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Submitted by:

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. 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.

On July 21, 2010, President Obama signed into law the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. 111-203. Dodd-Frank, *inter alia*, significantly expands SOX's civil whistleblower protections and creates additional anti-retaliation requirements for employers. The Dodd-Frank amendments, which will be discussed throughout this report, reflect Congress's response to criticism that Section 806 has been interpreted in an unduly restrictive, pro-employer manner which has limited whistleblowers' ability to have their claims heard on the merits.

SOX contains both a civil and a criminal whistleblower provision. Section 806, codified at 18 U.S.C. §1514A, creates a civil cause of action for employees who have been subject to retaliation for corporate whistleblowing. This provision addressed Congress's concern that corporate whistleblowers previously had 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. *See* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy). 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, codified at 18 U.S.C. §1513(e), makes it a felony for anyone to knowingly retaliate against or take any action "harmful" to any person, including interfering with the person's employment, for providing truthful information to a law enforcement officer relating to the commission or possible commission of a federal offense. As part of a criminal obstruction of justice statute, Section 1107 is enforced by the U.S. Department of Justice.

In 2010, Section 922 of the Dodd-Frank Act established new whistleblower protections, including a bounty system which allows the SEC, in any action involving sanctions in excess of $1 million, to compensate whistleblowers with up to 30% of the amount of the sanctions. Furthermore, Title X of Dodd-Frank creates the Bureau of Consumer Financial Protection, which is empowered to regulate the offering and provision of consumer financial products and services. The Bureau is granted certain enforcement powers, including the

authority to investigate and commence civil actions. Section 1057 prohibits retaliation against financial services employees who engage in protected conduct, which includes: (1) providing an employer, the Bureau, or any state, local of federal agency any information the employee reasonably believes to be a violation of Title X; (2) participating in Bureau proceedings; (3) filing any proceeding "under any federal consumer financial law"; and (4) objecting to, or refusing to participate in, any activity, policy, practice, or assigned task that the employee reasonably believes to be in violation of any law, rule, order, standard or prohibition subject to the Bureau's jurisdiction. Complaints must be filed with the DOL within 180 days of the alleged violation. The SEC is in the process of promulgating regulations interpreting the Dodd-Frank whistleblower provisions.

The membership of the Administrative Review Board ("ARB") changed dramatically in 2010. In January 2010, Labor Secretary Hilda Solis appointed Paul Igasaki to serve as Chair of the ARB and E. Cooper Brown as Vice-Chair. In July 2010, Joanne Royce and Luis A. Corchado were appointed to the Board. As a result, the ARB now consists of four judges appointed by Solis. Prior to joining the Board, Royce worked in government service and for 15 years with the Government Accountability Project (GAP), a non-profit law firm which represents whistleblowers. Corchado previously was the Director of Litigation in the Denver City Attorney's Office, which handled civil rights and employment litigation, and served as an ALJ for the State of Colorado.

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). This 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). In 2010, Dodd-Frank amended SOX to cover "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company." These provisions are discussed in Section III, *infra*.

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). These provisions are discussed in Section IV, *infra*.

In addition, Dodd-Frank added protections for whistleblowers who complain to the SEC. Specifically, Section 21F to the Securities Exchange Act allows an employee who complains to the SEC to file a claim directly in federal court, bypassing the current DOL

administrative process. Unlike Section 806, this provision does not contain a reasonable belief standard. Dodd-Frank also provides for double back-pay damages to prevailing whistleblowers in such cases, with a statute of limitations period of six years from the date of the violation or three years from the date the employee discovers the violation (but no more than ten years from the date of violation). Moreover, Section 922 allows the SEC, in any action involving sanctions in excess of $1 million, to compensate whistleblowers with up to 30% but not less than 10% of the amount of the sanctions. The amounts paid are within the sole discretion of the SEC, subject to judicial review.

Employees of covered companies who believe they have been subjected to adverse action for having engaged in protected activity may file a complaint with the Secretary of Labor within 180 days of the alleged retaliatory act. Prior to Dodd-Frank, this time period was limited to 90 days. *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 and many other recent federal whistleblower statutes, the Secretary of Labor has assigned responsibility for administering Section 806 to the Assistant Secretary for Occupational Safety and Health ("OSHA"). *See* Secretary's Order 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002). In 2004 OSHA 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 procedures governing SOX investigations are discussed in Section VI, *infra*.

In interpreting Section 806's substantive requirements and burdens of proof, the DOL and the courts have looked to agency and judicial decisions under other OSHA-enforced whistleblower statutes, such as AIR21 and 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 have borrowed heavily from case law developed under Title VII and other discrimination statutes. These concepts are discussed in Section V, *infra*.

One notable distinction between Section 806 of SOX and other earlier whistleblower laws administered by the DOL is SOX's "kick out" provision that allows the whistleblower claimant to bring a *de novo* action in district court. The claimant may do so, if the Secretary has not issued a final decision within 180 days of the filing of the complaint with the DOL, and provided 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, pursuant to Dodd-Frank, will be entitled to a jury trial. Regardless of where an action is adjudicated, however, the remedies available generally are the same. Section 806 provides that an employee subject to retaliation is "entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). Claimants who proceed before DOL, however, are entitled to "interim reinstatement." *See* 18 U.S.C. § 1514A(b)(2)(A) (incorporating 49 U.S.C. §

42121(b)(2)(A)). This aspect of SOX is discussed, *intra*, in Section VI.A.8.a. of this Report.

III. COVERED EMPLOYERS

A. Publicly Traded Companies

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

The fact that a company may own or even issue securities, alone, is insufficient to qualify it for Section 806 coverage. *See Crown v. City of Chicago*, 2010-SOX-60 (ALJ Oct. 29, 2010) (fact that city owned a portfolio of securities insufficient to establish coverage); *Phillips v. Denver Water Bd.*, 2009-SOX-24 (ALJ May 8, 2009) (although the board issued securities in the form of municipal bonds, the bonds were exempted securities for purposes of section 12 and, therefore, the Water Board was not a company covered by Section 806); *Flake v. New World Pasta Co*., 2003-SOX-18 (ALJ July 7, 2003), *aff'd*, ARB No. 03-126 (ARB Feb. 25, 2004) (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).

B. Subsidiaries

1. Dodd-Frank Act

In 2010, Dodd-Frank amended SOX to expressly cover "any subsidiary or affiliate (of a publicly-traded company) whose financial information is included in the consolidated financial statements of such company." Pub.L. 111-203, §929A (July 21, 2010). This amendment was intended to reverse some past cases in which whistleblower claims were dismissed because the whistleblower did not work for a "publicly-traded company," even though the whistleblower was employed by a publicly-traded company's subsidiary.

2. Pre-Dodd-Frank

Under pre-Dodd-Frank law, which is still relevant to cases pending prior to the Dodd-Frank effective date of July 21, 2010, Section 806 had been inconsistently applied to private subsidiaries of publicly traded companies under a number of theories. In Although several early ALJ decisions questioned whether subsidiaries were covered unser Section 806, the ARB in *Klopfenstein v. PPC Flow Technologies Holdings, Inc*., ARB Nos. 07-021, 07-022, 2004-SOX-11 (ARB Aug. 31, 2009), concluded that a non-publicly traded subsidiary of a publicly traded parent company could be a proper respondent as the parent's agent. The ARB found that the subsidiary was acting as the parent's agent for the purpose of discharging the complainant and therefore was properly named as a respondent, reasoning that the policy that complainant was alleged to have violated was a policy the parent company applied to its subsidiaries, an employee in the parent's finance department learned of the violation, the subsidiary president who

discharged the complainant also was executive vice president of the parent and this subsidiary president conferred with other senior managers from both the subsidiary and the parent following an investigation of and report on the violation of the policy.

Recent pre-Dodd-Frank ALJ decisions extended *Klopfenstein* to recognize subsidiary coverage even beyond the facts in *Klopfenstein.* *See Mallory v. Morgan Chase & Co*., 2009-SOX-29 (ALJ Nov. 20, 2009) (noting that the ARB "never said the agency had to be 'for employment purposes' nor implied that the Parent had to direct or order decisions about the worker's employment for the subsidiary to be an agent"); *Walters v. Deutsche Bank AG*, 2008-SOX-70 (ALJ Mar. 23, 2009) (concluding that the parent company "is directly responsible for acts of discrimination against a whistleblower working in one of its operating units within a non-publicly traded, consolidated subsidiary of a subsidiary of a subsidiary within [the parent]'s corporate family").

- **Court decisions**

In contrast, courts applying pre-Dodd-Frank law more often than not strictly construed the statute and found that subsidiaries were not covered under Section 806. *See Hein v. AT&T Operations, Inc*., 2010 WL 5313526 (D. Colo. Dec. 17, 2010) ("in light of the corporate law principle that parent companies are not liable for their subsidiaries' actions … Plaintiff is not a protected employee under § 1514A"); *Rao v. Daimler Chrysler Corp*., 2007 U.S. Dist. LEXIS 34922 (E.D. Mich. May 14, 2007) ("Congress could have specifically included subsidiaries within the purview of § 1514A if they wanted to," and, because they did not, "the general corporate law principle would govern and employees of non-public subsidiaries are not covered under § 1514A").

C. Agents/Contractors/Officers

SOX civil whistleblower provisions cover not only publicly traded companies and subsidiaries, but also "any officer, employee, contractor, subcontractor or agent" of a covered company. 18 U.S.C. §1514A(a). The terms "officer," "employee," "contractor," "subcontractor," and "agent" are not defined in the Act, and there has been significant debate as to the scope of these terms.

1. Defining The Scope Of "Contractor, Subcontractor Or Agent" Coverage

In *Fleszar v. U.S. Dept. of Labor*, 598 F.3d 912 (7th Cir. 2010), Judge Easterbrook, in dicta, suggested that the scope of "contractor, subcontractor, or agent" coverage should be limited to entities that "participate in the activities" of the publicly-traded company, particularly activities in relation to the employment of the claimant. The court explained:

> We don't share Fleszar's belief that the phrase "contractor, subcontractor, or agent" means anyone who has any contract with an issuer of securities. Nothing in § 1514A implies that, if the AMA buys a box of rubber bands from Wal-Mart, a company with traded securities, the AMA becomes covered by § 1514A. In context, "contractor, subcontractor, or agent"

sounds like a reference to entities that participate in the issuer's activities. The idea behind such a provision is that a covered firm, such as IBM, can't retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in "Up in the Air").

2. Employee Of Publicly-Traded Company Reporting Violation By Company's Contractor, Subcontractor Or Agent

In *Sharkey v. J.P. Morgan Chase & Co*., 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011), the court found that an employee of a publicly-traded company engaged in protected activity under Section 806 by complaining to the publicly-traded company that its client, not the publicly-traded company, was engaged in covered illegal activities (e.g., mail fraud, bank fraud, money laundering or violations of federal securities laws). The court reasoned that "[b]ecause SOX is a statute designed to promote corporate ethics by protecting whistleblowers from retaliation, it should not be read narrowly."

3. Employee Of "Contractor, Subcontractor Or Agent" Reporting Violation By Publicly-Traded Company

In *Klopfenstein v. Administrative Review Bd.*, 2010 WL 4746668 (5th Cir. Nov. 23, 2010), the SEC filed an amicus brief in which it discusses its position that Section 806 should broadly protect employees of contractors, subcontractors and agents who complain about violations of federal law by publicly-traded companies. The SEC reasoned that if such employees were not covered, "contractors, subcontractors and agents" coverage would be limited to rare situations in which they are alleged to have retaliated against employees of their publicly-traded client. Thus, employees of the Big Four accounting firms, as well as other private accounting and auditing firms, mutual fund investment advisers, and the vast majority of securities attorneys who work closely with issuers (i.e., attorneys employed by private law firms) would be virtually unprotected under Section 806.

In *Lawson v. FMR LLC*, 724 F. Supp. 2d 141 (D. Mass. 2010), the court concluded that an employee of a "contractor, subcontractor or agent" of a publicly-traded company was covered under Section 806 when he reported activity that related to fraud against shareholders of the publicly-traded company. The facts of the case were unique. The publicly-traded company was a mutual fund that fell within the scope of Section 806 due to its filing requirements, but had no employees of its own. Plaintiffs worked for an investment company acting as investment advisors for the fund. The court found that they acted as "agents" of the fund by, among other things, performing administrative and executive tasks for the fund, including making fundamental decisions as to how the assets would be invested.

In contrast, in *Gupta v. Johnson & Johnson*, 2010-SOX-54 (ALJ Jan. 07, 2011), the complainant was an employee of a proprietorship owned by his spouse, which had a distribution contract with a division of the publicly-traded respondent and, therefore, could have been construed as a "contractor" of a publicly-traded company. Complainant lost his job as a result of the publicly-traded respondent terminating its contract with the proprietorship. The

ALJ found that the complainant was not covered under Section 806, in part because he "did not suffer an adverse employment action as an employee of the Respondent." The ALJ rejected the complainant's claim that he was covered because the proprietorship was a "contractor" of the publicly-traded respondent. Notably, the decision does not suggest any nexus between any protected activity by the complainant and the respondent's reasons for terminating the contract.

4. Retaliation By "Contractor, Subcontractor Or Agent" Against Employee Of Publicly Traded Client

In *Kalkunte v. DVI Financial Services, Inc*., ARB Nos. 05-139, 05-140, 2004-SOX-56 (ARB Feb. 27, 2009), a non-publicly traded, "turnaround specialist" company, which was hired to manage a publicly traded company through bankruptcy and dissolution, was held liable for the termination of complainant, an employee/attorney of the publicly traded company. The ARB concluded that the turnaround specialist company was acting as a "contractor, subcontractor, or agent" of the publicly traded company because its main principal acted as the publicly traded company's CEO, had the power to affect the complainant's employment, and made the decision to fire the complainant. The ARB also expressed that the main principal who acted as CEO was an "officer" under SOX, and could have been held personally liable, but found that the issue of his personal liability was not before it.

5. Retaliation By "Contractor, Subcontractor Or Agent" Against Its Own Employee

In *Spinner v. David Landau & Assoc., LLC*, 2010-SOX-29 (ALJ June 2, 2010), the complainant was employed by respondent, a private company, and was assigned by his employer to perform auditing work for a publicly-traded client. The ALJ rejected complainant's argument that he was covered under the "contractor, subcontractor or agent" provision in Section 806. Significantly, the behavior of the respondent private company, not the publicly-traded company, was at issue.

D. Individual Liability

Section 806's prohibition of retaliation by "officers, employees, contractors, subcontractors or agents of covered companies" has been interpreted as establishing individual liability for wrongful retaliation. *See* 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004) ("[T]he definition of 'named person' will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action.").

1. Scope Of Individual Liability

Individual liability under Section 806 has been limited to persons who have the authority to affect the terms and conditions of the complainant's employment. In *Klopfenstein v. PCC Flow Technologies Holdings, Inc*., ARB 04-149, 2004- SOX-11 (ARB Aug. 31, 2009), the ARB applied this general rule and concluded that the employer's vice president, who participated in the investigation of complainant, but not complainant's termination, was not sufficiently

involved in the pertinent employment action to be subject to liability. The ARB concluded that "he was not a decision maker in the termination of [complainant]'s employment."

2. Must Exhaust Administrative Remedies As To Individual Defendants

District courts continue to hold that plaintiffs must exhaust their administrative remedies against individual defendants in order to proceed against them in federal court. *See Smith v. Psychiatric Solutions, Inc.*, 2009 WL 903624 (N.D. Fla. Mar. 31, 2009); *Bridges v. McDonald's Corp.*, 2009 WL 5126962 (N.D. Ill. Dec. 23, 2009).

In order to exhaust administrative remedies, it is unsettled whether the individual defendant must actually be identified as a respondent in the OSHA complaint. *Contrast Jones v. Home Federal Bank*, 2010 WL 255856 (D. Idaho Jan. 14, 2010) (although defendant was not named as respondent in plaintiff's OSHA complaint, he was sufficiently identified within the complaint) *with Smith v. Corning, Inc.*, 2007 U.S. Dist. LEXIS 52958 (W.D.N.Y. July 23, 2007) (dismissing SOX claim against individual defendant not named as respondent in plaintiff's OSHA complaint).

In a surprising decision, the ARB in *Evans v. U.S. EPA*, No. 08-059 (ARB Apr. 30, 2010), issued a decision applying *Aschroft v. Iqbal*, 129 S. Ct. 1937 (2009), to a whistleblower complaint filed with OSHA. In *Evans*, the ARB found that the complainant's allegation that he "engaged in protected activity" was insufficient; rather, the complainant "must present a factual allegation indicating that the activity could qualify for protection under the environmental acts." In light of the application of *Iqbal* to OSHA complaints, it would be prudent for complainants to specifically name the individual defendant as a respondent in the OSHA complaint in order to satisfy complainant's exhaustion requirements.

E. Extraterritorial Application

1. General Rule - *Carnero* and *Ede*

Most cases addressing the extraterritorial application of Section 806, applying the general presumption that federal labor statutes do not apply extraterritorially absent clear language by Congress to extend the statute's protections abroad, have held that Section 806 does not protect employees who work exclusively outside the United States for foreign companies, even where the employer is a subsidiary of a U.S. publicly traded company. *See Carnero v. Boston Sci. Corp.*, 433 F.3d 1 (1st Cir. 2006) and *Ede v. The Swatch Group Ltd.*, ARB 05-053, ALJ Nos. 2004-SOX-68 (ARB June 27, 2007).

In *Carnero*, the First Circuit refused to apply Section 806 to a foreign national who was directly employed by Argentinean and Brazilian subsidiaries of a corporation covered by SOX, reasoning that Congress was silent as to any intent to apply Section 806 abroad. However, the court left open the possibility that Section 806 may apply to conduct occurring overseas in cases where the complainant's employment relationship had a more substantial nexus to the U.S.

In *Ede*, the ARB dismissed a complaint because the complainant worked solely for foreign subsidiaries of the respondent in Switzerland, Hong Kong and Singapore, never worked for the respondent within the U.S., and the adverse employment actions at issue occurred outside the United States. The ARB, following *Carnero*, reasoned that Section 806 does not protect employees who work exclusively outside the United States.

