talk sense topics
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Sarbanes-Oxley Whistleblower Protection

Sarbanes-Oxley, at 18 U.S.C. §1514A(a)[1], creates protection for whistleblowers against retaliation by employers for reporting or providing information on violations of mail fraud, wire fraud and other statutes and rules applicable to securities fraud, whether to law enforcement or internally at the defendant employer.

The statutory remedy provides for "all relief necessary to make the employee whole," specifically including reinstatement with back pay and "compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 18 U.S.C. §1514A(c). This

[1] No [publicly traded] company…including any subsidiary or affiliate…or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes [certain statutes applicable to securities fraud] when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged [securities fraud].

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includes recovery of emotional distress damages, *Lockheed Martin Corp. v. Administrative Review Bd.,* 717 F.3d 1121, 1138 (10th Cir. 2013)($75,000 in emotional distress damages upheld); *Halliburton, Inc. v. Administrative Review Bd.,* 771 F.3d 254, 263-67 (5th Cir. 2014) (allowing recovery of damages for emotional distress and reputational injury). Punitive damages are not recoverable, however, *Hanna v. WCI Communities, Inc.*, 348 F.Supp.2d 1332 (S.D. Fla. 2004)

The complaining employee must initiate a proceeding with the Department of Labor (OSHA) but if there is no final decision within 180 days, may bring a *de novo* action in U.S. District Court. 18 U.S.C. §1514A(b)(1)[2]. The Department of Labor has an internal process in which appeals within the agency from adverse decisions by administrative law judges are reviewed by an Administrative Review Board, which provides agency interpretations of the statute[3]. Decisions of the Appeal Review Board are in turn reviewed by Courts of Appeals as administrative appeals of a federal agency under the Administrative Review Act, entitling the Administrative Review Board's interpretations to judicial deference.

The scope of the administrative complaint to the Department of Labor controls the scope of any subsequently filed court action brought after the expiration of the 180 day period. Applying the same standard as in determining whether a Title VII lawsuit is within the scope of the Title VII charge, the Fifth Circuit Court of Appeals refused to permit the plaintiff to expand the scope of the lawsuit beyond the type of wrongdoing claimed in the OSHA complaint in *Wallace v. Tesoro Corp,* --

[2] The right of action in federal court was added by Dodd-Frank, which has separate protections described in the section on Dodd-Frank Whstleblower Protections.

[3] This paper is limited to court decisions. The decisions of the Administrative Review Board cover topics touched on here and more. They are publicly available and may be found at http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/CASELISTS/SOX11LIST.HTM.

-F.3d ---, 2015 WL 4604967 (5th Cir.) at *4-6 (alleged complaint of an oral agreement to match prices in violation of antitrust laws could not be expected to alert OSHA to wire fraud claim based on other practices and so the scope of the allegations in the case that could be considered).

Covered Employers & Employees

The Supreme Court in *Lawson v. FMR LLC*, --- U.S. ---, 134 S.Ct. 1158, 1165-67, 1170, 188 L.Ed.2d 158 (2014) held that the Sarbanes-Oxley retaliation protection extends not only to employees of the public company in question, but also to employees of privately held contractors and subcontractors—for example, investment advisers, law firms, accounting enterprises—who perform work for the public company. Citing the fact that such contractors figured prominently in the events during the Enron collapse that led to the adoption of the statute, the court observed that many provisions of Sarbanes-Oxley regulate conduct by those kinds of entities precisely because of their ability to control securities fraud. The court also noted that in adopting the retaliation provision, Congress drew on the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, which had been read to have a similar expansive reach.

In *Lawson,* relying on the literal text of the prohibition, the dissenting Justices contended that the employees protected by the retaliation provision should be limited to employees of the public company only, and not reach employees of the contractors and subcontractors. Rejecting this view, the Court observed that this interpretation was at odds with the remedy provision, since a contractor would likely be unable to control reinstatement of a customer company's employee, 134

SCt. at 1167. The Court was also influenced by the fact that a contrary interpretation would insulate the entire mutual fund industry from the statute, since such entities are managed by separate corporations acting under contract, 134 S.Ct. at 1171.

