated, "U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." *See* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy). The provision addressed Congress's concern that corporate whistleblowers had hitherto been subject to the "patchwork and vagaries" of state laws, with a whistleblowing employee in one state being more vulnerable to retaliation than a similar whistleblowing employee in another state. *Id.* Section 806 is intended to set a national floor for employee protections and not to supplant or replace state law. *Id.*

Enforcement of SOX's civil whistleblower protection provision is entrusted, in the first instance, to the Secretary of Labor. The statute provides, however, that if the Secretary has not issued a final decision within 180 days of the filing of a complaint, and there has been no showing that the delay was due to the bad faith of the claimant, the claimant may bring a *de novo* action in district court. The United States Courts of Appeals have jurisdiction to review the Secretary of Labor's final decisions. *See* 18 U.S.C. § 1514A(b)(2).

Section 1107, SOX's criminal whistleblower provision, is in Title XI of the Act, entitled the Corporate Fraud Accountability Act of 2002. Section 1107 makes it a felony for anyone to knowingly retaliate against or take any action "harmful" to any person, including interfering with the person's employment, for providing truthful information to a law enforcement officer relating to the commission or possible commission of a federal offense. *See* 18 U.S.C. § 1513(e). As part of a criminal obstruction of justice statute, Section 1107 is enforced by the U.S. Department of Justice.

In addition to these civil and criminal whistleblower provisions, SOX contains two other mechanisms to encourage the disclosure of corporate fraud. Section 301 of the Act, codified at 15 U.S.C. § 78f(m)(4), requires that the audit committees of publicly traded companies establish procedures for the receipt, handling, and retention of anonymous complaints from employees relating to accounting or auditing matters. Section 307, codified at 18 U.S.C. § 7245, requires the Securities and Exchange Commission ("SEC") to issue a rule setting forth ethical standards for attorneys who practice before it that in turn requires them to report to their corporate clients certain breaches of fiduciary duty. Pursuant to this statutory provision, the SEC issued a rule requiring attorneys "appearing and practicing before the Commission" to report "evidence of a material violation" to their client's chief legal officer or chief executive officer and, absent an "appropriate response," to the company's audit committee or board of directors. *See generally* 17 CFR Part 205 (2003).

II. OVERVIEW OF SOX'S CIVIL WHISTLEBLOWER PROVISION

Under Section 806, publicly traded companies may not "discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment" because of any protected whistleblowing activity. 18 U.S.C. § 1514A(a). The Section applies to companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) or that are required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or to any officer, employee, contractor, subcontractor, or agent of such companies. *See* 18 U.S.C. § 1514A(a).

A broad range of activities relating to corporate fraud is protected under Section 806, including providing information to federal agencies, Congress or internally within the company, and filing, causing to be filed, testifying, participating in, or assisting in proceedings. *See* 18 U.S.C. § 1514A(a)(1)-(a)(2). Protected activity involves providing information that the employee "reasonably believes" constitutes a violation of federal mail, wire, bank or securities fraud (18 U.S.C. §§ 1341, 1343, 1344 and 1348), or a violation of any SEC rule or other provision of federal law relating to fraud against shareholders. *See* 18 U.S.C. § 1514A(a)(1).

Employees of covered companies who believe that they have been subject to adverse action for having engaged in such protected activity may file a complaint with the Secretary of Labor within 90 days of the alleged retaliatory act. *See* 18 U.S.C. § 1514A(b)(2)(D). Proceedings under Section 806 are governed by the rules and procedures, and by the burdens of proof, of the aviation safety whistleblower provisions contained in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. 42121. *See* 18 U.S.C. § 1514A(b)(2)(A) and (C). As with AIR21, the Secretary of Labor has assigned responsibility for administering Section 806 to the Assistant Secretary for Occupational Safety and Health, bringing to 14 the total number of whistleblower statutes administered by the Occupational Safety and Health Administration ("OSHA"). *See* Secretary's Order 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002).

OSHA has issued a final rule establishing procedures and time frames for the handling of retaliation complaints under Section 806. *See* 29 CFR Part 1980, 69 Fed Reg. 52104 (Aug. 24, 2004) ("Final Rule"). The rule addresses complaints to OSHA, investigations by OSHA, appeals of OSHA determinations to a U.S. Department of Labor ("DOL") administrative law judge ("ALJ") for a *de novo* hearing, hearings by ALJs, and review of ALJ decisions by DOL's Administrative Review Board ("ARB"), to which the Secretary has delegated authority to issue final agency decisions under SOX. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

In interpreting Section 806, its substantive requirements and burdens of proof, DOL and the courts have looked to agency and judicial decisions under AIR21, as well as other OSHA-enforced whistleblower statutes, such as the Energy Reorganization Act, 42 U.S.C. § 5851 ("ERA"), which provides protection to employees who report nuclear safety violations. Moreover, as has happened with the other whistleblower statutes enforced by OSHA, DOL and the courts likely will borrow heavily from case law developed under Title VII and other discrimination statutes.

One notable distinction between Section 806 of SOX and the other whistleblower laws administered by the Labor Department is SOX's "kick out" provision that allows the whistleblower claimant to bring a *de novo* action at law or equity in district court, if the Secretary has not issued a final decision within 180 days of the filing of his or her complaint, and there has been no showing that the delay was due to the bad faith of the claimant. *See* 18 U.S.C. § 1514A(b)(1)(B). Claimants must consider any number of factors in deciding whether to go to district court or continue with the administrative process. For instance, there are fewer evidentiary restrictions and less formal pleading requirements in agency adjudications. On the other hand, a claimant proceeding in district court will be able to subpoena witnesses and might be entitled to a jury trial. Regardless of where an action is adjudicated, however, the remedies available generally are the same. Section 806 provides that an employee subject to retaliation is "entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). Claimants who proceed before DOL, however, are entitled to "interim reinstatement." *See* 18 U.S.C. § 1514A(b)(2)(A) (incorporating 49 U.S.C. § 42121(b)(2)(A)). This aspect of SOX is discussed, *intra*, in Section VI.A.8.a. of this Report.

III. COVERED EMPLOYERS

A. Companies

SOX civil whistleblower provisions apply to all publicly traded companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. § 78l) or subject to the periodic reporting requirements of Section 15(d) (*e.g.*, required to file forms 10-K and 10-Q). (15 U.S.C. § 78o(d)). *See* 18 U.S.C. § 1514A(a).

1. Domestic

Section 806 applies to domestic corporations that meet the registration or reporting requirements of Sections 12 or 15(d). The provision requiring that a respondent be subject to the registration or reporting requirements of the Exchange Act has been strictly construed. Neither <u>voluntary compliance</u> with the requirements of Section 15(d) nor mandatory compliance with <u>other SEC reporting requirements</u> will subject an employer to coverage under Section 806.

a. Voluntary Compliance

In *Flake v. New World Pasta Co.*, ARB 03-126, 2003-SOX-18 (ARB Feb. 25, 2004), the respondent did not have registered securities, but to comply with a contractual agreement filed reports required by Section 15(d). The ARB concluded the respondent was not a covered employer under Section 806 because, although it *voluntarily* filed reports required by Section 15(d), it was not *required* to do so because it fell within an exception to Section 15(d)'s reporting requirements for companies with public debt held by less than 300 persons in each year since its registration and offering. The Third Circuit agreed with the ARB's reasoning in *Flake v. United States DOL*, 2007 U.S. App. LEXIS 22552 (3d Cir. Sept. 21, 2007).

See SEC Division of Corporation Finance, *Sarbanes-Oxley Act of 2002 – FAQ #1* (Nov. 8, 2002) (company that voluntarily files reports under Exchange Act but is not required to because it had fewer than 300 security holders of record at the beginning of its fiscal year is not an "issuer" within the meaning of SOX).

b. Other Reporting Requirements

In *Stevenson v. Neighborhood House Charter Sch.*, 2005-SOX-87 (ALJ Sept. 7, 2005), the respondent (a non-publicly traded charter school) was subject to reporting under SEC Rules 10b5 and 15c2-12 and had a retirement plan with benefits subject to reporting and disclosure requirements under ERISA. The ALJ found that, despite these reporting requirements, respondent was not covered under Section 806 because coverage "is determined solely by whether the company has a class of stock registered under Section 12 of the [Exchange Act] or whether it is required to make reports pursuant to Section 15(d)."

Other cases: *Paz v. Mary's Center for Maternal & Child Care*, ARB 06-031, 2006-SOX-7 (ARB Nov. 30, 2007) (non-profit health organization which neither had Section 12 securities nor reporting requirement under Section 15(d)); *Fleszar v. American Medical Ass'n*, 2007-SOX-30 (ALJ June 13, 2007) (reports filed in relation to respondent's defined benefits plans did not involve the issuance of securities and would not have been filed under Section 15(d)); *Fiedler v. Compass Group USA, Inc.*, 2005-SOX-38 (ALJ July 15, 2005); *Gibson-Michaels v. Federal Deposit Ins. Corp.*, 2005-SOX-53 (ALJ May 26, 2005) (FDIC is not a covered employer under Section 806); *Weiss v. KDDI America, Inc.*, 2005-SOX-20 (Feb. 11, 2005); *Ionata v. Nielsen Media Research, Inc.*, 2003-SOX-29 (ALJ Oct. 2, 2003).

c. Registration Must Be Effective at Relevant Time

Coverage under Section 806 is narrower than coverage under other sections of SOX, such as Section 402 (enhanced conflict of interest provisions), in that Section 806 does not cover companies that have filed a registration statement but do not yet have a class of securities registered under Section 12 or report under Section 15(d) of the Exchange Act. This issue was addressed in *Stalcup v. Sonoma College* 2005-SOX-114 (ALJ Feb. 7, 2006), where the respondent had filed a registration statement with the SEC, but the registration had not yet become effective nor had it been withdrawn at the time the complainant was terminated. The

ALJ found that, although the respondent may have been an "issuer" for purposes of other sections of SOX, it was not a covered employer under Section 806.

Other cases: *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Apr. 1, 2005) (no liability where adverse action occurred two weeks before respondent became subject to section 12 as a result of a merger); *Roulett v. American Capital Access*, 2004-SOX-78 (ALJ Dec. 22, 2004) (no coverage where respondent withdrew its registration before any approval by an exchange or the SEC was effected and, therefore, never registered a class of securities under section 12).

Likewise, Section 806 does not cover companies that delist their securities prior to the occurrence of the adverse employment action. In *Stone v. Instrumentation Laboratory SpA,* 2007-SOX-21 (ALJ Sept. 6, 2007), complainant alleged he was blacklisted in retaliation for filing his OSHA complaint. The ALJ dismissed the claim because respondent had delisted its securities prior to the date of the alleged blacklisting and therefore "was no longer a public company."

2. Foreign

The Act's whistleblower protections apply to foreign private issuers (as defined by Rule 36-4(c) of the Exchange Act) subject to the reporting and registration requirements under Sections 12 and 15(d). Foreign corporations doing business in the United States are subject to Section 806's whistleblower provisions. *Carnero v. Boston Sci. Corp.*, 433 F.3d 1 (1st Cir.) ("These registration and reporting provisions apply to U.S. and foreign companies listed on U.S. securities exchanges"), *cert. denied*, 126 S. Ct. 2973 (2006). *See Ward v. W & H Voortman, Ltd.*, 685 F. Supp. 231, 232 (M.D. Ala. 1988).

Foreign issuers exempt from SEC filing requirements under Rule 12g3-2(b) of the Exchange Act are excluded from coverage under Section 806. In *Deutschmann v. Fortis Investments*, 2006-SOX-80 (ALJ June 14, 2006), the ALJ rejected the argument that respondent, a non-publicly traded company, was covered under Section 806 as an agent of a Belgium-based publicly traded company. The ALJ reasoned that the foreign parent company was not covered under Section 806 because its securities were "exempt from registration under the SEC Rule 12g3-2(b). . .."

In *Tumban v. Biomerieux, Inc.*, No. 1:06cv442, 2007 WL 778426 (M.D.N.C. Mar.13, 2007), plaintiff contended defendant was a "publicly traded company" in France but conceded its stock was not traded on an American exchange. The court concluded that defendant was not a covered employer.

a. Extraterritorial Application

Courts and ALJs have refused to afford SOX whistleblower protection to employees working outside the United States, at least where the complainant is not a U.S. citizen and the employment relationship lacks a substantial nexus with the U.S.

(i) Courts

In *Carnero*, the First Circuit refused to apply Section 806 to a foreign national who was directly employed by Argentinean and Brazilian subsidiaries of a corporation covered by SOX. The court reasoned that Congress was silent as to any intent to apply Section 806 abroad, and it is generally presumed that federal statutes do not apply extraterritorially absent clear language by Congress in the statute to extend the statute's protections abroad. However, the court left open the possibility that Section 806 may apply to conduct occurring overseas in cases where the complainant's employment relationship had a more substantial nexus to the U.S. *See* 433 F.3d at 18 n.17.

(ii) ALJs

In *Ahluwalia v. ABB, Inc.*, 2007-SOX-44 (ALJ Sept. 24, 2007), the ALJ found Section 806 did not apply where the alleged protected activity occurred outside the United States. Complainant attempted to avoid the rule against extraterritorial effect by arguing the United States parent and foreign subsidiary should be jointly liable. The ALJ rejected this argument, reasoning that the "lack of jurisdiction was a consequence of the overseas location of the employment, not the subsidiary status of the employer, or its agency relation to the parent company."

Other cases: *Beck v. Citigroup, Inc.*, 2006-SOX-3 (ALJ Aug. 1, 2006) (Section 806 does not apply to a foreign national working exclusively in Germany for respondent's German division, despite fact that U.S.-based company officials may have participated in decision to terminate petitioner's employment); *DiGiammarino v. Barclays Capital, Inc.*, 2005-SOX-106 (ALJ July 7, 2006) (no coverage where employee worked exclusively in the U.K. for a division based in the U.K.); *O'Mahony v. Accenture Ltd.*, 2005-SOX-72 (ALJ Jan. 20, 2006); *Ede v. Swatch Group*, 2004-SOX-68, 2004-SOX-69 (ALJ Jan. 14, 2005); *Concone v. Capital One Finance Corp.*, 2005-SOX-6 (ALJ Dec. 3, 2004).

b. Nexus to the United States

Several decisions have acknowledged potential application of Section 806 to overseas conduct where the complainant's employment relationship has a significant nexus to the U.S. In *Penesso v. LLC International, Inc.*, 2005-SOX-16 (ALJ Mar. 4, 2005), the respondent moved for summary decision on the ground that the complainant worked in Italy and Section 806 did not apply extraterritorially. The ALJ denied summary decision, finding a substantial nexus to the United States. The ALJ reasoned that complainant was a U.S. citizen, much of the protected activity took place in the U.S. when complainant came to respondent's U.S. headquarters to inform corporate officers of the financial improprieties he believed were taking place in Italy, and at least one of the alleged retaliatory actions took place in the U.S.

In *Neuer v. Bessellieu*, 2006-SOX-132 (ALJ Dec. 5, 2006), complainant was not a U.S. citizen, the alleged SOX protected activity occurred in Israel, and the parent company was located in Israel. Nonetheless, the ALJ refused to dismiss the complaint based on lack of extraterritorial effect because complainant alleged he was employed by a U.S. subsidiary, spent most of his time working in the U.S., and his termination occurred in the U.S. Furthermore, the complainant raised the prospect of significant intermingling of the business activities of the Israel-based parent company and its U.S. subsidiary.

c. Conflict with Foreign Laws

One rationale for limiting extraterritorial application of Section 806 is concern that overseas application of U.S. whistleblower protections conflicts with foreign law and cultural norms. Comments received in response to the DOL's proposed Rules expressed this concern, however OSHA declined to clarify this issue in its Final Rule on the ground that the purpose of the regulations is procedural and not to interpret the statute. *See* 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004).

This concern over potential conflict between SOX whistleblower protections and foreign law has been addressed in Europe. The French Data Protection Authority (CNIL) found that whistleblower hotlines proposed by French subsidiaries of McDonald's and CEAC to comply with SOX Section 301 violated French privacy laws.[1] Subsequently, the CNIL issued a Guidance explaining that SOX whistleblowing systems are not necessarily prohibited by French law, "provided the rights of individuals directly or indirectly incriminated through them are guaranteed with regard to personal data protection rules."[2] The CNIL recommended eleven conditions which must be satisfied for a whistleblowing system to guarantee such rights. *See also Chartes d'Ethique, Alerte Professionnelle et Droit du Travail Francais: Etat des Lieux et Perspectives* ("Antomattei-Vivien report") (Jan. 2007) (concluding that whistleblowing systems must be limited in scope, must not infringe on employee rights, and must be presented to the employees for prior consent.[3]

A French court has upheld a corporate whistleblower system designed to ensure compliance with SOX which contained the protections recommended by the CNIL. *See Union Departementale CGT du Rhone v. Bayer Cropscience*, docket number unavailable (Tribunal de Grande Instance de Lyon Sept. 19, 2006). In Germany, a Düsseldorf court invalidated Wal-Mart's whistleblowing policy on the ground it was not first presented to the works council for approval. The court did not address whether the policy violated German privacy laws. *See* Decision of Landesarbeitsgericht, 10 TaBV 46/05 (Nov. 14, 2005).

The European Union also has addressed these concerns. On February 1, 2006, the EU's Article 29 Data Protection Working Party issued an opinion addressing how internal whistleblowing systems may be implemented in compliance with EU data protection rules. The

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[1] *See* Decisions of the Commission nationale de l'informatique et des libertés (May 26, 2005), available at http://www.cnil.fr/index.php?id=1834 and http://www.cnil.fr/index.php?id=1833.

[2] *See* Guideline document of the Commission nationale de l'informatique et des libertés (Nov. 10, 2005), available at http://www.cnil.fr/fileadmin/documents/uk/CNIL-recommaandations-whistleblowing-VA.pdf.

[3] Available at http://www.cohesionsociale.gouv.fr/IMG/pdf/Rapport_Ethique.pdf .

opinion sets forth a number of conditions which must be met to ensure compliance.[4]

On June 8, 2006, the SEC Director of Office of International Affairs responded to a letter from the Chairman of the Working Party seeking clarification regarding potential conflicts between the EU opinion and SOX whistleblower requirements. This response addressed, among other things, concerns that the Working Party's opinion restricted audit committees' power to investigate complaints, limited companies' ability to provide and publicize anonymous complaint procedures, and did not provide whistleblower procedures to all employees of covered employers. *See* Ethiopis Tafara correspondence to Peter Schaar (June 8, 2006).[5] The Working Party Chairman's July 3. 2006 reply expressed reluctance regarding anonymous complaint procedures because, among other things, anonymity may encourage slanderous or frivolous allegations against a specific person. *See* Peter Schaar correspondence to Ethiopis Tafara (July 3, 2006).[6]

Although these European authorities do not directly address Section 806, they do highlight the concerns justifying limitations on extraterritorial application of SOX whistleblower provisions.

On a related note, in the United States a company's unilateral implementation of a whistleblower system designed to comply with SOX may violate the National Labor Relations Act where the company applies the system to bargaining unit employees without first bargaining with the union. *Moore College of Art & Design & Moore Federation of Teachers, AFT Local 2208*, No. 4-CA-34292, 2006 NLRB Lexis 246 (NLRB June 14, 2006).

3. Agents/Contractors

SOX civil whistleblower provisions cover not only publicly traded companies, but also "any officer, employee, contractor, subcontractor or agent" of a covered company. 18 U.S.C. § 1514A(a). The terms "officer," "employee," "contractor," "subcontractor," and "agent" are not defined in the Act. However, it is clear that private companies that are not publicly traded, as well as other entities or individuals, that serve as "agents" or "contractors" of the publicly traded employer, may be subject to the whistleblower provisions.

a. Liability of Publicly Traded Company for Actions against Employee of Its Agent or Contractor

The terms "contractor," "subcontractor" and "agent" could be interpreted as applying to publicly traded companies for acts committed by them against employees of their agents or contractors. In an environmental whistleblower case, the ARB held that a government agency could be subject to a discrimination charge filed by the employee of a private-sector government contractor when the agency banned the contractor's employee from entering the

[4] Available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2006/wp117_en.pdf.

[5] Available at http://www.sec.gov/about/offices/oia/oia_rulemaking/schaar_letter_060806.pdf.

[6] Available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/others/2006-07-03-reply_whistleblowing.pdf

government workplace. *Stephenson v. NASA*, ARB 96-080, 94-TSC-5 (ARB Feb. 3, 1997). In its Final Rule, OSHA, citing *Stephenson*, confirmed that "a respondent may be liable for its contractor's or subcontractor's adverse action against an employee in situations where the respondent acted as an employer with regard to the employee of the contractor or subcontractor by exercising control of the work product or by establishing, modifying or interfering with the terms, conditions, or privileges of employment." Conversely, OSHA stated that "a respondent will not be liable for the adverse action taken against an employee of its contractor or subcontractor where the respondent did not act as an employer with regard to the employee." 69 Fed. Reg. at 52017.

The analysis used in *Stephenson* suggests that the scope of SOX may apply freely across contractual arrangements. Yet, the scope of contractor or agent coverage as interpreted thus far in ALJ decisions generally has been limited to cases where the complainant was employed by the publicly traded company, *not* by the agent or contractor.

For example, in *Goodman v. Decisive Analytics Corp.*, 2006-SOX-11 (ALJ Jan. 10, 2006), an ALJ held that an employee of a private contractor or subcontractor of a publicly traded company is not afforded SOX whistleblower protection. The ALJ reasoned that Section 806's discrimination prohibition refers solely to employees of publicly traded companies, and the terms "contractor" and "subcontractor" merely reference two of various entities of a publicly traded company that may not adversely affect the terms and conditions of an employee of a publicly traded company.

Likewise, in *Minkina v. Affiliated Physician's Group*, 2005-SOX-19 (ALJ Feb. 22, 2005), *appeal dismissed*, ARB 05-074 (ARB July 29, 2005), an ALJ interpreting SOX's "any officer, contractor, subcontractor or agent" language concluded that, although a privately held entity could engage in discrimination prohibited by Section 806 in regard to an employee of a publicly traded company when acting in the capacity as an agent of the publicly traded company, Section 806 does not protect employees of the privately-held contractors, subcontractors and agents from discrimination.

b. Liability of Agent or Contractor for Actions against Employee of Publicly Traded Company

A privately held entity acting as an agent or contractor of a publicly traded company may be liable under Section 806. The scope of contractor or agent coverage has been limited to cases where the contractor or agent is acting in the role of agent *with respect to the complainant's employment relationship*.

(i) "Agent" Coverage

In *Kalkunte v. DVI Financial Servs. Inc.*, 2004-SOX-56 (ALJ July 18, 2005), a non-publicly traded "turnaround specialist" company, which was hired to manage a publicly traded company through bankruptcy and dissolution, was held liable for the termination of complainant, an employee/attorney of the publicly traded company. The ALJ concluded that the turnaround specialist was acting as an agent of the publicly traded company because its main principal acted as its CEO, had the power to affect the complainant's employment, and made the decision to fire the complainant.

In contrast, in *Brady v. Calyon Securities (USA)*, 406 F. Supp. 2d 307 (S.D.N.Y. 2005), the court dismissed a SOX whistleblower complaint, rejecting an argument that the employer, a non-publicly traded company, should be liable as an "agent" because it acted as underwriter for publicly traded companies. The court concluded that "[t]he mere fact that defendants may have acted as an agent for certain public companies in certain limited financial contexts related to their investment banking relationship does not bring the agency under the employment protection provisions of Sarbanes-Oxley." The court explained that an agent of a publicly traded company may be held liable under Section 806 only if it was an agent with respect to the complainant's employment relationship.

A union may be deemed an "agent" subject to Section 806. In *Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)*, ARB 04-111, 2004-AIR-19 (ARB Aug. 31, 2007), the complainant alleged that in retaliation for filing an OSHA complaint the union failed to provide her assistance and the employer colluded by asking the union to not provide assistance. The ALJ dismissed on grounds that she had "no jurisdiction over disputes between a union and its member, including the interpretation of collective bargaining agreements, or a union's duty of representation." The ARB reversed, reasoning the complaint sufficiently alleged that not only did the union fail to provide assistance, but also the union acted as the employer's agent in denying complainant assistance to which she otherwise would have been entitled, in retaliation for activity protected under Section 806.

As discussed below, the concept of "agent" coverage has been analyzed in greater depth in cases involving subsidiaries of publicly traded companies.

(ii) "Contractor" Coverage

Section 806 does not define the term "contractor." OSHA has indicated that a small accounting firm acting as a contractor of a publicly traded company could be liable for retaliation against an employee who provides information to the SEC regarding a violation of SEC regulations (*e.g.*, accounting irregularities). OSHA Whistleblower Investigations Manual (2003), at 14-1 ("OSHA Manual"). However, as in cases analyzing "agent" coverage, the scope of contractor coverage has been limited to cases where the contractor is acting on behalf of the publicly traded company with respect to the complainant's employment relationship.

In *Fleszar v. American Medical Association,* 2007-SOX-30 (ALJ June 13, 2007), the ALJ dismissed the complaint because the respondent was not subject to Section 806. The ALJ rejected the complainant's argument that respondent was covered simply because it had contractual relationships with publicly traded companies.

In *Brady v. Direct Mail Mgmt., Inc.*, 2006-SOX-16 (ALJ Jan. 5, 2006), the ALJ rejected complainant argument that her not-publicly-traded employer was covered under Section

806 because it performed direct mail services as a "first tier contractor" to publicly traded companies. The ALJ reasoned no evidence reflected that the employer acted on behalf of a publicly traded company when it terminated complainant's employment and none of the publicly traded companies with whom her employer did business directed or controlled her employer's employment decisions. *See also Kukucka v. Belfort Instrument Co.*, 2006-SOX-57 (ALJ Apr. 17, 2006); *Judith v. Magnolia Plumbing Co., Inc.*, 2005-SOX-99 & 100 (ALJ Sept. 20, 2005); *Roulett v. American Capital Access*, 2004-SOX-78 (ALJ Dec. 22, 2004).

In *Reno v. Westfield Corp., Inc.*, 2006-SOX-30 (ALJ Feb. 24, 2006), the ALJ rejected an argument that respondent was a "contractor" within the meaning of Section 806 simply because it had entered into a settlement agreement with a publicly traded company. The ALJ reasoned that merely entering into a settlement agreement does not render a company a "contractor." Additionally, the ALJ concluded that the contractor "when discriminating against the employee must have been acting on behalf of the publicly traded company."

B. Subsidiaries

Section 806 does not expressly include subsidiaries of publicly traded companies within its coverage. Nevertheless, in certain circumstances Section 806 has been applied to private subsidiaries of publicly traded companies under a number of theories.

1. Agency Test

In *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB 04-149, 2004-SOX-11 (ARB May 31, 2006), the ARB ruled that a Section 806 cause of action may proceed directly against a non-publicly traded subsidiary under an agency theory, *e.g.*, that the subsidiary is an "agent" of the parent company. The ARB explained that whether a subsidiary is an agent of a publicly traded parent "should be determined according to principles of the general common law of agency." The ARB, citing the Restatement, explained that an agency relationship may be found where there is: a manifestation by the principal that the agent shall act for it; the agent's acceptance of the undertaking; and the understanding of the parties that the principal is to be in control. The ARB concluded that commonality of management and involvement by the principal in decisions relating to the complainant's employment were factors weighing in favor of finding existence of an agency relationship.

In *Savastano v. WPP Group, PLC*, 2007-SOX-34 (ALJ July 18, 2007), an ALJ followed *Klopfenstein*, but went further by explaining that the agency relationship must pertain to employment matters. The ALJ concluded that "for an employee of a non-public subsidiary to be covered under Section 806, the non-public subsidiary must act as an agent of its publicly held parent, and the agency must relate to employment matters." In other words, the fact that the companies share an agency relationship for other purposes, such as collecting and reporting financial data, is insufficient to establish subsidiary coverage under SOX.

Other cases applying an "agency" analysis: *Johnson v. Siemens Building Technologies, Inc.,* 2005-SOX-15 (ALJ Nov. 27, 2007); *Lowe v. Terminix International Co., LP*, 2006-SOX-89 (ALJ Sept. 15, 2006); *Gale v. World Financial Group*, 2006-SOX-43 (ALJ June 9, 2006); *Mann v. United Space Alliance, LLC*, 2004-SOX-15 (ALJ Feb. 18, 2005).

2. Integrated Enterprise Test

In an *amicus brief* filed with the ARB in *Ambrose v. U.S. Foodservice, Inc.*, the Solicitor of Labor urged application of the four-part "integrated enterprise" test for determining subsidiary coverage under section 806. *See* Brief of the Assistant Secretary of Labor for Occupational Safety and Health, *Ambrose v. U.S. Foodservice, Inc.*, ARB 06-096, 2005-SOX-105 (brief filed Sept. 1, 2006).[7] The "integrated employer" test focuses on: (a) interrelation of operations; (b) common management; (c) centralized control of employment decisions; and (d) common ownership or financial control. The *Ambrose* case was resolved through settlement without deciding the applicability of the integrated enterprise test. *See Ambrose v. U.S. Foodservice, Inc.*, ARB 06-096, 2005-SOX-105 (ARB Sept. 28, 2007) (approving settlement).

In *Stone v. Instrumentation Laboratory SpA*, 2007-SOX-21 (ALJ Sept. 6, 2007), an ALJ concluded a Section 806 cause of action may proceed directly against a non-publicly traded subsidiary under both an agency theory, as set forth in *Klopfenstein*, and a joint employer theory. The ALJ stayed consideration of summary decision to permit discovery on the issue of whether the parent participated in key employment matters involving the subsidiary's employees, such that the two companies were joint employers or that the subsidiary was an agent of the parent. The ALJ explained that the key issue under both tests is whether the parent was involved in matters related to the hiring and firing, discipline, pay and employment records, supervision and work assignments of the complainant and other employees of the subsidiary.

