NEW WAVE OF RETALIATION AND WHISTLEBLOWING

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I. INTRODUCTION

This paper focuses on sixteen diverse topics concerning retaliation and whistleblowing. My hope is that you will learn something new from this presentation, and use this paper as a helpful resource in your practice.

II. ENCOURAGING AN EMPLOYEE TO REAPPLY CAN UNDERMINE A RETALIATION CLAIM

In appropriate circumstances, employers should consider extending offers to reapply to employees when they are terminated. The best place to do this is in the termination letter. So long as the offer is *bona fide*, the employer can argue that it significantly undermines a retaliation claim – an argument that some courts have agreed with. *See, e.g.*, *Cooper v. Wyndham Vacation Resorts, Inc.*, 570 F. Supp. 2d 981, 988 (M.D. Tenn. 2008) (fact that the employer suggested that the sales representative, who was fired for excessive absenteeism after she filed a workers' compensation claim, could later reapply for a job undercut her claim of retaliation); *Oguezuonu v. Genesis Health Ventures, Inc.*, 415 F. Supp. 2d 577, 588 (D. Md. 2005) (granting summary judgment against retaliation claim and relying on the fact that plaintiff's "termination letter invites her to reapply when she is able to return to work"); *Greene v. Dialysis Clinic, Inc.*, 159 F. Supp. 2d 228, 240 (M.D.N.C. 2001) (granting summary judgment for the defendant on a retaliatory discharge claim in part because the defendant invited the plaintiff to reapply for a position when one became available).

III. DENYING DISCRIMINATION CAN BE PROOF OF RETALIATION IF AN EMPLOYER USES THE WRONG WORDS

It is not unusual for supervisors to attribute some sinister, underhanded, bad faith, strategic motive to employees who complain about alleged discrimination. Perhaps this is because employees sometimes make complaints out of such motives. Or, maybe it is because it is a natural defense mechanism. But, in any event, supervisors should generally refrain from stating that they believe a complaining employee is using their age, sex, race, or other protected characteristic to manufacture a meritless claim, shield themselves from legitimate discipline, or for other bad faith or strategic purposes. Otherwise, such statements could be used as proof of retaliation.

For example, in *Burnell v. Gates Rubber Co.*, 647 F.3d 704 (7th Cir. 2011), Eddie Burnell, Jr., the African-American plaintiff had a long history of repeatedly complaining about perceived racial discrimination. His most recent complaint was in early 2006. In December 2006, Burnell was given a disciplinary warning. He complained about that discipline. This time, however, Burnell did not contend the discipline was a product of racial discrimination. But, in response to Burnell's complaint about that discipline, the plant manager of Gates Rubber, Shahram Totonchian, accused the plaintiff of "playing the race card" and told him to find another job if he did not enjoy working at Gates Rubber. *Id*. at 707. The next day, after Burnell refused to sign another disciplinary warning, he was terminated.

The district court granted summary judgment against Burnell's race discrimination and retaliation claims. But, the Seventh Circuit U.S. Court of Appeals reversed the trial court's

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ruling on Burnell's retaliation claim. *Id*. at 709-10. The Court of Appeals noted Burnell's long history of complaints about perceived racial discrimination. It then stated that, "[g]iven Burnell's prior complaints of racial discrimination, Totonchian's statement is evidence that those complaints caused Burnell's discharge." *Id*. at 710. The Court concluded by stating, "Burnell certainly hasn't proven causation by a preponderance of the evidence, but his history of complaints and Totonchian's "race card" statement are enough to allow Burnell to survive summary judgment on his retaliation claim."

IV. MOST COURTS HOLD THAT HUMAN RESOURCES PERSONNEL AND OTHER MANAGERS MUST "STEP OUTSIDE" THEIR NORMAL JOB DUTIES TO ENGAGE IN PROTECTED OPPOSITIONAL ACTIVITY UNDER TITLE VII AND OTHER ANTI-DISCRIMINATION LAWS

Employers sometimes fear that human resources personnel or other managers involved in employee relations may themselves bring claims of retaliation. This can be worrisome for many fairly obvious reasons. But, the courts have imposed a higher standard for human resources personnel to engage in protected oppositional activity under Title VII and other similar laws. This line of cases has also been extended to managers not employed in a human resources capacity, who happen to become involved in an employee relations matter as part of their ordinary job duties.