There are two significant limitations on the extent of contractor liability under Sarbanes-Oxley. First, contractor liability applies only where the employee's whistleblowing pertains to the contractor's provision of services to the public company with which it contracts, that is, only insofar as the contractor is a firsthand witness to corporate fraud at the public company. Second, as is noted below, the fraud must be one committed by the public company, either itself or by its contractors. Fraud *against* the public company or not involving it is not covered. *Anthony v. Northwestern Mutual Life Ins. Co.,* --- F.Supp.3d ---, 2015 WL 5226651 (N.D. N.Y.) at *6 (plaintiff's claim of fraud by the company that marketed a mutual fund dismissed where the allegations concerned the marketing company's own marketing activity, such as trades by unregistered representatives, and did not implicate its relationship with the mutual fund).

Scope of Protected Activity

The type of whistleblowing protected by Sarbanes-Oxley is the reporting to regulators, law enforcement, Congress, or anyone in a position of authority over the employee or responsible for investigating or terminating misconduct. The subject of the report must be (a) mail fraud; (b) wire fraud; (c) financial institution fraud; (d) commodities fraud; (e) securities fraud; or (f) violation of specified SEC rules. 18 U.S.C. §1514A(a).

(a)Report Need Not "Definitively and Specifically" Identify Covered Law

At one time, the Department of Labor interpretation of Sarbanes-Oxley required that the employee report "definitively and specifically" relate to one of the statutes covered by the retaliation provision, *e.g., Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996–97 (9th Cir. 2009) *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476–77 (5th Cir. 2008); *Welch v. Chao,* 536 F.3d 269, 276-77 (4th Cir. 2008). This requirement is no longer applicable. The "definitively and specifically" standard originated from retaliation cases under the Energy Reorganization Act, which specifically provides for that standard. Since there is no such requirement under Sarbanes-Oxley, this standard was withdrawn by the Administrative Review Board, *Wiest v. Lynch,* 710 F.3d 121, 130 (3d Cir. 2013). Thus, "If the specific conduct reported was violative of federal law, the report would be sufficient to trigger Sarbanes–Oxley protection even if the employee did not identify the appropriate federal law by name." *Harp v. Charter Communications, Inc.*, 558 F.3d 722, 725 (7th Cir. 2009). *Accord, Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 805-812 (6th Cir. 2015); *see Wallace v. Tesoro Corp,* ---F.3d ---, 2015 WL 4604967 (5th Cir.) at *7.

Reasonable Belief Standard

"The Act requires that the employee 'reasonably' believe in the unlawfulness of the employer's action. … [R]easonableness must be scrutinized under both a subjective and objective standard…" *Harp v. Charter Communications, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) *citing Day v. Staples*, 555 F.3d 42, 54 (1st Cir.2009); *Allen v. Administrative Review Board*, 514 F.3d 468, 477 (5th Cir.2008); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir.2008). The violation of law of which an employee complains need not be proven, rather, the employee must show both that s/he subjectively believed that the information reported represented a violation of one of the laws covered by the Sarbanes-Oxley and that this belief was objectively reasonable. *Wiest v. Lynch,* 710 F.3d 121, 129-130 (3d Cir. 2013).

The reasonable belief requirement does not require the employee to show a reasonable belief that each element of the statutory violation has been satisfied; it is enough that the employee provide information on the essential wrongful nature of the conduct reported. As the court said in *Wiest v. Lynch,* 710 F.3d 121, 132 (3d Cir. 2013), the "employee should not be unprotected from reprisal because she did not have access to information sufficient to form an objectively reasonable belief that there was an intent to defraud or the information communicated to her supervisor was material to a shareholder's investment decision." The employee is protected even if there are gaps in the employee's knowledge or the employee is mistaken, *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 812 (6th Cir. 2015).