3. Piercing the Corporate Veil

At least one recent federal court has construed Section 806 as not providing a cause of action against a non-publicly traded subsidiary. In *Rao v. Daimler Chrysler Corp.*,2007 U.S. Dist. LEXIS 34922 (E.D. Mich. May 14, 2007), the district court narrowly interpreted Section 806 to deny a cause of action directly against the subsidiary alone. The court reasoned that "Congress could have specifically included subsidiaries within the purview of § 1514A if they wanted to," and, because they did not, "the general corporate law principle would govern and employees of non-public subsidiaries are not covered under § 1514A." The judge concluded that "it is not the job of the Court to rewrite clear statutory text."

The strict interpretation of *Rao* is consistent with a series of earlier ALJ decisions, rejected by *Klopfenstein*, which held that Section 806 does not provide a cause of action directly against the subsidiary. *See, e.g., Ambrose v. U.S. Foodservice, Inc.*, 2005-SOX-105 (ALJ Apr. 17, 2006); *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005)..

In *Robinson v. Morgan Stanley*, 2005-SOX-44 (ALJ Mar. 26, 2007), a post-*Klopfenstein* decision, the ALJ dismissed a non-publicly traded subsidiary as a respondent where

[7] Amicus brief available at http://www.dol.gov/sol/media/briefs/Ambrose(A)-09-01-2006.htm.

petitioner appeared to have an employment relationship with both the subsidiary and the parent company, but the parent company was the principal employer. The decision to dismiss the subsidiary appears to be based primarily on the fact that the parent company terminated petitioner's employment and was subject to coverage, however it does state that dismissal was based also in part on the conclusion that the subsidiary "is not a publicly traded company covered by SOX. . . ."

If courts continue to hold that Section 806 does not provide a cause of action directly against a non-publicly traded subsidiary, courts will be faced with the issue of whether the existence of separate corporate identities insulates the parent corporation from liability for acts of the subsidiary. This inquiry focuses on whether piercing the corporate veil or some other basis for ignoring corporate separateness is warranted so that the parent may be subject to suit.

This issue has not yet been addressed by courts, but was addressed in cases decided prior to the ARB's *Klopfenstein* decision by ALJs applying the narrow view that non-publicly traded subsidiaries were not subject to suit. Pre-*Klopfenstein* ALJ decisions include: *Powers v. Pinnacle Airlines Corp.*, 2003-AIR-12 (ALJ Mar. 5, 2003); *Hughart v. Raymond James & Associates, Inc.*, 2004-SOX-9 (ALJ Dec. 17, 2004); *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005).

4. Personal Jurisdiction Over Distant Parent Corporations

Additionally, if the courts continue to hold there is no direct cause of action against non-publicly traded subsidiaries, courts will be required to address whether, and to what extent, they have personal jurisdiction over distant publicly traded parent corporations. For example, in *Personalized Brokerage Servs., LLC v. Lucius*, 2006 U.S. Dist. LEXIS 75225 (D. Minn. Oct. 16, 2006), the parent company was a German company with no contacts with the forum state other than the fact that its subsidiary operated there. The court, finding that "there is no case authority that the Act permits a court to dispense with jurisdictional prerequisites in this context," dismissed plaintiff's Section 806 claim on the ground of lack of personal jurisdiction. The court noted that there was no evidence the subsidiary was an "alter ego" of the parent.

Other Section 806 cases in which personal jurisdiction of the parent company was at issue include: *Mifsud v. Tyco Valves and Controls, LP*, No. 2:06-CV-00585 (W.D. Wash. Dec. 13, 2006) (where parent company, a Bermuda corporation, moved to dismiss for lack of personal jurisdiction and plaintiffs alleged jurisdiction over parent primarily by virtue of the forum contacts of its subsidiary, the court permitted discovery on the question of whether the parent had sufficient contacts with the forum); *Andrews v. ING North America Insurance Corp.*, 2005-SOX-50 (ALJ Feb. 17, 2006) (dismissing complaint because complainant could not proceed directly against subsidiary, and complainant did not attempt to add publicly traded parent because of inability to sue parent due to its foreign status).

C. Individual Liability

Section 806's prohibition of retaliation by "officers, employees, contractors, subcontractors or agents of covered companies" has been interpreted as establishing individual liability for wrongful retaliation. *See* 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004) ("the definition of 'named person' will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action").

1. Limited to Individuals with Authority to Affect Complainant's Employment

Individual liability under Section 806 has been limited to persons who have the authority to affect the terms and conditions of the complainant's employment. In *Klopfenstein*, *supra*, the ARB concluded the employer's vice president could be covered individually under Section 806 if he acted as an agent of the company with respect to the material terms and conditions of complainant's employment. On remand, the ALJ found the vice president, who participated in the investigation of complainant, but not complainant's termination, was not sufficiently involved in the pertinent employment action to be subject to liability. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, 2004-SOX-11 (ALJ Oct. 13, 2006).

In *Leznik v. Nektar Therapeutics, Inc.*, 2006-SOX-93 (ALJ Nov. 16, 2007), an ALJ ruled that individual liability may only be imposed upon individuals who were "materially involved in the decision to take the unfavorable personnel action." The ALJ denied summary decision to respondents as to individual liability for the decision maker and the complainant's immediate supervisor where evidence suggested both were materially involved in the termination decision. However, the ALJ granted summary decision in favor of the company president and vice president, who had almost no role in the termination.

In *Robinson v. Morgan Stanley*, 2005-SOX-44 (ALJ Mar. 26, 2007), the ALJ dismissed the employer's general counsel as a respondent in part because she was not involved in petitioner's supervision and did not cause, recommend or approve petitioner's termination. The ALJ also reasoned that general counsel was an employee of a non-publicly traded subsidiary and therefore was not an officer, employee or agent of a SOX-covered employer.

In *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Oct. 19, 2004), the ALJ joined relevant decision-makers as respondents but rejected complainant's effort to join "any person or business entity . . . whose acts in concert with or at the direction of the Employer . . . lead to" his termination. The ALJ reasoned that "[o]nly individuals who were Complainant's superiors . . . could discriminate against him 'in the terms or conditions of his employment' . . . ."

2. Must Exhaust Administrative Remedies as to Individual Defendants

Plaintiffs must exhaust their administrative remedies against individual defendants in order to proceed against them in federal court. For example, in *Bozeman v. Per-Se Techs., Inc.*, 456 F. Supp. 2d 1282 (N.D. Ga. 2006), the court dismissed claims against individual defendants who were not named in the OSHA proceedings. The court reasoned that, "[w]hile the regulations implementing SOX may provide for individual liability, that does not obviate the need for the Plaintiff to exhaust his administrative remedies for each claim he seeks to assert against each defendant."

Accord, Smith v. Corning, Inc., 2007 U.S. Dist. LEXIS 52958 (W.D.N.Y. July 23, 2007) (dismissing SOX claim against individual defendant not named as respondent in plaintiff's OSHA complaint); *Hanna v. WCI Communities, Inc*., 2004 U.S. Dist. LEXIS 25652 (S.D. Fla. Nov. 15, 2004) (same).

D. Covered Employees

29 CFR § 1980.101 defines "employee" as "an individual presently or formerly working for a company or . . . an individual applying to work for a company or . . . whose employment could be affected by the company or company representative." Courts and ALJs have addressed whether the following categories of persons fall within Section 806's definition of "employee."

1. Employees of Subsidiaries

Employees of non-publicly traded subsidiaries of publicly traded companies have been held to be covered "employees" under Section 806, sometimes based on a finding that the subsidiary is an "agent" of the parent or that the parent otherwise has significant authority to affect the employment of the subsidiary's employees. However, some decisions have expressed that employees of subsidiaries are covered regardless of their agency relationship. Regardless of the test applied, all published decisions to date have concluded that employees of non-publicly traded subsidiaries are covered employees.

In *Carnero v. Boston Scientific Corp*., 433 F.3d 1 (1st Cir. 2006), the First Circuit suggested in *dicta* that an employee of a subsidiary of a publicly traded company may be a covered employee because the subsidiary is an "agent" of the parent. The court opined that "the fact that [complainant] was employed by [the parent's] subsidiaries may be enough to make him a[n] 'employee' [of the parent] for purposes of seeking relief under the whistleblower statute." However, the court ultimately held that Section 806 did not protect the plaintiff foreign national because the Act has no extraterritorial effect.

Other decisions in which employees of non-publicly traded subsidiaries of a publicly traded companies were found to be covered under Section 806 regardless of the parent company's role in affecting the employment of the subsidiary's employees include: *Morefield v. Exelon Servs. Inc*., 2004-SOX-2 (ALJ Jan. 28, 2004) (based on the legislative intent and purpose of SOX, the term "employee of publicly traded company . . . includes all employees of every constituent part of the publicly traded company, including, but not limited to, subsidiaries and subsidiaries of subsidiaries which are subject to its internal controls, the oversight of its audit committee, or contribute information, directly or indirectly, to its financial reports"); *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004).

In contrast, in *Collins v. Beazer Homes USA, Inc*., 334 F. Supp. 2d 1365 (N.D. Ga. 2004), the court focused on the degree of authority the parent had to affect complainant's employment in holding that, where the officers of a publicly traded parent company had the authority to affect the employment of the employees of the subsidiary, an employee of the subsidiary was a "covered employee" within the meaning of the SOX whistleblower provision.

Other decisions analyzing whether employees of non-publicly traded subsidiaries are covered under Section 806 under an "agency" analysis include: *Neuer v. Bessellieu*, 2006-SOX-132 (ALJ Dec. 5, 2006) (refusing to dismiss complaint because it sufficiently pleaded parent company approved complainant's termination and had supervisory authority over employment actions of the subsidiary); *Platone v. Atlantic Coast Airlines Holdings Inc.,* 2003-SOX-27 (ALJ Apr. 30, 2004) (employee of a non-publicly subsidiary was covered where the company's parent/holding company was the alter ego of the subsidiary and had the ability to affect the complainant's employment), *rev'd on other grounds*, *Platone v. Atlantic Coast Airlines Holdings Inc.,* ARB 04-154, 2003-SOX-17 (ARB Sept. 29, 2006).

2. Applicants

The definition of "employee" includes "an individual applying to work for a company. . . ." 29 CFR § 1980.101.

In *Deremer v. Gulfmark Offshore Inc*., 2006-SOX-2 (ALJ June 29, 2007), an independent contractor hired by respondent to serve as a project manager coordinating SOX compliance alleged he was a covered "employee" as an "individual applying to work for a company." The ALJ rejected this argument, finding that complainant never made formal application for the position and his conversations with company executives did not constitute application for a position where the desired position did not exist at the time and the executives did not have the authority to hire for that position.

3. Former Employees

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the U.S. Supreme Court held that the term "employees" as used in Title VII's retaliation provisions includes former employees. Courts have adopted a similar interpretation under Section 806. In *Portes v. Wyeth Pharmaceuticals, Inc.*, No. 06 Civ. 2689, 2007 U.S. Dist. LEXIS 60824 (S.D.N.Y. Aug. 20, 2007), the district court concluded that alleged harassment against a former employee for filing an OSHA complaint after his termination fell within the purview of Section 806, although the court ultimately dismissed the claim because the plaintiff failed to amend his OSHA complaint to include the harassment claim.

In contrast, ALJs have rejected former employees' post-employment retaliation claims except in cases involving blacklisting or interference with employment. For instance, in *Pittman v. Siemens AG*, 2007-SOX-15 (ALJ July 26, 2007), an ALJ held that a former employee's claim was not covered under Section 806 in part because he "was not an employee at the time of the alleged adverse act and this does not constitute blacklisting or interference with employment. . . ."

Likewise, in *Harvey v. The Home Depot, Inc.*, 2004-SOX-36 (ALJ May 28, 2004), the ALJ disallowed a complaint by a former employee where the protected activity occurred after plaintiff's termination. The ALJ found that "with the exception of blacklisting or other active interference with subsequent employment, the SOX employee protection provisions essentially shelter an employee from employment discrimination in retaliation for his or her protected activities, while the complainant is an employee of the respondent." (footnote omitted). *Compare Anderson v. Jaro Transp. Serv.*, ARB 05-011, 2004-STA-2 & 3 (ARB Nov. 30, 2005) (assuming that blacklisting in retaliation for protected activity which occurred while complainant was employed by respondent is prohibited under the STAA, but rejecting claim where complainant provided no evidence his employer had provided information to a potential employer).

4. Independent Contractors

In evaluating whether a complainant is an independent contractor and not a covered "employee," ALJs have adopted the common law agency test, which, as set forth in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), focuses on the hiring party's right to control the manner and means by which the product is accomplished.

In *Bothwell v. American Income Life*, 2005-SOX-57 (ALJ Sept. 19, 2005), an ALJ denied summary decision where respondent argued complainant was not protected under Section 806 because he was an independent contractor, not an employee. The ALJ reasoned that complainant presented evidence demonstrating respondent retained sufficient control over the means by which his work was performed to create an issue of material fact as to whether complainant was actually an "employee" under the *Darden* test.

However, regardless of a worker's status under the *Darden* test, an independent contractor may still be covered under Section 806 as "an individual whose employment could be affected by a company or company representative." *See* 29 C.F.R. § 1980.101. In *Deremer v. Gulfmark Offshore Inc.*, 2006-SOX-2 (ALJ June 29, 2007), an ALJ, applying the *Darden* principles, found complainant was an independent contractor. Nonetheless, the ALJ found the independent contractor was an "employee" as defined in 29 C.F.R. § 1980.101 because he was "an individual whose employment could be affected by a company or company representative." The ALJ observed that the regulation was purposely broad, and the term "employment" "includes any service or activity for which an individual was contracted to perform for compensation. Therefore, a contractor or subcontractor may be 'an individual whose employment could be affected by a company or company representative.'"

5. Officers and Directors

In *Vodicka v. DOBI Medical Int'l, Inc.*, 2005-SOX-111 (ALJ Dec. 23, 2005), respondent moved for summary decision on the grounds that complainant was a member of its board of directors and therefore was not an employee protected under Section 806. The ALJ, noted that, although corporate officers have been held to be employees under SOX, whether directors are "employees" under SOX was an issue of first impression. The ALJ was able to avoid this "interesting and difficult issue" by resolving the case on other grounds.

6. Third Parties

In *Davis v. United Airlines, Inc*., 2001-AIR-5 (ALJ Apr. 23, 2002), an ALJ denied derivative protection to spouses of whistleblowers based solely upon their status as a spouse.

E. Criminal Provision

Section 1107 of the Act amended the existing criminal obstruction of justice statute by making it a crime to knowingly and intentionally retaliate against any person who provides truthful information to a law enforcement officer relating to the commission or possible commission of any federal offense. *See* 18 U.S.C. § 1513(e). Section 1107 is enforceable solely by the Department of Justice. The Labor Department has no jurisdiction to enforce section 1107. *See* Amicus Brief of the Acting Assistant Secretary of Labor for Occupational Safety and Health, *Ede v. Swatch Group & Swatch Group USA*, ARB 05-053, 2004-SOX-68 (Apr. 6, 2005). *See also* Attorney General Memorandum on Implementation of the Sarbanes-Oxley Act of 2002 (Aug. 1, 2002) (stating that the DOJ will "play a critical role" in implementing SOX's criminal provisions, including Section 1107).

1. Criminal Liability Under Section 1107

Criminal sanctions include, for individuals, fines up to $250,000 and/or imprisonment up to 10 years and, for organizations, fines up to $500,000. *See* 18 U.S.C. § 3571. The legislative history of Section 1107 reflects that a primary purpose for establishing *criminal* sanctions for whistleblower retaliation was to prevent persons who retaliate against corporate whistleblowers from using federal bankruptcy laws to discharge civil judgments against them. *See* 148 Cong. Rec. H4686 (daily ed. July 16, 2002) (statement of Rep. Sensenbrenner).

Section 1107 has a number of potentially significant ramifications. First, Section 1107 applies not only to publicly traded companies, but to *any* "person," meaning employers, supervisors and other retaliating employees are potentially liable under the criminal provision. Employers are covered regardless of their corporate status or number of employees. Moreover, Section 1107 coverage is not limited to the employment relationship, therefore third parties, regardless of their agency relationship with the employer, may be liable. Finally, unlike the civil whistleblower provision, Section 1107 expressly applies overseas. *See* 18 U.S.C. 1513(d) ("There is extraterritorial Federal jurisdiction over an offense under this section").

Second, this provision is not limited to employees reporting fraud or securities violations, but covers disclosures to *any* federal law enforcement officer relating to commission or possible commission of *any* federal offense. "Law enforcement officer" includes any federal officer or employee "authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense." 18 U.S.C. § 1515(a)(4). This provision could reasonably be interpreted as encompassing complaints to the EEOC under federal employment discrimination statutes such as Title VII, ADA or ADEA. Whether such an interpretation is adopted hinges largely on the meaning of the term "federal offense," which is not defined in SOX. Although most commonly used in reference to criminal violations, this term has been applied in both civil and criminal contexts. *See, e.g., Cole v. United States Dept. of Agric.*, 133 F.3d 803 (11th Cir. 1998) (referring to "criminal and civil offenses")

Finally, the conduct prohibited by Section 1107 is extremely broad, covering any action "harmful" to a person, including "interference with the lawful employment of livelihood" of any person. It is not necessary for the aggrieved person to report an actual violation, rather a disclosure merely must be "truthful" and relate to the "possible commission" of a federal offense. Congress did not define the terms "harmful" or "interference," but there is nothing in the statute that would limit these concepts to injuries involving economic harm or even to retaliation occurring within the scope of the employment relationship. Accordingly, the scope of prohibited conduct under Section 1107 appears to be at least as broad as, and probably broader than, conduct prohibited under the hostile work environment theory under other employment statutes.

In *MacArthur v. San Juan County*, 2005 U.S. Dist. LEXIS 25235 (D. Utah June 13, 2005), plaintiffs contended they suffered retaliation in violation of Section 1107 for having informed their employer/hospital governance board of ethnic remarks made by hospital administration concerning another employee. The court noted that Section 1107 "simply cannot be read to reach the reporting of ethnic remarks to a local hospital's governance board." The court did not address, however, whether such reports would have been covered if they had been made to the EEOC, nor did the court address whether a private cause of action even exists under Section 1107.

2. Civil Liability Under Section 1107

Section 1107 does not expressly create a private cause of action, and all courts thus far have rejected civil claims under this provision. *See Compact Disc Minimum Advertised Price Antitrust Litigation*, No. 05-cv-118 (D. Conn. Sept. 25, 2006); *Deep v. Recording Industry Ass'n of America*, No. 2:05-cv-00118 (D. Me. Oct. 2, 2006); *Fraser v. Fiduciary Trust Co. Int'l*, No. 04 Civ. 6958 (S.D.N.Y. June 23, 2005).

3. Civil RICO Implications

Retaliation against corporate whistleblowers may give rise to a cause of action under the civil RICO statute, with the availability of treble damages. This is so because Section 1107 amends 18 U.S.C. § 1513(e) and, under RICO, "racketeering" includes "any act which is indictable under . . . 18 U.S.C. § 1513." *See* 18 U.S.C. § 1961. Therefore, by engaging in retaliation prohibited by Section 1107 (e.g., conceivably by creating a hostile work environment), a company or person commits a predicate act of racketeering under RICO.

Prior to the enactment of Section 1107, retaliatory discharge did not fall within the definition of "racketeering" and therefore generally could not give rise to a RICO action. *See Beck v. Prupis*, 529 U.S. 494 (2000). Even where an employee could allege that his or her employer committed a predicate act under RICO, the employee rarely could assert a viable RICO claim because the employee's injury was almost never proximately caused by the predicate act, but rather by a separate adverse employment action. *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41 (1st Cir. 1991). Section 1107, by expressly identifying retaliatory conduct as a predicate act, significantly expands the likelihood of establishing the necessary causal link between the predicate act and the injury.

Of course, a plaintiff must also establish the other civil RICO elements, such as existence of an enterprise and a "pattern of racketeering." In *Compact Disc Minimum Advertised Price Antitrust Litigation*, No. 05-cv-118 (D. Conn. Sept. 25, 2006), plaintiff alleged he was fired in retaliation for conveying truthful information during a federal investigation, and that his firing constituted a predicate act for purposes of RICO under 18 U.S.C. § 1513. The court dismissed plaintiff's RICO claims because he failed to establish a "pattern of racketeering." The court reasoned that the single act of termination, combined with alleged instructions by the employer to withhold information during "a single federal investigation," did not constitute a "pattern" sufficient to support a RICO claim. It remains to be seen whether an ongoing hostile work environment (as opposed to a single adverse employment action) could give rise to a "pattern of racketeering" under RICO.

4. SEC Implications

Beyond Section 1107, Section 3(b) of SOX can be interpreted as expanding *criminal* liability for any retaliatory action prohibited by Section 806, regardless of whether the retaliation was related to the disclosure of truthful information to a law enforcement officer. Section 3(b) states that "a violation by any person of th[e Sarbanes-Oxley] Act . . . shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) . . . and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations." In turn, the penalty provisions of the Exchange Act, 15 U.S.C. § 78ff, provide for fines up to $1,000,000 and 10 years in jail for "any person who willfully violates any provision of this chapter . . . ." The SEC has jurisdiction to enforce this provision.

On November 9, 2004, Senators Grassley and Leahy sent a letter to SEC Chairman William Donaldson advising him that they want "aggressive enforcement to deter retaliation against corporate whistleblowers," and asking: "[w]hat is your position on whether or not a violation of the Section 806 whistleblower prohibitions can generate criminal liability under Section 3(d) [sic] of the Act?" In February 2005, Chairman Donaldson responded to the effect that, while Section 3(b) is a useful provision allowing the SEC to enforce new laws enacted under SOX, the SEC has been guided by the principle that its resources can be applied most effectively to combat substantive violations of the securities laws, thereby leaving it to the Labor Department to investigate and prosecute potential Section 806 whistleblower violations.[8]

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[8] *See* James Hamilton, *SEC Responds to Senate Letter on Whistleblower Provisions*, 2005-32 SEC Today Online (CCH) (Feb. 17, 2005).

Even if Section 3(b) is not interpreted as criminalizing retaliation prohibited by Section 806, employers should be aware that all Section 806 complaints are brought to the attention of the SEC and therefore may give rise to prosecution for substantive violations of the securities laws. In his response to Senators Grassley and Leahy, Chairman Donaldson noted that OSHA regulations require DOL to notify the SEC of Section 806 complaints. The SEC and DOL have established a system under which such referrals are sent directly to the SEC's Division of Enforcement.

For example, in *Matter of Ashland Inc*., No. 3-12487 (SEC Nov. 29, 2006), an employee filed a complaint with the Labor Department alleging retaliation for raising concerns about understatement of the company's environmental reserves. Subsequently, based on these concerns, the SEC instituted proceedings against the company, ultimately finding the company violated the reporting, books and records, and internal controls provisions of the Exchange Act. The company and the SEC settled the matter.

Another well-publicized example of how a whistleblower claim can give rise to federal investigations by the SEC and DOJ, as well as civil RICO claims, is the case of *Whitley v. Coca-Cola Co.*, No. 03-CV-1504 (N.D. Ga., dismissed Oct. 9, 2003). In *Whitley*, a former manager asserted civil RICO and retaliation (but not SOX) claims arising from his termination, which he alleged occurred in retaliation for his reporting that Coke manipulated market tests relating to Frozen Coke. Defendant argued in a motion to dismiss that, under *Beck v. Prupis*, retaliatory discharge was not an act of "racketeering." The civil case quickly settled but the allegations led to investigations by both the SEC and the DOJ. According to a company press release, on April 18, 2005 the company settled with the SEC, and the DOJ decided to close its investigation.[9]

IV. PROTECTED CONDUCT

The Act provides protection to employees for two types of employee conduct. First, the Act protects employees "who provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee *reasonably believes* constitutes" securities fraud, bank fraud, wire fraud, or violation of "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1) (emphasis added). The assistance must be provided to or the investigation must be conducted by: "(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. § 1514A(a)(1)(A)-(C). Second, the Act affords protection to employees who "file, cause to be

[9] *See* News Release: *The Coca-Cola Company Comments on SEC Settlement* (Apr. 18, 2005), available at http://www2.coca-cola.com/presscenter/nr_20050418_corporate_sec_settlement.html; *see also* SEC Press Release: *The Coca-Cola Company Settles Antifraud And Periodic Reporting Charges Relating To Its Failure To Disclose Japanese Gallon Pushing* (Apr. 18, 2005).

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

A. 18 U.S.C. § 1514A(a)(1)

1. "Reasonable Belief"

Section 806 only protects an employee who "reasonably believes" the information he or she reports constitutes a violation of the enumerated provisions. The Act does not define "reasonable belief," nor does it suggest any source to define the term. The legislative history does provide some guidance. Specifically, from remarks submitted by Senator Leahy:

> In addition, a reasonableness test is also provided under the subsection (a)(1), which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts (See generally *Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478.) Certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief. The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.

As referenced in the legislative history, there are many statutes that use a "reasonable belief" standard when determining the validity of employee whistleblowing claims. Like SOX, other whistleblowing statutes typically are federal statutes that implement important public policies such as Title VII, various environmental laws, the Whistleblower Protection Act, the False Claims Act, and OSHA.

The case law interpreting the validity of whistleblowing and retaliation claims under these and other statutes shows that courts typically require both a subjective and objective component of the reasonable belief standard. The subjective component requires that the complainant or whistleblower make the allegations in good faith. The objective component requires that a "reasonable person" would have believed the reported conduct violated the relevant statute.[10]

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[10] Courts routinely have applied the "reasonable belief" standard in the context of other whistleblowing and retaliation statutes. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (Title VII); *Little v. United Techs. Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir.1997) (Title VII); *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002) (False Claims Act); *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (Whistleblower Protection Act); *Consolidation Coal Co. v. Federal Mine Safety & Health Review Com.*, 795 F.2d 364 (4th Cir. 1986) (Federal Mine Safety and Health Act); *Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984) (OSHA).

SOX decisions addressing the "reasonable belief" standard generally are consistent with the case law developed in other contexts. For example, in *Tuttle v. Johnson Controls Battery Div.,* 2004-SOX-76 (ALJ Jan. 3, 2005), an ALJ explained:

> Protected activity is defined under SOX as reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. While the employee is not required to show the reported conduct actually caused a violation of the law, he must show that he reasonably *believed* the employer violated one of the laws or regulations enumerated in the Act. Thus, the employee's belief "must be scrutinized under both subjective and objective standards." *Melendez v. Exxon Chemicals Americas*, ARB 96-051, 1993-ERA-6 (ARB July 14, 2000).

In *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005), an ALJ explained that the complainant's belief "must be scrutinized under both subjective and objective standards, *i.e.,* he must have actually believed the employer was in violation of the relevant laws or regulations and that the belief must be reasonable." Reasonableness is "determined on the basis of the knowledge available to a reasonable person in the circumstances with the employee's training and experience." The ALJ also explained that the mere fact that the employer investigates a complaint does not establish that complainant had a reasonable belief of unlawful conduct. Additionally, the ALJ rejected plaintiff's expert testimony on the reasonableness of plaintiff's belief that fraud occurred.

Applying these principles, in *Lerbs v. Buca Di Beppo, Inc*., 2004-SOX-8 (ALJ June 15, 2004), an ALJ granted the employer's motion for summary decision because the complainant, a "cash manager" for a restaurant, failed to show he engaged in protected activity, largely because he did not show he reasonably believed the employer engaged in illegal activity that misled investors or potential investors. The ALJ found that although the employee may have felt that certain practices "compromised the validity of the annual audit, which shareholders rely on to make investment decisions," he did not have an *actual* belief at the time of the complaint that the practice was *illegal*. The complainant also contended that the company inappropriately attempted to inflate the sales of one of its restaurants, which provided reduced-price lunches to employees at corporate headquarters, by increasing the prices of the lunches, thereby inflating its "same store sales" figures released to shareholders. The ALJ found that complainant failed to show it was reasonable to believe this practice was illegal, as "there is simply nothing unlawful or improper about a decision by Buca to adjust upward the amount it paid for employees' meals to bring the cost into line with the cost of meals for non-employee consumers."

In *Welch v. Cardinal Bankshares Corp*., ARB 05-064, 2003-SOX-15 (May 31, 2007), the ARB overturned an ALJ's finding that complainant had a reasonable belief that his employer violated the federal securities laws by reporting inflated income. The ARB noted that "an experienced CPA/CFO like Welch could not have reasonably believed that the . . . report presented potential investors with a misleading picture of Cardinal's financial condition." The ARB held the objective reasonableness of an complainant's belief can be determined as a matter of law. However, in *Allen v. Administrative Review Board,* No. 06-60849, 2008 WL 171588 (5th Cir. Jan. 22, 2008), the Court of Appeals held that while the objective reasonableness of an employee's believe may be decided as a matter of law in some cases, "the objective reasonableness of an employee's belief cannot be decided as a matter of law if there is a genuine issue of material fact . . . [and if] reasonable minds could disagree on this issue.

In *Robinson v. Morgan Stanley*, 2005-SOX-44 (ALJ Mar. 26, 2007), an ALJ noted that complainant engaged in protected activity by reporting concern that respondent's subsidiary was not complying with federal banking regulations by taking longer than permitted to charge off bankruptcies. The ALJ found complainant's concern was objectively and subjectively reasonable. It was subjectively reasonable because, based upon her audit testing and review of federal banking regulations, complainant believed the respondent's subsidiary to be in violation of the law. It was objectively reasonable since the subsidiary's CFO, upon his understanding of the disclosure and the length of the delay, believed the potential impact approached $6 to $8 million.

In *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007), an employee asserted that he engaged in protected activity while working for a company that was acquired by respondent. The employee raised concerns to his immediate manager that a new formula used to project future revenues fraudulently inflated company's revenue numbers, which, in turn, inflated the sales price of his company. The employee alleged that this new formula was being used to defraud shareholders of respondent. The ALJ determined that even though there was no evidence that the target company recklessly or fraudulently inflated its revenue forecasts for the purpose of drawing a higher offer from respondent, complainant was engaged in protected conduct because he was a salesman with no specialized training or expertise in the area of corporate acquisitions and it "would not be unreasonable for a person with Grove's relatively low level of expertise and knowledge to believe that use of a new formula, which dramatically increased projected income at a time when EMC's purchase offer increased substantially, presented potential advisors with a materially misleading picture of [target's] financial condition."