Other cases applying *Carnero* and *Ede*: *Ahluwalia v. ABB, Inc*., ARB 08-008, 2007-SOX-44 (ARB June 30, 2009) and *Pik v. Goldman Sachs Group, Inc*., ARB 08-062, 2007-SOX-92 (ARB June 30, 2009) (in both cases, Section 806 did not protect residents of foreign countries employed by foreign companies operating in those countries, where the alleged adverse actions occurred outside the United States); *Villanueva v. Core Labs*, 2009-SOX-6 (ALJ June 10, 2009) (even if the retaliatory employment decisions and the policy giving rise to the alleged fraud originated in the U.S., complainant was not protected because he was a foreign national employed by a foreign subsidiary of a company covered by SOX and any overt fraudulent acts, harm and alleged retaliatory acts occurred outside the U.S.); *Talisse v. UBS AG*, 2008-SOX-74 (ALJ Jan. 8, 2009) (dismissing complaint where complainant worked in Tokyo for a foreign subsidiary, and the adverse employment action occurred in Japan).

2. Potential Expansion Of Extraterritorial Coverage

Section 929P of the Dodd-Frank Act amended the Exchange Act to provide that United States district courts shall have jurisdiction over an action brought or instituted by the SEC alleging a violation of the antifraud provisions of the Exchange Act involving "[c]onduct occurring outside the United States that has a foreseeable substantial effect within the United States." The SEC currently is conducting a study to determine whether private rights of action should be similarly extended.[1] This provision could expand extraterritorial coverage for whistleblower claims, particularly claims brought by the SEC, but conceivably also private whistleblower claims under SOX.

Such a result is consistent with *Walters v. Deutsche Bank AG*, 2008-SOX-70 (ALJ Mar. 23, 2009), in which the ALJ concluded that Section 806 protected a complainant who worked in Switzerland for a Swiss subsidiary of a foreign subsidiary of a foreign subsidiary of a foreign publicly-traded parent company covered by SOX. The ALJ concluded that the general presumption against extraterritorial application did not apply because SOX was primarily a law intended to prevent securities fraud, not predominantly a labor law. Accordingly, the ALJ applied the "effects test" and the "conduct test" adopted by courts in securities fraud cases with extraterritorial implications. Applying these tests, the ALJ concluded that Section 806 applied because the retaliatory decision and some of the protected activity occurred in the U.S., the complainant alleged that he spent some time working in the U.S. and although the alleged securities law violations did not occur in the U.S., "it appear[ed] that the adverse effects crossed the pond when Deutsche Bank AG allegedly conveyed to American investors misleading information. . . ."

[1] *See* http://www.federalregister.gov/articles/2010/10/29/2010-27357/study-on-extraterritorial-private-rights-of-action.

F. Covered Employees

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

1. Applicants

Section 806's definition of "employee" includes "an individual applying to work for a company. . . ." 29 C.F.R. §1980.101.

In *Levi v. Anheuser Busch Companies, Inc*., ARB 08-086, 2008-SOX-28 (ARB Sept. 25, 2009), the ARB held that "in a case dealing with an applicant and prospective employer, the successful complainant must show that he properly applied to an open position for which the company was seeking applicants and that he was qualified." The ARB found that the complainant failed to offer evidence that he properly applied for a job for which respondent was seeking applicants and that he was qualified.

2. Former Employees

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the U.S. Supreme Court held that the term "employees" as used in Title VII's retaliation provisions includes former employees. Courts have adopted a similar interpretation under Section 806, but ALJs generally have limited former employees' post-employment retaliation claims to cases involving blacklisting or interference with employment.

For example, in *Moldauer v. Canandaigua Wine Co*., 2008-SOX-73 (ALJ Dec. 29, 2008), the only timely alleged retaliatory act was respondent's decision to go to trial in the concurrent federal court action. Complainant was no longer an employee at the time of this alleged retaliation. The ALJ concluded that, "[a]s Complainant's allegations do not involve blacklisting or interference with subsequent employment, Respondent's decision to go to trial in the federal-court action does not constitute discrimination in the terms and conditions of employment, and cannot be the basis of a claim under the Act."

3. Independent Contractors

In evaluating whether a complainant is an independent contractor and not a covered "employee," ALJs have applied 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.

However, in light of Section 806's expansive language incorparating coverage of "an individual whose employment could be affected by a company or company representative," some ALJs have questioned whether the *Darden* test is appropriate in the Section 806 context.

In *Mara v. Sempra Energy Trading, LLC*, 2009-SOX-18 (ALJ Oct. 5, 2009), the ALJ denied respondent's motion for summary judgment on the issue of whether the complainant was an employee or independent contractor, because a genuine issue of material fact existed on many of the *Darden* factors. The interesting aspect of this case is contained in a footnote, in which the ALJ opined "[w]hile not raised as an argument by [complainant], I question whether she would qualify as an employee of [respondent] for purposes of SOX because she may be 'an individual whose employment could be affected by a company or company representative.' 29 C.F.R. §1980.101." Accordingly, regardless of a worker's status under the *Darden* test, it is possible that an independent contractor may still be covered under Section 806 as "an individual whose employment could be affected by a company or company representative."

In *Field v. BKD, LLP*, 2009-SOX-46 (ALJ Aug. 7, 2009), the ALJ interpreted the phrase "an individual whose employment could be affected by a company or company representative." The ALJ noted the phrase was vague and could be interpreted expansively. For instance, the complainant had alleged that a third party respondent – an outside accounting firm used by complainant's employer – "condoned" his employer's actions and that their ignoring the problem led to his termination. The ALJ limited the scope of this phrase, requiring "indicia of control, not just customary factors such as the power to hire, transfer, promote, reprimand, or discharge the complainant, but also the ability to influence an employer to take such actions." Applying this standard, the ALJ found the outside accounting firm could sufficiently affect complainant's employment because undisputed evidence reflected that the accounting firm found evidence to support complainant's allegations and remained silent and, from this evidence, it could be inferred the firm's failure to report could have affected Complainant's employment with [his employer] and influenced the decision to terminate."

G. Criminal Provision

Section 1107 of the Act amended the existing criminal obstruction of justice statute by making it a crime to knowingly and intentionally retaliate against any person who provides truthful information to a law enforcement officer relating to the commission or possible commission of any federal offense. *See* 18 U.S.C. §1513(e). Section 1107 is enforceable solely by the Department of Justice, with supervisory authority assigned to the Criminal Division. U.S. D.O.J., U.S. Attorneys' Manual, Ch. 9-69.100 (2008). The Labor Department has no jurisdiction to enforce section 1107. *See* Amicus Brief of the Acting Assistant Secretary of Labor for Occupational Safety and Health, *Ede v. Swatch Group & Swatch Group USA*, ARB 05-053, 2004-SOX-68 (Apr. 6, 2005); *see also* Attorney General Memorandum on Implementation of the Sarbanes-Oxley Act of 2002 (Aug. 1, 2002) (stating the DOJ will "play a critical role" in implementing SOX's criminal provisions, including Section 1107). Criminal sanctions include, for individuals, fines up to $250,000 and/or imprisonment up to 10 years and, for organizations, fines up to $500,000. See 18 U.S.C. § 3571.

1. No Private Right Of Action

Courts continue to agree with all previous pertinent decisions that Section 1107 does not create a private cause of action. *See Hines v. California Public Utilities Comm.*, 2010

WL 4919234 (N.D. Cal. Nov. 24, 2010); *Rowland v. Prudential Financial, Inc.*, 2010 WL 76439, at *1 (9th Cir. Jan. 11, 2010); *Shahin v. Darling*, 606 F. Supp. 2d 525 (D. Del. 2009).

2. Cases Addressing Section 1107

In *U.S. v. Blitch*, 2008 WL 5255558 (M.D. Ga. Dec. 15, 2008), the indictment alleged that a superior court judge retaliated against a Special Agent of the Georgia Bureau of Investigation because of the Special Agent's role in the investigation, prosecution and conviction of the judge's son. Specifically, the indictment alleged that the judge, in violation of Section 1107, interfered with the Special Agent's ability to gain employment with several law enforcement agencies by contacting officials at those agencies and urging them not to hire the Special Agent. The court found that Section 1107 encompassed attempts to prevent an individual from obtaining future employment. However, the court ultimately concluded that the indictment was to far removed from the overriding purpose of Section 1107, which "was to protect corporate employees who report wrongdoing within their corporations," and that "the law enforcement officer who investigated a particular crime is not a witness, victim, or informant who is intended to be protected by the statute."

While prosections under Section 1107 have been rare, there have been several successful prosecutions under the related SOX criminal anti-shredding provisions. 18 U.S.C. § 1519. ("Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.")

Most notably, in *U.S. v. Kernell*, 2010 WL 1543846 (E.D. Tenn. Mar. 30, 2010), the defendant was a University of Tennessee student who hacked into Sarah Palin's private e-mail account weeks before the 2008 election and posted some of her emails and family photos online. In November 2010, a federal jury convicted Kernell of obstruction of justice in violation of 1519 because, after learning of the FBI's interest in his conduct, he removed and covered up records and files on his laptop computer relating to his use of Palin's e-mail account. Notably, the court earlier ruled that Section 1519 is not limited to the corporate context. *See also U.S. v. Morris*, 2010 WL 5173076 (5th Cir. Dec. 17, 2010) (conviction under § 1519 does not require proof of an ongoing federal investigation at time of destruction or falsification); *U.S. v. Fontenot*, 611 F.3d 734 (11th Cir. 2010) (conviction under § 1519 does not require proof that the defendant knew that the report would be part of a federal investigation).

IV. PROTECTED CONDUCT

Section 806 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).

The Dodd-Frank Act has added protections for whistleblowers who complain directly to the SEC. Specifically, Section 21F to the Securities Exchange Act allows an employee who suffers retaliation for complaining to the SEC to file a claim directly in federal court, bypassing the current DOL administrative process. Unlike Section 806, this provision does not contain a reasonable belief standard. Dodd-Frank also provides for double back-pay damages to prevailing whistleblowers in such cases, with a statute of limitations period of six years from the date of the violation or three years from the date the employee discovers the violation (but no more than ten years from the date of violation).

In addition, Title X of Dodd-Frank creates the Bureau of Consumer Financial Protection, which is empowered to regulate the offering and provision of consumer financial products and services. The Bureau has certain enforcement powers, including authority to investigate and commence civil actions. Section 1057 prohibits retaliation against financial services employees who engage in protected conduct, which includes: (1) providing an employer, the Bureau, or any state, local of federal agency any information the employee reasonably believes to be a violation of Title X; (2) participating in Bureau proceedings; (3) filing any proceeding "under any federal consumer financial law"; and (4) objecting to, or refusing to participate in, any activity, policy, practice, or assigned task that the employee reasonably believes to be in violation of any law, rule, order, standard or prohibition subject to the Bureau's jurisdiction. Complaints must be filed with the DOL within 180 days of the alleged violation.

A. 18 U.S.C. §1514A(a)(1)

1. "Reasonable Belief"

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

> is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts. Certainly, although not exclusively, any type of corporate or agency action

> taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief. The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.

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

Cases requiring both a subjective and objectively reasonable good faith belief include: *Gale v. U.S. Dept. of Labor*, 384 Fed. Appx. 926 (11th Cir. June 25, 2010); *Van Asdale v. International Game Tech.*, 577 F.3d 989 (9th Cir. 2009); *Harp v. Charter Communications, Inc.*, 558 F.3d 722 (7th Cir. 2009); *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009); *Pearl v. DST Systems, Inc.*, No. 08-2196 (W.D. Mo. Jan. 7, 2010) (complainant had not engaged in protected activity because his belief was not objectively reasonable); *Klopfenstein v. PCC Flow Techs. Holdings*, ARB 04-149, at 17 (ARB May 31, 2006), *aff'd* ARB 07-021, -022 (ARB Aug. 31, 2009); *Tuttle v. Johnson Controls Battery Div.*, 2004-SOX-76 (ALJ Jan. 3, 2005).

- **Subjective Belief**

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

Courts evaluating whether a whistleblower's belief is in "good faith" sometimes look to the whistleblower's relevant experience and knowledge. For example, in *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009) the court stated that, "[a]s to the subjective component, the law is not meant to protect those whose complaints are not undertaken in subjective good faith." In this regard, the court agreed with the district court that a "plaintiff's particular educational background and sophistication [is] relevant to the subjective component. Subjective reasonableness requires that the employee 'actually believed the conduct complained of constituted a violation of pertinent law.'" *Id*. (citations omitted). The court found that there was no evidence that the Complainant did not make his complaints in subjective good faith.

- **Reasonable Belief**

Objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the

whistleblower.

In *Harp v. Charter Communications, Inc.*, 558 F.3d 722 (7th Cir. 2009), the Seventh Circuit noted that the whistleblower provision of SOX requires that the employee "reasonably" believe in the unlawfulness of the employer's actions and stated that "[o]bjective reasonableness 'is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" *Id. (quoting Allen v. Administrative Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008)). The court found the Plaintiff had failed to establish an objectively reasonable belief that her supervisor had fraudulently authorized full payment to a contractor for work that was not performed. The court found that statements made by the supervisor were ambiguous and failed to support an objectively reasonable belief that a fraudulent payment had been ordered. *Id.*

A federal district court recently addressed how the "reasonable belief" standard applies in the context of an attorney whistleblower. In *Harkness v. C-Bass Diamond, LLC*, 2010 U.S. Dist. LEXIS 24380 (D. Md. Mar. 16, 2010), the Plaintiff was the General Counsel for the defendant. She reported that the President and CEO of the companymay have disclosed material, non-public information about the company in violation of applicable securities regulations. However, the General Counsel failed thoroughly to investigate whether the regulations had been violated, even after her colleagues suggested that the behavior may not have been a violation. The court found that the General Counsel's belief that the regulations had been violated was not reasonable, holding her to a seemingly higher standard of reasonableness. It held that "[i]n light of [Plaintiff's] professional experience and the legal resources available to her, [Plaintiff's] belief . . . was not objectively reasonable."

Other cases holding more sophisticated whistleblowers to a seemingly higher "reasonableness" standard: *Allen v. Administrative Review Bd.*, 514 F.3d 468 (5th Cir. 2008) (complainant's belief was unreasonable due to accountant's background and work experience, and the fact that the potentially non-compliant financial statements were publicly available for verification); *Welch v. Cardinal Bankshares Corp.*, ARB 05-064, 2003-SOX-15 (ARB May 31, 2007) ("an experienced CPA/CFO like Welch could not have reasonably believed that the ... report presented potential investors with a misleading picture of Cardinal's financial condition"), *aff'd, Welch v. Chao*, 536 F.3d 269, 279 (4th Cir. 2008).

Ironically, at least one court has found that a whistleblower's *lack* of sophistication rendered her belief unreasonable. In *Walton v. NOVA Info. Sys.*, No. 3:06-CV-292, 2008 WL 1751525 (E.D. Tenn. Apr. 11, 2008), the district court held an employee's belief that her employer was violating federal reporting and disclosure requirements was not objectively reasonable when the employee conceded that, as a database security administrator, she lacked familiarity with the reporting and disclosure requirements that she alleged were not being met.

An employee who merely suspects or speculates that her employer's conduct might cause a SOX-related violation in the future does not necessarily have a reasonable *belief* that wrongdoing is occurring, and is therefore not engaging in protected activity by reporting such conduct.

For example, in *Prioleau v. Sikorsky Aircraft Corp.*, 2010-SOX-00003 (ALJ Feb. 3, 2010), the ALJ held that "an allegation that a violation may occur, does not constitute conduct which the employee reasonably believes constitutes a violation of any rule or regulation of the Securities and Exchange Commission."

Other cases in which mere suspicion or speculation of possible violations was found to be insufficient: *Riedell v. Verizon Communications*, 2005-SOX-00077 (ALJ Aug. 14, 2006), *appeal dismissed*, ARB 06-144 (ARB Sept. 28, 2007) ("a suspicion is simply speculation and cannot logically be regarded as a reasonable belief"); *Joy v. Robbins & Myers, Inc.*, 2007-SOX-74 (ALJ Jan. 30, 2008), *aff'd* ARB 08-049 (ARB Oct. 29, 2009) (employee was merely warning of *possible* violations, rather than actual violations).

Circuit courts have opined that whether an employee's belief that her employer is violating a relevant law is objectively reasonable can sometimes be decided as a matter of law. Thus, in *Allen*, 514 F.3d 468, the Fifth Circuit held that while the objective reasonableness of an employee's belief may be decided as a matter of law in some cases, "the objective reasonableness of an employee's belief cannot be decided as a matter of law if there is a genuine issue of material fact . . . [and if] reasonable minds could disagree on this issue." *Id*. at 477. The Fourth Circuit has specified that the objective reasonableness inquiry is a mixed question of law and fact which can be decided as a matter of law in particular cases, and that it would be error to hold that it is *always* decided as a matter of law. *Welch*, 536 F.3d at 278 n.4.

In some cases, an employer's response to whistleblowing has served as evidence that the complainant's belief was reasonable. In *Ryerson v. American Financial Services Inc.*, ARB No. 08-064 (ARB July 30, 2010), the ARB upheld an ALJ decision finding that the complainant's belief that her employer was violating the securities laws was reasonable because her employer revised the form in question in response to the concerns that she raised. *See also Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004) (complainant's persistence in his concerns, including multiple conversations with company officials, demonstrated his reasonable belief).

In other cases, an employer's response to whistleblowing has served as evidence that, even where the complainant may have initially had a reasonable belief of fraud or violations of SEC rules, continued concern regarding such violations became unreasonable. In *Williams v. United States Dep't of Labor*, No. 03-1749, 2005 WL 3087895 (4th Cir. Nov. 18, 2005), the Fourth Circuit, addressing a complaint filed with the DOL under various environmental protection statutes, found that the complainant engaged in protected activity by raising concerns about lead in schools, but after respondent responded to those concerns by undertaking significant activity to ensure that the environment was safe and any potential problems were corrected, and also implementing a plan to ensure the safety of students and staff, "it was no longer reasonable for her to continue claiming that these schools were unsafe...." Accordingly, the court concluded that "her activities lost their character as protected activity."

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." In *Van Asdale v. International Game Tech.*, 577 F.3d 989 (9th Cir. 2009), the court stated that it agreed with the First Circuit that "[t]o have an objectively reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud." *Id.* at 10001 (*citing Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009)).

Recently, in *Falcon-Rodriguez v. Hertz Corp.*, 2010-SOX-00004, at 3 (ALJ Jan. 19, 2010), the complainant alleged that her managers had fired contractors and replaced them with their friends in exchange for kickbacks. Holding that SOX only protects whistleblowers who provide information specifically related to one of the laws enumerated in the Act, the ALJ found that the plaintiff had not engaged in protected activity because kickbacks are not covered by the laws enumerated in the Act.

In *Brittain v. Tyson Foods*, 2010-SOX-24, at 2 (ALJ Apr. 1, 2010), an ALJ held that complaints about food safety under the USDA regulations do not constitute protected activity under SOX. The court followed this same line of reasoning in *Adams v. Tyson Foods, Inc.*, 2010 U.S. Dist. LEXIS 36461 (W.D. Ark. Jan. 6, 2010), holding that "SOX does not cover violations of the rules of the USDA, violations of employment discrimination laws, or the failure to report injuries to a state worker's compensation commission."