The "reasonable belief" standard does require a showing that the employee subjectively believes in the illegality of the actions or practices reported and also that the belief is objectively reasonable to a person with the plaintiff's training and

experience, *Allen v, Administrative Review Board,* 514 F.3d 468, 477 (5th Cir. 2008); *Nasif v. Computer Services Corp.,* 2015 WL 3776892 (N.D. Cal.) at *5-6 (requiring that the employee's theory at least approximates the basic elements of the offense reported); *Wallace v. Tesoro Corp,* ---F.3d ---, 2015 WL 4604967 (5th Cir.) at *7 (reversing dismissal on the pleadings because the employee adequately alleged reasonable belief and how his level and role should weigh against him was grounded in factual disputes).

For at least claims based on alleged securities fraud, the employee must reasonably believe that the employer acted with the requisite *scienter, Allen v. Administrative Review Board,* 514 F.3d 468, 479-80 (5th Cir. 2008). This standard was satisfied where the employee had notified the employer of the issue without any action being taken and the employee alleged that the practice in question improved stock analysts' reporting, which resulted in higher compensation for the Senior Vice President, *Wallace v. Tesoro Corp,* ---F.3d ---, 2015 WL 4604967 (5th Cir.) at *10.

Because the standard is one of "reasonable belief" and not actual fraud, the exacting pleading standards of Fed.R.Civ.Proc. 9(b) requiring that fraud be pled "with particularity," are not applicable. *Wallace v. Tesoro Corp,* ---F.3d ---, 2015 WL 4604967 (5th Cir.) at *8-9.

(b) Fraud must be *by* the public company

The fraud that the employee reports must concern fraud *by* the public company, and does not extend to fraud *against* that company, *Gibney v. Evolution Marketing Research, LLC*, 25 F.Supp.3d 741, 747-48 (E.D. Pa. 2014)(rejecting retaliation action by employee of contractor who allegedly blew the whistle on a fraud by the contractor against the public company customer).

(c) Fraud on Shareholders Not Required

On the other hand, the securities fraud activity reported need not constitute a fraud on shareholders. In *Lockheed Martin Corp. v. Administrative Review Bd., U.S. Dept. of Labor*, 717 F.3d 1121 (10th Cir. 2013), the employee uncovered and reported fraudulent activity of a supervisor in the company which, while fraudulent, was not of a type that would constitute a fraud on shareholders. The court was unwilling to adopt such a restriction on the protection of the retaliation prohibition, particularly in light of the specification of the mail and wire fraud statutes, as well as because the Department of Labor had adopted a contrary interpretation. *Accord, O'Mahony v. Accenture Ltd.,* 537 F.Supp.2d 506, 517-18 (S.D. N.Y. 2008).

(d) Materiality Required For Securities Fraud

An important consideration in cases where the report concerns securities fraud is whether a misrepresentation or omission is "material," or sufficiently important that it could affect an investor's decision. In *Nasif v. Computer Services Corp.*, 2015 WL 3776892 (N.D. Cal.) at *6-7, the court held that accounting flaws amounting at most to $15 million in the aggregate could not reasonably be viewed as material by the accountant whistleblower because company total revenues were

$14 billion, especially where he conceded that the GAAP accounting violations were not "clear cut."

The financial magnitude of a false statement or omission can make it material, but the court in *Welch v. Chao,* 536 F.3d 269, 278 (4th Cir. 2008) also recognized that, under the right circumstances, materiality could be established by inaccuracies not because of their magnitude, but because their character renders them important. The court referenced the observation of the SEC in that case that "[t]he individual items, subtotals, or other parts of a financial statement may often be more useful than the aggregate to those who make investment, credit, and similar decisions."

(e) Violation Must be of U.S. Law

Villanueva v. U.S. Dept. of Labor, 743 F.3d 103, 109-110 (5th Cir. 2014) held that the statutory protection does not extend to underreporting of taxes under foreign law.

