Sarbanes-Oxley Whistleblower and Other Retaliation Claims

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I. SARBANES-OXLEY WHISTLEBLOWER PROTECTION

A. Introduction

One of the most widely discussed federal whistleblower statutes is the anti-retaliation provision contained in Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX 806"), 18 U.S.C.A. § 1514A (Westlaw 2011), that protects certain whistleblowers who report corporate fraud and financial or securities-related wrongdoing. SOX 806 provides a cause of action to employees of publicly-traded companies and certain of their subsidiaries who allege that they were retaliated against because they provided information about, or participated in an investigation relating to, what they:

> reasonably believe[d] constitute[d] a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], 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.A. § 1514A(a)(1) (Westlaw 2011). Some courts have interpreted this provision to mean that SOX 806 protections apply only to employees who complain about fraud against shareholders, while others have held that the plain language of the statute covers a complaint about any of the six types of violations enumerated in the provision. Compare Bishop v. PCS Admin., (USA), Inc., No. 05 C 5683, 2006 WL 1460032, at *9 (N.D. Ill. May 23, 2006) (finding that the phrase "relating to fraud against shareholders" must be read as modifying all violations enumerated under Section 806) with O'Mahony v. Accenture Ltd., 537 F.Supp.2d 506, 517 (S.D.N.Y. 2008) (finding Section 1514A protections based upon the whistleblower's reporting of fraud "under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud.").

The "investigation" prong of SOX 806 protects those who provide, or cause to be provided, information or otherwise participate in an investigation regarding any conduct that the employee reasonably believes constitutes a violation of specified federal securities and fraud law. 18 U.S.C.A. § 1514A(a)(1) (Westlaw 2011). The information or assistance must have been provided to, or the investigation must be conducted by: (1) a federal regulatory or law enforcement agency; (2) a member of Congress or any committee of Congress; (3) a person with supervisory authority over the employee; or (4) a person working for the employer who has the authority to investigate, discover, or terminate the misconduct. Id.

The "proceedings" prong protects those who file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed, or about to be filed, relating to an alleged violation of federal securities and fraud laws. 18 U.S.C.A. § 1514A(a)(2) (Westlaw 2011). The Department of Labor has historically interpreted "proceedings" broadly to encompass internal reports to management, and potentially employee leaks to the media, on the grounds that such contacts were a "preliminary step" toward causing a proceeding to be filed or initiated.

Section 929A of the Dodd-Frank Act expands the scope of SOX coverage to include certain subsidiary entities of publicly-traded corporations. Specifically, the statute expands coverage to "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of [a publicly-traded company]." Prior to the enactment of the Dodd-Frank Act, employers frequently avoided the application of SOX's employee protection provisions by arguing that they were not a covered entity under SOX. As of April 15, 2009, 1,400 Sarbanes-Oxley claims have been filed with OSHA. Of these, employees prevailed in 230 cases (including 210 cases that settled), employers prevailed in 930 cases, and 186 complaints were voluntarily withdrawn.[2] Previously, many claims were dismissed because the complainants worked for subsidiaries of publicly-traded corporations, which the DOL ruled were covered only if they are sufficiently intertwined with their parent corporations. With the exception of certain limited circumstances, the Department of Labor consistently interpreted SOX's whistleblower protection provisions to apply solely to publicly traded companies subject to the registration and reporting requirements of the Securities Exchange Act of 1934. Because of this restrictive interpretation that arguably contravened the plain language of SOX, wholly-owned subsidiaries of publicly-traded companies — entities that are not subject to the registration and reporting requirements of the Securities Exchange Act — frequently avoided the application of SOX in instances of unlawful retaliation.

B. Covered Employers

1. Companies

SOX whistleblower provisions apply to publicly-traded companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78l (Westlaw 2011), or that are 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) (Westlaw 2011); see 18 U.S.C. 1514A(a) (Westlaw 2011), as well as to their subsidiaries whose financial information are consolidated into their financial statements.

a. Domestic

The Act applies to all companies that have obtained a listing in the United States or have registered securities with the SEC. However, coverage under the whistleblower provisions is narrower than coverage under SOX Section 402 (enhanced conflict of interest provisions) in that it does not cover companies that have filed a registration statement but do not yet have a class of securities registered under Section 12 or report under Section 15(d) of the Exchange Act. See Roulett v. American Capital Access, 2004-SOX-78 (ALJ Dec. 22, 2004) (granting summary

[2] Laurence S. Moy, et al., Understanding the Securities Laws 2010: Whistleblower Claims Under the Sarbanes-Oxley Act of 2002, 1843 PLI/Corp149, 152 (2010).

decision to employer where it had filed a registration with the SEC but withdrew it prior to SEC approval).[3]

The requirement that a respondent be subject to the registration or reporting requirements of the Exchange Act has been strictly construed. For example, in Flake v. New World Pasta Co., 2003-SOX-18 (ALJ July 7, 2003), aff'd, ARB No. 03-126 (ARB Feb. 25, 2004), an ALJ addressed the issue of whether the respondent was a company subject to jurisdiction under Section 806. It was undisputed that the respondent had no publicly-traded securities. Therefore, the only issue was whether it was required to file reports under Section 15(d) of the Exchange Act. The ALJ found that the respondent fell within an exception to reporting requirements of Section 15(d) because its public debt had been held by less than 300 persons in each year since its registration and offering. According to the ALJ, the fact that the respondent voluntarily filed some reports required by Section 15(d) in order to comply with a contractual agreement did not transform it into an issuer "required to" make such filings. Therefore, the ALJ granted the respondent's motion for summary decision. See also SEC Division of Corporation Finance, Sarbanes-Oxley Act of 2002 – *FAQ #1* (Nov. 8, 2002) (company that voluntarily files reports under the Exchange Act but is not required to because it had fewer than 300 security holders of record at the beginning of its fiscal year is not an "issuer" within the meaning of SOX).

In Stevenson v. Neighborhood House Charter Sch., 2005-SOX-87 (ALJ Sept. 7, 2005), complainant argued that respondent, a non-publicly-traded charter school, should be covered under Section 806 because it was subject to reporting under SEC Rules 10b5 and 15c2-12, had a retirement plan with benefits subject to reporting and disclosure requirements under ERISA, and received funds from public companies. The ALJ rejected these arguments, reasoning that whether or not a company is covered by Section 806 "is determined solely by whether the company has a class of stock registered under Section 12 of the [Exchange Act] or whether it is required to make reports pursuant to Section 15(d)." See also Paz v. Mary's Center for Maternal & Child Care, 2006-SOX-7 (ALJ Dec. 12, 2005), aff'd, ARB No. 06-031 (ARB Nov. 30, 2007) (dismissing complaint against non-profit health organization which neither had a class of securities registered under Section 12 of the Exchange Act nor was required to file reports under Section 15(d)), aff'd, ARB No. 06-031 (ARB Nov. 30, 2007); Fiedler v. Compass Group USA, Inc., 2005-SOX-38 (ALJ July 15, 2005); Gibson-Michaels v. Federal Deposit Ins. Corp., 2005-SOX-53 (ALJ May 26, 2005) (FDIC is not a covered employer under Section 806); Weiss v. KDDI America, Inc., 2005-SOX-20 (ALJ Feb. 11, 2005); Roulett v. American Capital Access, 2004-SOX-78 (ALJ Dec. 22, 2004) (respondent not covered under Section 806 where it withdrew its registration before any approval by an exchange or the SEC was effected and, therefore, never registered a class of securities under Section 12); Ionata v. Nielsen Media Research, Inc., 2003-SOX-29 (ALJ Oct. 2, 2003) (ALJ lacked jurisdiction because the respondents were not companies "with a class of securities registered under Section 12 of the Securities Exchange Act of 1934").

[3] The ALJ in Roulett also found that SOX could not apply retroactively to cover an employer for actions undertaken prior to approval of the registration of its securities by the SEC, even if the company was subject to SEC registration requirements at the time the SOX complaint was filed with the Department of Labor.

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

b. Foreign

The SOX whistleblower protections apply to foreign private issuers (as defined by Rule 36-4(c) of the Exchange Act) subject to SEC reporting and registration obligations. Foreign issuers that are exempt from SEC filing requirements under Rule 12g3-2(b) of the Exchange Act are excluded from coverage under SOX. Foreign corporations doing business in the United States are subject to Section 806 whistleblower provisions because SOX applies to companies "with a class of securities registered under § 12 of the Securities Exchange Act" ... or "required to file reports" under the Exchange Act

Statutory whistleblower provisions generally do not apply extraterritorially absent clear language by Congress in the statute to extend the statute's protections abroad. See, e.g., EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); Mendonca v. Tidewater, Inc., 2001 U.S. Dist. LEXIS 3486, at *7 (E.D. La. Mar. 4, 2001). Courts have held that U.S. courts do, in certain circumstances, have jurisdiction over violations of the Exchange Act, even if the the violations took place outside the U.S. See, e.g., Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336-37 (2d Cir. 1972) (statute applicable when foreigner made substantial misrepresentations in the United States for transactions executed in England); Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. 1968). In its Final Rule, OSHA declined to clarify this issue, despite requests by commentators to do so, on the ground that the purpose of the regulations is procedural and not to interpret the statute. 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004). Additionally, one ALJ decided that a corporation registered only on European stock exchanges with securities exempt from SEC registration under Rule 12g3-2(b) is not covered by SOX, nor are its subsidiaries. Deutschmann v. Fortis Investments, 2006-SOX-80 (ALJ June 14, 2006).

The primary issue in addressing an international SOX claim is whether the claim raised an extraterritorial question. If a court determined that the complaint required the extraterritorial application of SOX, the claim was dismissed. See Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006). Carnero involved a complainant who was an Argentinean citizen resident in Brazil working for two Brazilian subsidies of an American corporation. Id. The court noted that there is a well-established presumption in statutory construction against the extraterritorial application of congressional statutes in the absence of clear evidence that Congress intended the law to reach abroad. The Carnero court held that the legislative history of SOX and its plain language did not suggest extraterritorial application. Thus, where the complainant was a foreign citizen working abroad who was employed and paid by the foreign subsidiary, whose primary employment duties were performed outside the United States, and whose complaint was instituted outside the United States, the court held that SOX did not apply. Id.; see also Ede v. The Swatch Group Ltd., ARB No. 05-053 (ARB June 27, 2007) (dismissing complaints where complainants worked solely for foreign subsidiaries and never in the U.S. and where the SOX complaint was grounded in adverse actions that occurred outside the U.S.); Pik v. Goldman Sachs Group, Inc., 2007-SOX-92 (ALJ Feb. 21, 2008) (same); Concone v. Capital One Financial Corp., 2005-SOX-6 (ALJ Dec. 3, 2005) (same).

In a recent case that cited Carnero, the Administrative Review Board ("ARB") granted summary judgment to defendant company where defendant asserted that the complainant was: (1) a resident of India; (2) directly employed by a United Kingdom-based company; (3) operating out of Dubai, U.A.E.; (4) who performed no work in the United States. See Salian v. Reedhycalog UK, ARB No. 07-080, ALJ No. 2007-SOX-20 (ARB Dec. 31, 2008). The ARB found that complainant's production of documents mentioning both him and his direct employer's U.S. parent was insufficient to raise a question of material fact as to whether he worked for a covered employer. Id.

The Carnero court noted, however, that its holding was fact-specific; i.e., similar facts might not implicate extraterritorial statutory application. Indeed, in an earlier case that cited the lower court's decision in Carnero, Penesso v. LLC International, Inc., 2005-SOX-16 (ALJ Mar. 4, 2005), the ALJ denied summary decision and distinguished Carnero, finding that the case "ha[d] a substantial nexus to the United States, and it [was] appropriate for the complainant to bring this claim under § 1514A of the Sarbanes-Oxley Act." In Pennesso, the complainant was employed in Italy by the Italian subsidiary of a U.S. corporation headquartered in Virginia. Id. The ALJ considered, inter alia, that much of the protected activity occurred in the U.S. when the complainant came to respondent's U.S. headquarters to inform corporate officers of the financial improprieties he believed were taking place in Italy, the complainant was a U.S. citizen, and at least one of the retaliatory actions was made in the U.S. Id. The court in Neuer v. Bessellieu, 2006-SOX-132 (ALJ Dec. 5, 2006), also distinguished Carnero based on the specific-facts presented. In Neuer, a non-U.S. citizen engaged in protected activity in Israel against a publicly-traded company located there. Id. Nevertheless, the ALJ found distinctions from Carnero that led it to deny the respondent's 12(b)(1) motion to dismiss for lack of subject matter jurisdiction: the complainant was employed full-time in the U.S. by a wholly owned subsidiary conducting business in the U.S.; the alleged adverse personnel action occurred in North Carolina; and a visa application indicated that the parent and subsidiary had significantly intermingled business activities. Id.

Since Penesso and Neuer, courts and the DOL continued to apply SOX 806 to overseas employees provided that the facts did not require the extraterritorial application of SOX. In O'Mahony v. Accenture Ltd., No. 1:07-CV-07916 (S.D.N.Y. Feb. 5, 2008), for example, the district court held that the extraterritorial application of SOX 806 was not implicated where an employee working in France was an employee of a U.S. subsidiary, the alleged fraud occurred in the U.S., and the alleged retaliatory conduct occurred in the U.S. In deciding whether the case required the extraterritorial application of SOX, the court used a two-factor test: (1) whether the wrongful conduct occurred in the U.S. and (2) whether the wrongful conduct had a substantial adverse effect in the United States or upon U.S. citizens.

Most recently, in Walters v. Deutsche Bank, et al., 2008-SOX-70 (ALJ Mar. 20, 2009) the ALJ held that SOX could in some cases apply to employees who work abroad. In Walters, the employer argued that an employee who worked in Switzerland was not covered by the law because SOX does not apply extraterritorially. Following the reasoning of O'Mahony v. Accenture, the ALJ held that because the employee had alleged that he spent some time working in the United States, that the decision to retaliate and the protected activity occurred in the United States, and that the underlying securities law violations harmed U.S. shareholders, the fact that he also worked abroad did not bar application of the statute. In reaching this conclusion, the ALJ did not hold that SOX applies extraterritorially; instead, he held that the case did not require extraterritorial application of the law because "all elements essential to establishing a prima facie violation of Section 806 allegedly occurred in the United States." Walters, slip op. at 41.

2. **Subsidiaries**

Section 929A of the Dodd-Frank Act expands the scope of SOX coverage to include subsidiary entities of publicly-traded corporations "whose financial information is included in the consolidated financial statements of [publicly-traded companies]." Prior to the enactment of the Dodd-Frank Act, employers frequently avoided the application of SOX's employee protection provisions by arguing that they were not a covered entity under SOX. With the exception of certain limited circumstances, the Department of Labor consistently interpreted SOX's whistleblower protection provisions to apply solely to publicly traded companies subject to the registration and reporting requirements of the Securities Exchange Act of 1934. Because of this restrictive interpretation that arguably contravened the plain language of SOX, wholly-owned subsidiaries of publicly-traded companies — entities that are not subject to the registration and reporting requirements of the Securities Exchange Act — frequently avoided the application of SOX in instances of unlawful retaliation.

Section 929A of the Dodd-Frank Act corrects this restrictive interpretation of SOX coverage and ensures that the anti-retaliation provisions of Section 806 of SOX apply to employees of publicly-traded companies and to employees of subsidiaries of publicly-traded companies whose financial information is incorporated into the consolidated financial statements of a publicly-traded company. Accordingly, employers falling under this latter category can no longer avoid coverage of SOX merely because they do not file directly with the SEC.

Moreover, the language of the Senate Committee Report on the Dodd-Frank Act provides strong basis for arguing that this amendment is not retroactive in nature as applied to currently pending cases

> *Section 929A. Protection for employees of subsidiaries and affiliates of publicly traded companies*
>
> Amends Section 806 of the Sarbanes-Oxley Act of 2002 to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers. Section 806 of the Sarbanes-Oxley Act creates protections for whistleblowers who report securities fraud and other violations. The language of the statute may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer. This **clarification** would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute.

Senate Report 111–176 at 114 (emphasis added). Because the legislative history characterizes Section 929A as a clarification of Section 806's language – not as an amendment that alters the existing landscape of the parties' substantive rights – the imposition of liability on wholly-owned subsidiaries of publicly-traded companies is arguably applicable to Complaints based on adverse employment actions that occurred prior to the enactment of the Dodd-Frank Act.

Previously, the Act's retaliation provisions had only sometimes been applied to private subsidiaries of publicly-traded companies. As noted above, however, the DOL often dismissed SOX complaints because the whistleblower worked for a subsidiary. The cases that have addressed this issue cited three distinct, albeit often intertwined, inquiries: (1) whether the employee of the subsidiary is a covered "employee" under SOX; (2) if so, whether the subsidiary/employer is a covered entity subject to suit; and (3) if the employee names the parent as a respondent, whether the existence of separate corporate identities insulates the parent from liability.

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

Courts had answered the first inquiry – whether the employee of the subsidiary is a covered "employee" under SOX – in the affirmative when the subsidiary and parent are sufficiently intertwined. For example, in Platone v. Atlantic Coast Airlines Holdings Inc., 2003-SOX-27 (ALJ Apr. 30, 2004), an ALJ held that an employee of a non-publicly-traded subsidiary was a covered "employee" where the company's parent/holding company was publicly-traded. The ALJ in Platone reasoned that, under the facts of the case, the holding company was the alter ego of the subsidiary and that it certainly had the ability to affect the complainant's employment.[4] Collins v. Beazer Homes USA, Inc., 334 F. Supp.2d 1365 (N.D. Ga. 2004), was the first reported federal district court decision on point, which held that where the officers of a publicly-traded parent company had the authority to affect the employment of the employees of

[4] A subsequent ARB decision did not reach the corporate identity issue and instead dismissed the complaint on a finding that Platone did not engage in protected activity. Platone v. FLYi, Inc., ARB No. 04-154 (Sept. 29, 2006).

the subsidiary, an employee of the subsidiary was a "covered employee" within the meaning of the SOX whistleblower provision. Both Platone and Collins looked to the interrelatedness of the corporate structures to ultimately conclude the employee of the subsidiary was a covered "employee." A later district court decision emphasized that unless the non-publicly-traded subsidiary was acting as an agent or alter ego of a publicly-traded parent, SOX did not cover an employee of the subsidiary. See Rao v. Daimler Chrysler Corp., No.2:06-CV-13723 (E.D. Mich. May 14, 2007).

Shortly after Rao, an ALJ decision, which challenged prior ALJ decisions, that held that the SOX whistleblower protections cover employees of subsidiaries. See Savastano v. WPP Group, PLC., 2007-SOX-34 (ALJ July 18, 2007). In Savastano, the ALJ ruled that the previous ALJ decision in Morefield v. Exelon Servs. Inc., 2004-SOX-2 (ALJ Jan. 28, 2004), wherein the ALJ held that the Vice President-Finance of a non-publicly-traded subsidiary of a publicly-traded company was covered under SOX, regardless of the parent company's role in affecting the employment of the subsidiary's employees, was incorrect and inconsistent with more recent decisions. The ALJ noted that the complainant did not allege facts supporting a finding that the employee's non-publicly-traded employer and its non-publicly-traded holding company were acting as agents of a publicly-traded parent company, and, therefore, held that the employee was not covered by SOX. Id. (citing Klopfenstein v. PPC Flow Technologies Holdings, Inc., 2004-SOX-11 (ALJ July 6, 2004)).

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

In Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006), the First Circuit suggested that an employee of a subsidiary of a publicly-traded company could be a covered employee not only due to the parent company's role in affecting the employment of the subsidiary's employees but also because the subsidiary could be considered an "agent" of the parent. Therefore, the court opined, "the fact that [complainant] was employed by [the parent's] subsidiaries may be enough to make him a BSC 'employee' for purposes of seeking relief under the whistleblower statute." However, the court ultimately held that Section 806 did not protect the plaintiff foreign national due to its lack of extraterritorial effect. Nevertheless, the Dodd-Frank 929A amendments supercede the court's decisions in Canerro and Rao by expanding SOX protections to employees of subsidiaries of publicly-traded companies whose financial information is incorporated into the consolidated financial statements of a publicly-traded company.

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

The second inquiry – whether a subsidiary of a publicly-traded parent company, standing alone, is a covered entity subject to suit – was a much debated issue by courts.

A groundbreaking decision by ALJ Stuart Levin found broad coverage for subsidiaries of publicly traded companies. In Walters v. Deutsche Bank, et al., 2008-SOX-70 (ALJ Mar. 23, 2009) the ALJ held that SOX extends to the employees of non-public, wholly-owned subsidiaries of publicly traded companies. The ALJ found that the structure and purpose of the Act required that "the term 'employee of a publicly traded company' . . . includes, within its meaning, all employees of every constituent part of the publicly traded company, including subsidiaries and subsidiaries of subsidiaries which are consolidated on its balance sheets, contribute information to its financial reports, are covered by its internal controls and the oversight of its audit committee, and subject to other Sarbanes-Oxley reforms imposed upon the publicly traded company." Walters, slip op. at 23.

In Klopfenstein v. PCC Flow Technologies, Inc., ARB No. 04-149, 2004-SOX-11 (ARB May, 31, 2006) (remanding the case to the ALJ for further findings based on erroneous legal analysis as to the standards used for determining who is covered by SOX provisions), an executive of a subsidiary of a non-publicly-traded holding company that, in turn, was owned by a publicly-traded parent company filed a complaint naming only the holding company and a vice president of the subsidiary as respondents. Initially, the ALJ held that the non-publicly-traded subsidiary was not a proper respondent, because SOX does not "provide[] a cause of action directly against such subsidiary alone." On review, however, the ARB found that the ALJ's holding was erroneous. The ARB held that it was necessary to that particular case to discuss whether SOX provisions covered non-public subsidiaries of its public parent. Instead, the ARB emphasized that "whether a particular subsidiary or its employee is an agent of a public parent for purposes of the SOX employee protection provision should be determined according to principles of the general common law of agency." Because the legal concept of agency relies on the underlying factual elements, the ARB made a point to charge the ALJ with the function of determining whether an agency relationship exists based on the specific facts in that case. These agency principles, expounded in Savastano v. WPP Group, PLC, 2007-SOX-34 (ALJ July 18, 2007) and similar decisions, can be summarized as follows:

1. Does the subsidiary act and run independently of the parent? If yes, it is not an agent; but, if the companies' identities are interchangeable, it may be an agent.
2. Is there overlap of officers between the subsidiary and its parent? If yes, it may be an agent.
3. Do the companies have separate officers, offices, and operations? If yes, the subsidiary is not an agent.
4. Are the subsidiary and parent involved in one another's daily activities? If yes, then depending on the level of involvement, the subsidiary may be an agent.
5. Did any officer or employee of the parent exert any control over the terms and conditions of the complainant's employment? If yes, the subsidiary may be an agent.

6. Did any officer of employee of the parent have any input, direct or indirect, on the hiring or termination of the complainant? If yes, the subsidiary may be an agent.

The Savastano opinion was notable because the ARB specifically rejected the ALJ's reasoning that the named respondents did not fall within the scope of agency principles. It was previously unclear what position the DOL would take on this issue, as the SOX whistleblower provision prohibits retaliation not only by publicly-traded companies, but also by "any officer, employee, contractor or agent" of a covered company. 18 U.S.C. § 1514A(a) (West 2008). The Klopfenstein ALJ had found that the subsidiary holding company did not fall within the category because the compnay was more than an "agent" of the parent within the meaning of SOX. The ARB, however, disagreed and found that because there were overlapping officers between them, and the PCC officers and employees were involved in overseeing the named respondents' investigation, it was more probable that an agency relationship existed "because one characteristic of an agent is that it acts on behalf of the principal." ARB No. 04-149 (May 31, 2006).

In its amicus brief filed in Ambrose v. U.S. Foodservice, Inc., ARB Case No. 06-096, ALJ No. 2005-SOX-105 (Apr. 17, 2006), the Secretary of Labor for OSHA took a strong position on this issue. It clearly recommended the "integrated employer" test for determining whether employees of subsidiaries of publicly-traded companies are protected under the SOX whistleblower provisions. In cases under labor and employment statutes, federal courts have used this test to determine if "two or more companies may be considered so interrelated that they constitute a single employer subject to liability or coverage under the particular statute." Amicus Curiae Br. of the Secretary of Labor for OSHA In Matter of: John Ambrose v. U.S Foodservice, Inc., ARB Case No. 06-096, p. 15 (ARB Apr. 17, 2006). The four factors used to make this determination, which were very similar to those used in the later Savastano decision discussed above, include: "(1) the interrelation of operations; (2) centralized control of labor or employment decisions; (3) common management; and (4) common ownership or financial control." Id. The Secretary emphasized that this is a case-by-case factual determination and that "[n]one of these factors are conclusive, and all four need not be met in every case." Id.; see also Su v. Alliant Energy Corp., 2008-SOX-00034 (ALJ June 16, 2008) (noting that if the president of a subsidiary is an employee of the parent and was involved in the determination to terminate the complainant, the parent corporation may be liable for a SOX violation).

On the other hand, an ALJ in Powers v. Pinnacle Airlines Corp., 2003-AIR-12 (ALJ Mar. 5, 2003), dismissed a complaint brought against the employer, a non-publicly-traded subsidiary of a non-publicly-traded subsidiary of a publicly-traded airline, on the basis that the subsidiary was not a proper respondent under SOX. The appeal of this decision was dismissed in Powers v. Pinnacle Airlines, Inc., ARB No. 04-035, ALJ No. 2003-AIR-12 (ARB Sept. 28, 2004) and a motion for reconsideration was denied in Powers v. Pinnacle Airlines, Inc., ARB No. 05-022, ALJ No. 2003-AIR-12 (ARB July 27, 2007). Citing Klopfenstein and Powers, the respondent in Gonzalez v. Colonial Bank, 2004-SOX-39 (ALJ Aug. 17, 2004), moved for summary decision on the ground that it was not a publicly-traded company. However, the issue did not have to be decided as the ALJ permitted the complainant to amend his complaint to include as a respondent the publicly-traded holding company.

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

c. Whether The Parent May Be Liable for the Actions of Its Subsidiaries.

The third inquiry – whether the publicly traded parent may be liable for the acts of its subsidiary – proven to be a more difficult issue for ALJs, requiring evaluation of specific facts to determine whether some basis for ignoring corporate separateness is warranted.

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

Likewise, in Hasan v. J.A. Jones-Lockwood, 2002-ERA-5 (ALJ Sept. 17, 2002), an ALJ held that a parent company was not an "employer" under the analogous ERA retaliation provision merely because it was the parent of another company that employed a complainant. The ALJ reasoned that no evidence showed that the parent had the power to hire, promote, discipline or give raises or had input in those decisions.

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

Similarly, in McIntyre v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2003-SOX-23 (ALJ Sept. 4, 2003), aff'd, ARB No. 04-055 (ARB July 27, 2005), the ALJ permitted complainant to amend his complaint to include as a respondent the publicly-traded parent company. The ALJ reasoned that complainant had alleged facts regarding commonality of management and operations which arguably justified piercing the corporate veil. The ALJ also noted that there was a genuine issue of material fact as to whether the subsidiary and parent company constituted a "joint employer." See also Clemmons v. Ameristar Airways, Inc., 2004-AIR-11 (ALJ Jan. 14, 2005) (finding joint employment based on interrelation of operations, common management, centralized control of labor relations and common ownership).

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

Most recently, in Walters v. Deutsche Bank, et al., 2008-SOX-70 (ALJ Mar. 23, 2009), the court broadly ascribed liability to parent corporations without relying on the previous tests described above. The ALJ held simply that corporate parents can be liable for their subsidiaries' retaliation against employees of the subsidiaries. The ALJ wrote that "the corporate parent . . . is directly responsible for acts of discrimination against a whistleblower working within one of its operating units within a non-publicly traded, consolidated subsidiary." Walters, slip op. at 24. The ALJ reasoned that the clear legislative intent of SOX was to avoid the problems that occurred with the scandals involving companies like Enron, who used subsidiaries to effectuate their fraudulent schemes. To deny anti-retaliation protection to employees of subsidiaries, therefore, would frustrate the purpose not only of SOX 806, but of the entire enforcement scheme of the Sarbanes-Oxley Act.