Other cases in which complaints about possible violation of laws or regulations not specifically enumerated in Section 806 where found to not constitue protected activity: *Joy v. Robbins & Myers, Inc.*, ARB 08-049, 2007-SOX-74 (ARB Oct. 29, 2009) ("possible violations" of U.S. export laws); *Godfrey v. Union Pacific Railroad Co.*, ARB 08-088, ALJ No 2008-SOX-5 (ARB July, 30, 2009) (discrimination and sexual harassment); *Reed v. MCI, Inc.*, 2006-SOX-71 (ARB Apr. 30, 2008) (use of pirated software); *Harvey v. Home Depot*, ARB 04-114, 2004-SOX-20 (ARB June 2, 2006) (complaint of employment discrimination); *Reed v. MCI, Inc.*, 2006-SOX-00071 (ALJ June 20, 2006), *aff'd* ARB 06-126 (Apr. 30, 2008) (use of

unlicensed computer software); *Townsend v. Big Dog Holdings*, 2006-SOX-00028 (ALJ Feb. 14, 2006) (discrepancies in payroll information reported to IRS); *Allen v. Stewart Enterprises, Inc.*, 2004-SOX-60, 61 & 62 (ALJ Feb. 15, 2005), *aff'd* ARB 06-081 (ARB July 27, 2006) (violations of state law that could result in sanctions and revocation of respondent's state licenses); *Jefferis v. Goodrich Corp.*, 2007-SOX-75 (ALJ May 9, 2008) (OSHA violation, improper accounting and violation of Department of State transfer rules); *Adam v. Fannie Mae*, 2007-SOX-50 (ALJ Feb. 25, 2008) (improper hiring of foreign nationals); *Azure v. Dominick's/Safeway*, 2007-SOX-52 (ALJ Sept. 14, 2007) (report of "possible theft," gender discrimination and disability); *Sylvester v. Parexel Int'l LLC*, 2007-SOX-39 and 42 (ALJ Aug. 31, 2007) (violation of FDA regulations); *Monzingo v. The South Financial Group*, 2007-SOX-2 (ALJ Dec. 6, 2006) (complaint that a deceased client's signature was forged to transfer her investment account may have constituted fraud against the heirs of the investor, but not fraud against shareholders or investors); *Minkina v. Affiliated Physician's Group*, 2005-SOX-19 (ALJ Feb. 22, 2005) (reports concerning air quality); *Heaney v. GBS Properties LLC*, 2004- SOX-72 (ALJ Dec. 2, 2004) (use of unlicensed home inspector and violation of building codes).

Likewise, merely raising complaints about violations of internal policy is not protected activity. *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009) (allegations of corporate inefficiency and poor internal practices); *Allen v. Administrative Review Bd.*, 514 F.3d 468 (5th Cir. 2008) (delaying refunds to customers in violation of state business laws); *Rogus v. Bayer Corp.*, No. 3:02CV1778, 2004 WL 1920989 (D. Conn. Aug. 25, 2004) (complaint about allowing production yields to be over-reported, resulting in production workers being overpaid bonuses); *Neuer v. Bessellieu*, ARB 07-036, 2006-SOX-132 (ARB Aug. 31, 2009) (complaint about coworkers' performance failures); *Reddy v. Medquist, Inc.*, ARB 04-123, 2004-SOX-35 (ARB Sept. 30, 2005) (internal company accounting practice); *Su v. Alliant Energy Corp.*, 2008-SOX-34 (ALJ June 16, 2008) (flaws in the company's engineering research and development protocols); *Lewandowski v. Viacom Inc.*, 2007-SOX-88 (ALJ Nov. 20, 2007) (concerns about [supervisor's] activities principally because they made her (the Complainant) look bad, and secondarily because they would be detrimental to Paramount"); *Galinsky v. Bank of America Corp.*, 2007-SOX-76 (ALJ Oct. 12, 2007) (concerns about being excluded from decisions, and other concerns about management decisions and corporate efficiency); *Marshall v. Northrup Grumman Synoptics*, 2005-SOX-8 (ALJ June 22, 2005) (violations of internal company policies and ethical standards and general accounting irregularities); *Barnes v. Raymond James & Assoc.*, 2004-SOX-58 (ALJ Jan. 10, 2005) (complaint of unethical conduct).

However, in some cases, the relationship between violations of internal policy and the securities laws was indirect yet was found sufficient to allege protected activity. Complaints that could result in violations of securities law can suffice. In *Smith v. Corning Inc.*, 496 F. Supp. 2d 244 (W.D.N.Y. July 9, 2007), plaintiff complained about an accounting report error that he reasonably believed would affect the integrity of defendant's quarterly reports, thereby misleading investors. The court denied the defendant's motion to dismiss because plaintiff alleged that defendants repeatedly refused to address a problem that was resulting in incorrect financial information being reported to the company's general ledger.

Other cases: *Pardy v. Gray*, 2008 U.S. Dist. LEXIS 53997 (S.D.N.Y. July 15, 2008) (report of fraudulent billing practices was protected activity because, while reporting these

irregularities, complainant communicated her belief that they could result in cash and invoice inaccuracies that related to securities fraud); *Fraser v. Fiduciary Trust Co.*, 417 F. Supp. 2d 310 (S.D.N.Y. 2006) (finding protected activity where complaint alleged that company's New York office sold bonds from ERISA and trust management accounts without communicating this decision to other offices, which Los Angeles clients to suffer losses relating to their holdings, which potentially violated the Investment Advisors Act of 1940); *Mann v. United Space Alliance* , 2004-SOX-15 (ALJ Feb. 18, 2005) (allegation of a perpetuation of a fraud on NASA by improperly favoring certain vendors in violation of federal acquisition regulations could, although less than direct, also perpetrate a fraud on shareholders under certain circumstances); *Morefield v. Exelon Servs. Inc*., 2004-SOX-2 (ALJ Jan. 28, 2004) (the catchall "any provision of Federal law relating to fraud against shareholders" 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").

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. The Fifth Circuit has held an employee must provide supporting facts and a reasonable basis to show that she reasonably believed that her employer had the requisite scienter or intent. *See, e.g., Allen v. Administrative Review Bd.*, 514 F.3d 468, 479-80 (5th Cir. 2008).

Other cases requiring allegation of intent: *Hopkins v. ATK Tactical Sys.*, 2004-SOX-19 (ALJ May 27, 2004) (complaint questioning 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 did not allege that the activities involved *intentional deceit* or resulted in a fraud against shareholders); *Allen v. Stewart Enterp., Inc.*, 2004-SOX-60 (ALJ Aug. 17, 2005), *aff'd* ARB 06-081 (ARB July 27, 2006) (report of accounting irregularities casued by unintentional mistake within the computing system did not sufficiently allege intent); *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005) (none of complainant's expressed concerns "contained any reference to fraud or implication that the company had acted intentionally to mislead shareholders or misstate the company's bottom line").

By contrast, in *Ellis v. Commscope, Inc.*, 2008 U.S. Dist. LEXIS 70543, (N.D. Tex. Sept. 11, 2008), the district court found that complainant stated a case sufficient to survive dismissal with respect to scienter based on his allegation that he was fired immediately after revealing concrete evidence of defects in the company's products to the vice president. While noting that this evidence did not actually prove scienter, the court commented that at the motion to dismiss stage, a complainant need only show that his belief in defendant's scienter was reasonable.

c. Effect on Shareholders or Investors

Courts are split on whether an employee's allegation of misconduct must relate to fraud in general, or fraud against shareholders in particular.

Cases requiring allegation of fraud against shareholders in particular: *Livingston v. Wyeth, Inc.*, 2006 U.S. Dist. LEXIS 52978, at *10 (M.D. N.C. July 28, 2006), *aff'd*, 520 F.3d 344 (4th Cir. 2008) (noting that the Fourth and Fifth Circuits, and a number of ALJs, have found that "[t]o be protected under Sarbanes-Oxley, an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud"); *Giurovici v. Equinix, Inc*., ARB 07-027, 2006-SOX-107 (ARB Sept. 30, 2008) (while it was reasonable for the complainant engineer to believe that including an inaccurate report would violate an SEC rule, it was not reasonable for him to believe that such information would negatively affect the company's shareholders); *Tuttle v. Johnson Controls*, 2004-SOX-76 (ALJ Jan. 3, 2005) (although fraud under SOX is broader than merely securities fraud, "an element of intentional deceit that would impact shareholders or investors is implicit"); *Carciero v. Sodexho Alliance*, 2008-SOX-12 (ALJ Feb. 12, 2009) (complaints about strong-arming vendors, bid-rigging, and use of a bonus plan that encouraged employees to act against the best interests of clients, did not involve fraud against shareholders); *Steward v. Kellogg, USA*, 2008-SOX-61 (ALJ Oct. 30, 2008) (impact on shareholders was only speculative); *Deremer v. Gulfmark Offshore, Inc.*, 2006-SOX-2 (ALJ June 29, 2007) ("allegations of 'shareholder fraud' is [*sic*] an essential element of a cause of action under SOX"); *Kaser v. A.G. Edwards & Sons, Inc*., 2007-SOX-54 (ALJ Apr. 14, 2008) (refusal to shred documents over her objection that some should have been retained by law not protected because it could not be shown to actually impact investors); *Stojicevic v. Arizona-American Water Co*., 2004-SOX-73 (ALJ Mar. 24, 2005) (complainant offered no evidence that respondent made any false statements to shareholders or investors regarding its earnings such that its conduct could constitute fraud), *aff'd Stojicevic v. Arizona-American Water Co.*, ARB 05-081(ARB Oct. 30, 2007).

Cases <u>not</u> requiring allegation of fraud against shareholders in particular: *O'Mahony v. Accenture Ltd*., 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008) (noting that "[Section 806] clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud"); *Reyna v. Conagra Foods, Inc.*, 506 F. Supp. 2d 1363 (M.D. Ga. June 11, 2007) ("[t]he statute protects an employee against retaliation based upon that employee's reporting of mail fraud regardless of whether that fraud involves a shareholder of the company").

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, most cases have stressed the need for some degree of materiality 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. For example, in *Lewandowski v. Viacom Inc.*, ARB 08-026, 2007-SOX-88 (ARB Oct. 30, 2009), the ARB concluded that a whistleblower must ordinarily complain about a material, misstatement of fact (or omission) about a corporation's financial condition on which an investor would reasonably rely. In *Day v. Staples, Inc.*, 555 F.3d 42, (1st Cir. 2009), the First Circuit expressed that "complaints about purely internal practices that are not financial in nature and are not reported to shareholders do not meet the materiality requirement" for shareholder fraud.

Other cases requiring some degree of materiality: *Kaser v. A.G. Edwards & Sons, Inc*., 2007-SOX-54 (ALJ Apr. 14, 2008) ("[n]ot all fraud is actionable under SOX. Fraud is not significant to the 'total mix' of information if it is not material to the company, and does not impact shareholders"); *Deremer v. Gulfmark Offshore, Inc.*, 2006-SOX-2 (ALJ June 29, 2007) (where respondent had revenues of $139 million and a loss of $4.63 million in 2004, a potential financial impact from allegedly fraudulent activity of an additional $200,000 expense was arguably immaterial); *Smith v. Hewlett Packard*, 2005-SOX-88 (ALJ Jan. 19, 2006), *aff'd* ARB 06-064 (April 29, 2008) (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"); *Harvey v. Home Depot, Inc*., 2004-SOX-20 (ALJ May 28, 2004) (individual race discrimination claim does not reach the "materiality threshold in terms of a corporation's financial condition"; noting, however, 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"); *Harvey v. Safeway, Inc*., 2004-SOX-21 (ALJ Feb. 11, 2005) (reports of discrepancies in his weekly paychecks, even if they violated the FLSA, were not protected activities because, *inter alia*, a single employee's shortages did not rise to the requisite level of materiality; noting, however, that 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"); *Giurovici v. Equinox*, 2006-SOX-107 (ALJ Nov. 15, 2006), *aff'd*, ARB 07-027 (ARB Sept. 30, 2008) (factual inaccuracies in the company's statements were not material to the representation of its financial condition).

Still, some ALJs have placed little emphasis on the materiality requirement. In *Morefield v. Exelon Servs. Inc*., 2004-SOX-2 (ALJ Jan. 28, 2004), 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." 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."

4. "Provide Information"

a. Specificity of Information Provided

Under Section 806(a)(1), an employee must "provide information" (or cause information to be provided) in order to engage in protected activity. The ARB has held that a complainant's protected activity must involve specific allegations. In *Platone v. FLYi, Inc*., ARB 04-154, 2003-SOX-27 (ARB Sept. 29, 2006), the ARB held that the complainant had not engaged in protected activity because she did not provide her employer with specific information

regarding conduct she believed constituted mail, wire, bank or securities fraud, a rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. The Fourth Circuit upheld this decision. *Platone v. United States Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008).

In *Jones v. First Horizon Nat'l Corp.*, ARB No. 09-005, at 5 (ARB Sept. 30, 2010), the ARB held that "referencing concerns of potential corporate fraud" is inadequate to constitute protected activity. In that case, the plaintiff had submitted complaints to the Equal Employment Opportunity Commission ("EEOC") alleging sex and race discrimination. The ARB found that a letter appended to an EEOC complaint that included accusations of fraudulent conduct was not the ""precise statement" necessary to have engaged in protected conduct under SOX.

In *Frederickson v. Home Depot U.S.A., Inc.*, ARB No. 07-100 (ARB May 27, 2010), the ARB affirmed a decision that an employee's corrected bookkeeping entries did not constitute protected activity. The ALJ explained that "for a communication to be protected, it arguably must be an express, not constructive, communication." The employee's entries were considered constructive, not express, communication because the employee simply assumed the manager would discover the corrected entries.

Similarly, in *Prioleau v. Sikorsky Aircraft Corp.*, 2010-SOX-0000, at 12 (ALJ Feb. 3, 2010), the ALJ emphasized that what matters is the actual words used by the plaintiff in her initial communication, not a later interpretation of those words. The plaintiff in *Prioleau* initially submitted a report to his employer complaining about "an apparent conflict" between a litigation preservation notice and the employer's document deletion policy, stating that the litigation preservation notice "may violate the policy." Although the plaintiff later specified that he should have used the word "fraud" instead of "conflict" and explained why his employer was potentially engaging in fraudulent activities, the ALJ found that he had not engaged in protected activity because his initial report did not allege fraud covered by SOX.

Other cases agreeing that a complaint must involve specific allegations: *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) ("employee must show that his communications to the employer specifically related to one of the laws listed in § 1514A"); *Van Asdale v. International Game Tech.*, 577 F.3d 989 (9th Cir. 2009) (employee's communications must "definitely and specifically" relate to one of the categories of fraud or securities violations listed under section 1514A(a)(1)); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008) ("employee's complaint must definitively and specifically relate to one of the six enumerated categories found in § 1514A"); *Getman v. Administrative Review Bd.*, 2008 WL 400232 (5th Cir. Feb. 13, 2008) (no protected activity because plaintiff had never actually conveyed her belief that upgrading rating would violate a securities law); *Brookman v. Levi Strauss & Co.*, 2006-SOX-36 (ARB July 23, 2008) (merely sending a letter detailing the company's allegedly widespread policy of refusing to accommodate disabled employees insufficient); *Stone v. Instrumentation Laboratory SpA*, 2007-SOX-21 (ALJ Sept. 6, 2007) (complainant did not definitively and identify the subject coding system as relating to shareholder fraud or a violation of SEC rules or regulations).

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

b. General Inquiries

In *Fraser v. Fiduciary Trust Co. Int'l*, 2009 WL 2601389, (S.D.N.Y., Aug. 25, 2009), the court found that a "general inquiry regarding a business decision" is not protected. In *Fraser*, plaintiff had sent an e-mail to the Respondent's president which he claimed constituted protected activity. The district court rejected this argument noting that the e-mail did not express any specific concern about any fraud enumerated in SOX §806. The court also noted the Plaintiff's stated reason for sending the e-mail to the president was to show the president that the New York office was making the right decisions and this did not constitute alerting an employer to a suspected fraud. The Plaintiff also argued that he engaged in protected activity when he told his supervisor that an internal document showing the United Nations as one of the Respondent's top ten relationships by revenue should not be shown to clients because the UN pension fund accounts were not managed accounts, and the document therefore overstated the Respondent's assets under management. The court also rejected this, stating the discussion with the supervisor was merely a general inquiry because the Plaintiff never expressed a specific concern that the information contained in the document was illegal.

Other case deeming general inquiries insufficient: *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005) ("simply raising questions and lodging complaints without any reference to or suspicion about fraud against shareholders is not protected activity").

c. Refusal to Participate in Unlawful Activity

Although the express language Section 806 protects employees who "provide information," adjudicators have concluded that a *refusal* to participate in unlawful activity is protected under Section 806. *See, e.g., O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008) (employee's refusal "to be a party to tax fraud" is protected conduct under SOX); *Bechtel v. Competitive Tech. Inc.*, 2005-SOX-33 (ALJ Oct. 5, 2005) (refusal to sign disclosure forms was protected activity); *Jayaraj v. Pro-Pharmaceuticals, Inc*., 2003-SOX-32 (ALJ Feb. 11, 2005).

Yet not every refusal to participate suffices to be considered protected conduct. In *Getman v. Southwest Securities, Inc*., ARB 04-059, 2003-SOX-8 (ARB July 29, 2005), a former securities analyst for an investment bank contended she was pressured to change her recommended rating of a certain stock and her refusal to do so was protected activity under Section 806. The ARB held this unspecified "refusal" was not sufficient to "provide information" to a person with supervisory authority relating to a violation and therefore did not constitute protected activity. The ARB reasoned that in the context within which this refusal

occurred, *i.e.*, during a review committee meeting between an analyst and her supervisor where disagreement over a rating may be the normal part of the process, the analyst must "communicate a concern that the employer's conduct constitutes a violation in order to have whistleblower protection." The Fifth Circuit affirmed this opinion. *Getman v. Administrative Review Bd.*, No. 07-60509, 2008 WL 400232 (5th Cir. Feb. 13, 2008).