In *Deremer v. Gulfmark Offshore, Inc.*, 2006-SOX-2 (ALJ June 29, 2007), complainant reported concerns regarding: (1) untimely signing-off of tasks as completed and the addition of items to an internal control document; (2) the attempted concealment of a $200,000 under-amortization of prepaid insurance; (3) willful misrepresentation by the controller to an external auditor concerning the time-frame of the existence and signing of an internal control document; and (4) the controller's instructions to complainant to conceal from auditors a feature of respondent's software that allowed manual override of foreign currency transaction exchange rates. Complainant claimed that these concerns constituted material weaknesses in internal control so as to prompt a negative audit opinion from a public audit firm concerning internal control. Complainant alleged that respondent resorted to the above practices in order to secure a "clean" audit opinion, which, complainant argued, would affect Respondent's stock price. The ALJ, however, found that the practices, even collectively, did not support an objective and subjective belief of fraudulent activity of a material nature. The ruling was in part based upon that it was only complainant's subjective opinion that these concerns would be material to shareholders, as shown by the external auditors' decision not to adjust the expense. Additionally, the ALJ stated that the only item with the potential to constitute a significant deficiency affecting the internal controls of the company was the manual override of currency exchange rates. Because the controller was unaware of the override when complainant presented the issue, the ALJ concluded that no one could reasonably believe that the feature was significant to internal control.

In *Frederickson v. Home Depot U.S.A., Inc.*, 2007-SOX-13 (ALJ July 10, 2007), complainant claimed that respondent had a policy of recording items as damaged instead of for "store use" in order to defraud vendors out of refunds. The ALJ found that the complainant had not engaged in protected activity because he did not have a reasonable basis to believe that the policy extended beyond the store he worked in or that the policy was of a magnitude sufficient to support a reasonable belief that a reasonable investor would rely upon such information.

In *Harvey v. Safeway, Inc.*, 2004-SOX-21 (ALJ Feb. 11, 2005), complainant had complained to the company that discrepancies in his weekly paychecks violated the FLSA. In his subsequent SOX complaint, complainant argued that earlier reports of FLSA violations constituted protected activity. The ALJ found that the employee's "personal experience over the course of a couple of weeks with Safeway and an anecdotal report of one other employee's wage concerns did not provide an objectively reasonable factual foundation for a . . . complaint about systematic wage underpayment."

In *Riedell v. Verizon Communications*, 2005-SOX-00077 (ALJ Aug. 14, 2006), an employee reported favoritism in procurement, a major breach of the main frame network, and employee use of fake identities to access an inordinate number of bank circuits and credit agency records. The ALJ granted summary judgment in favor of the respondent, finding the complainant did not come forth with factual information supporting his report. According to the ALJ, the complainant may have had enough information to develop a suspicion but "a suspicion is simply speculation and cannot logically be regarded as a reasonable belief."

In *Nixon v. Stewart & Stevenson Servs., Inc.*, 2005-SOX-1 (ALJ Feb. 16, 2005), an ALJ granted summary decision for respondent because there was no evidence that complainant reasonably believed that the conduct he reported could have been mail fraud. The ALJ reasoned that not only was there was no evidence that the letters to which complainant referred, even if false, were part of a scheme or artifice to obtain money or property, but there was also no evidence that complainant actually considered respondent's conduct to constitute mail fraud because the first mention of mail fraud was made before the ALJ. The ALJ also found there was no evidence that complainant reasonably believed the conduct he reported could have been a violation of SEC Rule S-K. The ALJ reasoned there was no evidence of any pending legal proceeding, nor were governmental authorities contemplating any legal proceeding that would have needed to have been reported under Rule S-K. *Aff'd Nixon v. Stewarts & Stevenson Servs., Inc.*, ARB 05-066, 2005-SOX-1 (ARB Sept. 28, 2007) ("[W]e agree with the ALJ's finding that there is no genuine issue of fact as to whether Nixon provided sufficient information to establish, prior to his termination, that he reasonably believed the Respondent engaged in mail fraud in violation of 18 U.S.C. §1341.")

In *Monzingo v. The South Financial Group, Inc.*, 2007-SOX-2 (ALJ Dec. 6, 2006), the complainant reported a deceased client's signature was forged to transfer her investment account. The ALJ found the complainant could not have reasonably believed this activity violated rules and regulations of the SEC. First, the complainant cited rules of NASD and the NYSE, self-regulatory organizations. Second, the facts did not even show a violation of these rules, since they dealt with the disposition of securities and not the transfer of investment accounts.

In *Richards v. Lexmark International, Inc.*, 2004-SOX-00049 (ALJ June 20, 2006), the complainant reported that accounting methods used by the company resulted in misleading inventory information and a more accurate picture of the amount of time items remained in inventory could be obtained through a different accounting method. The ALJ noted that "the complainant did not go so far as to say that the data generated involved intentional misrepresentations or fraud or that false information was disseminated to shareholders or investors." The ALJ found the complainant's testimony did not establish that he actually believed any false information was reported to anyone. The ALJ also found that even if the complainant had actually believed false information was reported, such a belief would not have been reasonable under the circumstances, because the method used was in accordance with generally accepted accounting principles and "[n]o facts have been adduced that would cause a reasonable person with complainant's training and experience to determine that there was any potential securities fraud or violation of any laws or SEC rules and regulations."

Likewise, in *Kalkunte v. DVI Financial Servs. Inc.*, 2004-SOX-56 (ALJ July 18, 2005), complainant, an attorney, alleged respondent improperly commingled funds and its senior management altered delinquency reports and incorporated those altered reports into disclosure statements filed to the public. The ALJ determined that complainant had a reasonable belief that the alleged conduct constituted a covered violation. The ALJ reasoned that the alleged conduct plainly violated SEC rules and regulations and constituted fraud against shareholders and, therefore, an attorney with complainant's experience and background "would easily discern these activities as potential violations of the Sarbanes-Oxley Act." The ALJ also noted that complainant had documentary evidence to support her allegations.

In *Jayaraj v. Pro-Pharmaceuticals, Inc.*, 2003-SOX-32 (ALJ Feb. 11, 2005), complainant alleged respondent was using an unregistered broker to solicit investors in exchange for a commission. Under the Exchange Act, it is unlawful for any "broker or dealer" to use interstate commerce to "effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless the individual is registered as a broker/dealer. The ALJ found that complainant's belief that respondent's conduct violated the Exchange Act was reasonable. The ALJ reasoned that complainant was aware the broker was not a licensed broker; knew a person could not sell securities unless the person was registered as a broker or broker dealer; knew the broker was trying to bring private investors to the company; knew he would not assist the company without payment for his efforts; overheard company officials discuss paying him a commission; participated in a call in which the broker asked for a commission; and, unbeknownst to complainant, the company had entered into a consulting agreement with the broker.

In *Taylor v. Wells Fargo, Texas*, 2004-SOX-43 (ALJ Feb. 14, 2005), an ALJ found that complainant reasonably believed her supervisor's practice of backdating letters of credit could have involved mail, wire and bank fraud. Although respondent argued there was no specific evidence it was committing fraud, the ALJ noted that an actual violation of the law is not required. The ALJ reasoned that complainant reasonably believed backdating the letters of credit constituted falsifying a bank document, which she believed "would constitute an illegal and criminal act," and when complainant raised her concern, respondent "admitted it must be careful to not deceive any government regulators or creditors of the applicant when backdating letters of credit."

In *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB 04-149, 2004-SOX-11 (ARB May 31, 2006), the complainant claimed to have engaged in protected activity by reporting an irregularity in the accounting for in-transit inventory even though he admitted he did not believe the inventory balance amounted to fraud. The ARB remanded the case because the ALJ had not reached a conclusion whether the complainant engaged in protected activity. The ARB stated in dicta: "It is certainly possible that Klopfenstein engaged in protected activity. The problems with PACO's in-transit inventory suggested, at a minimum, incompetence in Flow's internal controls that could affect the accuracy of its financial statements. Klopfenstein's communications thus related to a general subject that was not clearly outside the realm covered by SOX, and it certainly is possible that Klopfenstein could have believed that the problems were a deficiency amounting to a 'violation." *See also Gonzalez v. Colonial Bank ("Gonzalez III")*, 2004-SOX-39 (ALJ Aug. 20, 2004) (complainant's persistence in his concerns, including multiple conversations with company officials, demonstrated his reasonable belief).

Sometimes, a complainant may have initially engaged in protected conduct by raising concerns about fraud or violations of SEC rules, but intervening circumstances cause continued concern regarding such violations to become unreasonable. For example, in *Williams v. U.S. Dep't of Labor,* 2005 U.S. App. LEXIS 25011 (4th Cir. Nov. 18, 2005) (per curium), the Fourth Circuit, addressing a complaint filed with the DOL under various environmental protection statutes, agreed with the DOL that the complainant engaged in protected activity in raising concerns about lead in schools, but after respondent responded to those concerns by undertaking significant activity to ensure that the environment was safe and any potential problems were corrected, and also implementing a plan to ensure the safety of students and staff, "it was no longer reasonable for her to continue claiming that these schools were unsafe . . ." Accordingly, the court concluded that "her activities lost their character as protected activity."

Likewise, in *Sussberg v. K-Mart Holding Corporation*, 2006 WL 3313766 (E.D. Mich. Nov. 15, 2006), 25 IER Cases 449, the court rejected the complainant's argument that he was engaged in protected activity when he revealed his participation in an earlier investigation to his new manager. The individual accused of wrongdoing had been terminated prior to this disclosure. The court found complainant's "reiteration of his involvement cannot be said to be related to protecting shareholders from fraud because [the accused manager] had already been terminated for five months." Therefore, the protected activities had ended.

2. Fraud

To constitute protected activity, the subject matter of a SOX complaint must implicate a purported violation of "section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a). SOX's legislative history reflects that fraud is an integral element of a cause of action under the whistleblower provision. *See, e.g.*, CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy) (whistleblower provision to protect "those who report fraudulent activity that can damage innocent investors in publicly traded companies"); S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (the relevant section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company").

a. Violation of Enumerated Fraud Provisions

Section 806 protects against retaliation for reports implicating the enumerated federal fraud statutes (mail, wire, bank or securities fraud), SEC rules, or federal law "relating to fraud against shareholders." For example, in *Allen v. Stewart Enterprises, Inc.*, complainant raised concerns about possible violations of state laws which could result in sanctions and revocation of respondent's state licenses. The ALJ found this was not protected activity because Section 806 only provides protection for reporting violations of the enumerated fraud provisions, and the ARB affirmed. 2004-SOX-60, 61 & 62 (ALJ Feb. 15, 2005),

Likewise, in *Rogus v. Bayer Corp*., 2004 U.S. Dist. LEXIS 17026 (D. Conn. Aug. 25, 2004), plaintiff asserted causes of action for common law wrongful discharge and violation of the state whistleblower statute. Plaintiff contended she suffered retaliatory discharge for internally complaining that her supervisor allowed production yields to be over-reported and production workers were overpaid bonuses that would not have been paid had the true number been reported. The court stated in a footnote that plaintiff's complaint would not be protected under SOX "because the conduct she complained of did not 'constitute[] a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.'"

Merely raising complaints about violations of internal policy is not protected activity. For example, in *Reddy v. Medquist, Inc.*, ARB 04-123, 2004-SOX-35 (ARB Sept. 30, 2005), the complainant, a medical transcriptionist, had expressed concerns to management by e-mail regarding management's policy of decreasing line counts in her transcriptions thereby reducing her rate of pay. In one e-mail, complainant referred to this policy as an "Enron-type" accounting practice. The ARB held that complainant failed to show she engaged in protected activity where the evidence demonstrated the complaints concerned internal company policy as opposed to actual violations of federal law.

It can be difficult for an employee to try to convert a complaint about an internal policy into a complaint of fraud. For example, *Galinsky v. Bank of America Corp.*, 2007-SOX-76 (ALJ Oct. 12, 2007) details how complainant voiced concerns about being excluded from the decisions and other concerns about management decisions and corporate efficiency. Thereafter, the employer gave the complainant a negative performance review. Shortly following the negative performance review, complainant asserted that "[s]ome may argue . . . what I was point out . . . was fraud" and that the team's decisions constituted fraud against shareholders. The ALJ found that complainant's post-review communications did "not transform his concern with internal policy into concern about stockholder fraud. Complainant did not specify anything involving intentional deceit. He did not address his concerns to any individual responsible for company finances, who would logically recognize fraudulent conduct within the context of the Act."

Similarly, in *Lewandowski v. Viacom Inc.*, 2007-SOX-88 (ALJ Nov. 20, 2007), an ALJ dismissed the complaint noting that complainant had not engaged in protected activity. Despite complainant alleging that she had told respondent that her supervisor was engaged in wire fraud by divulging confidential information and property to competitors outside the company, the ALJ found no evidence of such a complaint. Complainant's communications instead only indicated that respondent was "distressed about [supervisor's] activities principally because they made her (the Complainant) look bad, and secondarily because they would be detrimental to Paramount."

In *Marshall v. Northrup Grumman Synoptics*, 2005-SOX-8 (ALJ June 22, 2005), complainant alleged he had engaged in protected activity when he reported to management his supervisor's misclassification of internal expenses, use of company contractors to provide personal home remodeling, and falsification of internal reports. The ALJ found no protected activity because complainant's allegations merely implicated violations of internal company policies and ethical standards rather than SOX's enumerated laws or regulations related to fraud against shareholders. Although some of his allegations related to accounting irregularities, there was no evidence of misrepresentation of the company's financial situation or fraudulent conduct. The ALJ concluded that "[t]he fact that the concerns involved accounting and finances in some way does not automatically mean or imply that fraud or any other illegal conduct took place."

In *Sylvester v. Parexel Int'l LLC*, 2007-SOX-39 and 42 (ALJ Aug. 31, 2007), an ALJ decided that complainants had not alleged protected activity specifically and definitively against the respondent, which operated research facilities for clinical drug testing. Complainants alleged that their coworkers falsely recorded and reported clinical data in violation of FDA regulations. The ALJ ruled that such allegations were inadequate. "The purported violations might have involved internal and FDA protocols, FDA regulations, and possibly other drug testing guidelines, but not SEC rules or other federal laws related to fraud against shareholders, and thus were not sufficiently related to shareholder fraud to constitute protected activity." The ALJ also noted that since "Complainants were employed in nursing or related capacities, not as investment analysts at a financial services firm, no reasonable inference that they were concerned with shareholder fraud could have been derived from their job responsibilities or the nature of their work."

In *Azure v. Dominick's/Safeway*, 2007-SOX-52 (ALJ Sept. 14, 2007), complainant's allegation that he was discriminated against based on reporting "possible theft" and filing union grievances relating to contract, gender discrimination, and disability did not allege SOX protected activity. The ALJ noted that "SOX specifically protects whistleblowers who provide information related to fraud or securities violations. Being discriminated against for sex, disability, or for reporting a possible petty theft, do [sic] not touch on the area of fraud or securities violation."

In *Minkina v. Affiliated Physician's Group*, 2005-SOX-19 (ALJ Feb. 22, 2005), an ALJ granted summary decision, concluding that complainant's reports concerning air quality were unrelated to fraud or the protection of investors. The ALJ rejected complainant's contention that poor air quality could result in financial loss to respondent, reasoning that SOX "was enacted to address the specific problem of fraud in the realm of publicly traded companies and not the resolution of air quality issues, even if there is a possibility that poor air quality might ultimately result in financial loss."

In *Heaney v. GBS Properties LLC d/b/a Prudential Gardner Realtors*, 2004-SOX-72 (ALJ Dec. 2, 2004), complainant, on separate occasions, expressed concerns over a purchaser's use of an unlicensed home inspector and concerns over a condominium project which he thought a developer had built in violation of certain codes. The ALJ found that neither communication constituted protected activity under SOX.

In *Reed v. MCI, Inc.*, 2006-SOX-00071 (ALJ June 20, 2006), the complainant claimed he engaged in protected activity when he reported the company was defrauding shareholders by reporting profits partly attributable to the use of pirated software. According to the complainant, the penalties per incident could be as high as $150,000 per incident, thousands of incidents could have occurred, and these fines combined with the loss of company goodwill could cost shareholders a significant portion of the value of the company. Despite these potential financial consequences, the ALJ found the matter complained of – the use of unlicensed computer software – did not fall within the purview of the protection provisions of SOX because the complainant could not reasonably have believed the respondent was committing a violation of any of the enumerated security laws or committing a fraud on shareholders.

In *Townsend v. Big Dog Holdings, Inc.*, 2006-SOX-00028 (ALJ Feb. 14, 2006), the ALJ granted summary judgment for the Respondent, finding the complainant's allegation that she reported discrepancies in payroll information reported to the IRS did not relate to fraud against investors or shareholders.

In *Harvey v. Home Depot*, ARB 04-114, 2004-SOX-20 (ARB June 2, 2006), the ALJ found the complainant did not engage in protected activity by reporting the company violated his constitutional, civil, first amendment and Title VII rights and the Board of Directors condoned those violations, since these reports did not relate to misrepresentation of the company's financial condition or fraud against its shareholders.

In *Monzingo v. The South Financial Group, Inc.*, 2007-SOX-2 (ALJ Dec. 6, 2006), the complainant reported a deceased client's signature was forged to transfer her investment account. The ALJ found this reporting was not protected activity. Although the conduct may have constituted fraud against the heirs of the investor, it did not constitute fraud against shareholders or investors.

Similarly, in *Barnes v. Raymond James & Assoc.*, 2004-SOX-58 (ALJ Jan. 10, 2005), complainant voiced concerns that her supervisor was conducting improper "switches" of mutual fund accounts in order to generate unnecessary client fees. The ALJ found that complainant did not engage in protected activity, in part because complainant acknowledged that she raised the issue of improper switches only as an example of unethical conduct and not as an example of fraud against shareholders or investors.

In *Armstrong v. Wal-Mart Stores, Inc.*, 2006-SOX-58 (ALJ July 27 2006), complainant alleged that he reported that managers were having workers perform personal services while on the clock, that a supervisor was using company resources for personal use, that employees falsified financial reports to increase employee bonuses, and that managers misappropriated money raised for charity. OSHA concluded that complainant's reported evidence of favoritism by managers, violations of company policy, and other issues, was not protected activity under 806.

In *Neuer v. Bessellieu*, 2006-SOX-132 (ALJ Dec. 5, 2006), the complainant voiced concern that the company's product delivery problems were caused in part by one manager who was overworked and another manager who was incompetent. The ALJ found that "the purported performance failure by two employees does not constitute recognizable fraud under SOX."

In *Bishop v. PCS Administration (USA), Inc.*, 2006 WL 1460032 (N.D. Ill. May 23, 2006), the court found an in-house attorney was not engaged in protected activity when she opined that the company's compliance program was inadequate to reduce penalties under the Federal Sentencing Guidelines. The court noted that companies are not required to adopt compliance programs meeting the provisions of the Sentencing Guidelines and the failure to do so could not be objectively regarded as fraudulent conduct within the meaning of the Act.

In contrast, in *Morefield v. Exelon Servs. Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004), an ALJ broadly construed the catchall "any provision of Federal law relating to fraud against shareholders." The ALJ held that this provision "may provide ample latitude to include rules governing the application of accounting principles and the adequacy of internal accounting controls implemented by the publicly traded company in compliance with such rules and regulations." *Id.* at 5.

Likewise, in *Mann v. United Space Alliance, LLC*, 2004-SOX-15 (ALJ Feb. 18, 2005), an ALJ denied summary decision to respondents on the issue of protected activity because complainant's allegation of a perpetuation of a fraud on NASA by improperly favoring certain vendors in violation of federal acquisition regulations, although less than direct, could also perpetrate a fraud on shareholders under certain circumstances.

In *Fraser v. Fiduciary Trust Company*, 417 F. Supp. 2d 310 (S.D.N.Y. 2006), the court found that a former vice president for an investment management company adequately pled protected activity when he complained the company's New York office sold bonds from ERISA and trust management accounts without communicating this decision to other offices. The failure to communicate with other offices caused Los Angeles clients to suffer losses relating to their holdings which otherwise would have been avoided. The court determined the conduct potentially violated the Investment Advisors Act of 1940, a statute proscribing conduct that operates as a fraud or deceit upon clients.

The relationship between a complaint and the securities laws can be indirect yet constitute protected activity. Complaints that could result in violations of securities law can suffice. In *Smith v. Corning Inc.*, 496 F. Supp. 2d 244 (W.D.N.Y. July 9, 2007), plaintiff complained about an accounting report error that he reasonably believed would affect the integrity of defendant's quarterly reports, thereby misleading investors. Defendants contended that plaintiff's complaints should not be protected since they involved an internal accounting dispute that had the <u>potential</u> for future fraud, but the Court found that distinction to be irrelevant for purposes of a Rule 12(b)(6) motion since plaintiff alleged that defendants repeatedly refused to address a problem that was resulting in incorrect financial information being reported to the company's general ledger.

b. Intent to Deceive or Defraud

Some ALJs have held that, because an essential element of fraud is an intent to defraud or deceive, a Section 806 complaint must allege a degree of intentional deceit or fraud.

For example, in *Hopkins v. ATK Tactical Systems*, 2004-SOX-19 (ALJ May 27, 2004), an ALJ found that a complaint that did not address any kind of fraud and did not allege that the activities involved *intentional deceit* or resulted in a fraud against shareholders or investors did not fall within the purview of the SOX whistleblower provision. The employee's complaint questioned whether the employer's systems illegally resulted in the release of sludge water into the ground water system due to poor maintenance and overdue inspections. The ALJ found that such an activity failed to state a cause of action because an "an element of intentional deceit that would impact shareholders or investors is implicit" under the SOX whistleblower provision.

Likewise, in *Allen v. Stewart Enter., Inc.*, 2004-SOX-60 (ALJ Aug. 17, 2005), *aff'd* ARB 06-081(ARB July 27, 2006), an ALJ found that complainants did not engage in protected activity by reporting accounting irregularities because they did not actually believe that the respondent had acted intentionally when an unintentional mistake within the computing system resulted in incorrect interest calculations. The ALJ observed that a complainant must reasonably believe the reported activity was fraudulent, and "a fraudulent activity cannot occur without the presence of intent."

Similarly, in *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005), complainant voiced concerns that her supervisor was conducting improper "switches" of mutual fund accounts in order to generate unnecessary client fees. The ALJ held that complainant did not engage in protected activity where none of his expressed concerns "contained any reference to fraud or implication that the company had acted intentionally to mislead shareholders or misstate the company's bottom line."

By contrast, in *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007), the ALJ concluded that complainant had engaged in protected activity where complainant wrote an e-mail complaining that his employer was "*intentionally* inflating their forecasts by using non-standard formulas . . . making [target's] pipeline look much more significant" and "the possibility of [target] *intentionally* booking orders that are not shipping to customers for the purpose of expediting revenue recognition." (Emphasis added).

c. Effect on Shareholders or Investors

ALJs have noted that, although the fraud provisions enumerated in Section 806 go beyond those specifically relating to securities fraud, to constitute protected activity, the alleged conduct must impact shareholders or investors. For example, in *Tuttle*, 2004-SOX-76, complainant alleged he was terminated because he complained that significant numbers of its batteries were defective. The ALJ granted summary decision because complainant did "not address any kind of fraud or any transactions relating to securities. Moreover, there has been no allegation that the activities complained of involved intentional deceit or resulted in a fraud against shareholders or investors." The ALJ reasoned that, although fraud under SOX is broader than merely securities fraud, "an element of intentional deceit that would impact shareholders or investors is implicit."

Similarly, in *Stojicevic v. Arizona-American Water Co*., 2004-SOX-73 (ALJ Mar. 24, 2005), an ALJ found complainant had not engaged in protected activity when he complained about poor project decisions and that the company's sub-par year-end earnings were caused by failure to make necessary capital investments. The ALJ reasoned "[a]n allegation that Respondent made financially unsound choices . . . is quite distinct from an allegation that Respondent engaged in fraud." The ALJ noted complainant offered no evidence that respondent made any false statements to shareholders or investors regarding its earnings such that its conduct could constitute fraud. *Aff'd Stojicevic v. Arizona-American Water Co.*, ARB 05-081, 2004-SOX-73 (ARB Oct. 30, 2007) (Respondent "has not shown that he engaged in protected activity under the SOX.").

However, some courts have disagreed. In *Reyna v. Conagra Foods, Inc.*, 506 F. Supp. 2d 1363 (M.D. Ga. June 11, 2007), defendants and plaintiffs debated over whether reports of mail and wire fraud were protected activity regardless of whether that fraud relates to fraud against shareholders. The court in *Reyna* noted that other courts are split as whether the phrase – "relating to fraud against shareholders" – should apply to all of the conduct listed in the statute. Based on the court's reading of the plain meaning of the statute, the court concluded that "[t]he statute protects an employee against retaliation based upon that employee's reporting of mail fraud regardless of whether that fraud involves a shareholder of the company." *Contra Deremer v. Gulfmark Offshore, Inc.*, 2006-SOX-2 (ALJ June 29, 2007) (rejecting *Reyna*) ("[A]llegations of "shareholder fraud" is an essential element of a cause of action under SOX. Therefore, where the conduct complained of involves potential dissemination of false information to the investing public, not all intentionally fraudulent activity may support a cause of action under SOX. Rather, the alleged conduct must be sufficiently material to rise to the level of shareholder fraud.").

3. Materiality

Materiality is an element of the predicate fraud provisions. *See, e.g., Neder v. United States*, 527 U.S. 1, 4 (1999). In addition, ALJs have applied a materiality element under the "any rule or regulation of the Securities and Exchange Commission" and "any provision of Federal law relating to fraud against shareholders" provisions of the SOX whistleblower provision. Still, some ALJs have placed little emphasis on the materiality requirement. For example, in *Morefield*, 2004-SOX-2, an ALJ denied respondent's motion to dismiss despite the fact that the amounts involved totaled less than .0001% of the annual revenues of the parent company. The ALJ reasoned that "[w]hether or not 'materiality' is a required element of a criminal fraud conviction as Respondents contend, we need be mindful that Sarbanes-Oxley is largely a prophylactic, not a punitive measure." *Id.* at 5. Therefore, "[t]he mere existence of alleged manipulation, if contrary to a regulatory standard, might not be criminal in nature, but it very well might reveal flaws in the internal controls that could implicate whistleblower coverage for seemingly paltry sums." *Id.*

However, others have stressed the need for some degree of materiality, particularly in the context of cases involving the issue of whether traditional employment discrimination or FLSA wage and hour claims can constitute fraud against shareholders and therefore give rise to a Section 806 cause of action. For example, in *Harvey v. Home Depot, Inc.*, 2004-SOX-20 (ALJ May 28, 2004), an ALJ discussed the materiality requirement under 18 U.S.C. § 1514A(a)(1)'s catchall, "any provision of Federal law relating to fraud against shareholders." The ALJ concluded that an employee complaint about alleged race discrimination that had "a very marginal connection with" (*e.g.,* did not <u>materially</u> affect) a corporation's accurate accounting and financial condition did not constitute activity protected under SOX. Initially, the ALJ found that the only federal law directly related to fraud against shareholders that could possibly be implicated was the SOX statute itself, which requires certification that a financial disclosure is accurate and does not contain any untrue statement of material fact. The ALJ concluded that, although a reported incident of discrimination within a publicly traded company that represents itself to be non-discriminatory may conceivably adversely affect the accuracy of corporate disclosures, "the connection becomes tenuous upon close examination of SOX." *Id.* For example, the ALJ found that individual discrimination does not reach the "materiality threshold in terms of a corporation's financial condition." *Id.* at 13. Additionally, the ALJ noted the discrimination complaints at issue centered on the alleged *existence* of discrimination, not the company's *failure to report* such discrimination to the public. However, the ALJ suggested that "[p]erhaps, the failure to disclose a class action lawsuit based on systemic racial discrimination with the potential to sufficiently affect the financial condition of a corporation might become the subject of a SOX protected activity if an individual complained about the failure to disclose that situation." *Id.*

Similarly, in *Deremer v. Gulfmark Offshore, Inc.*, 2006-SOX-2 (ALJ June 29, 2007), an ALJ noted that where respondent had revenues of $139 million and a loss of $4.63 million in 2004, a potential financial impact from allegedly fraudulent activity of an additional $200,000 expense was arguably immaterial.

Likewise, in *Smith v. Hewlett Packard*, 2005-SOX-88 (ALJ Jan. 19, 2006), complainant, an employee relations staffer, alleged he engaged in protected activity when he threatened to take allegations of a potential race discrimination class action to the EEOC. The ALJ rejected this argument, reasoning that "[m]ere knowledge that an employee-evaluation process adversely affected minorities (without knowing whether this result was intentional), coupled with an insider's access to disgruntled employees' conversations about 'external' resolutions, is not enough." The ALJ noted that, although there was a rumor of a class-action lawsuit, there was no such litigation, therefore there was nothing for the company to disclose to its shareholders. The ALJ did note, however, that a disclosure of company-wide discrimination could form the basis of SOX whistleblower claim, explaining: "[h]ad such a suit actually been filed, and if HP had prevented that information from reaching its shareholders, and if the Complainant learned of this omission and if he had reported it, then he would have engaged in protected activity under the Act."

In *Harvey v. Safeway, Inc.*, 2004-SOX-21 (ALJ Feb. 11, 2005), the ALJ found that an employee's reports of discrepancies in his weekly paychecks, even if they violated the FLSA, were not protected activities under SOX because they did not involve violations of a federal law relating to fraud on the shareholders. The ALJ reasoned that a single employee's shortages did not rise to the requisite level of materiality, particularly where respondent remedied the shortfalls, because "its financial reports were not likely affected by the temporary wage shortages" and the effect on the financial reports "would have been microscopic." The ALJ noted, however, that although the complainant did not make any factually viable complaints of company-wide wage underpayments, systemic violations of FLSA could alter the accuracy of a company's financial disclosures mandated by SOX and therefore "might reach the necessary magnitude to effectively perpetuate a fraud on shareholders."