3. Agents/Contractors

SOX whistleblower provisions cover not only publicly traded companies and to employees of subsidiaries of publicly-traded companies whose financial information is incorporated into the consolidated financial statements of a publicly-traded company. but also "any officer, employee, contractor, subcontractor or agent" of a covered company. 18 U.S.C.A. § 1514A(a) (West 2011). Therefore, private companies that are not publicly traded, as well as other entities or individuals, that serve as "agents" or "contractors" of the publicly-traded employer or its subsidiaries, may be subject to the whistleblower provisions. OSHA specified, for example, that a small accounting firm acting as a contractor of a publicly-traded company could be liable for retaliation against an employee who provides information to the SEC regarding a violation of SEC regulations (e.g., accounting irregularities). OSHA Whistleblower Investigations Manual (2003), at 14-1 ("OSHA Manual").

SOX also might be found to apply to publicly-traded companies for acts committed by them against employees of their agents or contractors. In an environmental whistleblower case, the ARB held that a government agency could be subject to a discrimination charge filed by the employee of a private-sector government contractor when the agency banned the contractor's employee from entering the government workplace. See Stephenson v. NASA, ARB No. 98-025 (July 18, 2000) (dismissing case on factual grounds). In its Final Rule, OSHA, citing Stephenson, confirmed that "a respondent may be liable for its contractor's or subcontractor's adverse action against an employee in situations where the respondent acted as an employer with regard to the employee of the contractor or subcontractor by exercising control of the work product or by establishing, modifying or interfering with the terms, conditions, or privileges of employment." "Conversely," OSHA added, "a respondent will not be liable for the adverse action taken against an employee of its contractor or subcontractor where the respondent did not act as an employer with regard to the employee." 69 Fed. Reg. at 52017.

The analysis used in Stephenson suggests that the scope of SOX may apply freely across contractual arrangements, yet the scope of contractor or agent coverage generally has been limited to cases where the contractor or agent is acting or could act in such a role with respect to the complainant's employment relationship. See, e.g., Fleszar v. American Medical Assoc., 2008-SOX-16 (ALJ Mar. 4, 2008) (no SOX liability based solely on contracts between private organization and publicly-traded firm); Brady v. Direct Mail Mgmt., Inc., 2006-SOX-16 (ALJ Jan. 5, 2006); Roulett v. American Capital Access, 2004-SOX-78 (ALJ Dec. 22, 2004); Judith v. Magnolia Plumbing Co., Inc., 2005-SOX-99 & 100 (ALJ Sept. 20, 2005). A more recent ARB decision held that a turnaround and corporate restructuring company hired by a company going into bankruptcy could be held liable under SOX 806 under an agency theory. See Kalkunte v. DVI Financial Services, Inc., ARB Nos. 05-139, 05-140, 2004-SOX-56 (ARB Feb. 27, 2009). In Kalkunte, DVI Financial Services ("DVI") hired AP Services ("APS") to negotiate for operating funds. When DVI went in to bankruptcy, two principals from APS acted as CEO and Chief Administrative Officer of DVI. The complainant, a contract attorney working for DVI, filed a

SOX whistleblower claim against both DVI and APS. The ARB found that the complainant was a DVI employee whose employment could be affected by APS and that APS was a "contractor, subcontractor, or agent" of DVI within the meaning of SOX 806. APS, therefore, could be held liable for retaliation because the acting DVI CEO notified complainant of his termination.

The scope of contractor or agent coverage also has generally been limited to cases where the complainant was employed by the publicly-traded company, not by the agent or contractor. For example, in Minkina v. Affiliated Physician's Group, 2005-SOX-19 (ALJ Feb. 22, 2005), appeal dismissed, ARB No. 05-074 (ARB July 29, 2005), an ALJ, interpreting SOX's "any officer, contractor, subcontractor or agent" language, concluded that, although a privately held entity could engage in discrimination prohibited by Section 806 with regard to an employee of a publicly-traded company when acting in the capacity as an agent of the publicly-traded company, Section 806 does not protect employees of the privately-held contractors, subcontractors and agents from discrimination. See also Goodman v. Decisive Analytics Corp., 2006-SOX-11 (ALJ Jan. 10, 2006) (employee of a private contractor or subcontractor of a publicly-traded company is not afforded SOX whistleblower protection).

4. Individual Liability.

Section 806's prohibition of retaliation by "officers, employees, contractors, subcontractors or agents of covered companies" could be construed as providing for individual liability for wrongful retaliation. This conclusion is supported by the summary and discussion in the Final Rule, which provides "the definition of 'named person' will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action." 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004).

The first decision to address this issue under SOX found that Section 806 does provide for individual liability. In Gallagher v. Granada Entm't USA, 2004-SOX-74 (ALJ Oct. 19, 2004), an ALJ, citing the above Federal Register quote, permitted amendment of the complaint to add as respondents the executives who terminated the complainant's employment. However, the ALJ rejected complainant's effort to join "any person or business entity . . . whose acts in concert with or at the direction of the Employer . . . lead to" his termination. The ALJ reasoned that "[o]nly individuals who were Complainant's superiors . . . could discriminate against him 'in the terms or conditions of his employment' . . ." The ALJ concluded that "[t]he availability of damages does not convert this statutory proceeding into a common law tort action, permitting joinder of persons or entities who were not the Complainant's superiors as if they were joint tortfeasors."

Then in Jordan v. Sprint Nextel Corp., 2006-SOX-41 (ALJ Mar. 14, 2006), the ALJ denied the named company's motion to dismiss three individually named respondents. The ALJ noted that SOX expressly provides for liability of officers of the company named in the complaint, and that the complainant in this case had named three officers in the complaint filed with OSHA. Sprint argued that because OSHA failed to name or serve the three officers in its investigation and findings, the officers could not properly be respondents before the ALJ. The ALJ rejected this argument, holding that OSHA's failings in this regard were not attributable to the complainant, who had adequately identified the three officers in his OSHA complaint.

Most recently, in Kalkunte v. DVI Financial Services, Inc., ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-56 (ARB Feb. 27, 2009), discussed *supra*, the ARB stated in dicta that the CEO of a publicly traded company who dismissed a complainant for allegedly retaliatory reasons could have been held personally liable under SOX 806. Looking to 18 U.S.C.A. § 1514A(a) and the implementing regulations at 29 C.F.R. 1801.101 and 1801.102, the ARB noted that the CEO of DVI, the publicly traded company, was an "officer" within the meaning of those provisions and therefore could be personally liable under SOX 806. The ARB did not decide the issue, however, because the ALJ had not allowed the complainant to amend his complaint to add the CEO in his individual capacity.

C. 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. . . ." In many cases, a person's status as an employee is obvious. In other instances where an employee works for a non-publicly traded subsidiary or agent of the publicly traded parent, courts and the DOL have engaged in the analyses described above. The scope of the definition has also been addressed in several other contexts:

1. Independent Contractors

In Bothwell v. American Income Life, 2005-SOX-57 (ALJ Sept. 19, 2005), respondent argued that complainant was not protected under Section 806 because he was an independent contractor, not an employee. In evaluating whether the complainant was an independent contractor, the ALJ adopted the common law agency test, which, as set forth in Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992), focuses on the hiring party's right to control the manner and means by which the product is accomplished. The ALJ refused to grant summary decision for the respondent on this issue because complainant presented evidence demonstrating that respondent retained control over the means by which his work was performed. For instance, there was evidence that complainant was required to report to his superiors every day at a specific time, was given a specific list of daily contacts and appointments, was not allowed to alter his sales presentation or decide how to accomplish any tasks without first receiving input, had no control over his work hours or appointment schedule, and was required to complete all of his work at respondent's office. In Deremer v. Gulfmark Offshore, Inc., 2006-SOX-2 (ALJ June 29, 2007), the ALJ found that the complainant was independent contractor under agency law but was also covered employee for SOX purposes because complainant's employment could be affected by respondent company. Thus, whether an independent contractor meets the statutory requirements of a "covered employee" is largely dependent on the factual circumstance regarding the individual's level of control over his or her employment.

2. Officers and Directors

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

3. Third Parties

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

D. Protected Activity

1. Scope of Protected Activity

The scope of protected activity under SOX 806 has generally been narrowly construed. For example, the 5th Circuit's decision in Allen v. Administrative Review Board, 514 F.3d 468 (5th Cir. 2008), constitutes a dramatic departure from the purpose of the whistleblower law by seemingly requiring employees to become experts in securities law before making complaints.

The Allen decision concerned three employees who served as "Quality Assurance Representatives" of a large funeral home and cemetery business who made internal complaints about a series of alleged accounting improprieties including; faulty interest calculations, potentially illegal delays in processing of customer refunds and payoffs that they believed could expose the Company to liability, and inaccurate internal financial statements. Plaintiffs alleged that following their complaints to various Company officials they were subjected to a series of retaliatory actions ending in termination. The Allen court held that one of the employee's complaints did not constitute protected activity under the statute because it did not *"definitively and specifically relate"* to a particular SEC rule. The court stated, "an employee's complaint must 'definitively and specifically relate' to one of the six enumerated categories found in § 1514A: (1) 18 U.S.C. § 1341 (mail fraud); (2) 18 U.S.C. § 1343 (wire fraud); (3) 18 U.S.C. § 1344 (bank fraud); (4) 18 U.S.C. § 1348 (securities fraud); (5) any rule or regulation of the SEC; or (6) any provision of federal law relating to fraud against shareholders." The court made this finding notwithstanding the fact the plain language of the statute requires no such "definitive" or "specific" relationship. Furthermore, the employee in question, a CPA, not only complained that the Company was overstating gross profits but actually specifically complained that the Company was not in compliance with a particular SEC Staff Accounting Bulletin, SAB-101, issued to offer guidance on proper accounting practices for SEC reporting. The Court nevertheless found that although the Company's failure to comply with SEC guidance on proper accounting practices may have caused the employee to suspect the Company was not compliant in its SEC filings, her complaints did not constitute protected activity. Allen was the first Circuit Court opinion to place such a tremendous burden on the retaliated against employee.

Earlier decisions had squarely rejected the cramped view of the law presented in Allen. See Smith v. Corning Inc., 496 F.Supp.2d 244 (W.D.N.Y. 2007) (holding that disclosing a violation of GAAP principles or deficient internal controls can constitute protected activity under SOX provided that plaintiff reasonably believed that a violation of a law relating to fraud against shareholders had occurred); Mahoney v. KeySpan Corp., No. 04-CV-554, 2007 WL 805813 (E.D.N.Y. Mar. 12, 2007) (denying summary judgment where plaintiff engaged in protected activity concerning suspected fraudulent financial statements and finding "a fair and reasonable juror could find that Plaintiff reasonably believed that the company was engaging in accounting practices that needed to be corrected *before* its financial statements misled shareholders.") (emphasis added).

In the most recent decision on the matter, however, the 9th Circuit agreed with the Allen court that to constitute protected activity, an employee's communications must relate "definitively and specifically" to one of the categories of fraud or securities violations enumerated in 18 U.S.C.A. § 1514A(a)(1). Van Asdale v. Int'l Game Tech., 577 F.3d 989 (9th Cir. 2009). The Van Asdale court emphasized, however that the words "fraud" or "fraud on shareholders" need not be used. The court found that the complainants had engaged in protected activity when they raised with the respondent's General Counsel and its Vice President of Product Development the issue of the company's failure to disclose possible problems with an important patent holding prior to a merger.

In May 2007, the ARB determined that an employee who reported his employer's deviation from generally accepted accounting practices (GAAP) and other industry standards was not necessarily engaging in protected activity under SOX because such deviations are not inherently violations of securities laws. Welch v. Cardinal Bankshares Corporation, ARB No. 05-064, ALJ No. 2003-SOX-15 (ARB May 31, 2007).

David Welch, a certified public accountant and MBA, who served as the Chief Financial Officer of Cardinal Bankshares Corp. brought a SOX claim against the company. Welch believed that Cardinal violated GAAP and rules set forth by the Federal Financial Institutions Examination Council (FFIEC) because the company allowed employees with no special accounting skills to make ledger entries. GAAP standards provide that only individuals with accounting expertise should be permitted to make ledger entries. Welch also had concerns that during the second and third quarters of 2001, Cardinal's CEO, Ronald Moore, recorded two loan recoveries, totaling $195,000, as forms of income. Welch believed that this also violated GAAP and the FFIEC rules. As a result of this accounting entry, the company's third quarter 10-QSB report to the SEC included this $195,000 as year-to-date income. In addition, Welch complained that the CEO had generally been rejecting his accounting advice and excluding him from important meetings with the outside auditor where accounting issues were discussed. Welch himself was investigated for improper conduct and eventually terminated.

Welch then filed a SOX whistleblower complaint. The Occupational Safety and Health Administration investigated his complaint and determined that it had no merit. Welch requested a hearing before a Labor Department ALJ who concluded that Cardinal had violated SOX and recommended that Welch be reinstated and receive back pay and other relief. Cardinal appealed this decision to the Labor Department's Administrative Review Board.

The ARB reversed the ALJ's conclusion, holding that Welch had not engaged in protected activity because he did not have a reasonable belief of violations of securities laws. The ARB based its decision on the following four conclusions:

1) An experienced CFO could not have reasonably believed that Cardinal's third quarter SEC report presented potential investors with a misleading picture of the company's financial condition.

2) Welch's complaint about his lack of access to the outside auditor did not constitute protected activity under SOX. The ARB emphasized that Welch failed to demonstrate that the complaint related in any way to fraud statutes, any SEC rule or regulation, or any federal law relating to fraud against shareholders.

3) Cardinal's rejection of Welch's recommendations on accounting matters was not inherently a violation of federal securities laws. Again pointing to the lack of legal authority and failure to establish how the complaints about inadequate internal controls could reasonably be held to implicate federal securities laws, the ARB concluded that Welch's allegations did not constitute protected activity.

4) Welch's concerns about the fact that Cardinal misclassified loan recoveries as income and allowed employees without accounting expertise to make financial transaction entries violated GAAP accounting standards and accounting rules by the FFIEC did not, in itself, violate SOX. The ARB rejected this contention because SOX's section 1514A expressly provides that SOX protects whistleblowers who report employer conduct that specifically violates federal fraud statutes, SEC rules or regulations or federal laws relating to shareholder fraud. The ARB also pointed to the intent of Congress in passing SOX by maintaining that if Congress had intended for standards such as GAAP and rules promulgated by the FFIEC to be included in SOX's employee protection provisions, it would have articulated such an intent in the law.

This decision was upheld on appeal to the 4th Circuit. Welch v. Chao, 536 F.3d 269 (4th Cir. 2008) (holding that Welch did not have a reasonable belief, but confirming that § 1514A protects an employee's communications based on a reasonable but mistaken belief that conduct constitutes a securities violation even if employee does not complain of an actual violation). In light of this decision, accounting professionals should be aware that without a showing of a reasonable belief that federal fraud statutes and/or SEC rules are being violated by their employer, protesting an employer's accounting practices and failure to follow GAAP or other related codes of conduct in the accounting and finance industry may not be deemed to be protected under SOX.

On August 20, 2007, a federal judge in the Southern District of New York dismissed a SOX retaliation lawsuit brought by a project manager who complained that his employer failed to comply with a Consent Decree issued by the FDA and various other federal regulations governing good manufacturing practices ("GMP") generally accepted in the pharmaceutical industry. See Portes v. Wyeth Pharmaceuticals, Inc., No. 06-Civ-2689, 2007 WL 2363356 (S.D.N.Y. Aug. 20, 2007). Portes involved a Consent Decree that had been issued by the FDA in

2000 against Wyeth Pharmaceuticals, Inc. for failing to comply with various federal regulations, as well as GMP for the production of pharmaceutical and biological products. To comply with the Consent Decree, the company implemented a program called the Sustainable Compliance Initiative ("SCI") to improve its operations. In September 2003, Wyeth hired Portes as a principal project manager for the SCI department in one of its facilities. Id. at *1. In this capacity, Portes discovered several problems that led him to believe that Wyeth's operations were in violation of the Consent Decree, federal regulations, EU regulations and provisions of the Barr Mandate. Id.

Portes complained about these possible violations to Wyeth's Director of Quality, but was berated for raising these concerns, placed on a Performance Improvement Plan, and eventually terminated. Id., at *2. Portes filed a SOX whistleblower complaint with OSHA in March 2005. Because the Department of Labor made no final determination on his claim within 180 days, Portes availed himself of SOX's "kick out" provision and filed his claim in federal court. The court concluded that Portes' allegations that Wyeth violated the Consent Decree, FDA regulations, EU regulations and other drug manufacturing guidelines were not sufficiently related to shareholder fraud.

The court determined that there was no way to derive Portes' concern for potential fraud against Wyeth shareholders from his actual allegations, the circumstances of his disclosures to the company or his position at the company. Portes' allegations were exclusively concerns with violations of regulations and guidelines pertaining to the manufacture of pharmaceuticals; the circumstances of his disclosures did not suggest that he was concerned that such violations could lead to or demonstrate fraud against investors but rather that the company was not adhering to standards promulgated by the FDA. Further, the court emphasized that Portes was employed as a chemist and project manager, not an investment analyst, which led the court to conclude that no inference that Portes was concerned about shareholder fraud could be derived from his job responsibilities. Therefore, the court held that Portes' complaints to Wyeth fell outside the scope of protected activity under SOX. Id., at *5.

The holdings in Portes v. Wyeth Pharmaceuticals, Inc. and Welch v. Cardinal Bankshares Corp., are prime examples of the heightened "definitively and specifically related" standard later articulated in cases like Allen and Van Asdale. See also Day v. Staples Inc., 555 F.3d 42, 55 (1st Cir. 2009). A showing that the complaints related to violations of federal fraud statutes and/or SEC rules is of paramount importance when asserting a claim under the whistleblower protection provision of SOX.

Accordingly, "general inquires" have been found insufficient to support a claim for protected activity under the statute. In Fraser v. Fiduciary Trust Co., Int'l, No. 1:04-cv-06958 (S.D.N.Y. Aug. 25, 2009) the court found that certain emails and memos written and distributed by complainant involving financial losses to the company that he believed could have been avoided were mere complaints that his advice or recommendations were not followed. Slip op. at 9. Since the complainant failed to specify allegations of conduct that would alert Defendants that he believed the company was violating any federal rule or law related to fraud on shareholders the court found these complaints inadequate.

Likewise, in Sharkey v. J.P. Morgan Chase & Co., No. 10 Civ. 3824, 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011), the court, citing Allen, held that the plaintiff did not sufficiently state the "specific violations" when she informed her superior that she "believed their client was engaged in illegal activities." Specifically, J.P. Morgan's compliance and risk management team contacted Sharkey to express concern that one of her client's might be involved in illegal activities, including mail fraud, bank fraud, and money laundering. After this report, Sharkey conducted independent research into the client's activities and determined that the client was violating federal securities laws. Sharkey communicated the result of her investigation and her conclusions that the client was engaged in illegal activities to her superior. Despite the evidence that the defendant knew that the illegal activities involved mail fraud, bank fraud and other securities violations, the Court dismissed the plaintiff's SOX claim for lack of specificity on the basis that Sharkey did not identify "the allegedly illegal conduct."

2. Reasonable Belief Requirement

As noted above, courts have increasingly held that an employee's complaints must relate "definitively and specifically" to fraud on shareholders or violations of one of the federal fraud or SEC provisions described in 18 U.S.C. 1514A(a)(1). There is no requirement, however that there be an actual violation of such provisions. See Welch v. Chao, 536 F.3d 269 (4th Cir. 2008). Rather, in order to gain protection under the whistleblower provisions of Sarbanes-Oxley, an employee must act upon a "reasonable belief" that a specified federal securities or fraud law was violated. The reasonableness of an employee's complaint has both subjective and objective components. See Gale v. United States Dep't of Labor, 384 Fed. Appx. 926, 929 (11th Cir. 2010); Day v. Staples, Inc., 555 F.3d 42, 54 (1st Cir. 2009).

The subjective reasonable belief analysis often includes consideration of objective factors, blurring the line between the two components. In Day v. Staples, the court stated that "[a]s to the subjective component [of the SOX 806 reasonable belief test], the law is not meant to protect those whose complaints are not undertaken in subjective good faith." Id. In holding that Day had a subjective good faith belief, the First Circuit agreed with the lower court that it should look to objective factors, stating that a "plaintiff's particular educational background and sophistication [is] relevant to the subjective component." Id. at 54, n. 10. The court further noted that "[s]ubjective reasonableness requires that the employee actually believed the conduct complained of constituted a violation of pertinent law."

The Day court also specifically addressed the objective reasonableness analysis, laying out a three-prong analysis and principles that may have broader application, including a materiality requirement. First, the court held that the complaint must relate to one of three categories of conduct proscribed by 18 U.S.C. 1514A(a)(1), namely (a) a violation of enumerated federal criminal fraud statutes; (b) a violation of any rule or regulation of the SEC;

and/or (c) a violation of any provision of federal law relating to fraud against shareholders. Second, the court held that the employee's communication must relate specifically to one of the three categories of prohibited conduct, though the employee need not identify a precise code provision or an actual violation of such provision. Third, the court held that the employee's communication must at least approximate a claim of securities fraud. In applying this tripartite test to the facts before it, the court made several findings that may have wider implications: (1) mere disagreement about corporate efficiency is not actionable; (2) mere allegation of needless loss of revenue is not actionable; (3) mere allegation of billing discrepancy is not actionable; and (4) mere allegation of general accounting provisions is not actionable. The court reasoned that the materiality of the alleged violation is important to an assessment of the objective reasonableness of a complaint of shareholder fraud. Thus, if the complaint is merely of internal practices that are not financial in nature and are not reported to shareholders, the complainant cannot be said to have a reasonable objective belief that shareholder fraud has occurred.

In Harp v. Charter Communications, Inc., 558 F.3d 722 (7th Cir. 2009), the Seventh Circuit also set guidelines for objective reasonableness, though not as systematically as the Day court. The court 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. at 723; see also Drake v. Agency for Int'l Dev., 543 F.3d 1377 (Fed. Cir. 2008) (holding that the test for reasonable belief is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the complainant could reasonably conclude that a violation occurred). In Harp, the court identified several objective indicators that led to its conclusion that plaintiff did not have a reasonable belief in an actual or potential violation of one of the enumerated provisions. First, the court noted that the employee's alleged protected activity consisted of a conversation in which the employee was attempting to determine whether his supervisor intended to pay certain invoices. Nowhere in that conversation did the employee complain that the employer was engaging in activity that would constitute fraud or an SEC violation; rather, the court found that he made only ambiguous statements and inquiries, suggesting that she did not objectively believe that fraud was occurring. Next, the court noted that the supervisor to whom the employee initially complained continually supported her efforts to investigate improper billing even after her ethics complaint to her human resources department. One dissenting judge, however, held that this latter point did not indicate a lack of objective belief and that it was possible to reconcile the supervisor's supposed support for the employee with her objective belief that fraud was occurring.

In Livingston v. Wyeth, Inc., 520 F.3d 344 (4th Cir. 2008), the Fourth Circuit affirmed the district court's grant of summary judgment on a corporate whistleblower's SOX claim on the grounds that the plaintiff did not have a reasonable belief that fraud had occurred or was occurring. The court found that the plaintiff, who complained about illegalities related to the Food and Drug Administration ("FDA") compliance issues at a pharmaceutical company, had failed to establish that the compliance issues could reasonably be thought to violate securities laws. The court emphasized that in order to meet the reasonable belief standard, the plaintiff must show not only that he believed that the conduct constituted a violation, but also that a reasonable person in his position would have believed that the conduct constituted a violation. Further, the court held that a plaintiff's reasonable belief must be about "an *existing* violation" and that the plaintiff in Livingston had articulated only a *prospective* or pending violation. Id. at 352.

Other Circuit Courts have established the same objective reasonableness standard as the First, Seventh, and Fourth Circuits. See VanAsdale, 577 F.3d at 1000-01; Gale v. U.S. Dep't of Labor, 384 F3d. Appx. 926, 929 (11th Cir. June 25, 2010).

In Harkness v. C-Bass Diamond, LLC, the district court further addressed the importance of a complainant's professional experience when determining whether the employee's incorrect or uncertain belief can still be reasonable. No. CCB-08-231, 2010 WL 997101 (D. Md. Mar. 16, 2010). The plaintiff, the company's general counsel, was found to be unreasonable in her belief that her company had violated a securities regulation because she had failed to perform adequate legal research to ascertain whether the regulation applied to her company. Id. The court reasoned that the case was similar to Allen v. Admin. Review Bd., because plaintiff was a lawyer with over 20 years of legal experience and should have been "familiar with performing legal research to ascertain the applicability of various laws" similar to the Allen court's finding that the complainant as an accountant should have had the accounting knowledge to ascertain whether Respondent was violating an SEC rule. Id. at *6. The court found that "in light of Ms. Harkness's professional experience and the legal resources available to her, Ms. Harkness's belief that [her employers] was in violation of [an SEC rule] was not objectively reasonable. Id. at 7.

While an employee who acts on a reasonable belief is protected even if that belief later turns out to be wrong, where the complainant's belief is unreasonable from the outset, the complainant's activity will not be protected. See Heaney v. Prudential Real Estate Affiliates, Inc., No. 05-820, 2008 WL 2704542 (E.D. La. July 3, 2008) (holding that mere allegations of misrepresentations by employer without sufficient showing that plaintiff reasonably believed there had been a violation of § 1514A did not state a cause of action under SOX); Skidmore v. ACI Worldwide, Inc., No. 8:08CV01, 2008 WL 4186247 (D. Neb. June 18, 2008) (finding that an accounting dispute that the employee did not reasonably believe implicated fraud was not protected activity under SOX).

3. Fraud

As discussed above, 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.A. § 1514A(a) (West 2011). 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"). Many courts have narrowly interpreted this provision to mean that SOX 806 protections apply only to employees who complain about fraud against shareholders, while others have held that the plain language of the statute covers a complaint about any of the six types of violations enumerated in SOX 806. Compare Bishop v. PCS Admin., (USA), Inc., No. 05 C 5683, 2006 WL 1460032, at *9 (N.D. Ill. May 23, 2006) (finding that the phrase "relating to fraud against shareholders" must be read as modifying all violations enumerated under Section 806) with O'Mahony v. Accenture Ltd., 537 F.Supp.2d 506, 517 (S.D.N.Y. 2008).

One example of the narrow interpretation of the fraud requirement is found in Skidmore v. ACI Worldwide, Inc., No. 08:08CV1, 2008 WL 2497442 (D. Neb. June 18, 2008). There, the court held that "[i]n order for a SOX claim to survive a Rule 12(b)(6) motion to dismiss, a complaint must state a cause of action where an employee reasonably believed that the reported conduct was violating the provisions of §§ 1514A relating to shareholder fraud." Id. at *4. The court found that the Plaintiff had not alleged any facts supporting his contention that booking an estimated tax rate, not backed by supporting information, related to fraud against shareholders. Id. In reaching its conclusion that a SOX 806 claim requires an allegation relating to shareholder fraud, the court looked to recent decisions. See, e.g., Livingston v. Wyeth, Inc., 520 F.3d 344, 353 (4th Cir. 2008) (holding that employee disclosures must be related to illegal activity and involve shareholder fraud); Smith v. Corning Inc., 496 F. Supp. 2d 244 (W.D.N.Y. 2007) (denying Rule 12(b)(6) motion because plaintiff reasonably believed defendant's actions were in violation of the provisions of SOX 806 and the violation was related to shareholder fraud).

Other courts, looking to the language and legislative intent behind SOX 806, have concluded that the alleged violation may related to any of the six categories enumerated in 18 U.S.C. § 1514A. For example, in Reyna v. Conagra Foods, Inc., 506 F.Supp.2d 1363, 1383 (M.D. Ga. 2007), the court noted that the punctuation of SOX 806 clearly indicated that the drafters intended for the last clause relating to fraud against shareholders to stand alone and not to modify the other clauses relating to fraud, and that there were no other indicia in the statute to suggest a contrary intent. Therefore, the court denied summary judgment against the employee-plaintiff, concluding that protected activity may consist solely of the reporting of mail or wire fraud. Similarly, in Allen v. Admin. Review Bd., 514 F.3d 468 (5th Cir. 2008), the court affirmed the ARB's legal conclusion that an employee's complaint must "definitively and specifically relate to one of the six enumerated categories found in § 1514A [SOX 806]." The court noted that its decision was consistent with holdings of the Administrative Review Board in cases such as Platone v. FLYI, Inc., ARB Case No. 04-154, 2006 WL 3246910, at *8 (ARB Sept. 29, 2006) and Harvey v. Home Depot USA, Inc., ARB Case No. 04-114, 2006 WL 3246905, at *11 (ARB June 2, 2006).