Other cases denying protection for refusals to participate: *Reed v. MCI, Inc*., 2006-SOX-71 (ARB Apr. 30, 2008) (refusal to commit felonies by using pirated software did not sufficiently relate to relevant SOX statutes); *Henrich v. Ecolab, Inc.*, ARB 05-030, 2004-SOX-51 (ARB June 29, 2006) (merely failing to follow through and give approval to write-offs not protected); *Menz v. Lannett Co., Inc*., 2007-SOX-72 (ALJ May 27, 2008) (refusal to sign certification statement not protected where employee never indicated she believed securities laws were implicated).

d. Reporting Information Already Known to the Public or Management

There is authority under other whistleblower statutes for the proposition that a report of information that has already been made public or is already known to the company does not constitute protected activity. *Francisco v. Office of Pers. Mgmt*., 295 F.3d 1310 (Fed. Cir. 2002) (WPA); *Meuwissen v. Dep't of the Interior*, 234 F.3d 9 (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 (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 v. Administrative Review Board*, 514 F.3d 468 (5th Cir. 2008), an ALJ rejected respondent's argument that, to constitute protected activity, a complaint must provide information that was not already known by the company. However, the ALJ concluded the complainant could not have a reasonable belief that respondent was engaged in fraud, in part because respondent already knew about the problem before complainant reported it and was making it a priority to remedy it. The Fifth Circuit affirmed the ARB's decision upholding the ALJ.

Where an employee's job consists of investigating and reporting wrongdoing, courts have concluded that the performance of such job duties does not constitute protected activity under similar whistleblower statutes. *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Sasse v. United States DOL*, 409 F.3d 773 (6th Cir. 2005) (U.S. attorney who alleged Justice Department retaliated against him while investigating environmental crimes failed to show agency violated whistleblower provisions of environmental laws because performance of his job duties was not protected whistleblowing activity); *Huffman v. Office of Personnel Mgmt.*, 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).

e. Reporting Illegal Conduct of a Third Party

The court in *Sharkey v. J.P. Morgan Chase & Co.*, 2010 U.S. Dist. LEXIS 139761 (S.D.N.Y. Jan. 14, 2010), expanded the definition of "providing information" even further, finding that reporting the illegal conduct of a third party may be protected activity under SOX. In that case, the plaintiff reported to her employer her belief that one of her clients had engaged in illegal activities including mail fraud, bank fraud, and money laundering. Although the court ultimately concluded that the plaintiff's belief was unreasonable, it held that the plaintiff had properly pled that she engaged in protected activity under the SOX whistleblower provision by alleging that she reported her concerns about the client's illegal activity.

5. "Otherwise Assist in an Investigation"

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

In *Romaneck v. Deutsche Asset Mgmt*, No. C05-2473, 2006 WL 2385237 (N.D. Cal. Aug. 17, 2006), the defendant conceded the complainant's production of documents to the SEC constituted protected activity, making it unnecessary for the court to determine whether his anticipated testimony before the SEC was also protected. Though not reaching the question, the court inferred that anticipated testimony would be considered protected activity, stating in *dicta* that "the company has failed to persuade the Court that [complainant's] anticipated testimony before the SEC does not also fall into this category." *Id*. at *5.

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

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

The term "supervisory authority" has been broadly construed. In *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004), the complainant, former chairman of the local bank advisory board, allegedly informed two local executive officers of the respondent

bank that a lending company they had formed possibly violated banking laws, was a fraud against shareholders. The respondent moved for summary decision on the theory that the complainant testified he had "actual authority" over the executives and therefore the complainant did not "provide information" to "a person with supervisory authority over the employees." Despite this testimony, the ALJ found a genuine issue of material fact existed as to whether the CEO had authority over the complainant, or *vice versa*.

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

In contrast, in *Tides v. Boeing Co.*, No. C08-1601-JCC, at 4-5 (W.D. Wa. Feb. 9, 2010), the court held that leaking confidential documents to the outside media such as the *Seattle Post-Intelligencer* is not protected activity.

7. Complaint to a Member of Congress

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

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

B. 18 U.S.C. §1514A(a)(2)

In addition to protecting employees who report possible fraud or assist in investigations, SOX contains a "participation clause" that explicitly protects employees who

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

There have been some significant decisions pertaining to this provision. In *Romaneck v. Deutsche Asset Mgmt.*, No. C05-2473, 2006 WL 2385237 (N.D. Ca. Aug. 17, 2006), plaintiff claimed to be engaged in protected activity by anticipating testifying before the SEC in an investigation related to market-timing. Though defendant claimed plaintiff's general statements that "he would tell the whole truth and let the chips fall where they may" lacked specificity since they did not reference a specific SOX violation, *id*. at *5, the Court found Defendant's opposition was baseless as it tied the specificity requirement to the "provide information" language that appears only in one prong of the Act – 18 U.S.C. §1514A(a)(1). The absence of "provide information" in the prong that relates to employee testimony – 18 U.S.C. §1514A(a)(2) – enabled the Court to relax the specificity requirement in this circumstance. *Id*. at *5-6.

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

In *Miles v. Wal-Mart Stores, Inc.*, No. 06-5162, 2008 U.S. Dist. LEXIS 5781 (W.D. Ark. Jan. 25, 2008), the district court ruled it was protected activity for an administrative employee to contact an executive being investigated for mail and wire fraud regarding the shredding of potentially relevant documents. The defendant argued the investigation had not yet matured into a proceeding at the time of plaintiff's act, but the court rejected that argument because the plaintiff had clearly identified the grand jury proceeding at issue and only 8 months had lapsed between her act and the executive's conviction.

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

V. VIOLATIVE CONDUCT - RETALIATION

A. Statutory Language

Section 806(a) provides that no publicly traded company or individual may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee" to blow the whistle on a violation, including mail fraud, bank fraud or securities fraud or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a).[2]

B. The Supreme Court's Ruling in *Crawford v. Metropolitan Government of Nashville*

In 2009, the Supreme Court issued a ruling concerning a claim under Title VII of the Civil Rights Act of 1964 which could impact how courts interpret Section 806(a). In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S.Ct. 846 (2009), the Court considered Title VII's anti-retaliation clause.

In *Crawford*, the plaintiff was interviewed during an investigation relating to rumors of sexual harassment by a manager. Human Resources interviewed plaintiff and inquired into whether she had seen any inappropriate actions by the manager. Plaintiff responded that she had. Metropolitan subsequently terminated the plaintiff for alleged embezzlement and also terminated the other employees who reported harassing conduct by the manager. Plaintiff brought suit under Title VII, alleging that she was terminated in retaliation for opposing conduct which constituted harassment. Both the district court and the Sixth Circuit held that plaintiff's conduct in providing a statement during an employer's investigation was not sufficient to establish opposition to discrimination.

The Supreme Court reversed, noting that because the statute did not define "oppose," the ordinary meaning of the term "resist" applied. The Court held that plaintiff's statement met the standard for "opposition." It noted that under EEOC guidelines, "[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication virtually always constitutes the employee's *opposition* to the activity." Accordingly, the Court determined that opposition included more than actually instigating a charge. As a result, the Court held that the plaintiff's conduct constituted protected activity under the "opposition" provision in Title VII.

C. The Impact of *Crawford v. Metropolitan Government of Nashville* on the Interpretation of Section 806(a)

Courts have not yet analyzed the impact of *Crawford* on Section 806(a) claims. The *Crawford* case certainly indicates that the Supreme Court's interpretation of protected conduct

[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203) enacted in July of 2010 greatly expands many of the whistleblower protections under §806(a), however whether these broadened protections will impact the standards discussed in this section remains to be seen.

is much broader than what might have previously been expected. The Court's willingness to protect even employees who had not actively complained of discrimination is noteworthy.

For claims outside of the Title VII context, the issue will be how much of *Crawford's* holding was based upon the specific language of Title VII's anti-retaliation provision. Section 806(a) protects those who "provide information, cause information to be provided, or otherwise assist in an investigation." 18 U.S.C. § 1514A(a). As a result, Section 806(a)'s language appears to have contemplated protection for those who engage in conduct like that of the plaintiff in *Crawford*. Section 806(a), by its terms, protects those who provide information during an investigation, with no requirement that the investigation be instigated by the employee's complaint.

As a result, despite textual differences between Title VII and Section 806(a), there is a strong argument that the type of conduct held to be protected in *Crawford* would also appear to be protected under Section 806(a).

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

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

Plaintiff was a track maintenance laborer for Burlington Northern & Santa Fe Railroad (BNSF). White filed an internal complaint alleging that her foreman sexually harassed her and discriminated against her. Ten days later, White was removed from her forklift duties and assigned to more physically demanding and dirtier track maintenance work.

White filed two charges of sex discrimination and retaliation with the U.S. Equal Employment Opportunity Commission (EEOC). Soon thereafter, she was involved in a dispute with a supervisor and was suspended without pay for insubordination. After an investigation, BNSF reversed the suspension and reinstated White with full back pay and expunged the suspension from her personnel record. White filed a Title VII lawsuit claiming sex discrimination and retaliation and alleging that the retaliation consisted of (i) her reassignment from forklift duties to more demanding responsibilities, and (ii) her suspension because she had filed EEOC charges.

The Sixth Circuit held that the two alleged acts of retaliation were not sufficient to state a claim for retaliation under Title VII. Upon rehearing en banc, the Sixth Circuit reversed on the basis that Title VII prohibits adverse actions that materially change the terms of employment, including the two acts against White. The en banc court determined that taking away an employee's paycheck for over a month is not trivial, and that White's reassignment was done with retaliatory intent and constituted a demotion to a more arduous, dirtier, and less

prestigious job.

The Supreme Court affirmed, holding that the plaintiff simply had to prove that the "employer's challenged action would have been material to a reasonable employee," and likely would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." The opinion contrasted the language of Title VII's anti-discrimination provision, which prohibits discrimination as to "terms and conditions of employment," with Title VII's anti-retaliation provision which prohibits "discrimination" but is not limited by the additional phrase "terms and conditions of employment." The opinion reasoned that this difference in language showed Congress' intent to forbid a broader range of retaliatory acts than are prohibited under the anti-discrimination provision. The opinion stated that the requirement of "material adversity . . . is important to separate significant from trivial harms," and that the "reasonable employee" standard "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." The opinion also stated that the standard was phrased "in general terms because the significance of any given act of retaliation will often depend on the particular circumstances. Context matters."

In a potentially far-reaching statement, the opinion held that Title VII's anti-retaliation provision "does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." *Id.* at 2414. The opinion reasoned that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."

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

Initially, it was unclear what impact, if any, *Burlington Northern* would have on Section 806 claims. *See Rzepiennik v. Archstone Smith, Inc.*, 2004-SOX-26 (ALJ Feb. 23, 2007) ("Given the reliance upon Title VII by administrative authorities interpreting the Sarbanes-Oxley Act, it is unclear what, if any, effect the Court's decision [in *Burlington Northern*] will have on retaliation claims under SOX.").

However, recent cases have applied *Burlington Northern.* In *Schlicksup v. Caterpillar, Inc.*, 2010 WL 2774480 (C.D. Ill. July 13, 2010), the court applied the *Burlington Northern* standard, e.g., an employment action is adverse if it would "dissuade a reasonable worker from filing a charge." The court found that defendant's alleged banishment of plaintiff from the finance and tax departments would leave plaintiff with fewer potential positions than he would have had if those career paths were open and, thus, an issue of fact existed as to whether or not such a banishment would deter a reasonable person in the plaintiff's situation.

Likewise, the ARB has concluded that the *Burlington Northern* standard applies to whistleblower claims before the DOL. *See Melton v. Yellow Transp. Inc.*, ARB No. 06-052, ALJ No. 2005-STA-02 (ARB Sept. 30, 2008).

Other cases applying *Burlington Northern*: *Allen v. Administrative Review Bd.*,

514 F.3d 468 (5th Cir. 2008) (due to the similarity of the whistleblower protections afforded by both AIR 21 and SOX, the *Burlington Northern* definition of "adverse employment action" applies to SOX whistleblower claims); *Bozeman v. Per-Se Techs., Inc*., 456 F. Supp. 2d 1282 (N.D. Ga. 2006) (applying Burlington Northern standard to retaliation claim, but not addressing Burlington Northern during its analysis of constructive discharge claim); *Allen v. Stewart Enters., Inc.*, ARB 06-081 (ARB July 27, 2006) (applying both the "tangible job consequences" test (a tangible job consequence is one that constitutes a significant change in employment status) and the "detrimental effect" test (an action is adverse if it is reasonably likely to deter employees from making protected disclosures)); *Deremer v. Gulfmark Offshore, Inc.*, 200-SOX-2 (ALJ June 29, 2007) (explaining that *Burlington Northe*rn relaxed the standard for an adverse employment action in retaliation cases, and that the complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities, but that it had not relaxed the standard that must be applied in whistleblower cases to hostile work environment claims).

In *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29 (ALJ Oct. 5, 2006), the ALJ explained that "[a]dministrative decisions have used different interpretations of what constitutes an adverse action under whistleblower law, but they generally agree that while Title VII case law influences whistleblower decisions, differences in statutory language signify that adverse action should be interpreted more broadly under whistleblower claims than under Title VII claims." Based on this rationale, the ALJ stated that *Burlington Northern* serves as a starting point for analysis of potentially adverse actions in SOX cases. The ALJ found that a reasonable employee would have been dissuaded from engaging in protected activity as a result of the complainant's transfer to a different department after receiving one day to decide whether to accept the transfer or face a lay-off.

F. Proof Issues

There is no dispositive ruling yet from the courts or the ARB concerning the precise parameters of what constitutes unlawful retaliatory conduct. In *Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004), the ALJ, noting disagreement in ARB precedents, stated that "it makes sense to follow the case law of the circuit in which a given whistleblower claim arises." Applying Tenth Circuit precedent, the ALJ found that the complainant's placement on a layoff list, even though he was not actually laid off, constituted an adverse action because "an employee who is placed on a lay-off list reasonably fears that he will lose his job when that list goes into effect." *Id*. at 15. This logic is called into question by the national standard for retaliation announced in *Burlington Northern*.

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

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

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

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

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

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

> This close temporal proximity, however, does not require such a finding. While Complainant was terminated from her employment just nine days after contacting Homeyer and Bevis about the backdated letters of credit, her discharge was also after a series of confrontations in the office and poor performance. The timing of the

termination is not suspicious when that timing is credibly explained by a non-retaliatory motive. *Taylor*, 2004-SOX-43, at 12.

The *Taylor* decision was affirmed in *Taylor v. Administrative Review Board*, 288 Fed. Appx. 929 (5th Cir. 2008. The Fifth Circuit noted that there was evidence that the employee refused to speak to her supervisor after a negative review. Additionally, the employee screamed at her supervisor and was belligerent during meetings. The court found that there was evidence that the employee would have been discharged even without the complaint.

Other cases holding temporal proximity, alone, insufficient: *Richard v. Lexmark Int'l Inc.*, 2004-SOX-49 (ALJ June 20, 2006) (termination one day after raising concerns about inventory accounting problems not sufficient proof of causation where employer proved it had decided to terminate the employee several weeks before the employee expressed concerns); *Pardy v. Gray*, 2008 WL 2756331 (S.D.N.Y. 2008) (six-month gap between alleged protected activity and termination not sufficient to establish retaliation); *Johnson v. Stein Mart, Inc.*, No. 3:06-cv-341-J-33TEM, 2007 U.S. Dist. LEXIS 44579 (M.D. Fla. June 20, 2007) (termination of employment twenty months after initial complaint not sufficient temporal link); *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).

But see Leznik v. Nektar Therapeutics, Inc., 2006-SOX-93 (ALJ Nov. 16, 2007) (discharge two weeks after raising a perceived violation of corporate code of ethics could support an inference of causation); *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).

3. Pre-existing Performance Problems

See, e.g., Pardy v. Gray, 2008 WL 2756331 (S.D.N.Y. 2008) (employee who had been placed on probation twice before her complaint was terminated for legitimate reasons unrelated to her complaint); *Giurovici v. Equinox, Inc.*, 2008 WL 4462991 *8 (ARB Sept. 30, 2008) (employee had deteriorating work performance, repeated incidents of insubordination, and refused to work with other employees); *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007) (employer changed its decision to discharge complainant for failing to attend a mandatory training once the employer learned about the complainant's protected activity, but later discharged the complainant for insubordination because the complainant had stopped working and failed to cooperate with employer's lawful investigation of complainant's allegation); *Robinson v. Morgan Stanley*, 2005-SOX-44 (ALJ Mar. 26, 2007) (well-documented pre-existing performance issues regarding work product and accepting adverse performance feedback); *Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004) (complainant's history of conflict and difficulty with interpersonal relations due to "military style"); *Taylor v. Wells Fargo*, 2004-SOX-43 (ALJ Feb. 14, 2005), *aff'd* ARB 05-062 (ARB June 28, 2007) (series of unprofessional and contentious actions that resulted in final written warning for breach of ethics, and ultimately termination); *Grant v. Dominion East Ohio*

Gas, 2004-SOX-63 (ALJ Mar. 10, 2005) (violation of e-mail policy by sending vulgar message to company executive); *Stojicevic v. Arizona-American Water Co.*, 2004-SOX-73 (ALJ Mar. 24, 2005), *aff'd* ARB 05-081 (ARB Oct. 30, 2007) (complainant's inappropriate comments, hostile attitude, and insubordination, resulting in suspension, and, ultimately, discharge for coming into work while suspended and refusing to leave the work premises); *Trodden v. Overnite Transp. Co.*, 2004-SOX-64 (ALJ Mar. 29, 2005) (complainant violated company policy by providing information about a subordinate to a third party outside the company); *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Apr. 1, 2005) (complainant's repeated refusal to work for assigned supervisor constituted insubordination justifying non-renewal of contract).

4. Previously Planned Decisions

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

5. Post-termination Acts of Retaliation

Several ALJs have ruled that post-termination conduct by employers is not actionable. These decisions may be questionable in light of the holding in *Burlington Northern & Santa Fe Ry. v. White* that post-employment acts may constitute retaliation.

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

6. Hostile Environment

A hostile work environment may constitute adverse action, but ALJs have typically required proof that (1) the harassing conduct was sufficiently severe or pervasive to alter the conditions of employment, and (2) the harassment would have detrimentally affected a reasonable person and did so affect the complainant. *Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23, at 17 (ALJ Dec. 9, 2004). In contrast, "[d]iscourtesy or rudeness should not be confused with harassment." *Id*. *See also Allen v. Stewart Enters., Inc.*, 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005), *aff'd* ARB 06-081 (ARB July 27, 2006) (allegedly hostile acts not "severe and pervasive" enough to rise to level of hostile environment); *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007) (evidence did not establish that complainant had been subjected to harassment sufficiently severe or pervasive enough to have created a hostile work environment).

