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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 his 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 OSHA 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/EMPLOYEES

A. Companies

SOX whistleblower provisions apply to 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

The Act applies to all companies that have obtained a listing in the United States or have registered securities with the SEC. However, coverage under the whistleblower provisions is narrower than coverage under SOX Section 402 (enhanced conflict of interest provisions) in that it 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.

The requirement that a respondent be subject to the registration or reporting requirements of the Exchange Act has been strictly construed. For example, in *Flake v. New World Pasta Co.*, 2003-SOX-18 (ALJ July 7, 2003), *aff'd*, ARB No. 03-126 (ARB Feb. 25, 2004), an ALJ addressed the issue of whether the respondent was a company subject to jurisdiction under Section 806. It was undisputed that the respondent had no publicly traded securities. Therefore, the only issue was whether it was required to file reports under Section 15(d) of the Exchange Act. The ALJ found that the respondent fell within an exception to Section 15(d)'s reporting requirements because its public debt had been held by less than 300 persons in each year since its registration and offering. According to the ALJ, the fact that the

respondent voluntarily filed some reports required by Section 15(d) in order to comply with a contractual agreement did not transform it into an issuer "required to" make such filings. Therefore, the ALJ granted the respondent's motion for summary decision. *See also* SEC Division of Corporation Finance, *Sarbanes-Oxley Act of 2002 – FAQ #1* (Nov. 8, 2002) (company that voluntarily files reports under the 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).

In *Stevenson v. Neighborhood House Charter Sch*., 2005-SOX-87 (ALJ Sept. 7, 2005), complainant argued that respondent, a non-publicly traded charter school, should be covered under Section 806 because it was subject to reporting under SEC Rules 10b5 and 15c2-12, had a retirement plan with benefits subject to reporting and disclosure requirements under ERISA, and received funds from public companies. The ALJ rejected these arguments, reasoning that whether or not a company is covered by Section 806 "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)."

See also Paz v. Mary's Center for Maternal & Child Care, 2006-SOX-7 (ALJ Dec. 12, 2005) (dismissing complaint against non-profit health organization which neither had a class of securities registered under Section 12 of the Exchange Act nor was required to file reports 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); *Roulett v. American Capital Access*, 2004-SOX-78 (ALJ Dec. 22, 2004) (respondent not covered under Section 806 where it 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); *Ionata v. Nielsen Media Research, Inc*., 2003-SOX-29 (ALJ Oct. 2, 2003) (ALJ lacked jurisdiction because the respondents were not companies "with a class of securities registered under Section 12 of the Securities Exchange Act of 1934").

Consistent with this strict construction of the requirement that the respondent be subject to the registration or reporting requirements of the Exchange Act, an ALJ in *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Apr. 1. 2005), found no liability where the employer was not subject to the requirements of Sections 12 or 15(d) at the time the adverse employment action was taken. The ALJ reasoned that the adverse action occurred on January 22, 2004, but the company did not become subject to Section 12 until after a merger on February 2, 2004.

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 SEC reporting and registration obligations. Foreign issuers that are exempt from SEC filing requirements under Rule 12g3-2(b) of the Exchange Act are excluded from coverage under SOX.

Foreign corporations doing business in the United States are subject to Section 806 whistleblower provisions. *See Ward v. W & H Voortman, Ltd.*, 685 F. Supp. 231, 232 (M.D. Ala. 1988).

Whether SOX whistleblower provisions apply to U.S. residents working abroad has been an open issue. Statutory whistleblower provisions generally do not apply extraterritorially absent clear language by Congress in the statute to extend the statute's protections abroad. *See, e.g.*, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *Mendonca v. Tidewater, Inc*., 2001 U.S. Dist. LEXIS 3486, at *8 (E.D. La. Mar. 4, 2001).

Still, courts have held that U.S. courts do, in certain circumstances, have jurisdiction over violations of the Exchange Act, although the violations take place outside the U.S. *See, e.g., Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336-37 (2d Cir. 1972); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968).

In its Final Rule, OSHA declined to clarify this issue, despite requests by commentators, on the ground that the purpose of the regulations is procedural and not to interpret the statute. 69 Fed. Reg. 52104, 52107 (Aug. 24, 2004).

Nonetheless, most courts and ALJs have refused to afford SOX whistleblower protection to employees working outside the United States. For instance, in *Carnero v. Boston Scientific Corp.*, 2004 U.S. Dist. LEXIS 17205 (D. Mass. Aug. 27, 2004), the court refused to apply Section 806 to a foreign national working for Argentinean and Brazilian subsidiaries. According to the court, "[n]othing in Section 1514A(a) remotely suggests that Congress intended it to apply outside of the United States." The court noted, as well, that application of Section 1514A overseas might conflict with foreign laws, particularly where a plaintiff seeks reinstatement. The First Circuit, citing the presumption against the extraterritorial application of Congressional statutes, affirmed. *Carnero v. Boston Scientific Corp*., 433 F.3d 1 (1st Cir. 2006). *See also O'Mahony v. Accenture Ltd*., 2005-SOX-72 (ALJ Jan. 20, 2006) ("[a]s a matter of statutory construction, the whistleblower provision of the Act applies only to employees who work within the United States"); *Ede v. Swatch Group*, 2004-SOX-68 & 69 (ALJ) (Jan. 14, 2005) (SOX does not apply extraterritorially to employees working outside of the United States); *Concone v. Capital One Finance Corp.*, 2005-SOX-6 (ALJ Dec. 3, 2004) (no applicability to persons employed outside the United States).

However, in *Penesso v. LLC International, Inc*., 2005-SOX-16 (ALJ Mar. 4, 2005), respondent, citing *Carnero* and *Concone*, moved for summary decision on the grounds that Section 806 does not have extraterritorial application. The ALJ denied summary decision and distinguished *Carnero* and *Concone*, finding "this case has a substantial nexus to the United States, and it is appropriate for the complainant to bring this claim under §1514A of the Sarbanes-Oxley Act." The ALJ reasoned that the 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.

3. Agents/Contractors

SOX 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). Therefore, 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.

For example, OSHA specifies 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").

SOX also might be found to apply 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 government workplace. *Stephenson v. NASA*, ARB No. 96-080, ALJ No. 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 added, "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 generally has been limited to cases where the contractor or agent is acting in such a role with respect to the complainant's employment relationship. For example, in *Brady v. Calyon Securities (USA)*, 2005 U.S. Dist. LEXIS 27130 (S.D.N.Y. Nov. 8, 2005), the court dismissed a SOX whistleblower complaint where plaintiff alleged that, although his employer, the alleged discriminator, was not a publicly traded company, it should be liable as an "agent" because it acted as underwriter for publicly traded companies. The court rejected this argument and 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; "[t]hus, a non-publicly traded company can be deemed to be the agent of a publicly traded company if the publicly traded company directs and controls the employment decisions."

Likewise, in *Brady v. Direct Mail Mgmt., Inc.*, 2006-SOX-16 (ALJ Jan. 5, 2006), complainant asserted that respondent, her employer, was covered under Section 806 because, although it was not publicly traded, it performed direct mail services as a "first tier contractor" to publicly traded companies. The ALJ rejected this argument, reasoning that there was no

evidence reflecting 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.