Specifically, when human resources managers provide their opinions regarding personnel decisions, how to handle discrimination complaints, or other normal human resources related issues, most court have held that is not protected from retaliation under Title VII and other similar laws. Rather, most courts hold that for human resources managers to engage in protected oppositional activity under Title VII and other similar laws, they must step outside their job's normal role, and clearly establish that they are engaging in protected oppositional or participative activities other than the normal work involved with their job. *See, e.g., McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (personnel manager who reported FLSA related problem to employer did not step outside of her job's role, and thus did not engage in protected activity); *Correa v. Mana Prods., Inc.*, 550 F. Supp. 2d 319, 330 (E.D.N.Y. 2008) (relying on *McKenzie* to dismiss a Title VII retaliation claim based on the rationale that "[i]n order for employees in human resources positions to claim retaliation they need to first clearly establish that they were engaged in protected activities other than the general work involved in their employment."); *Cyrus v. Hyundai Motor Mfg. Ala., LLC*, No. 2:07-cv-144, 2008 WL 1848796 (M.D. Ala. Apr. 24, 2008) (relying on *McKenzie* to conclude that "[because in reporting misconduct to Duckworth in August 2005 Plaintiff was merely doing his job, not engaging in protected conduct, Plaintiff cannot establish a *prima facie* case."); *Bradford v. UPMC*, NO. 02:04CV0316, 2008 WL 191706 (W.D. Pa. Jan 18, 2008) (in a case involving a plaintiff who was an HR professional, stating "[i]t appears to this Court, however, that Plaintiff's first form of alleged protected activity, *i.e*., reports about EEO investigations, does not constitute "protected activity." Courts have held that an employee must "step outside" her normal role in order to be considered as opposing unlawful activity. *Claudio-Gotay v. Bectom-Diskinson Caribe, Ltd*., 375 F.3d 99, 102 (1st Cir. 2004), *cert. denied*, 534 U.S. 1120 (2005); *Vidal v. Romallo Bros. Printing, Inc.*, 380 F. Supp. 2d 60 (D.P.R. 2005); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486 (10th Cir. 1996). This Court finds and rules that neither Plaintiff's investigation

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of the allegations in Ms. Prysock-Mitchell's complaint, nor the recommendations that Plaintiff provided to her superiors constitutes protected activity and thus the motion in limine should be granted."). The Fifth Circuit succinctly explained the basis for this rule, and extended it to the context of a supervisor who was not employed in a human resources role, but claimed retaliation under the FLSA when he was terminated shortly after passing along an FLSA related complaint to the human resources department:

> [A] part of any management position often is acting as an intermediary between the manager's subordinates and the manager's own superiors. The role necessarily involves being mindful of the needs and concerns of both sides and appropriately expressing them. Voicing each side's concerns is not only not adverse to the company's interests, it is exactly what the company expects of a manager.
>
> If we did not require an employee to "step outside the role" or otherwise make clear to the employer that the employee was taking a position adverse to the employer, nearly every activity in the normal course of a manager's job would potentially be protected activity under [Section 215(a)(3) of the FLSA]. An otherwise typical at-will employment relationship could quickly degrade into a litigation minefield, with whole groups of employees-management employees, human resources employees, and legal employees, to name a few – being difficult to discharge without fear of a lawsuit. For those reasons, we agree that an employee must do something outside of his or her job role in order to signal to the employer that he or she is engaging [in] protected activity . . .

Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 628 (5th Cir. 2008).[1]

Other courts so holding include, for example: *Pettit v. Steppingstone, Center for the Potentially Gifted*, 429 Fed. Appx. 524, 530 n.2 (6th Cir. 2011) ("To the degree that Pettit's FLSA complaints were made in the course of performance of human resource job duties assigned to her and undertaken for the purpose of protecting the interests of the employer, they do not constitute protected activity under § 215(a)(3)."); *Samons v. Cardington Yutaka Techs*., Civ. A. No. 08-988, 2009 WL 961168 at *7 (S.D. Ohio Apr. 7, 2009) (finding that plaintiff did not step outside her role as human resources manager where she alerted the company about alleged FLSA violations as part of her job duties and did not complain about these alleged violations on behalf of herself or other women employees from a standpoint adversarial to the company); *Cook v. CTC Comm'ns Corp.*, Civ. A. No. 06-58, 2007 WL 3284337, at *6 (D. N.H. Oct. 30, 2007) (holding that in order to show protected activity, the plaintiff had to establish that she acted outside of her role as a human resources manager when she advocated on behalf of an

[1] In *Rangel v. Omni Hotel Management Corp*., No. SA–09–CV–0811, 2010 WL 3927744 (W.D. Tex. Oct. 4, 2010), the magistrate judge limited *Hagan* to its FLSA-related facts, holding that extending the rule in *Hagan* to employment discrimination complaints would "strip Title VII protection from "whole groups of employees-management employees, human resources employees, and legal employees, to name a few" – employees who are in the best positions to advise employers about compliance." *Id*. at *5. Given the substantial authority applying the same rule as in *Hagan* to Title VII and other non-FLSA cases, this case appears to represent an outlier holding.