4. Enumerated Federal Provisions

Regardless of the interpretation of the enumerated categories, it is important to note that Section 806 protects against retaliation for reports implicating the enumerated *federal* fraud statutes, SEC rules, or federal law "relating to fraud against shareholders." Thus, in Allen v. Stewart Enterprises, Inc., 2004-SOX-60, 61 & 62 (ALJ Feb. 15, 2005), the ALJ found that the complainant had not engaged in protected activity where the complainant raised concerns about possible violations of state laws which could result in sanctions and revocation of respondent's state licenses. The ALJ found that such complaints, though based on a reasonable belief, did not implicate SOX 806 because they did not relate to federal law.

5. Intent to Deceive or Defraud

Some courts 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 Court of Appeals addressed this issue in depth. See Allen v. Admin. Review Bd., 514 F.3d 468 (5th Cir. 2008). The Allen court held that the sixth enumerated category of SOX 806 relating to fraud on shareholders was a "catch-all" category, unlike the previous five categories which point to specific statutes and regulations, and that therefore the employee must have reasonably believed that his or her employer "acted with a mental state embracing intent to deceive, manipulate, or defraud its shareholders." Id. at 480. Accordingly, the court stated that "[m]ere negligence on the part of the employer does not constitute a violation of federal law relating to fraud against shareholders." Id. In a footnote, the Allen court stated that it was not expressing an opinion on whether the other five enumerated categories of protected activity also required scienter. The court identified a split in authority, noting that several ALJs had held that fraud is an essential element of all whistleblower claims arising under § 1514A, which necessarily includes an element of intentional deceit. See Gale v. World Fin. Group, 2006-SOX-43, 2006 WL 3246898, at *4 (ALJ June 9, 2006) (Romero, J.); Wengender v. Robert Half Int'l, Inc., 2005-SOX-59, 2006 WL 3246887, at *11 (ALJ Mar. 30, 2006) (Kennington, J.); Marshall v. Northrup Gruman Synoptics, 2005-SOX-8, 2005 WL 4889013, at *3 (ALJ June 22, 2005) (Price, J.); Hopkins v. ATK Tactical Sys., 2004-SOX-19, slip op. at 6 (ALJ May 27, 2004) (Wood, J.). It remains an open question as to whether intent is required for these first five categories.

6. Materiality

As noted above, under Section 806, employees need only demonstrate, by a preponderance of the evidence, that they had a "reasonable belief" that they were reporting a violation of securities fraud statutes or SEC rules. In cases of deliberate or knowing misstatements in financial records, the SEC has recognized that "reasonable belief" does not require that the misstatements be material. This is evident in the requirements of § 13(b) of the Securities Exchange Act of 1934 as explained by the SEC's Staff Accounting Bulletin No. 99:

> Even if misstatements are immaterial, registrants must comply with Sections 13(b)(2) - (7) of the Securities Exchange Act of 1934 (the "Exchange Act"). Under these provisions, *each registrant* with securities registered pursuant to Section 12 of the Exchange Act, or required to file reports pursuant to Section 15(d), *must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the registrant and must maintain internal accounting controls that are sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP*. In this context, determinations of what constitutes “reasonable assurance” and “reasonable detail” are based not on a “materiality” analysis but on the level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs. *Accordingly, failure to record accurately immaterial items, in some instances, may result in violations of the securities laws*.

(Emphasis Added).[5]

Courts have acknowledged that by its terms SOX 806 does not require a showing of materiality. In Welch v. Chao, 536 F.3d 269 (4th Cir. 2008), the Fourth Circuit Court of Appeals held that while many of the laws listed in SOX 806 contain materiality requirements, nothing in the provision indicates that SOX 806 contains an independent materiality requirement. Thus, if the violation alleged by a complainant meets the materiality element of one of the enumerated fraud provisions, the complainant need not also show that the fraud itself had some material effect. The court noted that, for example, that a violation of § 10(b) of the Securities Exchange Act and SEC Rule 10b-5 requires a statement or omission concerning a material fact, but a complainant need not make any other showing of materiality to establish an alleged violation of fraud on shareholders. Other Courts of Appeals have noted that with regard to such securities fraud, part of an analysis of a complainant’s objective reasonableness is whether the alleged statements or omissions would likely have been viewed by the reasonable investor as having “significantly altered the total mix of information made available.” Day v. Staples, Inc., 555 F.3d 42, 54 (1st Cir. 2009); Livingston v. Wyeth, Inc., 520 F.3d 344, 355 (4th Cir. 2008).

[5] “SEC Staff Accounting Bulletin: No. 99 – Materiality”, DATE: August 12, 1999
U.S. Securities and Exchange Commission <http://www.sec.gov/interps/account/sab99.htm> (March 31, 2006) “2. Immaterial Misstatements That are Intentional,” “Considerations of the Books and Records Provisions Under the Exchange Act.”

E. Prohibited Retaliation

SOX 806 prohibits publicly traded companies and their officers, employees and agents, from discharging, demoting, suspending, threatening, harassing, “or in any other matter discriminat[ing] against an employee because of any lawful act done by the employee” relating to such alleged violations. 18 U.S.C.A. § 1514A(c) (Westlaw 2011); see generally “Sarbanes-Oxley Act of 2002,” H. Rept. No. 107-610 (July 24, 2002). Previously, courts and the DOL held that the standard for determining what constitutes an adverse action for purposes of SOX 806 was whether the employee suffered a tangible consequence or ultimate employment action. This analysis changed following the Supreme Court’s decision in Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Under Burlington Northern, the relevant question in determining whether an employer’s actions are “adverse” is not whether the employee has suffered an ultimate employment action, such as termination or demotion, or whether the employer has formally disciplined the employee. Instead, the applicable standard for adverse employment actions is whether the employer’s actions were “materially adverse.” A materially adverse action is one that would have been harmful to the point that it could well dissuade a reasonable worker in the complainant’s position, considering the totality of the circumstances, from engaging in protected activity.

Although Burlington Northern arose in the context of Title VII of the Civil Rights Act of 1964, courts and the DOL have adopted the Burlington Northern standard in analyzing adverse actions under SOX 806. See, e.g., Hardy v. City of Tupelo, NO. 1:08-CV-28-SA-JAD, 2009 WL 3678262 (N.D. Miss. Nov. 2, 2009); Allen v. Admin. Review Bd., 514 F.3d 468 (5th Cir. 2008); Miles v. Wal-Mart Stores, Inc., No. 5:06-CV-05162, 2008 WL 222694 (W. D. Ark. Jan. 25, 2008). Accordingly, adverse actions include a wide spectrum of specific conduct ranging from termination to increased scrutiny, and the objective material adversity of an employer’s action is often a fact-specific determination. See, e.g., McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 2003-SOX-23 (ALJ Jan. 16, 2004) (blacklisting); Gattegno v. Prospect Energy Corp., ARB No. 06-118, 2006-SOX-8 (ARB May 29, 2008) (constructive discharge); Fraser v. Fiduciary Trust Co., Int'l, No. 1:04-cv-06958, 2009 WL 2601389 (S.D.N.Y. Aug. 25, 2009) (demotion / reduced responsibilities); Reines v. Venture Bank and Venture Financial Group, 2005-SOX-112 (ALJ Mar. 13, 2007) (same); Levi v. Anheuser Busch Companies, Inc., ARB No. 08-086, 2008-SOX-28 (ARB Sept. 25, 2009) (failure to hire); Hughart v. Raymond James & Associates, Inc., 2004-SOX-9 (ALJ Dec. 17, 2004) (failure to promote); Grove v. EMC Corp., 2006-SOX-99 (ALJ July 2, 2007) (hostile work environment); Allen v. Stewart Enterprises, Inc., ARB No. 06-081, 2004-SOX-60 to 62 (ARB July 27, 2006) (increased scrutiny); Hendrix v. American Airlines, Inc., 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004) (reorganization / placement on a layoff list); McClendon v. Hewlett Packard, Inc., 2006-SOX-29 (ALJ Oct. 5, 2006) (transfer).

F. The Litigation Process

1. Arbitration

Section 922 also contains key provisions exempting SOX whistleblower claims from mandatory arbitration. As with other federal employment law statutes, employers often seek to avoid civil suit in federal court under SOX by requiring an employee to sign an agreement to arbitrate all claims. See, e.g., Ulibarri v. Affiliated Computer Services, 2005-SOX-46 and 47 (ALJ Jan. 13, 2006) aff'd ARB No. 07-003 (ARB July 31, 2008); Boss v. Salomon Smith Barney Inc., 263 F. Supp. 2d 684, 685 (S.D.N.Y. 2003) (nothing in the text or legislative history of the SOX evinces an intent to preempt the FAA). However, as part of its overall scheme of protecting the rights of whistleblowers and encouraging the reporting of corporate malfeasance, Section 922(c) of the Dodd-Frank Act invalidates any "agreement, policy form, or condition of employment, including a pre-dispute arbitration agreement" that has the effect of waiving rights and remedies available to SOX whistleblowers.

2. Filing a Claim

In addition to expanding the scope of SOX coverage, Section 922(c) of the Dodd-Frank Act increases the statute of limitations for SOX whistleblower claims from 90 days to 180 days. The statute of limitations is strictly enforced by the courts and begins once the employee either experiences or has notice of an adverse action. See, e.g., Coppinger-Martin v. Nordstrom, Inc., ARB No. 07-067, 2007-SOX-19 (ARB Sept. 25, 2009) (rejecting complainant's argument that 90-day period did not begin to run because her employer misrepresented the reason for her termination and she had no reason to know that her termination had been in retaliation for engaging in SOX activity until after limitations period had expired); Corbett v. Energy East Corp., ARB No. 07-044, 2006-SOX-65 (ARB Dec. 31, 2008) (holding that "the date that an employer communicates to the employee its intent to implement the discharge or other discriminatory act marks the occurrence of a violation, rather than the date the employee experiences the consequences"); Salian v. Reedhycalog UK, ARB No. 07-080, 2007-SOX-20 (ARB Dec. 31, 2008) (holding that 90-day filing period commenced when complainant received a letter stating that his position was being made redundant in 30 days); Shelton v. Time Warner Cable, ARB No. 06-153, 2006-SOX-76 (ARB July 31, 2008) (dismissing complaint as untimely where complainant filed earlier complaints under ERISA and section 11(c) of the Occupational Safety and Health Act but did not allege SOX violation within 90 days); Rollins v. American Airlines, ARB No. 04-140, 2004-AIR-9 (ARB Apr. 3, 2007) (counting the 90 day period as beginning with an advisory letter which provided "final and unequivocal" notice of termination to the complainant, not the actual termination letter issued 5 days later, and finding the complaint untimely because complainant failed to file his complaint within 90 days of the advisory letter); Halpern v. XL Capital, Ltd., ARB No. 04-120, 2004-SOX-54 (ARB Aug. 31, 2005) (rejecting complainant's argument that he was entitled to tolling because he was unaware of unlawful motive for retaliatory action within the limitations period); Hickernell v. Penske Truck Leasing, Inc., 2008-SOX-00025 (ALJ Apr. 17, 2008) (strictly construing 90-day limit where complainant claimed to have delayed filing due to credible threats by agent of former employer). As these cases demonstrate, tolling of the statute of limitations is strongly disfavored, and one ALJ has held that even a tolling agreement entered into by the parties in furtherance of settlement negotiations was ineffective. See Szymonik v. TyMetrix Inc., 2006-SOX-50, (Mar. 8, 2006). In addition, a filing with another agency, even for the same adverse action, does not constitute a timely filing if it does not request relief for retaliation in violation of SOX. See Corbett v. Energy East Corp., ARB No. 07-044, 2006-SOX-65 (ARB Dec. 31, 2008) (dismissing as untimely a complaint timely filed with the National Labor Relations Board but not filed with OSHA within 90 days). Finally, while there is no written form required for timely filing, the complaint must be in writing and should include a full statement of the allegations, with relevant dates. See Shelton v. Time Warner Cable, ARB No. 06-153.

3. Burdens of Proof

The statute provides that the burdens of proof in a Sarbanes-Oxley whistleblower case are identical to the burdens in cases arising under AIR 21's whistleblower provisions.[6] In Allen v. Administrative Review Board, 514 F.3d 468, the Fifth Circuit Court of Appeals provided an overview of the burdens of proof in SOX 806 claims:

> The legal burdens of proof set forth in [AIR21], 49 U.S.C. § 42121(b), govern SOX whistleblower actions. 18 U.S.C. § 1514A(b)(2)(C). To prevail, an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. ...
>
> If the employee establishes these four elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv). This "independent burden-shifting framework" is distinct from the McDonnell Douglas burden-shifting framework applicable to Title VII claims. ...

Id. at 475-76.

4. Procedure before the DOL

After a claim has been filed, OSHA will then conduct an investigation if it determines that the employee has stated a *prima facie* case that his protected conduct was a contributing factor in an unfavorable employment action, and the employer has failed to rebut the claim by clear and convincing evidence. Otherwise, OSHA will dismiss the complaint.

Either party may appeal an adverse decision by OSHA to the Department of Labor's Office of Administrative Law Judges, which then conducts an administrative hearing preceded

[6] See 18 U.S.C.A. § 1514A(b)(2) (Westlaw 2011).

by discovery. The ALJ's decision can be appealed by the unsuccessful party to the Department of Labor's Administrative Review Board, with further appeal to the U.S. Circuit Court of Appeals for the circuit in which the employee resided or the violation allegedly occurred.[7] This statutory enforcement scheme is comparable to those of other federal whistleblower statutes administered by the U.S. Department of Labor, with one significant exception: a party can remove the claim to federal court if the Department of Labor does not resolve the claim within 180 days. Jurisdiction vests with the district court when the case is filed. See Stone v. Duke Energy Corp., 432 F.3d 320 (4th Cir. 2005). This "kick-out" provision is discussed in more detail below.

5. SOX "Kick-Out" Provision

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. See 18 U.S.C.A. § 1514A (b)(1)(B) (Westlaw 2011) (claimant may seek relief, "if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, [by] bringing an action at law or equity for de novo review in the appropriate district court"). 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. See 18 U.S.C. § 1514A(b)(2)(C).

In a recent decision denying respondent's motion to dismiss, the Fourth Circuit Court of Appeals emphasized that the federal courts' review of SOX 806 cases is *de novo* and thus that an ALJ's decision may not result in issue preclusion (also known as collateral estoppel). See Stone v. Instrumentation Lab. Co., 591 F.3d 239 (4th Cir. 2009). In Stone, the plaintiff had appealed a negative OSHA determination to the ALJ, who granted respondents' motion for summary decision on the merits. Id. at 242. Stone then appealed the ALJ's decision to the ARB, who established a briefing schedule. Id. One month before his initial brief before the ARB was due, Stone filed notice with the ARB that he intended to bring an action in federal district court, and then did so. Id. The U.S. District Court for the District of Maryland then granted defendants' 12(b)(6) motion to dismiss based upon preclusion principles, reasoning that Stone had had a full and fair opportunity to litigate his claims before the ALJ and that the ALJ's decision was a "final judgment on the merits." Id. Analyzing the plain language of the statute, the Fourth Circuit concluded that if the ARB accepts a party's petition for review, the ALJ's decision is inoperative until the ARB adopts the decision. Id. at 244 (citing 29 C.F.R. § 1980.110(b)). In such case, if 180 days or more have passed since the filing of the complaint and the ARB has not adopted the ALJ's decision, there is no final decision on the merits and, pursuant to 18 U.S.C. § 1514A

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[7] The ARB defers to ALJ's factual findings, especially where they are predicated on the ALJ's credibility determinations about the testimony of conflicting witness. See Halloum v. Intel Corp., ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31,2006).

(b)(1)(B), a party may appeal the ALJ's decision to the appropriate district court for *de novo* review. Id. at 245.

According to SOX implementing regulations, fifteen days in advance of filing an action in district court, the complainant must file notice with the ALJ or ARB of his or her intention to file such a complaint, and serve such notice upon all parties. 29 C.F.R. § 1980.114(b). In some cases the fifteen-day notice requirement has been strictly enforced. See, e.g., Levi v Anheuser-Busch Co., Inc., No. 08-00398, 2008 WL 4816668 (W.D. Mo. Oct. 27, 2008) (refusing review of ARB decision where complainant failed to give required notice). A recent case from the Southern District of New York, however, held that neither SOX 806 nor its implementing regulations conditions the district courts' jurisdiction on providing 15 days' notice. Rather, the court held:

> Because deference is not given to administrative regulations that narrow Congress's statutory grant of jurisdiction to district courts, a district court can properly exercise jurisdiction over a whistleblower claim under SOX even when no notice is given to the ALJ in contravention of the DOL's fifteen-day notice requirement.

Lebron v. American Int'l Group, Inc., No. 09 Civ. 4285, 2009 WL 3364039, at *4 (S.D.N.Y. 2009).

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

Complainants must exhaust their administrative remedies before filing a complaint in federal court. 18 U.S.C. § 1514A(b)(1)(A). In McClendon v. Hewlett-Packard Co., No. CV-05-87-S-BLW, 2005 WL 2847224 (D. Idaho Oct. 27, 2005), plaintiff's complaint alleging defendant took away his job duties was untimely under OSHA's 90-day administrative filing period. Plaintiff opted out of the DOL forum and filed an action in the district court, alleging he was not time-barred from asserting other adverse employment actions. The court stated each discriminatory act starts the clock for filing an OSHA complaint. Since plaintiff's additional adverse employment actions were not asserted in his OSHA complaint, the court could not review them. The district court later denied plaintiff's motion for reconsideration on this point and noted that plaintiff did not even attempt or request to file an amended complaint while his claim was pending in the DOL. See McClendon v. Hewlett-Packard Co., No. CV-05-087-S-BLW, 2006 WL 318813 (D. Idaho Feb. 9, 2006).

District courts have jurisdiction to stay SOX proceedings, but after a complainant has filed in district court the ARB does not. In Allen v. Stewart Enters., Inc., No. 05-4033 (E.D. La.

Apr. 6, 2006), a Louisiana federal district court acknowledged its authority to stay federal proceedings and to reinstate the proceedings to the Department of Labor. In doing so, the Court looked beyond the statute's plain language to traditional legal principles of issue preclusion to avoid the absurd result of re-litigating an entire case where the plaintiffs had already fully litigated the matter before the ALJ and had requested a review. In Kelly v. Sonic Automotive, Inc., ARB No. 08-027, 2008-SOX-3 (ARB Dec. 17, 2008), the complainant filed in district court 30 days after filing with the ALJ, and the ALJ refused to stay proceedings as the complainant requested. The ARB held that the Department of Labor was deprived of jurisdiction once the complainant filed in district court, so even if the ALJ had agreed to a stay of proceedings so the complainant could file in district court, the stay would have become ineffective once the filing was made. Id.

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.A. § 1514A(d) (Westlaw 2011). Case law supports the view that state and SOX 806 claims are not mutually exclusive. For example, in Gonzalez v. Colonial Bank, 2004-SOX-39 (ALJ Aug. 9, 2004), the 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.

6. Right to Jury Trial

In addition to expanding the statute of limitations for SOX complaints, Section 922(c) of the Dodd-Frank Act explicitly provides SOX whistleblowers with the right to a jury trial in federal court. Previously, SOX did not expressly provide for a jury trial, and courts generally agreed that no right to a jury trial existed under SOX 806 prior to the enactment of the Dodd-Frank Act. See, e.g., Schmidt v. Levi Strauss & Co., No. 5:05-cv-01026 (N.D. Cal. Mar. 28, 2008); Walton v. Nova Information Systems, 514 F.Supp.2d 1031 (E.D. Tenn. 2007).

G. Available Remedies

The goal of SOX remedies is to make the employee whole. In other words, the intention of put the employee in the same financial and employment state she would have been in but for the respondent's illegal actions. Accordingly the Department of Labor may provide a broad range of remedies in successful SOX cases, such as reinstatement, back pay with interest, and compensation for special damages, including litigation costs, expert witness fees, and reasonable attorney's fees.

1. Reinstatement

A logical form of restitution under SOX is reinstatement of a wrongly terminated complainant. Although reinstatement is a drastic remedy that can pose difficulties, the ALJ in Welch v. Cardinal Bankshares Corp., 2003-SOX-15 (ALJ Feb. 15, 2005), noted that it is nonetheless part of the "make whole" goal of the SOX and that it is the presumptive remedy in wrongful termination cases

In Windhauser v. Trane, ARB No. 05-127, ALJ No. 2005-SOX-17 (ARB Oct. 31, 2007), OSHA issued a preliminary order of reinstatement. The ALJ denied the Respondent's motion to stay the order of reinstatement, and the ARB denied review of the ALJ's order because it was an interlocutory appeal. Id. Following a settlement approved by the ALJ, the ALJ imposed monetary sanctions on the respondent for refusal to comply with OSHA's preliminary order of reinstatement, awarding the complainant the expected salary and bonuses due during the period between the issuance of the preliminary order of reinstatement and the order approving the settlement. Id. The ALJ awarded the Complainant a pro rata portion of his salary and expected bonus for the months from the preliminary order of reinstatement to the settlement of the case. The respondent appealed, and the ARB held that only the federal district courts, not the ALJ, had the power to levy economic sanctions against a respondent. Id. The ARB therefore vacated the sanction. Id.

2. Front Pay

At least two ALJs have held that front pay is an available remedy under certain circumstances. See Hagman v. Washington Mutual Bank, Inc., 2005-SOX-73 (ARB May 23, 2007); Kalkunte v. DVI Financial Services, Inc., 2004-SOX-56 (ALJ July 18, 2005). In Hagman, the ALJ noted that the complainant's rejection of her employer's offer of reinstatement was objectively reasonable because of the open hostility exhibited by her managers and the unlikelihood of a functional work environment upon her return. Id. Moreover, the employer had not moved the harasser, instead placing him in a position immediately above the complainant, and the employer had failed to institute any changes that would prevent retaliation or even the fraud and credit problems the complainant had complained about in the first place. Id. Based on these factors, the ALJ imposed a higher standard of evidentiary proof on the respondent to show by clear and convincing evidence that reinstatement was the appropriate remedy. Id. The respondent could not meet that burden, and so the ALJ held that an award of front pay was appropriate. Id. In calculating front pay, the ALJ noted that since the complainant was only in her 40s, front pay until retirement was inappropriate. Id. Rather, based on evidence that included statements by financial experts, the ALJ held that an award of 10 years' front pay was appropriate because the complainant would almost certainly recover her career track within that time. Id.

3. Compensatory and Special Damages

Monetary damages in SOX cases are intended to be restitutionary, restoring prevailing plaintiffs to the status quo that would have existed but for the employer's discriminatory actions. The payments are not intended to compensate the complainant or punish the respondent. The district court in Schmidt v. Levi Strauss & Co., 621 F.Supp.2d 796 (N.D. Cal. 2008) affirmed this position, holding that SOX's remedial provision specifically identifies back pay with interest[8] and compensation for special damages stemming from the respondent's illegal retaliation; it does not provide for a broad claim of monetary damages. Id.

In addition to a general limitation on broad monetary damages, difficulty in calculation of benefits is also a factor in denying special and compensatory damages. In Platone v. Atlantic Coast Airlines Holdings, Inc., 2003-SOX-27 (ALJ July 13, 2004), overruled on other grounds, ARB No. 04-154 (ARB Sept. 29, 2006), a complainant sought to include in her back pay award damages for 401(k) participation and the value of free and discounted airline tickets provided to employees. At the time of her termination, the complainant had not yet enrolled in the 401(k) program, so the court was unable to determine how much she would have contributed to the plan or if she would have invested at all. Id. Similarly, with regard to the plane tickets, there was no way to assign a value to airline tickets that the complainant might have purchased at a discount or received for free because there was no way to know how often or in what way she would have taken advantage of the program. Id. Thus neither potential benefit was accepted as a component of back pay.

In a unique case, the ALJ noted that successful plaintiffs may be able to recover the value of lost stock options if pled with specificity. See Jayaraj v. Pro-Pharmaceuticals, Inc., 2003 SOX 32 (ALJ Feb. 11, 2005). The ALJ held that this was an appropriate remedy to make the complainant whole, since the stock options would have been available to the complainant but for the respondent's actions.

4. Attorneys' Fees

[8] When awarded, the calculation for interest on backpay is based upon the post-judgment interest rate contained in 28 U.S.C. § 1961(a), because the rates reasonably approximate the rate of return on a risk-free investment during the back pay period. See Parexel Int'l Corp. v. Feliciano, No. 04-cv-3798, 2008 WL 5194299 (E.D. Pa. Dec. 4, 2008) (holding that prejudgment interest on backpay is appropriate).

Attorneys' fees are another remedy available to successful SOX complainants. Two cases mentioned above addressed appropriate calculations of attorneys fees. First, in Hagman v. Washington Mutual Bank, Inc., 2005-SOX-73 (ALJ Dec. 19, 2006), the ALJ held that the appropriate rates for calculating attorneys' fees were based on the geographic market in which the proceedings took place, barring exceptional circumstances. Thus, although the complainant retained a New York firm, because the OSHA hearing ultimately took place in southern California, the ALJ awarded attorneys' fees at the Altman Weil Survey of Law Firm Economics rate for Los Angeles. Id. The ALJ in Platone, 2003-SOX-27 (overruled on other grounds) also used the Altman Weil Survey. Platone also identified other, more subjective factors to consider in determining appropriate rates for attorneys' fees awards: the complexity of the issues presented; the lead attorney's experience; and the quality of the attorneys' performance at trial. Id. The ALJ applied a rule of reasonability, taking into account these particular factors and the totality of the circumstances in determining that the rates requested in the fee petition were objectively reasonable and within the market range. Id.

5. Punitive Damages Not Available

Punitive damages are not available under the whistleblower provisions of SOX. See Murray v. TXU Corp., No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444, at *4 (N.D. Tex. June 7, 2005) (reviewing the legislative history and noting that the omission of punitive damages from the statute is clear and unequivocal); Hanna v. WCI Communities, Inc.,348 F.Supp.2d 1332 (S.D. Fla. 2004) (same).

6. Non-Economic Damages

The district courts are split as to whether SOX gives plaintiffs the right to non-economic damages, also referred to as legal damages, to provide redress for harm to reputation, emotional, mental or physical distress and anxiety. The Administrative Review Board ("ARB") has indicated that complainants may recover for emotional distress. See Kalkunte v. DVI Financial Services, Inc., 2004-SOX-56 (ARB Feb. 27, 2009) (affirming Administrative Law Judge ("ALJ") award for "pain, suffering, mental anguish, the effect on her credit [because of her loss of employment] and the humiliation that she suffered."); Brown v. Lockheed Martin Corp., 2008-SOX-0004 (ALJ Jan. 15, 2010) ("Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation.") (citing 29 C.F.R. §§ 1980.109(b)). The majority of courts that have addressed whether SOX provides damages for reputational injury have held that "because reputational damages are not specifically enumerated in SOX and such damages are non-pecuniary, reputational damages are akin to damages for emotional distress and are not recoverable under SOX." See Jones v. Home Fed. Bank, No. CV09-336-CWD, 2010 WL 255856 (D. Idaho Jan. 14, 2010) (collecting cases). In Walton v. Nova Information Systems, 514 F.Supp.2d 1031 (E.D. Tenn. 2007), the district court granted respondent's motion to strike plaintiff's claims for non-economic damages which included harm to her career and reputation, emotional, mental and physical distress and anxiety and punitive damages. In reaching its holding, the court declined to accept Walton's argument that the "action at law" phrase in the enforcement provision of SOX made jury trials available for Section 806 retaliation claims, and noted that such legal damages were questions for juries, which as noted above, courts have held are not available in SOX 806 actions. See also Murray v. TXU Corp., No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444 (N.D. Tex. June 7, 2005) (granting defendants' Motion to Strike Plaintiff's Demand for a Jury Trial where plaintiff sought from a jury damages for reputational injury and punitive damages, both of which plaintiff was seeking from a jury). However, the district court in Jones v. Home Fed. Bank, found that "allowing a plaintiff to claim damages for a reputational injury that caused a decrease in the plaintiff's future earning capacity could be consistent with SOX's goal of making the plaintiff whole." 2010 U.S. Dist. LEXIS 3579 at *16. See Mahony v. KeySpan Corp., No. 04-CV-554, 2007 U.S. Dist. LEXIS 22042 (E.D.N.Y. Mar. 12, 2007; Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1332 (S.D. Fla. 2004) (finding that "a successful Sarbanes-Oxley Act plaintiff cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff's future earning capacity.").