In *Roulett v. American Capital Access*, 2004-SOX-78 (ALJ Dec. 22, 2004), an ALJ rejected complainant's contention that it was covered under Section 806 as a "contractor, subcontractor or agent" of publicly traded companies because it engaged in financial business with such companies. The ALJ reasoned that "the fact that publicly traded companies rely upon Respondent's services and purchase its products does not make Respondent their contractor, subcontractor or agent."

In *Judith v. Magnolia Plumbing Co., Inc.*, 2005-SOX-99 & 100 (ALJ Sept. 20, 2005), complainant contended that respondent was covered under Section 806 because, although it was not publicly traded, it had numerous contracts with municipal and federal governments. The ALJ disagreed, reasoning that "[i]f a company is not publicly traded, the Act simply does not apply."

The scope of contractor or agent coverage also has generally been limited to cases where the complainant was employed by the publicly traded company, not by the agent or contractor. For example, in *Minkina v. Affiliated Physician's Group*, 2005-SOX-19 (ALJ Feb. 22, 2005), *appeal dismissed*, ARB No. 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 with 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.

Likewise, 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.

Consistent with this reasoning, 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.

B. Subsidiaries

The Act's retaliation provisions have been applied to private subsidiaries of publicly traded companies, but not under all circumstances. The cases have addressed three

distinct, albeit often intertwined, inquiries: (1) whether the employee of the subsidiary is a covered "employee" under SOX; (2) if so, whether the subsidiary/employer is a covered entity subject to suit; and (3) if the employee names the parent as a respondent, whether the existence of separate corporate identities insulates the parent from liability.

1. Whether The Employee Of The Subsidiary Is A Covered "Employee"

The first inquiry – whether the employee of the subsidiary is a covered "employee" under SOX – has been consistently answered in the affirmative. For example, in *Platone v. Atlantic Coast Airlines Holdings Inc.,* 2003-SOX-27 (ALJ Apr. 30, 2004), an ALJ held that an employee of a non-publicly traded subsidiary was a covered "employee" where the company's parent/holding company was publicly traded. The ALJ in *Platone* reasoned that, under the facts of the case, the holding company was the alter ego of the subsidiary and that it certainly had the ability to affect the complainant's employment.

Similarly, in *Collins v. Beazer Homes USA, Inc*., 334 F. Supp.2d 1365 (N.D. Ga. 2004), the first reported federal district court decision on point, a federal district court in Georgia held 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.

Both *Platone* and *Collins* looked to the interrelatedness of the corporate structures to ultimately conclude the employee of the subsidiary was a covered "employee." Going one step further, an ALJ in *Morefield v. Exelon Servs. Inc*., 2004-SOX-2 (ALJ Jan. 28, 2004), held that the Vice President-Finance of a non-publicly traded subsidiary of a publicly traded company was covered under SOX, regardless of the parent company's role in affecting the employment of the subsidiary's employees. The ALJ concluded that, based on the legislative intent and purpose of SOX, the term "employee of publicly traded company," within the meaning of SOX, "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."

Similarly, in *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004) (*Gonzalez III*), an ALJ concluded that Congress intended to provide whistleblower protection to employees of subsidiaries of publicly traded companies. Therefore, the ALJ held that the complainant, an employee of a non-publicly traded subsidiary of a publicly traded bank holding company, set forth a cause of action sufficient to withstand a motion for summary decision. The ALJ also reasoned that evidence reflected that the holding company's actions affected the complainant's employment and shared management and function with the subsidiary.

In *Klopfenstein v. PPC Flow Technologies Holdings, Inc*., 2004-SOX-11 (ALJ July 6, 2004), an ALJ, citing *Morefield*, agreed with the complainant that employees of non-public subsidiaries of publicly traded companies can be covered by the SOX whistleblower provisions.

In *Carnero v. Boston Scientific Corp*., 433 F.3d 1 (1st Cir. 2006), the First Circuit suggested that an employee of a subsidiary of a publicly traded company could be a covered employee not only due to the parent company's role in affecting the employment of the subsidiary's employees but also because the subsidiary could be considered an "agent" of the parent. Therefore, the court opined, "the fact that [complainant] was employed by [the parent's] subsidiaries may be enough to make him a BSC 'employee' for purposes of seeking relief under the whistleblower statute." However, the court ultimately held that Section 806 did not protect the plaintiff foreign national due to its lack of extraterritorial effect.

2. Whether A Non-Publicly Traded Subsidiary Is A Covered Entity

The second inquiry – whether a subsidiary of a publicly traded parent company, standing alone, is a covered entity subject to suit – has been consistently answered in the negative.

For instance, in *Klopfenstein*, 2004-SOX-11, an executive of a subsidiary of a non-publicly traded holding company that, in turn, was owned by a publicly traded parent company filed a complaint naming only the holding company and a vice president of the subsidiary as respondents. The ALJ held that the non-publicly traded subsidiary was not a proper respondent, because SOX does not "provide[] a cause of action directly against such subsidiary alone."

Notably, the ALJ in *Klopfenstein* specifically rejected complainant's argument that the holding company was a covered "agent" of the parent company. It was previously unclear what position the DOL would take on this issue, as the SOX whistleblower provision prohibits retaliation not only by publicly traded companies, but also by "any officer, employee, contractor, subcontractor or agent" of a covered company. 18 U.S.C. § 1514A(a). The *Klopfenstein* ALJ found that the subsidiary/holding company did not fall within this category because the holding company was more than an "agent" of the parent within the meaning of SOX, rather it was an integral part of the publicly traded company with overlapping officers. The ALJ also found that the named vice president was not a proper respondent because he was not an officer, employee, contractor, subcontractor, or agent of the publicly traded parent company.

Similarly, an ALJ in *Powers v. Pinnacle Airlines Corp*., 2003-AIR-12 (ALJ Mar. 5, 2003), dismissed a complaint brought against the employer, a non-publicly traded subsidiary of a non-publicly traded subsidiary of a publicly traded airline, on the basis that the subsidiary was not a proper respondent under SOX. The appeal of this decision was dismissed in *Powers v. Pinnacle Airlines, Inc*., ARB No. 04-035, ALJ No. 2003-AIR-12 (ARB Sept. 28, 2004).

Citing *Klopfenstein* and *Powers*, the respondent in *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 17, 2004) (*Gonzalez II*), moved for summary decision on the ground that it was not a publicly traded company. However, the issue did not have to be decided as the ALJ permitted the complainant to amend his complaint to include as a respondent the publicly traded holding company.

In *Dawkins v. Shell Chemical, LP*, 2005-SOX-41 (ALJ May 16, 2005), the ALJ granted summary decision for the employer because the complaint identified only the employer, a non-publicly traded subsidiary, as respondent and did not name the parent companies. The ALJ noted that there was no evidence that the parent companies were sufficiently involved in the management and employment relations of the respondent to justify piercing the corporate veil. However, it does not appear that the ALJ considered this factor in deciding whether the complainant could proceed against the subsidiary, but rather addressed this issue only in relation to whether the complainant successfully could have pursued the parent companies if they had been properly included or were added as respondents.