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employee's USERRA rights); and *Hill v. Belk Stores Svcs., Inc.*, Civ. A. No. 06-398, 2007 WL 2997556, at *1 (W.D.N.C. Oct. 12, 2007) ("actions within the scope of an employee's duties are not protected for purpose of Title VII.").

Most recently, in *Brush v. Sears Holdings Corp*., No. 11–10657, 2012 WL 987543 (11th Cir. Mar. 26, 2012) (unpublished), the Eleventh Circuit applied this rule to a plaintiff who held the position of Loss Prevention District Coach. The plaintiff had investigated the alleged rape and sexual harassment of an employee. *Id*. at *2. Sears terminated the plaintiff's employment shortly after her investigation was complete. She then sued Sears, claiming retaliation. Citing *McKenzie* and *Hagan*, the Eleventh Circuit applied what it called the "manager rule" – that to qualify as "protected activity" an employee must cross the line from being an employee "performing her job . . . to an employee lodging a personal complaint." *Id*. at *5 (citing *McKenzie*, 94 F.3d at 1486). Applying that rule, the court found that the plaintiff never crossed that line, and affirmed the district court's grant of summary judgment against her retaliation claim. *Id*. at *6.

Finally, it is worth noting that there is at least one district court case in which the judge stated his belief that this line of authority has been abrogated or significantly weakened by the U.S. Supreme Court's decision in *Crawford v. Metro. Gov't of Nashville and Davidson Cnty.*, 555 U.S. 271, 129 S. Ct. 846 (2009), which is discussed at length later in this paper. *See, e.g.*, *Schanfield v. Sojitz Corp. of America*, 663 F. Supp. 2d 305, 342 (S.D.N.Y. 2009) ("I thus decline to accept Defendants' argument that Schanfield's retaliation complaint must be dismissed because it was his job as an internal auditor to identify litigation risks."). Whether that one case turns into a trend is something to keep an eye on.

V. SEEMINGLY "NO BRAINER" TERMINATION DECISIONS CAN BECOME CLOSE CALLS WHEN THE EMPLOYEE HAS BEEN PARTICIPATING IN PROTECTED ACTIVITIES

Case law has long held that the rights afforded to employee are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors. *Florida Steel Corp., v. NLRB*, 529 F.2d 1225, 1234 (5th Cir. 1976) (citing *Corriveau & Routhier Cement Block, Inc. v. NLRB*, 410 F.2d 347, 350 (1st Cir. 1969)); *cf. Hamilton v. Southwestern Bell Tel. Co*., 136 F.3d 1047, 1052 (5th Cir. 1998) (noting that anti-retaliation laws "are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors."). In actual practice however, the line is not always so clear. The cases summarized in this section teach that what sometimes appear to be "no brainer" termination decisions can become anything but, once seen through the lens of a retaliation analysis.

A. Expressing A Desire To Kill A Supervisor: *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012)

In *Coleman*, the plaintiff, a long-term African-American employee, made complaints of alleged unlawful discrimination against her new white supervisor at the Postal Service. *Id*. at 842. She then took a leave of absence for psychiatric problems. *Id*. at 843. While on the leave of absence she told a psychiatrist that she had homicidal thoughts towards her white supervisor. *Id*. The psychiatrist then reported the plaintiff's thoughts to the supervisor. *Id*. The supervisor

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reported the "threat" to the police. *Id*. Around the same time, while still on leave, the plaintiff filed two EEOC complaints against her white supervisor. *Id*. Several months later, while the plaintiff was still suspended from work pending investigation, she was terminated for violating the Postal Services' policy against making threats of violence. *Id*. at 844. The plaintiff then filed a grievance over her termination, and an arbitrator ordered her returned to work. *Id*. After that, the plaintiff filed a lawsuit, alleging race discrimination, sex discrimination, and retaliation under Title VII. The district court granted the Postal Service's motion for summary judgment, and the plaintiff appealed. *Id*. at 844-45.

The Seventh Circuit U.S. Court of Appeals reversed the district court's grant of summary judgment. The court found that:

- Two white workers who allegedly held a knife to the neck of an African-American employee, who were suspended, but not terminated, were appropriate comparators to prove disparate treatment. The court explained at length its standard for proving disparate treatment through such comparisons, and articulated a pragmatic approach that does not turn on overly technical distinctions. *Id*. at 846-52, 858-59.

- The close timing between the plaintiff's protected activities and her subsequent alleged mistreatment, suspension, and termination, supported her retaliation claim. *Id*. at 860-61.