II. THE DODD-FRANK ACT

On July 15, 2010, Congress enacted a massive overhaul of the nation's financial regulatory system. President Barack Obama signed the bill into law on July 21, 2010. Congress designed the Wall Street Reform and Consumer Protection Act – popularly known as the Dodd-Frank Act –to address some of the root causes of the collapse of the financial sector in 2008. As part of its comprehensive program to ensure corporate accountability and compliance, the Dodd-Frank Act strengthened and created numerous whistleblower protections. As noted in Section I above, Congress expanded the whistleblower protection provision of the Sarbanes-Oxley Act ("SOX 806") by extending the statute of limitations, clarifying the scope of coverage and right to a private civil action, and ensuring that the protections of SOX 806 were non-waivable by employees in most cases. The Dodd-Frank Act also created a Securities and Exchange Commission ("SEC") whistleblower incentive program, as well as a Commodity Futures Trading Commission ("CFTC") whistleblower incentive program, both of which reward those who provide information to the government on securities violations by giving whistleblowers a share of any money the government recovers. It also created a specific whistleblower-protection program for those who work in the financial industry to encourage them to come forward with information related to fraudulent conduct in the sale and marketing of consumer financial products or services. As detailed below, the Dodd-Frank Act also strengthened the False Claims Act and created new whistleblower protections and incentive programs to reward individuals who report violations of the law that result in monetary sanctions against the offending party.

A. Commodity Futures Trading Commission Whistleblower Incentive Program

Section 748 of the Dodd-Frank Act amends the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, to create an incentive program for whistleblowers who provide original information to the CFTC that results in the imposition of monetary sanctions greater than $1 million. The statutory language establishing this incentive program is as follows:

> In any **covered judicial or administrative action**, or **related action**, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an **award** or awards to 1 or more **whistleblowers** who voluntarily provided **original information** to the Commission that led to the **successful enforcement** of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

Section 748 states that the whistleblower's financial reward for the provision of such original information shall be not less than 10 percent and not more than 30 percent of the total collected monetary sanctions from the offending party. The CFTC maintains discretion in determining the size of the whistleblower's financial reward. In crafting this reward, the CFTC will consider the significance of the information provided, the extent of the whistleblower's assistance, the programmatic interests of the SEC, and any other relevant factor that the CFTC establishes by subsequent rule or regulation.

The Dodd-Frank Act further defines these bolded CFTC Whistleblower Program terms as follows:

- **Covered judicial or administrative action:** Any judicial or administrative action brought by the CFTC under the Commodity Exchange Act that results in **monetary sanctions** in excess of $1,000,000.

- **Monetary Sanctions**: these sanctions include any monies, including penalties, disgorgement, restitution, and interest ordered to be paid, as well as any monies deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes Oxley Act of 2002 as a result of such action or any settlement of such action.

- **Whistleblower**: any individual (or individual*s* acting jointly) who provides information relating to a violation of the Commodity Exchange Act in a manner established by rule or regulation of the CFTC.

- **Original Information** is information that is:

  (A) derived from the independent knowledge or analysis of a whistleblower;

  (B) not known to the CFTC from any other source, unless the whistleblower is the original source of the information; and

  (C) not exclusively derived from an allegation made in a (1) judicial or administrative hearing, in a (2) governmental report, hearing, audit, or investigation, or (3) from the news media, unl**ess** the whistleblower is a source of the information.

Additionally, original information triggers the CFTC whistleblower program so long as the original information was submitted to the CFTC after the date of enactment of the Dodd-Frank Act.

Moreover, awards issued pursuant to the CFTC Whistleblower Program are available to whistleblowers who provided timely original information to the CFTC even where the violation of the Commodities Exchange Act (or its implementing rules and regulations) occurred prior to the enactment of the Dodd-Frank Act.

- **Successful enforcement**: Successful enforcement includes any settlement of covered actions.

As stated above, the CFTC whistleblower's award shall be not less than 10 percent and not more than 30 percent of the total monetary sanctions that have been collected as imposed via the covered action or related actions. The determination of this award rests within the discretion of the CFTC. The Dodd-Frank Act lists certain criteria that should guide the CFTC's discretion. These criteria include: (1) the significance of the CFTC whistleblower's information to the success of the covered judicial or administrative action against the wrongdoer; (2) the degree of the CFTC whistleblower's assistance (as well as the assistance of the whistleblower's legal representative); (3) the CFTC's programmatic interest in deterring violations of the Commodity Exchange Act (and its implementing regulations); and (4) additional relevant factors as established by a rule or regulation of the CFTC.

The Dodd-Frank Act envisions numerous scenarios in which an individual's employment precludes that person from eligibility as a CFTC whistleblower. These scenarios include any individual who is or was at the time of acquiring the original information submitted to the CFTC a members/officer/employee of the following: Appropriate regulatory agency; the Department of Justice; a registered entity; a registered futures association; a self-regulatory organization under Securities Exchange Act (e.g., Financial Industry Regulatory Authority [FINRA]); or a law enforcement organization.

The Dodd-Frank Act also disallows awards to any whistleblower convicted of a criminal violation related to the covered judicial/administrative action that produced the award. Whistleblowers are not eligible for awards where the whistleblower submits information to the CFTC that is based on facts underlying the covered action previously submitted by another whistleblower. Finally, the Dodd-Frank Act prohibits awards to any whistleblower who fails to submit information to the CFTC in such a form as required by CFTC rule or regulation.

The Dodd-Frank Act permits a whistleblower to be represented by counsel when making a claim for an award under the CFTC Whistleblower Program. Additionally, the whistleblower may initially remain anonymous and act through his or her counsel, provided that the whistleblower eventually discloses his or her identity to the CFTC prior to the payment of the award.

Unlike Section 922 of the Dodd-Frank Act (the SEC Whistleblower Program), Section 748 permits CFTC whistleblowers to appeal any award determination of the CFTC. The whistleblower-appellant must file an appeal with the appropriate Circuit Court of Appeals not more than 30 days after the CFTC issues its award determination.

Section 748 of the Dodd-Frank Act also creates a private right of action for CFTC whistleblowers who experience adverse personnel actions on account of protected activity. This anti-retaliation protection provision protects whistleblowers who provide information to the CFTC in accordance with the above-described CFTC whistleblower program, or whistleblowers who assists in any CFTC investigation or judicial/administrative action that is based upon or related to the whistleblower's provision of information.

Section 748's anti-retaliation protection provision permits a non-federal government employee to bring an action against the employer in federal district court. Federal government employees must bring the action pursuant to Section 1221 of Title 5 of the U.S. Code. Whistleblowers must bring the action no later than two years after the date of the adverse personnel action occurs**.** A successful whistleblower is entitled to reinstatement, backpay and interest, compensation for special damages, litigation costs, expert witness fees, and reasonable attorneys' fees.

B. Securities and Exchange Commission (SEC) Whistleblower Incentive Program and Anti-Retaliation Provisions

Section 922 of the Dodd-Frank Act amends the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, to create a new federal program by which the Securities and Exchange Commission ("SEC") will reward whistleblowers who voluntarily provide original information to the SEC regarding securities violations that result in the imposition of monetary sanctions greater than $1 million.

The provisions of Section 922 are a near mirror to the provisions of Section 748's CFTC Whistleblower Incentive Program described above. Section 922 states that the whistleblower's financial reward for the provision of such original information shall be not less than 10 percent and not more than 30 percent of the total collected monetary sanctions from the offending party. As is the case with the CFTC, the SEC maintains discretion in determining the size of the whistleblower's financial reward. In crafting this reward, the SEC will consider the significance of the information provided, the extent of the whistleblower's assistance, the programmatic interests of the SEC, and any other relevant factor that the SEC establishes by subsequent rule or regulation. However, unlike the CFTC Whistleblower Incentive Program, SEC Whistleblowers have no right to appeal the SEC whistleblower award to federal court.

Section 922 specifically forbids awards to whistleblowers who were employees of an "appropriate regulatory agency," the Department of Justice, a self-regulatory organization, the Public Company Accounting Oversight Board, or a law enforcement organization. Section 922 also prohibits financial rewards to whistleblowers who are convicted of a criminal violation related to the judicial or administrative action for which the whistleblower provided information, individuals who gain the original information by auditing financial statements as required under the securities laws and individuals who fail to submit information to the SEC as required by an SEC rule.

In addition to creating the federal program to encourage the reporting of securities violations, § 922 protects employees against retaliation when these employees provide information about their employer to the SEC in accordance with the program, or when these employees initiate, testify or assist in any investigation related to the program, or make required disclosures under SOX, the Securities Exchange Act of 1934, and any other law, rule, or regulation under the jurisdiction of the SEC. The Act creates a private right of action that may be filed in federal court.

The remedies available to an aggrieved whistleblower vary slightly from the remedies available to the CFTC whistleblower. Under Section 922, whistleblower's remedies under this new provision include reinstatement, double back pay with interest, attorneys' fees, and the reimbursement of other related litigation expenses.

C. Whistleblower Protections for Financial Services Employees

Section 1057 of the Dodd-Frank Act creates a new private cause of action for financial services industry employees who experience retaliation for disclosing information regarding an employer's fraudulent or unlawful conduct related to the provision of a consumer financial product or service.

1. Covered Employers and Employees

Section 1057 covers employers who engage in the offering or provision of a consumer financial product or service. This applies to a wide array of employers, including organizations that extend credit or service or broker loans, provide financial advisory services to consumers regarding proprietary financial products, provide real estate settlement services or perform property appraisals, or analyze, collect, maintain, or provide consumer report information in connection with any decision related to the offering or provision of a consumer financial product or service. The scope of coverage also encompasses affiliates who provide a related material service to the employer, including the design, maintenance, and/or operation of the financial product or service, or for the processing of related transactions. Covered services and employment included property appraisals, financial advisory services, credit counseling, credit rating, real estate settlement, and loan underwriting. Covered Employees include any individual who performs tasks related to the offering/provision of a consumer financial product or service.

2. Protected Activity

Section 1057 prohibits retaliation for four types of whistleblowing activities. First, Section 1057 protects a covered employee who provides, causes to be provided, or is about to provide or cause to be provided information to the employer, the Consumer Financial Protection Bureau ("Bureau"), or any other state, local, or federal government authority or law enforcement agency, relating to any violation of any provision of Title X of the Dodd-Frank Act or any rule, order, standard or prohibition prescribed or enforced by the Bureau. This type of protected activity includes the employee's provision of information regarding an act or omission that the employee reasonably believes to be a violation of these provisions and rules; testimony in any proceeding resulting from the administration or enforcement of any provision of Title X of the Dodd-Frank Act or any rule, order, standard or prohibition prescribed or enforced by the Bureau. Id.

Second, covered employees are protected under Section 1057 if they testify or will testify in any proceeding resulting from the administration or enforcement of any provision of Title X of the Dodd-Frank Act or any rule, order, standard or prohibition prescribed or enforced by the Bureau. Third, Section 1057 protects covered employees who file or institute any proceeding under any federal consumer financial law.

Finally, the fourth form of protected activity under the Section 1057 protects internal whistleblowers. Section 1057 protects a covered employee if he or she objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be a violation of any law, rule, standard, or prohibition subject to the jurisdiction of, or enforceable, by the Bureau.

It is important to note that Section 1057's anti-retaliation prohibition protects employees or authorized representatives both when that employee/representative acts in the foregoing manners on her own initiative, or instead during the employee's execution of her duties in the normal course of affairs.

3. Prohibited Retaliation

Under Section 1057, covered employers may not "terminate or in any other way discriminate against, or cause to be terminated or discriminated against" covered employees for engaging in protected activity.

4. The Litigation Process

The statute of limitations for the new private cause of action under § 1057 is 180 days. An employee must file their claim with the Occupational Safety Health Administration ("OSHA"). OSHA will then inform the person(s) named in the Complaint of the allegations and provide an opportunity for written response. OSHA will initiate its investigation within 60 days after the filing of the Complaint.

Section 1057 tracks many of the same provisions of the Sarbanes Oxley Act anti-retaliation provisions, where within 60 days of receipt of the complaint, the Secretary of Labor may order relief upon a finding of reasonable cause that retaliation occurred. Furthermore, Section 1057 contains an employee-friendly burden-shifting framework; a complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was "a contributing factor" in the unfavorable action. The employer must then prove by clear and convincing evidence that it would have executed the same adverse employment action even in the absence of the employee's protected activity. Parties may file objections to the Secretary of Labor's written determination no later than 30 days after issuance, and request a hearing.

As is the case with other federal whistleblower protections, both the employee and the employer can appeal OSHA's findings and request a hearing before a Department of Labor ("DOL"). If the DOL fails to issue a final order within 210 days of filing, the employee can remove his or her § 1057 claim to federal court. Either party can then request a trial by jury.

5. Available Remedies

An employee who prevails under an action brought pursuant to Section 1057 is entitled to the following relief: reinstatement or front pay; back pay with interest; compensatory damages; attorneys' fees; and litigation costs, expressly inclusive of expert witness fees.

III. CONSUMER PRODUCTS SAFETY WHISTLEBLOWER PROTECTIONS

In the wake of scandals over lead paint found in toys and other recalls in the last few years, Congress passed the "Consumer Products Safety Reform Act of 2008," a broad set of amendments to the Consumer Products Safety Act. The Act was signed into law and became effective on August 14, 2008. Section 219 of the Act, which has been unofficially codified as 15 U.S.C.A. § 2087 (West 2008), provides for new whistleblower protections.

A. Protected Activity

This statute provides a civil remedy to employees of manufacturers, private labelers, distributors, or retailers of consumer products who allege that they were retaliated against because they provided information about, or participated in an investigation relating to, what they reasonably believed to be violations of consumer safety laws enforced by the United States Consumer Product Safety Commission ("the Commission"). 15 U.S.C.A. § 2087(a) (West 2008).

B. Consumer Product Safety Laws

Under the new Act, an employee has to have a reasonable belief that his or her employer violated consumer product safety laws. The Consumer Products Safety Act ("CPSA"), 15 U.S.C. §§ 2051-2084 (West 2008), created consumer product safety laws and established the Commission, which is charged with protecting the public from unreasonable risks of serious injury or death from consumer products. The CPSA defines the term "consumer product" as any article, or component part thereof, produced or distributed for: (1) sale to a consumer for use in or around a permanent or temporary household, school, or in recreation, and (2) for the personal use in or around a permanent or temporary household, school, or in recreation. 15 U.S.C. § 2052 (West 2008). While the Commission has jurisdiction over more than 15,000 different products under this definition, the CPSA excludes products from the Commission's jurisdiction whose regulation expressly lies in another federal agency's jurisdiction, for example food, cosmetics, medical devices, tobacco products, firearms and ammunition, motor vehicles, pesticides, aircrafts, and boats. Id.

Under the CPSA, the Commission has power to develop safety standards and pursue recalls for consumer products that present unreasonable or substantial risks of injury or death to consumers. 15 U.S.C. §§ 2056 and 2061 (West 2008). The Commission also has the power to ban a product if there is no feasible alternative. 15 U.S.C. § 2057 (West 2008). While the Commission's jurisdiction is very broad, the CPSA (with some exceptions) leaves it up to the Commission to determine precisely what to regulate and/or how to regulate it. 15 U.S.C. § 2056 (West 2008). As such, not all dangers to consumer safety will be violations of the CPSA or the Commission's rules, regulations, or orders because the Commission may have only enacted voluntary guidelines or weak regulations. See http://www.cpsc.gov/businfo/regsbyproduct.html (website containing links that provide guidance regarding mandatory and voluntary standards).

The CPSA, however, requires that every manufacturer, distributor, and retailer of a consumer product must immediately inform the Commission if it obtains information that reasonably supports the conclusion that the consumer product: (1) fails to comply with the applicable consumer safety rule; (2) contains a defect that could create a substantial risk of injury to the public; or (3) create an unreasonable risk of serious injury or death. 15 U.S.C. § 2064(b) (West 2008). Failure or refusal to follow this notification requirement expressly violates the CPSA. 15 U.S.C. § 2068(a)(3) (West 2008).

C. Forms of Protected Activity

The new Act protects four types of whistleblowing activities. The first form of protected activity is when an employee provides, cause to be provided, or is about to provide or cause to be provided information relating to any violation of consumer product safety laws, orders, rules, regulations, standards, or ban enforced by the Commission. 15 U.S.C.A. § 2087(a)(1) (West

2008). The employee can provide that information to the employer, the Federal Government, or the attorney general of a state. Id.

The second and third forms of protected activity protect employees who assist in proceedings. An employee is protected under the Act when he or she testified or is about to testify in a proceeding concerning a violation of consumer product safety laws, orders, rules, regulations, standards, or ban enforced by the Commission. 15 U.S.C.A. § 2087(a)(2) (West 2008). An employee is also protected if he or she assisted or participated, or is about to assist or participate in, such a proceeding. 15 U.S.C.A. § 2087(a)(3) (West 2008).

The fourth form of protected activity under the Act protects internal whistleblowers. An employee is protected under the Act if he or she objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of consumer product safety laws, orders, rules, regulations, standards, or ban enforced by the Commission. 15 U.S.C.A. § 2087(a)(4) (West 2008).

Importantly, the Act protects an employee who engages in one or more of these four forms of protected activity regardless of whether the whistleblowing act was at the employee's initiative or in the ordinary course of the employee's duties. 15 U.S.C.A. § 2087(a) (West 2008).

D. Covered Employers

The Act prohibits manufacturers, private labelers, distributors, or retailers, from retaliating against an employee who has engaged in protected activities. 15 U.S.C.A. § 2087(a) (West 2008). The CPSA defines manufacturer as "any person who manufactures or imports a consumer product." 15 U.S.C. § 2052(a)(4) (West 2008). A distributor is defined as "a person to whom a consumer product is delivered or sold for purposes of distribution in commerce," but excluding manufacturers or retailers. 15 U.S.C. § 2052(a)(5) (West 2008). A retailer is defined as "a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer." 15 U.S.C. § 2052(a)(6) (West 2008). Lastly, a private labeler is defined as "an owner of a brand or trademark on the label of a consumer product which bears a private label." 15 U.S.C. § 2052(a)(7)(A) (West 2008). A consumer product bears a private label when (1) the product is labeled with the brand or trademark of a person other than a manufacturer of the product, (2) the person with whose brand or trademark the product has been labeled has authorized it to be so labeled, and (3) the brand or trademark of a manufacturer of such product does not appear on the label. 15 U.S.C. § 2052(a)(7)(B) (West 2008).

E. Prohibited Retaliation

The Act prohibits a covered employer from "discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment." 15 U.S.C.A. § 2087(a) (West 2008).

F. The Litigation Process

To qualify for relief under the Act, the employee must file a complaint with the Secretary of Labor no later than 180 days after the date on which the violation occurred. 15 U.S.C.A § 2087(b)(1) (West 2008). The complaint must identify the person responsible for the retaliatory act or acts. Id.

After a claim has been filed, the Secretary of Labor will then conduct an investigation, if it determines that the employee has stated a *prima facie* case that his protected conduct was a contributing factor in an unfavorable employment action and the employer has failed to rebut the claim by clear and convincing evidence. 15 U.S.C.A. § 2087(b)(2)(B)(i)-(ii) (West 2008). Otherwise, the Secretary of Labor will dismiss the complaint without an investigation. 15 U.S.C.A. § 2087(b)(2)(B)(i) (West 2008).

To ultimately find in favor of the employee, the Secretary of Labor must determine that the protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint and that the employer failed to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected action. 15 U.S.C.A. § 2087(b)(2)(B)(iii)-(iv) (West 2008).

The Secretary is supposed to issue written findings, including ordering any appropriate relief, no later than 60 days after the complaint is filed. 15 U.S.C.A. § 2087(b)(2)(A) (West 2008). Parties have 30 days after "notification of findings" to object to the determination and request a hearing on the record. Id. Reinstatement is not stayed pending the hearing. Id. A final order must issue within 120 days of the hearing. 15 U.S.C.A. § 2087(b)(3)(A) (West 2008). A party may petition for review of a final agency order in the U.S. Court of Appeals in the circuit where the violation occurred or where the complainant resided on the date of the violation. 15 U.S.C.A. § (b)(5)(A) (West 2008).

If the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after issuing a written determination, the complainant may bring an action for *de novo* review in the U.S. District Court with jurisdiction over the action. 15 U.S.C.A. § 2087(b)(4) (West 2008). The Act appears to give the Secretary of Labor up to 300 days to issue a final decision: if the Secretary of Labor issues the written determination on day 210, then the Act provides for another 90 days to make a final decision. The Act expressly provides a right to a jury trial at the request of either party. Id.

G. Available Remedies

Under the Act, the Secretary of Labor is directed to provide a broad range of remedies in successful cases, including: affirmative action to abate the violation, reinstatement of the complainant to his or her former position with back pay, and compensatory damages. 15 U.S.C.A. § 2087(b)(3)(B)(i)-(iii) (West 2008). Notably, the Act requires, at the request of the complainant, the Secretary of Labor to assess against the opposing party the aggregate amount of all reasonably incurred costs and expenses, including attorneys' and expert witness fees. 15 U.S.C.A. § 2087(b)(3)(B)(iii) (West 2008).

If the complainant brings an action in District Court because the Secretary of Labor has failed to issue a final decision within the statutorily required time, the Act allows the district court to grant all relief necessary to make the employee whole, including: reinstatement, back pay with interest, compensatory relief, injunctive relief, and "compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 15 U.S.C.A. § 2087(b)(4) (West 2008).

IV. FDA FOOD SAFETY MODERNIZATION ACT WHISTLEBLOWER PROTECTIONS

A. Introduction

In response to recent high-profile outbreaks of foodborne illnesses and nationwide food recalls, Congress passed the FDA Food Safety Modernization Act ("FSMA"), Pub. L. No. 111-353, 124 Stat. 3885, which expands the regulatory authority of the FDA and provides sweeping amendments to the Federal Food, Drug, and Cosmetic Act ("FDC"), 21 U.S.C. § 301. Signed into law by President Obama on January 4, 2011, the FSMA is designed to implement preventative process controls to enhance the food-safety system and hold the food industry accountable for preventing contamination. Section 402 of the FSMA, which became effective immediately upon signing, establishes robust whistleblower protections for employees in the food-service industry who play a front-line position in protecting the integrity of the nation's food supply.

B. Covered Employers and Employees

The whistleblower protections created by Section 402 broadly apply to employees of any entity engaged in "the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food." §402(a). Thus, Section 402 protects employees at multiple points along the food-supply chain—such as a truck driver transporting food or an assembly line worker at a processing plant—who speak out against violations of food safety laws enforced by the FDA.

C. Protected Activity

Under Section 402, an employer may not retaliate against an employee who: (1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information the employee reasonably believes to be a violation of the FDC or any order, rule, regulation, standard, or ban under the FDC; (2) testified or is about to testify in a proceeding concerning such violation; (3) assisted or participated or is about to assist or participate in such a proceeding; or (4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee "reasonably believed" to be in violation of the FDC, or any order, rule, regulation, standard, or ban under the FDC. §402(a)(1)-(4).

It is important to note that the whistleblower protections under Section 402 only extend to disclosures of violations of food-safety regulations enforced by the FDA. The language of Section 402 does not cover violations of food-safety regulations enforced by the USDA, which generally cover the meat and poultry industries. Food-safety regulations enforced by the FDA cover nearly all other food products, such as fruits, vegetables, nuts and grains.

D. Prohibited Retaliation

Covered employers are prohibited from discharging or "otherwise discriminat[ing] against an employee with respect to compensation, terms, conditions, or privileges of employment" in retaliation for the employee engaging in protected activity. Pub. L. No. 111-353, §402(a). Notably, Section 402 explicitly provides whistleblower protection regardless of whether the protected activity occurs at the employee's initiative or in the ordinary course of the employee's duties. Id.

E. The Litigation Process

The Secretary of Labor is tasked with enforcing the whistleblower protections under Section 402, which includes the adjudication of whistleblower complaints filed with the Department of Labor. An employee alleging retaliation for engaging in protected activity under the FSMA must file a complaint with the Secretary no later than 180 days after the date on which the violation occurred. §402(b)(1). The complaint must identify the person responsible for the retaliation. Id.

After the complaint has been filed, the Secretary will initiate an investigation if it determines that the employee has made a *prima facie* case showing that his or her protected activity was "a contributing factor" in the unfavorable employment action alleged in the complaint, and that the employer has failed to rebut the claim by clear and convincing evidence. §402(b)(2)(C)(i)-(iv). Otherwise, the Secretary will dismiss the complaint without an investigation. Id.

If the complaint survives dismissal, the Secretary is to initiate an investigation no later than 60 days after the complaint has been filed. §402(2)(a). The Secretary will only find reasonable cause that a Section 402 violation has occurred if the employee demonstrates that her protected activity was "a contributing factor" in the unfavorable employment action. §402(b)(2)(C)(i). The employer can avoid liability only by demonstrating by clear and convincing evidence that it would have taken the unfavorable employment action in the absence of the employee's protected activity. §402(b) (2)(C)(iv).

The Secretary is to issue a written determination of its findings, including ordering any appropriate relief, no later than 60 days after the complaint is filed. §402(b)(2)(A)-(B). Should the Secretary conclude that the employee's complaint is frivolous or has been brought in bad faith, the Secretary may award the prevailing employer a "reasonable attorneys' fee," not to exceed $1,000. §402(b)(3)(D).

Parties have 30 days after the "notification of findings" to file an objection to the determination and request a hearing on the record. §402(b)(2)(B). The requested hearing is to be "conducted expeditiously," but reinstatement is not stayed pending the hearing. Id. The Secretary must issue a final order within 120 days of the hearing. §402(b)(3)(A). However, any party adversely affected or aggrieved may obtain review of the order in the U.S. Court of Appeals in the circuit where the violation occurred or where the complainant resided on the date of the violation. Pub. L. No. 111-353, §402(b)(5)(A). Unless ordered by the court, the commencement of the review proceedings will not operate as a stay of the final order. Id.

If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after issuing a written determination, the employee may bring an action for *de novo* review in the U.S. District Court with jurisdiction over the action. Pub. L. No. 111-353. §402(b)(4)(A). Section 402 expressly provides a right to a jury trial at the request of either party. Id.

F. Available Remedies

If the Secretary of Labor determines that a violation of Section 402 has occurred, the Secretary is directed to order affirmative action to abate the violation, reinstatement of the employee to his or her former position with back pay, and compensatory damages. Pub. L. No. 111-353, §402(b)(3)(B)(i)-(iii). Notably, Section 402 requires, at the request of the complainant, the Secretary to assess against the opposing party the aggregate amount of all reasonably incurred costs and expenses, including attorneys' and expert witness fees. Pub. L. No. 111-353, §402(b)(3)(C).

If the complainant brings an action in District Court because the Secretary failed to issue a final decision within the statutorily required time, the FSMA allows the District Court to grant all relief necessary to make the employee whole, including: reinstatement, back pay with interest, and "compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees." Pub. L. No. 111-353, §402(b)(4)(B).

V. DEFENSE CONTRACTOR WHISTLEBLOWER PROTECTIONS

The wars in Afghanistan and Iraq have seen unprecedented levels of private defense contractors in prominent military support and reconstruction roles. This burgeoning niche is in addition to the multibillion dollar defense contracting industry already in existence prior to the most recent military operations. The lure of lucrative government contracts, combined with the lives and taxpayer dollars at stake in the performance of those contracts, necessitates whistleblower protections for defense contractors and their employees. This protection is found in 10 U.S.C. § 2409. There is very little case law interpreting the law's provisions.