In contrast to the above cases, an ALJ in *Hughart v. Raymond James & Associates, Inc*., 2004-SOX-9 (ALJ Dec. 17, 2004) suggested that a case under Section 806 may proceed solely against a subsidiary if the parent company and its wholly owned subsidiary are "so intertwined as to represent one entity." Ultimately, the ALJ dismissed the complaint because the two corporate entities had a sufficient degree of separation such that they "were not one entity for consideration of the applicability of SOX."

In *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005), an ALJ rejected the reasoning in *Hughart* and concluded (consistent with what appears to be the majority view) that the plain language of Section 806 provides no cause of action against a non-public subsidiary standing alone, regardless of whether complainant could produce evidence to justify piercing the corporate veil. The ALJ reasoned that even if complainant could establish that the parent company was liable for the acts of its subsidiary, this "does not cure the deficiency of not naming a company covered by the Act as Respondent. In other words, neither the doctrine of piercing the corporate veil, nor agency law principles generally, operate to pull a parent company into litigation if the parent company is not named as a party in the first place."

3. Whether The Existence Of Separate Corporate Identities Insulates The Parent From Liability

The third inquiry – whether the existence of separate corporate identities insulates the parent corporation from liability for acts of the subsidiary – has proven a more difficult issue for ALJs, requiring evaluation of specific facts to determine whether piercing the corporate veil or some other basis for ignoring corporate separateness is warranted.

For instance, in *Powers*, 2003-AIR-12, an ALJ dismissed a SOX complaint where the employee was employed by a non-publicly traded subsidiary of a non-publicly traded subsidiary of a publicly traded airline. The ALJ reasoned that the complainant's attempt to hold the parent liable "ignores the general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries. In other words, the mere fact of a parent-subsidiary relationship between two corporations does not make one company liable for the torts of its affiliate." The ALJ continued that the complainant had not alleged any facts that would justify piercing the corporate veil and ignoring the separate corporate entities. Specifically, the ALJ noted that the subsidiary's impact on the parent was "questionable at best."

Likewise, in *Hasan v. J.A. Jones-Lockwood*, 2002-ERA-5 (ALJ Sept. 17, 2002), an ALJ held that a parent company was not an "employer" under the analogous ERA retaliation

provision merely because it was the parent of another company that employed a complainant. The ALJ reasoned that no evidence showed that the parent had the power to hire, promote, discipline or give raises or had input in those decisions.

In contrast, in *Platone*, 2003-SOX-27, an ALJ held that the parent/holding company was a proper respondent in an action by an employee of a non-publicly traded subsidiary where the ALJ found the subsidiary to be a "mere instrumentality" of the holding company. The ALJ reasoned that the holding company had no employees; the companies disregarded the separate identity of the subsidiary in its dealings with the public, the SEC, and its employees; there was a great degree of commonality between the senior management of the two corporate entities, including those responsible for labor relations within the subsidiary; and the holding company had the ability to affect the complainant's employment, including making the ultimate termination decision.

Likewise, in *Gonzalez III*, 2004-SOX-39, the complainant, an employee of a non-publicly traded subsidiary, was permitted to amend his complaint to add the publicly traded holding company as a respondent. The ALJ denied summary decision for the holding company because evidence suggested that the holding company had shared management and function with the subsidiary and that the holding company's actions affected the complainant's employment.

Similarly, in *McIntyre v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2003-SOX-23 (ALJ Sept. 4, 2003), the ALJ permitted complainant to amend his complaint to include as a respondent the publicly traded parent company. The ALJ reasoned that complainant had alleged facts regarding commonality of management and operations which arguably justified piercing the corporate veil. The ALJ also noted that there was a genuine issue of material fact as to whether the subsidiary and parent company constituted a "joint employer." *See also Clemmons v. Ameristar Airways, Inc*., 2004-AIR-11 (ALJ Jan. 14, 2005) (in AIR21 case, finding joint employment based on interrelation of operations, common management, centralized control of labor relations and common ownership).

In *Mann v. United Space Alliance, LLC*, 2004-SOX-15 (ALJ Feb. 18, 2005), Boeing and Lockheed Martin established the employer USA as a joint venture. All three entities were named as respondents. The ALJ, citing *Gonzalez*, *Platone*, and *Morefield*, found that "shared management and control and unity of operations have been key factors in holding the parent company and its subsidiary to be covered by the Act." Finding a lack of such shared functions, the ALJ concluded that USA was not a covered respondent under the Act. The ALJ reasoned that neither Boeing nor Lockheed affected, nor was USA acting as an agent with respect to, the complainant's employment. The ALJ also found that Boeing and Lockheed Martin could not be held liable for any violation of the Act by USA.

In *Bothwell v. American Income Life*, 2005-SOX-57 (ALJ Sept. 19, 2005), an ALJ granted summary decision on the grounds that complainant's employer, a non-public subsidiary of a publicly traded company, was not a covered employer subject to SOX's whistleblower provisions. The complainant failed to name the parent company in the complaint, and the ALJ refused to permit amendment to add the parent because the parent was not given notice of the action prior to expiration of the 90-day statute of limitations. The ALJ further ruled that, even if the parent had been timely named, complainant was unable to provide sufficient evidence of

commonality of management and purpose to justify piercing the corporate veil and holding the parent liable for the subsidiary's actions. The ALJ reasoned that there was no indication that the subsidiary was acting as an agent for its parent company "with respect to employment practices towards Complainant or any other employee," *e.g.,* the parent took no part in hiring or terminating complainant and had no role in payment of complainant's salary, and complainant had no interaction with the parent's employees.

C. Individual Liability

Section 806's prohibition of retaliation by "officers, employees, contractors, subcontractors or agents of covered companies" could be construed as providing for individual liability for wrongful retaliation. This conclusion is supported by the summary and discussion in the Final Rule, which provides "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." 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004).

Yet, in *Williams v. Lockheed Martin Energy Systems, Inc.*, 1995-CAA-10 (ARB Jan. 31, 2001), a case dealing with liability under CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610) and SDWA (Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)), the ALJ dismissed individual supervisors from the case because they were not the complainant's employer despite statutory language providing that no "person" shall discriminate against whistleblowers. The complainant did not appeal, nor did the ARB decision address, this issue.

The only decision to date addressing this issue under SOX found that Section 806 does provide for individual liability. In *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Oct. 19, 2004), an ALJ, citing the above Federal Register quote, permitted amendment of the complaint to add as respondents the executives who terminated the complainant's employment. However, the ALJ 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' . . ." The ALJ concluded that "[t]he availability of damages does not convert this statutory proceeding into a common law tort action, permitting joinder of persons or entities who were not the Complainant's superiors as if they were joint tortfeasors."

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. . . ." As discussed in Section III.B., *supra*, courts and ALJs generally have included employees of subsidiaries within this definition. Whether the following other categories of persons fall within Section 806's definition of "employee" also has been addressed:

1. 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. There is no reason to believe this holding will not be adopted under SOX.