- Evidence suggested that the plaintiff's alleged "threat" was not a "true threat," and even if it was, "a number of background facts cast doubt on the assertion that [she] was dangerous." *Id*. at 855-56.

- The Postal Service admittedly had options short of termination to gauge the plaintiff's propensity for violence, such as seeking a "fitness for duty" certificate. *Id*. at 856-57.

- The arbitrator's ruling, while not preclusive, supported the plaintiff's claim that the Postal Service's basis for termination was pretextual. *Id*. at 853-57.

- The fact that the plaintiff made the statement to her psychiatrist somehow favored the plaintiff because "[i]t would be troubling to think that anyone who confides to her psychiatrist that she has fantasized about killing her boss could automatically be subject to termination for cause." *Id*. at 856.

B. Expressing A Desire To Knock Out A HR Manager's Teeth: *Miller v. Illinois Dept. of Transp*., 643 F.3d 190 (7th Cir. 2011)

Miller requested an accommodation under the ADA. After much wrangling back and forth, it was denied. Angie Ritter, an IDOT personnel manager, allegedly told Miller "we don't grant requests." Two months later, on his first day back at work after a company-mandated leave of absence that was related to his request for accommodation, Miller was at an IDOT office, where he encountered Ritter. Referring to Ritter, Miller then said to another employee: "Right

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there is Arch enemy Number 1. I have never hit a woman. Sometimes I would like to knock her teeth out."

IDOT construed Miller's comment as a threat, informed Miller that he had been relieved of duty, and instructed him to go home. Shortly thereafter, Miller was formally discharged for making a threat of violence against another employee and for disruptive behavior. Miller grieved his discharge, and the parties submitted to arbitration. Miller was found to have engaged in "conduct unbecoming" but was returned to work, without back pay or benefits. Miller then filed suit under the ADA, and for retaliatory discharge. Miller presented evidence that a crew leader, named Steve Maurizio, had threatened violence against his co-workers on more than one occasion – including one incident in which he threatened to kill three co-workers – but unlike Miller, was not disciplined or terminated for his behavior. The district court granted summary judgment against both claims.

The Seventh Circuit U.S. Court of Appeals reversed the district court's grant of summary judgment. As for the retaliation claim, the court stated:

> In reviewing the evidence, we cannot second-guess IDOT's employment decisions to the extent that they were innocently unwise or unfair. But Miller has presented sufficient evidence from which a finder of fact could genuinely call into question IDOT's honesty. First, a reasonable jury could find that Miller's statement about Ritter was not a "threat" at all, or that even if IDOT properly construed it as such, its decision to terminate Miller was a disingenuous overreaction to justify dismissal of an annoying employee who asserted his rights under the ADA. Miller presented evidence that Maurizio himself had had a genuinely violent workplace outburst but was not terminated, and yet Miller was terminated for a much milder comment on his first day back at work. Also, Ritter's comment to Miller that "we don't grant requests" could be construed by a reasonable jury as showing a general hostility to requests for accommodation under the ADA. There is more here than "mere temporal proximity." *Cf. Stone*, 281 F.3d at 644 (noting that mere temporal proximity between the protected conduct and the allegedly retaliatory act "will rarely be sufficient in and of itself to create a triable issue"). The combination of the ambiguity of the asserted threat, the response to Maurizio's violent outburst, the hostility toward Miller's request for accommodation, and the timing provided sufficient evidence to permit a reasonable trier of fact to infer pretext and retaliatory intent. The question must be decided at trial rather than on summary judgment.

Id. at 200-01.

C. Failing To Satisfy A Performance Improvement Plan's Objective Sales Production Goals That Were Put In Place Before The Employee Engaged In Protected Activity: *Smith v. Xerox Corp.*, 371 Fed. Appx. 514 (5th Cir. Mar. 2010) and *Smith v. Xerox Corp*., 602 F.3d 320 (5th Cir. 2010)

Kim Smith was employed by Xerox Corporation for approximately 22 years before she was terminated in January 2006. She worked as an Office Solutions Specialist, responsible for

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supporting Xerox dealers, or "agents," who placed and serviced copying equipment in North Texas. For the majority of her employment, Smith received positive evaluations. By all accounts she was a very good employee who only two years before her termination was named to Xerox's prestigious President's Club, an annual award that is bestowed on only the top eight performing employees in the country.

In January 2005 Steve Jankowski took over as manager of Xerox's Central Region, which included the territory assigned to Smith. At the same time, the sales territories within Smith's region were realigned. As a result, Smith's territory and the number of agents that she supported were reduced. At that time, Smith's sales performance began to decline.