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

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

In *Hughart*, the complainant submitted his resignation on a Friday afternoon after his supervisor criticized his sending an e-mail entitled "fraud alert" as an example of the complainant's previously demonstrated tendency to overstate and miscommunicate. The supervisor told the complainant that she needed to consider his employment status over the weekend and threatened to terminate him if he continued to miscommunicate, but also that she did not want to end his employment because he was a valued employee. At the close of the business day that Friday, the complainant submitted his resignation and his supervisor warned him to think about what he was doing. When the complainant learned two days later that his supervisor had accepted his resignation, he told the supervisor that "it was not her fault." Under all of the circumstances, the ALJ concluded that the complainant had proved that he "felt abandoned by his supervisor, misunderstood, and on the verge of being fired," but had not

satisfied the standard for proving a constructive discharge. *Id.* at 53. The outcomes of these cases may be called into question by *Burlington Northern*. *See Deremer v. Gulfmark Offshore, Inc.*, 200- SOX-2 (ALJ June 29, 2007) (stating that *Burlington Northern* had lowered the overall standard of conduct that constitutes retaliation to be weighed under the standard that must be applied in whistleblower cases involving hostile work environment claims).

7. De Minimis Acts of Retaliation

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

VI. PROCEDURES

A. Procedures and Burden of Proof

1. Statutory Provisions

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

2. Dodd-Frank Act Amendments

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. 111-203 (July 21, 2010) made several significant procedural changes to Section 806 of SOX:

- The statute of limitations period was doubled (from 90 days to 180 days) and begins to run on the date on which the employee *became aware of* the violation.

- Where a SOX claim is removed to federal court, there is an express right to try the case before a jury.

- SOX retaliation claims are not subject to arbitration agreements

The ARB is currently considering whether amendments to the Dodd-Frank Act are retroactive. *Johnson v. Siemens Bldg. Tech., Inc.*, ARB No.08-032, ALJ No. 2005-SOX-15 (ARB Apr. 15, 2010).

3. 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, 2003, 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.

4. Filing of Complaint

a. Predispute Arbitration Agreements and Waivers

Under the 2010 amendments to Section 806, employers cannot condition employment on the employee's waiver of his or her Section 806 rights, including the right to a jury trial.

b. 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).

One federal court has held that where a common law wrongful discharge claim is premised on the public policy articulated in Section 806 of SOX, the plaintiff need not comply with the statutory enforcement scheme. *Romaneck v. Deutsche Asset Management*, No. C05-2473, 2006 WL 2385237 (N.D. Cal., Aug. 17, 2006).

c. 180-Day Statute of Limitations

In 2010, the Dodd-Frank Act changed the statute of limitations for SOX from "no later than 90 days after the date the violation occurred" to "no later than 180 days after the date on which the violation occurs, or after the date on which the employee *became aware of* the violation." 18 U.S.C. §1514A(b)(2)(D). "Filed" has been interpreted as meaning when the complaint is received by the Labor Department. *Murray v. TXU Corp*., 279 F. Supp. 2d 799, 802 (N.D. Tex. 2003). However, the regulations state that, for complaints sent by mail, the date of the postmark will be the date of filing. 29 CFR § 1980.103(d). *See also Reddy v. Medquist, Inc*., 2004-SOX-35, ARB 04-123 (ARB Sept. 30, 2005) (SOX complaints may be filed by e-mail).

Complaints 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 a telephone call to the DOL within the statute of limitations timeframe is not sufficient.

The 180-day limitation period commences on either the date the alleged violation occurs or the date the employee becomes aware of the violation. 29 CFR § 1980.103(d). The regulations define the phrase "date the alleged violation occurs" as "when the discriminatory decision has been both made and communicated to the complainant." 29 CFR § 1980.103(d).

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

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

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

d. Equitable Tolling

OSHA opines that the 180-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.

The 180-day tolling period is subject to equitable tolling. *Carter v. Champion Bus, Inc.*, ARB 05-076, 2005-SOX-23 (ARB Sept. 29, 2006) (applying equitable tolling principles and holding that filing of alleged SOX complaint with EEOC did not warrant equitable tolling because the EEOC is not the responsible government agency for the adjudication of SOX whistleblower cases and generic allegations in the complaint letter would not have caused the EEOC to deem it a SOX complaint).

Several ALJ decisions also have addressed whether the 180-day filing period may be equitably tolled. In *Taylor v. Express One Int'l, Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002), an ALJ held that filing the complaint with the wrong agency (the FAA) was a sufficient basis for tolling the time limit for filing a complaint under AIR21. The ALJ noted that the improperly filed complaint raised the statutory claim at issue and the complainant had filed his complaint without the assistance of legal counsel. *See Hillis v. Knochel Bros. Inc.*, ARB Nos. 03-136, 04-081, -148, ALJ No. 2002-STA-50, slip op. at 8-9 (ARB Mar. 31, 2006) (finding that the statute of limitations for a Surface Transportation Assistance Act retaliation claim was equitably tolled while the complainants were unaware they had filed their complaint in the wrong forum).

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

In *Ubinger v. CAE Int'l*, ARB 07-083, 2007-SOX-036 (Aug. 27, 2008), the ARB affirmed the ALJ's decision that there was no basis for equitably tolling the filing time limit where the complainant's primary basis for such waiver was that his complaints were legitimate

and that he had no knowledge of Section 806. The ARB held that the severity of an alleged violation does not warrant tolling of the limitations period and that ignorance of the law will not generally support a finding of equitable modification.

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

e. 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 statute of limitations for the filing of the complaint, even if they were related to acts that fall within the prescriptive period. Citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the ALJ reasoned that a discrete retaliatory act "occurs" on the day it happens and the complaint must be filed within the statutory time frame based on the happening of that event. *See also Dolan v. EMC Corp*., 2004-SOX-1 (ALJ Mar. 24, 2004) (applying *Morgan* to SOX claims and holding that retaliatory acts outside the statute of limitation period are actionable only in hostile work environment claims).

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

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

5. Preliminary *Prima Facie* Showing

a. General

The regulations require OSHA to dismiss the complaint prior to its investigation if the complainant fails to make a *prima facie* showing that the protected activity was a "contributing factor" in the adverse employment action. 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. 29 C.F.R. § 1980.104(b)(2). Normally, this burden will be satisfied if the adverse action occurred "shortly after" the protected activity. *Id.* Thus, a significant gap in time between the complainant's protected conduct and the adverse action may result in dismissal. *See Heaney v. GBS Properties LLC*, 2004-SOX-72 (ALJ Dec. 2, 2004) (dismissing complaint for failure to make a *prima facie* case where the complainant engaged in protected conduct several years prior to his termination).

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

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

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

b. Particularity

In *Collins v. Beazer Homes USA, Inc.,* 334 F. Supp. 2d 1365 (N.D. Ga. 2004), a

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

The district court in *Collins* 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." 334 F. Supp. 2d at 1377.

6. Notice of Receipt

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

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

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

7. 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).

8. Respondent's Statement of Position

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

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

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

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

9. 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.

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

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

10. Preliminary Orders of Reinstatement

If, after the investigation, OSHA determines there is "reasonable cause" to believe the complaint has merit, with limited exceptions "it shall issue" a preliminary order restoring the complainant to his or her employment status and requiring the employer to take affirmative action to abate the violation. 49 U.S.C. § 42121(b)(3)(B); 29 CFR § 1980.105(a)(1). Reinstatement orders are immediately effective and are not stayed pending the resolution of any objections or appeal. *See* 49 U.S.C. § 4212 (b)(2)(A). If preliminary, immediate reinstatement is to be ordered under SOX, the investigator first must contact the named party and provide, in writing, the "substance of the relevant evidence" supporting the finding. 29 CFR § 1980.104(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 the first SOX case in which an employer refused to comply with an OSHA order requiring preliminary reinstatement, the district court enforced the order and the employer reinstated the employees to avoid being held in contempt. *Bechtel v. Competitive Technologies Inc*., 369 F. Supp. 2d 233 (D. Conn. 2005). On appeal, the Second Circuit held that SOX did not provide for judicial enforcement of such orders. *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006). This issue of enforceability is addressed more fully in the Remedies section, *infra*.

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. According to OSHA, it should only be applied where reinstatement might result in "physical violence" against persons or property. 69 Fed. Reg. 52109.

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

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

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

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

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

12. Discovery and Hearing Before ALJ

a. Case Assigned to ALJ

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

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

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

b. Stay of Preliminary Reinstatement Order

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

When evaluating a respondent's motion to stay a preliminary order of reinstatement, the ARB considers four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Board grants a stay; and (4) the public interest in granting a stay." *Welch v. Cardinal Bankshares Corp.*, ARB 06-062, 2003-SOX-15 (June 9, 2006) (citing *Ohio ex rel. Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1987).

c. Discovery

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

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

Protective orders are not routinely granted. Instead, the movant must demonstrate good cause with specificity. 29 CFR § 18.15. In *Thomas v. Pulte Homes, Inc*., 2005-SOX-9 (ALJ Aug. 9, 2005), the complainant moved to seal the record, and the respondent consented to the motion. The ALJ denied this request on the ground that the complainant failed to identify a specific need for confidentiality, such as "a privacy interest or potential harm or embarrassment

that could result from disclosure of the record . . . ." The ALJ noted that "[a]s the whistleblower provision in the Sarbanes-Oxley Act is involved, there is a public interest in the protection of investors, employees, and members of the public by improving the accuracy and reliability of financial disclosures by publicly traded corporations." *Id*. at 3 (*citing* S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002)). *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 *Koeck v. Gen. Elec. Consumer & Indus*., ARB 08-068, 2007-SOX-073 (ARB Aug. 28, 2008), the respondent moved to seal the record of the proceedings before the ALJ. The ARB denied the motion to seal, holding that "there is no authority permitting the sealing of a record in a whistleblower case because the case file is a government record subject to disclosure pursuant to the Freedom of Information Act." *Id*. at 3. In *Cantwell v. Northrop Grumman Corp*., 2004-SOX-75 (ALJ Feb. 9, 2005), the ALJ granted a protective order covering the salary amounts and performance reviews of employees, but denied a requested protective order for compensation policies and procedures.

Sanctions, including dismissal of the complaint, are available for failure to participate in discovery. *See Harnois v. American Eagle Airlines*, 2002-AIR-17 (ALJ Sept. 9, 2002) (dismissing complaint due to complainant's failure to comply with discovery order and repeated requests to withdraw his objections and request for a formal hearing); *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Apr. 23, 2003) (ordering complainant to show cause why her complaint should not be dismissed for her failure to cooperate in discovery); *Powers v. Pinnacle Airlines, Inc*., 2003-AIR-12 (ALJ May 21, 2003) (disqualifying counsel based on conduct before the ALJ); *Reid v. Niagara Mohawk Power Corp*., 2002-ERA-3 (ALJ Dec. 26, 2002) (failure to appear at depositions without good cause warranted dismissal). In *Matthews v. LaBarge, Inc*., ARB 06-121, 2007-SOX-056 (ARB Nov. 26, 2008), the ALJ dismissed the complaint due to the complainant's failure to comply with discovery and pre-hearing orders, including complainant's failure to index and organize thousands of documents contained on a CD that he produced in discovery. The ARB affirmed the ALJ's decision, concluding that the ALJ had given the complainant adequate opportunity to comply with the discovery orders.

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

Although SOX is silent regarding an ALJ's authority to issue subpoenas and despite the fact that the Administrative Procedures Act, 5 U.S.C. § 555(d) (agency subpoenas "authorized by law shall be issued to a party on request"), and the OALJ Rules of Practice, 29 CFR § 18.24, both allow agencies to issue subpoenas only where authorized by statute or law, the ARB has found that ALJs have the authority to issue subpoenas, even in the absence of an express statutory authorization. *See Peck v. Island Express*, 2001-AIR-3 (ALJ Aug. 20, 2001) (following *Childers v. Carolina Power & Light Co*., ARB 98-77, 97-ERA-32 (ARB Dec. 29,

2000) (ruling that ALJs have inherent power to issue subpoenas when a statute requires a formal trial-like proceeding)); *Hill v. Tennessee Valley Authority*, 87-ERA-23 and 24 (ALJ Apr. 17, 1990). However, in *Bobreski v. EPA*, 284 F. Supp. 2d 67, 76-77 (D.D.C. 2003), the court held that there is no subpoena power under the whistleblower provisions of six environmental statutes where the relevant statutes (like SOX) did not explicitly provide for subpoena power.

Both SOX and the OALJ Rules of Practice are silent as to the geographic scope of an ALJ's subpoena power, if any; however it generally has been considered nationwide. *See, e.g., Taylor v. Express One 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. 1027, 1029 (E.D. Wis. 1964) (*citing United States v. Morton Salt Co.*, 338 U.S. 632 (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 Federal Rule of Civil Procedure 15(c), although ALJs have been inconsistent in its application.

(i) Additional Claims

It is fairly clear that the scope of a SOX complaint filed in federal court after the expiration of 180 days without a final decision generally must be limited to the claims identified in the initial OSHA complaint.

For example, in *Willis v. Vie Financial Group, Inc*., No. 04-Civ-435, 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*., No. CV-05-087, 2005 WL 2847224 (D. Idaho Oct. 27, 2005), the district court declined to adjudicate claims that had not been filed with OSHA.

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

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

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

In contrast, in *Hooker v. Westinghouse Savannah River Co*., ARB 03-036, 2001-ERA-16 (ARB Aug. 26, 2004), a *pro se* complainant failed to allege his refusal-to-rehire claim in his initial ERA discrimination complaint, although he did testify to it in his deposition. The ALJ *sua sponte*, noting the complainant's *pro se* status and the fact that respondent did not

contest the court's motion, amended the complaint to include the refusal-to-rehire allegation. On review, the ARB did not contest the *sua sponte* amendment, but explained that the proper procedure for amending complaints is found at 29 CFR § 18.5(e), which was not addressed by the ALJ in the decision.

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

(ii) Additional Parties

In *Hanna v. WCI Communities, Inc.*, No. 04-Civ-80595, 2004 U.S. Dist. LEXIS 25652 (S.D. Fla. 2004), the court held that the plaintiff could not add new defendants to a federal district court complaint which were not named in the initial OSHA complaint. The court reasoned that the plaintiff "failed to afford OSHA the opportunity to resolve [plaintiff's] allegations [against the newly-named defendants] through the administrative process. . . [and] never afforded the DOL the opportunity to issue a final decision within 180 days of filing his administrative complaint." 2004 U.S. Dist. LEXIS 25652, at * 8. Similarly, in *Bozeman v. Per-Se Technologies, Inc*., 456 F. Supp. 2d 1282 (N.D. Ga. 2006), the court held that by failing to name individual respondents in an OSHA complaint, complainant did not exhaust his administrative remedies with respect to his SOX claim against these individual respondents, and therefore the claims against the individual respondents must be dismissed. While the regulations implementing SOX provide for individual liability, a plaintiff is obligated to exhaust her administrative remedies for each claim that she seeks to assert against each defendant. *Bridges v. McDonald's Corp.*, No. 09-CV-1880, 2009 U.S. Dist. LEXIS 118597 (N.D. Ill. Dec. 21, 2009).

In contrast, complainants' attempts to add new respondents before the ALJ, subsequent to an initial determination by OSHA, have met with mixed results. In *Powers v. Pinnacle Airlines, Inc*., 2003-AIR-12 (ALJ Mar. 5, 2003), the complainant attempted to add the parent company of the originally named respondent, Pinnacle, to the ALJ complaint after OSHA dismissed her complaint on the basis that Pinnacle was not a publicly traded company. The ALJ ruled the complainant could not add the parent as a respondent because, *inter alia*, the complaint against the parent was untimely as it had been filed outside the statute of limitations.

However, 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 Federal Rule of Civil Procedure 15(c)) permitted the amendment to relate back to the date of the initial OSHA complaint, thereby rendering the claims against the parent corporation timely. The ALJ reasoned that, although the complainant was

aware of the identity and role of the parent company from the outset, "amending the complaint filed before OSHA by adding . . . the parent company . . . as a respondent comports with the purpose of Rule 15(c) and the purpose of the Act." The ARB affirmed this decision, holding that "an administrative law judge may permit a complainant to amend a complaint when the amendment is reasonably within the scope of the original complaint, the amendment will facilitate a determination of a controversy on the merits of the complaint and there is no prejudice to the public interest and the rights of the parties." *Gonzalez v. Colonial Bank*, 2004-SOX-39, ARB 05-060, at 3 (ARB May 31, 2005).

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

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

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

e. Motions

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

At least 20 days before the hearing date, parties may file motions for summary

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

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

f. Bench Trial Before ALJ

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

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

g. Evidence

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

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

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

h. Reconsideration

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

The ARB employs the same principles that federal courts employ in deciding requests for reconsideration, including "(i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision." *McCloskey v. Ameriquest Mortgage Co.*, ARB 06-033, 2005-SOX-093 (ARB Mar. 26, 2008) (denying reconsideration where complainant failed to meet provisions of the Board's four-part test for reconsideration, but instead rehashed arguments that the Board already considered); *Halpern v. XL Capital, Ltd.*, ARB 04-120, 2004-SOX-54 (ARB Apr. 4, 2006) (citations omitted). *See also Getman v. Southwest Securities, Inc.*, ARB 04-059, 2003-SOX-8 (ARB Mar. 7, 2006) (applying same factors and denying reconsideration because complainant's motion for reconsideration did not raise new factual or legal arguments).

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

13. 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. A petition must specifically identify the findings, conclusions, or orders to which exception is taken. 29 C.F.R. § 1980.110(a). A "blanket objection to all of the ALJ's findings and conclusions clearly fails to satisfy the specificity requirement for a petition to the Board for review." *Brookman v. Levi Strauss & Co.*, 2006-SOX-036, ARB 07-074 (ARB July 23, 2008) (*pro se* complainant

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

The ARB acts in an appellate capacity and its decision is based only on evidence considered by the ALJ in the initial hearing. *Carter v. Champion Bus, Inc*., ARB 05-076, 2005-SOX-23 (ARB Sept. 29, 2006) (the ARB will not consider legal arguments or evidence raised for the first time on appeal). No discovery is available. *See Reid v. Constellation Energy Group, Inc*., ARB 04-107, 2004-ERA-8 (ARB Oct. 13, 2004); *Halpern v. XL Capital, Ltd*., ARB 04-120, 2004-SOX-54 (ARB Oct. 13, 2004); *Cummings v. USA Truck, Inc*., ARB 04-043, 2003-STA-47 (ARB Sept. 15, 2004).

"A party's failure to present an argument on an issue or contest an element of a claim will result in a waiver of the issue." *Florek v. Eastern Air Central, Inc.*, ARB 07-113, 2006-AIR-009 (ARB May 21, 2009) (respondent neglected to object to complainant's failure to allege a specific violation of regulation or law pertaining to air carrier safety resulting in ALJ and ARB assuming conduct was protected). Similarly, claimed procedural due process violations not presented to the ALJ are waived. *Reddy v. Medquist, Inc.*, ARB 04-123, 2004-SOX-35, at 9 (ARB Sept. 30, 2005) (*citing Schlagel v. Dow Corning Corp.*, ARB 02-092, 01-CER-1, at 9 (ARB Apr. 30, 2004).