Yet, in *Harvey v. The Home Depot, Inc*., 2004-SOX-36 (ALJ May 28, 2004), the ALJ refused to allow a complaint by a former employee to proceed where the protected activity occurred after plaintiff's termination. The complaint alleged that the employer violated SOX's whistleblower provision where, after the complainant had filed a professional responsibility complaint against the company's attorney, the attorney's representative filed a response to the state committee contending that the complainant's grievances were "part of an ongoing campaign by Mr. Harvey to harass Home Depot and its employees." The complainant no longer was employed by the company when this statement was made. 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." (Emphasis in original; footnote omitted). *Compare Anderson v. Jaro Transp. Serv*., 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 that his employer had provided information to a potential employer).

2. Independent Contractors

In *Bothwell v. American Income Life*, 2005-SOX-57 (ALJ Sept. 19, 2005), respondent argued that complainant was not protected under Section 806 because he was an independent contractor, not an employee. In evaluating whether complainant was an independent contractor, the ALJ 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. The ALJ refused to grant summary decision for the respondent on this issue because complainant presented evidence demonstrating that respondent retained control over the means by which his work was performed. For instance, there was evidence that complainant was required to report to his superiors every day at a specific time, was given a specific list of daily contacts and appointments, was not allowed to alter his sales presentation or decide how to accomplish any tasks without first receiving input, had no control over his work hours or appointment schedule, and was required to complete all of his work at respondent's office.

3. 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. While an "interesting and difficult issue," the ALJ was able to resolve the case on other grounds.

4. 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 amends 18 U.S.C. § 1513(e) 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. Criminal sanctions include, for individuals, fines up to $250,000 and/or imprisonment of up to 10 years and, for organizations, fines up to $500,000. *See* 18 U.S.C. § 3571. This provision has a number of potentially significant ramifications, none of which have yet been addressed by the courts. First, because "persons" generally includes individuals, corporations and other organizations, both employers and employees are subject to the criminal provision. Second, this provision is not limited to employees reporting fraud or securities violations, but covers disclosures to any federal agency relating to violations of any federal law, including other federal employment discrimination statutes such as Title VII, ADA or ADEA.[1] Therefore, Section 1107 criminalizes retaliatory conduct in other employment law contexts which, in the past, may have given rise only to civil liability. Third, Section 1107 applies not only to publicly-traded companies, but also to *any* company, regardless of corporate status, that engages in prohibited conduct. Moreover, because there is nothing limiting the criminal provision to the employment relationship, third parties may be liable for participating in prohibited retaliatory conduct.

Finally, this provision arguably may give rise to causes of action under the civil RICO statute. Under RICO, "racketeering" includes "any act which is indictable under . . . 18 U.S.C. § 1513." *See* 18 U.S.C. § 1961. Therefore, employers or employees who engage in a pattern of retaliation prohibited by Section 1107 (*e.g.,* conceivably by creating a hostile work environment) and/or violations of the federal fraud provisions listed as predicate offenses under RICO (*e.g.,* mail, wire or securities fraud), now may be exposed to civil RICO penalties, including treble damages. 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). Notably, a civil RICO action may proceed even if defendant has not been convicted of a predicate act or of a RICO violation. *See Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479 (1985).

Beyond Section 1107, Section 3(b) of SOX could 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

[1] "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).

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 . . ." 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 DOL to investigate and prosecute potential Section 806 whistleblower violations.[2]

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 Division of Enforcement, and the DOL and SEC are considering the need for preparing a memorandum of understanding to further facilitate coordination. In addition, the Attorney General has expressed that the DOJ will "play a critical role" in implementing the criminal provisions of SOX, including Section 1107. *See* Attorney General Memorandum on Implementation of the Sarbanes-Oxley Act of 2002 (Aug. 1, 2002) ("it is vital that all components of the Department of Justice . . . work together to ensure that we take full advantage of the provisions of this new law to enhance our prosecution of significant financial crimes").

One well-publicized example of how a whistleblower claim can give rise to both civil RICO claims as well as federal investigations by the DOJ and SEC 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.[3]

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

[3] *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).

IV. PROTECTED CONDUCT

A. 18 U.S.C. § 1514A(a)(1)

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 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).

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.)[4] 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

[4] *Passaic Valley Sewerage,* 992 F.2d 474 (3rd Cir. 1993), addresses Section 507(a) of the Clean Water Act. In that case, the court found that an employee's "non-frivolous" "good-faith" complaint fell within the protection of the whistle-blower provision of the Act even if the complaint was misguided and unfounded.

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.[5]

The SOX decisions addressing the "reasonable belief" standard 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 No. 96-051 (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 a company 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 the restaurant, failed to show he engaged in protected activity, largely because he did not show he reasonably believed the employer engaged in illegal

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[5] 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 harassment); *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).

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." *Id*. at 13.

In *Harvey v. Safeway, Inc*., 2004-SOX-21 (ALJ Feb. 11, 2005), complainant contended his complaints that discrepancies in his weekly paychecks violated the FLSA 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 *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 held that complainant's belief that her supervisor engaged in improper switches was not reasonable in light of the absence of any evidence of such transactions, the fact that complainant failed to raise her complaints earlier, a subsequent company investigation concluding no improper switches occurred, and her own sworn statements stating that her supervisor engaged in more "exchanges" than switches.

In *Allen v. Stewart Enter. Inc*., 2004-SOX-60 (ALJ Feb. 15, 2005), complainant inquired into whether respondent was taking steps to comply with securities regulations. The ALJ found that complainant did not have a reasonable belief that respondent had violated a SEC rule where the relevant documents were internal working documents not intended for submission to the SEC and complainant admitted that she was not aware of any law making the SEC rule applicable to those internal documents. Additionally, the ALJ reasoned that respondent already knew about the problem before complainant reported it and was making it a priority to remedy the problem.

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 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 also there was 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 that 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 that there was no evidence of any pending legal

proceeding or that governmental authorities were contemplating any legal proceeding that would have needed to have been reported under Rule S-K.

In *Bechtel v. Competitive Technologies Inc*., 2005-SOX-33 (ALJ Oct. 5, 2005), an ALJ found that reporting alleged insider trading was not protected activity because his conclusions were not "objectively supported" and because he failed to act in a way that would lead one to believe he thought fraud was taking place. The ALJ noted that complainant did not report the alleged conduct to any authority and did not follow the company's procedures for making allegations regarding insider trading. The ALJ concluded that this "failure to bring such a serious allegation to anyone's attention is inconsistent with his expressed concerns for how his disclosure would affect shareholders and the company's compliance with SOX disclosure rules." However, the ALJ did find that complainant's refusal to sign disclosure forms and his expressed concerns about the disclosure committee were protected activity under Section 806.

In contrast, in *Platone,* 2003-SOX-27, the ALJ ruled that a former airline labor relations manager engaged in protected activity by raising concerns about financial irregularities within the company. Specifically, the complainant complained of discrepancies in the "flight loss" pay system, an arrangement which effectively 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 when the pilot was called away from flight duty to attend to official union business. Complainant reported that some members of the union leadership 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.

Despite an absence of evidence reflecting that the company was ever not reimbursed by the union or that this purported arrangement ever resulted in any financial loss to the company, the *Platone* ALJ determined that the complainant's "suspicions were reasonable, and that she had good grounds to believe that a fraud was being perpetrated" on the company and its stockholders. Curiously, the ALJ did not address the materiality requirement and did not specify which predicate federal fraud or securities provision may have been violated.