In June 2005 Jankowski sent Smith a formal warning letter which outlined various deficiencies in Smith's performance and placed her on a 90-day warning period. The letter indicated that Smith was currently at only 63% of her revenue goals and that she was "below expectations" in several areas. Jankowski later revised the letter to correct certain errors therein and re-started the warning period. The 90-day period was the first step in Xerox's Performance Improvement Process ("PIP") and was set to end on October 25, 2005. Smith refused to sign the warning letter because she believed it was inaccurate. Instead, she sought a meeting with Jankowski's supervisor, Jack Thompson, and also complained to a Xerox human resources manager, Joe Villa, all to no avail.

On October 27, 2005, at the conclusion of Smith's warning period, Jankowski placed Smith on a 60-day probationary term which was to expire on December 28, 2005. Jankowski's letter to Smith informing her of the probation stated in part that Smith had met approximately only 70% of her revenue plan and had also failed in other performance areas. The letter warned Smith that failure to meet a satisfactory performance level, including making up her entire year's shortfall and meeting 100% of her revenue plan, could result in termination of employment at the conclusion of the probationary period, or sooner if there were no evidence of improvement in the early stages of the period.

On November 4, 2005, Smith responded in writing to Jankowski's letter. She agreed that she was not at her plan goals but disagreed with Jankowski's assessment of other performance areas. She contended that the goals set for her did not reflect the "real world sales environment," including the decrease in her territory, and that she was not being treated the same as other employees or given the same amount of time usually offered when someone misses her sales numbers. Smith asked Jankowski to reconsider the length of her time on probation. Jankowski indicated on November 8, 2005, that he did not believe he was treating Smith differently from any other employee on the team and that he would not reconsider his position on the length of Smith's probation.

On November 17, 2005, Smith notified Jankowski that she had filed a discrimination charge against Xerox with the EEOC. Smith charged in her EEOC complaint that Jankowski had placed her in the PIP with the intention of terminating her employment and that he had done so based on her age, gender, and race. Smith's letter advised Jankowski of the law's prohibition of an employer taking action against an employee in retaliation for filing such charges. Smith was

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terminated in January 2006 at the conclusion of her probationary period, at which point she had achieved approximately 74% of her revenue goals.

Smith sued Xerox and a jury found in her favor on her retaliation claim. The district court, however, granted Xerox's motion for judgment as a matter of law. Smith appealed. On appeal, the Fifth Circuit Court of Appeals found that there was sufficient evidence to support the jury's verdict in Smith's favor on her retaliation claim because:

- Evidence showed Jankowski was a difficult manager who did not like employees who stood up to him, and especially did not like Smith, thus leading to the inference that he is the sort of person who would retaliate. *Smith*, 371 Fed. Appx. at 516.

- Xerox's policies generally state that counseling and coaching of employees should occur prior to the issuance of formal warning letters, yet Xerox offered no documentation supporting Jankowski's claim that he counseled Smith before placing her on probation. *Id.* at 517.

- There was evidence from which a reasonable jury could have concluded that Jankowski had started the termination process just days after Smith filed her EEOC charge, and well before the expiration of her 60-day probationary term. *Id*. at 517-18.

- Just two weeks after Smith filed her EEOC charge, Jankowski issued her a "letter of concern" over two arguably trivial issues, and did so without talking to Smith to get her side of the story first – which Xerox's own human resources manager, Joe Villa, testified was a violation of Xerox policy and looked like retaliation to him. *Id*. at 519. "Following so closely on the heels of Smith's EEOC complaint, the letter was certainly probative of Jankowski's attitude toward Smith and provided further context for Jankowski's decision to seek Smith's termination." *Id*.

The Fifth Circuit rejected Xerox's reliance on *Clark County School District v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508 (2001). In *Clark County*, the plaintiff was transferred to a new position only one month after filing a lawsuit, and her retaliation claim relied solely on this temporal proximity. The evidence showed, however, that plaintiff's transfer was contemplated by the manager before he knew about the suit. The Supreme Court held that 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 yet definitively determined, is no evidence whatever of causality." *Id*. at 272, 121 S. Ct. at 1511. The Fifth Circuit stated: "Smith, unlike the plaintiff in *Clark County*, has not presented evidence only of temporal proximity. Smith was a long-tenured employee with no disciplinary history prior to 2005 who was subjected not only to termination shortly following the EEOC complaint but also to suspicious new charges of wrongdoing for arguably minor incidents following that complaint." *Smith*, 371 Fed. Appx. at 520. Summing the case up, the Fifth Circuit held:

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> We think the evidence was sufficient for the jury to conclude that Jankowski's animus toward Smith boiled over due to the filing of the EEOC complaint, which provided a motivating factor for the termination. In sum, Jankowski failed to follow Xerox policies as far as documentation prior to placing Smith in the disciplinary process; the termination process itself was set in motion by the transmittal of the termination request within days of the EEOC charge even though Smith was supposed to be on probation for 60 days; a subsequent letter of concern followed closely after the EEOC charge and leveled new and potentially serious accusations for incidents that were arguably minor and easily explained; and Villa admitted that the letter of concern was suspicious and indicative of retaliatory motivation.