A. Protected Activity

Under the defense contractor whistleblower law, an employee of a defense contractor is protected for making disclosures to one of several entities of misconduct by his or her employer. To be protected by the act, the employee must reasonably believe that she has information that evidences: (1) "gross mismanagement of a Department of Defense contract or grant;" (2) "a gross waste of Department of Defense funds;" (3) "a substantial and specific danger to public health or safety;" or (4) "a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant." 10 U.S.C.A. § 2409(a) (West 2008). Protection of reprisal is available to employees who disclose such information to "a Member of Congress, a representative of a committee of Congress, an Inspector General, the Government Accountability Office, a Department of Defense employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice." Id.

B. Covered Employers

The term "contractor" is defined broadly within the statute to mean "a person awarded a contract or a grant with an agency." 10 U.S.C.A. § 2409(e)(4) (West 2008). Covered agencies include the Department of Defense, the Army, the Navy, the Air Force, the Coast Guard, and the National Aeronautics and Space Administration (NASA). See 10 U.S.C.A. § 2303(a) (West 2008).

C. Prohibited Retaliation

Under the statute, a contractor may not discharge, demote, or otherwise discriminate against an employee for engaging in any of the forms of protected activity described above. 10 U.S.C.A. § 2409(a) (West 2008).

D. The Litigation Process

An employee alleging reprisal for protected activity under the law must file a complaint with the Inspector General ("IG") of the Department of Defense in most cases or with the IG of NASA if the complaint concerns NASA. 10 U.S.C.A. §2409(b)(1) (West 2008). Unlike most whistleblower statutes, the defense contractor anti-reprisal law does not contain a statute of limitations for filing a complaint. If it does not find that the complaint is frivolous, the IG has 180 days to investigate it and submit a report to the complainant, the respondent contractor, and the head of the relevant agency with whom the private party contracted. 10 U.S.C.A. §2409(b)(1), (2)(A) (West 2008). If the agency denies relief or fails to file an order granting relief within 210 days after the filing of the complaint, the complainant may file in federal district court, without regard to the amount in controversy. 10 U.S.C.A. §2409(c)(2) (West 2008) Either the complainant or the respondent may request a jury trial. Id.

E. Available Remedies

Within 30 days after receiving a report from an Inspector General regarding the whistleblower complaint, the head of the relevant agency may determine whether the employee was subjected to reprisal by the contractor and may deny or grant relief. 10 U.S.C.A. §2409(c)(1) (West 2008). There are several available forms of relief. The broadest is an order that the contractor "take affirmative action to abate the reprisal," which is a general make-whole provision designed to restore the pre-retaliation status quo. 10 U.S.C.A. §2409(c)(1)(A) (West 2008). More specifically, the act mentions as possible remedies reinstatement, compensation (including back pay), employment benefits, and a restoration of pre-reprisal conditions of employment. 10 U.S.C.A. §2409(c)(1)(B) (West 2008). Additionally, a successful claimant may obtain reasonable attorneys' fees and expenses, including expert witness fees. 10 U.S.C.A. §2409(c)(1)(C) (West 2008).

VI. FALSE CLAIMS ACT WHISTLEBLOWER PROTECTIONS

The False Claims Act ("FCA") is a law intended to provide an incentive to private citizens to file claims on behalf of the Federal Government for making fraudulent claims against the government. See 31 U.S.C. §§ 3729 - 3733. Successful claimants under the FCA receive a portion of the recovery, often approximately 15-25%, with the remainder going to the government. See 31 U.S.C.A. § 3730(d). The Dodd-Frank Act also strengthened the FCA and created new whistleblower protections and incentive programs to reward individuals who report violations of the law that result in monetary sanctions against the offending party.

Under the FCA, a person is liable for a fine and treble damages if that person:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

29 U.S.C.A. § 3729(a)(1)(A) – (G).

An employee who participates in an FCA action is protected under the act's whistleblower protection provisions. See 31 U.S.C. § 3730(h). The law protects employees from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer" because the employee has sought to stop an employer from engaging in any of the acts that would violate 31 U.S.C. § 3729(a)(1). Id. Employees engage in protected activity when they meet the "distinct possibility" standard under which protected activity occurs when an employee's opposition to fraud takes place in a context where "litigation is a distinct possibility, when the conduct reasonably could lead to a viable FCA action, or when…litigation is a reasonable possibility." Mann v. Heckler & Koch Defense, Inc. 2010 WL 5262729, at *3 (4th Cir. 2010); Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 869 (4th Cir.1999).

Section 1079(b) of the Dodd-Frank Act contains significant changes to the anti-retaliation provisions of the FCA regarding the scope of activity protected from retaliation. First, Section 1079(b) of the Dodd-Frank Act amends the FCA by expanding the concept of protected activity to include "lawful acts done by the employee, contractor, or agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of [the False Claims Act]." As a result, 31 U.S.C. § 3730(h) now encompasses a broader range of activities that could further a potential qui tam action or could halt a violation of the FCA, including protections against associational discrimination. Second, Section 1079(b)(1)(c) amends the FCA to remove the statutory language of ''agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter'' and instead inserts ''agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." This new statutory language should increase both the scope of protected activity and the class of individuals protected under the FCA's anti-retaliation provision, but the extent to which the courts are willing to interpret this amended language remains to be seen.

To prove that an employer retaliated against an employee in violation of 31 U.S.C. § 3730(h), an employee must demonstrate that: (1) she engaged in protected activity; and (2) that she was discriminated against because of her protected activity. See U.S. ex rel. Hefner v. Hackensack Univ. Med. Ctr., 495 F.3d 103, 111 (3d Cir. 2007); see also U.S. ex rel Cooper v. Gentiva Health Servs., Inc., 2003 WL 22495607 (W.D. Pa. 2003) (denying summary judgment on FCA retaliation claim where plaintiff successfully pled he engaged in protected activity where he internally complained of the employer's fraudulent conduct). To demonstrate that she was discriminated against "because of" conduct in furtherance of a False Claims Act suit, an employee must show that her employer had knowledge of the protected activity and that her employer's retaliation was motivated, at least in part, by the employee's engaging in protected activity. See Hefner, 495 F.3d at 111.

The employee may bring her whistleblower claim in federal district court. 31 U.S.C.A. § 3730(h)(2) (West 2008). Section 1049(b) of the Frank-Dodd Act amends the FCA to provide that an employee may bring a civil action under the FCA against a retaliatory employer up to three years after the date of the retaliation. See 31 U.S.C.A. § 3730(h)(2) (West 2008). This amendment provides much-needed clarity, in light of a recent Supreme Court decision that required plaintiffs to engage in the uncertain task of identifying and applying the most analogous state-law statute of limitations to FCA retaliation claims. See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 545 U.S. 409 (2005) (holding that the FCA's six-year statute of limitations did not govern FCA civil actions for retaliation).

The remedies available to a successful claimant are generally designed to "make the employee whole." 31 U.S.C. § 3730(h). Remedies include reinstatement with seniority, double back pay with interest, and special damages including attorneys' fees. Id.

VII. OTHER STATUTORY WHISTLEBLOWER PROTECTIONS

The following list includes other statutory whistleblower protections and a brief description of their coverage:

1. **Section 11(c) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 660(c)**: Protects employees from discharge or discrimination based on instigation of or participation in a proceeding against his or her employer for occupational hazards prohibited by the act. The employee must file a complaint with OSHA within 30 days of the retaliation.

2. **The Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105**: Provides protection for employees of commercial motor vehicles to report noncompliance with safety, health, or security regulations. The employee must file a complaint with OSHA within 180 days.

3. **The Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 U.S.C. § 2651**: Provides employee protection against retaliation for reporting violations of environmental laws relating to asbestos in elementary and secondary school systems, whether public or non-profit private. The employee must file a complaint with OSHA within 90 days.

4. **The International Safe Container Act of 1977 (ISCA), 46 U.S.C. §** 80507: Protects employees who report unsafe cargo containers. The employee must file a complaint with OSHA within 60 days.

5. **The Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. § 300j-9(i)**: Under the SDWA, any public building—whether constructed before or after the passage of the SDWA—must have lead-free drinking water. Additionally, any new construction—public or private—must have lead-free drinking water. Employees are protected from retaliation for reporting potential violations of the law and must file a complaint with OSHA within 30 days.

6. **The Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1367**: Prohibits the release of hazardous levels of pollution into any waters that constitute a natural habitat for living things. An employee who reports any misrepresentations or noncompliance by the employer is protected from employment retaliation. The employee must file a complaint with OSHA within 30 days.

7. **The Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. § 2622**: The TSCA regulates the thousands of industrial chemicals produced or imported into the United States to protect the health and safety of humans and the environment. It sets guidelines for the EPA's testing, inspection, and tracking of industrial chemicals. TSCA also allows the EPA to ban the manufacture of chemicals it considers to pose an unreasonably high risk. An employee who reports potential violations of the TSCA or in any way assists in proceedings or investigations of such violations is protected from employment retaliation. The employee must file a complaint with OSHA within 30 days.

8. **The Solid Waste Disposal Act of 1976 (SWDA), 42 U.S.C. § 7001**: The SWDA regulates the management of hazardous waste. It also provides funds for and assists in the development of technology and facilities to recover energy and other commodities from waste. An employee is protected for reporting abuses of funding and assistance, violation of waste management requirements, or other potential violations of the Act. The employee must file a complaint with OSHA within 30 days.

9. **The Clean Air Act of 1977 (CAA), 42 U.S.C. § 7622**: The Clean Air Act is a comprehensive statute establishing standards for air quality, acceptable pollutants, and related reporting and inspection procedures. The specific provisions of the statute are exhaustive, but whistleblower cases are most often brought when a company misrepresents its emissions levels or fails to comply with reporting and cleanup standards. An employer may not retaliate against an employee who reports any misreporting or noncompliance by the employer. The employee must file a complaint with OSHA within 30 days.

10. **The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610**: CERCLA provides for liability, compensation, and emergency response for hazardous substances that have been released or are threatening to be released into the environment. Employees are protected if they have provided information to the local or federal government, have filed a complaint about their employer under the Act, or have participated in any CERCLA proceeding – for example by testifying or aiding in an investigation – against her or his employer. An employee must file a complaint with OSHA within 30 days.

11. **The Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851**: This ERA established the Nuclear Regulatory Commission. Under the Act, an employee is

protected for reporting violations of the nuclear safety provisions contained therein. An employee must file a complaint with OSHA within 180 days.

12. **The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121**: Protects employees who provide information to or assist in an investigation by the government or an internal investigation regarding a potential violation of the laws of the Federal Aviation Administration (FAA) or any other federal law or regulation related to air carrier safety. An employee must file a complaint with OSHA within 90 days.

13. **The Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C. § 60129**: Protects employees who provide information to or assist in an investigation of potential violations of pipeline safety standards, inspection and repair requirements, and training requirements for employees performing sensitive tasks. An employee must file a complaint with OSHA within 180 days.

14. **The Federal Rail Safety Act of 1970 (FRSA), 49 U.S.C. § 20109**: Protects employees providing information to or assisting in an investigation by a federal regulatory or law enforcement agency, a member or committee of Congress, or their employer about a potential violation of any laws pertaining to: (1) railroad safety and security or (2) gross fraud, waste, or abuse of funds intended for safety and security. Additionally, an employee is protected for reporting hazardous safety and security conditions, refusing to work under such conditions, or refusing to authorize the use of any safety- or security-related equipment, track, or railroad structures. An employee must file a complaint with OSHA within 180 days.

15. **The National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C. § 1142**: The NTSSA is the metropolitan transit system equivalent of the FRSA. It similarly protects employees, contractors, and subcontractors of metropolitan transit systems from retaliation for reporting potential violations of laws concerning (1) public transportation safety and security or (2) gross fraud, waste, or abuse of funds intended for safety and security. Additionally, an employee is protected for reporting hazardous safety and security conditions, refusing to work under such conditions, or refusing to authorize the use of any safety- or security-related equipment, track, or railroad structures. Employees must file a complaint with OSHA within 180 days.

VIII. <u>RETALIATION CLAIMS</u>

Workplace retaliation claims – in which the plaintiff alleges that he or she was retaliated against for having exercised his or her rights under the anti-discrimination statutes – are an increasingly important component of employment discrimination litigation. Retaliation claims are comparable to, but distinct from, statutory discrimination and harassment claims.

A. Definition

Section 704 of Title VII protects employees from retaliation for opposing discriminatory or harassing practices or for participating in an inquiry into discriminatory or harassing practices. The "opposition" clause makes it unlawful to discriminate against a person who "has opposed any practice made an unlawful employment practice by this subchapter," and the "participation" clause similarly makes it unlawful to discriminate against a person who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C.A. § 2000e-3(a) (West 2011).

The references to "this subchapter" means that this statute protects only those who have opposed or participated in any matter under Title VII; equivalent statutory protections are available under the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), the Equal Pay Act ("EPA"), and as of 2008, Section 1981. See CBOCS West, Inc. v. Humphries, 553 U.S. 442, 452 (2008); see also Gómez-Pérez v. Potter, 128 S. Ct. 1931 (2008) (holding that public employees may bring a retaliation claim under § 633a(a) of the ADEA, even though the statute lacked explicit language creating that cause of action).

Public employees may also be able to invoke the First Amendment, through a Section 1983 claim, 42 U.S.C. § 1983 (West 2008), to protect their workplace speech or conduct from retaliatory actions, so long as that speech or conduct is made as a citizen and not as part of their official duties — when public employees make statements pursuant to their official duties, the First Amendment does not protect them from discipline. See Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). Whistleblower statutes, state or federal, may provide another remedy for public or private employees. See generally E.S. Callahan & T.M. Dworkin, "The State of Whistleblower Protection," 38 Am. Bus. L.J. 99 (2000) (collecting state statutes and case law); S.M. Kohn, Concepts and Procedures in Whistleblower Law (2001) (collecting federal statutes and case law); R.G. Vaughn, "State Whistleblower Statutes and the Future of Whistleblower Protection," 51 Admin. L. Rev. 581 (1999). Detailed discussion of these topics is beyond the scope of this chapter, except for the Sarbanes-Oxley Act of 2002, which is discussed in Part I, infra. Practitioners should determine their availability for any given plaintiff.

Most states have state anti-retaliation statutes, many of which are modeled after Title VII, and which may cover employees who are not covered by Title VII (such as those who work for employers with fewer than 15 employees). Two high-profile cases from the Supreme Court of California illustrate the broad scope of some state statutes. Miller involved discrimination, harassment, and retaliation claims brought by several female employees at a state prison who alleged that the warden engaged in sexual favoritism by promoting a co-worker who was also his mistress. Miller v. Dep't of Corrections, 115 P.3d 77, 90 (Cal. 2005). The Court held it was not necessary for plaintiffs to "elaborate to their employer on the legal theory underlying the complaints they are making." Id. at 96. Rather, all they had to do to state their retaliation claim was to show that they made a complaint "of sexual favoritism in the workplace," and suffered consequences as a result. Id.; see also B. Egelko, "State High Court Rules on Sex with the Boss;

'Casting Couch' Way to the Top can be Deemed Harassment," San Francisco Chronicle, July 19, 2005 at B-1. Yanowitz, which involved a sales manager for a cosmetics company who alleged that her employer took adverse actions against her after she repeatedly refused to comply with a supervisor's demands that she fire a dark-skinned female sales associate and replace her with "somebody hot," or "one who looks just like" a young, blond customer, the Court held that the plaintiff had set forth sufficient facts to survive summary judgment. Yanowitz v. L'Oreal USA, Inc., 116 P.3d 1123 (Cal. 2005). The court further held that refusal to follow a supervisor's discriminatory directive can constitute protected activity under the state anti-retaliation statute, even if the employee does not tell the supervisor why she so refused. The Court further held that the plaintiff could use the continuing violation doctrine to show the totality of circumstances relating to the retaliatory actions. Id.at 1140; see also B. Egelko, "Woman's Suit Against L'Oreal to go to Trial; Court Rules Alleged Retaliatory Actions a Civil Rights Matter," San Francisco Chronicle, Aug. 12, 2005, at B-4; M. Dolan, "Court Widens Protections for Workers Sensing Bias," L.A. Times, Aug. 12, 2005.

Retaliation claims are an increasingly important component of litigation and EEOC charges. In fiscal year 1997, 22.6% of all charges filed with the EEOC included a retaliation claim; this increased to 34.3% of all charges by fiscal year 2008. See EEOC, "Charge Statistics FY 1997 Through FY 2008" (Mar. 26, 2009), http://archive.eeoc.gov/stats/charges.html.

In 1998, the EEOC issued a revised version of its Compliance Manual section on "Retaliation" which provides a useful overview of the EEOC's guidelines and analytical framework for investigating retaliation claims. See EEOC Compliance Manual, Section 8, Retaliation (May 20, 1998), http://www.eeoc.gov/policy/docs/retal.pdf. This Manual acknowledges, in several areas, that the EEOC disagrees with the current case law, or that the EEOC has adopted a position not taken by a majority of the courts. Thus, this Manual is, in part, a statement of what the EEOC believes the law should be.

Courts have recognized that a plaintiff can succeed on her retaliation claim, even if the underlying discrimination or harassment is found not to be actionable, so long as the plaintiff had a reasonable belief that she was engaging in protected conduct, or that the employer was engaging in illegal conduct:

> An employee does not need to demonstrate that the action he protests is actually a violation of Title VII, instead he need only to have a good faith belief that his behavior is protected conduct. Moreover, in order to prevail on a retaliation claim, a plaintiff need not prove the merits of the underlying discrimination complaint. A verdict, therefore, can contain both a finding against a plaintiff on his Title VII claim, but for a plaintiff on his Title VII retaliation claim.

Bianchi v. Philadelphia, 183 F. Supp. 2d 726, 739 (E.D. Pa. 2002) (internal citations omitted); E.E.O.C. v. Luce, Forward, Hamilton, & Scripps, 303 F.3d 994, 1005 (9th Cir. 2002); see also Evans v. Port Auth. of N.Y. & N.J., 192 F. Supp. 2d 247, 278 (S.D.N.Y. 2002) ("If anything, the evidence supporting a finding of retaliation is stronger than the evidence supporting a finding of discrimination because the jury need not take the logical step from plaintiff's [protected conduct] to his race.").

The Tenth Circuit addressed the question of "whether a plaintiff may maintain a retaliation claim based on a subjective good-faith belief that the challenged conduct violated Title VII." Crumpacker v. Kansas Dep't of Human Resources, 338 F.3d 1163, 1171 (10th Cir. 2003). The Tenth Circuit noted that several prior circuit cases had allowed such claims, but the Supreme Court's intervening decision in Clark County Sch. Dist. v. Breeden 532 U.S. 268 (2001) (per curiam), had rejected that approach, to the extent that it was based on a plaintiff's unreasonable belief. "The Supreme Court, however, recently rejected by implication any interpretation of Title VII that would permit plaintiffs to maintain retaliation claims based on an unreasonable good-faith belief that the underlying conduct violated Title VII." Crumpacker, 338 F.3d at 1171 (citing Breeden, 532 U.S. at 269). Thus, "the Supreme Court's decision in Clark supersedes and overrules this court's prior decisions, to the extent they interpreted Title VII as permitting retaliation claims based on an *unreasonable* good-faith belief that the underlying conduct violated Title VII." Id. However, a reasonable good-faith belief remains protected under the anti-retaliation statute. "By permitting plaintiffs to maintain retaliation claims based on a reasonable good-faith belief that the underlying conduct violated Title VII, employees are able to report what they reasonably believe is discriminatory conduct without fear of reprisal. Strong policy supports allowing plaintiffs to maintain such claims." Id. at 1172. The Third Circuit agrees that the plaintiff must have an objectively reasonable belief, in good faith, that the activity he or she opposes is unlawful under Title VII. Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006) (citing Breeden, 532 U.S. at 271).

The Fourth Circuit further expounded upon what constitutes a reasonable good faith belief regarding the underlying conduct in a retaliation claim. In Jordan v. Alternative Resources Corp., 458 F.3d 332 (4th Cir. 2006), plaintiff heard a coworker, who was watching television exclaim "they should put those two black monkeys in a cage with a bunch of black apes and the let the apes f-k them." Id. The coworker was speaking to the television set in response to a report about the D.C. snipers. Id. at 336. Plaintiff complained about the coworker's comments to various supervisors and alleges that he was retaliated against after having complained. Id. at 337. Relying on the holding in EEOC v. Navy Federal Credit Union, 424 F.3d 397, 406 (4th Cir. 2005), which established the objective-reasonableness inquiry, the court held that an employee could not have reasonably believed that the conduct he complained about – a racially hostile work environment – violated Title VII when such conduct was isolated, not directed at him and there was no suggestion of any plan in motion to create a hostile work environment or that a hostile work environment was likely to occur as a result of one co-worker's singular racist comment. Jordan, 458 F.3d at 340-341. Denying the plaintiff's petition for rehearing en banc, the Fourth Circuit summarily affirmed its prior holding which maintained that "as the law stands, Title VII does not create a claim for every employee who complains about the potential for Title VII violations or about other employees' isolated racial slurs." Jordan v. Alternative Res. Corp., 467 F.3d 378, 380 (4th Cir. 2006), cert. denied, Jordan v. Alternative Res. Corp., 127 S. Ct. 2036

(2007) The court reasoned that despite an employee's contention that a single isolated incident might eventually lead to a Title VII violation, the law does not protect employees in connection with their complaints about potential or future violations. Id. at 379. Therefore, an employee's retaliation claim should be based on an "objectively reasonable belief that a violation is actually occurring based on circumstances that the employee observes and reasonably believes." Jordan, 458 F.3d at 341.

Title VII discrimination and harassment claims can be based on a "mixed motive" element allowing the plaintiff to recover when she "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (West 2008). However, there is an on-going debate among the federal appellate courts about whether this statutory "mixed motive" element is available for Title VII retaliation claims, since the statute does not include retaliation for engaging in protected conduct in its listing of five categories of protected status. While the Fifth Circuit has held that mixed-motive standard applies to Title VII claims, Smith v. Xerox Corp., 602 F.3d 320, 332 (5th Cir. 2010), several other circuit courts have held that it does not. See Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001); Matima v. Celli, 228 F.3d 68, 81 (2d Cir. 2000); Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 552 n.7 (4th Cir. 1999); Speedy v. Rexnord Corp., 243 F.3d 397, 406 (7th Cir. 2001); Woodson v. Scott Paper Co., 109 F.3d 913, 932-36 (3d Cir. 1997); Tanca v. Nordberg, 98 F.3d 680, 682-85 (1st Cir. 1996); Norbeck v. Basin Electric Power Coop., 215 F.3d 848, 851 (8th Cir. 2000). The D.C. Circuit has refrained from deciding this question. Borgo v. Goldin, 204 F.3d 252, 255 n.6 (D.C. Cir. 2000); see also Porter v. Natsios, 414 F.3d 13, 19 (D.C. Cir. 2005) (citing Borgo). However, a recent D.C. district court held that as a matter of law a plaintiff could not bring a "mixed motive" retaliation claim under Title VII. See Hayes v. Sebelius, No. 1:08-cv-0150-RCL, 2011 WL 316043 (D.D.C. Feb. 2, 2011).

Against this backdrop, the impact of the Supreme Court's decision in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), remains unclear. In Desert Palace, the Court held that direct evidence of unlawful motivation is not required to proceed under a mixed-motive theory. Id. at 101. The Court based its decision largely on the language of § 2000e-2(m), which would suggest that its holding applied only to the discrimination claims within the section's orbit. The 5th Circuit has held that because of Desert Palace, the mixed-motive scheme of § 2000e-2(m) applies to retaliation claims as well. See Smith, 602 F.3d 320, 332 (5th Cir. 2010) (holding that direct evidence is not required in order to obtain a mixed-motive jury instruction in a Title VII retaliation case); Warren v. Terex Corp., 328 F. Supp. 2d 641, 646 (N.D. Miss. 2004). In Smith, the plaintiff alleged that her employer discriminated against her based on her gender and age, and retaliated against her for filing charges with the EEOC, in violation of Title VII. At trial, the district court concluded that the case had been tried as a mixed-motive retaliation case and instructed the jury on a mixed-motive theory of causation, who on the retaliation claim found for Smith. Upholding the district court's ruling, the 5th Circuit reasoned:

> Because the text of § 2000e-3(a) neither requires nor prohibits a specific evidentiary showing, construing it to include the mixed-motive framework to be shown by circumstantial evidence does no violence to the statute. Title VII does not affirmatively require direct evidence from a plaintiff, whether in a discrimination or retaliation context, and we can see no basis for requiring a heightened evidentiary showing in order to obtain a motivating factor jury instruction predicated only on the theory of liability alleged in the complaint (discrimination versus retaliation)...We therefore hold that to the extent we have previously required direct evidence of retaliation in order to obtain a mixed-motive jury instruction in a Title VII case, our decisions have been necessarily overruled by Desert Palace. [The employee] therefore was not required to present direct evidence of retaliation in order to receive a mixed-motive jury instruction.

Id. at 332. However, Smith is a marked departure from other recent decisions regarding the application of Desert Palace's mixed-motive theory to retaliation claims. See Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962-63 (7th Cir.2010) (noting with approval McNutt v. Board of Trustees, 141 F.3d 706, 709 (7th Cir.1998), which prohibited mixed-motive retaliation claims); Bozeman v. Per-Se Technologies, Inc., 456 F.Supp.2d 1282, 1338 n.143 (N.D. Ga. 2006) (rejecting plaintiff's contention that Desert Palace's mixed-motive theory applies to retaliation claims); Funai v. Brownlee, 369 F. Supp. 2d 1222, 1228 (D. Haw. 2004) (holding that Desert Palace does not apply to retaliation claims and applying Price Waterhouse defense);).

Given the current weight of the authority, it seems likely that employers will continue to have a full mixed-motive defense to Title VII retaliation claims under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The D.C. Circuit explained the consequences of this defense:

> Where, on the other hand, the plaintiff argues that the [retaliatory] action resulted from mixed motives, a slightly different model operates. A plaintiff asserting mixed motives must persuade the trier of fact by a preponderance of the evidence that unlawful retaliation constituted a substantial factor in the defendant's action. Price Waterhouse, 490 U.S. at 276 (O'Connor, J., concurring); id. at 259 (White, J., concurring). When the plaintiff successfully shows that an unlawful motive was a substantial factor in the employer's action, the defendant may seek to prove in response that it would have taken the contested action even absent the discriminatory motive. See id. at 244-45 (Brennan, J.). If the defendant fails to persuade the trier of fact by a preponderance of the evidence that it would have taken the action even absent the discriminatory motive, the plaintiff will prevail. See id. at 276 (O'Connor, J., concurring).
>
> This burden on a defendant in a mixed-motives case has been characterized both as an affirmative defense, id. at 246 (Brennan, J.), and as a shifting burden of persuasion, id. at 274 (O'Connor, J., concurring). The question of characterization is "semantic," and need not be definitively resolved. See id. at 259 (White, J., concurring). What is noteworthy, however, is that under Price

> Waterhouse a defendant who is guilty of acting pursuant to an unlawful motive may nonetheless escape liability by proving that it would have made the same decision in the absence of the unlawful motivation. In short, the ultimate burden of persuasion as to the facts constituting the defense properly falls on the defendant in a mixed-motives case, because the plaintiff has proven that unlawful motivation constituted a substantial factor in the defendant's action.

Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 202-03 (D.C. Cir. 1997) vacated on other grounds, 1998 WL 988451 (D.C. Cir. Feb. 25, 1998); see also Rose v. New York City Bd. of Educ., 257 F.3d 156, 161-62 (2d Cir. 2001); Kubicko, 181 F.3d at 552-53 & n.8 (collecting cases).