Similarly, in *Welch v. Cardinal Bankshares Corp*., 2003-SOX-15 (ALJ Jan. 28, 2004), an ALJ found that complainant had a reasonable belief that improper entries totaling $195,000 on the company's financial statements were improper, were material and could mislead potential investors.

Likewise, in *Kalkunte v. DVI Financial Servs. Inc*., 2004-SOX-56 (ALJ July 18, 2005), complainant, an attorney, alleged that 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 that 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 that the broker was not a licensed broker, knew that one could not sell securities unless one were 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 that her supervisor's practice of backdating letters of credit could have involved mail, wire and bank fraud. Although respondent argued that there was no specific evidence that it was committing fraud, the ALJ noted that an actual violation of the law is not required. The ALJ reasoned that complainant reasonably believed that 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."

See also Gonzalez III, 2004-SOX-39 (complainant's persistence in his concerns, including multiple conversations with company officials, demonstrated his reasonable belief); *Henrich v. Ecolab, Inc.*, 2004-SOX-51 (ALJ Nov. 23, 2004) (complainant reasonably believed that company's shareholders may be subjected to fraud by alleged "cheating" in accounting for inventory, material losses and labor costs); *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004) (complainant reasonably believed that he had been asked to commit an illegal activity even though a subsequent investigation concluded otherwise).

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 curiam), 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, in response to those concerns, undertook significant activity to ensure that the environment was safe, that any potential problems were corrected, and that a plan was in place 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."

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.*, 2004-SOX-60, 61 & 62 (ALJ Feb. 15, 2005), complainant raised concerns about possible violations of state laws which could result in sanctions and revocation of respondent's state licenses. The ALJ found that this was not protected activity because Section 806 only provides protection for reporting violations of the enumerated fraud provisions.

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 that 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.*, 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 that the complaints concerned internal company policy as opposed to actual violations of federal law.

Likewise, in *Marshall v. Northrup Gruman Synoptics*, 2005-SOX-8 (ALJ June 22, 2005), complainant alleged that 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 that complainant did not engage in protected

activity because his 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 *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 *Barnes*, 2004-SOX-58, 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.* (OSHA Jan. 27, 2006),[6] 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 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

[6] *See* 22 Daily Labor Report (BNA), at A-2 (Feb. 2, 2006).

vendors in violation of federal acquisition regulations, although less than direct, could also perpetrate a fraud on shareholders under certain circumstances. *See also Kalkunte v. DVI Financial Servs. Inc.*, 2004-SOX-56 (ALJ July 18. 2005) (where complainant alleged that respondent improperly commingled funds and its senior management altered delinquency reports and incorporated those altered reports into disclosure statements filed to the public, ALJ found that these activities "plainly violate SEC rules and regulations, and constitute fraud against shareholders").

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*, 2004-SOX-60, 61 & 62, 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*, 2004-SOX-63, 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."

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."

In *Stojicevic v. Arizona-American Water Co*., 2004-SOX-73 (ALJ Mar. 24, 2005), an ALJ found that complainant did not engage 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 that "[a]n allegation that Respondent made financially unsound choices . . . is quite distinct from an allegation that Respondent engaged in fraud." The ALJ noted that complainant offered no evidence that respondent made any false statements to shareholders or investors regarding its earnings such that its conduct could constitute 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.*

Yet, 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 materially 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 that 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.*

Likewise, in *Smith v. Hewlett Packard*, 2005-SOX-88 (ALJ Jan. 19, 2006), complainant, an employee relations staffer, alleged that 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."

4. "Provide Information"

Under Section 806(a)(1), an employee must "provide information" (or cause information to be provided) in order to engage in protected activity. Contrary to this express language, some ALJs have concluded that a refusal 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, in *Getman v. Southwest Securities, Inc*., 2003-SOX-8 (ARB July 29, 2005), complainant, a former securities analyst for an investment bank, contended that 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 that 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, 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."

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.

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 *Trodden v Overnite Transp. Co*., 2004-SOX-64 (ALJ March 29, 2005), complainant, 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 that 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.'"

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 did conclude that 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. *See Sasse v. United States DOL*, 409 F.3d 773 (6th Cir. 2005) (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).

a. "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.

5. "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 fact 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 that her comments to the company's COO constituted protected activity. Although the COO was complainant's peer, and not her supervisor, the ALJ found that 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 that 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.

6. Complaint to a Member of Congress

Senators Patrick Leahy and Charles E. Grassley, who co-authored the whistleblower provisions of the Act, have stated 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). Likewise, in its interim regulations, the DOL explained that the Act's protections extend to employees who complain to a Member of Congress "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." 68 Fed. Reg. 31861 (May 28, 2003) (explaining 29 C.F.R § 1980.102.).

Yet, the White House has expressed that SOX coverage is 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).

In one decision, the DOL concluded that an employee's complaints to a Member of Congress constituted protected activity under the whistleblowing provisions of various environmental statutes, even though the Member was not conducting an official investigation. *See Sasse v. Office of the U.S. Attorney*, 1998-CAA-7 (ALJ May 8, 2002). The employee was an Assistant U.S. Attorney who alleged he was retaliated against by his Department of Justice supervisors because he investigated and prosecuted environmental crimes. In the course of his work, the Assistant U.S. Attorney complained to Congressman Dennis Kucinich about contaminated land by the Cleveland Hopkins International Airport. The ALJ concluded that the Assistant U.S. Attorney was engaging in protected activity despite the fact that Congressman Kucinich was not engaged in a duly authorized investigation. The ALJ found the Congressman was not in the employee's chain of command and that the employee's dealings with the Congressman were not a part of his normal work duties. Because he risked his "own personal

job security for the advancement of the public good by disclosing abuses by government personnel," the employee demonstrated that he had engaged in protected activity.

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. There is not yet any case law under this provision of the Act defining the range of activities that are covered. Still, while this 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).

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 that 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

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. Proof Issues

There is little case law under SOX as yet 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).

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 plaintiff's protected conduct.

   a. *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).

   b. *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 (10th Cir. 2001) (Title VII, § 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 San 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 Plaintiff's 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 plaintiff's race and age discrimination complaint did not establish retaliation absent evidence that plaintiff's "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 (1st 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: *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:

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 plaintiff's 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 plaintiff's supervisors began shortly after plaintiff's complaint of discrimination); *Malec v. Dry Storage Corp.,* 1997 WL 534917 (N.D. Il. Aug. 19, 1997) (increased pattern of criticism and animosity proved causal connection); EEOC Guidelines, Vol. 2, Sec. 8-II, E.2 (even where time lapse between protected activity and adverse action is long, employee still may establish retaliation claim if there is other evidence that raises inference of retaliation, such as frequent comments about the protected activity during that period).

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 plaintiff's 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. Performance problems.

See, *e.g.*, *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. Quad/Graphics, 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 plaintiff's EEOC complaint).

4. Previously planned decisions.

See, *e.g.*, *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

plaintiff's 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 plaintiff's ability to return to work with or without reasonable accommodation remained essentially the same before and after she filed EEOC charge).

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).

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 DOL. *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*., ARB No. 04-123, ALJ No. 2004-SOX-35 (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 No. 04-120, ALJ No. 2004-SOX-54 (ARB Aug. 31, 2005). Halpern asserted that 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 arguments, holding that "Halpern's failure to acquire such evidence does not constitute an extraordinary circumstance warranting tolling of the limitations period." ARB No. 04-120 at 5.