In *Giurrovici v. Equinox*, 206-SOX-107 (ALJ Nov. 15, 2006), the complainant alleged that he engaged in protected activity when he reported the company was issuing false explanations for a power outage at the company. The complainant alleged the company was lying because revealing the true reason for the power outage (a software deficiency) would hurt the company's reputation and impact share price. The ALJ dismissed the claim, finding any factual inaccuracies in the company's statements were not material to the representation of its financial condition.

In *Livingston v. Wyeth Inc.,* 2006 WL 2129794 (M.D.N.C. July 28, 2006), the court found that the complainant's report of training deficiencies in violation of FDA standards was not material because the FDA would allow the company to remedy any such deficiencies through a legacy plan, resulting in little or no financial impact.

4. "Provide Information"

a. Specificity of Information Provided

Under Section 806(a)(1), an employee must "provide information" (or cause information to be provided) in order to engage in protected activity.

The ARB has similarly held that a complainant's protected activity must involve specific allegations. In *Platone v. FLYi, Inc.*, ARB 04-154, 2003-SOX-27 (ARB Sept. 29, 2006), a former airline labor relations manager raised concerns about financial irregularities within the company. Specifically, the complainant complained of discrepancies in the "flight loss" pay system, an arrangement which shifted the cost of paying pilots from the company to the union by requiring the union to reimburse the company for portions of a pilot's pay. Complainant reported that union leaders were improperly taking advantage of the flight loss system for their own monetary gain. After her reports went unheeded, complainant concluded that members of company management, who needed bargaining leverage to obtain concessions from the union in upcoming negotiations, had devised a plan to improperly funnel the airline's money to members of the union through the flight loss compensation arrangement. Disagreeing with the initial ALJ decision, the ARB concluded that any loss associated with the scheme would have been borne by the union, not the company. The ARB held that Platone had not engaged in protected activity because she did not provide her employer with specific information regarding conduct she reasonably believed constituted mail fraud, wire fraud, bank fraud, securities fraud, a rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

Similarly, in *Grant*, 2004-SOX-63, an ALJ found that complainant had not engaged in protected activity where he simply voiced discontent and requested explanations about issues he did not understand. The ALJ reasoned that "simply raising questions and lodging complaints without any reference to or suspicion about fraud against shareholders is not protected activity." The ALJ explained that, to be protected, a complaint must contain a certain degree of specificity; SOX only protects "employees who report *reasonable* beliefs based in *articulable fact of illegal activity designed to defraud shareholders*. The Act does not protect an employee who simply raises questions about virtually everything with which he disagrees or does not understand." (Emphasis in original.)

In *Stone v. Instrumentation Laboratory SpA*, 2007-SOX-21 (ALJ Sept. 6, 2007), an ALJ failed to find protected activity where complainant stated only that a coding change in a financial reporting and accounting disclosure system was "the right thing to do" but did not definitively and specifically identify the coding system as relating to shareholder fraud or a violation of SEC rules or regulations.

In *Robinson v. Morgan Stanley*, 2005-SOX-44 (ALJ Mar. 26, 2007), an ALJ concluded that complainant's concerns about the independence, professionalism, and qualification of certain internal audit department members, her allegations of employment discrimination, and her allegations of incidents that "represent[] significant financial, operational, and regulatory risks that could result in financial loss and reflect insufficient control which interferes with the company's ability to disrupt the 'triangle' of fraud" were general assertions that did sufficiently relate to the violations enumerated by the Act.

b. Refusal to Participate in Unlawful Activity

Although the express language Section 806 protects employees who "provide information," in some cases adjudicators have concluded that a <u>refusal</u> to participate in unlawful activity or conduct is protected under Section 806. *See Bechtel v. Competitive Technologies Inc.*, 2005-SOX-33 (ALJ Oct. 5, 2005) (refusal to sign disclosure forms was protected activity); *Jayaraj v. Pro-Pharmaceuticals, Inc*., 2003-SOX-32 (ALJ Feb. 11, 2005).

Yet, not every refusal will suffice. In *Getman v. Southwest Securities, Inc*., ARB 04-059, 2003-SOX-8 (ARB July 29, 2005), a former securities analyst for an investment bank contended she was pressured to change her recommended rating of a certain stock and her refusal to do so was protected activity under Section 806. The ARB held this unspecified "refusal" was not sufficient to "provide information" to a person with supervisory authority relating to a violation and therefore did not constitute protected activity. The ARB reasoned that in the context within which this refusal occurred, *i.e.*, during a review committee meeting between an analyst and her supervisor where disagreement over a rating may be the normal part of the process, the analyst must "communicate a concern that the employer's conduct constitutes a violation in order to have whistleblower protection."

Likewise, in *Henrich v. Ecolab, Inc.*, ARB 05-030, 2004-SOX-51 (ARB June 29, 2006), the complainant claimed to have engaged in protected activity by expressing concern over the company's accounting practices. However, the ARB found the complainant did not do enough to clearly communicate his complaint. The complainant merely failed to follow through and give approval to write-offs, which the ARB found distinguishable from a "refusal" to do so. According to the ARB, the complainant never "blew his whistle" because he neither alleged nor proved that he told his supervisor *why* he was not approving the write-offs.

To be protected, a complaint also must contain a certain degree of specificity. For instance, in *Allen*, 2004-SOX-60, 61 & 62, the ALJ found that merely inquiring into whether the respondent was taking steps to comply with a certain SEC rule was not protected activity. The ALJ reasoned that complainant did not raise a complaint or concern that respondent had violated the law.

In *Trodden v Overnite Transp. Co*., 2004-SOX-64 (ALJ Mar. 29, 2005), a former manager alleged he resisted orders to inflate performance measures. The ALJ found that, although complainant may have had a realistic belief that these inflated performance measures were provided to the SEC and may have led to an inflated stock price, there was no evidence he ever notified a superior of these activities. The ALJ concluded that, "[i]n effect, this is a whistleblower claim brought by an employee who suspected his employer of committing a fraud against its shareholders and the SEC, but the employee never 'blew the whistle,' yet he now seeks remedies from a statute designed to protect employees who do 'blow the whistle.'"

c. Reporting Information Already Known to the Public or Management

There is authority under other whistleblower statutes for the proposition that a report of information that has already been made public or is already known to the company does not constitute protected activity. *Francisco v. Office of Pers. Mgmt.*, 295 F.3d 1310, 1314 (Fed. Cir. 2002) (WPA); *Meuwissen v. Dep't of the Interior*, 234 F.3d 9, 12-14 (Fed. Cir. 2000) (WPA). Likewise, a plaintiff bringing a *qui tam* suit under the FCA must be the "original source" of the information. 31 U.S.C. § 3730(e)(4)(A); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co*., 944 F.2d 1149, 1160 (3d Cir. 1991). Under the FCA, if a claim is based solely on information that has been publicly disclosed, the suit is barred. *Prudential Ins. Co*., 944 F.2d at 1160 (explaining the "public disclosure bar" in the FCA context).

Yet, in *Allen*, 2004-SOX-60, 61 & 62, an ALJ rejected respondent's argument that, to constitute protected activity, a complaint must provide information that was not already known by the company. However, the ALJ concluded the complainant could not have a reasonable belief that respondent was engaged in fraud, in part because respondent already knew about the problem before complainant reported it and was making it a priority to remedy it.

Where an employee's job consists of investigating and reporting wrongdoing, courts have concluded that the performance of such job duties does not constitute protected activity under similar whistleblower statutes. *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006); *Sasse v. United States DOL*, 409 F.3d 773 (6th Cir. 2005) (affirming *Sasse v. Office of the U.S. Attorney*, ARB 02-077, 1998-CAA-7 (Jan. 30, 2004) (U.S. attorney who alleged the Justice Department retaliated against him while he was investigating environmental crimes failed to show the agency violated the whistleblower provisions of various environmental laws, because the performance of his job duties was not protected whistleblowing activity); *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352 (Fed. Cir. 2001) ("A law enforcement officer whose duties include the investigation of crime by government employees and reporting the results of an assigned investigation to his immediate supervisor is a quintessential example" of conduct that is not protected by the WPA); *Langer v. Department of the Treasury*, 265 F.3d 1259, 1267 (Fed. Cir. 2001) (IRS employee, whose duty it was to review actions taken by the IRS's Criminal Division, did not engage in activity protected by the WPA by informing DOJ officials that their grand jury investigations disproportionately targeted African-Americans).

5. "Otherwise Assist in an Investigation"

In *Hendrix v. American Airlines, Inc*., 2004-SOX-23 (ALJ Dec. 9, 2004), complainant was a witness in an investigation into another manager's report that an employee was engaging in fraudulent conduct by creating art objects for personal gain out of company property. The ALJ found that complainant engaged in protected conduct because he "otherwise assist[ed] in an investigation" and reasonably believed the employee's conduct constituted fraud against shareholders. The ALJ reasoned that, although complainant never identified any enumerated fraud provision he believed had been violated, all he needed was a reasonable belief that he was blowing the whistle on fraud and protecting investors.

In *Romaneck v. Deutsche Asset Management*, 2006 WL 2385237 (N.D. Cal. Aug. 17, 2006), the defendant conceded the complainant's production of documents to the SEC constituted protected activity, making it unnecessary for the court to determine whether his anticipated testimony before the SEC was also protected. Though not reaching the question, the court inferred that anticipated testimony would be considered protected activity, stating in dicta that "the company has failed to persuade the Court that [complainant's] anticipated testimony before the SEC does not also fall into this category."

6. "Supervisory Authority" or "Authority to Investigate, Discover, or Terminate Misconduct"

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

The term "supervisory authority" has been broadly construed. For example, in *Gonzalez III*, 2004-SOX-39, the complainant, former chairman of the local bank advisory board, allegedly informed two local executive officers of the respondent bank that a lending company they had formed possibly violated banking laws, was a fraud against shareholders, and violated their employment contracts. The respondent moved for summary decision on the theory that the complainant testified that he had "actual authority" over the executives and therefore the complainant did not "provide information" to "a person with supervisory authority over the employees." Despite the complainant's testimony, the ALJ found a genuine issue of material fact existed as to whether the CEO had authority over the complainant, or *vice versa*. Moreover, the *Gonzalez* ALJ rejected respondent's argument that the complainant did not "provide information" to the executives because, even if he did inform the executives that the lending company was unlawful, they obviously already knew about it and therefore were not "person[s] working for the employer who ha[ve] the authority to investigate, discover or terminate misconduct." The ALJ found that while the executives clearly knew about the lending company they had formed, the evidence showed the complainant had advised them to sell it or shut it down because of possible violations of banking and mail fraud laws, and that this type of communication was protected by the SOX whistleblower provision.

The phrase "such other person working for the employer who has authority to investigate, discover, or terminate misconduct" also has been broadly construed. In *Jayaraj*, 2003-SOX-32, complainant asserted her comments to the company's COO constituted protected activity. Although the COO was complainant's peer, and not her supervisor, the ALJ found the comments were protected because the COO had the "authority to investigate, discover and terminate misconduct related to securities law." The ALJ reasoned that, although there was no direct evidence the COO was responsible for securities law violations, she was the second in command and had broad authority, including the authority to monitor the activities of and interface with the auditors.

In *Deremer v. Gulfmark Offshore, Inc.*, 2006-SOX-2 (ALJ June 29, 2007), an ALJ held complainant properly made disclosures to an external audit firm and an investigating law firm. The ALJ reasoned that the investigating law firm was hired by respondent's audit committee and was acting as an agent of the audit committee and therefore qualified as "such other person working for the employer who has the authority to investigate, discover, or terminate misconduct." The ALJ also noted that the external audit firm, obligated to render an objective opinion as to respondent's financial statements and assertions, was in a position to at least constructively "terminate misconduct" by refusing to render a positive opinion. According to the ALJ, because the Act went through "great lengths to insure auditors' independence," disclosures to the external auditor were protected since holding otherwise "would produce a result inconsistent with the purpose of the Act."

7. Complaint to a Member of Congress

When signing the Sarbanes-Oxley Act, the White House expressed the view that SOX coverage was limited to congressional investigations "authorized by the rules of the Senate or House of Representatives and conducted for a proper legislative purpose." Sarbanes –Oxley Act of 2002: Statement by the President of the United States, 2002 U.S.C.C.A.N. 543 (July 30, 2002). Senators Patrick Leahy and Charles E. Grassley, who co-authored the whistleblower provisions of the Act, immediately challenged this position, writing that the Act does not require there be an ongoing investigation of Congress or that the investigation be within the jurisdiction of any Congressional Committee. *See* Letter from Senators Leahy and Grassley to President George W. Bush (July 31, 2002).

The Labor Department subsequently acceded to the congressional view. Under the DOL SOX regulations, 29 C.F.R § 1980.102(b)(ii), an employee is protected against retaliation for providing information to "any Member of Congress or any committee of Congress," and the preamble to the final SOX regulations also states that "Complaints to an individual member of Congress are protected, even if such member is not conducting an ongoing Committee investigation within the jurisdiction of a particular Congressional committee, provided that the complaint relates to conduct that the employee reasonably believes to be a violation of one of the enumerated laws or regulations." 69 Fed. Reg. 52106 (Aug. 24, 2004).

B. 18 U.S.C. § 1514A(a)(2)

In addition to protecting employees who report possible fraud or assist in investigations, SOX contains a "participation clause" that explicitly protects employees who "file, cause to be filed, testify, participate in, or otherwise assist in" proceedings alleging violations of securities laws, SEC rules or regulations, or other federal laws relating to fraud against shareholders. The case law under this provision of the Act -- defining the range of activities that are covered -- is still developing. Also, while the precise language of the Act is not found in other DOL-enforced whistleblower provisions, some other DOL-enforced whistleblower provisions include comparable language referring to employees who file or participate in "proceedings." *See, e.g.*, 42 U.S.C. §9610(a) (CERCLA); 42 U.S.C. §5851(a)(1)(F) (ERA).

Recently, there have been some significant decisions pertaining to this provision. In *Romaneck v. Deutsche Asset Management*, No. C05-2473 THE, 2006 WL 2385237 (N.D. Ca. Aug. 17, 2006), plaintiff claimed to be engaged in protected activity by anticipating testifying before the SEC in an investigation related to market-timing. Though defendant claimed that plaintiff's general statements that "he would tell the whole truth and let the chips fall where they may" lacked specificity since they did not reference a specific SOX violation, the Court found that Defendant's opposition was baseless as it tied the specificity requirement to the "provide information" language that appears only in one prong of the Act – 18 U.S.C. § 1514A(a)(1). The absence of "provide information" in the prong that relates to employee testimony – 18 U.S.C. §1514A(a)(2) – enabled the Court to relax the specificity requirement in this circumstance.

Additionally, in *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007), complainant called an SEC attorney to get information about the legality of certain agreements to which respondent was a party; however, the SEC brought no forth no proceeding against respondent as a result of complainant's inquiries. Even though a strict reading of the Act only protects contacts relating to proceedings, the ALJ noted that such an application of law "would require a narrow and overly technical reading of the Act that would run counter to the legislative history which reflects that the law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." Consequently, the ALJ ruled that "when an employee contacts the SEC in connection with a reasonable belief of a securities law violation within the scope of Sarbanes-Oxley . . . that action is protected even if no formal SEC proceeding is ever initiated."

As the case law develops, there may be some surprises under this provision. For example, the "participation clause" protects against retaliation any employee who is involved in proceedings that implicate possible violations of *any* SEC rule or regulation – not merely rules or regulations relating to shareholder fraud, and not merely rules relating to publicly-traded corporations that are the prime target of SOX protections. Furthermore, employee involvement in a proceeding is protected if it involves violations of any federal law that touches on shareholder fraud, a provision that is not limited to laws enforced by the SEC. While it is likely most complaints under the "participation clause" will originate with employees who are participating in familiar whistleblower-type proceedings, the broad language of the clause suggests that involvement in other types of proceedings may be protected as well.

V. VIOLATIVE CONDUCT - RETALIATION

A. Statutory Language

Section 806(a) provides that no company or individual may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee" to blow the whistle on a violation of the federal securities laws. 18 U.S.C. §1514A(a).

B. The Supreme Court's Ruling in *Burlington Northern & Santa Fe Railway v. White*

In a ruling that is affecting interpretation of Section 806(a), the Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006) ("*Burlington Northern*"), that a plaintiff may pursue a retaliation claim under Title VII of the Civil Rights Act of 1964 if the "employer's challenged action would have been material to a reasonable employee," and likely would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." The Supreme Court specifically rejected more restrictive standards of proof that had been used by several U.S. Courts of Appeals.

Plaintiff was hired as a track maintenance laborer by Burlington Northern & Santa Fe Railroad (BNSF) in June of 1997. She was the only woman in the department, and the only person who was qualified to operate a forklift. For the first three months of her employment, White was assigned to operate a forklift, which is less physically demanding and cleaner than other track maintenance work. On September 16, 1997, White filed an internal complaint alleging that her foreman sexually harassed her and discriminated against her. Ten days later, the foreman was given a ten-day suspension, and White was removed from her forklift duties and assigned to more physically demanding and dirtier track maintenance work.

White filed charges of sex discrimination and retaliation with the U.S. Equal Employment Opportunity Commission (EEOC) on October 10, 1997, and again on December 4, 1997. On December 11, 1997, White was involved in a dispute with a supervisor and was suspended without pay for insubordination. White made a timely request for an investigation within the fifteen day period for appealing disciplinary actions provided under the applicable collective bargaining agreement. Upon the conclusion of the investigation, BNSF reversed the suspension. On January 16, 1998, BNSF reinstated White with full back pay and expunged the suspension from her personnel record.

After exhausting her administrative remedies, White filed a Title VII lawsuit alleging sex discrimination and retaliation. White alleged that the retaliation consisted of (i) her reassignment from forklift duties to more demanding responsibilities, and (ii) her suspension because she had filed EEOC charges. The jury returned a verdict in favor of BNSF as to White's sex discrimination claim. However, the jury found in favor of White as to her retaliation claim, and awarded her $43,250 in compensatory damages based on White's testimony that being without income over the Christmas holidays caused her to seek medical treatment for serious distress about providing for herself and her children.

The Court of Appeals for the Sixth Circuit reversed the ruling on the retaliation claim, holding that the two alleged acts of retaliation were not sufficient to state a claim for retaliation under Title VII. The Sixth Circuit reasoned that it could not see how White suffered an adverse employment action by being directed to do a job for which she was hired, and that the suspension pending the investigation, followed by reinstatement, was an interim decision that was not actionable. Upon rehearing of the case en banc, the Sixth Circuit affirmed the jury's verdict on the basis that Title VII prohibits adverse actions that materially change the terms of employment, including the two acts against White. The en banc court determined that taking away an employee's paycheck for over a month is not trivial, and that White's reassignment was done with retaliatory intent and constituted a demotion to a more arduous, dirtier, and less prestigious job.

Prior to the Supreme Court's decision, several Courts of Appeals had used different standards to determine whether employer conduct rises to the level of retaliation under Title VII. In its decision in this case, the en banc Sixth Circuit stated that a plaintiff alleging a Title VII retaliation claim must prove the existence of (i) an "adverse employment action" or (ii) severe or pervasive retaliatory or other discrimination-based harassment by a supervisor. *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789 (6th Cir. 2004). The Sixth Circuit defined "adverse employment action" as action causing "a materially adverse change" in the terms of employment. The Sixth Circuit explained that this standard prevents lawsuits from being filed based on trivial workplace dissatisfactions, and that mere inconvenience or alteration of job responsibilities do not satisfy the "materially adverse" standard.

Affirming the verdict in White's favor, the Supreme Court specifically adopted the standard that had been used by the Seventh and District of Columbia Circuits which required the plaintiff to prove that the "employer's challenged action would have been material to a reasonable employee," and likely would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern* at 2415, *citing Washington v. Illinois Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005), and *Rochon v. Gonzales*, 438 F.3d 1211, 1217-1218 (D.C. Cir. 2006). The opinion contrasted the language of Title VII's anti-discrimination provision, which prohibits discrimination as to "terms and conditions of employment," with Title VII's anti-retaliation provision which prohibits "discrimination" but is not limited by the additional phrase "terms and conditions of employment." The opinion reasoned that this difference in language showed Congress' intent to forbid a broader range of retaliatory acts than are prohibited under the anti-discrimination provision. The opinion stated that the requirement of "material adversity. . . is important to separate significant from trivial harms," and that the "reasonable employee" standard "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." The opinion also stated that the standard was phrased "in general terms because the significance of any given act of retaliation will often depend on the particular circumstances. Context matters."

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

C. The Impact of *Burlington Northern* on the Interpretation of Section 806(a)

A few DOL decisions have since addressed the *Burlington Northern* standard when determining whether the employer had caused a complainant to experience an adverse employment action in violation of Section 806(a) of Sarbanes-Oxley, but the full impact of *Burlington Northern* on Section 806(a) is still unclear. *See Rzepiennik v. Archstone Smith, Inc.*, 2004-SOX-26 (ALJ Feb. 23, 2007) ("Given the reliance upon Title VII by administrative authorities interpreting the Sarbanes-Oxley Act, it is unclear what, if any, effect the Court's decision [in *Burlington Northern*] will have on retaliation claims under SOX."). Section 806(a) states that covered employers may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." The first few DOL decisions indicate that *Burlington Northern* will result in a broader interpretation of Section 806(a).

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

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

Subsequently, in an ALJ decision decided after both *Allen* and *Bozeman*, the ALJ addressed *Burlington Northern* more squarely. In *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29 (ALJ Oct. 5, 2006), the ALJ explained that "[a]dministrative decisions have used different interpretations of what constitutes an adverse action under whistleblower law, but they generally agree that while Title VII case law influences whistleblower decisions, differences in statutory language signify that adverse action should be interpreted more broadly under whistleblower claims than under Title VII claims." Based on this rationale, the ALJ stated that the *Burlington Northern* decision serves as a starting point for analysis of potentially adverse actions in Sarbanes-Oxley cases. However, the ALJ cited *Burlington Northern* when the ALJ stated that "the test is whether a reasonable employee would be dissuaded from whistleblowing based on the alleged adverse action." The ALJ then found that a reasonable employee would have been dissuaded from engaging in protected activity as a result of the complainant's transfer to a different department after receiving one day to decide whether to accept the transfer or face a lay-off. Also, the transfer significantly decreased his workload, and the scope of the new position varied unfavorably from the scope when past employees had filled the same position.

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

Although the reach of Section 806(a) is unresolved in light of *Burlington Northern & Santa Fe Railway v. White*, decisions interpreting Section by 806(a) are set forth below.

D. Proof Issues

There is no dispositive ruling yet from the courts or the ARB concerning the precise parameters of what constitutes unlawful retaliatory conduct. See, however, *Bechtel v. Competitive Technologies, Inc.*, 2005-SOX-33 (ALJ Oct. 5, 2005) (removal of complainant's status as company officer and failure to conduct performance review did not constitute adverse employment actions); *Willis v. Vie Financial Group, Inc.*, 2004 WL 1774575 (E.D. Pa. Aug. 6,

2004) (loss of job responsibilities is a change in employment conditions sufficient to constitute an adverse action under the Act).

In *Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004), the ALJ noted a disagreement in ARB precedents regarding the definition of "adverse employment action." The ALJ stated that "it makes sense to follow the case law of the circuit in which a given whistleblower claim arises." *Id*. at 14. Applying Tenth Circuit precedents, the ALJ found that the complainant's placement on a layoff list, even though he was not actually laid off, constituted adverse action because "an employee who is placed on a lay-off list reasonably fears that he will lose his job when that list goes into effect." *Id*. at 15. This logic is called into question by the national standard for retaliation announced in *Burlington Northern Santa Fe Ry. v. White*.

Case law under other whistleblower statutes and under various discrimination laws is well developed and should serve as a guide to the DOL and the courts.

1. Prior Knowledge, Particularly by the Decisionmaker of Complainant's Protected Conduct.

SOX Cases: In *Henrich v. Ecolab, Inc.*, 2004-SOX-51 (ALJ Nov. 23, 2004), *aff'd* ARB 05-030 (ARB June 29, 2006), the complainant argued that his immediate supervisor's knowledge about the instances of protected conduct should be imputed to the higher executives who decided to terminate his employment. The ALJ ruled that the immediate supervisor's knowledge could be imputed to the higher executives as to the first instance of protected conduct, but not as to the second.

However, in *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005), the ALJ rejected the complainant's "speculation and supposition" that the executive who decided to terminate the complainant's employment "must have known" about the complainant's protected activity. The ALJ found no evidence the employer had attempted to insulate the decisionmaker from knowledge of protected conduct. The ALJ also found it was unreasonable to conclude the complainant's supervisors would have relayed his questions about accounting to higher executives because it was part of the complainant's job to raise questions about proper accounting practice.

In *Jayaraj v. Pro-Pharmaceuticals, Inc*., 2003-SOX-32 (ALJ Feb. 11, 2005) the employer was a "small start-up biotechnology company" whose primary executives were a chief executive officer (CEO) and a chief operating officer (COO). The CEO testified he decided to terminate the complainant's employment, and he was unaware that she had engaged in protected activities. The ALJ found it was likely the COO had told the CEO about the complainant's protected activity in light of evidence that the CEO and COO had worked closely together since the founding of the company.

SEE GENERALLY:

See, e.g., *Mulhall v. Ashcroft*, 287 F.3d 543 (6th Cir. 2002) (summary judgment granted in retaliation claim where plaintiff unable to prove agents knew he was a witness in EEO complaint at the time they sent superior negative letter accusing plaintiff of falsely recording overtime); *Mato v. Baldauf*, 267 F.3d 444, 450-52 (5th Cir. 2001) (retaliation not shown by plaintiff terminated allegedly for assisting co-workers in filing sexual harassment complaints, where no evidence of knowledge by decisionmaker); *Alexander v. Wisconsin Dept. of Health & Family Servs.*, 263 F.3d 673, 688 (7th Cir. 2001) (plaintiff's suspension just one day after his complaint with personnel commission insufficient to establish retaliation, where no evidence decisionmakers had knowledge of his complaint); *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 831-32 (6th Cir. 1999) (plaintiff could not show individuals responsible for shift transfer on which she based her Title VII claim were aware of her earlier sexual harassment complaint at time of decision). *But see Gordon v. New York Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000) (district court erred in charging jury that agents had to know of protected activity; sufficient if agent found to be acting on orders of superior with knowledge); *Ghirardelli v. McAvey Sales & Serv., Inc.*, 287 F. Supp. 2d 379 (S.D.N.Y. 2003), *aff'd*, 98 Fed. Appx. 909 (2d Cir. 2004) (general corporate knowledge established when senior company official knew plaintiff engaged in protected activity, and, based on management size, it was reasonable to infer that information was shared with official who decided to terminate plaintiff); *Donlon v. Group Health Inc.*, 2001 WL 111220, at *3 (S.D.N.Y. Feb. 8, 2001) (general corporate knowledge established when supervisor who approved discharge decision knew employee had engaged in protected activity).

AND:

See, e.g., *Byrd v. Illinois Dept. of Public Health*, 423 F.3d 696 (7th Cir. 2005) (Title VII) (causal link broken if employer made independent decision untainted by illegal bias); *English v. Colorado Dept. of Corrections*, 248 F.3d 1002, 1011 (l0th Cir. 2001) (Title VII, Sections 1981 and 1983) ("A plaintiff cannot claim that a firing authority relied uncritically upon a subordinate's prejudiced recommendation where the plaintiff had an opportunity to respond to and rebut the evidence supporting the recommendation."); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998) (causal link between protected activity and allegedly retaliatory act "can be severed if there is evidence that the ultimate decisionmaker did not merely 'rubber stamp' the recommendation of the employee with knowledge of the protected activity, but conducted an independent investigation into the circumstances surrounding the employee's termination"); *Jackson v. Missouri Pac. R.R. Co.*, 803 F.2d 401, 407 (8th Cir. 1986) (no retaliation claim where, even though discharge occurred five months after filing of lawsuit, plaintiff was terminated after investigation by someone who did not know plaintiff had filed suit); *Medrano v. City of Sun Antonio*, 2004 WL

2550592, at * 6 (W.D. Tex. Sept. 27, 2004) (ADA) (plaintiff failed to prove "the ultimate decision maker . . . was pressured to terminate Plaintiff based on another employee's knowledge of Plaintiffs EEOC complaint."). *But see Bergene v. Salt River Project*, 272 F.3d 1136, 1141 (9th Cir. 2001) (evidence of retaliation where plaintiff's former supervisor, who threatened plaintiff with denial of foreman position if she held out for too much money in settlement negotiations for her pregnancy-discrimination claim, played influential role in selection process, even if he was not decisionmaker); *Vogt v. Dain Rauscher Inc.*, 2002 WL 992753, at * 8 (D. Minn. May 14, 2002) (Title VII and Minnesota Human Rights Act), *aff'd*, 67 Fed. Appx. 989 (8th Cir. 2003) ("comments demonstrating a discriminatory animus that were made by individuals closely involved in the decision-making process can be evidence that an impermissible factor was a motivating factor for that decision.") (emphasis in original).

2. Causal Nexus.

   a. Knowledge Alone Not Sufficient.

See, e.g., *Brackman v. Fauquier County, Va.*, 72 Fed. Appx. 887 (4th Cir. 2003) (Title VII) (need more than knowledge of protected activity to show causation); *Gibson v. Old Town Trolley Tours, Inc.*, 160 F.3d 177, 182 (4th Cir. 1998) (decisionmaker's knowledge of plaintiffs race and age discrimination complaint did not establish retaliation absent evidence that plaintiffs "complaint in some way triggered" supervisor's failure to complete employment reference form as requested); *Mesnick v. General Elec. Co.*, 950 F.2d 816, 828 (lst Cir. 1991) ("knowledge on an employer's part . . . cannot itself be sufficient to take a retaliation case to the jury").

   b. Temporal Proximity.