B. Elements of the Claim: Direct Evidence Framework

If the employee has direct evidence of retaliation, then the McDonnell Douglas burden shifting framework does not apply. As the Seventh Circuit concisely explained, summary judgment should be denied if the employee has direct evidence of retaliation, unless the employer can show, by unrebutted evidence, that it would have made the same adverse employment action against the plaintiff:

> The plaintiff in a retaliation case should have two (and only two) distinct routes to obtaining/preventing summary judgment. One, the more straightforward, the one that is unrelated to McDonnell Douglas, is to present direct evidence (evidence that establishes without resort to inferences from circumstantial evidence) that he engaged in protected activity (filing a charge of discrimination) and as a result suffered the adverse employment action of which he complains. If the evidence is uncontradicted, the plaintiff is entitled to summary judgment. If it is contradicted, the case must be tried unless the defendant presents unrebutted evidence that he would have taken the adverse employment action against the plaintiff even if he had had no retaliatory motive; in that event the defendant is entitled to summary judgment because he has shown that the plaintiff wasn't harmed by retaliation.

Stone v. City of Indianapolis Public Utilities Div., 281 F.3d 640, 644 (7th Cir. 2004). If the plaintiff does not have direct evidence of retaliation, courts should apply the McDonnell Douglas burden shifting framework, as discussed in the next section.

C. Elements of the Claim: Burden-Shifting Framework

Retaliation claims are typically brought under the McDonnell Douglas burden shifting framework. Thus, there are three components to the case. First, the plaintiff must prove her prima facie retaliation claim. Second, the burden then shifts to the defendant to provide a "legitimate, nondiscriminatory reason" for the action(s) taken. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Third, if the defendant has satisfied its burden of production, then the plaintiff must be "afforded a fair opportunity" to show that the defendant's proffered reason is pretextual. Id. at 804.

The Supreme Court has clarified the level of proof required at each stage and the consequences for a party's failure to satisfy its burden, while keeping the tripartite framework. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509-19 (1993); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-56 (1981). Under Hicks, if the plaintiff makes a prima facie case, then the defendant's burden is not discharged unless the defendant "introduces evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." Hicks, 509 U.S. at 509 (emphasis in original). If the defendant meets its burden, then the trier of fact proceeds to the ultimate question — instead of going through the third McDonnell Douglas step — and decides whether to reject defendant's proffered reasons. Id. at 511. If the trier of fact rejects these reasons, then the ultimate burden of persuasion remains with the plaintiff. Id. Alternatively, if the defendant fails to rebut plaintiff's prima facie case, then "the court must award judgment to the plaintiff as a matter of law." Id. at 509.

Courts have consistently recognized three elements to plaintiff's prima facie retaliation claim: (1) opposition to discrimination or participation in covered proceedings; (2) adverse action; (3) causal connection between the protected activity and the adverse action. See EEOC Compliance Manual, Section 8, at 3. The exact wording used by the various circuits differs somewhat. The Sixth Circuit requires four elements, although its additional element (defendant's knowledge) is inherent in the "causal connection" element of the traditional three-element test. The following cases represent recent statements of the circuit courts for retaliation under Title VII.

District of Columbia Circuit. The plaintiff "must show that (1) she engaged in statutorily protected activity; (2) her employer took an adverse personnel action against her; and (3) a causal connection exists between the two." Carney v. American Univ., 151 F.3d 1090, 1095 (D.C. Cir. 1998); see also Jarmon v. Genachowski, 720 F. Supp. 2d 30, 42 (D.D.C. 2010); Broderick v. Donaldson, 338 F. Supp. 2d 30, 38 (D.D.C. 2004).

First Circuit. The plaintiff "must demonstrate that (1) he engaged in protected conduct under Title VII; (2) he suffered an adverse employment action; and (3) the adverse action is causally connected to the protected activity." Hernández-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998); see also Agusty-Reyes v. Dept. of Educ. of Puerto Rico 601 F.3d 45, 57 (1st Cir. 2010)

Second Circuit. The plaintiff "must show (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action." Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998), abrogated in part on other grounds by Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002); see also Gorzynski v. Jetblue Airways Corp. 596 F.3d 93, 110 (2d. Cir. 2010)

Third Circuit. The plaintiff "must show that: (1) he or she engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action." Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001); see also Hare v. Potter, 200 Fed. Appx. 120, 127 (3d Cir. 2007).

Fourth Circuit. The plaintiff must prove "that (1) plaintiff engaged in a protected activity, such as filing an EEO complaint; (2) the employer took adverse employment action against plaintiff; and (3) a causal connection existed between the protected activity and the adverse action." Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998); see also Anderson v. G.D.C, Inc., 281 F.3d 452, 458 (4th Cir. 2002); Schamann v. O'Keefe, 314 F. Supp. 2d 515, 528 (D. Md. 2004).

Fifth Circuit. The plaintiff "must show that: (1) he engaged in an activity protected by Title VII; (2) he was subjected to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action." Davis v. Dallas Area Rapid Transit, 383 F.3d 309, 319 (5th Cir. 2004).

Sixth Circuit. This circuit requires four elements, with the additional element (defendant's knowledge) interposed between the first and second elements of the traditional three-element test. The plaintiff "must show that: (1) he engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action." Hafford v. Seidner, 183 F.3d 506, 515 (6th Cir. 1999); accord Allen v. Michigan Dep't of Corrections, 165 F.3d 405, 412 (6th Cir. 1999); see also Bukta v. J.C. Penny Co., Inc., 359 F. Supp. 2d 649, 671 (N.D. Ohio 2004). Since the discussion in this chapter is based on the three-element test, practitioners in the Sixth Circuit should refer to these two cases, and the earlier cases cited therein, for guidance on interpreting the unique aspects of the Sixth Circuit's retaliation test.

Seventh Circuit. The Seventh Circuit reformulated its framework for retaliation cases based on indirect evidence by requiring a "similarly situated" analysis, which requires the plaintiff to show that after engaging in protected conduct, "only he, and not any similarly situated employee who did not file a charge [or other protected conduct], was subjected to an adverse employment action even though he was performing his job in a satisfactory manner." Stone, 281 F.3d at 644; see also Sylvester v. SOS Children's Villages Illinois, Inc., 453 F.3d 900, 902 (7th Cir. 2006). The court explained that "If the defendant presents no evidence in response, the plaintiff is entitled to summary judgment. If the defendant presents unrebutted evidence of a noninvidious reason for the adverse action, he is entitled to summary judgment. Otherwise there must be a trial." Id.

Eighth Circuit. The plaintiff "must show that (1) she engaged in statutorily protected conduct; (2) suffered an adverse employment action; and (3) there is a causal connection between her protected conduct and the adverse employment action." Zhuang v. Datacard Corp., 414 F.3d 849, 856 (8th Cir. 2005).

Ninth Circuit. The plaintiff "must show that: (1) he or she engaged in a protected activity; (2) suffered an adverse employment action; and (3) there was a causal link between the two." Pardi v. Kaiser Found. Hosps., 389 F.3d 840, 849 (9th Cir. 2004).

Tenth Circuit. The plaintiff must show "(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." Somoza v. Univ. of Denver, 513 F.3d 1206, 1212 (10th Cir. 2008); see also Medlock v. Ortho Biotech Inc., 164 F.3d 545, 549-550 (10th Cir. 1999) (using direct evidence method instead of burden-shifting framework).

Eleventh Circuit. The plaintiff must "show that: (1) she engaged in an activity protected under Title VII; (2) she suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008); see also Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009).

D. Protected Activity

1. Opposition

The EEOC has provided four generic examples of opposition activity, all of which must be read, pursuant to the statute, as involving unlawful discrimination: (1) "threatening to file a charge or other formal complaint alleging discrimination;" (2) "complaining to anyone about alleged discrimination against oneself or others;" (3) "refusing to obey an order because of a reasonable belief that it is discriminatory;" and (4) "requesting reasonable accommodation or religious accommodation." See EEOC Compliance Manual, Section 8, at 4-6. The fourth provision does not apply to racial or sexual harassment plaintiffs, although some may also have a claim related to their religion or disability.

While the lower courts had been inconsistent on the issue, in a recent case the Supreme Court held that a plaintiff was protected by the anti-retaliation provisions of the opposition clause of Title VII where the opposition was made in response to her employer's investigation of a coworker's complaints rather than on the employee's own initiative. Crawford v. Metropolitan Gov't of Nashville & Davidson County, TN, 129 S. Ct. 846 (2009). In Crawford, the plaintiff's employer was conducting an internal investigation into alleged sexual harassment by the agency's employee relations director and asked her whether she had witnessed such inappropriate behavior. Id. at 849. The plaintiff informed the interviewer that she had observed sexually inappropriate behavior and had in fact repeatedly been the victim of such behavior. Id. While she had not initiated the complaint, the plaintiff and the other two accusers were terminated shortly after the conclusion of the investigation. Id. The District Court and the Sixth Circuit held that Ms. Crawford had not met the standard for "opposition" because she had not initiated the complaint but rather had only passively answered questions pursuant to an internal investigation. Id. at 850. The Supreme Court, noting that the phrase "oppose" was not defined in Title VII, applied the ordinary dictionary meaning of the word and held that "opposition" requires nothing more active than expressing an opinion resistant to or disapproving of the alleged discriminatory behavior. Id. It noted that this result was consistent with the EEOC guidelines: "When 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." Id. at 851 (quoting 2 EEOC Compliance Manual §§ 8-II-B(1), (2), p. 614:0003 (Mar.2003)).

The district courts are split as to whether resisting a supervisor's sexual advances, without more, constitutes protected activity, although a majority of the courts that have ruled on this issue "have held that an employee's refusal to submit to sexual advances constitutes protected activity." Little v. Nat'l Broad.Co., 210 F. Supp. 2d 330, 385-86 (S.D.N.Y. 2002) (collecting cases). The Second, Third and Seventh Circuit have all noted the existence of this issue but did not rule upon it. Id. at 385. In Little, the district court held that "rejecting sexual advances from an employer does constitute protected activity," on the grounds that "sexual harassment by an employer or supervisor is an unlawful practice, and an employee's refusal is a means of opposing such unlawful conduct." Id. at 386.

Protected opposition to unlawful discrimination may come in the form of protests, including informal expressions of one's views through an established grievance procedure, employer-wide meetings, etc. However, the clause does not protect certain insubordinate or non-productive behavior. Matima v. Celli, 228 F.3d 68, 78-79 (2d Cir. 2000) ("The law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination . . . . But not all forms of protest are protected . . . . For instance, Title VII does not constitute a license for employees to engage in physical violence in order to protest discrimination."). Thus, federal appellate courts have held "that disruptive or unreasonable protests against discrimination are not protected activity under Title VII and therefore cannot support a retaliation claim." Id. at 79 (collecting cases).

Neither the opposition clause nor the participation clause protects employees who assist their employers during Title VII investigations, when the employee alleges that he is subsequently retaliated against by his supervisors for having taken the employer's side against the employee. Twisdale v. Snow, 325 F.3d 950, 952 (7th Cir. 2003) (Title VII's retaliation provision is "for the protection of the discriminated against, and not their opponents."). In Twisdale, the plaintiff's supervisors were upset that the plaintiff had not sided with the employee who complained of discrimination. However, the Tenth Circuit has held that a city attorney who represented an alleged violator during an EEOC mediation qualified as a protected participant under the participation clause. See Kelley v. City of Albuquerque, 542 F3d 802, 813 (10th Cir. 2008).

Similarly, the opposition clause does not provide a direct cause of action for retaliation against an employer based solely upon association with a person engaged in protected activity. See Reed v. Int'l Union, UAW, 569 F.3d 576 (6th Cir. 2009). In a case where a plaintiff reported numerous instances of co-worker harassment and was subjected to a hostile work environment, including threats of violence and offensive comments and an alleged denied promotion based upon her relationship with an African-American coworker, the court denied her claim of retaliation because only one comment could be traced to her advocacy conduct. See Barrett v. Whirlpool Corp., 556 F.3d 502 (6th Cir. 2009).

2. Participation

Participation activity essentially tracks the statutory definition, i.e., having "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a) (West 2008).

In a case analogous to Crawford, supra, dealing with the participation clause rather than the opposition clause, the Eleventh Circuit rejected the argument that participation in an employer's internal investigation pursuant to an EEOC charge should not be treated as protected activity:

> Here, we recognize that, at least where an employer conducts its investigation in response to a notice of charge of discrimination, and is thus aware that the evidence gathered in that inquiry will be considered by the EEOC as part of its investigation, the employee's participation is participation "in any manner" in the EEOC investigation. Accordingly, by participating in her employer's investigation conducted in response to an EEOC notice of charge of discrimination, Clover engaged in statutorily protected conduct under the participation clause.

Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1353 (11th Cir. 1999), 176 F.3d at 1353, accord Abbott v. Crown Motor Co., 348 F.3d 537, 543 (6th Cir. 2003). It is important to note, however, that the Crawford holding is broader than Clover in that it does not require that the internal investigation be pursuant to an EEOC investigation.

Interestingly, even the alleged harasser may be protected under the participation clause, if the harassed employee is able to elicit deposition or trial testimony from the harasser that corroborates her claims and the employer then retaliates against the harasser solely because of his testimony which increased the employer's liability. Merritt v. Dillard Paper Co., 120 F.3d 1181, 1185 (11th Cir. 1997). This latter scenario may be less problematic for the employer, since the employer can still fire the accused harasser for his conduct, independent of the harasser's testimony. Id. at 1191 ("Dillard could have fired Merritt after he gave his deposition testimony, as well, so long as it did not fire him because he 'testified, assisted, or participated in any manner' in a Title VII investigation or proceeding."). Further, the employer may be able to invoke the mixed-motives defense, which would preclude the fired harasser from obtaining monetary damages (other than attorney's fees) or reinstatement. 42 U.S.C.A. § 2000e-5(g)(2)(B) (Westlaw 2011).

3. Reasonable Belief Requirement

To obtain protection under either the opposition or the participation clause, it is not necessary that the employee actually prove that the harassment or discrimination complained about was unlawful: "She need only demonstrate that she had a *good faith, reasonable belief* that the underlying challenged actions of the employer violated the law." Quinn, 159 F.3d at 769; see Prise v. Alderwoods Group, Inc., 657 F.Supp.2d 564 (W.D.Pa.2009); Elston v. UPMC-Presbyterian Shadyside, No. 2:06-CV-329, 2007 WL 3120291, at *9 (W.D. Pa. Oct. 27, 2007) (citing Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir.1996). Even if a plaintiff does not have a valid claim under Title VII, he could still prevail on his retaliation claim if the complaint was based upon a good-faith reasonable belief of a Title VII violation. Id. If a plaintiff complains that the employer failed to give her a promotion and pay increase, but does not attribute that failure to gender or other status-based discrimination, then the plaintiff was not engaged in protected activity. Hunt v. Nebraska Public Power Dist., 282 F.3d 1021, 1028-29 (8th Cir. 2002). The First Circuit similarly rejected claims of protected activity where the alleged opposition or participation activity did not evidence a reasonable belief of a violation of anti-discrimination law. Fantini v. Salem State College, 557 F.3d 22 (1st Cir. 2009) (finding no protected activity where employee simply complained about male directors' violations of conflict of interest and disclosure laws). Thus, in addition to showing that the employee subjectively believed that there was an "unlawful employment practice," plaintiffs are also required to demonstrate that there was sufficient evidence to raise a material issue of fact that their belief was objectively reasonable. See Dixon v. the Hallmark Cos., Inc., 627 F.3d 849, 857 (11th Cir. 2010)

4. Examples of Protected Activity under Title VII

In addition to the foregoing interpretations of opposition and participation, the retaliation cases referenced below provide non-exhaustive examples of what the courts have considered to be protected activity:

(1) Plaintiff "complained to [] management about what she believed constituted discriminatory practices" and was fired "after she failed to appear for the [in-house] deposition concerning [another plaintiff's] employment at Cort Furniture." Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996).

(2) Plaintiff filed “various grievances against [defendant]” with the EEOC and the Michigan Civil Rights Commission. Allen, 165 F.3d at 412.

(3) Plaintiff filed two EEOC charges alleging discrimination. Berman v. Orkin Exterminating Co., 160 F.3d 697, 702 (11th Cir. 1998).

(4) Plaintiff’s letter to outside investigators “purports to complain of racism, sexism, and retaliation.” Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 373 (5th Cir. 1998).

(5) Plaintiff filed a complaint with the New York Department of Human Rights. Quinn, 159 F.3d at 769.

(6) Plaintiff was terminated one month after his deposition in his Title VII case; defendants’ termination letter stated that their decision was “a result of issues raised in your deposition.” Medlock, 164 F.3d at 550.

(7) Plaintiff informed defendant by letter that she intended “to file suit” regarding her discrimination claims. Carney, 151 F.3d at 1095; see also Jones v. Washington Metro. Area Transit Auth., 205 F.3d 428, 433 (D.C. Cir. 2000) (supervisor retaliated against plaintiff “for protected activity, namely the 1985 letter . . . complaining of Department discrimination”); Ferguson v. Small, 225 F. Supp. 2d 31, 38 (D.D.C. 2002) (“Accordingly, the Court finds that the [plaintiff’s attorney’s] letter to defendant’s General Counsel constituted protected activity.”).

(8) Plaintiff complained to supervisors and to corporate headquarters about racial harassment. Roberts v. Roadway Express, Inc., 149 F.3d 1098, 1103 (10th Cir. 1998).

(9) Plaintiff provided information to the employer during its internal investigation of another employee’s sexual harassment charge. Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1353 (11th Cir. 1999).

(10) Plaintiff conducted investigation of sexual harassment claim against the head of his employee’s union, who then retaliated by denying him a promotion. McMenemy v. Rochester, N.Y., 241 F.3d 279, 284-85 (2d Cir. 2001).

(11) Plaintiff actively participated in an internal diversity program “aimed at promoting the hiring of people of color and fostering relationships with minority firms,” after which his supervisors increasingly criticized his work, downgraded his evaluations, and transferred him to another project. Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1214, 1220-21 (10th Cir. 2002).

(12) Plaintiff testified at a deposition in a reverse-race discrimination lawsuit, after which he was involuntarily demoted and lost his monthly stipend. Marra v. Philadelphia Hous. Auth., 497 F.3d 286, 292 (3d Cir. 2007).

(13) Plaintiff complained to her supervisor, the CEO of the company, about the CFO's discriminatory and harassing behavior in an email, after which she was terminated. Flitton v. Primary Residential Mortg., Inc., 238 Fed. Appx. 410, 413 (10th Cir. 2007).

(14) Plaintiff alleged that her employer was overpaying invoices to a company owned by a friend of the president of her employer, was overpaying sales agents based on personal friendships, and that kickbacks were paid for the purchase of lumber, thereby "circumvent[ing] the company's system of internal accounting controls in violation of Section 13 of the Exchange Act," after which she was fired. Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1376-77 (N.D. Ga. 2004).

5. In-House Counsel and Limitations on Protected Activity

The Fifth Circuit has recognized an important limitation by holding that the protected activity must itself constitute lawful conduct and that "any betrayal of a client's confidences that breaches the ethical duties of the attorney places that conduct outside Title VII's protections." Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 376 (1998) (plaintiff, an attorney, violated Louisiana State Bar Rules of Professional Conduct by her unauthorized disclosure of confidential information about her employer to third party). But see Willy v. Admin. Review Bd., 423 F.3d 483, 500 (5th Cir. 2005) (rejecting as a matter of federal common law that the "attorney-client privilege is a *per se* bar to retaliation claims under federal whistleblower statutes").

Other Circuit Courts have allowed in-house counsel to use attorney-client privileged information in a retaliation suit. In Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173 (3d Cir. 1997), the Third Circuit held that a former in-house attorney could maintain a Title VII suit for retaliatory discharge. The Third Circuit reasoned that "concerns about the disclosure of client confidences in suits by in-house counsel" did not alone warrant dismissal of the plaintiff's action. Rather the Third Circuit suggested that a district court should balance the needed protection of sensitive information with the in-house counsel's right to maintain the suit by using protective measures at trial to safeguard confidential information. See also Van Asdale v. Int'l Game Tech., 577 F.3d 989 (9th Cir. 2009).

In the SOX context, courts have been more favorable to the plight of in-house counsel. The Administrative Review Board for the Department of Labor has held that in-house counsel are permitted to rely on statements or documents covered by the attorney-client privilege in support of a SOX whistleblower complaint. See Jordan v. Sprint Nextel Corp., ARB No. 2006-SOX-41 (ARB Sept. 30, 2009). The Ninth Circuit has issued a similar holding.

The state courts are split as to whether in-house counsel can reveal client confidences to her attorney in order to prove a wrongful discharge or other discrimination claim. Courts from California, Oregon, Connecticut, Montana, Utah, Tennessee, and Kansas have held that attorneys can reveal client confidences in such circumstances, contrary to an older decision from Illinois. Compare Meadows v. KinderCare Learning Centers, Inc., No. Civ. 03-1647-HU, 2004 WL 2203299, at *2-*4 (D. Or. Sept. 29, 2004) (in-house counsel could bring state wrongful discharge claims based on refusal to implement discriminatory employment practices, but did not state Title VII retaliation claims) and Spratley v. State Farm Mut. Auto. Ins. Co. 78 P.3d 603, 610 (Utah 2003) (in-house counsel "may, consistent with their duties under the Rules of Professional Conduct, disclose matters relating to their representation of State Farm in a suit against State Farm, so long as those disclosures are reasonably necessary to that claim") and O'Brien v. Stolt-Nielsen Transp. Group, Ltd., 838 A.2d 1076, 1080-82 (Conn. Super. Ct. 2003) (collecting cases) and Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852 (Tenn. 2002) (allowing plaintiff to bring wrongful discharge claim based on her refusal to violate her ethical obligations) and Burkhart v. Semitool, Inc., 300 Mont. 480, 5 P.3d 1031 (Mont. 2000) (plaintiff can reveal confidential attorney-client information to establish her employment discrimination claim) and Heckman v. Zurich Holding Co. of America, 242 F.R.D. 606, 608 (D. Kan. 2007) (permitting an in-house counsel plaintiff to maintain a retaliatory discharge claim) and General Dynamics Corp. v. Superior Court, 7 Cal 4th 1164 (Cal. 1994) (instructing lower courts to use equitable measures such as protective orders or sealing documents to enable in-house plaintiffs to use potentially privileged materials to prove their claims) with Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d. 104 (Ill. 1991) (in-house counsel cannot bring action for retaliatory discharge).

A 2005 Maryland decision explained the contrary approach of the Illinois courts as turning on the fact that in Maryland (and some other states), Rule 1.6, Md. Rules Prof. Conduct, allows an attorney to reveal confidential information "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." Hoffman v. Baltimore Police Dep't, 379 F. Supp. 2d 778, 782 (D. Md. 2005). In Hoffman, the court also found that the employer had waived the attorney-client privilege as to numerous documents that the employer had submitted to the EEOC as part of its response to the employee's charge of discrimination. Id. at 784-85.

An intermediate appellate court in Florida held that an in-house counsel's attorney in a whistleblower suit could not be disqualified on the basis that the client made reasonably necessary disclosures to her attorney to help prove her claims. See Alexander v. Tandem Staffing Solutions, Inc., 881 S.2d 607, (Fla. Dist. Ct. App. 2004), reh'g den., Sept. 22, 2004; accord Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 310-11, (Cal. Ct. App. 2001).

In 2010, the Minnesota Supreme Court held that an attorney serving as in-house counsel would only be protected for blowing the whistle if he could demonstrate to a court that he was acting above and beyond his assigned responsibilities, for example by reporting the misconduct to law enforcement or other governmental authorities. See Kidwell v. Sybaritic, Inc., 784 N.W. 2d 220 (Minn. 2010).

The American Bar Association has explored this issue and concluded that in some circumstances, in-house counsel can bring a wrongful discharge claim. See American Bar Ass'n, Formal Ethics Opinion 01-424, "A Former In-House Lawyer may Pursue a Wrongful Discharge Claim Against her Former Employer and Client as long as Client Information Properly Is Protected" (Sept. 22, 2001) (collecting cases); see generally B. Marshall, "In Search of Clarity: When Should In-House Counsel Have the Right to Sue For Retaliatory Discharge?," 14 Geo. J. Legal Ethics 871 (2001) (same). The California legislature passed a government attorney whistleblower bill that "would authorize an attorney who learns of improper governmental activity, as defined, in the course of representing a governmental organization to urge reconsideration of the matter and to refer it to a higher authority in the organization." Assembly Bill 363 (Aug. 28, 2002). However, former Governor Gray Davis vetoed this bill on the grounds that it would have interfered with the need for candor and confidentiality in the attorney-client relationship. See "California Governor Unexpectedly Vetoes Government Attorney Whistleblower Bill," 71 U.S.L.W. 2243 (Oct. 15, 2002). Thus, practitioners who are faced with this situation will need to ascertain the applicable case law and state ethical rules and opinions, bearing in mind that not all states have addressed this issue. See also R. Adams & D. S. Katz, "Lawyers Who 'Tell' Risk All," Nat'l L.J., Mar. 29, 2004, at 22; J. Gibeaut, "Telling Secrets: When In-House Lawyers Sue Their Employers, They Find Themselves in the Middle of the Debate on Client Confidentiality," ABA J., Nov. 2004, at 38-44, 73; M. Lyons & P.F. Butcher, "Too Many Loyalties," Legal Times, Apr. 19, 2004, at 49; S. Reisinger, "Every Lawyer's Nightmare," Legal Times, Oct. 20, 2003, at 25.

E. Retaliation Claims under Section 1981 of the Civil Rights Act of 1866

Section 1981 of the Civil Rights Act of 1866 was enacted to provide additional rights for freed slaves, and it has since been applied to persons of various races and colors. The original statute as enacted states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to the like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.A. § 1981(a) (West 2008). With the Civil Rights Act of 1991 ("1991 Act"), Pub.L. No. 102-166, 105 Stat. 1071, Congress expanded the definition of the phrase "make and enforce contracts" for § 1981 claims, allowing a cause of action for post-formation discriminatory modification and termination of contracts.

Originally, retaliation claims were not actionable under Section 1981, which unlike Title VII did not explicitly provide protection from retaliation for participation or opposition activity.

Since then, the Supreme Court has addressed the issue and has held that § 1981 retaliation claims are actionable. CBOCS West, Inc., v. Humphries, 553 U.S. 442 (2008).

In CBOCS West, Hedrick G. Humphries, an African-American former assistant manager of a Cracker Barrel restaurant, sought relief under Section 1981 after CBOCS West, Inc. (Cracker Barrel's owner) terminated him from employment because of racial bias and because he had complained to managers that a fellow assistant manager had dismissed another black employee for race-based reasons. The Court concluded that Section 1981 includes retaliation claims. CBOCS West, 128 S.Ct. at 1954-55. The Court based its decision on the long history of construing Section 1981 and Section 1982 alike because of the sister statutes' common language, origin, and purpose, and the fact that Section 1982 had long been held to encompass a retaliation action. Id. at 1957-58. It also based its decision on the intent and effect of the 1991 Act, which was to explicitly expand the scope of Section 1981 to include post-contract-formation conduct. Id. at 1958. After CBOCS West, then, retaliation claims are actionable under Section 1981.

The McDonnell Douglas burden-shifting framework applies equally to Title VII and § 1981 claims, and, thus, the particular elements of a § 1981 retaliation claim are that plaintiff (1) was engaged in a statutorily protected activity, (2) plaintiff's employer took an adverse personnel action against her, and (3) a causal connection existed between the two. See Glymph v. Dist. of Columbia, 211 F. Supp. 2d 152, 154 (D.D.C. 2002); Carney, 151 F.3d at 1092-93, 1095. Any § 1981 claim, including retaliation claims, must contain some race-based connection, but courts have held that membership in a protected class is not an element of a prima facie retaliation claim. See, e.g., Glymph, 211 F. Supp. at 154 (holding that a former white employee, who complained about race discrimination within the company, was not required to allege membership in protected class to state § 1981 retaliation claim). The race-based element must lie in the protected activity, not in the race of the plaintiff. Id.; see also Farmer v. Lowe's Companies, Inc., 188 F. Supp. 2d 612, 618 (W.D.N.C. 2001) (holding that a female director's complaints that women and racial minorities were under represented at corporation and that corporation engaged in discrimination were "protected activity" under § 1981) Furthermore, a successful § 1981 retaliation claim requires that the activity in question involve vindication of contractual equality. See Welzel, 436 F. Supp. 2d at 118 (holding that plaintiff admonishing an executive for derogatory racial comments made at closed door meeting was not a vindication of any contractual rights, precluding a § 1981 retaliation action).