In *Murray*, the court expressed that a federal district court lacks jurisdiction over a SOX retaliation complaint if the plaintiff failed to file the original complaint with the 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 that the complaint was timely because the letter was incorrectly addressed, and therefore it was plausible that the complainant did not receive it until April 9, 2002, within the 90-day statute of limitations. *Id.* at 5.

In *Swenk v. Exelon Generation Co*., LLC, 2003-ERA-30 (ALJ Nov. 13, 2003), an employee's unescorted access to the employer's nuclear power plant was suspended on November 5, 2002, effectively terminating his employment. Until January 8, 2003, the employer allowed him to seek employment opportunities that did not require unescorted access while also considering his internal appeal of the suspension. The ALJ held that the adverse action occurred on November 5; therefore, his June 4, 2003 complaint was untimely.

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 not justify extension of the filing period, including:

- Ignorance of the statutory filing period;
- Filing of unemployment compensation claims;
- Filing a workers' compensation claim;
- Filing a private negligence or damage suit;

- Filing a grievance or arbitration action; or

- Filing a discrimination complaint with a state plan state or another agency that has the authority to grant the requested relief.

OSHA Manual, at 2-4, 5.

ALJs have addressed the issue of 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, in that case 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 that 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 that she had not raised "the precise statutory claim in issue" but had mistakenly done so in the wrong forum. *Id.* at 7-8.

In *Moldaver 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 that 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 that 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. The ALJ, citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), 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 that 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 that the actions collectively created a hostile work environment and "should be viewed as one unlawful employment practice." *Id.*

4. Preliminary *Prima Facie* Showing

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.[7] 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 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.8 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).

In *Taylor v. Express One Int'l, Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002), the ALJ stated that in order to establish a prima facie AIR21 case, the employee must demonstrate: (1) the employer is covered by the act; (2) the employee engaged in protected activity; (3) the employee suffered an adverse employment action; and (4) a nexus existed between the protected

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[7] 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).

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

activity (as a contributing factor) and the adverse action, or circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the adverse action.

In *Davis v. United Airlines, Inc*., 2001-AIR-5 (ARB Apr. 25, 2002), the ARB, applying the same standard, expressed that the words "contributing factor" mean any factor, which alone or in connection with the other factors, tends to affect in any way the outcome of the decision. The ARB noted that this test is specifically intended to overrule the existing case law, which required a whistleblower to prove that his protected activity was a "significant," "motivating," "substantial," or "predominant" factor in an employment action.

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.

a. 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 that these remarks were more like general inquiries which were not protected under SOX.

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 as to 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 ALJ, 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)).

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 statute establishes a higher "clear and convincing evidence" standard. 49 U.S.C. § 42121(b)(2)(B)(ii).

In *Taylor v. Express One International, Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002), the ALJ observed that although there is no precise definition of "clear and convincing," "the Secretary and the courts recognize that this evidentiary standard is a higher burden than preponderance of the evidence but less than beyond a reasonable doubt." *Id.* at 28.

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").

a. 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). This "preliminary order of reinstatement" mechanism is parallel to provisions found in AIR21, the ERA and the Surface Transportation Assistance Act

("STAA"), though most DOL-enforced whistleblower statutes do not provide for preliminary reinstatement.

If preliminary, immediate reinstatement is to be ordered, 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.

In *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), the Court interpreted a similar pre-hearing reinstatement provision in Section 405 of the STAA. The Court 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 only 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). In *Bechtel*, OSHA concluded that the complainants, two former vice presidents of Competitive Technologies, Inc. ("CTT"), engaged in protected conduct by raising concerns with several members of defendant's management concerning financial reporting, and that CEO John Nano's attitude toward them changed after they raised these concerns. Mr. Nano criticized and attempted to embarrass them at staff meetings and in front of co-workers, and ultimately terminated them. After CTT had numerous opportunities to respond to the allegations, OSHA concluded that the complainants were terminated in violation of Section 806 and issued a preliminary order requiring CTT to reinstate them.

CTT requested a hearing and filed a motion to stay the reinstatement order. The ALJ denied the motion, and CTT continued to violate the preliminary order of reinstatement. The complainants filed suit in district court seeking enforcement of the preliminary order of reinstatement. CTT asserted that the court lacked subject matter jurisdiction and that the complainants failed to show that they were entitled to injunctive relief. Judge Covello held that SOX "explicitly authorizes jurisdiction in this court to enforce a preliminary order as if it were a final order." *Bechtel*, 369 F.Supp.2d at 236 (*citing* 49 U.S.C. § 42121(b)(2)). In addition, Judge Covello held that the complainants were entitled to reinstatement regardless of preliminary order regardless of whether they established the elements for preliminary injunctive relief under Federal Rule of Civil Procedure 65. *Id.* The case is currently on appeal before the Second Circuit.

The summary of the interim regulations suggests that the "after-acquired evidence" defense is available to defeat reinstatement where evidence shows that 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.

9. 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 Chief ALJ of the DOL 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.

In *Bodine v. International Total Services*, 2001-AIR-4 (ALJ Nov. 20, 2001), the ALJ dismissed the respondent's objections because its filing was five (5) days beyond the deadline. However, in *Swint v. Net Jets Aviation, Inc*., 2003-AIR-26 (ALJ July 9, 2003), the ALJ decided that the 30-day objection period is subject to equitable tolling. Nonetheless, the ALJ ultimately held that tolling was inappropriate because the complainant failed to demonstrate that his untimeliness fell within one of "the circumscribed equitable tolling 'exceptions.'" *Id*. at 8.

Likewise, 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 that the complainant's failure to serve a copy of his objections on the respondent within 30 days of receipt of OSHA's determination was not grounds for dismissal. *See also Richards v. Lexmark 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).

10. 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*, ARB No. 02-109, ALJ No. 2002-SWD-1 (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*. 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

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 (ARB 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).

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*, 2005-SOX-9 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 as to 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).

Although SOX is silent as to 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 Case No. 98-77, ALJ Case No. 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 that 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 U.S. Dist. LEXIS 15753, 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 of 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 that 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 that 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 No. 03-036, ALJ No. 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), unaddressed 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 that 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 Cmtys., Inc.*, 2004 U.S. Dist. LEXIS 25652 (S.D. Fla. Nov. 18, 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."

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 that 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*, ARB No. 05-060, ALJ No. 2004-SOX-39, at 3 (ARB May 31, 2005).

Likewise, in *Gallagher v. Granada Entertainment USA and ITV plc*, 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 No. 03-048, ALJ No. 2002-CAA-5 (ARB Aug. 31, 2004).