SOX Cases: The mere fact that adverse action follows protected activity is not necessarily sufficient to prove causation. In *Trodden v. Overnite Transportation Co.*, 2004-SOX-64 (ALJ Mar. 29, 2005), the ALJ held that the complainant had failed to show that his termination four months after he engaged in protected activity was causally related to his protected conduct. In *Taylor v. Wells Fargo, Texas*, 2004-SOX-43 (ALJ Feb. 14, 2005), *aff'd* ARB 05-062 (ARB June 28, 2007) the complainant's employment was terminated nine days after she engaged in protected conduct. However, her employment was terminated four days after the last in a series of insubordinate acts. After observing that close temporal proximity between protected activity and termination may be sufficient to establish retaliatory intent, the ALJ ruled as follows:

> This close temporal proximity, however, does not require such a finding. While Complainant was terminated from her employment just nine days after contacting Homeyer and Bevis about the

> backdated letters of credit, her discharge was also after a series of confrontations in the office and poor performance. The timing of the termination is not suspicious when that timing is credibly explained by a non-retaliatory motive. *Taylor*, 2004-SOX-43, at 12.

Termination one day after raising concerns about inventory accounting problems was held not to be sufficient proof of causation in *Richard v. Lexmark Int'l Inc.*, 2004-SOX-49 (ALJ June 20, 2006). In that case, the employer proved that it had decided to terminate the employee several weeks before the employee expressed concerns about accounting issues.

See also Johnson v. Stein Mart, Inc., No. 3:06-cv-341-J-33TEM, 2007 U.S. Dist. LEXIS 44579 (M.D. Fl. June 20, 2007) (termination of employment twenty months after the initial complaint was not a sufficient temporal link to establish causation); *Leznik v. Nektar Therapeutics, Inc.*, 2006-SOX-93 (ALJ Nov. 16, 2007) (discharge two weeks after raising a perceived violation of the corporate code of ethics could support an inference of causation); *Bechtel v. Competitive Technologies, Inc.*, 2005-SOX-33 (ALJ Oct. 5, 2005) (no nexus between perceived threat in December 2002 and termination in June 2003); *Kalkunte v. DVI Financial Servs., Inc. and AP Servs., LLC*, 2004-SOX-56 (ALJ July 18, 2005) (time span of less than one month was sufficient circumstantial evidence); *Jayaraj v. Pro-Pharmaceuticals, Inc.*, 2003-SOX-32 (ALJ Feb. 11, 2005) (sending complainant home the same day as protected activity and terminating her ten days later was sufficient temporal proximity); *Heaney v. GBS Properties LLC d/b/a Prudential Gardner Realtors*, 2004-SOX-72 (ALJ Dec. 2, 2004) (complaint dismissed because, inter alia, no temporal proximity between complainant's concerns and his termination).

SEE GENERALLY:

Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 149 L.Ed.2d 509 (2001) (citing with approval cases finding temporal proximity of four and three months insufficient to demonstrate a causal connection); *Schultze v. White*, 127 Fed. Appx. 212, 219 (7th Cir. 2005) (Title VII) ("At least on this record, a two-year gap cannot establish a causal link between the two events."); *Stover v. Martinez*, 382 F.3d 1064 (10th Cir. 2004) (two years precludes inference of causation without additional evidence); *Brackman v. Fauquier County, Va.*, 72 Fed. Appx. 887 (4th Cir. 2003) (Title VII) (absent other evidence: two years between Conciliation Agreement and termination was too long to establish causation); *Raggs v. Mississippi Power & Light Co.*, 2002 WL 13632, at *7 (5th Cir. Jan. 3, 2002) (seven-year time lapse between plaintiff's EEOC claim and termination, given intervening positive evaluation, undermined any causal connection); *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998) (14-year gap too long); *Chavez v. City of Arvada*, 88 F.3d 861, 866 (10th Cir.

1996) (absent strong evidence to contrary, a retaliatory inference cannot be drawn where more than a three-year gap between protected activity and adverse employment decision); *EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 359 (8th Cir. 1994) ("passage of seven years blunts any inference" of retaliation); *Spillers v. Brooke County Bd. of Education*, 2001 WL 34614945 (N.D.W. Va. July 11,2001) (Title VII), aff'd, 24 Fed. Appx. 207 (4th Cir. 2002) (eight months insufficient to establish temporal proximity).

AND:

Horne v. Reznick Fedder & Silverman, 2005 WL 3076921, 154 Fed. Appx. 361 (4th Cir. Nov. 17, 2005) (Title VII) (two months between termination and discrimination complaint was long enough to weaken inference of causation); *Filipovic v. K&R Express Sys., Inc.*, 176 F.3d 390, 398-99 (7th Cir. 1999) (summary judgment for employer on Title VII retaliation claim where four-month gap between plaintiffs filing of EEOC charge and termination); *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998) (13-month interval between charge and termination too long); *Parkins v. Civil Constr. of Ill., Inc.*, 163 F.3d 1027, 1039 (7th Cir. 1998) (no prima facie showing of causal connection between employee's complaint of sexual harassment in August and the subsequent layoff in November of same year); *Smith v. Keystone Shipping Co.*, 2005 WL 1458226 (E.D. La. May 26, 2005) (no causal link when five years passed between EEOC complaint and termination).

BUT SEE:

Fasold v. Justice, 409 F.3d 178 (3d Cir. 2005) (ADEA and Pennsylvania Human Rights Act) (less than three months may be enough for an inference of retaliation); *Miles v. Dell, Inc.*, 429 F.3d 480 (4th Cir. 2005) (Title VII) (despite the one year between plaintiff's pregnancy and termination, other evidence proved a causal connection); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 177 (2d Cir. 2005) (Title VII) (evidence of adverse employment actions prior to limitations period should be used as "background evidence" to determine causal connection); *Farrel v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000) (reversing summary judgment for employer; "'causation, not temporal proximity . . . is an element of plaintiff's prima facie case, and temporal proximity . . . merely provides an evidentiary basis for which an inference can be drawn"') (internal citations omitted); *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1014 (7th Cir. 1997) (reversing summary judgment where "pattern of criticism and animosity" by plaintiffs supervisors began shortly after plaintiffs complaint of discrimination).

AND:

Evans v. City of Houston, 246 F.3d 344 (5th Cir. 2001) (Title VII, ADEA, § 1981 and Texas Labor Law) (five days between protected activity and recommendation for demotion was sufficient for causal connection); *King v. Preferred Tech. Group*, 166 F.3d 887, 893 (7th Cir. 1999) (plaintiff, discharged one day after returning from FMLA leave, established causal connection sufficient for prima facie showing); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir. 1998) (prima facie case established where plaintiff discharged less than two months after filing internal complaint of sexual harassment and 10 days following her complaint to New York State Division of Human Rights); *Goodwin v. Orange & Rockland Utilities, Inc.*, 2005 WL 2647929 (S.D.N.Y. Oct. 14, 2005) (Title VII and New York Human Rights Law) (termination less than one month after plaintiffs complaint was sufficient); *White v. Tomasic*, 31 Kan. App. 2d 597, 69 P.3d 208 (Kan. Ct. App. 2003) (September 28 absences for work-related injury and October 18 termination was sufficient showing of causal connection); *Berman v. Orkin Exterminating Co.*, 160 F.3d 697, 702 (11th Cir. 1998) (several-month long time period between EEOC filing and two involuntary transfers sufficient to establish prima facie case of retaliation).

3. Pre-existing Performance Problems.

SOX Cases: *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007) (employer changed its decision to discharge complainant for failing to attend a mandatory training once the employer learned about the complainant's protected activity, but later discharged the complainant for insubordination because the complainant had stopped working and failed to cooperate with the employer's lawful investigation of the complainant's allegation); *Robinson v. Morgan Stanley*, 2005-SOX-44 (ALJ Mar. 26, 2007) (well-documented pre-existing performance issues regarding work product and accepting adverse performance feedback); (*Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004) (complainant's history of conflict and difficulty with interpersonal relations due to "military style"); *Taylor v. Wells Fargo, Texas*, 2004-SOX-43 (ALJ Feb. 14, 2005), *aff'd* ARB 05-062 (ARB June 28, 2007) (complainant engaged in series of unprofessional and contentious actions that resulted in final written warning for breach of ethics, and ultimately termination); *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005) (complainant's violation of e-mail policy by sending vulgar message to company executive); *Stojicevic v. Arizona-American Water Co.*, 2004-SOX-73 (ALJ Mar. 24, 2005), *aff'd* ARB 05-081 (ARB Oct. 30, 2007) (complainant's inappropriate comments, hostile attitude, and insubordination, resulting in suspension, and, ultimately, discharge for coming into work while suspended and refusing to leave the work premises); *Trodden v. Overnite Transp. Co.*, 2004-SOX-64 (ALJ Mar. 29, 2005) (complainant violated company policy by providing information about a subordinate to a third party outside the company); *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Apr. 1, 2005) (complainant's repeated refusal to work for assigned supervisor constituted insubordination justifying non-renewal of contract).

SEE GENERALLY:

Nicastro v. New York City Dept. of Design and Construction, 125 Fed. Appx. 357 (2d Cir. 2005) (Title VII) (no causal connection when plaintiff was subjected to adverse employment actions before engaging in protected activity and ten months passed after such activity before plaintiff had his salary reduced and was demoted); *Buie v. QuadGraphics, Inc.*, 366 F.3d 496, 507 (7th Cir. 2004) (ADA) (no discrimination when plaintiff on "brink" of termination for excessive absences prior to employer discovering he had AIDS); *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001) ("Where . . . gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise."), *cert. denied*, 534 U.S. 951 (2001); *Lamas v. Freeman Decorating Co.*, 234 F.3d 1273, 2000 WL 1273512 (7th Cir. Sept. 6, 2000) (Title VII) (no inference of discrimination when discipline for violent behavior and harsh words was warranted); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769-70 (2d Cir. 1998) (no retaliation where plaintiff had history of rudeness toward clients and co- workers resulting in negative performance evaluation); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511-12 (7th Cir. 1998) (upholding summary judgment where employer had begun documenting plaintiff's performance problems long before she made complaint); *Jackson v. Delta Special Sch. Dist.*, 86 F.3d 1489, 1494 (8th Cir. 1996) (affirming JNOV notwithstanding close temporal proximity and damaging direct evidence because record of insubordinate activity long before plaintiffs EEOC complaint).

4. Previously Planned Decisions.

SOX Cases: Termination one day after raising concerns about inventory accounting problems was held not to be sufficient proof of causation in *Richards v. Lexmark Int'l Inc.*, 2004-SOX-49 (ALJ June 20, 2006). In that case, the employer proved that it had decided to terminate the employee several weeks before the employee expressed concerns about accounting issues.

SEE GENERALLY:

Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 272 (2001) (no causal connection where employer was contemplating transfer before learning of suit); *Shields v. Federal Express Corp.*, 120 Fed. Appx. 956 (4th Cir. 2005) (Title VII) (no causation when plaintiffs file contained documented problems with his management prior to engaging in protected activity); *Pipkins v. City of Temple Terrace*, 267 F.3d 1197 (11th Cir. 2001) (holding that city employee whose job performance evaluations plummeted after she ended a consensual sexual relationship with a city official failed to make a prima facie case of retaliation because "[e]ven assuming . . . [she] suffered an adverse employment action, any protected expression on her part occurred only after the commencement of the adverse employment actions of which she complained."); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 470 (6th Cir. 1999) (Guy, J., concurring) (employer's position concerning plaintiffs ability to return to work with or without reasonable accommodation remained essentially the same before and after she filed EEOC charge).

5. Post-termination Acts of Retaliation.

SOX Cases: Several ALJs have ruled that post-termination conduct by employers is not actionable. In *Vodicka v. Dobi Medical*, 2005-SOX-111 (ALJ Dec. 23, 2005), the employer filed a lawsuit against a former member of its Board of Directors seeking an injunction preventing the former board member from breaching his confidentiality agreement. The ALJ found the filing of the lawsuit was not actionable because, in contrast with "blacklisting," the complainant failed to show "how this lawsuit could affect his ability to obtain future employment or the terms and conditions of such employment." *Id*. at 12. *See also Pittman v. Siemens AG*, 2007-SOX-15 (ALJ July 26, 2007) (respondent's slanderous statements about complainant and anti-SLAPP claim against complainant relating to defamation suit, both occurring more than one and half years after the termination of complainant's employment, but shortly after complainant filed his third OSHA claim against respondents, were not adverse employment actions because the acts did not constitute blacklisting or interference with employment and complainant was not employed by respondents at the time that the slanderous statements were made or the anti-SLAPP claim was filed); *Rzepiennik v. Archstone Smith, Inc.*, 2004-SOX-26 (ALJ Feb. 23, 2007) (letter sent by employer to complainant one year after the termination of employment offering the complainant a bonus in exchange for agreeing not to pursue further legal action or report information, and the expiration of the consideration period of the offer letter, did not constitute an adverse action even under an expansive view of the adverse action provision); *Halpern v. XL Capital, Ltd.*, ARB 04-120 (ARB Apr. 4, 2006) (employer's testimony at unemployment compensation hearing not actionable); *Pittman v. Diagnostic Products Corp*., 2006-SOX-53 (Mar. 1, 2006) (post-termination acts not adverse employment actions). These decisions may be questionable in light of the holding in *Burlington Northern & Santa Fe Ry. v. White* that post-employment acts may constitute retaliation.

6. Hostile Environment

SOX Cases: A hostile work environment may constitute adverse action, but ALJs have typically required proof that (1) the harassing conduct was sufficiently severe or pervasive to alter the conditions of employment, and (2) the harassment would have detrimentally affected a reasonable person and did so affect the complainant. *Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23, at 17 (ALJ Dec. 9, 2004). In contrast, "[d]iscourtesy or rudeness should not be confused with harassment." *Id. See also Allen v. Stewart Enters., Inc.*, 2004-

SOX-60, 61 and 62 (ALJ Feb. 15, 2005), *aff'd* ARB 06-081 (ARB July 27, 2006) (allegedly hostile acts not "severe and pervasive" enough to rise to level of hostile environment); *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007) (evidence did not establish that complainant had been subjected to harassment sufficiently severe or pervasive enough to have created a hostile work environment).

In *Hughart v. Raymond James & Associates, Inc.*, 2004-SOX-9, at 51 (ALJ Dec. 17, 2004), the ALJ adopted the following standard for determining whether a resignation may be treated as a constructive discharge:

> Establishing a constructive discharge claim requires the showing of an even more offensive and severe work environment than is needed to prove a hostile work environment. *Berkman (*ARB Feb. 29, 2000); *Brown v. Kinney Shoe Corp., 237* F.3d 556, 566 (5th Cir. 2001). To demonstrate that he was constructively discharged, a complainant must show that his employer created "working conditions so intolerable that a reasonable employee would feel compelled to resign." *Williams,* 376 F.3d at 480 (quoting *Hasan v. U.S. Dep't of Labor,* 298 F.3d 914, 916 (10th Cir. 2002)); *see also Talbert v. Washington Public Power Supply System,* 1993-ERA-35 (ARB Sept. 27, 1996). In other words, the working conditions were rendered so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to resign, such that the resignation is effectively involuntary. *Johnson v. Old Dominion Security,* 1985 CAA 3 to 5 (Sec'y May 29, 1991). Such an environment may be established by evidence of *pattern* of abuse, threats of imminent discharge, and *marked* lack of response by supervisors to the complainant's concerns (emphasis added). *Taylor v. Hamilton Recreation and Hamilton Manpower Services*, 1987 STA 13 (Sec'y Dec. 7, 1998).

In *Hughart*, the complainant submitted his resignation on a Friday afternoon after his supervisor criticized his sending an e-mail entitled "fraud alert" as an example of the complainant's previously demonstrated tendency to overstate and miscommunicate. The supervisor told the complainant that she needed to consider his employment status over the weekend and threatened to terminate him if he continued to miscommunicate, but also that she did not want to end his employment because he was a valued employee. At the close of the business day that Friday, the complainant submitted his resignation and his supervisor warned him to think about what he was doing. When the complainant learned two days later that his supervisor had accepted his resignation, he told the supervisor that "it was not her fault." Under all of the circumstances, the ALJ concluded that the complainant had proved that he "felt abandoned by his supervisor, misunderstood, and on the verge of being fired," but had not satisfied the standard for proving a constructive discharge. *Id.* at 53. The outcomes of these cases may be called into question by *Burlington Northern*. *See Deremer v. Gulfmark Offshore, Inc.*, 200-SOX-2 (ALJ June 29, 2007) (stating that *Burlington Northern* had lowered the overall standard of conduct that constitutes retaliation to be weighed under the standard that must be applied in whistleblower cases involving hostile work environment claims).

7. De Minimis Acts of Retaliation.

SOX Cases: In *Allen v. Stewart Enterprises, Inc.*, 2004-SOX-60, 61 and 62, at 94–95 (ALJ Feb. 15, 2005), *aff'd* ARB 06-081 (ARB July 2006) the ALJ rejected the complainants' argument that they suffered tangible job consequences when they were moved to a new workspace with less overhead storage, smaller desk areas, no personal storage area, and unsatisfactory lighting.

VI. PROCEDURES

A. Procedures and Burden of Proof

1. Statutory Provisions

Section 806 provides that a SOX action will be governed by "the rules and procedures set forth in AIR21. 18 U.S.C. § 1514A(b)(2)(A). AIR21, in turn, has been analyzed in accordance with the ERA, so that both statutes may be looked to for guidance in interpreting SOX.

2. Agency Interpretations

On May 28, 2003, the Department of Labor issued interim final regulations and, on August 24, 2004, its Final Rule clarifying the procedures to be applied in SOX whistleblower retaliation actions. OSHA's Whistleblower Investigations Manual ("OSHA Manual"), issued August 22, 2004 provides further guidance as to how such retaliation actions will be handled by the agency.

The SEC also has been given authority to promulgate rules and regulations interpreting SOX, including its whistleblower provisions. Section 3 states that "[t]he Commission shall promulgate rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act." To date, the SEC has not promulgated any such rules and/or regulations.

3. Filing of Complaint

a. With Whom the Complaint Must Be Filed

Whistleblower complaints must first be filed "with the Secretary of Labor." 18 U.S.C. § 1514A(b)(1)(A). In turn, the Secretary has delegated to the Assistant Secretary for OSHA responsibility for receiving and investigating complaints. 29 CFR § 1980 n.1 (citing

Secretary's Order 5-2002, 67 FR 65008 (Oct. 22, 2002)). The pertinent DOL regulation instructs that the complaint should be filed with the OSHA Area Director responsible for the area where either the complainant resides or the alleged wrongful acts occurred. 29 CFR § 1980.103(c). However, OSHA suggests that complaints may be filed "with any official of the U.S. Department of Labor . . ." OSHA Manual, at 1-2 (Aug. 22, 2003).

However, one federal court has held that where a common law wrongful discharge claim is premised on the public policy articulated in Section 806 of SOX, the plaintiff need not comply with the statutory enforcement scheme. *Romaneck v. Deutsche Asset Management*, 2006 WL 2385237 (N.D. Cal., Aug. 17, 2006).

b. 90-Day Statute of Limitations

The complaint must be filed within 90 days of the alleged violation. 18 U.S.C. § 1514A(b)(2)(D). "Filed" has been interpreted as meaning when the complaint is received by the Labor Department. *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 802 (N.D. Tex. 2003). However, the regulations state that, for complaints sent by mail, the date of the postmark will be the date of filing. 29 CFR § 1980.103(d). *See also Reddy v. Medquist, Inc.*, 2004-SOX-35, ARB 04-123 (ARB Sept. 30, 2005) (SOX complaints may be filed by e-mail).

Complaints must be in writing and should include a full statement of the alleged violations. 29 CFR § 1980.103(b). In *Foss v. Celestica, Inc.*, 2004-SOX-4 (ALJ Jan. 8, 2004), an ALJ explained that unwritten complaints will not be considered and held that a telephone call to the DOL within the 90-day timeframe was not sufficient.

The 90-day limitation period commences on the date the alleged violation occurs. 29 CFR § 1980.103(d). The regulations define the phrase "date the alleged violation occurs" as "when the discriminatory decision has been both made and communicated to the complainant." 29 CFR § 1980.103(d). *See also Lawrence v. AT&T Labs*, 2004-SOX-65 (ALJ Sept. 9, 2004) (statute of limitations begins to run "when the employee is made aware of the employer's decision to terminate him or her even when there is a possibility that the termination could be avoided") (citations omitted); *Flood v. Cedant Corp.*, 2004-SOX-16, at 2 (ALJ Feb. 23, 2004) (statute of limitations began to run on date complainant was notified of termination, not on date termination became effective); *Halpern v. XL Capital, Ltd.*, 2004-SOX-54, at 4 (ALJ June 7, 2004) ("[T]he statute of limitations begins to run once the employee is aware or reasonably should be aware of the employer's decision."); *Wintrich v. American Airlines, Inc.*, 2004-AIR-1, at 2 (ALJ Dec. 30, 2003) ("it is when the employee is aware or reasonably should be aware of the employer's decision"); *Brune v. Horizon Air Industries, Inc.*, 2002-AIR-8, at 9 (ALJ Dec. 16, 2003) ("[t]he period begins to run when the employer takes the adverse action, not when the employee engaged in the protected activity"); *Walker v. Aramark Corp.*, 2003-SOX-22, at 3 (ALJ Aug. 26, 2003) ("[t]he act occurs on the day it happens and a charge must be filed within 90 days of that happening").

The ARB has clarified that the limitations period begins to run upon the complainant's awareness of the adverse action, not upon awareness that the adverse action constitutes a violation of SOX. *Halpern v. XL Capital, Ltd.*, ARB 04-120, 2004-SOX-54 (ARB Aug. 31, 2005). Halpern asserted he was entitled to equitable tolling because he did not become aware of his former employer's unlawful motivation for his termination until after the limitations period had run. The ARB rejected this argument, holding that "Halpern's failure to acquire such evidence does not constitute an extraordinary circumstance warranting tolling of the limitations period." *Id.* at 5.

In *Murray*, the court held that a federal district court lacks jurisdiction over a SOX retaliation complaint if the plaintiff failed to file the original complaint with DOL within 90 days of the alleged violation. 279 F. Supp. 2d at 802.

In *Mehen v. Delta Air Lines*, 2003-AIR-4 (ALJ Feb. 24, 2003), the adverse action allegedly occurred on March 6, 2002, when the employee's request for an extension of her COBRA benefits was denied. This decision was communicated to the employee by letter. The employee did not file her complaint until July 5, 2002, more than 90 days after the alleged denial. However, the ALJ held the complaint was timely because the letter was incorrectly addressed, and therefore it was plausible the complainant did not receive it until April 9, 2002, within the 90-day statute of limitations. *Id.* at 5.

In *Coppinger-Martin v. Nordstrom, Inc.*, 2007-SOX-19 (ALJ Apr. 4, 2007), the complainant was notified in mid-November 2005 that her employment would be terminated due to budgetary reasons. To enable the complainant to exercise her stock options, the employer permitted her to stay employed through February 28, 2006, the date on which her options vested. Rejecting complainant's contention that the statute began to run on the effective date of her termination, the ALJ held that the 90-day period began to run in mid-November 2005, when the employer informed the complainant that her employment would be terminated.

c. Equitable Tolling

OSHA opines that the 90-day filing period may be equitably tolled for "certain extenuating circumstances." OSHA Manual, at 2-4. For example, valid extenuating circumstances could include:

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

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

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

OSHA Manual, at 2-4, 5.

The 90-day tolling period is subject to equitable tolling. *Carter v. Champion Bus, Inc.*, ARB 05-076, 2005-SOX-23 (ARB Sept. 29, 2006) (applying equitable tolling principles and holding that the filing of an alleged SOX complaint with the EEOC did not warrant equitable tolling because the EEOC is not the responsible government agency for the adjudication of SOX whistleblower cases and the generic allegations in the complaint letter would not have caused the EEOC to deem it a SOX complaint).

Several ALJ decisions also have addressed whether the 90-day filing period may be equitably tolled. In *Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ Feb. 15, 2002), an ALJ held that filing the complaint with the wrong agency (the FAA) was sufficient basis for tolling the 90-day time limit for filing a complaint under AIR21. The ALJ noted that the improperly filed complaint raised the statutory claim in issue and the complainant had filed his complaint without the assistance of legal counsel. *Id*. at 30.

In *Trechak v. American Airlines, Inc.*, 2003-AIR-5 (ALJ Aug. 8, 2003), an ALJ held a complaint was not timely filed, and there was no basis for equitably tolling the 90-day filing time limit, where the complainant could not show that the defendant actively misled her respecting the cause of action or that she had in some extraordinary way been prevented from asserting her rights. The ALJ also noted the complainant had not raised "the precise statutory claim in issue" but had mistakenly done so in the wrong forum. *Id.* at 7-8.

In *Moldauer v. Canandaigua Wine Co.*, 2003-SOX-26 (ALJ Nov. 14, 2003), an ALJ accepted that the 90-day filing period may be equitably tolled, but held the complainant's voluntary departure from the country and ignorance of law did not warrant equitable tolling. Moreover, although the complainant filed a complaint with another agency, the ALJ found the complaint did not specifically allege facts that would support a SOX violation.

Finally, in *Wintrich v. American Airlines, Inc*., 2004-AIR-1 (ALJ Dec. 30, 2003), the ALJ held that the fact that the complainant was permitted to file an internal appeal of her termination pursuant to company policies did not delay the commencement of the running of the statute of limitations. *Id.* at 2. Therefore, the ALJ dismissed the complaint.

d. Continuing Violation Theory

In *Ford v. Northwest Airlines, Inc*., 2002-AIR-21 (ALJ Oct. 18, 2002), the ALJ held that discrete retaliatory acts are not actionable if they occurred outside the 90 days before the employee filed a complaint, even if they were related to acts that fall within the prescriptive period. Citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the ALJ reasoned that a discrete retaliatory act "occurs" on the day it happens and the complaint must be filed within the statutory time frame based on the happening of that event. *Id.* at 7. *See also Dolan v. EMC Corp*., 2004-SOX-1, at 3 (ALJ Mar. 24, 2004) (applying *Morgan* to SOX claims and holding that retaliatory acts that took place outside the statute of limitation period are actionable only in hostile work environment claims).

In *Walker v. Aramark Corp*., 2003-SOX-22, at 3 (ALJ Aug. 26, 2003), the ALJ held that OSHA's dismissal of the complaint as untimely was proper because the complainant's first contact with OSHA was 105 days after his termination. Following OSHA's determination, the complainant attempted to argue another retaliatory act, to wit, the respondent's contesting of his application for unemployment benefits. The ALJ held that, even if this new alleged act of retaliation was timely filed, it would not make the complaint regarding termination timely because, under *Morgan*, these retaliatory actions constitute "discrete acts" and therefore the continuing violation doctrine would not apply. *See also Trechak v. American Airlines, Inc*., 2003-AIR-5, at 7 (ALJ Aug. 8, 2003) ("Discrete acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges").

In contrast, in *Brune v. Horizon Air Industries, Inc*., 2002-AIR-8, at 10 (ALJ Dec. 16, 2003), the ALJ held that, consistent with *Morgan*, claims of retaliatory conduct earlier than 90 days prior to the filing of a complaint may be timely where such conduct takes the form of an ongoing hostile work environment. *Id.* at 10. In *Brune*, the ALJ found the unlawful "practice" was management's ongoing attempt to constrain the employee's discretion by threats and by singling him out, and requiring justification for his actions as a pilot in command. Although some of the acts occurred outside the 90 days before the employee complained, the ALJ found the actions collectively created a hostile work environment and "should be viewed as one unlawful employment practice." *Id.*

4. Preliminary *Prima Facie* Showing

a. General

The regulations require OSHA to dismiss the complaint prior to its investigation if the complainant fails to make a *prima facie* showing that the protected activity was a "contributing factor" in the adverse employment action.[11] 49 U.S.C. § 42121(b)(2)(B)(i); 29 CFR § 1980.104. SOX regulations set forth what elements must be satisfied to make this *prima facie* showing. 29 CFR § 1980.104(b)(1). Generally, the complaint must allege the existence of

[11] Once the claim proceeds to a hearing, the complainant must prove by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse action alleged in the complaint. 29 CFR § 1980.109(a); *Harvey v. The Home Depot, Inc.,* 2004-SOX-77, n.4 (ALJ Nov. 24, 2004).

facts and evidence to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a "contributing factor" in the adverse employment action.[12] 29 CFR § 1980.104(b)(2). Normally, this burden will be satisfied if the adverse action occurred "shortly after" the protected activity. *Id.* Thus, a significant gap in time between the complainant's protected conduct and the adverse action may result in dismissal. *See Heaney v. GBS Properties LLC*, 2004-SOX-72 (ALJ Dec. 2, 2004) (dismissing complaint for failure to make a *prima facie* case where the complainant engaged in protected conduct several years prior to his termination).

To establish a *prima facie* SOX case, the employee must demonstrate (1) the employee engaged in protected activity; (2) the employer knew of the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. *Van Asdale v. International Game Technology*, 498 F. Supp. 2d 1321, 1329 (D. Nev. 2007)

In *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB 04-149, 2004-SOX-11 (ARB May 31, 2006), the ARB held that a SOX complainant need not show that protected activity was a *primary* motivating factor in order to establish causation, and instead need only demonstrate that protected activity was a *contributing* factor. Citing *Marang v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), a leading case interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1), the ARB held that a "contributing factor" is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Klopfenstein*, ARB 04-149 at 18. The ARB noted this test is specifically intended to overrule the existing case law, which required a whistleblower to prove his protected activity was a "significant," "motivating," "substantial," or "predominant" factor in an employment action. *Id.*

The OSHA Manual provides that, although complaints which do not allege a *prima facie* allegation will not be docketed if the complainant indicates concurrence with the decision to close the case administratively, if the complainant refuses to accept this determination the case will be docketed and subsequently dismissed with appeal rights. OSHA Manual, at 2-2.

b. Particularity

In *Lerbs*, 2004-SOX-8, the ALJ granted the employer's motion for summary decision because the complainant, a "cash manager" for the restaurant, failed to show he engaged in protected activity, in part because one of his alleged complaints did not state a particular concern about the company's practices. Specifically, the employee allegedly asked the company's controller about certain entries in a general ledger that reclassified a negative cash account balance to accounts payable. On another occasion, he allegedly told the company's chief information officer that he thought the entry was misleading. The ALJ found these remarks were more like general inquiries which were not protected under SOX.