The ARB holds its proceedings in Washington, D.C., unless for good cause the ARB orders that proceedings in a particular matter be held in another location. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). There is no provision on oral argument before the ARB under the SOX regulations, and the absence of such a provision implies that granting oral argument is within the discretion of the ARB. *Varnadore v. Oak Ridge National Laboratory*, ARB 99-121, 1992-CAA-2, (ARB June 9, 2000). In practice, the ARB decides whistleblower cases on the pleadings and does not hold oral argument. The ARB does not currently have its own procedural regulations.

The ARB reviews the ALJ's findings of fact under a substantial evidence standard (29 CFR § 1980.110(b)) and conclusions of law *de novo*. *Barron v. ING North America Insurance Corp*., ARB 06-071, 2005-SOX-051 (ARB Aug. 29, 2008); *Negron v. Vieques Air Link, Inc*., ARB 04-021, 2003-AIR-10 (ARB Jan. 8, 2004); *Hasan v. J.A. Jones, Inc*., ARB 02-123, 2002-ERA-5 (ARB June 25, 2003). An ALJ's recommended grant of summary decision, however, is reviewed *de novo*. *Reddy v. Medquist, Inc*., ARB 04-123, 2004-SOX-35 (ARB Sept.

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

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

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

a. Timeliness of Appeal

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

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

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

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

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., Jordan v. Sprint Nextel Corp.*, ARB 06-105, 2006-SOX-41 (ARB June 19, 2008); *Welch v. Cardinal Bankshares Corp.*, ARB 04-054, 2003-SOX-15 (ARB May 13, 2004) (denying interlocutory appeal of ALJ order finding that respondent retaliated against claimant where the ALJ had bifurcated consideration of liability and damages and had not yet ruled on damages); *Hibler v. Exelon Generation Co., LLC*, ARB 03-106, 2003-ERA-9 (ARB Feb. 26, 2004) (denying interlocutory appeal of order denying respondent's motion to dismiss on basis that claimant failed to timely serve respondent with his hearing request); *Walton v. Nova Information*, ARB 06-100, 2005-SOX-107 (ARB Sept. 29, 2006) (denying interlocutory appeal of ALJ's order denying motion to dismiss).

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

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

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

c. Sanctions

Failure to adhere to ARB orders, such as briefing schedules, may be grounds for

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

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).

14. Appeal to Court of Appeals

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

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

15. Removal to Federal Court On or After 180 Days

If the DOL has not issued a *final* decision within 180 days and the delay is not a result of the complainant's bad faith, the complainant may withdraw his or her administrative complaint and file an action for *de novo* review in federal district court. 18 U.S.C. §1514A(b)(1)(B). *See Kelly v. Sonic Auto. Inc*., ARB 08-027, 2008-SOX-003 (ARB Dec. 17, 2008) (affirming ALJ's decision that the DOL was deprived of jurisdiction over the complainant's SOX complaint once the complainant filed his action in district court seeking *de novo* review); *Wingard v. Countrywide Home Loans, Inc*., 2008 WL 4277982 (holding that complainant may not bypass administrative procedures where DOL has issued a decision within 180 days); *Roulett v. American Capital Access Corp*., ARB 05-045, 2004-SOX-78 (ARB Aug. 30, 2005); *Allen v. Stewart Enterprises, Inc*., ARB 05-059, 2004-SOX-60, 61 & 62 (ARB Aug. 17, 2005); *McIntyre v. Merrill Lynch*, ARB 04-055, 2003-SOX-23 (ARB July 27, 2005); *Heaney v. GBS Properties LLC, d/b/a/ Prudential Gardner Realtors*, ARB 05-039, 2004- SOX-72 (ARB May 19, 2005). The district court has jurisdiction without regard to the amount in controversy. Moreover, the same burdens of proof that apply before the ALJ apply in the district court. 18 U.S.C. § 1514A(b)(2)(C).

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

In *Stone*, the whistleblower lost a motion for summary decision before the ALJ and successfully petitioned the ARB for review. More than a month before his initial brief was due the complainant removed the complaint to district court. The employer filed a motion to dismiss, arguing that the ARB's dismissal of the complaint rendered the ALJ's decision a "final judgment" for purposes of collateral estoppel. The district court, relying on DOL implementing regulations, held that relitigating the case would be "absurd" and remanded it to the ARB. The Fourth Circuit, looking to the language of SOX and apparent congressional intent, disagreed, finding that SOX "expressly provided for *de novo* review non-deferential review in district court." *Id.* at 4. The *Stone* decision makes it clear that if the administrative process at the DOL does not move quickly, a whistleblower has an unwavering right to start afresh in district court. Deferring to an administrative agency is in direct conflict with the language of SOX which provides for *de novo* review. In *Hanna v. WCI Communities, Inc*., No. 04-Civ-80595, 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 *Trusz v. UBS Realty Investors, LLC*, 2010 WL 1287148 (D. Conn. Mar. 30, 2010), the court held that amending a SOX complaint to include additional acts of retaliation does not reset the 180-day period that a complainant must wait before removing the complaint from DOL to federal court.

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 that 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 the filing with the district court. The ALJ refused both motions stating, "his attempt to invoke the 180 limit after having informed the parties he waived such a right and obtaining a delay based on that representation, constitutes bad faith under the regulations."

In *Murray v. TXU Corp*., 279 F. Supp. 2d 799 (N.D. Tex. 2003), a federal district court in Texas held that the defendant bears the burden of showing that the Secretary's failure to timely issue a final decision was due to the claimant's bad faith. *See also Collins v. Beazer Homes USA, Inc*., 334 F. Supp. 2d 1365 (N.D. Ga. 2004) (evidence that plaintiff did not fully cooperate with OSHA investigators and that delay in issuance of OSHA's final determination was due in some part to settlement negotiations alone was insufficient to defeat federal court jurisdiction based on plaintiff's 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). Failure to comply with section 1980.114(b) does not prevent a court from exercising jurisdiction. *Lebron v. Am. Int'l Group, Inc.*, No. 09-Cv-4285(SAS), slip op. (S.D.N.Y. Oct. 19, 2009) (finding that "[n]either section 1514A nor section 42121(b) conditions the district court's jurisdiction on fifteen days notice to the ALJ of the complainant's intent to remove the case to federal court").

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

Complainants must exhaust their administrative remedies before filing a complaint in federal court. 18 U.S.C. § 1514A(b)(1)(A). Being an attorney does not exempt a plaintiff from this requirement. *Curtis v. Century Sur. Co.*, 320 F.App'x 546 (9th Cir. 2009). In *McClendon v. Hewlett-Packard Co*., No. 05-Civ-087, 2005 WL 2847224 (D. Idaho Oct. 27, 2005), the district court determined that plaintiff's complaint alleging that defendant took away his job duties was untimely under OSHA's administrative filing period. Plaintiff opted out of the DOL forum and filed an action in the district court, alleging he was not time-barred from asserting other adverse employment actions. The court stated each discriminatory act starts the clock for filing an OSHA complaint. Since plaintiff's additional adverse employment actions

were not asserted in his OSHA complaint, the court could not review them.

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

a. Issues Relating To Removal

An issue that is just beginning to be addressed (*see* the Fourth Circuit's reversal of *Stone v. Instrumentation Lab Co., supra*) is whether a complainant may remove an action to district court after receiving an adverse decision from an ALJ, but before completing the appeals process to the ARB, if the ARB has not issued its ruling within 180 days after the filing of the complaint. Comments in DOL implementing regulations state that "the Secretary anticipates that Federal courts will apply [preclusion] principles" when a SOX claim is removed to federal court. 69 Fed. Reg. 52104-01. This 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. In the DOL's view, where an administrative hearing has been completed and a matter is pending before an ALJ or the ARB for a decision, a district court should treat a complaint as a petition for mandamus and order the DOL to issue a decision under appropriate time frames. 69 Fed. Reg. 52111.

In *Stone*, the Fourth Circuit flatly rejected this argument, holding that a whistleblower my seek *de novo* review at any time after the complaint has been pending for 180 days without a final decision by the Secretary of Labor. However, in *Allen v. Stewart Enterprises, Inc.*, No. 05-Civ-4033, slip op. (E.D. La. Apr. 6, 2006), the court refused to allow a complainant to relitigate his claim in federal court after an ALJ dismissed it following a hearing on the merits. Ironically, the judge gave the ARB two requested extensions to issue a final decision. This type of delay is the primary reason Congress gave SOX complainants the option to remove their claims to federal court if DOL does not issue a final decision within 180 days of commencement of the action. The ARB subsequently issued a decision affirming the ALJ's dismissal of the case. *See Allen v. Stewart Enterprises, Inc.*, ARB 06-081, 2004-SOX-60 to 62 (ARB July 27, 2006).

In *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332 (S.D. Fla. 2004), OSHA issued its preliminary order after the expiration of 180 days but prior to the filing of the plaintiff's district court lawsuit. While acknowledging the DOL's concerns regarding waste of resources resulting from duplicative litigation, the court held that OSHA's *preliminary* findings are not entitled to *res judicata* (claim preclusion) or collateral estoppel (issue preclusion) treatment in federal district court and the plaintiff was not required to exhaust his administrative appeals prior to filing a lawsuit in federal district court. The court reasoned that the plaintiff had not yet even reached the ALJ stage of the administrative process.

A related issue arises when a complainant pursues claims in other fora based on

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

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

In *Radu v. Lear Corp.*, No. 04-Civ-40317, 2005 WL 2417625 (E.D. Mich. Sept. 30, 2005), the court dismissed plaintiff's SOX claim for failing to meet SOX's procedural requirements. The filed his SOX claim (among others) in state court one day beyond the statute of limitations. 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

Prior to the enactment of the Dodd-Frank Act in 2010, it was unclear whether SOX allowed for a jury trial. 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). The Dodd-Frank Act expressly clarifies that Section 806 plaintiffs have the right to try their claims before a jury.

In *Schmidt v. Levi Strauss & Co.*, No. 04-Civ-01026, 2008 U.S. Dist. LEXIS 58322 (N.D. Cal. Mar. 28, 2008), the court granted defendant's motion to strike plaintiffs' demand for jury trial, concluding that the statutory text of Section 806 does not imply a statutory right to jury trial.

In *Mahony v. KeySpan Corp.*, No. 04 CV 554, 2007 WL 805813 (E.D.N.Y. Mar. 12, 2007), the court, without explanation, assumed that a SOX plaintiff is entitled to a trial by jury. Denying the employer's motion for summary judgment, the court held that it would defer to a jury's judgment whether plaintiff met his burden and the employer established by clear and convincing evidence that plaintiff's termination was non-retaliatory.

16. Burdens of Proof

SOX provides that a whistleblower action "shall be governed by the legal burdens of proof set forth in [AIR21]." 18 U.S.C. § 1514A(b). The burden-shifting framework of

McDonnell Douglas and other cases decided under federal anti-discrimination statutes applies generally to SOX cases, but the quantum of proof imposed on the parties is changed. Under SOX and AIR21, a complainant may prevail merely by showing that an improper motive was a "contributing factor" in the employment decision. Once this relatively low quantum of proof is established by the complainant, a respondent seeking to avoid liability using a "mixed motive" analysis must show by "clear and convincing evidence" (rather than a simple "preponderance of the evidence") that it would have taken the same employment action even in the absence of complainant's protected activity.

For example, in *Collins v. Beazer Homes USA, Inc*., 334 F. Supp. 2d 1365 (N.D. Ga. 2004), the federal district court explained that "[t]he evidentiary framework to be applied in Sarbanes-Oxley is an analysis different from that of the general body of employment discrimination law." 334 F. Supp. 2d 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.

In *Kalkunte v. DVI Financial Services, Inc.*, ARB 05-139, 2004-SOX-056 (ARB Feb. 27, 2009), the ARB articulated the burdens of proof that apply to SOX cases. A SOX complainant need not show that her protected conduct was a motivating or determinative factor in the decision to take an adverse action; rather she must only show that it was a contributing factor. Once the complainant has established by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action, the employer can avoid liability only by proving by a clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protect activity. *Id.* at 8. In *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1004 (9th Cir. 2009), the court held that "'causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity.'" Thus, close temporal proximity is sufficient to avoid Summary judgment.

In *Williams v. Administrative Review Board*, 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.

17. Confidentiality

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

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

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

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

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

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

In *Thomas v. Pulte Homes, Inc.*, 2005-SOX-9 (ALJ Aug. 9, 2005), the ALJ refused complainant's request that the entire record be sealed. "A request for the record to be sealed may be made by requesting a protective order pursuant to 29 C.F.R. §§ 18.15 and 18.46

or requesting a designation of confidential commercial information pursuant to 29 C.F.R. § 70.26." Complainant failed to support the need for confidentiality by failing to identify a privacy interest, potential harm or embarrassment that could result from disclosure and failed to identify confidential commercial information. The ALJ, however, noted that confidential information can be subject to disclosure through FOIA requests. Thus, even if the record were sealed, in responding to FOIA requests, the DOL would determine whether or not to withhold the information and, if there were no applicable exemptions, it would be disclosed.

B. Retroactivity

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

C. ADR

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

Where there is an enforceable arbitration agreement, the Department of Labor 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.

D. Settlement Agreements

1. General

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

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

investigative stage must be reviewed and approved by OSHA and settlements reached after OSHA issues its findings must be approved by the ALJ or ARB).

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

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

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

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

Another issue to consider regarding settlement is confidentiality. In *Doherty v. Hayward Tyler, Inc*., ARB 04-001, 2001-ERA-43 (ARB May 28, 2004), the ARB found that the parties' submissions, including a settlement agreement, may become part of the record of the case and may be subject to disclosure under FOIA. Therefore, the ARB denied a joint motion requesting an order that the settlement agreement not be disclosed, except as set forth in the agreement. Likewise, in *Michaelson v. OfficeMax, Inc*., 2004-SOX-17 (ALJ June 21, 2004), the ALJ found that the agreement's confidentiality provision could not prevent disclosure to

governmental agencies, and that the agreement could be subject to disclosure pursuant to a FOIA request. *See also Jacques v. Competitive Technologies, Inc*., 2005-SOX-34 (ALJ June 14, 2005); *Bahr v. Mercury Marine and Brunswick Corp*., 2005-SOX-18 (ALJ June 13, 2005); *Hogan v. Checkfree Corp*., 2005- SOX-7 (ALJ May 10, 2005).

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

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

2. Enforcement

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

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

E. Effect of Bankruptcy Proceedings

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

police and regulatory authority. In contrast, in *Briggs v. United Airlines*, 2003-AIR-3 (ALJ Feb. 13, 2003), the ALJ held that a DOL proceeding pursuant to AIR21 was exempt from the automatic stay provision under the regulatory and police powers exception.

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

VII. REMEDIES

A. Civil

1. Introduction

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

> (1) IN GENERAL. – An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.
>
> (2) COMPENSATORY DAMAGES. Relief for any action under paragraph (1) shall include –
>
> > (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
> >
> > (B) the amount of back pay, with interest; and
> >
> > (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
> >
> > (D) RIGHTS RETAINED BY EMPLOYEE.--Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

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

For examples of recent cases applying the SOX remedies provisions, *see, e.g., Stroupe v. Branch Banking & Trust Co.*, 2008-SOX-00047 (ALJ Apr. 1, 2010) (ordering

reinstatement and back pay for SOX violation). *Fort v. Tenn. Commerce Bancorp, Inc.*, 4-1760-08-017 (OSHA Mar. 17, 2010) (ordering reinstatement, back pay, lost bonuses, interest, attorneys' fees, and other special damages for SOX violation.[3]

For a discussion of the employer's refusal to follow OSHA's order to reinstate the complainant in *Fort*, and the resulting litigation, see section 6 on reinstatement below.

2. Back pay

a. Basic Entitlement

The general rule regarding back pay awards for SOX violations has been stated:

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

Platone v. Atlantic Coast Airlines Holdings, Inc., 2003-SOX-27 (ALJ July 13, 2004), *rev'd on other grounds sub nom. Platone v. FLYi, Inc.*, ARB 04-154 (ARB Sept. 29, 2006), *aff'd sub nom. Platone v. Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008) (internal citations omitted). *See also Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 at 15 (ALJ Feb. 15, 2005), *rev'd on other grounds*, ARB 05-064 (ARB May 31, 2007), *aff'd sub nom. Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 2968 (U.S. 2009) (holding that "if the administrative law judge concludes that the party charged has violated the law, the order will provide all relief necessary to make the employee whole, including… back pay with interest").

b. Promotions and Salary Increases

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

[3] http://www.whistleblowers.org/storage/whistleblowers/documents/blogdocs/fortsigned%20secretarys%20findings%20and%20order%20fort%20v%20tncc2.pdf (last accessed Jan. 13, 2011).

c. Accrued Vacation

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

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

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

d. Valuing Fringe Benefits

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

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

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

For a recent example of a case in which the complainant was awarded reimbursement for a variety of fringe benefits, *see, e.g., Fort*, 4-1760-08-017 (OSHA Mar. 17, 2010) (ordering that employer reimburse SOX complainant for, among other things, a bonus, seven board meeting fees, stock options, medical expenses, car allowance, insurance, and job hunting expenses).

(i) Loss of Health Insurance Coverage

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

- *Brown v. Lockheed Martin Corp.*, 2008-SOX-49 at 54 (ALJ Jan. 15, 2010) ("Health, pension, and other related benefits are terms, conditions and privileges of employment to which a successful complainant is entitled from the date of a discriminatory layoff until reinstatement or declination, and these compensable damages include medical expenses incurred because of termination of medical benefits, such as insurance premiums.");

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

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

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

- *Welch*, 2003-SOX-15 at 18 (ALJ Feb. 15, 2005) (awarding successful SOX complainant reimbursement for health insurance premiums, as he would not have had to purchase health insurance if he had not been unlawfully discharged).

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

In *Welch*, 2003-SOX-15 (ALJ Feb. 15, 2005), the complainant lost his life and health insurance benefits when fired by the respondent. While he was employed by a subsequent employer, the complainant was not entitled to either life or health insurance coverage, and he purchased health insurance through his wife's employer. The ALJ found the expense recoverable because complainant would not have had to purchase health insurance benefits if he had not been unlawfully discharged.