At least 20 days before the hearing date, parties may file motions for summary decision. 29 CFR § 18.41. Once a party that has moved for summary decision "has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The non-moving party may not rest upon mere allegations, speculation, or denials of his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof." *See Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office*, ARB No. 03-048, ALJ No. 2002-CAA-5 (ARB Aug. 31, 2004) (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."

i. 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 nonlitigious solutions to disputes, and that exclusion is not required where the evidence is offered for a purpose other than to prove liability or damages. In the case at hand, 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 *Welch v. Cardinal Bankshares Corp*., 2003-SOX-15 (ALJ Aug. 1, 2003), the ALJ granted the complainant's request that the employer produce, *in camera*, unredacted copies of the minutes of joint meetings of several Audit Committees. Nearly 50% of the text of the minutes produced by the employer during discovery had been redacted and the words "redacted – attorney client privilege" inserted in the blank portions of the documents. The ALJ, relying on Fourth Circuit precedent, ruled that the employer had not met its burden to demonstrate that the attorney-client privilege was applicable to the redacted portions of the minutes. Thereafter, in a decision reported at 2003-SOX-15 (ALJ Aug. 15, 2003), the ALJ determined, after inspection, that the privilege had not been properly invoked. Although two of the employer's attorneys had made statements before the Audit Committees, none of those statements contained confidential client communications made by the employer. Rather, their statements were, in large part, "descriptions of verbal and written communications *made by or to Complainant*, and actions *taken by him*, with respect to his concerns about alleged improprieties at the bank." Slip op. at 4 (emphasis in original).

ii. Reconsideration

The SOX regulations suggest that 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*., 86-ERA-23 (ARB Nov. 20, 1998). However, in *Negron v. Vieques Air Link, Inc*., ARB No. 04-021, ALJ No. 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 that 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.

11. 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 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 No. 05-036, ALJ No. 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. No discovery is available. *See Reid v. Constellation Energy Group, Inc*., ARB No. 04-107, ALJ No. 2004-ERA-8 (ARB Oct. 13, 2004); *Halpern v. XL Capital, Ltd*., ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Oct. 13, 2004); *Cummings v. USA Truck, Inc*., ARB No. 04-043, ALJ No. 2003-STA-47 (ARB Sept. 15, 2004). Claimed procedural due process violations not presented to the ALJ are waived. *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, at 9 (ARB Sept. 30, 2005) (*citing Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 01-CER-1, slip op. at 9 (ARB Apr. 30, 2004). The ARB holds its proceedings in Washington, DC, 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 No. 99-121, ALJ Nos. 1992-CAA-2 & 5, 1993-CAA-1, 1994-CAA-2 and 3, 1995-CAA-1 (ARB June 9, 2000). 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 No. 04-021, ALJ No. 2003-AIR-10 (ARB Jan. 8, 2004); *Hasan v. J.A. Jones, Inc*., ARB No. 02-123, ALJ No. 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 No. 04-123, ALJ No. 2004-SOX-35, at 4 (ARB Sept. 30, 2005) (*citing Honardoost v. Peco Energy Co*., ARB No. 01-030, ALJ 00-ERA-36, slip op. 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 Nos. 03-156 & 04-065, ALJ Nos. 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 expressed that this 120-day period is directory and not jurisdictional. *Welch v. Cardinal Bankshares Corp*., ARB No. 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 passed since the filing of the complaint). *Heaney v. GBS Properties LLC*, ARB No. 05-039, ALJ No. 2004-SOX-72 (ARB May 19, 2005); *Allen v. Stewart Enterprises, Inc*., ARB No. 05-059, ALJ Nos. 2004-SOX-60 to 62 (ARB Aug. 17, 2005).

a. Timeliness of Appeal

In *Svendsen v. Air Methods, Inc*., ARB No. 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*, 2002-AIR-7, at 2 (ARB July 29, 2003); *Herchak v. America West Airlines, Inc*., 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 No. 04-054, ALJ No. 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 No. 03-106, ALJ No. 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).

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 No. 02-118, ALJ No. 02-STA-44 (ARB Feb. 13, 2003); *Puckett v. Tennessee Valley Auth*., 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*., 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 No. 03-106, ALJ No. 2003-ERA-9 (ARB Feb. 26, 2004), and *Welch v. Cardinal Bankshares Corp*., ARB No. 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 will still evaluate whether interlocutory appeal is appropriate

under the collateral order exception. In *Welch*, the ARB refused to decide the issue of 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 No. 04-078, ALJ No. 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 No. 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 No. 04-107, ALJ No. 2004-ERA-8 (ARB Dec. 17, 2004) (dismissing appeal for failure to comply with briefing schedule); *Powers v. Pinnacle Airlines, Inc*., ARB No. 04-035, ALJ No. 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 No. 03-153, 1993-ERA-6 (ARB Mar. 30, 2004); *Gass v. Lockheed Martin Energy Systems, Inc*., ARB No. 03-093, ALJ No. 2000-CAA-22 (ARB January 29, 2004); *Steffenhagen v. Securitas Sverige, AR*, ARB No. 03-139, ALJ No. 2003-SOX-24 (ARB January 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).

12. 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 that 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."

13. 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 No. 05-045, ALJ No. 2004-SOX-78 (ARB Aug. 30, 2005); *Allen v. Stewart Enterprises, Inc*., ARB No. 05-059, ALJ Nos. 2004-SOX-60, 61 & 62 (ARB Aug. 17, 2005); *McIntyre v. Merrill Lynch*, ARB No. 04-055, ALJ No. 2003-SOX-23 (ARB July 27, 2005); *Heaney v. GBS Properties LLC, d/b/a/ Prudential Gardner Realtors*, ARB No. 05-039, ALJ No. 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 Cmtys., Inc*., 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. Nov. 18, 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. September 2, 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.

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.

a. Issues Relating To Removal

An issue that is just beginning to be addressed 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 DOL suggests 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. 69 Fed. Reg. 52111. Similarly, the DOL suggests that 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 DOL to issue a decision under appropriate time frames. *Id*.

In *Hanna v. WCI Cmtys., Inc*., 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. Nov. 18, 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 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 *Barron v. Duke Energy Corp*., No. 3:03-CV-256 (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 *Hanna v. WCI Cmtys., Inc*., 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. Nov. 18, 2004), 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.

In *Radu v. Lear Corp*., 2005 WL 2417625 (E.D. Mich. Sept. 30, 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).

In *Hanna v. WCI Cmtys., 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* that 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.

14. 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). Some earlier ALJ decisions addressing similar whistleblower provisions suggested that the traditional *McDonnell Douglas* burden-shifting framework might apply in SOX whistleblower actions. *See, e.g., Taylor v. Express One International, Inc.*, 201-AIR-2 (ALJ Feb. 15, 2002). More recent decisions, however, have rejected this notion, instead consistently employing a "mixed motive" type analysis.

For example, in *Collins*, 334 F. Supp. 2d 1365, 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 No. 04-123, ALJ No. 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 Gruman 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 No. 04-059, ALJ No. 2003-SOX-8 (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.