[12] The written complaint may be supplemented by OSHA's interviews of the complainant. 29 CFR § 1980.104(b)(1).

In contrast, in *Collins*, 334 F. Supp. 2d 1365, a federal district court denied defendants' motion for summary judgment because it found a genuine issue of material fact existed whether the plaintiff had engaged in protected activity. The plaintiff made four disclosures which she alleged were protected by SOX: (1) that the company knowingly overpaid invoices to an advertising agency; (2) that the company used the ad agency because of a personal relationship between management and the agency; (3) that the Director of Sales violated the company's commissions scheme by overpaying sales agents who were her personal friends; and (4) that there were kickbacks involving the purchase of lumber. The plaintiff contended that these disclosures were protected because they alleged attempts to circumvent the company's system of internal accounting controls and therefore stated a violation of Section 13 of the Exchange Act, 15 U.S.C. § 78m(b) ("no person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls").

The *Collins* court rejected the company's assertion that the complaints were too vague to constitute protected activity, noting that the company had taken the allegations seriously and investigated the claims. Moreover, although the court agreed that "the connection of Plaintiff's complaints to the substantive law protected in Sarbanes-Oxley [wa]s less than direct," it found that "the mere fact that the severity or specificity of her complaints does not rise to the level of action that would spur Congress to draft legislation does not mean that the legislation it did draft was not meant to protect her." *Id.* at 1377.

5. Notice of Receipt

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

According to the OSHA Manual, as part of the docketing procedures (after the 20-day preliminary determination period) when a case is opened for investigation, the Supervisor will prepare a letter notifying the respondent that a complaint alleging discrimination has been filed by the complainant and requesting that the respondent submit a written position statement. OSHA Manual, at 2-3. This suggests that the employer will not be notified until after the investigator already has made his or her decision regarding whether the complainant established a *prima facie* case.

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

6. Notice to SEC

At its request, copies of all pleadings must be sent to the SEC. 29 CFR § 1980.108(b). Moreover, a copy of OSHA's findings and determination must be transmitted to the SEC. OSHA Manual, at 14-5. Furthermore, the SEC may participate as *amicus curiae* at any time in the proceedings. 29 CFR § 1980.108(b).

7. Respondent's Statement of Position

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

If the respondent requests a meeting with OSHA, the respondent may be accompanied by counsel and "any persons with information about the complaint who may make statements." OSHA Manual, at 14-3.

At this stage, if the respondent demonstrates in its submission by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the complainant's protected activity, an investigation of the complaint will not be conducted. 49 U.S.C. § 42121(b)(2)(B)(ii); 29 CFR § 1980.104(c); OSHA Manual, at 14-2. In one of the earliest SOX decisions on the merits, "clear and convincing" evidence was defined as an evidentiary standard that "requires a burden higher than 'preponderance of the evidence' but lower than 'beyond a reasonable doubt.'" *Getman v. Southwest Securities, Inc*., 2003-SOX-8, at 10 (ALJ Feb. 2, 2004) (*citing Yule v. Burns Int'l. Security Service*, 1993-ERA-12 (Sec'y May 24, 1995)); *see also Taylor v. Express One International, Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002). The ARB has relied on the Black's Law Dictionary definition: "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB 02-028, 2001-AIR-3 (Jan. 30, 2004).

In *Cunningham v. Tampa Electric Co., Inc*., 2002-ERA-24 (ALJ Dec. 18, 2002), an ALJ described this defense as a "statutory adoption of the dual or mixed motive analysis in *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977)." However, the AIR 21 statute (and by extension, Sarbanes-Oxley) establishes a higher "clear and convincing evidence" standard. 49 U.S.C. § 42121(b)(2)(B)(ii).

8. Investigation and Determinations

If, during the preliminary complaint-and-response phase, the respondent does not demonstrate by clear and convincing evidence that it would have taken action against the employee in the absence of protected activity, OSHA must investigate the complaint within 60 days of receiving it to determine whether there is reasonable cause to believe that the respondent discriminated against the complainant in violation of the statute. 29 CFR §§ 1980.104(d) and 1980.105(a). Although the statute mandates investigation within 60 days, OSHA recognizes that "there may be instances when it is not possible to meet [this mandate.]" OSHA Manual, at 14-4.

OSHA has delegated the overall responsibility for all whistleblower investigation activities to the Regional Administrators, who are authorized to issue determinations and approve settlement of whistleblower complaints. This authority may be re-delegated, but no lower than the Assistant Regional Administrator or Area Director level. OSHA Manual, at 1-2.

Statements made to DOL in the course of a SOX whistleblower investigation have been found to be protected by an absolute privilege from a state law defamation claim because they were statements to an administrative agency acting in a quasi-judicial capacity. *Morlan v. Qwest Dex, Inc.*, 2004 WL 1900368 (D. Or. Aug. 25, 2004) (plaintiff's suit for defamation based, in part, on statements made by employer's attorney during DOL investigation of SOX whistleblower complaint; attorney wrote in letter to DOL that employer had terminated plaintiff for "enhancement of data" and "falsification of documents").

9. Preliminary Orders of Reinstatement

If, after the investigation, OSHA determines there is "reasonable cause" to believe the complaint has merit, with limited exceptions "it shall issue" a preliminary order restoring the complainant to his or her employment status and requiring the employer to take affirmative action to abate the violation. 49 U.S.C. § 42121(b)(3)(B); 29 CFR § 105(a)(1). Reinstatement orders are immediately effective and are not stayed pending the resolution of any objections or appeal. *See* 49 U.S.C. § 4212 (b)(2)(A). If preliminary, immediate reinstatement is to be ordered under SOX, the investigator first must contact the named party and provide, in writing, the "substance of the relevant evidence" supporting the finding. 29 CFR § 1980.104(e). The named party must be given an opportunity to provide a written response and to present rebuttal witness statements within 10 days. *Id.*; OSHA Manual, at 14-3.

Although most DOL-enforced whistleblower statutes do not provide for preliminary reinstatement, the SOX "preliminary order of reinstatement" mechanism is parallel to provisions found in AIR21, the ERA and the Surface Transportation Assistance Act ("STAA"). There are, however, key differences in the structure of these statutes that affects the enforceability of such orders.

The legality of preliminary orders of reinstatement under the STAA was affirmed by the Supreme Court in 1987. In *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), the Court interpreted the pre-hearing reinstatement provision in Section 405 of the STAA, and held that minimal due process is satisfied where a DOL reinstatement order provides the respondent with: (1) notice of the employee's allegations; (2) notice of the substance of the relevant supporting evidence; (3) an opportunity to submit a written response; and (4) an opportunity to meet with the investigator and present statements from rebuttal witnesses. The Court held that the employer's presentation need not be formal, and cross-examination of the employee's witnesses need not be afforded prior to temporary reinstatement. *Id.* at 264.

In the first SOX case in which an employer refused to comply with an OSHA order requiring preliminary reinstatement, the district court enforced the order and the employer reinstated the employees to avoid being held in contempt. *Bechtel v. Competitive Technologies,* *Inc.*, 369 F. Supp. 2d 233 (D. Conn. 2005). On appeal, the Second Circuit held the Sarbanes-Oxley Act did not provide for judicial enforcement of such orders. *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006). This issue of enforceability addressed more fully in the Remedies section, *infra*.

In *Windhauser v. Trane*, ARB 05-127, 2005-SOX-17 (ARB Oct. 31, 2007), the ARB vacated an ALJ order awarding sanctions to the complainant for the employer's failure to comply with a preliminary order of reinstatement. The ARB held that the ALJ did not have the authority to impose monetary sanctions, and any enforcement action for failure to reinstate must be brought in federal court. The summary of the interim regulations suggests the "after-acquired evidence" defense is available to defeat reinstatement where evidence shows the employer would have terminated the employee on lawful grounds, regardless of the protected activity, on the basis of subsequently obtained information. *See* 68 Fed. Reg. 31861 (*citing McKennon v. Nashville Banner Publishing, Co*., 513 U.S. 352, 360-62 (1995)).

In the summary of its Final Rule, OSHA confirmed that "[w]here the named person establishes that the complainant would have been discharged even absent the protected activity, there would be no reasonable cause to believe that a violation has occurred. Therefore, a preliminary reinstatement order would not be issued." 69 Fed. Reg. 52108.

Another exception to reinstatement is where it can be established that the complainant is a "security risk (whether or not the information is obtained after the complainant's discharge)." 29 CFR § 1980.105(a)(1), 69 Fed. Reg. 52114. OSHA explained that this exception is to be narrowly construed. It is based on a similar provision added to the AIR21 regulations in response to the events of September 11, 2001. Accordingly, according to OSHA, it should only be applied where reinstatement might result in "physical violence" against persons or property. 69 Fed. Reg. 52109.

10. Objections

Within 30 days of receipt of findings, either party may file objections and request a hearing on the record before an ALJ. If no objection is filed within 30 days, the preliminary order is deemed a final order that is not subject to judicial review. 49 U.S.C. § 42121(b)(2)(A); 29 CFR § 1980.106(b)(2).

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

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

In *Lerbs v. Buca DiBeppo, Inc.*, 2004-SOX-8 (ALJ Dec. 30, 2003), the ALJ held that the 30-day objection period is not a jurisdictional requirement and, therefore, is subject to equitable tolling. The *Lerbs* ALJ decided the complainant's failure to serve a copy of his objections on the respondent within 30 days of receipt of OSHA's determination was not grounds for dismissal. *See also Richards v. Lexmark International, Inc.*, 2004-SOX-49, at 10-11 (ALJ Oct. 1, 2004) (denying motion to dismiss where respondent was not prejudiced by complainant's failure to timely serve respondent with his request for a hearing).

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

11. Discovery and Hearing Before ALJ

a. Case Assigned to ALJ

Upon receipt of an objection and request for hearing, the Chief ALJ assigns the case to an ALJ. 29 CFR § 1980.107(b). The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges apply to ALJ proceedings. *See* 29 CFR § 1980.107(a). When those Rules are inconsistent with a statute or regulation, the latter controls. 29 CFR § 18.1(a). Further, an ALJ may take any appropriate action authorized by the Federal Rules of Civil Procedure. 29 CFR § 18.29(a)(8). Moreover, in *In re Slavin*, 2002-SWD-1, ARB 02-109 (ARB June 30, 2003), the ARB found that the standards enunciated in the rules of professional conduct applicable within the state of the proceedings apply to proceedings before the ALJ.

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

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

b. Stay of Preliminary Reinstatement Order

Under SOX, if, after the investigation, OSHA determines there is reasonable cause to believe the complaint has merit, "it shall issue" a preliminary order reinstating the complainant. 49 U.S.C. § 42121(b)(3)(B). Reinstatement orders are immediately effective and under DOL's interim SOX rule could not have been stayed pending appeal. However, the DOL's Final Rule provides a procedure for a respondent to file a motion with the OALJ for a stay of a preliminary order requiring immediate reinstatement. *See* 29 CFR § 1980.106(b)(1) (ALJ); 29 CFR § 1980.110(b) (ARB).

c. Discovery

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

The scope of discovery in SOX whistleblower cases is broadly construed. *Leznik v. Nektar Therapeutics, Inc.,* 2006-SOX-93, at 5 (ALJ Feb. 9, 2007) (Order Granting Motion to Compel). "Unless it is clear that the information sought can have no possible bearing on a party's claims or defenses, requests for discovery should be permitted." *Id.* To allow the complainant to establish discrimination through inferences and circumstantial evidence, the complainant must have access to the employer's records. *Id.* (*citing Khandelwal v. Southern California Edison*, ARB 98-159, 1997-ERA-6 (ARB Nov. 3, 2000)).

Protective orders are not routinely granted. Instead, the movant must demonstrate good cause with specificity. 29 CFR § 18.15. In *Thomas v. Pulte Homes, Inc.*, 2005-SOX-9 (ALJ Aug. 9, 2005), the complainant moved to seal the record, and the respondent consented to the motion. The ALJ denied this request on the ground that the complainant failed to identify a specific need for confidentiality, such as "a privacy interest or potential harm or embarrassment that could result from disclosure of the record . . . " *Thomas*, at 3. The ALJ noted, "As the whistleblower provision in the Sarbanes-Oxley Act is involved, there is a public interest in the protection of investors, employees, and members of the public by improving the accuracy and reliability of financial disclosures by publicly traded corporations." *Id*. at 3 (*citing* S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002)). *See also Bechtel v. Competitive Technologies, Inc.*, 2005-SOX-33, at 3 (ALJ Oct. 5, 2005) (ALJ declined to consider, pre-hearing, a joint motion for protective order because the parties failed to explain the need for such an order, as required by 29 CFR § 18.15). In *Cantwell v. Northrop Grumman Corp*., 2004-SOX-75 (ALJ Feb. 9, 2005), the ALJ granted a protective order covering the salary amounts and performance reviews of employees, but denied a requested protective order for compensation policies and procedures.

Sanctions, including dismissal of the complaint, are available for failure to participate in discovery. *See Harnois v. American Eagle Airlines*, 2002-AIR-17, at 4 (ALJ Sept. 9, 2002) (dismissing complaint due to complainant's failure to comply with discovery order and repeated requests to withdraw his objections and request for a formal hearing); *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Apr. 23, 2003) (ordering complainant to show cause why her complaint should not be dismissed for her failure to cooperate in discovery); *Powers v. Pinnacle Airlines, Inc*., 2003-AIR-12 (ALJ May 21, 2003) (disqualifying counsel based on conduct before the ALJ); *Reid v. Niagara Mohawk Power Corp*., 2002-ERA-3 (ALJ Dec. 26, 2002) (failure to appear at depositions without good cause warranted dismissal).

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

Although SOX is silent regarding an ALJ's authority to issue subpoenas and despite the fact that the Administrative Procedures Act, 5 U.S.C. § 555(d) (agency subpoenas "authorized by law shall be issued to a party on request"), and the OALJ Rules of Practice, 29 CFR § 18.24, both allow agencies to issue subpoenas only where authorized by statute or law, the ARB has found that ALJs have the authority to issue subpoenas, even in the absence of an express statutory authorization. *See Peck v. Island Express*, 2001-AIR-3 (ALJ Aug. 20, 2001) (following *Childers v. Carolina Power & Light Co*., ARB 98-77, 97-ERA-32 (ARB Dec. 29, 2000) (ruling that ALJs have inherent power to issue subpoenas when a statute requires a formal trial-like proceeding)); *Hill v. Tennessee Valley Authority*, 87-ERA-23 and 24 (ALJ Apr. 17, 1990). However, in *Bobreski v. EPA*, 284 F. Supp. 2d 67, 76-77 (D.D.C. 2003), the court held there is no subpoena power under the whistleblower provisions of six environmental statutes where the relevant statutes (like SOX) did not provide for subpoena power.

Both SOX and the OALJ Rules of Practice are silent as to the geographic scope of an ALJ's subpoena power, if any; however it generally has been considered nationwide. *See, e.g., Taylor v. Express One International, Inc*., 2001-AIR-2 (ALJ Dec. 6, 2001). Nonetheless, the scope of a subpoena is limited by the following principles: (1) it must be issued for a lawful purpose within the statutory authority of the issuing agency; (2) the documents requested must be relevant to that purpose; and (3) the subpoena demand must be reasonable and not unduly burdensome. *See generally Peck v. Island Express*, 2001-AIR-3 (ALJ Aug. 20, 2001); *Taylor v. Express One International, Inc*., 2001-AIR-2 (ALJ Dec. 6, 2001); *see also United States v. Allis Chalmers Corp.*, 498 F. Supp. at 1027, 1029 (E.D. Wis. 1964) (*citing United States v. Morton Salt Co.*, 338 U.S. 632, 70 S. Ct. 357, 94 L.Ed. 401 (1950)).

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

d. Addition of Claims or Parties

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

In general, 29 CFR § 18.5(e) of the OALJ Rules of Practice governs amendment of "complaints, answers and other pleadings" before an ALJ. A "complaint," within the ambit of the Rules of Practice, is "any document initiating an adjudicatory proceeding." 29 CFR § 18.2(a). Because an initial OSHA complaint does not initiate an adjudicatory proceeding, it would appear that, under the plain language of the Rules, it is not subject to amendment under 29 CFR § 18.5(e). However, ALJs generally have not adhered to a strict interpretation of this text. Relation-back of amendments is governed by Fed.R.Civ.P. 15(c), although ALJs have been inconsistent in its application.

(i) Additional Claims

It is fairly clear that a SOX complaint filed in federal court after the expiration of 180 days generally must be limited in scope to the claims identified in the initial OSHA complaint.

For example, in *Willis v. Vie Financial Group, Inc*., 2004 WL 1774575 (E.D. Pa. Aug. 6, 2004), the district court held that the administrative exhaustion requirement of the SOX whistleblower provision precluded recovery for a discrete act of retaliation which was never presented to OSHA for investigation. In *Willis*, the complainant was terminated after he filed his initial OSHA complaint, but never sought to amend his administrative complaint nor did he ever file a new complaint with OSHA. Only when complainant removed the action to federal court did he attempt to add his termination claim. The court dismissed, reasoning that the SOX administrative scheme, unlike the Title VII administrative scheme, "is judicial in nature and is designed to resolve the controversy on its merits . . ." *Id.* at *15. The court also noted that, if the plaintiff had chosen to pursue administrative, as opposed to federal district court, adjudication, he could not have added the subsequent claim during an appeal to the ARB if it had not been before the ALJ. Similarly, in *McClendon v. Hewlett-Packard Co*., 2005 WL 2847224 (D. Idaho Oct. 27, 2005), the district court declined to adjudicate claims that had not been filed with OSHA.

The question whether a complainant may add claims in an ALJ proceeding after OSHA has issued its initial determination was answered in the negative in *Ford v. Northwest Airlines, Inc*., 2002-AIR-21 (ALJ Oct. 18, 2002). In *Ford*, an ALJ denied complainant's attempt to amend his complaint to include evidence of retaliatory adverse action that was not presented during the OSHA investigation. The ALJ reasoned that although "the substance of the [new claims was] based on the same core of operative facts that form[ed] the basis of [the original OSHA complaint]," OSHA was not given the opportunity to investigate the allegations "under the two-tiered scheme Congress provided for handling whistleblower claims." *Id*. at 8 n.3. The ALJ concluded:

> I will not arbitrarily usurp the system established by Congress and determine the legitimacy of this allegation in the first instance. A better procedure is to make the initial complaint to OSHA and then move to consolidate the complaint with litigation pending before the OALJ.

Id.

Likewise, in *Kingoff v. Maxim Group LLC*, 2004-SOX-57 (ALJ July 21, 2004), the complainant, after OSHA issued its initial determination, attempted to add constructive discharge claims before the ALJ. The ALJ found the constructive discharge claims were of a drastically different type from those contained in the initial complaint and were clearly untimely under the SOX whistleblower provision. The ALJ held the belated claims could not, consistent with due process, be considered in the matter before the ALJ.

Similarly, in *Roulett v. American Capital Access*, 2004-SOX-78 (ALJ Dec. 22, 2004), the ALJ refused to permit the complainant to amend his complaint after the expiration of the 90-day statute of limitations period to include an unfavorable compensation claim where the claim was not reasonably related to complainant's termination claim in his original complaint.

In contrast, in *Hooker v. Westinghouse Savannah River Co.*, ARB 03-036, 2001-ERA-16 (ARB Aug. 26, 2004), a *pro se* complainant failed to allege his refusal-to-rehire claim in his initial ERA discrimination complaint, although he did testify to this in his deposition. The ALJ *sua sponte*, noting the complainant's *pro se* status and the fact that respondent did not contest the court's motion, amended the complaint to include the refusal-to-rehire allegation. On review, the ARB did not contest the *sua sponte* amendment, but explained that the proper procedure for amending complaints is found at 29 CFR § 18.5(e), which was not addressed by the ALJ in the decision.

On a related issue, the ALJ in *Morefield v. Exelon Servs. Inc*., 2004-SOX-2 (ALJ Jan. 28, 2004), concluded that, although new violations generally may not be raised after 90 days, "the scope of an OSHA investigation does not establish boundaries of the factual inquiry permitted in the subsequent adjudication." Therefore, the ALJ found there is no transgression of the "two tiered" administrative scheme for handling whistleblower claims where an ALJ considers evidence not raised at the OSHA investigation phase. The ALJ reasoned that the statute and regulations permit discovery and a *de novo* hearing of the facts relating to both the protected activities and the reasons for the adverse action regardless of OSHA's findings.

(ii) Additional Parties

In *Hanna v. WCI Communities, Inc.*, 2004 U.S. Dist. LEXIS 25652 (S.D. Fla. 2004), the court held that the plaintiff could not add new defendants to a federal district court complaint which were not named in the initial OSHA complaint. The court reasoned that the plaintiff "failed to afford OSHA the opportunity to resolve [plaintiff's] allegations [against the newly-named defendants] through the administrative process. . . [and] never afforded the DOL the opportunity to issue a final decision within 180 days of filing his administrative complaint." Similarly, in *Bozeman v. Per-Se Technologies, Inc*., 456 F. Supp. 2d 1282 (N.D. Ga. 2006), the court held that by failing to name individual respondents in an OSHA complaint, complainant did not exhaust his administrative remedies with respect to his SOX claim against these individual respondents, and therefore the claims against the individual respondents must be dismissed.

In contrast, complainants' attempts to add new respondents before the ALJ subsequent to an initial determination by OSHA have met with mixed results.

In *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Mar. 5, 2003), the complainant attempted to add the parent company of the originally named respondent, Pinnacle, to the ALJ complaint after OSHA dismissed her complaint on the basis that Pinnacle was not a publicly traded company. The ALJ ruled the complainant could not add the parent as a respondent because, *inter alia*, the complaint against the parent was untimely as it had been filed more than 90 days after the alleged violation.

In contrast, in *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 17, 2004), the ALJ, citing 29 CFR § 18.5(e) of the OALJ Rules of Practice, permitted complainant to amend his initial OSHA complaint to include as a respondent the publicly held parent company of his employer. Further, the ALJ (citing Fed.R.Civ.P. 15(c)) permitted the amendment to relate back to the date of the initial OSHA complaint, thereby rendering the claims against the parent corporation timely. The ALJ reasoned that, although the complainant was aware of the identity and role of the parent company from the outset, "amending the complaint filed before OSHA by adding . . . the parent company . . . as a respondent comports with the purpose of Rule 15(c) and the purpose of the Act." The ARB affirmed this decision, holding that "an administrative law judge may permit a complainant to amend a complaint when the amendment is reasonably within the scope of the original complaint, the amendment will facilitate a determination of a controversy on the merits of the complaint and there is no prejudice to the public interest and the rights of the parties." *Gonzalez v. Colonial Bank*, 2004-SOX-39, ARB 05-060, at 3 (ARB May 31, 2005).

Likewise, in *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Oct. 19, 2004), the ALJ, citing no authority, stated that "[i]ndividuals and entities may be added as parties when they were not joined below through error." The ALJ permitted the complainant to add as respondents the individual executives of the named corporate respondent who were named as those who terminated the complainant's employment. Although the ALJ observed that the initial OSHA complaint is "not a pleading under Rule 8(a), Fed. R. Civ. P., but a complaint in the ordinary sense," the ALJ did not reconcile this observation with 29 CFR § 18.5(e), which only grants the ALJ discretion to permit amendments to "complaints, answers and other pleadings, as defined by the Rules." The ALJ denied the complainant's attempt to add as individual defendants other employees who were not the complainant's "superiors."

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

The *Gonzalez* and *Gallagher* decisions illustrate why a complainant might choose to pursue agency adjudication rather than removing to federal district court after 180 days. For example, if the complainant in *Gonzalez* had removed to federal court, the court, consistent with the reasoning in *Willis* and *Hanna*, likely would have held that the administrative exhaustion requirement of the SOX whistleblower provision precluded addition of the parent corporation as a defendant. Moreover, in federal court, the OSHA administrative complaint clearly would not have been subject to amendment under Fed.R.Civ.P. 15(a). *See* Fed.R.Civ.P. 3 ("complaint" is a document filed with the court that commences a "civil action"). Finally, the applicable federal district court would have been bound by Eleventh Circuit precedent. *See Powers v. Graff*, 148 F.3d 1223, 1226-27 (11th Cir. 1998) (Rule 15(c) does not permit relation back where the plaintiff was "fully aware of the potential defendant's identity but not of its responsibility for the harm alleged. . . . '[E]ven the most liberal interpretation of "mistake" cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset.'") (*quoting Wells v. HBO & Co*., 813 F. Supp. 1561, 1567 (N.D. Ga. 1992)).

e. Motions

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

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

f. Bench Trial Before ALJ

If a timely objection to OSHA's determination is made, a full hearing before an ALJ must be held "expeditiously." 29 CFR § 1980.107. The term "expeditiously" is not defined. Objections are heard *de novo* before the ALJ. 29 CFR § 1980.107(b); OSHA Manual, at 4-3.

29 CFR § 18.27(c) provides that "[u]nless otherwise required by statute or regulation, due regard shall be given to the convenience of the parties and the witnesses in selecting a place for the hearing." ALJs are required to issue findings on all contested issues. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB 04-149, 2004-SOX-11 (ARB May 31, 2006).

g. Evidence

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

In *Dolan v. EMC Corp.*, 2004-SOX-1 (ALJ Mar. 24, 2004), the complainant sought to introduce into evidence a letter from the employer's counsel in which the employer refused to remove a negative performance evaluation in order to show a retaliatory act had occurred within the SOX limitations period. The letter was written in response to a letter from complainant's counsel arguing that the evaluation was false and defamatory and suggesting the employer should settle. The employer contended its counsel's letter was inadmissible as part of settlement negotiations under FRE 408. The ALJ disagreed. The ALJ found that the policy favoring exclusion of settlement documents was to prevent chilling of non-litigious solutions to disputes, and that exclusion is not required where the evidence is offered for a purpose other than to prove liability or damages. The ALJ ruled the letter was proffered to establish the final retaliatory act against the complainant and was, therefore, admissible. In any event, the ALJ found the letter was not, in fact, an offer of settlement or compromise.

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

h. Reconsideration

The SOX regulations suggest ALJs have the authority to reconsider within 10 days following issuance of the initial decision and order, and that a timely filed motion to reconsider tolls the time for appeal. 29 CFR § 1980.110(c). *See also Allen v. EG & G Defense Materials, Inc.*, 1997-SDW-8 & 10 (ALJ Aug. 21, 2001); *Macktal v. Brown & Root, Inc.*, ARB 98-112, 86-ERA-23 (ARB Nov. 20, 1998). However, in *Negron v. Vieques Air Link, Inc.*, ARB 04-021, 2003-AIR-10 (ARB Jan. 8, 2004), the ARB found that once a party files a petition for review with the ARB, the ALJ lacks jurisdiction to reconsider or amend his or her order. In *Steffenhagen v. Securitas Sverige, AR*, 2003-SOX-24 (ALJ Aug. 13, 2004), the ALJ found she did not have jurisdiction to rule on a motion to reconsider when the complainant also filed on the same day an appeal to the ARB.

The ARB employs the same principles that federal courts employ in deciding requests for reconsideration, including "(i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision." *Halpern v. XL Capital, Ltd.*, ARB 04-120, 2004-SOX-54 (ARB Apr. 4, 2006) (citations omitted). *See also Getman v. Southwest Securities, Inc.*, ARB 04-059, 2003-SOX-8 (ARB Mar. 7, 2006) (applying same factors and denying reconsideration because complainant's motion for reconsideration did not raise new factual or legal arguments).

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

12. Appeal to Administrative Review Board

Within 10 business days following the ALJ's decision, either party may file a petition for review with the ARB. 29 CFR § 1980.110(a). Review is discretionary. If no petition is filed, the ALJ's decision becomes final within 10 days. If a petition for review is filed, but the ARB does not issue an order accepting the case for review within 30 business days of the ALJ's decision, the ALJ decision becomes final. 29 CFR § 1980.110(b). *See also Walker v. Aramark Corp.*, 2003-SOX-22, ARB 04-006 (ARB Nov. 13, 2003). The ARB has been delegated the authority to act for the Secretary and issue final decisions under SOX and acts with all the powers the Secretary would possess in rendering a decision. 29 CFR § 1980.110(a). If the ARB accepts a case for review, the ALJ's decision becomes "inoperative," except that a preliminary order of reinstatement remains effective while review is conducted. 29 CFR § 1980.110(b). Unlike the Federal Rules of Appellate Procedure, the procedural regulations governing SOX claims do not provide for the filing of a cross-petition. Accordingly, a party that prevails before the ALJ but may later wish to appeal a portion of the decision must file a protective appeal within 10 days of the issuance of the ALJ's decision. *Henrich v. Ecolab, Inc.*, ARB 05-036, 2004-SOX-51 (ARB Mar. 31, 2005).