F. Adverse Employment Action

The second element of plaintiff's *prima facie* retaliation case is that he or she has experienced an adverse employment action. The EEOC has proposed a broad universe of adverse actions:

> The most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. Other types of

> adverse actions include threats, reprimands, negative evaluations, harassment, or other adverse treatment.
>
> Suspending or limiting access to an internal grievance procedure also constitutes an "adverse action.

EEOC Compliance Manual, Section 8, at 11. The EEOC's definition was a critical response to several circuits in which courts had generally limited retaliation to ultimate employment actions as being "unduly restrictive" given that the statutes "prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." See EEOC Compliance Manual, Section 8, at 13-14 (collecting cases).

The Supreme Court decided this issue in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S.Ct. 2405 (2006), by unanimously adopting a broad objective standard of adverse employment actions similar to the one found in the expansive proposal recommended by the EEOC. Prior to Burlington Northern, there was a significant split in the circuits as to what constitutes adverse employment action for retaliation claims under Title VII. The Fifth and Seventh Circuits recognized only adverse actions rising to the level of an ultimate employment decision. Johnson v. Cambridge Indus., Inc., 325 F.3d 892, 902 (7th Cir. 2003); Krause v. City of La Crosse, 246 F.3d 995, 1000-01 (7th Cir. 2001); Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997) abrogated by Burlington Northern, 548 U.S. 53, 126 S.Ct. 2405, ("To hold otherwise would be to expand the definition of "adverse employment action" to include events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee -- anything which *might* jeopardize employment in the future. Such expansion is unwarranted."); see also McGuire v. City of Springfield, Ill., 280 F.3d 794, 797 (7th Cir. 2002) ("An employer's action can be called 'retaliation' only if it makes the employee worse off on account of the protected activity.").

The Supreme Court, however, rejected the view that Title VII's anti-retaliation provision was limited to an employer's actions affecting the terms and conditions of employment and, thus, abrogated these circuit courts' prior decisions limiting the definition of adverse actions to ultimate employment decisions. Instead, the Supreme Court held that the Title VII anti-retaliation protections extend to actions by an employer that are not employment related or that take place outside of the workplace. Burlington Northern, 548 U.S. at 62-68. The Court further emphasized that "the standard for judging harm must be objective" and interpreted this standard broadly. Id. at 54. It only requires the plaintiff to show that "a reasonable employee would have found the challenged action materially adverse" and that challenged action "might well have dissuaded a reasonable worker from [protected conduct]." Id. at 67-68.

In Burlington Northern, the plaintiff was transferred to a less desirable position in the company after complaining about gender discrimination and the suspended for insubordination after complaining about the transfer. Id. at 63. The Court found that these discriminatory acts fell within the definition of "adverse action" under anti-retaliation laws, but, in expanding the definition, it emphasized an employee is not protected from any trivial act by an employer that creates a minor annoyance. Id. at 67-68. Instead, it is the context that matters; "the significance of any act of retaliation will often depend upon the particular circumstances." Id. For example, "a supervisor's refusal to invite an employee to lunch is normally trivial, a non-actionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." Id. at 67-70.

The courts have been quick to adopt the Burlington Northern broad "adverse action" standard in application to a variety of non-ultimate employer actions. See Thompson v. North American Stainless, LP, 131 S. Ct. 863 (2011) (termination of plaintiff's fiancé qualifies as a materially adverse employment action); Hicks v. Bains, 593 F.3d 159 (2d 2010) (holding that adjusting employees' shift times was sufficient to demonstrate materially adverse action, but not submitting false memoranda concerning employees' work); O'Neal v. City of Chicago, No. 09-1716 (7th Cir. Nov. 17, 2009) (holding that reassignments of plaintiff were adverse actions because they were repetitive and negatively affected the employee's opportunities for advancement); Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1090 (10th Cir. 2007) (denying summary judgment because defendants' threats to ruin plaintiff's family and marriage and opposition to her employment benefits constituted adverse actions that would have dissuaded a reasonable person from engaging in protected activity); Carmona-Rivera v. Puerto Rico, 464 F.3d 14, 19, (1st Cir. 2006) (adopting the Burlington standard despite the finding that the employer's delays in fulfilling the plaintiff's request for accommodation were not sufficient to prove adverse action); Kessler v. Westchester County Dept. of Social Servs., 461 F.3d 199, 209 (2d Cir. 2006) (holding that plaintiff "presented sufficient evidence to create a genuine triable issue as to whether the reassignment to which he was subjected could well have dissuaded a reasonable employee in his position from complaining of unlawful discrimination."); Moore v. City of Philadelphia, 461 F.3d 331, 346, (3d Cir. 2006) (finding "that a reasonable jury could conclude that a lateral transfer from the district where a police officer had earned goodwill and built positive relations with the community over time is the kind of action that might dissuade a police officer from making or supporting a charge of unlawful discrimination within his squad."); Pryor v. Wolfe, 196 Fed. Appx. 260, 262 (5th Cir. 2006) (finding that the plaintiff met the Burlington standard for adverse action where the defendant withheld his paycheck); Pegues v. Mineta, No.04-2165, 2006 WL 2434936, at *7 (D.D.C. Apr. 26, 2006) (finding that the plaintiff's retaliation claims were not "trivial," "petty," or "minor" where the defendant's actions directly impinged on his ability to be promoted.); Storey v. Illinois State Police, No. 05-cv-4011-JPG, 2006 WL 2385283, at *23 (S.D. Ill. Aug. 17, 2006) (holding that a jury could find that the defendant's various actions of taking away the plaintiff's responsibilities, giving her a "needs improvement" evaluation and a "constructive transfer," and denying her an open position for which she applied "would dissuade a reasonable individual from pursuing her rights under Title VII"); Gentry v. Wells Fargo, No. C-1-04-20, 2006 WL 2319987, at *16 (S.D. Ohio Aug. 9, 2006) (adopting the Burlington standard despite the fact that plaintiff's retaliation claim failed because an employer requiring an employee to comply with reasonable performance requirements and disciplining for noncompliance does not constitute an adverse employment action).

Despite this broadened definition of adverse action, courts have made clear that not all negative employment actions constitute adverse employment actions within the meaning of relevant statutes. For example, in Taylor v. Solis, 571 F.3d 1313 (D.C. Cir. 2009), the court held that a number of alleged reprisals were not materially adverse, including criticism for negative behaviors, slowing processing of employee's caseload and refusing to recommend the employee for a job that ultimately was never authorized. Similarly, in Stewart v. Mississippi Transp. Comm'n, No. 08-60747 (5th Cir. Oct. 21, 2009), the court held that finding personal items removed and locks changed, along with suffering ostracism, was not materially adverse in the circumstances, and that even forced leave was not adverse where the plaintiff suffered minimal consequences and no apparent injury to reputation. In Hunter v. Sec'y of the U.S. Army, 565 F.3d 986 (6th Cir. 2009), the court held that under the circumstances, delay of one assignment, transfer, neutral and uniform application of policy requiring permission to leave desk and a single insulting remark did not rise to the level of materially adverse action. Other courts, looking at the totality of the circumstances, have found that similar adverse actions were *not* materially adverse. See, e.g., Morales-Vallellanes v. Potter, 605 F.3d 27 (1st Cir. 2010) (holding that selective enforcement of breaks policy, temporary rotation of employee's preferred "distribution" of duties, and alteration of rest days in job posting did not amount to a materially adverse employment action); Foshee v. Ascension Health-IS, Inc., 384 Fed. Appx. 890 (11th Cir. 2010) (employer's requirement that employee attend counseling session and sign behavioral agreement and its refusal to communicate with her while she was on leave or consider accommodating her did not constitute adverse employment action); Sutherland v. Missouri Dept. of Corrections, 580 F.3d 748 (8th Cir. 2009) (lower performance rating and shunning by coworkers); Littleton v. Pilot Travel Centers, LLC, 568 F.3d 641 (8th Cir. 2009) (correction notice on employee's performance).

On the other hand, a few courts have tried to remain more favorable to the employer by placing emphasis on enforcing a higher standard for proving that the alleged action taken against the employee be "significant" rather than "trivial." See Clark v. Potter, No. 1:05-CV-201-TWT, 2006 WL 2520348, at *11 (N.D. Ga. Aug. 30, 2006) (holding that although the new standard for adverse actions "falls short of ultimate employment decisions," the plaintiff must still demonstrate "some threshold level of substantiality," finding that employer's denial of FMLA leave, a letter of warning, and a 7-day suspension did not meet the threshold) (internal quotes omitted); Martin v. Merck & Co., Inc., 446 F. Supp. 2d 615, 638, (W.D. Va. 2006) (holding that the defendant removing plaintiff "from the relief operator position fails to support a prima facie case of retaliation because it would not dissuade a reasonable worker from making or supporting a charge of discrimination" by emphasizing that trivial incidents are still insufficient to support a claim of retaliation under the Burlington standard). Despite this more conservative interpretation made by some courts, the new standard in Burlington is still a marked victory for proponents of employee protections.

G. Causal Connection

The final element is that there must be a causal connection, or nexus, between the protected activity and the adverse action. "[A] causal connection is established where the plaintiff presents evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." Williams v. W.D. Sports, N.M., Inc., 497 F.3d at 1091 (quoting MacKenzie v. City and County of Denver, 414 F.3d 1266, 1279 (10th Cir. 2005) (internal quotations omitted). In Williams, the court found that the defendant's statement, "[i]f you will drop your Human Rights claim, I won't fight you on your unemployment," created a reasonable inference of direct causal link between plaintiff's complaint and the adverse action taken against her. Id. at 1092.

In Breeden, 532 U.S. 268, the Supreme Court held that there was no evidence of causation when the employer had already initiated adverse employment action, but had not fully implemented it at the time of the protected conduct. The lower federal courts have recognized this defense to retaliation claims. See, e.g., Warren v. Ohio Dep't of Public Safety, 24 Fed. Appx. 259, 266 (6th Cir. 2001); Bates v. Variable Annuity Life Ins. Co., 200 F. Supp. 2d 1375, 1383 (N.D. Ga. 2002); Ianetta v. Putnam Investments, Inc., 183 F. Supp. 2d 415, 426-27 (D. Mass. 2002); McFadden v. State Univ. of N.Y., College at Brockport, 195 F. Supp. 2d 436, 455 (W.D.N.Y. 2002); Kaplan v. City of Arlington, 184 F. Supp. 2d 553, 564 (N.D. Tex. 2002). As one district court concluded, "an employee who knows that some adverse action is in the works cannot manufacture a claim for retaliation, based solely on the anticipated adverse action itself, merely by complaining of discrimination before the action is finally taken." McFadden, 195 F. Supp. 2d at 455.

In Breeden, the Supreme Court reversed the Ninth Circuit and upheld summary judgment for the employer, concluding that the employer either did not know that the plaintiff had filed an EEOC charge or knew about the filing of the charge 20 months earlier before the proposed adverse employment action, thereby defeating the causation element.

In 1994, Ms. Breeden, a School District employee, met with her supervisor and another male employee to review the psychological evaluation reports of four job applicants. The report of one applicants disclosed that the applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." The supervisor read the statement aloud, and, looking at Breeden, said, "I don't know what that means." The male employee said, "Well, I'll tell you later," upon which both men laughed. Ms. Breeden complained about the comment to the employee who made it, to her supervisor, and to two Assistant Superintendents. Id. at 269-70.

In August 1995, Ms. Breeden filed a charge of discrimination with the EEOC. In April 1997, several months after receiving the right-to-sue letter, Ms. Breeden filed a Title VII retaliation lawsuit in which she alleged that she was punished for these complaints, including being transferred to a different position. Id. at 269, 271-72. The Ninth Circuit held that Ms.

Breeden's opposition was protected "if she had a reasonable, good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment." Id. at 270.

In a per curiam opinion issued without hearing oral argument, the Supreme Court reversed, concluding that no reasonable person could have believed that the single incident violated Title VII's standard. The comment and chuckling by Breeden's co-worker "cannot remotely be considered 'extremely serious' as our cases require." Id. at 271. Secondly, Breeden was unable to show a causal connection between her protected activities and her transfer as the employer was "contemplating" the transfer before Breeden filed suit. Id. at 272. "Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not definitively determined, is no evidence whatever of causality." Id. Further, the Court held that even if the employer did know about the employee's filing of an EEOC charge, it knew 20 months prior to the adverse action, thereby negating an inference of causality. Id. at 273. The Court rejected the employee's claim that the EEOC's issuance of a right-to-sue letter could support temporal causation, since the employee took no part in that action. Id.

The lower federal courts have applied Breeden's holdings to retaliation claims with respect to (1) the temporal gap between the protected activity and the adverse employment action and (2) protected activity that occurs after the employer has already decided to initiate adverse employment activity (discussed in Part C, supra).

The Supreme Court in Breeden held that 20 months was too long a gap between protected conduct and adverse employment action to prove temporal proximity, which is consistent with prior holdings of the lower courts, and the subsequent case law has similarly recognized that temporal gaps of 8 to 24 months cannot support temporal proximity. See, e.g., Mayers v. Laborers' Health & Safety Fund of North America, 478 F.3d 364, 369 (D.C. Cir. 2007) (finding an eight-month gap between the protected activity and the adverse employment action too long to infer causation); Grosz v. The Boeing Co., 455 F. Supp. 2d 1033, 1044 (C.D. Cal. 2006) (finding a 10 months separation between a plaintiff's termination and her protected activity insufficient temporal proximity to prove a causal connection between the two); Shanklin v. Fitzgerald, 397 F.3d 596, 604 (8th Cir. 2005) (10 months); Vasquez v. County of Los Angeles, 349 F.3d 634, 646 (9th Cir. 2003) (13 months); Bishop v. Bell Atl. Corp., 299 F.3d 53, 60 (1st Cir. 2002) (12-30 months); Bernales v. County of Cook, 37 Fed. Appx. 792, 797-98 (7th Cir. 2002) (22 months); Scurto v. Commonwealth Edison Co., 37 Fed. Appx. 213, 216-17 (7th Cir. 2002) (10 months); Warren, 24 Fed. Appx. at 266 (11 months); Taylor v. Procter & Gamble Dover Wipes, 184 F. Supp. 2d 402, 417 (D. Del. 2002) (one to two years); Adams v. Calvert County Public Sch., 201 F. Supp. 2d 516, 520 (D. Md. 2002) (24 months); Hill v. Taconic Developmental Disabilities Servs. Office, 181 F. Supp. 2d 303, 322 (S.D.N.Y. 2002) (1.5 years); Figueroa v. City of New York, 198 F. Supp. 2d 555, 570 (S.D.N.Y. 2002) aff'd 118 Fed. Appx. 524 (2d Cir. 2004) ("Due to the passage of time [over a year] between the filing and these actions, there is no basis for inferring a causal connection."); see also Delk v. Arvinmeritor, Inc., 179 F. Supp. 2d 615, 624 (W.D.N.C. 2002) (4 months probably too long), aff'd 40 Fed. Appx. 775 (4th Cir. 2002) (per curiam).

In contrast, where the employee made repeated complaints during the same year as the adverse action, then temporal proximity existed to support causation. See Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 563 (6th Cir. 2004) (holding that plaintiff could establish prima facie causation element based on three-month gap between complaint and retaliatory action); Ciavarra v. BMC Software, Inc., 2008 WL 352273 (S.D. Tex. Feb. 7, 2008) (denying summary judgment for defendant where plaintiffs alleged protected activity occurred three months before very negative job evaluation); Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 25-26 (1st Cir. 2004) (finding one month sufficient to establish prima facie temporal connection); Winarto v. Toshiba Am. Electronics Components, Inc., 274 F.3d 1276, 1287 & n.10 (9th Cir. 2001) ("Winarto's several complaints . . . closely preceded the [adverse] evaluation."); see also Turner v. Hous. Auth. of Jefferson County, 188 F. Supp. 2d 1066, 1079 (S.D. Ill. 2002) ("The fact that the plaintiff was fired two weeks after his complaints to management is a short enough time to establish the necessary causal link."); Elries v. Denny's, Inc., 179 F. Supp. 2d 590, 599 (D. Md. 2002) ("[P]laintiff shows retaliatory conduct that began shortly after filing a complaint, thus showing prima facie causation, even though actual termination came much later."); Little, 210 F. Supp. 2d at 386 ("Muro engaged in protected activity when he filed a complaint with the NBC Ombudsperson in June 1998. His assignment two months later to undesirable shifts . . . raises a genuine issue of fact as to whether Muro's protected activity was followed so closely by discriminatory treatment as to establish causation by temporal proximity.").

Moreover, where an ultimate employment action took place 19 months after the filing of an EEOC charge, the Sixth Circuit Court of Appeals still found temporal proximity based on earlier steps taken by the employer. See Upshaw v. Ford Motor Co., 576 F.3d 576 (6th Cir. 2009). The court found that at the beginning of the EEOC investigation process for her first of several claims, an employee's managers began developing a timeline of her employment and asking employees to send them information about her complaints to HR. The court also found that the plaintiff was subjected to heightened scrutiny based upon an email between employees months before the plaintiff's termination that discussed the "type of documentation that [the managers] were interested in with regard to [plaintiff]" and said that something "need[ed] to be done with [plaintiff]."

The First Circuit rejected the employer's claim that an eleven month temporal gap between the employee's filing of a complaint and his demotion, since "temporal proximity is but one method of proving retaliation." Che v. Massachusetts Bay Transp. Auth., 342 F.3d 31, 38 (1st Cir. 2003). There was "ample evidence of disparate and discriminatory treatment from which a jury could find a causal connection between Che's demotion and his earlier lawsuits," id., particularly disparate disciplinary actions and racist remarks. For example:

> . . . after Johnson disciplined Che for the argument, Che fainted and his union representative asked Johnson to call for help. In response, Johnson said "I think the chink is faking it." There was evidence at trial that Johnson and another MBTA supervisor referred to Che as a "chink" on other occasions. In sum, this evidence of discriminatory and disparate treatment is sufficient to meet "the relatively low threshold showing necessary to establish a prima facie case."

Id. at 39. The First Circuit found that the employer's proffered non-discriminatory reasons were pretextual in light of the strong evidence of disparate treatment. Id. at 40. ("In light of the evidence described above, we agree with the district court that there was sufficient evidence from which a jury could find that the MBTA's stated reason for Che's demotion was pretextual."). The First Circuit also found that the plaintiff suffered a retaliatory hostile work environment. Id.

The Seventh Circuit reversed the district court's determination that a three month gap between plaintiff's complaint and her termination was insufficient to state a retaliation claim, since temporal proximity was only one aspect of causation. See Sitar v. Indiana Dep't of Transp., 344 F.3d 720, 728 (7th Cir. 2003). Critically, "Here, a trier of fact could find that the causal relationship existed from much more. Baker was visibly upset upon receiving Price's findings and recommendations against him. He decided almost immediately, at the same meeting, that he would terminate Sitar." Id. Thus, the deposition testimony of the supervisor was sufficient to prove causation: "Sitar's complaint, legitimized by Price's findings, cast a shadow over Baker's performance, and he was embarrassed when he learned about Price's report in the presence of his supervisors. A reasonable jury could find that Baker punished Sitar for complaining about his misconduct, and not because her performance was allegedly unsatisfactory. Therefore, we find that Sitar has established a *prima facie* case of retaliation under the direct method." Id. at 729. Moreover, even under the indirect method, it is not necessary for the plaintiff to prove causation. Id. ("Lack of causation should not have been the district court's sole basis for granting summary judgment. In *Stone,* we held that for a plaintiff proceeding under the indirect method, causation would no longer be a part of her *prima facie* burden.") (citing Stone, 281 F.3d 640).

The Ninth Circuit emphasized that since Breeden was an appeal from a grant of summary judgment, its standard is not directly applicable to a post-trial motion, in which the court must decide whether the plaintiff's "evidence allowed the jury to draw a reasonable inference of retaliatory motive." Winarto, 274 F.3d at 1287 n.10 ("Breeden does not control this case."). In such circumstances, the Ninth Circuit emphasized that the timing of events and the supervisor's known animus could support the jury's verdict for the plaintiff on her retaliation claim:

> [Plaintiff's] several complaints, any one of which or combination of which could have triggered [the supervisor's] low evaluation of [plaintiff], closely preceded the evaluation. The evidence of timing of the events in this case and the evidence

> of [the supervisor's] hostility toward [plaintiff] could support a jury's reasonable inference that [the supervisor] had a retaliatory motive.

Id.

Thus, factors that courts consider in determining the presence of retaliatory motive are negative or hostile remarks made, or actions taken, by the supervisor upon learning of the employee's protected conduct. These remarks and actions, even if anecdotal, can constitute direct evidence of retaliation. See, e.g., Azzaro v. County of Allegheny, 110 F.3d 968, 974 (3d Cir. 1997) ("[A] reasonable juror could infer that Braun knew Azzaro was for some reason on a 'hit list,' and that he sought to aid the efforts to 'get' Azzaro by including her discharge as part of his reorganization plan."); Lee v. New Mexico State Univ. Bd. of Regents, 102 F. Supp. 2d 1265, 1277, 1280 (D.N.M. 2000) (plaintiff "was subject to heightened scrutiny and surveillance" and her "colleagues were also asked to monitor her actions" in order to provide "negative feedback regarding plaintiff"). In Williams v. W.D. Sports, N.M., Inc., the defendant made several threats to the plaintiff to expose rumors about her sexual activity and threatened to oppose her application for unemployment benefits, saying, "If you will drop your Human Rights [discrimination] claim, I won't fight you on your unemployment." Id. at 1084. The court denied defendants' motion for summary judgment, finding that these statements should go to the jury and permit an inference of direct causal link. Id. at 1092.

Another factor is whether the decision-maker was the "cat's paw" — i.e. an apparently neutral person whose actions were impermissibly influenced by those who had a retaliatory motive. For example, the Fifth Circuit, in a Title VII gender retaliation case, stated that the alleged innocence of a final decisionmaker cannot insulate the company from liability: "[W]hen the person conducting the final review serves as the 'cat's paw' of those who were acting from retaliatory motives, [then] the causal link between the protected activity and adverse employment action remains intact." Gee v. Principi, 289 F.3d 342, 346 (5th Cir. 2002) (reversible error to grant summary judgment where decision maker was improperly influenced by others); but cf. Furline v. Morrison, Nos. 04-CV-1029 & 04-CV-1114 (D.C. Cir. July 24, 2008) (holding that under the D.C. Human Rights Act even if a biased supervisor motivated the disciplinary investigation of an employee, if the investigation was "independent," then the supervisor's bias will not be imputed to the investigation).

Courts also look to whether an employer has punished the plaintiff more seriously than other employees for the same alleged infractions. See, e.g., Smith v. Riceland Foods, Inc., 151 F.3d 813, 820 (8th Cir. 1998) (plaintiff "presented evidence that management at Riceland confronted her about filing her charge and that other employees who had not filed charges of discrimination were not investigated as closely or punished as severely as she was"); Marx v. Schnuck Markets, Inc., 76 F.3d 324, 329 (10th Cir. 1996) (plaintiff was "written up" after filing retaliation complaint); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1525 (11th Cir. 1991) superseded by statute on other grounds Civil Rights Act of 1991, Pub.L. No. 102-166, § 101, 105 Stat. 1071 (1991) ("The pronounced increase in negative reviews and the careful scrutiny of

Weaver's performance, coupled with testimony suggesting that management personnel were acutely aware of Weaver's EEOC charge, is sufficient to establish a causal link for Weaver's prima facie case of retaliatory discharge."); Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990) ("The causal connection between the protected activity and the adverse employment action can be established indirectly with circumstantial evidence, for example, . . . through evidence of disparate treatment of employees who engaged in similar conduct . . ."); Lee, 102 F. Supp. 2d at 1280 ("Such heightened scrutiny and differential treatment indicates that [supervisor] was acting out of a retaliatory mind set and intended to create a difficult work environment for plaintiff.").

Jury findings of retaliation are commonly affirmed based on evidence that the employer's stated reason was incorrect, particularly so where the stated reason is potentially mendacious. See, e.g. King v. Preferred Technical Group, 166 F.3d 887, 894 (7th Cir. 1999) (stated reason that plaintiff was fired for failure to produce missing doctor's slips belied by evidence that the reason was false and potentially mendacious). Reasons that are intertwined with an employee's conduct during the resulting investigation of her complaint may also be suspect. See Gilooly v. Missouri Dep't of Health & Senior Servs., 421 F.3d 734 (8th Cir. 2005) (reversing summary judgment on retaliation claim in which plaintiff was terminated for a "lack of credibility" during the investigation of his complaints and holding that "questions related to the very substance of the investigation are 'not sufficiently independent' and therefore within the scope of the protected activity").

The failure of the employer to follow established protocols or procedures can also constitute evidence of retaliatory motive. McClam v. Norfolk Police Dep't, 877 F. Supp. 277, 283 (E.D. Va. 1995) ("The most telling evidence of pretext here is proof that the articulated reason for refusing to transfer McClam based on his disciplinary record was not consistently applied in the past" to other employees).

Direct evidence of causation is not necessary since the plaintiff may use circumstantial evidence to demonstrate causation. See, e.g., Aman, 85 F.3d at 1086 (five items of circumstantial evidence sufficient to prove causation); Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993) ("The defendant's awareness of the protected statement, however, may be established by circumstantial evidence."); Russell, 160 F. Supp. 2d at 264 ("Thus, where direct evidence of causation is missing temporal proximity may provide the necessary nexus to meet the third element of the plaintiff's case."). However, "conclusory statements" alone are insufficient to prove causation. Tarin, 123 F.3d at 1265.

Causation is not susceptible to simple rules or line-drawing; the Seventh Circuit has stated the plaintiff "must demonstrate that the [defendant] would not have taken the adverse action 'but for' the protected expression." Adusumilli v. City of Chicago, 164 F.3d 353, 363 (7th Cir. 1998) (citations and internal quotation marks omitted). The Eleventh Circuit has taken a slightly more lenient reading by holding that causation "is satisfied if the evidence shows that the protected activity and the adverse action are not totally unrelated." Berman, 160 F.3d at 701 (collecting cases). The Sixth Circuit has recognized that "no one factor is dispositive" but evidence of differential treatment "or that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation." Allen, 165 F.3d at 413. The District of Columbia Circuit has required both knowledge of the protected activity and temporal proximity. Carney, 151 F.3d at 1095 (citing Mitchell v. Baldrige, 759 F.2d 80, 86 (D.C. Cir. 1985)).

The Seventh Circuit concluded that where the female plaintiff in a sexual harassment and retaliation case was herself terminated because she engaged in "highly inappropriate" workplace conduct towards male employees, the plaintiff could not maintain a retaliation claim based on having reported harassment by another co-worker. See Hall v. Bodine Elec. Co., 276 F.3d 345, 359 (7th Cir. 2002) ("[A]n employee's complaint of harassment does not immunize her from being subsequently disciplined or terminated for inappropriate workplace behavior."). Here, the plaintiff admitted that she had engaged in sexual bantering, but claimed that it did not rise to the level of Title VII harassment. The Seventh Circuit rejected this argument, concluding that "Bodine was still permitted to terminate her. In fact, the company's failure to do so would have most likely constituted a Title VII violation (i.e., sex discrimination against Lopez), as well as subjecting the company to future liability if another complaint of harassment was filed against Hall." Id. at 359.

H. Retaliatory Lawsuits Against Employees

1. Declaratory Judgment Lawsuits By Employers

Some employers have used the Declaratory Judgment Act, 28 U.S.C. § 2201, in an attempt to obtain a court ruling that they have not discriminated against employees who have complained of discriminatory or harassing conduct or have filed charges with the EEOC. See, e.g., L. Bernabei, "Reverse Litigation (SLAPP) Lawsuits and Employment Discrimination Law: Impermissible Retaliation Against Employees," 2 J. Empl. Discr. L. 269 (2000); D. S. Hilzenrath, "MicroStrategy Hit by Bias Complaint; Discrimination, Overtime Abuse Alleged," Wash. Post, May 6, 2000, at E1; J. Richardson, "MicroStrategy's Strategy: Sue or Be Sued," Legal Times, May 1, 2000, at 20; S. Siwolop, "Recourse or Retribution? Employers are Taking on Disgruntled Workers in Court," N.Y. Times, June 7, 2000, at C1.