Id.

VI. POSITIVE TREATMENT OF AN EMPLOYEE AFTER THEIR PROTECTED ACTIVITY IS OFTEN – BUT NOT ALWAYS – REGARDED AS POTENT PROOF OF NON-RETALIATION

The most difficult retaliation cases to defend are often ones where a long-term employee had a spotless record and positive performance reviews for years, engaged in protected activity, and then promptly began being written up and their performance reviews plummeted. *See, e.g., Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 43 (5th Cir. 1992) (affirming a jury verdict in a retaliation case involving a long-term employee, and stating "[w]e find it surprising that suddenly, after Shirley filed her EEOC complaint, problems with her work surfaced.").

On the other hand, where employers take favorable action towards an employee after they have engaged in protected activity, courts often regard that evidence as powerful proof of non-retaliation. A case demonstrating this point is *Brady v. Houston Independent School Dist*., 113 F.3d 1419, 1424 (5th Cir. 1997). There, the Fifth Circuit U.S. Court of Appeals reversed a jury verdict for the plaintiff in a retaliation case, stating:

> Brady's case suffers from other critical flaws. During the eighteen month period between Brady's protected statements and the Appellants' alleged retaliation, Mahaffey and Cortese gave Brady positive evaluations and twice recommended that she be promoted. This fact is utterly inconsistent with an inference of retaliation, and we fail to understand why two individuals allegedly harboring a retaliatory motive against Brady would take affirmative steps to secure a job promotion for her.

Id.

Other courts have reached similar conclusions. For example, in *Moticka v. Weck Closure Systems*, 183 Fed. Appx. 343, 353 (4th Cir. 2006), the court affirmed summary judgment against a retaliation claim, stating:

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> Here, the inference of retaliatory motive is undercut, not only by the length of time between the protected activity and adverse action (nearly two years), but also by the favorable treatment Moticka received from July 2000 until her termination. First, because Moticka had not complied with the FMLA's notice requirement in requesting her leave, Weck could have denied her leave when it was initially requested, but it did not do so. Next, Weck gave her more paid leave than was required under its short-term disability policy (payments ended on February 15, 2001, rather than on January 19, 2001). Finally, by allowing Moticka thirty-four weeks of leave, Weck gave Moticka more leave than required under its FMLA and short-term disability policies. These facts are not consistent with an intent to retaliate against Moticka. Because Moticka has failed to make out a *prima facie* case of retaliation, the district court properly granted Weck's motion for summary judgment on Moticka's retaliation claim.

But, this view of things is not absolute. For example, in *Feder v. Bristol-Myers Squibb Co.*, 33 F. Supp. 2d 319, 339 (S.D.N.Y. 1999), the employer argued that its favorable post-complaint treatment of the plaintiff precluded a retaliation claim, but the court disagreed, stating:

> Defendant argues that its favorable treatment of Feder after her EEOC charge precludes any inference of retaliatory motive. There is a question, however, whether that favorable treatment was an effort to avert or undermine a claim of retaliation. After all, BMS has not explained why Feder, who had not reported to Weg when she ran licensing, was given a direct reporting relationship – along with a new title and direct contact with the chairman and chief executive officer – after Feder filed her charge and after a major part of her responsibilities was removed from her. On this record, the trier of fact would be entitled to infer that defendant's favorable treatment was intended to mask a retaliatory motive.

VII. COURTS ARE SPLIT ON THE AVAILABILITY OF EMOTIONAL DISTRESS AND PUNITIVE DAMAGES IN FLSA RETALIATION CLAIMS

A. Emotional Distress Damages

The damages provision of the anti-retaliation section of the FLSA states in relevant part:

> Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

29 U.S.C. § 216(b).

Circuit courts that have addressed the issue have held that "legal or equitable relief" includes emotional distress damages. *See Moore v. Freeman*, 355 F.3d 558, 563–64 (6th Cir. 2004) (emotional distress damages are recoverable under the anti-retaliation provision of the FLSA); *Broadus v. O.K. Indus., Inc*., 238 F.3d 990, 992 (8th Cir. 2001) (emotional distress

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damages are recoverable in Equal Pay Act retaliation case); *Lambert v. Ackerley*, 180 F.3d 997, 1017 (9th Cir. 1999) (reversing and remanding emotional distress award of $75,000 under anti-retaliation provision of FLSA for determination of appropriate amount of emotional distress damages); *Avitia v. Metro. Club of Chicago., Inc*., 49 F.3d 1219, 1228–29 (7th Cir. 1995) (citing *Travis v. Gary Cmty. Mental Health Ctr., Inc*., 921 F.2d 108, 111–12 (7th Cir. 1990)) (emotional distress damages are recoverable under the anti-retaliation provision of the FLSA); *Bogacki v. Buccaneers Ltd. Partnership*, 370 F. Supp. 2d 1201 (M.D. Fla. 2005) (same).