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

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

(ii) Stock Options

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

e. Tax Bump Relief

Although the author is not aware of any cases directly on point under SOX, the ARB has suggested that the tax consequences of an award may be considered if there is sufficient evidentiary groundwork. *Doyle v. Hydro Nuclear Servs.*, ARB No. 99-041, ARJ No. 89-ERA-22 (ARB May 17, 2000). The issue of "tax bump up" has been addressed by the courts in employment discrimination cases arising under other statutes. In *Blaney v. Int'l Ass'n of Machinists*, 87 P.3d 757 (Wash. 2004) (*Blaney II*), in an action under the state anti-discrimination law, the Supreme Court of Washington allowed for an offset of the tax consequences to the plaintiff flowing from the lump sum payment of damages. However, the court refused to characterize the offset of additional federal income tax consequences as "actual damages" because the tax consequences were too attenuated from unlawful discrimination to be deemed actual damages. Instead, the court characterized the offset as "any other appropriate remedy authorized by . . . the United States Civil Rights Act. During the litigation, a certified public accountant had provided expert testimony establishing that plaintiff would incur nearly a quarter of a million dollars in tax obligations that she would not have incurred "but for" the awards.

The Washington Supreme Court, distinguishing *Blaney v. Int'l Ass'n of Machinists*, 55 P.3d 1208 (Wash. 2002) (*Blaney I*) (affirmed in part and reversed in part by *Blaney v. Int'l Ass'n of Machinists*, 87 P.3d 757 (Wash. 2004) (*Blaney II*)), declined to award a tax offset for non-economic damages. In *Blaney I*, the court awarded tax offset damages where the plaintiff had incurred additional taxes on back pay and front pay that plaintiff received in a lump sum. In *Chuong Van Pham v. Seattle City Light*, 151 P.3d 976 (Wash. 2007), the court found compelling reasons not to provide tax offset relief where the plaintiff was awarded non-

economic damages, finding that the Congress had explicitly decided that non-economic damages were to be taxable when they were attributable to non-physical injuries, and Congress had placed this tax burden on the plaintiff. Thus, the court found that under the reasoning of the plaintiffs, "a plaintiff would retain no tax liability for non-economic damages. Shifting the tax burden on these awards *entirely* to the defendant simply goes too far." *Id.* at 981 (emphasis in original).

The federal courts are split as to whether tax bump relief is available under the 1991 Civil Rights Act. *Compare Fogg v. Gonzales*, 492 F.3d 447 (D.C. Cir. 2007) (Court affirmed the award of back pay and denial of front pay, but reversed as to the extent of the "gross up." On the issue of "gross up" relief, which increases the damages award to account for lump sum recovery and adverse tax consequences, the court found that D.C. Circuit precedent held that absent an agreement between the parties, "gross up" relief was not appropriate relief.); *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536 (4th Cir. 2003) (holding that the district court did not abuse its discretion in refusing to enhance the plaintiff's back pay award to compensate for the higher income tax burden incurred as a result of receiving the payment in a lump sum); *Dashnaw v. Pena*, 12 F.3d 1112 (D.C. Cir. 1994) (holding that "absent an arrangement by voluntary settlement of the parties, the general rule that victims of discrimination should be made whole does not support 'gross-ups' of back pay to cover tax liability. We know of no authority for such relief.") *with Gelof v. Papineau*, 829 F.2d 452, 455 n.2 (3d Cir. 1987) (avoiding the question of whether a plaintiff is entitled to an award for negative tax consequences); *Sears v. Acheson, Topeka & Kansas City Ry. Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (allowing an increase in award for back pay in order to compensate for the resultant tax burden from receiving a lump sum of more than 17 years in back pay); *Jordan v. CCH, Inc.*, 230 F. Supp. 2d 603 (E.D. Pa. 2002) (holding "that the speculative task of determining a plaintiff's tax liability does not preclude the award when an economic expert that testified at trial presents the change in applicable task rates"); *O'Neill v. Sears Roebuck & Co.*, 108 F. Supp. 2d 443 (E.D. Pa. 2000) (holding that the plaintiff was entitled to "an award for negative tax consequences, but limit[ed] the award to the increased tax liability on the award of front and backpay, only"); *EEOC v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364 (S.D. Fla. 1998) (citing *Sears* with approval but holding that such a tax bump required a sufficient evidentiary foundation); *Cooper v. Paychex, Inc*., 960 F.Supp. 966, 975 (E.D. Va. 1997) (citing *Gelof* and *Sears* with approval); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3d Cir. 1995) (holding that in order to fulfill the make-whole purpose of remedies in ADEA cases the plaintiff was entitled to prejudgment interest to compensate the plaintiff for the lost time value of money); *May v. Automated Data Management, Inc.*, 1989 WL 38955 (D.C.C. 1989) (holding that *Sears* applied to protracted litigation and that sufficient evidence was required to establish the tax penalty). *See also* Laura Sager & Stephen Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 S. Cal. L. Rev. 1075 (2000); Gregg D. Polsky & Stephen F. Befort, *Employment Discrimination Remedies and Tax Gross Ups*, 90 IOWA L. REV. 67 (2004).

f. Mitigation of Damages

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

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

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

If an employee refuses an offer by the employer to return to a past position, this fact alone may support the employer's failure to mitigate claim. In addition, an offer of a position that previously was denied often will toll the back-pay liability of an employer who is charged with employment discrimination. The employee's rejection of the offer will end the employer's back pay liability. *See Kalkunte*, 2004-SOX-56 at 55-57 (ALJ July 18, 2005).

The amount of any back pay award may be reduced by the total amount of wages received by the complainant during any interim employment the complainant held since his termination from the respondent employer. *See, e.g., Brown v. Lockheed Martin Corp.*, 2008-SOX-49 at 54 (ALJ Jan. 15, 2010).

g. Right to Jury Trial

The Dodd-Frank Act expressly clarifies that Section 806 plaintiffs have the right to a jury trial. Under pre-Dodd-Frank law, it was unsettled whether plaintiffs were entitled to a jury trial. *See, e.g., Walton v. Nova Info. Sys.*, 514 F. Supp. 2d 1031 (E.D. Tenn. 2007); *Schmidt v. Levy Strauss & Co.*, 2008 U.S. Dist. LEXIS 58332 (N.D. Cal. Aug. 1, 2008); *Murray v. TXU*, 2005 U.S. Dist. LEXIS 10945 (N.D. Tex. June 7, 2005); *Fraser v. Fiduciary Trust Co. Int'l*, 417 F. Supp. 2d 310 (S.D.N.Y. 2006); *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332 (S.D. Fla. 2004).

3. Interest

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

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

Id. at 21-22.

The court retains the discretion to determine the applicable prejudgment interest rate. *See, e.g., Loesch v. City of Phila*., 2008 U.S. Dist. LEXIS 48757 (E.D. Pa. June 19, 2008). Interest on back pay and benefits continue to the date of reinstatement or other remedy, and are usually calculated at the rate then in effect under 26 U.S.C. 6621(a)(2), the underpayment rate. *See, e.g., Clinchfield Coal Co. v. Federal Mine Safety and Health Comm'n*, 895 F.2d 773, 778-780 (D.C. Cir. 1990); 26 CFR 301.6621-1(a)(3) (rate compounded daily). The IRS publishes these rates in Revenue Rulings, which are in turn published in the Internal Revenue Bulletin.

At least one district court used the rate contained in the federal post-judgment interest rate statute, 28 U.S.C. § 1961(a). *Parexel Intern. Corp. v. Feliciano*, 2008 WL 5194299 (E.D. Pa. Dec. 4, 2008). That statute provides that "such interest shall be calculated from the date of the entry of the judgment, at a rate equal to weekly 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding." The court noted that many other courts had used the same method for calculating prejudgment interest in Title VII cases, and reasoned that this method of calculation is also appropriate in SOX cases because it adequately "serves to compensate a plaintiff for the loss of the use of money that the plaintiff otherwise would have earned had he not been unjustly discharged." *Id.*

4. Special Damages

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

a. Emotional Distress/Pain and Suffering

Complainants may recover for emotional pain and suffering, mental anguish,

embarrassment, and humiliation in DOL whistleblower cases. *See, e.g.*, *Kalkunte v. DVI Financial Services, Inc.*, ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-56 (ARB Feb. 27, 2009), *remanded to ARB for settlement approval*, No. 09-2221, 09-2233 (3rd Cir. 2009), *settlement approved and case dismissed,* 05-139, 05-140 (ARB Oct. 15, 2009); *Waechter v. J.W. Roach & Sons Logging and Hauling*, 04-STA-43, ARB 04-183 (ARB Dec. 29, 2005). Expert medical or psychiatric testimony is not strictly necessary, but such damages must be supported by evidence of the physical or mental consequences caused by the adverse employment actions proven by the employee. *Brown v. Lockheed Martin Corp.*, 2008-SOX-49 at 54-55 (ALJ Jan. 15, 2010) (*citing Thomas v. Arizona Public Service Co.*, 1989-ERA-19 (Sec'y Sept. 17, 1993)).

In *Kalkunte*, ARB Nos. 05-139, 05-140 (ARB Feb. 27, 2009), the ARB affirmed the ALJ's award of $22,000 in damages for "pain, suffering, mental anguish, the effect on [plaintiff's] credit [due to losing her job], and the humiliation she suffered."

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

> Complainant has testified that she suffered from depression and loss of self-esteem during and following her employment and constructive discharge from Respondent. Although no medical evidence has been presented in support, Complainant's son testified in confirmation of Complainant's emotional distress and depression with the resulting effects on both the family and their economic situation. Moncallo, Asbury, and Colditz all confirmed the Complainant's distress over what the undersigned has found to be unlawful discriminatory employment actions while in Respondent's employ. Accordingly, I find Complainant's testimony regarding her emotional pain and suffering, mental anguish, embarrassment, and humiliation to be generally credible. In line with awards made in similar cases, I hereby award Complainant the sum of $75,000.00 as non-economic compensatory damages.

Like claims for emotional distress in other employment litigation, proving the extent of emotional distress and its causal relationship to the unlawful conduct can be problematic. For example, in *Kalkunte*, 2004-SOX-56 at 62 (ALJ July 18, 2005), the ALJ observed that "compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation," but found that some elements of the plaintiff's alleged emotional distress injury were not proved to be causally related to the respondent's conduct.

For other cases on mental anguish damages and related topics, see *Pillow v. Bechtel Constructions, Inc.*, 87-ERA-35 (July 19, 1993); *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983); *Simmons v. Florida Power Corp.*, 89-ERA-28/29 (Dec. 13, 1989); *English v. Whitfield*, 868 F.2d 957 (4th Cir. 1988), and *Marcus v. U.S. EPA*, 92-TSC-5 (Feb. 7, 1994). In *Marcus*, the complainant never sought psychological counseling and did not call an expert

witness in this area. The award was based on the complainant's testimony regarding the disruption to his "home life," his "depression," and other matters which caused Dr. Marcus to suffer "mental and physical anguish" and a loss of professional reputation. *Marcus*.

b. Reputation Damages

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

In one SOX case, *Hanna v. WCI Communities., Inc*., 348 F. Supp. 2d 1332 (S.D. Fla. 2004), a district court held that reputation damages are allowed under the Act, finding that a plaintiff's reputation is damaged by termination, therefore diminishing their future earning capacity, and that accordingly plaintiff must be compensated for this loss in earnings in order to be made whole as the statute requires. The court relied on the Seventh Circuit's decision in *Williams v. Pharmacia, Inc*., 137 F.3d 944 (7th Cir. 1998) in which that court held that Title VII's remedies, as amended by the Civil Rights Act of 1991, allowed for an award for reputation damages. *See Mahony v. Keyspan Corp.*, 2007 U.S. Dist. LEXIS 22042 (E.D.N.Y. Mar. 12, 2007) (adopting the reasoning of *Hanna* and denying the defendant's request to strike the plaintiff's demand for damages to his reputation). *Cf. United States v. Burke*, 504 U.S. 229, 239 (1992) (in discussing Title VII, as written before the 1991 Act, the court stated that "nothing in this remedial scheme purports to recompense a Title VII plaintiff for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages").

In contrast, in *Murray v. TXU Corp.*, 279 F. Supp. 2d 799 (N.D. Tex. 2003), a district court held that nonpecuniary damages such as reputational injury are not allowable under SOX, finding the remedies under SOX analogous to the remedies under Title VII prior to the passage of the 1991 amendments. Similarly, in *Walton v. Nova Information Systems*, 514 F. Supp. 2d 1031 (E.D. Tenn. 2007), the court, relying on the Court's Title VII decision in *United States v. Burke*, 504 U.S. 229 (1992), held that non-pecuniary remedies including "injury to reputation, emotional, mental and physical distress and anxiety, or punitive damages" were not recoverable under SOX.

c. Damage to Credit Rating

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

5. Punitive Damages

The statute also does not authorize punitive damages as they are not considered "relief necessary to make the employee whole." *Murray v. TXU Corp.*, 279 F. Supp. 2d 799 (N.D. Tex. 2003) (punitive damages not allowed as the statutory omission of punitive damages is clear and unequivocal, and, in any event, the fact that the original draft of the Act explicitly provided for punitive damages and subsequent drafts removed that language, reinforced the court's conclusion decision to read the statute "as written"). *See also Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332 (S.D. Fla. 2004) (plaintiff conceded that punitive damages are unavailable under SOX). Additionally, the ARB has held that the Labor Department cannot award exemplary or punitive damages without express statutory authorization. *See Berkman v. U.S.Coast Guard Academy*, ARB 98-056, 1997-CAA-2 (ARB Feb. 29, 2000).

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

6. Reinstatement

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

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

In a recent example of reinstatement being used as a remedy for a SOX violation, OSHA announced on March 3, 2010 that it had ordered e-Smart Technologies to reinstate a California whistleblower. OSHA also ordered e-Smart to pay the employee in question his lost back wages with interest, to pay him $600,000 in compensatory damages, to provide him with a neutral reference, to expunge his personnel file of any reference to his exercise of rights under SOX, and to post a notice to employees outlining their whistleblower protections. According to OSHA's announcement of the order, OSHA's investigation "substantiated the employee's complaint that his job duties were systematically removed and his paychecks were delayed and

ultimately stopped after he questioned the accuracy of several statements made in the company's Securities and Exchange Commission filings."[4]

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

"Preliminary reinstatement" under Section 806 has been contested and ignored by some employers, who have refused to reinstate complainant employees before the exhaustion of the administrative process. Such actions by employers have led affected employees to file suit in district courts seeking injunctions to enforce OSHA's preliminary orders of reinstatement. In two prominent decisions, courts have held they do not have the power to enforce OSHA's preliminary orders of reinstatement.

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

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

[4] http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17214 (last accessed Jan. 13, 2011).

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

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

For further discussion of the Second Circuit's decision regarding the "preliminary reinstatement" issue in *Bechtel*, *see Competitive Technologies, Inc. v. Bechtel*, 2009 U.S. Dist. LEXIS 57459 (D. Conn. 2009) (granting the defendant's motion to dismiss in a later case between the same parties).

Subsequently, in *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006), *vacated and appeal dismissed*, 2008 U.S. App. LEXIS 28045 (4th Cir. 2008), a district court adopted Judge Jacobs' opinion in *Bechtel* and granted the defendant employer's motion to dismiss. While the district court noted there was a conflict between its decision and the regulations implementing the Act, it concluded the regulations conflicted with the plain language of the statute, which did not grant judicial authority to enforce preliminary orders. The court also noted that the efficient administration of justice requires that the administrative process be final before federal courts begin adjudication. This ensured that appeals go through "all levels of the administrative process before reaching federal court." *Welch* at 558. Later, the ALJ's decision in the complainant's favor, ALJ No. 2003-SOX-15 (ALJ Feb. 15, 2005), was reversed by the ARB, No. 05-064 (ARB May 31, 2007), and the Fourth Circuit thereafter vacated the district court's order and dismissed the appeal. 2008 U.S. App. LEXIS 28045 (4th Cir. 2008).

More recently, the Tenth Circuit addressed a preliminary reinstatement order issued by OSHA under the federal aviation whistleblower statute, 49 U.S.C. § 42121, but the Court was able to avoid on procedural grounds the question of whether district courts have the

power to enforce such administrative orders. *Rollins v. American Airlines, Inc.*, 279 Fed. Appx. 730 (10th Cir. 2008). In an action brought by the plaintiff-employee seeking to enforce OSHA's preliminary reinstatement order, the district court granted summary judgment for the defendant-employer on the grounds that the plaintiff's underlying administrative complaint had been filed in an untimely manner, thus nullifying the reinstatement order and mooting the issue. *Rollins* at 731. On appeal, the Tenth Circuit acknowledged in dicta the view taken by the courts in *Bechtel* and *Welch*, holding that district courts do not have jurisdiction to enforce such preliminary reinstatement orders. *Id.* at 732-33 n.2. However, in affirming the district court's decision on the grounds of the untimely administrative filing, the Court stated that it "need not resolve this other jurisdictional concern." *Id*.

The Sixth Circuit recently considered, but did not rule upon, the issue of the enforceability of such preliminary reinstatement orders, in a case involving a charge filed against Tennessee Commerce Bank by its former CFO. On March 18, 2010, OSHA announced that it had "ordered Tennessee Commerce Bank in Nashville to reinstate the CFO, Mr. Fort] and pay more than $1 million in back wages, interest, attorney's fees, compensatory damages, and other relief." *Fort v. Tennessee Commerce Bancorp, Inc.*, 4-1760-08-017 (OSHA Mar. 17, 2010). In total, the bank was ordered to (1) reinstate Fort as CFO immediately; (2) pay Fort's backpay; (3) pay for a bonus which Fort missed; (4) pay interest; (5) pay for seven missed Board meeting fees; (6) reinstate Fort's stock options; (7) pay Fort's medical expenses, car allowance, insurance, and job hunting expenses; (8) pay attorneys' fees; (9) expunge Fort's employment records; (10) refrain from further retaliation; and (11) post a notice to employees about their SOX rights. Fort alleged that he was placed on administrative leave in March 2008 and fired in May 2008 after he had raised concerns about the Bank's internal controls, employee accounts, insider trading, and other issues. Fort first raised his concerns with the bank's audit committee, and later to the FDIC and the Tennessee Department of Financial Institutions.[5]

After the bank refused to reinstate Fort, both Fort and the Secretary of Labor filed separate actions in the Middle District of Tennessee, seeking a preliminary injunction, requiring the bank to comply with OSHA's order. The Secretary of Labor was successful in obtaining injunctive relief, *Solis v. Tennessee Commerce Bancorp. Inc. ("Solis I")*, 713 F. Supp. 2d 701 (M.D. Tenn. 2010), and the court denied the bank's motion to stay enforcement of the injunction. *Solis v. Tennessee Commerce Bancorp., Inc. ("Solis II")*, 2010 U.S. Dist. LEXIS 49827 (M.D. Tenn. 2010). Five days later on appeal, the Sixth Circuit stayed enforcement of the injunction, pending expedited briefing on the issue of whether the district court had authority to issue the preliminary injunction. *Solis v. Tennessee Commerce Bancorp, Inc. ("Solis III")*, 2010 U.S. App. LEXIS 15302 (6th Cir. May 25, 2010). In so ruling, the Court stated:

> We find that the defendant's motion for a stay raises a substantial question as to the authority of the district court to issue the preliminary injunction. The defendants assert that they will suffer irreparable harm if Fort is physically reinstated immediately. They argue that Fort's reinstatement will cause

[5] http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17283 (last accessed Jan. 13, 2011); http://www.whistleblowers.org/storage/whistleblowers/documents/blogdocs/fortsigned%20secretarys%20findings%20and%20order%20fort%20v%20tncc2.pdf (last accessed Jan. 13, 2011).