However, courts may view such preemptive actions as constituting retaliation against employees for having raised concerns or filing charges, particularly where the employer's lawsuit was filed before the completion of the EEOC investigation, or under circumstances where the employee is unaware of its filing.

For example, MicroStrategy was a "reverse" or "SLAPP" [Strategic Lawsuit Against Public Participation] lawsuit filed by an employer against a female employee and her attorney regarding their use of information about stock options in her pending EEOC charge of discrimination and her future Title VII litigation. MicroStrategy, Inc. v. Convisser, Civ. A. No.

00-453-A, 2000 WL 554264 (E.D. Va. May 2, 2000). Ms. Lauricia, the Vice President for Corporate Development Operations at MicroStrategy, an Internet start-up company in northern Virginia that had recently gone public, alleged that while she was only granted 7,500 stock options, "another [male] vice president, hired four months before her, was granted 125,000 stock options." See Richardson, supra.

Ms. Lauricia filed her EEOC charge of discrimination in early 2000; MicroStrategy "received her complaint on March 13," and then called Ms. Lauricia to a meeting on March 14, after which "she was placed on administrative leave." Id. Three days later, MicroStrategy filed its reverse lawsuit in federal court against both Ms. Lauricia and her attorney, Claude Convisser. In its complaint, MicroStrategy averred that information about its employee compensation, including stock options, constituted trade secrets, and privileged attorney-client information; thus, MicroStrategy alleged that the use of this information by Ms. Lauricia and her attorney (through her EEOC charge and, presumably, any future litigation) constituted theft of trade secrets and misuse of confidential attorney-client information. Complaint for Declaratory Relief, ¶¶ 42-50. MicroStrategy also alleged that Ms. Lauricia had breached her fiduciary duty to her employer through using this information, id., ¶¶ 51-56, and further requested a declaratory judgment that MicroStrategy had not violated the anti-retaliation provisions of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), in its proposed termination of Ms. Lauricia. Id. at ¶¶ 37-41.

The district court dismissed MicroStrategy's lawsuit — which was filed before MicroStrategy had responded to the EEOC charge, let alone before Ms. Lauricia had even exhausted her administrative remedies through the EEOC — on the grounds that judicial intervention at this stage in an employer's suit against an employee was unwarranted:

> There is good reason why federal courts have not accepted jurisdiction in employment disputes under the Declaratory Judgment Act as plaintiff would have us do. In effect, MicroStrategy is asking this court to place an imprimatur upon a proposed employment action. If we were to accept this role, a federal court would become a super-personnel advisor to wary employers. Moreover, by exercising jurisdiction over this complaint we would encourage pre-emptive strikes by employers against dissatisfied employees, potentially undercutting Congress's very clear direction that such disputes be addressed through the administrative process. To take a step in this direction would be a step towards the involvement of federal courts in the workplace of unprecedented magnitude. We decline to impose such a role on the federal judiciary.

MicroStrategy, 2000 WL 554264, at * 4 (internal citation omitted). MicroStrategy filed an unsuccessful emergency appeal with the Fourth Circuit; undeterred, it promptly filed a parallel lawsuit in the Alexandria Circuit Court, "seeking the return of numerous documents the company claims are confidential," Richardson, supra, and the parties were subjected to a gag order, with the documents in the custody of the court. See MicroStrategy, Inc. v. Lauricia, 82 FEP Cases 1568 (Va. Cir. Ct. 2000).

Meanwhile, Ms. Lauricia filed a Title VII, ADEA and FLSA federal lawsuit that also sought declaratory relief. See MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 247-48 (4th Cir. 2001) (discussing history of case). MicroStrategy sought to compel arbitration, and the district court denied its motion on the grounds that "by virtue of its 'remarkably aggressive' course of litigation against Lauricia, MicroStrategy had waived its right to insist on arbitration." Id. at 248 (quoting Lauricia v. MicroStrategy, Inc., 114 F. Supp. 2d 489, 492 (E.D. Va. 2000)). The Fourth Circuit reversed, and dismissed Ms. Lauricia's complaint, on the grounds that there was a valid arbitration agreement, and MicroStrategy's litigation activities were not so burdensome as to constitute a waiver. Id. at 254.

2. "SLAPP" Statutes

At least twenty-three states have "SLAPP" statutes, which "allow the defendant in a SLAPP lawsuit to file a counterclaim or an expedited motion to dismiss, or to institute a separate proceeding against the plaintiff (the so-called SLAPP-back lawsuit) on the grounds that the SLAPP lawsuit constitutes illegal retaliation for having engaged in protected conduct."[9] Colorado and West Virginia have judicial doctrines addressing SLAPP lawsuits. See Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984) (establishing that an action against a defendant arising out of defendant's legitimate petition for redress of grievances under the First Amendment of the U.S. Constitution is subject to summary judgment for the defendant), aff'd by Krystkowiak v. W.O. Brisben Companies, 90 P.3d 859 (Colo. 2004); Webb v. Fury, 282 S.E.2d 28 (W. Va. 1981) (holding that a person's right to petition the government for redress of grievances is a constitutional right and does not give rise to a cause of action), modifying Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993) (holding there is no absolute privilege attached to the right to petition, instead the right is protected by the actual malice standard of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964)).

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[9] These states include: Arkansas, Ark. Code. Ann. §§ 16-63-501 – 16-63-508 (West 2008); California, Cal. Civ. Proc. Code §§ 425.17, 425.18, 1987.1, and 1987.2 and Cal. Civ. Code § 47 (West 2008); Delaware, Del. Code. Ann. Tit. 10, §8136 – 8138 (West 2008); Florida, Fla. Stat. § 768.295 (West 2008); Georgia, Ga. Code Ann. § 9-11-11.1 (West 2008); Hawaii, Haw. Rev. Stat. § 634F (West 2008); 735 Illinois, Ill. Comp. Stat. § 110 (West 2008); Indiana, Ind. Code § 34-7-7 (West 2008); Louisiana, La. Code Civ. Proc. Ann. Art. 971 (West 2008); Maine, Me. Rev. Stat. Ann. Tit. 14, § 556 (West 2008); Maryland, Md. Code. Ann., Cts. & Jud. Proc. § 5-807 (West 2008); Massachusetts, Mass Gen. Laws ch. 231, § 59H (West 2008); Minnesota, Minn. Stat. § 554 (West 2008); Missouri, Mo. Rev. Stat. § 537.528 (West 2008); Nebraska, Neb. Rev. Stat. §§ 25-21,241 – 25-21,246 (West 2008); Nevada, Nev. Rev. Stat. §§ 41.635 – 41.670 (West 2008); New Mexico, N.M. Stat. §§ 38-2-9.1 and 38-2-9.2 (West 2008); New York, N.Y. Civ. Rights Law § 70-a and 76-a and N.Y. C.P.L.R.§§ 3211(g) and 3212(h) (West 2008); Oregon, Or. Rev. Stat. § 31.150 – 31.155 (West 2008); Pennsylvania, 27 Pa. Cons. Stat. Ann. §§ 7707, and 8301-8305 (West 2008); Rhode Island, R.I. Gen. Laws § 9-33 (West 2008); Tennessee, Tenn. Code Ann. §§ 4-21-1001 – 4-21-1004 (West 2008); Utah, Utah Code Ann. §§ 78-58-101 – 78-58-105 (West 2008), and Washington, Wash. Rev. Code §§ 4.24.500 – 4.24.520 (West 2008).

California's SLAPP statute, Cal. Code Civ. Proc. § 425.16, is probably the most frequently litigated statute. Under the statute, the defendant (e.g., employee or community activist group) does not have to show that the action was brought with the intent to chill the defendant's exercise of the constitutional rights of free speech or to petition the government for redress of grievances in order to obtain dismissal of the action under the California SLAPP statute. See City of Cotati v. Cashman, 29 Cal. 4th 69, 52 P.3d 695, 124 Cal. Rptr. 2d 519 (Cal. 2002); Equilon Enter's, LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 52 P.3d 685, 124 Cal. Rptr. 2d 507 (Cal. 2002); Navellier v. Sletten, 29 Cal. 4th 82, 52 P.3d 703, 124 Cal. Rptr. 2d 530 (Cal. 2002). Instead, the defendant only has to show that the targeted cause of action arose from the protected activity. Id. These three decisions enhance the SLAPP defendant's (i.e., employee's) ability to prevail on a motion to dismiss the SLAPP suit. If the defendant is the *employer*, the employer benefits rather than the employee by the lower evidentiary standard.

For example, in Kibler, the California Court of Appeals, rejected a SLAPP retaliation claim brought by a hospital physician after he was suspended allegedly for criticizing the hospital's management. The Court upheld the hospital's motion to dismiss the SLAPP suit, reasoning that the physician employee's lawsuit "constituted an effort to chill defendant's exercise of free speech as related to an official proceeding authorized by law," the "official proceeding" referred to being the legally-mandated peer review process. Kibler v. Northern Inyo County Local Hospital, 24 Cal. Rptr. 3d 220, 222 (2005), aff'd, 39 Cal. 4th 192, 138 P.3d 193, 46 Cal. Rptr. 3d 41 (Cal. Jul 20, 2006).

Once the court concludes the action arises from protected activity, it must then determine whether the plaintiff has "demonstrated a probability of prevailing on the claim." Equilon, 29 Cal. 4th at 67, 52 P.3d at 694. To prevail on the defendant's motion to strike, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 741, 74 P.3d 737, 746, 3 Cal. Rptr. 3d 636, 646 (Cal. 2003) (declining to create exemption from anti-SLAPP motions for malicious prosecution claims); see also Gallant v. City of Carson, 128 Cal. App. 4th 705, 27 Cal. Rptr. 3d 318 (Cal. 2005) (denying employer's motion to strike an employee's lawsuit against the employer for wrongful termination and defamation because the employer waived evidentiary objections that would otherwise have prevented the employee from proving that the defamatory statements were false).

3. Retaliatory Lawsuits and Counterclaims

After an employee files a lawsuit against his or her current or former employer, which alleges discriminatory or retaliatory conduct, the employer may then, as part of its answer, file counterclaims against the employee. Or, an employer may file a lawsuit against the employee while the employee's charge is still pending with the EEOC. Typical claims against the employee might include breach of contract (arising from an employment contract or a severance agreement), theft of trade secrets, violation of a non-compete agreement, or breach of fiduciary duty.

Can the plaintiff then bring a retaliation claim which alleges that the counterclaim is itself retaliatory? The majority of courts that have addressed this issue have held that a plaintiff can base her retaliation claim on an allegedly bad faith counterclaim or lawsuit brought against her. The courts have recognized that "'a lawsuit . . . may be used by an employer as a powerful instrument of coercion or retaliation' and that such suits can create a 'chilling effect' on the pursuit of a discrimination claim." EEOC v. Outback Steakhouse of Florida, Inc., 75 F. Supp. 2d 756, 758 (N.D. Ohio 1999) (quoting Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 740-41 (1983)). For example, the Tenth Circuit held that "the filing of charges against a former employee may constitute adverse action" under Title VII. Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996).

Numerous district courts have held that the filing of a lawsuit or a counterclaim motivated by retaliation against an employee can serve as a basis for a retaliation claim under Title VII. See, e.g., Harper v. Realmark Corp., No. 4:04-CV00040-DFH-WGH, 2004 WL 1795392, at *4 (S.D. Ind. July 29, 2004) (denying motion to dismiss a claim based on retaliatory counterclaim); Rosania v. Taco Bell, 303 F. Supp. 2d 878, 887-88 (N.D. Ohio 2004) (reviewing Title VII case law in FMLA retaliation context); Hernandez v. Data Sys. Int'l, Inc., 266 F. Supp. 2d 1285, 1306 (D. Kan. 2003) ("[R]etaliatory civil litigation can constitute an adverse employment action for purposes of a retaliation claim."); Gliatta v. Tectum, Inc., 211 F. Supp. 2d 992, 1009 (S.D. Ohio 2002) ("This Court concludes that the adverse action requirement for a retaliation claim encompasses an allegedly bad faith counterclaim brought by the employer against its former employee"); Ward v. Wal-Mart Stores, Inc., 140 F. Supp. 2d 1220, 1230-31 (D.N.M. 2001) (holding that employer's filing of appeal of former employee's claim for unemployment benefits less than a month after he engaged in protected activity "raises the inference of a retaliatory motive sufficient to establish a causal connection" for a Title VII retaliation claim); Outback Steakhouse, 75 F. Supp. 2d at 758-60; Jones v. Ryder Services Corp., No. 95 C 4763, 1997 WL 158329, at *5 (N.D. Ill. Mar. 31, 1997) (denying summary judgment to employer where employer withdrew plaintiff's workers' compensation settlement offer in retaliation for filing EEOC charges); Cozzi v. Pepsi-Cola General Bottlers, Inc., No. 96 C 7228, 1997 WL 312048, at *3, 74 FEP Cases (BNA) 321, 323 (N.D. Ill. June 6, 1997) (holding that filing of retaliatory lawsuit constituted "adverse employment action" under Title VII, but dismissing suit on other grounds); Harmar v. United Airlines, Inc., No. 95 C 7665, 1996 WL 199734, at *1 (N.D. Ill. Apr. 23, 1996); Urquiola v. Linen Supermarket, Inc., No. 94-14-CIV-ORL-19, 1995 WL 266582, at *1 (M.D. Fla. Mar. 23, 1995); EEOC v. Levi Strauss & Co., 515 F. Supp. 640, 643-44 (N.D. Ill. 1981); EEOC v. Virginia Carolina Veneer Corp., 495 F. Supp. 775, 778 (W.D. Va. 1980).

The courts have similarly recognized retaliation claims under other labor, employment, and civil rights statutes based on lawsuits or counterclaims against the plaintiff(s). See, e.g., Bill Johnson's Restaurants, 461 U.S. at 743-44 (employer's lawsuit against employees for assertion of labor rights constituted retaliation under the NLRA); Darveau v. Detecon, Inc., 515 F.3d 334 (4th Cir. 2008) (holding that plaintiff had a claim for retaliation despite the court rejecting the employee's underlying FLSA claim); Torres v. Gristede's Operating Corp., No. 04 Civ. 3316, 2008 WL 4054417 (S.D.N.Y. August 28, 2008) (granting plaintiffs' motion for summary judgment for their FLSA retaliation claim because the employer's counterclaims were completely baseless); McLaughlin v. Innovative Logistics Group, Inc., No. 05-72305, 2007 WL 1017101, *3-4 (E.D. Mich. March 29, 2007) (holding that plaintiff's FMLA retaliation claim based on defendant's frivolous lawsuit could be presented to a jury); Gill v. Rinker Materials Corp., 91 FEP Cases (BNA) 179, 182-83 (E.D. Tenn. 2003) (ADA and ADEA retaliation claims for filing bad faith counterclaim against employee); Zhu v. Countrywide Realty, Co., Inc., 165 F. Supp. 2d 1181, 1199 (D. Kan. 2001) (filing for "petition for a restraining order roughly three weeks after plaintiff filed her HUD complaint raises an inference of causation" under anti-retaliation provision of Fair Housing Act); Blistein v. St. Johns College, 860 F. Supp. 256, 268 (D. Md. 1994) (filing counterclaim against employee, including counterclaim for breach of contract, stated a claim for retaliation under the ADEA).

However, the Fifth Circuit rejected this approach, in a case where the former employer brought a counterclaim for theft (of building materials) against a terminated employee. Hernandez v. Crawford Bldg. Material Co., 321 F.3d 528 (5th Cir. 2003) (per curiam). The Fifth Circuit held that it was reversible error to allow the jury to determine whether this counterclaim was retaliatory, since under Fifth Circuit precedent, only an ultimate employment action can constitute retaliation. Id. at 531-32. The holding in Hernandez, however, is likely no longer good law after Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S. Ct. 2405 (2006). Burlington Northern rejected the Fifth Circuit's "ultimate employment decision" standard for retaliation claims and held that the new standard was "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." See Peace v. Harvey, 207 Fed. Appx. 366, 368 (5th Cir. 2006) (quoting Burlington Northern); Steward v. Gonzales, 2007 WL 647003, n. 42 (E.D. La. Feb. 28, 2007). Notably, the Supreme Court cited Bill Johnson's Restaurants as an illustration of materially adverse action under a law that provides for a similar kind of protection against retaliation as Title VII. 548 U.S. at 66-67. In Bill Johnson's Restaurants, the Supreme Court construed an anti-retaliation provision of the National Labor Relations Act as prohibiting the retaliatory filing of a lawsuit against an employee. 461 U.S. 731, 103 S. Ct. 2161 (1983).

4. Management Lawsuits Against Unions

The U.S. Supreme Court, in the labor-management context, held that the NLRB could not prosecute an employer for having filed a suit against employees or a union, where that suit was filed with a retaliatory purpose, so long as that lawsuit was not objectively baseless. See BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002). In BE & K, the employer filed two lawsuits against several unions, alleging that their activities had delayed the employer's construction project, in violation of the Sherman Act and the secondary boycott provision of the Labor-Management Relations Act. Id. at 519-21. After these lawsuits were dismissed, the unions lodged complaints with the NLRB, which determined that the employer's lawsuits "had violated the NLRA because it was unsuccessful and retaliatory." Id. at 523. The Sixth Circuit affirmed, finding that "evidence of a simple retaliatory motive . . . sufficed to adjudge [BE & K] of committing an unfair labor practice." Id.

The Supreme Court reversed, finding that only if the lawsuit was objectively baseless could it be deemed as retaliatory under the labor statutes. Other retaliatory lawsuits, so long as they are not objectively baseless, can continue to be brought without fear of enforcement action by the NLRB. Id. at 536-37. The rationale is that the First Amendment right to petition allows some "breathing space" in seeking judicial relief. Id. at 531; see generally NLRB Office of the General Counsel, Memorandum GC 02-09, "Case Handling Instructions for Cases Concerning Bill Johnson's Restaurants and BE & K Constr. Co." (Sept. 20, 2002), http://www.nlrb.gov/.

Although this case arose in the context of NLRB enforcement, since it relied upon Supreme Court precedent regarding retaliatory lawsuits in other contexts, some courts may extend its principles to declaratory judgment and SLAPP lawsuits in the employment context. For example, the Supreme Judicial Court of Massachusetts held, in an age discrimination and retaliation case, that the employer's declaratory judgment complaint was not retaliatory, where the employer only sought a declaratory judgment that the release which the employee signed upon her termination precluded the employee from bringing her statutory claims. Sahli v. Bull HN Info. Sys., Inc., 437 Mass. 696, 704-07, 774 N.E.2d 1085, 1092-94 (2002).

I. The False Complaint

Is an employee who falsely accuses a supervisor or co-worker of discriminatory or harassing conduct protected from retaliation? The Tenth Circuit upheld a district court's determination that the employee's falsified complaint was a legitimate, non-discriminatory reason for terminating the employment of the employee, so that the termination was not retaliatory. Renner-Wallace v. Cessna Aircraft Co., 95 Fed. Appx. 967 (10th Cir. 2004). Here, the two plaintiffs filed sexual harassment claims with the EEOC, alleging that their foreman had harassed them. The company's internal investigation failed to identify sufficient evidence to support their claim, but instead led to information showing that the plaintiffs "may have fabricated the sexual harassment allegation," based on interviews with at least four witnesses. The company then terminated the two employees based on "breach of trust in falsifying reports of sexual harassment." Id. at 968. The Tenth Circuit affirmed the grant of summary judgment to the employer. Id. at 970; see generally "Alleged Fabricators of Harassment Story Who Were Fired Lose Claims Against Cessna," BNA Daily Labor Report, Mar. 25, 2003, at A-1 (discussing district court decision).

Employees who bring claims determined to be false may also risk criminal sanctions. In 2004, the Fourth Circuit upheld an employee's conviction for making false statements under oath, making a false claim, and perjury because she brought false sexual harassment claims against her supervisor. United States v. Smith, 105 Fed. Appx. 506, 507 (4th Cir. 2004) (per curiam), cert. denied, 125 S. Ct. 677 (2004). The case was remanded for recalculating the defendant's sentence, resulting in an amended sentence of 21 months, followed by two years' supervised release. United States v. Smith, No. CR-02-313, Amended Judgment (D.S.C. Sept. 17, 2004) (Docket No. 93).

J. The "NO FEAR Act" and Federal Employees.

On May 15, 2002, the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002" ("NO FEAR Act"), Pub. L. No. 107-174, 116 Stat. 566 (West 2008), became law. The NO FEAR Act, which only applies to the federal sector, was passed by Congress after receiving testimony that agencies were neglecting their responsibilities under the anti-discrimination and whistleblower statutes, and that the agencies had little incentive to settle meritorious claims, particularly class actions, in a timely manner, since any monetary judgment against the agency would not come from the agency's own budget, but from the Judgment Fund of the U.S. Department of Justice. See "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001," S. Rept. No. 107-143 (Apr. 15, 2002); see generally S. Barr, "Making Agencies Pay the Price of Discrimination, Retaliation," Wash. Post, May 16, 2002, at B-2.

Specifically, the U.S. General Accounting Office (GAO) testified that the Judgment Fund "discourages accountability by being a disincentive to agencies to resolve matters promptly in the administrative processes; by not pursuing resolution, an agency could shift the cost of resolution from its budget to the Judgment Fund and escape the scrutiny that would accompany a request for a supplemental appropriation." S. Rep. No. 107-143, at 3.

With the passage of the NO FEAR Act, agencies are now required to reimburse the U.S. Treasury for any judgment or settlement under the federal sector anti-discrimination and whistleblower statutes. Pub. L. No. 107-174, § 201. Courts have held, however, that the NO FEAR Act did not create a private cause of action. Glaude v. U.S., 248 Fed. Appx. 175, 177, 2007 WL 2682957, at *2 (Fed. Cir. Sept. 7, 2007); Baney v. Mukasey, No. 3:06-CV-2064-L, 2008 WL 706917, at *7 (N.D. Tex. Mar. 14, 2008); Mills v. Barreto, 2004 WL 3335448, at *3 (E.D. Va. Mar. 8, 2004).

The NO FEAR Act also requires individual agencies, as well as the EEOC, to post annual statistics on their websites, setting forth the numbers of complaints filed, pending, and resolved; the amount paid out on such claims; the number of employees disciplined for discrimination, retaliation, or harassment; and an examination of any trends in those statistics, including a causal analysis, the practical knowledge obtained through this experience, and any actions taken or planned to improve the complaint resolution process in each agency. Pub. L. No. 107-174, §§ 203, 301, and 302. This information must also be submitted by each agency to Congress and the Attorney General. Id. at § 203. The EEOC promulgated its "Final Rule" in August 2006, with regulations governing these posting and reporting requirements, codified at 29 C.F.R. § 1614. See Pub. L. 107-174. (Aug. 2, 2006) (http://edocket.access.gpo.gov/2006/pdf/E6-12432.pdf). The EEOC also posts current data on the annual statistics reported by these agencies for EEOC internal complaint activity, government-wide hearings, and government-wide appeals. http://www.eeoc.gov/stats/nofear/index.html.

K. Exhaustion of Administrative Remedies

An important issue is whether an employee who files an EEOC charge that alleges discrimination or harassment but does not allege retaliation, can later file a lawsuit that includes a retaliation claim, where that claim is based on retaliation for having filed an EEOC charge. If the retaliation is based on conduct *prior* to the EEOC charge, then courts have held that the EEOC charge must include a retaliation claim. See, e.g., Eberle v. Gonzales, 240 Fed. Appx. 622 (5th Cir. 2007) (dismissing plaintiff's retaliation claim because the retaliation occurred before the filing of the EEOC charge; plaintiff should have exhausted his administrative remedies by including the retaliation claim—which he knew about—in the initial charge).

Although defendants usually attempt to dismiss subsequent retaliation claims on the grounds that the plaintiff failed to exhaust her administrative remedies, prior to 2002 the courts increasingly recognized that it would be futile to require an employee to file a new EEOC charge when that retaliation arises from the protected activity of filing the first EEOC charge. In 2001, the First Circuit joined the majority of the federal appellate courts in holding that retaliation claims can be brought in court, even if the plaintiff only included a discrimination or harassment claim in her EEOC charge. Clockedile v. New Hampshire Dep't of Corrections, 245 F.3d 1, 4 & n.3 (1st Cir. 2001) (collecting cases from Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits). The First Circuit concluded, "retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency -- e.g., the retaliation is for filing the agency complaint itself." Clockedile, 245 F.3d at 6. The Sixth Circuit also has allowed retaliation claims if based on events that occurred after the filing of the EEOC charge. Weigel v. Baptist Hosp. of East Tenn., 302 F.3d 367, 380 (6th Cir. 2002).

Some courts have moved away from this line of cases since the Supreme Court's decision in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), which eliminated the continuing violation theory by holding that Title VII precludes recovery for discrete acts of discrimination or retaliation occurring beyond the limitations period. Some courts have applied Morgan to discrete acts of retaliation occurring *after* a charge has been filed, thus requiring plaintiffs to make the retaliatory actions the subject of an amended or new charge. See Martinez v. Potter, 347 F.3d 1208, 1210-11 (10th Cir. 2003); Hernandez v. Gutierrez, --- F.Supp.2d ----, 2009 WL 2998115 at *3 (D.D.C. Sept. 19, 2009) (recognizing the split in authority in D.C. but agreeing with the majority of judges in D.C. that Morgan should bar non-exhausted claims of discrete acts whether they occurred after the filing of a complaint and regardless of whether they are sufficiently related to exhausted claims). Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139, 149 (D.D.C. 2005) ("[I]t makes sense to apply Morgan to bar subsequent discrete acts that a plaintiff fails to exhaust in the administrative process."); Bowie v. Ashcroft, 283 F. Supp. 2d 25, 34 (D.D.C. 2003).

Other courts have given Morgan a more narrow interpretation. For example, in Jones v. Calvert Group, Ltd., 551 F.3d 297 (4th Cir. 2009), the court held that the Morgan rule addresses only the issue of when the limitations clock for filing an EEOC charge begins ticking with regard to discrete unlawful employment practices, but that it does not purport to address the extent to which an EEOC charge satisfies exhaustion requirements for claims of related, post-charge events. See also Lewis v. District of Columbia, 535 F. Supp. 2d 1, 8 (D.D.C. 2008) (granting defendant's motion to dismiss because plaintiff failed to exhaust administrative remedies, but applying a narrow reading of Morgan that would allow the court to consider a subsequent act if it were part of a continuous and ongoing pattern that a reasonable investigation would uncover); Hazel v. Washington Metropolitan Area Transit Authority, No. 02-1375, 2006 WL 3623693, at *8 (D.D.C. Dec. 4, 2006) (holding that plaintiff's additional claim of retaliation was appropriate for adjudication because no exhaustion separate and apart from plaintiff's initial EEOC charge was required).

Many circuits, however, continue to allow a claim for retaliation that occurred subsequent to an administrative filing. The First Circuit continues to apply the theory that a retaliation claim can be "bootstrapped" onto another Title VII claim, even if it has not been put through the administrative process, because of its close relation to and origins in the other Title VII discrimination claim. Franceschi v. U.S. Dept. of Veterans Affairs, 514 F.3d 81, 86 (1st Cir. 2008). The Fifth Circuit has affirmed that retaliation claims may be brought in a lawsuit if the retaliation occurred after the EEOC charge was filed. Eberle v. Gonzales, 240 Fed. Appx. 622, 628 (5th Cir. 2007) (quoting Gupta v. East Texas State University, 654 F.2d 411 (5th Cir. 1981)) ("[I]t is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court.) The Sixth Circuit, in an unpublished opinion, declined to extend Morgan to subsequent actions by allowing a claim for retaliation that "can be reasonably expected to grow out of the EEOC charge" Delisle v. Brimfield Township Police Dep't, 94 Fed. Appx. 247, 252-54 (6th Cir. 2004) (internal quotes omitted). Similarly, the Eighth Circuit applies the theory that "reasonably related subsequent acts may be considered exhausted," but has narrowed its view of what later acts are sufficiently related to be considered exhausted along with the original administrative charge. Wedow v. City of Kansas City, Mo., 442 F.3d 661, 673-74 (8th Cir. 2006).