The ARB acts in an appellate capacity and its decision is based only on evidence considered by the ALJ in the initial hearing. *Carter v. Champion Bus, Inc.*, ARB 05-076, 2005-SOX-23 (ARB Sept. 29, 2006) (the ARB will not consider legal arguments or evidence raised for the first time on appeal). No discovery is available. *See Reid v. Constellation Energy Group, Inc.*, ARB 04-107, 2004-ERA-8 (ARB Oct. 13, 2004); *Halpern v. XL Capital, Ltd.*, ARB 04-120, 2004-SOX-54 (ARB Oct. 13, 2004); *Cummings v. USA Truck, Inc.*, ARB 04-043, 2003-STA-47 (ARB Sept. 15, 2004). Claimed procedural due process violations not presented to the ALJ are waived. *Reddy v. Medquist, Inc.*, ARB 04-123, 2004-SOX-35, at 9 (ARB Sept. 30, 2005) (*citing Schlagel v. Dow Corning Corp.*, ARB 02-092, 01-CER-1, at 9 (ARB Apr. 30, 2004). The ARB holds its proceedings in Washington, D.C., unless for good cause the ARB orders that proceedings in a particular matter be held in another location. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). There is no provision on oral argument before the ARB under the SOX regulations, and the absence of such a provision implies that granting oral argument is within the discretion of the ARB. *Varnadore v. Oak Ridge National Laboratory,* ARB 99-121, 1992-CAA-2, (ARB June 9, 2000). In practice, the ARB decides whistleblower cases on the pleadings and does not hold oral argument. The ARB does not currently have its own procedural regulations.

The ARB reviews the ALJ's findings of fact under a substantial evidence standard (29 CFR § 1980.110(b)) and conclusions of law *de novo*. *Negron v. Vieques Air Link, Inc.*, ARB 04-021, 2003-AIR-10 (ARB Jan. 8, 2004); *Hasan v. J.A. Jones, Inc.*, ARB 02-123, 2002-ERA-5 (ARB June 25, 2003). An ALJ's recommended grant of summary decision, however, is reviewed *de novo*. *Reddy v. Medquist, Inc.*, ARB 04-123, 2004-SOX-35, at 4 (ARB Sept. 30,

2005) (*citing Honardoost v. Peco Energy Co*., ARB 01-030, 00-ERA-36, at 4 (ARB Mar. 25, 2003)). Dismissals for failure to prosecute or to comply with the federal rules or any order of the court are reviewed under an abuse of discretion standard. *Howick v. Campbell-Ewald Co*., ARB 03-156 & 04-065, 2003-STA-6 & 7 (ARB Nov. 30, 2004).

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

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

a. Timeliness of Appeal

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

The limitations period for filing a petition for review with the ARB is considered an internal procedural rule that is subject to equitable tolling. *See Stoneking v. Avbase Aviation*, ARB 03-101, 2002-AIR-7, at 2 (ARB July 29, 2003); *Herchak v. America West Airlines, Inc*., ARB 03-057, 2002-AIR-12, at 5 (ARB May 14, 2003).

b. Interlocutory Appeals

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

To obtain review of an ALJ's interlocutory order, a party seeking review is generally required first to obtain certification of the interlocutory questions from the ALJ. *Somerson v. Mail Contractors of America*, ARB 02-118, 02-STA-44 (ARB Feb. 13, 2003); *Puckett v. Tennessee Valley Auth*., ARB 02-070, 2002-ERA-15 (ARB Sept. 26, 2002). An ALJ's authority to certify questions of law for interlocutory review is analogous to a federal district court's authority to certify a question to a court of appeals under 28 U.S.C. § 1292(b). *See Plumley v. Federal Bureau of Prisons*, 86-CAA-6 (Sec'y April 29, 1987). Under 28 U.S.C. § 1292(b), a district judge may certify an interlocutory order for appeal when: (1) the order "involves a controlling question of law as to which there is substantial ground for difference of opinion"; and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In *Ford v. Northwest Airlines, Inc*., ARB 03-014, 2002-AIR-21, at 4 (ARB Jan. 24, 2003), the ARB held that it may also decide to review non-final orders that fall within the limited "collateral order" exception as applied by the courts, under which "the order appealed must 'conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.'"

In *Hibler v. Exelon Generation Co., LLC*, ARB 03-106, 2003-ERA-9 (ARB Feb. 26, 2004), and *Welch v. Cardinal Bankshares Corp*., ARB 04-054, 2003-SOX-15 (ARB May 13, 2004), the ARB expressed that even if the ALJ certifies an issue for appeal under 28 U.S.C. § 1292, the ARB still will evaluate whether interlocutory appeal is appropriate under the collateral order exception. In *Welch*, the ARB refused to decide the issue whether a failure to obtain certification is fatal to a request to file an interlocutory appeal.

c. Sanctions

Failure to adhere to ARB orders, such as briefing schedules, may be grounds for dismissal. *See Cunningham v. Washington Gas Light Co*., ARB 04-078, 2004-SOX-14 (ARB Apr. 21, 2005) (dismissing appeal for failure to file a brief and failure to file a response to the ARB's show cause order); *Reid v. Niagara Mohawk Power Corp*., ARB 04-181, 2000-ERA-23 (ARB Dec. 8, 2004) (dismissing appeal for failure to file a petition for review of ALJ's recommended decision within 10 business days of the date on which the ALJ issued the recommended decision and failing to respond to show cause order); *Reid v. Constellation Energy Group, Inc*., ARB 04-107, 2004-ERA-8 (ARB Dec. 17, 2004) (dismissing appeal for failure to comply with briefing schedule); *Powers v. Pinnacle Airlines, Inc*., ARB 04-035, 2003-AIR-012 (ARB Sept. 28, 2004) (Board dismissed Powers' appeal for failure to file a conforming brief), *appeal pending, Powers v. Department of Labor*, No. 04-4441 (6th Cir.); *Melendez v. Exxon Chemical Americas*, ARB 03-153, 1993-ERA-6 (ARB Mar. 30, 2004); *Gass v. Lockheed Martin Energy Systems, Inc*., ARB 03-093, 2000-CAA-22 (ARB Jan. 29, 2004); *Steffenhagen v. Securitas Sverige, AR*, ARB 03-139, 2003-SOX-24 (ARB Jan. 13, 2004).

d. Enforcement of a Final Order

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

13. Appeal to Court of Appeals

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

SOX does not set forth the standard of review for appeals to the Court of Appeals. Accordingly, the default standards set forth in the Administrative Procedures Act ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law") should apply. *See Alaska Dep't of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461 (2004). Under the APA, the court is bound by the ARB's factual findings if they are supported by substantial evidence. 5 U.S.C. § 706(2). *See UPS v. Administrative Review Bd*., 1998 U.S. App. LEXIS 24978 (6th Cir. 1998). In *Roadway Express, Inc. v. Admin. Review Bd*., 2004 U.S. App. LEXIS 25578 (6th Cir. Nov. 22, 2004), the Sixth Circuit stated the legal conclusions of the ARB are to be reviewed "*de novo*, with the proper deference due an agency interpreting the statute it is charged with administering."

14. Removal to Federal Court On or After 180 Days

If the DOL has not issued a *final* decision within 180 days and the delay is not a result of the complainant's bad faith, the complainant may withdraw his or her administrative complaint and file an action for *de novo* review in federal district court. 18 U.S.C. § 1514A(b)(1)(B). *See Roulett v. American Capital Access Corp*., ARB 05-045, 2004-SOX-78 (ARB Aug. 30, 2005); *Allen v. Stewart Enterprises, Inc*., ARB 05-059, 2004-SOX-60, 61 & 62 (ARB Aug. 17, 2005); *McIntyre v. Merrill Lynch*, ARB 04-055, 2003-SOX-23 (ARB July 27, 2005); *Heaney v. GBS Properties LLC, d/b/a/ Prudential Gardner Realtors*, ARB 05-039, 2004-SOX-72 (ARB May 19, 2005). The district court has jurisdiction without regard to the amount in controversy. Moreover, the same burdens of proof that apply before the ALJ apply in the district court. 18 U.S.C. § 1514A(b)(2)(C).

In *Hanna v. WCI Communities, Inc*., 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. 2004), a federal district court in Florida explained that OSHA's "preliminary findings" do not constitute a "final" order even if issued within 180 days, rather a "final" order is obtained only when the ARB issues a final decision or if the plaintiff fails to appeal the preliminary order.

In *Nixon v. Stewart & Stevenson Servs., Inc*., 2005-SOX-1 (ALJ Feb. 16, 2005), complainant's delay constituted "bad faith," and his motion to withdraw his complaint and stay the proceedings was denied. First, complainant requested the proceeding be delayed for financial reasons. The ALJ granted that request over respondent's objections, explaining to complainant the 180-day limitations period would be tolled. Complainant was granted another delay for incomplete discovery. The ALJ again explained the tolling of the limitations period. Respondent then delayed the proceeding because of the unavailability of a witness, and again the limitations period was tolled. Complainant asked to withdraw his complaint to file the action in district court and filed a motion to stay the proceeding, pending filing with the district court. The ALJ refused both motions stating, "his attempt to invoke the 180 limit after having informed the parties he waived such a right and obtaining a delay based on that representation, constitutes bad faith under the regulations."

In *Murray v. TXU Corp.*, 279 F. Supp. 2d 799 (N.D. Tex. 2003), a federal district court in Texas held that the defendant bears the burden of showing that the Secretary's failure to timely issue a final decision was due to the claimant's bad faith. *See also Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004) (evidence that plaintiff did not fully cooperate with OSHA investigators and that delay in issuance of OSHA's final determination was due in some part to settlement negotiations alone was insufficient to defeat federal court jurisdiction based on plaintiff bad faith; plaintiff's ability to file in federal court is not premised on showing of good faith, but on a failure to show that delay in OSHA's final determination was a result of bad faith).

Fifteen (15) days in advance of filing an action in district court, the complainant must file a notice with the ALJ or ARB of his or her intention to file such a complaint, and serve such notice upon all parties. 29 CFR § 1980.114(b).

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

In *Stone v. Duke Energy Corp.*, 432 F.3d 320 (4th Cir. 2005), the plaintiff filed a SOX complaint in district court after 180 days had passed following his filing of an administrative complaint with DOL. While the district court action was pending, the ALJ entered an order in the administrative proceeding stating that the district court had assumed jurisdiction and the case no longer was before the OALJ. Subsequently, the district court dismissed the complaint for failing to meet pleading requirements. Rather than amend his complaint to satisfy those requirements, the plaintiff filed a new complaint. The employer argued that the ALJ order had been a "final order" so that the plaintiff's new complaint was, in actuality, an appeal of a final decision of the DOL and thus had to be brought in the circuit court. The district court agreed and dismissed the complaint for lack of subject matter jurisdiction. The Fourth Circuit disagreed, and remanded the case back to the district court. It found the ALJ's order was not a final decision. Rather, the ALJ simply was stating the administrative complaint no longer was before him. Moreover, the new complaint really was just a restatement of the prior complaint, and the prior complaint had been filed before the ALJ issued his order.

It is not yet settled whether a SOX complainant can remove the complaint to federal court once the claim has been tried on the merits before an ALJ. In the first decision addressing this issue, the court refused to allow a complainant to relitigate his claim in federal court after an ALJ dismissed it following a hearing on the merits. *Allen v. Stewart Enterprises, Inc.*, No. 05-4033 (E.D. La. Apr. 6, 2006). Relying on the principles of issue preclusion, collateral estoppel and the inherent right to stay an action pending an administrative decision, the court declined to permit a *de novo* adjudication and instead issued an order of mandamus requiring the ARB to issue a decision. Ironically, the judge gave the ARB two requested extensions to issue a final decision. This type of delay is primarily the reason Congress gave SOX complainants the option to remove their claims to federal court if DOL does not issue a final decision within 180 days of commencement of the action. The ARB subsequently issued a decision affirming the ALJ's dismissal of the case. *See Allen v. Stewart Enterprises, Inc.*, ARB 06-081, 2004-SOX-60 to 62 (ARB July 27, 2006).

Complainants must exhaust their administrative remedies before filing a complaint in federal court. 18 U.S.C. § 1514A(b)(1)(A). In *McClendon v. Hewlett-Packard Co.*, 2005 WL 2847224 (D. Idaho Oct. 27, 2005), plaintiff's complaint alleging defendant took away his job duties was untimely under OSHA's 90-day administrative filing period. Plaintiff opted out of the DOL forum and filed an action in the district court, alleging he was not time-barred from asserting other adverse employment actions. The court stated each discriminatory act starts the clock for filing an OSHA complaint. Since plaintiff's additional adverse employment actions were not asserted in his OSHA complaint, the court could not review them.

Where a party withdraws an appeal pending before the ARB, the ALJ's decision becomes the final decision of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). *Lowe v. Terminix International Co., L.P.*, ARB 07-004, 2006-SOX-89 (ARB Aug. 23, 2007); *Hagman v. Washington Mutual Bank, Inc.*, ARB 07-039, 2005-SOX-73 (ARB May 23, 2007).

a. Issues Relating To Removal

An issue that is just beginning to be addressed (*see* the district court's remand of *Allen v. Stewart Enterprises, Inc.*, *supra*) is whether a complainant may remove an action to district court after receiving an adverse decision from an ALJ, but before completing the appeals process to the ARB, if the ARB has not issued its ruling within 180 days after the filing of the complaint. The Labor Department has suggested that if the administrative process has resulted in a decision by an ALJ or the ARB even if after the expiration of 180 days, courts should apply the principles of collateral estoppel or *res judicata* in order to prevent the waste of resources resulting from duplicative litigation. In the Department's view, where an administrative hearing has been completed and a matter is pending before an ALJ or the ARB for a decision, a district court should treat a complaint as a petition for mandamus and order the Department to issue a decision under appropriate time frames. 69 Fed. Reg. 52111.

In *Hanna v. WCI Communities, Inc*., 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. Dec. 2, 2004), OSHA issued its preliminary order after the expiration of 180 days but prior to the filing of the plaintiff's district court lawsuit. While acknowledging the DOL's concerns regarding waste of resources resulting from duplicative litigation, the court held that OSHA's *preliminary* findings are not entitled to *res judicata* (claim preclusion) or collateral estoppel (issue preclusion) treatment in federal district court and the plaintiff was not required to exhaust his administrative appeals prior to filing a lawsuit in federal district court. The court reasoned that the plaintiff had not yet even reached the ALJ stage of the administrative process. The result may have been different had the complainant proceeded further through the administrative process.

In *Stone v. Duke Energy Corp*., 2004 WL 1834597 (W.D.N.C. June 10, 2003), a federal district court in North Carolina acknowledged the availability of a stay or writ of mandamus in such a case. *See also Corrada v. McDonald's Corp*., No. 04-1029 (D.C.P.R. Jan. 22, 2004) (granting plaintiff's motion to stay the administrative proceedings and ordering ALJ to demonstrate whether the failure of the DOL to issue a final decision within 180 days was due to the bad faith of the complainant).

A related issue arises when a complainant pursues claims in other fora based on the same facts and seeking similar relief as the SOX claim. This issue is particularly relevant in the SOX context because SOX retaliation claims potentially give rise to other securities-related or shareholder derivative litigation as well as related actions under state whistleblower protection statutes. The text of SOX suggests that its whistleblower provisions do not preempt such state laws. *See* 18 U.S.C. § 1514A(d).

In *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 9, 2004) (*Gonzalez I*), complainant filed a SOX whistleblower complaint with OSHA and several days later a state whistleblower action seeking similar relief on the same facts, which the respondent removed to a federal district court in Florida. The ALJ rejected respondent's argument that complainant was precluded from pursuing his OSHA claim because allowing the SOX case to proceed would have constituted impermissible "claim-splitting." The ALJ held that complainant's case was not barred by *res judicata* or claim-splitting as there was no prior judgment, the SOX claim was filed first, and most significantly, because the SOX action differed materially from the Florida whistleblower action.

In *Radu v. Lear Corp*., 2005 WL 2417625 (E.D. Mich. 2005), the court dismissed plaintiff's SOX claim for failing to meet SOX's procedural requirements. Ninety-one (91) days after plaintiff's termination, he filed his SOX claim (among others) in state court. Shortly after the action was removed to federal court, plaintiff filed a complaint with OSHA. The complaint was dismissed as untimely and plaintiff appealed that determination, requesting the court stay its proceedings. The court refused, ruling that filing a complaint in state court does not satisfy or toll SOX's statute of limitations.

b. Jury Trial

SOX does not expressly provide for a jury trial. However, its legislative history reflects that at least some of its drafters intended that a jury trial be available for whistleblower actions. *See* 148 Cong. Rec. § 7418, 7420 (comments by Sen. Leahy). If a plaintiff removes a SOX complainant to federal court and adds state law claims, the SOX complaint will likely be tried before a jury.

In *Hanna v. WCI Communities, Inc*., 2004 U.S. Dist. LEXIS 25650 (S.D. Fla. Dec. 2, 2004), a federal district court in Florida acknowledged that SOX is silent as to whether a plaintiff may demand a jury trial, and the issue was one of first impression. The court, however, refused to address the issue until and unless the parties' dispositive motions were denied, so that "the court might have the benefit of guidance from other courts that have considered the availability of jury trials under the Sarbanes-Oxley Act."

In *Murray v. TXU Corp*., 2005 WL 1356444 (N.D. Tex. June 7, 2005), the court granted defendants' Motion to Strike Plaintiff's Demand for a Jury Trial (but would consider an advisory jury if requested). The court determined SOX does not provide remedies for reputational injury nor does it provide for punitive damages, both of which plaintiff was seeking from a jury. In addition, the court rejected the contention that SOX's reference to an "action at law" implied a right to a jury trial. The court stated the legislative history, specifically Senator Leahy's comments in favor of a jury trial, were unpersuasive.

In *Mahony v. KeySpan Corp.*, 2007 WL 805813 (E.D.N.Y. Mar. 12, 2007). the court, without explanation, assumed that a SOX plaintiff is entitled to a trial by jury. Denying the employer's motion for summary judgment, the court held that it would defer to a jury's judgment whether plaintiff met his burden and the employer established by clear and convincing evidence that plaintiff's termination was non-retaliatory. In addition, the court held that SOX authorizes damages for reputational harm.

In *Walton v. Nova Information Systems*, 514 F. Supp. 2d 1031 (E.D. Tenn. 2007), the court held that "special damages" under SOX does not include damages for emotional distress or reputational harm, and that the back pay relief authorized by SOX is equitable in nature. Accordingly, there are no remedies under SOX for which a jury trial is required.

15. Burdens of Proof

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

For example, in *Collins*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004), the federal district court explained that "[t]he evidentiary framework to be applied in Sarbanes-Oxley is an analysis different from that of the general body of employment discrimination law." *Id.* at 1374, n.11. Under the SOX framework, a plaintiff in federal court must show by a preponderance of the evidence that the plaintiff's protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. In particular, the plaintiff must show by a preponderance of the evidence that: (1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. Once the plaintiff has met this burden, the defendant employer may avoid liability if it can demonstrate by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of [protected] behavior." *Id.* at 1376.

Likewise, this mixed-motive standard has been consistently applied by a number of ALJs during the past year. *See, e.g., Bechtel v. Competitive Technologies, Inc.*, 2005-SOX-33 (ALJ Oct. 5, 2005); *Reddy v. Medquist, Inc.*, ARB 04-123, 2004-SOX-35 (ARB Sept. 30, 2005) (finding complainant was not engaged in SOX-protected activity); *Kalkunte v. DVI Financial Servs., Inc.*, 2004-SOX-56 (ALJ July 18, 2005); *Marshall v. Northrup Grumman Synoptics*, 2005-SOX-8 (ALJ June 22, 2005); *Jayaraj v. Pro-Pharmaceuticals, Inc.*, 2003-SOX-32 (ALJ Feb. 11, 2005); *Platone v. Atlantic Coast Airlines*, 2003-SOX-27 (ALJ Apr. 30, 2004); *Getman v. Southwest Securities, Inc.*, 2003-SOX-8 (ALJ Feb. 2, 2004), and later proceeding at ARB 04-059 (ARB July 29, 2005); *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (ALJ Jan. 28, 2004).

In *Williams v. Administrative Rev. Bd.*, 376 F.3d 471 (5th Cir. 2004), the Fifth Circuit held that the *Ellerth/Faragher* standard applies in an ERA hostile work environment case where the employee suffered no adverse employment action. Therefore, a defendant can avert vicarious liability for a hostile work environment by showing that: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the harassed employee unreasonably failed to take advantage of any preventive opportunities provided by the employer. The court reasoned that "[i]f the *Ellerth/Faragher* standard applies in a race discrimination case, there is no reason not to apply the same standard in a whistle-blower case." *Id.* at 478. There appears to be no reason to believe the *Williams* reasoning would not apply to SOX whistleblower actions.

In *Sasse v. U.S. Dept. of Labor*, 409 F.3d 773 (6th Cir. 2005), the court recognized continuing violations for hostile work environment claims under the whistleblower statutes in CAA, SWDA and FWPCA, reasoning there are no material differences between Title VII and those statutes' whistleblower provisions because they all require actions to be filed within a certain time period after employment actions occur. Thus, the same analysis for such claims may be applied under SOX.

16. Confidentiality

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

According to OSHA, "[t]he information and statements obtained from investigations are confidential except for those which may be released under [FOIA] and the Privacy Act. . .." OSHA Manual, at 1-7 - 1-8; 14-5. Generally, this means that case file material will remain confidential during the pendency of the agency "enforcement proceedings." *See* 5 U.S.C. § 522(b). *See also Pruitt Electric Co. v. U.S. Dep't of Labor*, 587 F. Supp. 893, 895 (N.D. Tex. 1984).

However, after the case is closed, much of the case file material will be available for disclosure upon receipt of a FOIA request, a request from another federal agency, a request from an ALJ or through discovery procedures. OSHA Manual, at 1-8; 29 CFR § 70.3. For purposes of FOIA, a case file is "closed" once OSHA has completed its investigation and issues its determination (unless OSHA is participating as a party before the ALJ). OSHA Manual, at 1-8.

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

Moreover, if during the course of an investigation the employer identifies any materials obtained as a trade secret or confidential commercial or financial information, such information may be protected from disclosure "except in accordance with the provisions of Section 15 of the Act or similar protections under the other statutes." OSHA Manual, at 1-8.

However, in *Wallace v. CH2M Hill Group, Inc.*, 2004-SWD-3 (ALJ Dec. 6, 2004), the ALJ expressed that pleadings, motions and materials filed in the record as evidence probably cannot be shielded from public disclosure, but directed the parties to negotiate the issue and, if unsuccessful, file a motion to seal in the same manner as before a federal district court. The ALJ pointed out the distinction between confidentiality concerns and privileges, and directed that if a privilege is claimed, privilege logs should be prepared.

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

B. Retroactivity

In an issue of decreasing relevance, ALJs consistently have held that SOX whistleblower provisions do not apply retroactively. *See, e.g., McIntyre v. Merrill. Lynch, Pierce, Fenner & Smith, Inc*., 2003-SOX-23 (ALJ Jan. 16, 2004). However, evidence of pre-SOX conduct may be admissible to prove a violation of the Act. *See Taylor v. Express One International, Inc*., 2001-AIR-2 (ALJ Dec. 5, 2001).

C. ADR

Where there is an arbitration agreement, the Labor Department may defer to the arbitration process. *Boss v. Salomon Smith Barney*, 263 F. Supp. 2d 684 (S.D.N.Y. 2003). In *Roganti v. Metlife Financial Services*, 2005-SOX-2 (ALJ Nov. 23, 2004), the complainant asked the ALJ to permit him to withdraw his claim because he decided to pursue his SOX matter before an arbitration panel at the NASD, but requested the opportunity to reinstate the matter before the ALJ. The ALJ advised the complainant that he was not aware of any procedure that would allow the reinstatement of his complaint once it was withdrawn.

Similarly, in *Guyden v. Aetna, Inc*., 2006 WL 2772695 (D. Conn. Sept. 25, 2006), the court granted the employer’s motion to compel arbitration of a SOX claim. The court rejected complainant’s arguments that arbitration frustrates the legislative intent to place the whistleblower in the role of a private attorney-general who can "put a permanent dent" in the "corporate code of silence" (citing legislative history of Section 806). In addition, the court rejected complainant’s assertion that the confidentiality of arbitration and limited discovery available in arbitration rendered the arbitration agreement invalid.

In *Christensen v. Fannie May*, 2005-SOX-62 (ALJ Dec. 5, 2005), the ALJ issued an order staying the proceedings because the parties were pursuing arbitration and granted the Claimant’s Withdrawal of Objections.

The preclusive effect of arbitration decisions involving SOX claims has not yet been tested. Unlike DOL regulations implementing the whistleblower protections of the Surface Transportation Assistance Act (“STAA”), the regulations implementing SOX are silent on this issue. Under the STAA regulations, an ALJ is permitted to defer to an arbitrator's decision if the arbitration dealt adequately with the factual issues, the proceedings were fair and free from procedural defect, and the outcome was not repugnant to the purposes and policy of the STAA. 29 C.F.R. § 1978.112(c). *See, e.g.*, *Eash v. Roadway Express, Inc.*, ARB 04-036, 1998-STA-28 (ARB Sept. 30, 2005).

D. Settlement Agreements

1. General

At any time before issuance of a final order, a SOX proceeding may be terminated on the basis of a settlement agreement entered into by the parties and approved by the ALJ. 29 CFR § 1980.111(d)(2). It is OSHA's policy to seek settlement in all cases determined to be meritorious prior to referring the case for litigation. OSHA Manual 6-1.

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

Employers have an incentive to settle SOX claims where a general release of other existing and potential claims between the parties can be obtained from the complainant. In furtherance of its policy to seek settlement in all cases, the DOL has generally approved settlement agreements containing a general release of claims. *See Moore v. Cooper Cameron,* 2004-SOX-37 (ALJ July 21, 2004) (ALJ accepted settlement agreement containing general release as fair and reasonable).

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

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

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

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

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

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

2. Enforcement

In any case where the employer fails to comply with the terms of a settlement agreement, OSHA opines that it may treat such failure as a new instance of retaliation and require the opening of a new case. Alternatively, direct enforcement of the agreement may be sought in court. OSHA Manual 6-5.

In *Chao v. Alpine, Inc*., 2004 WL 2095732 (D. Me. Sept. 20, 2004), the DOL had filed a complaint seeking to enforce backpay, interest and attorney fees awarded by the ARB. While pending before the district court, the attorneys for the employee and the defendant entered into a verbal settlement agreement, the defendant sent a check to the employee's attorney to hold, and the employee's attorney sent a settlement agreement to the defendant for signature and return for signing by the employee. Upon return, however, the employee refused to sign. The check was not returned to the defendant. The defendant then sought enforcement of the settlement agreement by the district court. The court granted enforcement, reasoning that the employee was bound by the agreement of her counsel to the settlement, the counsel having not expressly conditioned the agreement on the employee's signature or on the employee's acceptance of the terms of the agreement.

E. Effect of Bankruptcy Proceedings

In *Davis v. United Airlines, Inc*., ARB 02-105, 2001-AIR-5 (ARB May 30, 2003), the ARB held that whistleblower actions brought pursuant to AIR21 are subject to the automatic stay of the Bankruptcy Code, 11 U.S.C.A. § 362(a)(1), and are not exempt from the stay pursuant to § 362(b)(4), which applies to actions and proceedings by a governmental unit to enforce its police and regulatory authority. In contrast, in *Briggs v. United Airlines*, 2003-AIR-3 (ALJ Feb. 13, 2003), the ALJ held that a DOL proceeding pursuant to AIR21 was exempt from the automatic stay provision under the regulatory and police powers exception.

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

VII. REMEDIES

A. Civil

1. Introduction

The text of the Sarbanes-Oxley Act provides for the following remedies:

> (1) In general. – An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.
>
> (2) Compensatory damages. Relief for any action under paragraph (1) shall include –
>
> (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

> (B) the amount to back pay, with interest; and
>
> (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

18 U.S.C. § 1514A(c). This language is comparable to the remedies text found in other whistleblower statutes administered by the Department of Labor; the ARB's remedies precedents under these other statutes, therefore, are likely to be followed by the Labor Department in SOX cases as well.

2. Back pay

a. Mitigation of Damages

Under the Act, a victim of employment discrimination is not specifically required to mitigate damages. However, the ARB has found such a requirement to be implicit, following the general common law rule of "avoidable consequences." *Johnson v. Roadway Express, Inc.*, ARB 99-111, 1999-STA-5 (ARB Mar. 29, 2000).

The employer bears the burden of proving that the employee failed to properly mitigate damages. To prove a failure to mitigate, the employer must show (1) there was substantially equivalent work available, and (2) the employee did not use reasonable effort in seeking the available positions. *Hobby v. Georgia Power Co.*, ARB 98-166, 90-ERA-30 (ARB Feb. 9, 2001).

If an employee refuses an offer by the employer to return to a past position, this fact alone normally supports the employer's failure to mitigate claim. In addition, an offer of a position that previously was denied often will toll the back-pay liability of an employer who is charged with employment discrimination. The rejection of the offer by the employee will end the employer's back pay liability. *Kalkunte v. DVI Fin. Servs.*, 2004-SOX-56 (ALJ July 18, 2005).

b. Valuing Fringe Benefits

The valuation of fringe benefits as part of the back-pay award to a successful plaintiff can be both controversial and complicated. Courts that have faced the valuation of fringe benefits have placed the burden on the plaintiff to prove that a fringe benefit existed, and the value of the benefit. Generally, this has resulted in the use of experts who employ complex formulas to demonstrate the values of lost benefits.

(i) Loss of Health Insurance Coverage

Prevailing employees are entitled to damages for health care costs incurred as a result of loss of coverage caused by termination. This may include the value of health insurance premiums or out-of-pocket medical expenses. *See Hobby, supra*; *Platone v. Atlantic Coast*

Airlines Holdings, Inc., 2003-SOX-27 (ALJ July 13, 2004) *rev'd on other grounds* ARB 04-154 (ARB Sept. 29, 2006); *see also Kalkunte, supra*; *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (ALJ Feb. 15, 2005).

In *Kalkunte*, the ALJ held that back pay and benefit considerations may include lost overtime, lost vacation and other chargeable pay remedies such as compensatory time, sick time, etc., and may include lost pension and health benefit losses and contributions to those plans for hours that would otherwise have been worked. However, the Complainant failed to request reinstatement of fringe benefits. In *Welch*, the complainant lost his life and health insurance benefits when he was fired by the respondent. While he was employed by a subsequent employer, the complainant was not entitled to either life or health insurance coverage, and he purchased health insurance through his wife's employer; the ALJ found the expense recoverable because complainant would not have had to purchase health insurance benefits if he had not been unlawfully discharged.