> disruption to the bank's personnel and operations that cannot be undone if this court finds the district court lacked authority to issue the injunction. By contrast, if the reinstatement order was properly issued, Fort can be made whole with compensatory damages, back pay, and interest. A balancing of the harms supports the issuance of a stay.

The Sixth Circuit did not rule on the matter, because the case which Fort brought separately in district court was dismissed, Fort subsequently terminated the underlying administrative proceedings, and the case brought by the Secretary of Labor was therefore dismissed as moot. *See Solis v. Tennessee Commerce Bancorp, Inc. ("Solis IV")*, 2010 U.S. Dist. LEXIS 114071 (M.D. Tenn. Oct. 26, 2010).

7. Front Pay in Lieu of Reinstatement

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

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

Hobby, ARB No. 98-166 at 7-8 (ARB Feb. 9, 2001) (citations omitted). *See also Hagman*, 2005-SOX-00073 (ALJ Dec. 19, 2006), in which the ALJ noted the following in connection with awarding front pay as opposed to reinstatement:

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

Id. at 33 (citations omitted). *See also Brown v. Lockheed Martin Corp.*, 2008-SOX-49 at 51-52 (ALJ Jan. 15, 2010). In recommending an award of front pay in *Hagman*, Administrative Judge Etchingham stated:

> A remedial gap can open up when reinstatement is found to be inappropriate. *McKnight v. General Motors Corp.*, 908 F.2d 104, 116 (7th Cir. 1990) (McKnight II). In *McKnight II*, Circuit Judge Posner found that there was a presumption that an employee's employment opportunities had been damaged where reinstatement was not ordered and substantial back pay ($55,000) had also been awarded. *Id*. Judge Posner reasoned that "there is a presumption that the plaintiff does not have equally good employment opportunities, for if he did he would have been earning about the same in whatever job he took, upon being discharged, in order to mitigate his damages." *Id*.

Id. at 39. Administrative Judge Etchingham also stated at some length the appropriate standard for awarding front pay damages for SOX violations:

> Section 806 of SOX provides that where a SOX violation has occurred, the employee "shall be entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1)(2002); 29 C.F.R. § 1980.105. It is my conclusion that in order to make Complainant "whole" in this case, I have discretion in fashioning relief to order economic reinstatement, front pay, and/or money for future lost earnings as a result of discrimination under SOX.
>
> While some speculation is necessary to determine front pay, expert testimony concerning an employee's earning potential and evidence about what positions are available comparable to the discharged position is helpful. In *Ass't Sec'y & Bryant v Mendenhall Acquisition Corp.*, the ARB stated that "a litigant who seeks an award of front pay must provide the court 'with the essential data necessary to calculate a reasonably certain front pay award.' Such information includes the

> amount of the proposed award, the length of time the complainant expects to work, and the applicable discount rate." The Ninth Circuit has held that a plaintiff's work history, work expectancy, and life expectancy are pertinent factors in calculating the amount of front pay.
>
> Most cases seem to award front pay for a set amount of time. "Similarly, in *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984), the Sixth Circuit upheld an award of front pay to a 59 year-old plaintiff [through - 39 - retirement age] but noted that front pay for a 41 year-old plaintiff until retirement age might be unwarranted. Indeed, '[o]ther courts seem to agree that plaintiffs in their forties are too young for lifetime front pay awards' (citations omitted)."

Id. at 38-39 (citations omitted).

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

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

Id. at 37 (citations omitted)

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

In *Brown v. Lockheed Martin Corp.*, 2008-SOX-49 (ALJ Jan. 15, 2010), the ALJ refused to order front pay in lieu of reinstatement. The ALJ indicated a strong inclination towards reinstatement instead of front pay, even though the complainant tried to avoid being reinstated. While the ALJ found some hostility between the parties, he held that it did not rise to the level of "irreparable animosity" under which "a productive and amicable working relationship would be impossible" as required to justify a front pay award. *Id*. at 53. In that

regard, the ALJ in Brown quoted a passage from *Farley v. Nationwide Mutual Ins. Co.*, 197 F.3d 1322, 1339-40 (1999):

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

Brown, supra at 52-53 (citations omitted). The ALJ also rejected the complainant's argument that she was entitled to front pay because she had suffered emotional distress during her employment which would make her unable to resume her prior employment. *Brown*, 2008-SOX-49 at 53. The ALJ noted that the complainant had not submitted any medical records which would substantiate a claim that she was medically unable to perform her job. *Id*. Finally, the ALJ also rejected the complainant's argument that reinstatement was not possible because there was no longer a position in the company comparable to the one which she once held. *Id*. at 53-54. The ALJ noted that reinstatement does not require placement in the exact position the complainant once held, and cited evidence that comparable positions were available in the company. *Id*. Thus, the ALJ ordered that the complainant be reinstated to a comparable position, effective immediately. *Id*. at 54.

8. Abatement Orders

The Department of Labor has broad authority to issue abatement orders, which can include, among other things, the power to (1) order that respondent take all reasonable "affirmative action" to abate discrimination which may discourage employees from raising concerns; (2) require the respondent to officially inform all employees of their right to contact the relevant authorities; (3) require the sealing of documents and an expungement of all negative information; and (4) require that orders of administrative law judges be prominently posted. *See, e.g., Chase v. Buncombe County, N.C.*, 85-SWD-4, p. 4, (Nov. 3, 1986); *Simmons v. Florida Power Corp.*, 89-ERA-28/29, p. 22, (Dec. 13, 1989).

9. Attorneys' Fees and Costs

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

> After having determined that Complainant is a prevailing party, I must determine whether the fees sought are reasonable and properly supported. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. Hours not "reasonably expended" or which are excessive, redundant or otherwise unnecessary should be excluded, according the principle that "[h]ours that are not properly billed to one's client are not properly

> billed to one's adversary pursuant to statutory authority." *Id*. at 434 (emphasis in original). A petition for attorney's fees must specify the date on which the attorney's time was expended, the amount of hours expended, and a specific description of the tasks undertaken by the attorney during that time.

Id. at 42.

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

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

A reasonable hourly rate, or rate of compensation, is equivalent to the market rate of attorneys, within the community where the case is tried, of reasonably comparable skill, experience, and reputation. *See Murray v. Air Ride, Inc.*, ARB 00-45, 99-STA-34 (Dec. 29, 2000); *Platone*, 2003-SOX-27 (ALJ July 13, 2004). In *Hagman, supra*, the ALJ awarded $305,748 of the requested $500,000 in attorney fees and costs. The ALJ in *Hagman* refused to consider New York rates in its determination of the fee award, stating that the plaintiff could have found representation within the locality of Southern California. In so holding, the ALJ stated:

> At the outset, I note that the relevant geographic market or legal community for purposes of determining the appropriate hourly rate for attorney's fees is normally the locality of the hearing. *Hoch v. Clark County Health District*, 1998-CAA-12 (ALJ Mar. 15, 2000); *see also Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991). The specialized nature of the case and the unavailability of local counsel may be grounds for exception to that rule. *Graf v. Wackenhut Services L.L.C.*, 1998-ERA-37 (ALJ Feb. 6, 2001) (awarding fees based on Complainant's counsel's rates in Seattle, rather than rates for the Colorado area where the hearing

> was held); *see also Guam Society of OB/GYNs v. Ada*, 100 F.3d 691, 702 (9th Cir. 1996) (same). However, I do not find special circumstances exist in this case to warrant changing the relevant legal market from the Los Angeles area, the proper location of the hearing and witnesses, to New York, the location of only Complainant's counsel. Without contradictory evidence from the parties, I find that the prevailing hourly rates are lower for the Los Angeles area than for New York, which provides further support for the reductions in the hourly rates of Complainant's counsel. Moreover, I find that the quality of the representation provided by Complainant's counsel was substantially equivalent to that of the attorneys who regularly practice before me in California, and does not justify the higher rates sought given the awards I have issued in similar cases.

Id. at 44.

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

Attorneys litigating SOX cases should be careful to ensure that their billable time entries are described in adequate detail, and should avoid the practice of block billing. *See, e.g.*, the following discussion from *Hagman, supra*:

> Entries such as "review documents," "depositions," "trial preparation," or "legal research" are too vague to provide a meaningful opportunity for review of whether the hours were reasonably expended. *Varnadore v. Oak Ridge National Laboratory*, 92- CAA-2 and 5 and 93-CAA-1 (ALJ Sept. 22, 1994) (citing *H. J., Inc. v. Flygt Corporation*, 925 F.2d 257, 260 (8th Cir. 1991) and *Ecos, Inc. v. Brinegan*, 671 F.Supp. 381, 396 (M.D.N.C.)). Where the billing descriptions do not afford a meaningful opportunity to determine the reasonableness of the time expenditures, an ALJ need not engage in an item by item reduction of the hours, but rather, may make reductions based upon a percentage basis. *Id*.; *Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-SOX-27, at 12 (July 13, 2004); *Graf v. Wackenhut Services L.L.C.*, 1998-ERA-37 (ALJ Feb. 6, 2001).

Id. at 47. The ALJ in *Hagman* also discussed the practice of billing in quarter-hour increments as opposed to tenth-hour increments, and held as follows in that regard:

> Use of quarter-hour incremental billing may be reasonable based on the tasks completed. *See, e.g., White v. The Osage Tribal Council*, 1995-SDW-1 (ALJ Aug. 10, 2000). However, as discussed above with regard to the vague fee entries and use of block billing, I find that the fee entries are not detailed enough to

> determine whether a quarter hour is a reasonable amount of time to have spent on a given task. Accordingly, this provides further justification for the 25 percent across-the-board hours reduction discussed above.

Id. at. 48. The ALJ in *Hagman* also considered the complainant's petition to be granted, as a part of her attorneys' fees award, a number of miscellaneous expenses, including expenses for photocopying, mailing, faxing, and research. In disallowing recovery for such charges, the ALJ stated:

> I find that the charges for photocopying, postage, facsimile charges, Federal Express, Express Mail, Kinko's, Westlaw research, and purchasing a copy of the regulations are part of verhead, and Complainant has not shown that these costs were extraordinary and should be reimbursed, nor have any receipts been provided. Accordingly, I disallow all of these costs.

Id. at 50.

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

10. Sanctions

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

B. Criminal

In addition to civil liability, the Act contains criminal penalties for those interfering with the employment of certain whistleblowers. 18 U.S.C. § 1513(e). The definition of a whistleblower is narrower for criminal liability than for civil liability. *Compare* 18 U.S.C. § 1513(e) *with* 18 U.S.C. § 1514A(a). The criminal provision is discussed in Section III.G, *supra.*

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 C.F.R. §205 ("Part 205"). The rules establish minimum standards concerning when, and to whom, an attorney (in-house or outside counsel) should report "up-the-ladder" if he or she becomes aware of a material violation of federal securities laws, state securities laws or breaches of fiduciary duty[6].

The rules also define the term "evidence of a material violation," which triggers an attorney's obligation to report up-the-ladder within an issuer. An attorney's reporting obligation is triggered when the attorney becomes aware of "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." This is an objective standard that does not require actual belief that a material violation occurred or will occur.

B. Ethical Obligations, Outside and In-House Counsel

The obligations on attorneys imposed by the Act and the SEC's rules raise ethical issues, particularly for in-house counsel acting as whistleblowers. These issues concern 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 treated varies under the Model Rules and the Model Code.

[6] In 2003, the SEC extended the comment period on the "Noisy Withdrawal" and related provisions originally included in proposed Part 205. The Noisy Withdrawal proposals would require outside counsel upon (a) lack of an appropriate response to the counsel's up-the-ladder reporting and (b) reasonable belief of a material violation likely to result in injury to an issuer or investor, 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 filings with the SEC that the attorney believes to be false or misleading. The proposals do not require in-house attorneys to resign if the violation occurred in the past, 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 proposals, the attorney's notice to the SEC is deemed not to be a breach of the attorney-client privilege. The SEC has not taken final action on the Noisy Withdrawal proposals.

STATES APPLYING THE MODEL RULES

The ABA Model Rules of Professional Conduct[7] 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 Model Rules of Professional Conduct Rule 1.6(b)(5) (2006).

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

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

Willy v. Admin. Rev. Bd., 423 F.3d 483, 501 (5th Cir. 2005). In *Willy*, the Fifth Circuit concluded the attorney-client privilege issues before the DOL ALJ and ARB were a matter of federal common law. In analyzing the law, the Fifth Circuit analyzed the Supreme Court Standard 503(d), the ABA Model Rules, and applicable case law under those rules. Like the ABA Model Rules, Supreme Court Standard 503(d) provides that no privilege exists "[a]s to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to the lawyer. . . ." 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,

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[7] Rule1.6 Confidentiality of Information: "(a) A lawyer shall not reveal information relating to the 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 prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) 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 (6) to comply with other law or a court order." ABA Model Rules of Professional Conduct Rule 1.6 (2006).

Willy alleged that he was discharged because of the privileged report. The employer attempted to prevent Willy from introducing the report as evidence, arguing that the attorney-client privilege and ethical rules prevented an attorney from disclosing privileged communications. The Fifth Circuit concluded, however, that the federal common law does not prevent the report from being introduced as evidence in an administrative proceeding before an ALJ.

In *Jordan v. Sprint Nextel Corp.*, ARB 06-105, 2006-SOX-41 (ARB Sept. 30, 2009), the ARB held that an in-house attorney-complainant may rely on privileged documents or communications in order to assert a whistleblower claim under Section 806 of the Act. The plaintiff claimed that the company retaliated against him after he refused to grant a waiver of the company-wide ethics policy to a senior officer, failed to condone his supervisor's actions in causing a senior officer to violate the company's Securities Law Compliance Policy, and opposed his supervisor's fraudulent filings with the SEC. *Id.* at 3. At issue in this case were privileged reports filed by plaintiff in accordance with SEC's Part 205 regulations that he wanted to use in a SOX Section 806 proceeding in order to establish that he had engaged in a SOX-protected activity. The review board concluded that the "material violation" contained in the privileged Part 205 report was admissible as an exception to the privilege rules to support Jordan's retaliation claim. *Id.* at 32. Further, the review board concluded that any other relevant privileged communications are admissible in Section 806 proceedings subject to "protective, in camera, or other orders" the ALJ may issue with the "objective of protecting privileged communications pursuant to 29 C.F.R. 18.46(a).…" in order for the attorney-complainant to establish that he engaged in SOX protected activities. *Id.*

Fernandez v. Navistar International Corp., 2009-SOX-43 (ALJ Oct. 16, 2009), is another case where an employee was permitted to gain access to otherwise privileged communications. In *Fernandez,* the ALJ was asked to determine whether an internal report by the Sidley Austin law firm was entitled to client confidentiality where the complainant had participated in creating the report. *Id.* at 5. Fernandez argued that the so-called "Sidley Report" was part of a fact-finding investigation and that the firm had the intention of reporting results to the SEC rather than using the report to provide confidential legal advice to Navistar. *Id.* at 7. The ALJ found that the report was subject to the attorney-client privilege, but also concluded that the respondents had waived the privilege when they disclosed the report to the SEC, and complainant could compel its production. *Id.* at 18.

Other recent cases follow the *Willy*, *Jordan*, and *Fernandez* rationales, and allow the disclosure of privileged communications in whistleblower cases. *See, e.g., Van Asdale v. Int'l Game, Tech.*, 577 F.3d 989, 995-96 (9th Cir. 2009) (allowing the use of confidential information in SOX claim; citing to Third and Fifth Circuit cases and noting that "[t]o the extent this suit might nonetheless implicate confidentially-related concerns . . . the appropriate remedy is for the district court to use the many equitable measures at its disposal to minimize the possibility of harmful disclosures . . . ") (internal quotations omitted); *Heckman v. Zurich Holding Co. of America*, 242 F.R.D. 606 (D. Kan 2007) ("[P]laintiff [former in-house counsel] is entitled to maintain her retaliatory discharge claim against defendants and is entitled to reveal confidential information under Rule 1.6(b)(3) to the extent necessary to establish such claim."); *but see Nesselrotte v. Allegheny Energy, Inc*., No. 06-Civ-01390, 2008 U.S. Dist. LEXIS 55730 (W.D. Pa. July 22, 2008) (distinguishing *Willy* and ABA Formal Opinion 01-424, and holding

that in-house attorney-plaintiff, who removed privileged documents without authorization before her employment was terminated, was not permitted to use such documents in her subsequent Title VII litigation).

In addition to the confidentiality obligations contained in Model Rule 1.6, Model Rule 1.13 details the ethical obligations of an attorney with respect to an organizational client. Rule 1.13(c) permits disclosure of confidential information when the attorney has fulfilled the reporting-up requirement, the violation was not sufficiently addressed, and the "lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization." Conflict may arise in states that do not follow the Model Rules or that retain the earlier versions of Model Rule 1.13 and 1.6, which would not permit attorneys to disclose privileged information to prevent the client from committing criminal acts that the lawyer believes are likely to result in substantial injury to the financial interest or property of another.

STATES APPLYING THE MODEL CODE

In those few states that apply the Model Code rather than the Model Rules, a different approach applies. Before New York became a Model Rules 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 court in *Wise* 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 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 Heckman v. Zurich Holding Co.*, 2007 U.S. Dist. LEXIS 34164, at *14 (D. Kan. May 8, 2007,) (performing same comparison). Thus, in *Crews v. Buckman,* 78 S.W.3d 852, 863-64 (Tenn. 2002), the court acknowledged that the Model Code under which it was operating would not permit wrongful discharge claims to go forward. The court addressed this, however, by adopting a new provision to TN Disciplinary Rule 4-101(C) that parallels the language of former Model Rule 1.6 (b)(2)as a means to allow the plaintiff's case to proceed.