(f) Tax Fraud Reports Protected

The court in *Wiest v. Lynch,* 710 F.3d 121, 130 (3d Cir. 2013) treated fraudulent tax reporting as coming within the scope of Sarbanes-Oxley protected activity. *See Wallace v. Tesoro Corp,* ---F.3d ---, 2015 WL 4604967 (5th Cir.) at *9 (booking taxes as revenue reasonably believed to be fraudulent).

(g) Complaints About Violation of Company Policies Not Protected

The court in held that conduct that is only generally improper or that only violates policies of the company, such as "engaging in office romances, using office equipment for personal reasons, asking an assistant to fix personal computers of the supervisor's family and friends, spending too much time on out-of-office travel,

showing lack of enthusiasm in being a branch manager, meeting "undesirables" in the parking lot, and the like" is not protected activity. *Miller v. Stifel, Nicolaus & Co., Inc.*, 812 F.Supp.2d 975, 990-91 (D. Minn. 2011).

Elements of a Claim For Retaliation Under Sarbanes-Oxley

"To prevail under this provision, 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.... This standard is incorporated from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b) and reflected in the applicable regulations, 29 C.F.R. § 1980.104(b)(1).

The court in *Harp v. Charter Communications, Inc.*, 558 F.3d 722, 725-26 (7th Cir. 2009) acknowledged that the employee could sustain a claim although she had "reported a violation of the code of ethics, as opposed to a violation of federal laws, if the employee reported specific conduct that constituted a violation of federal law." However, the employee had no reasonable belief that there was anything fraudulent on the part of her superiors, as the evidence did not suggest anything other than serious investigation of her complaints about a vendor.

As in other retaliation cases, timing is frequently a part of the fact pattern, and depending on the circumstances, may buttress a claim of retaliation, For example, the court in *Lockheed Martin Corp. v. Administrative Review Bd.,* 717 F.3d 1121, 1136-37 (10th Cir. 2013) found that the adverse employment actions employee experienced began shortly after the conclusion of the investigation. While

it cited the timing as support for its finding that retaliation was a contributing factor, it did so only after detailed review of all relevant events and the surrounding circumstances.

If the employee established 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." *Harp v. Charter Communications, Inc.,* 558 F.3d 722, 723 (7th Cir. 2009) *citing Allen v. Administrative Review Board*, 514 F.3d 468, 475–76 (5th Cir.2008); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 (4th Cir.2008); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir.2008). The court in *Guitron v. Wells Fargo Bank, N.S.,* 2015 WL 4523263 (9th Cir.)(unpublished opinion) was satisfied that the required showing that the employee would have been terminated regardless of the protected conduct. The employer showed that the employee failed to meet sales goals, was insubordinate to her district manager and refused to return to work from administrative leave. In *Bogenschneider v. Kimberly Clark Global Sales, LL,* 2015 WL 3948137 (W.D. Wis.) at *2-5, the court rejected the contention that a termination by mutual agreement became an unfavorable personnel action where, in defense of subsequent litigation brought by the employee, the employer cited evidence that there was good cause for termination. Moreover, because the statements were made in court filings and were relevant to the proceedings, they were both absolutely privileged and rightly viewed as not being made to retaliate, but to defend a lawsuit.

Adverse Employment Action

The loosened requirement for what constitutes an actionable adverse employment action applicable to retaliation cases under Title VII that was adopted in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)(finding an adverse employment action to be sufficiently material if significant enough to have dissuaded a reasonable worker from making a complaint) is applicable in Sarbanes-Oxley cases, *Halliburton, Inc. v. Administrative Review Bd.,* 771 F.3d 254, 260-61 (5th Cir. 2014). Thus, the court found in that case, disclosure of the identity of the whistleblower which led to his being ostracized by co-workers was a sufficient adverse action because