The Fifth Circuit U.S. Court of Appeals has yet to address whether emotional distress damages are available in a FLSA retaliation claim. However, several district courts within the Fifth Circuit have recently held that they are not. *See Douglas v. Mission Chevrolet,* 757 F. Supp. 2d 637, 639-40 (W.D. Tex. 2010) (granting the defendant's motion to dismiss plaintiff's claims for emotional distress damages in a FLSA anti-retaliation claim); *Rumbo v. Southwest Convenience Stores*, *LLC*, No. EP–10–CA–184–FM (W.D. Tex. July 19, 2010) (same).

B. Punitive Damages

Federal appellate courts that have considered the issue are split on whether a plaintiff can recover punitive damages in a FLSA retaliation claim. *Compare Travis*, 921 F.2d at 111–12 (punitive damages are available in an FLSA retaliation claim), *with Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933–35 (11th Cir. 2000) (punitive damages are not available in a FLSA retaliation claim). The Fifth Circuit U.S. Court of Appeals has yet to address whether punitive damages are available under an anti-retaliation claim brought pursuant to the FLSA. However, in both *Douglas* and *Rumbo*, *supra*, district courts within the Fifth Circuit held that punitive damages are not recoverable in a FLSA retaliation claim. The Ninth Circuit has affirmed an award of punitive damages in a FLSA-retaliation case but did not address the issue of whether the statute allows punitive damages. *Lambert*, 180 F.3d at 1011 ("Although the Seventh Circuit's reasoning [in *Travis*] is persuasive, we do not reach the question because the defendants have waived the issue of the availability of punitive damages by failing to raise it below.").

District courts are also split on this issue. Some district courts have held that punitive damages are recoverable in a FLSA retaliation claim. *See, e.g*., *Wolfe v. Clear Title, LLC*, 654 F. Supp. 2d 929, 937 (E.D. Ark. 2009) (holding that punitive damages are available in FLSA retaliation cases); *Marrow v. Allstate Security & Investigative Servs., Inc*., 167 F. Supp. 2d 838, 842-46 (E.D. Pa. 2001) (same). Other district courts have held they are not. *See, e.g., Allen v. Garden City Co–Op, Inc.*, 651 F. Supp. 2d 1249 (D. Kan. 2009) (holding punitive damages unavailable under FLSA's anti-retaliation provision); *Johnston v. Davis Sec., Inc*., 217 F. Supp. 2d 1224 (D. Utah 2002) (same); *Huang v. Gateway Hotel Holdings*, 520 F. Supp. 2d 1137, 1143 (E.D. Mo. 2007) (same); *Lanza v. Sugarland Run Homeowners Ass'n, Inc*., 97 F. Supp. 2d 737, 739-42 (E.D. Va. 2000) (same); *Waldermeyer v. ITT Consumer Fin. Corp*., 782 F. Supp. 86, 88 (E.D. Mo. 1991) (same).

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VIII. A SUFFICIENTLY SPECIFIC INTERNAL COMPLAINT, WHETHER ORAL OR WRITTEN, IS PROTECTED FROM RETALIATION UNDER THE FLSA – EXCEPT PERHAPS IN THE SECOND CIRCUIT

As we all know, in *Kasten v. Saint–Gobain Performance Plastics Corp*., __ U.S. __, 131 S. Ct. 1325 (2011), the U.S. Supreme Court held that an employee's oral complaint could fall within the purview of the FLSA's anti-retaliation provision. The Court expressly declined to address the issue of whether the complaint had to be made to a government agency or whether an internal, intra-company complaint would be covered under the anti-retaliation provision. *Id*. at 1336. It declined because, although the complaints at issue in *Kasten* were, in fact, complaints made internally to a private employer, the Court found that the employer failed to raise the issue on appeal. *Id*.