In *Welch v. Cardinal Bankshares Corp*., 2003-SOX-15 (ALJ Jan. 28, 2004), the employer contended that its Chief Financial Officer was terminated because he refused to meet with Audit Committee investigators (including the company's outside counsel) without his personal attorney present to discuss concerns he had raised about the company's accounting practices. The employer claimed it did not allow an outside attorney to be present because the attorney's presence would destroy the confidentiality of the meeting and prevent attorney-client privilege from attaching to communications made at the meeting. In addition, the company believed the presence of the attorney would have changed the meeting from a fact-finding investigation into an adversarial process oriented toward the complainant's desire for a severance package. The ALJ found the employer to be disingenuous. The ALJ opined that the purpose of the meeting was not to conduct a legitimate inquiry into concerns raised by the CFO, but to create a situation where the CFO would refuse to attend the meeting, thus justifying his discharge. Moreover, the ALJ found, the company under the circumstances had no reasonable expectation that the information to be discussed was confidential, making the attorney-client privilege inapplicable. In any event, the CFO, as an officer, could waive the privilege:

> Welch, as Cardinal's CFO, was a corporate officer of Respondent. As such, he had a fiduciary duty to Cardinal and its shareholders to ensure, *inter alia*, that Respondent complied with all applicable laws and regulations governing the administration of financial institutions such as Cardinal, and to disclose any failure of Cardinal to do so. In furtherance of those duties, he raised a number of issues regarding various events which occurred at Cardinal during the Summer and early Fall

> of 2002, which events he reasonably believed constituted violations of Federal law. Each of the issues raised by Welch concerned matters under the direct auspices of the CFO and involved a variety of documents and information to which he had legitimate access.
>
> Clearly, the disclosure of perceived financial improprieties is in the best interests of a corporation's shareholders so they may ensure that the corporation's officers and directors are complying with, *inter alia*, their duties of good care, good faith, and loyalty. Furthermore, Sarbanes-Oxley was expressly enacted by Congress to foster the disclosure of corporate wrongdoing and to protect from retaliation those employees, officers, and directors who make such disclosures. When ordered by Moore to meet with Densmore and Larrowe to discuss the issues he had raised, Welch was clearly acting in furtherance of his fiduciary duty to disclose possible wrongdoing. Allowing him to have his own counsel present during the meeting would not only promote Welch's fulfillment of that duty, it would further the purposes of Sarbanes-Oxley by protecting Welch from retaliation for disclosing improprieties governed by the Act. As an officer of Cardinal, it thus was within his power to waive the attorney-client privilege consistent with his fiduciary duty to act in the best interests of Respondent. [Citation Omitted.]

15. 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).

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"), in order 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).

In *Lerbs v. Buca Di Beppo, Inc*., 2004-SOX-8 (ALJ June 15, 2004), the employer sought dismissal of the complaint on the ground, *inter alia*, that SOX was not in effect at the time the complainant blew the whistle. The ALJ ruled that the retroactivity inquiry looks to the date of the alleged retaliatory act, which occurred post-SOX effective date, rather than the date of the protected activity.

At least one court has addressed the possible retroactive application of SOX. In *Zhu v. Federal Housing Finance Board*, 389 F.Supp.2d 1253 (D. Kan. 2005), plaintiff's claim was based on events occurring prior to July 27, 2001, slightly over a year before SOX's effective date (July 30, 2002). The court noted the absence of case law on the issue and reasoned,

"Because of the 90-day exhaustion requirement, however, the Act could only provide relief for conduct which occurred ninety days (or less) before the statute was enacted."

C. ADR

While still an open issue, where there is an arbitration agreement, the DOL 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.

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.

D. Settlement Agreements

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, as did 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 of 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).

In *Concone v. Capital One Financial Corp*., ARB No. 05-038, ALJ No. 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.

Another issue to consider regarding settlement is confidentiality. In *Doherty v. Hayward Tyler, Inc*., ARB No. 04-001, ALJ No. 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).

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.

1. 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 No. 02-105, ALJ No. 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. Equitable Relief

Section 806 of the Act provides that a prevailing employee is "entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c). The available damages "include" reinstatement with the same seniority the employee would have had but for the discrimination and back pay plus interest. Also included are "special damages sustained as a result of the discrimination." There is no express authority for emotional distress damages, but the DOL and ARB consistently have viewed emotional distress damages as falling within the "make whole" relief authorized under the whistleblower statutes within its jurisdiction. *See, e.g.,*

Kalkunte v. DVI Financial Servs. Inc., ALJ No. 2004-SOX-56 (July 18, 2005) (awarding $22,000 in compensatory damages for emotional distress); *see also, Van der Meer v. Western Kentucky Univ.*, ARB No. 98-132, ALJ No. 1995-ERA-38 (April 20, 1998).

The statute also does not authorize punitive damages, and punitive damages would not be considered as "relief necessary to make the employee whole." *See Murray v. TXU Corp*., 2005 WL 1356444 (N.D. Tex. June 7, 2005) (reviewing statute and legislative history and concluding that "the Court finds no reason to believe that [SOX] allows for punitive damages"); *Hanna v. WCI Communities, Inc*., 2004 WL 2931132 (S.D. Fla. December 2, 2004) (punitive damages are unavailable under SOX). Furthermore, punitive damages could not be constitutionally awarded in an agency proceeding. It has been the ARB's view that the DOL cannot award exemplary or punitive damages absent express statutory authorization. *See, e.g., Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 97-CAA-2 (Feb. 9, 2000).

In *Halloum v. Intel Corp*., 2003-SOX-7 (ALJ Mar. 4, 2004), the employer, while preparing for hearing, discovered that the complainant had made a misrepresentation regarding moving expenses. The ALJ found that the misrepresentation could not have been a reason for the adverse employment action, as it was discovered later. Thus, according to the ALJ, such after-acquired evidence does not bar an employee for prevailing on the issue of retaliation, but it would operate to limit the remedy in the event the complainant were to prevail.

2. Attorneys' Fees

To the prevailing employee, Section 806 authorizes "any special damages . . . including litigation costs, expert witness fees, and reasonable attorney fees." The ALJ uses the following standards in determining a fee and cost award to the prevailing employee:

> A reasonable fee is not necessarily that agreed to by the Complainant and her counsel. *Blanchard v. Bergeron,* 489 U.S. 87 (1989); *Blackburn v. Metric Constructors, Inc.,* 86-ERA-4 (Sec'y October 30, 1991). Factors to be considered in awarding fees are:
>
> 1. Time and labor required;
> 2. Customary fee;
> 3. Novelty and difficulty of the questions;
> 4. The skill requisite to perform the legal service properly;
> 5. Preclusion of other employment by the attorney due to acceptance of the case;
> 6. Limitations imposed by the client or the legal circumstances. Priority work that delays the lawyer's other legal work is entitled to some premium;
> 7. Amount involved and the results obtained;

8. Experience, reputation, and ability of the attorney;

9. "Undesirability" of the case;

10. Awards in similar cases;

11. Whether the fee is fixed or contingent; and

12. Nature and length of the professional relationship with the client.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974).

In addition, litigation costs and expenses are also reimbursable, including monies reasonably spent in pursuing the cause of action. *Goldstein v. Ebasco Constructors, Inc.,* No. 86-ERA-36 (May 17, 1988). This includes lodging, paralegal expenses, and the Complainant's transportation expenses to and from the hearing.

Kalkunte v. DVI Financial Servs. Inc., DOL ALJ No. 2004-SOX-56 (July 18, 2005).

A prevailing employer may be awarded up to $1,000 in attorneys' fees if the complaint is found to be frivolous or brought in bad faith. 49 U.S.C. § 42121(b)(3)(C).

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·

> (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)).

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 that 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

· The quoted Rule reflects the revisions made by the ABA in February 2002.

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.

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