> [W]hen it is the boss that identifies one of his employees as the whistleblower who has brought an official investigation upon the department, as happened here, the boss could be read as sending a warning, granting his implied imprimatur on differential treatment of the employee, or otherwise expressing a sort of discontent from on high…. In an environment where insufficient collaboration constitutes deficient performance, the employer's disclosure of the whistleblower's identity and thus targeted creation of an environment in which the whistleblower is ostracized is not merely a matter of social concern, but is, in effect, a potential deprivation of opportunities for future advancement.
>
> *Id.,*at 262

In *Kshetrapal v. Dish Network, LLC*, — F.Supp.3d —, 2015 WL 857911 at *3 (S.D.N.Y. 2015), the employee claimed to have reported kickbacks given to a superior by a vendor of the defendant, resulting in discipline against a superior. The employee was allegedly forced to resign and claimed that his deposition testimony about the alleged fraudulent invoicing was a protected report.

Allegedly in retaliation, the defendant then refused to do business with the employee's new employers. The defendant conceded that the statutory definition of "employee" extended to post-employment retaliation under the principles applied in

Robinson v. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997), but contended that post-employment deposition testimony could not be protected. The court rejected this contention, noting that accepting it could discourage employees from reporting fraudulent employer conduct for fear of being blacklisted and contravene the statutory purpose of encouraging whistleblowing.

Statute of Limitations

The limitations period under Sarbanes Oxley is only 180 days, 18 U.S.C. §1514A(b)(2)(B).

Jury Trial & Arbitration

Sarbanes-Oxley provides for a right to jury trial, 18 U.S.C. §1514A(b)(2)(E). Decisions prior to adoption of Dodd-Frank enforced arbitration agreements in Sarbanes-Oxley cases, *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 779 (10th Cir. 2010)(rejecting argument based on provision of arbitration agreement prohibition on award of attorneys' fees that conflicted with statutory right to recover such fees); *Guyden v. Aetna, Inc.*, 544 F.3d 376, 382-84 (2d Cir. 2008)(rejecting argument that allowing arbitration of Sarbanes-Oxley claims interfered with statutory objective of bringing securities fraud to public attention).

The statute, after amendment by Dodd-Frank, now invalidates predispute arbitration agreements that call for arbitration of Sarbanes-Oxley claims, 18 U.S.C. §1514A(e)(2); *Wong v. CKX, Inc.*, 890 F.Supp.2d 411, 420-23 (S.D. N.Y.

2012)(applying arbitration prohibition retroactively to predispute agreement that predated Dodd-Frank).

While the statutory phrasing might imply that an arbitration clause which, by its terms, is applicable to Sarbanes-Oxley actions, would be entirely invalidated, the court in *Santoro v. Accenture Federal Services, LLC*, 748 F.3d 217, 222-24 (4th Cir.2014) held to the contrary, finding that the use of this phrasing was insufficient to indicate a Congressional intent to impose so broad a limitation on the Federal Arbitration Act. *Accord, Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488 (3d Cir. 2014)(also concluding that the prohibition on predispute arbitration agreements applies only to Sarbanes-Oxley claims, and not to Dodd-Frank whistleblower claims); *Murray v. UBS Securities, LLC*, 2014 WL 285093 at *7-9 (S.D.N.Y. 2014)(where the complaint pled Dodd-Frank violations and the relief sought referenced Dodd-Frank and not Sarbanes-Oxley, an arbitration clause was properly invoked).

However, in *Stewart v. Doral Financial Corp.*, 997 F.Supp.2d 129, 139-40(D. P.R. 2014), the employee was able to invalidate an arbitration clause as to a breach of contract claim that was "intertwined" with the Sarbanes-Oxley claim because the breach of contract claim arose from the same nucleus of operative fact and would require the same dispute to be litigated twice. Similarly, where the Dodd-Frank violations were based on violation of substantive prohibitions found in Sarbanes-Oxley, the Dodd-Frank arbitration prohibition extended to the Dodd-Frank claims, *Wiggins v. ING U.S., Inc.*, 2015 WL 3771646 at *4-7 (D.Conn. 2015)(appeal pending).