In *Tipton v. Indiana Michigan Power Co.*, ARB 04-147, 2002-ERA-30 (ARB Sept. 29, 2006) the ARB ruled that a complainant may recover the value of health insurance fringe benefits paid by his former employer or the cost of purchasing substitute coverage, but not both.

In *Jackson v. Butler & Co.*, ARB 03-116, 2003-STA-26 (Sept. 2, 2004), the complainant was awarded recovery of lost health insurance benefits, valued as the actual and direct expenses resulting from his loss of respondent's health plan. This included both the costs of premiums for replacement health insurance and out-of-pocket medical expenses.

(ii) Stock Options

The value of stock options is recoverable in whistleblower cases before the Department of Labor. *See, e.g.*, *Hobby, supra*. In *Jayaraj v. Pro-Pharmaceuticals, Inc.*, 2003-SOX-32 (ALJ Feb. 11, 2005) the ALJ explicitly stated that the economic loss recoverable by the plaintiff may include the value of lost stock options. However, because the complainant raised her request for recovery of the lost stock options for the first time in a post-hearing submission, rather than during the hearing itself, recovery was denied. There has been no ruling to date determining whether stock options can be included in a calculation of front pay damages.

c. Tax Bump Relief

Although there are currently no cases directly on point under SOX, the ARB has suggested the tax consequences of an award may be considered if there is sufficient evidentiary groundwork. *Doyle v. Hydro Nuclear Servs.*, ARB 99-041, 89-ERA-22 (ARB May 17, 2000). The issue of "tax bump up" has been addressed by the courts in employment discrimination cases arising under other statutes. In *Blaney v. Int'l Ass'n of Machinists*, 87 P.3d 757 (Wash. 2004), in an action under the state anti-discrimination law, the Supreme Court of Washington allowed for an offset of the tax consequences to the plaintiff flowing from the lump sum payment of damages. However, the court refused to characterize the offset of additional federal income tax consequences as "actual damages" because the tax consequences were too attenuated from unlawful discrimination to be deemed actual damages. Instead, the court characterized the offset as "any other appropriate remedy authorized by . . . the United States Civil Rights Act. During the litigation, a certified public accountant had provided expert testimony establishing that plaintiff would incur nearly a quarter of a million dollars in tax obligations that she would not have incurred "but for" the awards. *See also*, *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987) (allowing damages to compensate plaintiff for increased tax burden caused because of a single lump award); *Sears v. Atchison, Topeka & Santa Fe R.R. Co.*, 749 F.2d 1451 (10th Cir. 1984) (allowing an increase in award for back pay in order to compensate for the resultant tax burden from receiving a lump sum of more than 17 years in back pay); *EEOC v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364 (S.D. Fla. 1998) (citing *Sears* with approval but holding that such a tax bump required a sufficient evidentiary foundation); *Jordan v. CCH, Inc.*, 230 F. Supp. 2d 603 (E.D. Pa. 2002); Laura Sager & Stephen Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 S. CAL. L. REV. 1075 (2000); Gregg D. Polsky & Stephen F. Befort, *Employment Discrimination Remedies and Tax Gross Ups,* 90 IOWA L. REV. 67 (2004).

3. Interest

Plaintiffs who are successful in bringing an action under Sarbanes-Oxley are entitled to interest as part of their back pay award. As in other employment cases wherein the plaintiff is awarded back pay, the interest is determined in accordance with Section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621. Interest is not awarded on compensatory damages. *See, e.g., Kalkunte, supra* (citing *Smith v. Littenberg,* 92-ERA-52 at 5 (Sec'y Sept. 6, 1995)).

4. Special Damages

One court has suggested that "special damages," *e.g.*, reputation loss, must be specifically stated in the complaint. *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 802 (N.D. Tex. 2003). However, it is unlikely the Labor Department would require this kind of specificity in its pleading requirements.

a. Emotional Distress/Pain and Suffering

Complainants may recover for emotional distress in DOL whistleblower cases. *See, e.g.*, *Waechter v. J.W. Roach & Sons Logging and Hauling*, 04-STA-43, ARB 04-183 (ARB Dec. 29, 2005). However, like claims for emotional distress in other employment litigation, proving the extent of emotional distress and its causal relationship to the unlawful conduct can be problematic. *See, e.g.*, *Kalkunte, supra* (in SOX case, ALJ observes "compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation" but finds some elements of alleged emotional distress injury were not proved to be causally related to respondent's conduct).

b. Reputation Damages

The Act does not expressly provide for any award of damages for loss of reputation, but the ARB routinely has sustained awards for reputational damage under whistleblower statutes. *See Leveille v. New York Air Nat'l Guard*, ARB 98-079, ALJ 94-TSC-3

(ARB Dec. 16, 2003); *Van Der Meer v. Western Kentucky Univ.*, ARB 97-078, 95-ERA-38 (Apr. 20, 1998).

In one SOX case, *Hanna v. WCI Communities., Inc.*, 348 F. Supp. 2d 1332 (S.D. Fla. 2004), a district court held that reputation damages are allowed under the Act, finding that a plaintiff's reputation is damaged by termination, therefore diminishing their future earning capacity, and that accordingly plaintiff must be compensated for this loss in earnings in order to be made whole as the statute requires. The court relied on the Seventh Circuit's decision in *Williams v. Pharmacia, Inc.*, 137 F.3d 944 (1998) in which that court held that Title VII's remedies, as amended by the Civil Rights Act of 1991, allowed for an award for reputation damages. *See Mahony v. Keyspan Corp.*, No. 04 CV 554, 2007 U.S. Dist. LEXIS 22042 (E.D.N.Y. Mar. 12, 2007)(adopting the reasoning of *Hanna* and denying the defendant's request to strike the plaintiff's demand for damages to his reputation). *Cf. United States v. Burke*, 504 U.S. 229, 239 (1992) (court discussing Title VII, as written before the 1991 Act, stated that "nothing in this remedial scheme purports to recompense a Title VII plaintiff for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages...").

In contrast, in *Murray v. TXU Corp.*, *supra*, a district court held that non-pecuniary damages such as reputational injury are not allowable under SOX, finding the remedies under SOX analogous to the remedies under Title VII prior to the passage of the 1991 amendments. Similarly, in *Walton v. Nova Information Systems*, 514 F. Supp. 2d 1031 (2007), a district court, relying on the Supreme Court's Title VII decision in *United States v. Burke*, 504 U.S. 229 (1992), held that non-pecuniary remedies including "injury to reputation, emotional, mental and physical distress and anxiety, or punitive damages" were not recoverable under SOX.

5. Punitive Damages

The statute also does not authorize punitive damages because they are not considered as "relief necessary to make the employee whole." *Murray v. TXU Corp.*, *supra* (punitive damages not allowed as the statutory omission of punitive damages is clear and unequivocal, and, in any event, the fact that the original draft of the Act explicitly provided for punitive damages and subsequent drafts removed that language, reinforced the court's conclusion decision to read the statute "as written"); *see also Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332 (D. Fla. 2004) (plaintiff conceded that punitive damages are unavailable under SOX). Additionally, the ARB has held that the Labor Department cannot award exemplary or punitive damages without express statutory authorization. *See Berkman v. U.S. Coast Guard Academy*, ARB 98-056, 1997-CAA-2 (ARB Feb. 29, 2000).

Due to the unavailability of punitive damages, an Oregon District Court has found that "SOX does not provide an adequate statutory remedy to preclude" a common law wrongful discharge claim. *Willis v. Comcast of Oregon II*, 2007 U.S. Dist LEXIS 79927 (Oct. 25, 2007) (denying defendant's motion to dismiss plaintiff's wrongful discharge claim). However, in *Repetti v. Sysco Corp.*, 730 N.W.2d 189 (Feb. 28, 2007) the Wisconsin Court of Appeals held that SOX affords adequate relief to employees wrongfully discharged because the Act entitles employees to "all relief necessary to make the employee whole."

6. Reinstatement

The Act expressly includes reinstatement with the same seniority as a remedy available to an employee who prevails in a SOX claim. 18 U.S.C. § 1514A(c)(2)(A). Reinstatement is a standard and obvious component of a "make whole" remedy.

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

"Preliminary reinstatement" under the Sarbanes-Oxley Act has been contested and ignored by some employers, who have refused to reinstate complainant employees before the exhaustion of the administrative process. Such actions by employers have led affected employees to file suit in district courts seeking injunctions to enforce OSHA's preliminary orders of reinstatement. In two prominent decisions, courts have held they do not have the power to enforce OSHA's preliminary orders of reinstatement.

In May 2006, a divided panel of the Second Circuit vacated a district court injunction to reinstate a complainant employee and ordered the district court to dismiss the complainant. *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006). The court issued three separate opinions.

The first opinion, issued by Judge Jacobs, vacated the injunction on the grounds that the district court lacked jurisdiction to enforce a preliminary order. Judge Jacobs observed there are three provisions of § 1514A that provide for federal power to enforce actions related to complaints under the Act, but none of the provisions authorizes enforcement of preliminary orders. Furthermore, Judge Jacobs found that none of the provisions of § 1514A that authorize judicial enforcement refer to AIR21's subparagraph (b)(2)(A), the source of the Secretary power to issue a preliminary order of reinstatement. Judge Jacobs focused on three considerations to explain why OSHA's preliminary order reinstating Bechtel was unenforceable. First, 18 U.S.C. § 1514A(b)(1)(B) provides for *de novo* review in the district court if the Secretary's has not issued a final decision within 180 days of the filing of the complaint, which reduces the need for a judicial order. Second, preliminary orders of reinstatement are based on no more than "reasonable cause to believe that the complaint has merit," which Judge Jacobs believed to be "tentative" and "inchoate" in Bechtel's case. Third, immediate enforcement at each level of review could cause a rapid sequence of reinstatement and discharge, and a "generally ridiculous state of affairs." In summary, Judge Jacobs believed that while the statute specifically grants courts the authority to enforce *final* orders, the absence of any reference to enforcing preliminary orders indicates that Congress did not intend for courts to have jurisdiction to enforce *preliminary* orders. *Bechtel*, 448 F.3d at 469-74 .

Judge Leval concurred, but expressed the view that the court should vacate the district court's injunction because the employer was denied due process. Judge Leval argued that the Secretary's disclosures to the employer during the initial investigation did not satisfy the requirements set forth in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), *i.e.*, notice of witness and whistleblower statements and a list of witnesses. Judge Leval argued that even if Judge Jacobs is correct that "there are good reasons why a preliminary order should not be enforced, these considerations do not explain why Congress would provide that a preliminary order is not stayed if despite the statute's denial of a stay, the employer without adverse consequence may effectively stay the order simply by declining to obey it." In this case, Judge Leval believed that due process was not met because CTI was not given reasonable notice of the evidence against it. *Bechtel*, 448 F.3d at 478-81.

The dissenting opinion by Judge Straub noted that the failure to enforce a preliminary reinstatement order negated congressional intent to provide a quick remedy for whistleblowers. Judge Straub observed that the text of the Sarbanes-Oxley Act, when read as a whole, "firmly supports" the exercise of jurisdiction to enforce the Secretary of Labor's preliminary order. In Judge Straub's view, the provisions of the Act, taken together, reflect Congress' intention that timely reinstatement is necessary to prevent employer retaliation. Judge Straub argued that to read otherwise would discourage whistleblowing as other employees react to the sudden disappearance of a whistleblower from the workplace. Judge Straub concluded by stating that the ultimate inquiry in whistleblower actions comes down to whether the "reinstatement procedures establish a reliable initial check against mistaken decisions, and complete and expeditious review is available." *Bechtel* at 484-88.

Subsequently, in *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006), a district court adopted Judge Jacobs' opinion in *Bechtel* and granted the defendant employer's motion to dismiss. While the district court noted there was a conflict between its decision and the regulations implementing the Act, it concluded the regulations conflicted with the plain language of the statute, which did not grant judicial authority to enforce preliminary orders. The court also noted that the efficient administration of justice requires that the administrative process be final before federal courts begin adjudication. This ensured that appeals go through "all levels of the administrative process before reaching federal court." *Welch* at 558.

7. Front Pay in Lieu of Reinstatement

In limited circumstances, front pay may be awarded to successful complainants in lieu of reinstatement.

The ARB has indicated that reinstatement – and not front pay – is the favored remedy under the whistleblower statutes enforced by the Department:

> Although reinstatement is primarily a "make-whole" remedy for a prevailing complainant in a discrimination case, intended to return the complainant to the position that he or she would have occupied but for the unlawful discrimination, reinstatement also serves as an important deterrent to other discriminatory acts that might be committed by the offending respondent. As the Supreme Court observed in a leading Title VII case, courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419 (1975) (emphasis added). We find this prophylactic objective (*i.e.*, preventing "like discrimination in the future") to be particularly compelling in connection with whistleblower statutes like the employee protection provision of the ERA. The whistleblower protection laws are not intended merely to protect the private rights of individual employees, but are part of a broader enforcement scheme that promotes critical public interests. . . . Thus "[t]he Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits. Protected whistleblowing under the ERA may expose not just private harms but health and safety hazards to the public." *Beliveau v. United States Dep't of Labor*, 170 F.3d 83, 88 (1st Cir. 1999).
>
> Such "whistle-blower" provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes . . . . If the regulatory scheme is to effectuate its substantial goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute. *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 478 (1993), cert. denied, 510 U.S. 964 (1993). Quite simply, reinstatement is important not only because it vindicates the rights of the complainant who engaged in protected activity, but also because the return of a discharged employee to the jobsite provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective.

Hobby v. Georgia Power Co., ARB 98-166, 90-ERA-30 (ARB Feb. 9, 2001).

A plaintiff can reasonably turn down an employer's offer of reinstatement and be awarded front pay based on projected earnings. Front pay may be awarded as a substitute when reinstatement is inappropriate due to: (1) an employee's medical condition that is causally related to her employer's retaliatory action (*see Michaud v. BSP Transport, Inc.,* ARB 97-113, 95-STA-29 (ARB Oct. 9, 1997), *rev'd and vacated*, ARB 99-017 (Dec. 21, 1998); (2) manifest hostility between the parties (*see Creekmore v. Abb Power Sys. Energy Servs., Inc.,* 93-ERA-24 (Sec'y Feb. 14, 1996); (3) the fact that claimant's former position no longer exists (*see Doyle v. Hydro Nuclear Servs*., 89-ERA-22 (ARB Sept. 6, 1996); *Cassino v. Reichhold Chems., Inc*., 817 F.2d 1338, 1346 (9th Cir. 1987)); or (4) the fact that employer is no longer in business at the time of the decision (*see Kalkunte v. DVI Fin. Servs., Inc.,* 2004-SOX-00056 (July 18, 2005)).

In *Hagman v. Washington Mutual Bank, Inc.*, 2005-SOX-73 (ALJ Dec 19, 2006), the ALJ in granting a $642,941 award of front pay, characterized the environment to which the plaintiff would be returning as "dysfunctional." The ALJ cited the company's insistence that the plaintiff was fired for cause, a statement that the company would not have handled the situation any differently, and the fact that the personnel responsible for the retaliation against the plaintiff were still employed by the bank as evidence that the plaintiff made an objectively reasonable decision not to return to her former position.

8. Attorney Fees and Costs

The Sarbanes-Oxley Act expressly allows complainant recovery of expert witness fees and litigation costs, including attorney fees. 18 U.S.C. § 1514(c)(2)(A)(C).

In *Hensley v. Eckerhart*, 461 U. S. 424, 426 (1983), the Supreme Court provided an analysis to apply to all federal statutes that allow fee awards to prevailing parties. As a threshold issue, to recover attorney fees, an employee must qualify as a "prevailing party." The Court subsequently stated that to qualify as a "prevailing party" a plaintiff must obtain some amount of relief based on the merits of his claim. *See Farrar v. Hobby*, *506 U. S. 103, 110* (1992). Interpreting attorney fee language under the Energy Reorganization Act similar to the text of SOX, the ARB has held that a whistleblower complainant is entitled to attorney fees under the whistleblower statutes only if he or she prevails on the merits of the discrimination claim, and not merely if the plaintiff has vindicated an important legal principle. *Macktal v. Brown & Root, Inc.*, ARB 98-112, 86-ERA-23 (ARB Jan. 9, 2001).

Attorney fees include not only the hours an attorney expends but, the entire work product. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). The ARB applies the "lodestar" method for calculating reasonable attorney fees. *See Negron v. Vieques Air Link, Inc.*, ARB 04-021, 2003-AIR-10 (Mar. 7, 2006). The "lodestar" figure is the result of the reasonable rate of compensation multiplied by the reasonable number of hours expended. *See Hensley*, 461 U.S. at 433. This figure may then be adjusted in accordance with other factors; however there is a "strong presumption" in favor of the lodestar figure and upward adjustments are allowed only in exceptional cases that are supported by specific evidence. *Blum v. Srenson*, 465 U.S. 886, 898-900 (1984); *see also Hensely* 461 U.S. at 434. This presumption was mildly relaxed in *Blanchard v. Bergeron*, 489 U.S. 87 (1989).

A reasonable hourly rate, or rate of compensation, is equivalent to the market rate of attorneys, within the community where the case is tried, of reasonably comparable skill, experience, and reputation. *See Murray v. Air Ride, Inc.*, ARB 00-45, 99-STA-34 (Dec. 29, 2000); *Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-SOX-27, (July 13, 2004), *rev'd on other grounds*, *Platone v. FLYi, Inc.*, ARB 04-154 (ARB Sept. 29, 2006). In *Hagman v. Washington Mutual Bank, Inc.*, 2005-SOX-73 (ALJ Dec 19, 2006), the ALJ awarded $305,748 of the requested $500,000 in attorney fees and costs. The ALJ refused to consider New York rates in its determination of the fee award, stating that the plaintiff could have found representation within the locality of Southern California.

The second step in the calculation of the lodestar figure is to ascertain the reasonable number of compensable hours. A reasonable amount of compensable hours is equivalent to the reasonable amount of time that complainant's counsel should have expended to reach a positive result, given the nature and circumstances of the case. *See Platone*, 2003-SOX-27 (July 13, 2004). A judge has discretion in determining the reasonableness of the compensable hours. *Id*. Claimants must submit documentation that reflects "reliable contemporaneous recordation of time spent on legal tasks that are described with reasonable particularity." *Hensley*, 461 U.S. at 433.

A prevailing employer may be awarded up to $1,000 in attorney fees if the complaint is found to be frivolous or brought in bad faith. 49 U.S.C. § 42121(b)(3)(C). A complaint is frivolous "if it lacks an arguable basis in law or fact." *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Harper v. Showers*, 174 F.3d 716, 718 (5th Cir.1999). *Cf. Pittman v. Siemans AG,* 2007-SOX-15 (ALJ July 26, 2007)(denying respondents' request for attorney fees, even though the *pro se* complainant's case was not strong, because complainant's case was not completely frivolous and complainant had demonstrated a deep belief in his claims).

9. Sanctions

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

B. Criminal

In addition to civil liability, the Act contains criminal penalties for those interfering with the employment of certain whistleblowers. 18 U.S.C. § 1513(e). The definition of a whistleblower is narrower for criminal liability than for civil liability. *Compare* 18 U.S.C. § 1513(e) *with* 18 U.S.C. § 1514A(a). Under the criminal provisions, the whistleblower must have provided any truthful information to a "law enforcement officer" (rather than a federal regulatory or law enforcement agency, a member of Congress, or a person with supervisory authority over the employee). The information provided must be "truthful," as opposed to "reasonabl[y] believe[d]" for civil liability. Under the criminal provisions, the information provided must relate to the commission or possible commission of any federal offense (rather than an offense related to the enumerated types of fraud, a violation of an SEC rule or regulation, or any federal law relating to fraud against shareholders under the civil liability provisions). Persons who knowingly, with the intent to retaliate, take actions harmful to such whistleblowers, including interfering with the whistleblower's employment or livelihood, are subject to fines (up to $250,000 for individuals and $500,000 for organizations) and/or imprisonment for up to 10 years. The criminal provision provides for "extraterritorial Federal jurisdiction" (18 U.S.C. § 1513(d)), whereas the civil provisions are less clear. *See supra* Section III.A.2.

VIII. ATTORNEY OBLIGATIONS/ETHICAL ISSUES

A. SEC Rulemaking

Section 307 mandates that the SEC adopt new standards governing the conduct of attorneys who represent public companies before the Commission, including internal reporting requirements. The SEC promulgated interim final rules on January 23, 2003. 17 CFR Part 205. The rules establish minimum standards when an attorney (in-house or outside counsel) becomes aware of a material violation of federal securities laws, state securities laws or breaches of fiduciary duty. Generally, the rules:

- require an attorney to report evidence of a material violation, determined according to an objective standard, "up-the-ladder" within the issuer to the chief legal counsel or the chief executive officer of the company or the equivalent;

- require an attorney, if the chief legal counsel or the chief executive officer of the company does not respond appropriately to the evidence, to report the evidence to the audit committee, another committee of independent directors or the full board of directors;

- expressly cover attorneys providing legal services to an issuer who have an attorney-client relationship with the issuer, and who have notice that documents they are preparing or assisting in preparing will be filed with or submitted to the Commission;

- provide that foreign attorneys who are not admitted in the United States, and who do not advise clients regarding U.S. law, would not be covered by the rule, while foreign attorneys who provide legal advice regarding U.S. law would be covered to the extent they are appearing and practicing before the Commission, unless they provide such advice in consultation with U.S. counsel;

- allow an issuer to establish a "qualified legal compliance committee" (QLCC) as an alternative procedure for reporting evidence of a material violation. Such a QLCC would consist of at least one member of the issuer's audit committee, or an equivalent committee of independent directors, and two or more independent board members, and would have the responsibility, among other things, to recommend that an issuer implement an appropriate response to evidence of a material violation. One way in which an attorney could satisfy the rule's reporting obligation is by reporting evidence of a material violation to a QLCC;

- allow an attorney, without the consent of an issuer client, to reveal confidential information related to his or her representation to the extent the attorney reasonably believes necessary (1) to prevent the issuer from committing a material violation likely to cause substantial financial injury to the financial interests or property of the issuer or investors; (2) to prevent the issuer from committing an illegal act; or (3) to rectify the consequences of a material violation or illegal act in which the attorney's services have been used;

- state that the rules govern in the event they conflict with state law, but will not preempt the ability of a state to impose more rigorous obligations on attorneys that are not inconsistent with the rules; and

- state that the rules do not create a private cause of action and that authority to enforce compliance with the rules is vested exclusively with the SEC.

In addition, the rules define the term "evidence of a material violation," which triggers an attorney's obligation to report up-the-ladder within an issuer. The SEC adopted what it described as an objective, rather than a subjective, triggering standard, involving credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely a material violation has occurred, is ongoing or is about to occur.

The SEC also extended the comment period on the "noisy withdrawal" and related provisions originally included in proposed Part 205. The Noisy Withdrawal Proposal requires outside counsel to withdraw from representing the issuer, to provide written notice to the SEC within one business day indicating the withdrawal was based on "professional considerations," and to disaffirm certain documents filed with the SEC that the attorney believes to be false or misleading. The Proposal does not require in-house attorneys to resign, but they must notify the SEC of their intentions to disaffirm any documents that are believed to be false or misleading. Under the Noisy Withdrawal Proposal, the attorney's notice to the SEC is deemed not to be a breach of the attorney-client privilege.

The Commission also proposed an alternative to Noisy Withdrawal that would require attorney withdrawal, but would require an issuer, rather than an attorney, to publicly disclose the attorney's withdrawal or written notice that the attorney did not receive an appropriate response to a report of a material violation. Under the proposed alternative, if an issuer has not complied with the disclosure requirement, the attorney could inform the SEC that the attorney has withdrawn from representing the issuer or provided the issuer with notice that the attorney has not received an appropriate response to a report of a material violation.

B. Ethical Obligations, Outside and In-House Counsel

The Act and the SEC's rules place new obligations on attorneys. These obligations raise ethical issues, particularly for in-house counsel acting as whistleblowers, concerning the attorney-client privilege, federal regulation of the various state bars and an attorney's ethical obligation to clients as defined by the Model Rules of Professional Conduct and the Model Code of Professional Responsibility. How such actions are presently treated varies under the Model Rules and the Model Code.

MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.6 Confidentiality of Information[13]

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> 1. to prevent reasonably certain death or substantial bodily harm;
> 2. to secure legal advice about the lawyer's compliance with these Rules;
> 3. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> 4. to comply with other law or a court order.

The ABA Model Rules of Professional Conduct permit in-house counsel to maintain actions against a former employer/client for wrongful discharge or for violation of whistleblower statutes, even if the attorney must disclose information relating to the representation of the client in the process. However, the disclosures must be limited "'to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . .'" ABA Formal Ethics Opinion 01-424 (2001) (*quoting* former ABA Model Rules of Professional Conduct Rule 1.6(b)(2) (2001), now Rule 1.6(b)(3)).

[13] The quoted Rule reflects the revisions made by the ABA in February 2002.

Using the ABA Model Rules as a guide, the U.S. Court of Appeals for the Fifth Circuit held:

> [N]o rule or case law imposes a *per se* ban on the offensive use of documents subject to the attorney-client privilege in an in-house counsel's retaliatory discharge claim against his former employer under the federal whistleblower statutes when the action is before an ALJ.

Willy v. Admin. Rev. Bd., 423 F.3d 483, 501 (5th Cir. 2005). In *Willy*, the Fifth Circuit concluded the attorney-client privilege issues before the DOL ALJ and ARB were a matter of federal common law. In analyzing the law, the Fifth Circuit analyzed the Supreme Court Standard 503(d), the ABA Model Rules, and applicable case law under those rules. Like the ABA Model Rules, Supreme Court Standard 503(d) provides that no privilege exists "[a]s to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to the lawyer. . . ." *Willy,* 423 F.3d at 496. The litigation arose under the federal environmental whistleblower laws under which the DOL enforces and adjudicates. Willy was an in-house environmental attorney who investigated certain environmental issues and wrote an attorney-client privileged report critical of management and finding that the company was exposed to liability for violating several environmental laws. After he was discharged from employment, Willy alleged that he was discharged because of the privileged report. The employer attempted to prevent Willy from introducing the report as evidence before the ALJ because of the attorney-client privilege and the ethical rules preventing an attorney from disclosing privileged communications. The Fifth Circuit concluded that the federal common law does not prevent the report from being introduced as evidence in an administrative proceeding before an ALJ.

Recently, the Supreme Courts of Utah, Tennessee, and Montana have expressly allowed in-house attorneys to go forward with suits against their employers for wrongful discharge, even though some client confidences would necessarily be revealed in the process. *Spratley v. State Farm Mutual Automobile Insurance Co.*, 78 P.3d 603, 608-10 (Utah 2003) (relying on ABA Formal Ethics Opinion 01-424 and holding that the "claim or defense" provision of Rule 1.6 "plainly permits disclosure to establish a wrongful discharge claim") (internal citations omitted); *Crews v. Buckman Laboratories Int'l, Inc.*, 78 S.W.3d 852, 863-64 (Tenn. 2002) (adopting a new provision to TN Disciplinary Rule 4-101(C) that parallels the language of former Model Rule 1.6 (b)(2) and allowing the case to proceed); *Burkhart v. Semitool, Inc.*, 300 Mont. 480, 495-97 (2000) (concluding that in-house counsel may maintain an action for employment related claims against an employer-client, and that such claims are within the contemplation of former Rule 1.6 of the Model Rules, which Montana has adopted).

Utah and Montana had both adopted the Model Rules at the time of these opinions, and Tennessee adopted the Model Rule at issue during the decision; the ABA itself has declared that the Model Rules allow these claims to go forward. Moreover, the language of the revised Rule with regard to this issue remains identical to that of the former Rule. Therefore, wrongful discharge claims made by in-house counsel in Model Rules states should not be hampered by disclosure issues.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY

Canon 4

A lawyer should preserve the confidences and secrets of a client.

DR 4-101. PRESERVATION OF CONFIDENCES AND SECRETS OF A CLIENT.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

1. Reveal a confidence or secret of his client.

2. Use a confidence or secret of his client to the disadvantage of the client.

3. Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

1. Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

2. Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

3. The intention of his client to commit a crime and the information necessary to prevent the crime.

4. Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

In Model Code states, there is a trend different from that in Model Rules states. In New York, a Model Code state, the Appellate Division of the New York State Supreme Court disallowed a suit brought by in-house counsel for wrongful termination because permitting it to go forward would entail counsel's improper disclosure of client confidences. *Wise v. Consolidated Edison Company of New York, Inc.*, 723 N.Y.S.2d 462 (2001). In reaching its decision the Wise court analyzed the relevant Disciplinary Rule, DR 4-101, and concluded that the exception allowing disclosure did not encompass a suit for wrongful discharge. *Id.* at 463. Therefore, the Model Code would not permit claims of wrongful termination to proceed if any client confidences could be revealed.

Moreover, in its Formal Ethics Opinion 01-424, the ABA compared the comparable provisions of the Model Code and the Model Rules and determined that the Model Code only allowed a lawyer to reveal confidences or secrets if such was necessary to establish or collect a fee or to defend him or herself against an accusation of wrongful conduct. The ABA further noted that the Model Rules expanded this exception to "'include disclosure of information relating to claims by the lawyer other than for the lawyer's fee—for example, recovery of property from the client.'" *Id.* (*quoting* the Annotated Model Rules of Professional Conduct 68 (4th ed. 1999); *see also Burkhart*, 300 Mont. at 496 (performing same comparison). The *Crews* court also acknowledged that the Model Code under which it was operating would not permit wrongful discharge claims to go forward; thus, it adopted Model Rule 1.6 as a means to allow the Plaintiff's case to proceed. *Crews,* 78 S.W.3d at 863-64.