In *Minor v. Bostwick Laboratories, Inc*., 669 F.3d 428 (4th Cir. 2012), a case decided about a year after *Kasten*, the Fourth Circuit Court of Appeals reviewed the district court ruling, issued before *Kasten*, that the plaintiff's internal oral complaint did not rise to the level of "protected activity," under the FLSA. Although the Fourth Circuit did not find the Supreme Court's decision in *Kasten* to be controlling, it adopted much of the Court's reasoning, and concluded that internal complaints, such as the oral one asserted by Minor, could be covered under the FLSA's anti-retaliation provision. *Id*. at 437-38.

The Fourth Circuit also noted, however, that although an internal complaint could constitute a "protected activity" under the FLSA, not every instance of an employee "letting off steam" would qualify. *Id*. at 439. Rather, "some degree of formality" is required to constitute "protected activity," rising to the level where the employer receives "fair notice that a grievance has been lodged and does, or should, reasonably understand that matter as part of its business concerns." *Id*. Applying the test articulated by the Supreme Court in *Kasten*, the Fourth Circuit held that the proper standard to be applied to determine whether an internal complaint constitutes a "protected activity" is whether the complaint was:

- "sufficiently clear and detailed for a reasonable employer to understand it";
- "in light of both content and context";
- "as an assertion of rights protected by the [FLSA]"; and
- "a call for their protection"

Id.

The *Minor* court found that the plaintiff's allegations were sufficient to satisfy this standard, so as to withstand a motion to dismiss. Therefore, the Court reversed the case, and remanded it to the district court. *Id*.

In *Coberly v. Christus Health*, __ F. Supp. 2d __, Civil Action No. 3:10–CV–1213–L, 2011 WL 5331671 (N.D. Tex. Nov. 3, 2011), the employee admitted that he never specifically used the words "Fair Labor Standards Act" or "overtime." But, the employee claimed he did

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complain to his supervisor at least four times about not being compensated for time he worked in excess of forty hours in a week. *Id*. at *4. The district court held on summary judgment that such evidence was sufficiently specific to trigger protection under *Kasten*. *Id*.

The Fourth Circuit's holding in *Minor* that internal complaints may be covered by the FLSA's anti-retaliation provision is consistent with the holdings of the majority of the courts of appeals. *See, e.g., Kasten v. Saint–Gobain Performance Plastics Corp.,* 570 F.3d 834, 838 (7th Cir. 2009)*, rev'd on other grounds,* __ U.S. __, 131 S. Ct. 1325 (2011) ("[T]he plain language of [§215(a)(3)] indicates that internal, intracompany complaints are protected."); *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 626 (5th Cir. 2008) ("We adopt the majority rule, which allows an informal, internal complaint to constitute protected activity under Section 215(a)(3), because it better captures the anti-retaliation goals of that section."); *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc) (finding that § 215(a)(3) covered internal complaints based on its remedial purpose); *Valerio v. Putnam Assocs., Inc*., 173 F.3d 35, 42 (1st Cir. 1999) (same); *EEOC v. White & Son Enters*., 881 F.2d 1006, 1011 (11th Cir. 1989) (same); *Love v. RE/MAX of Am., Inc*., 738 F.2d 383, 387 (10th Cir. 1984) (same); *Brennan v. Maxey's Yamaha, Inc*., 513 F.2d 179, 181 (8th Cir. 1975) (same); *see also EEOC v. Romeo Cmty. Sch*., 976 F.2d 985, 989 (6th Cir. 1992) (holding that an employee's complaints to her employer were sufficient to trigger protection of the FLSA's anti-retaliation provision without explaining its rationale). *Cf. Brock v. Richardson*, 812 F.2d 121, 124–25 (3d Cir. 1987) (holding that, because of the FLSA's remedial purpose, a retaliatory firing based on an employer's belief that an employee had filed a complaint – even when he had not – was prohibited by § 215(a)(3)).

The Second Circuit Court of Appeals took a contrary view in *Lambert v. Genesee Hosp*., 10 F.3d 46, 55 (2d Cir. 1993). There, the Second Circuit stated that "[t]he plain language of [Section 215(a)(3)] limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor." (citing *Romeo*, 976 F.2d at 990 (Surheinrich, J., dissenting)). In light of *Kasten* it seems unlikely that the Second Circuit Court of Appeals will still take the position that internal complaints can never qualify as protected activity under the FLSA. However, that remains to be seen, and one district court within the Second Circuit has held that *Lambert* remains good law on this point, even after *Kasten*. Specifically, in *Hyunmi Son v. Reina Bijoux, Inc*., __ F. Supp. 2d __, 2011 WL 4716344 (S.D.N.Y. Oct. 7, 2011), the district court granted the defendants' motion to dismiss, which relied on *Lambert*, stating:

> Defendants argue that Son fails to state a valid retaliation claim under the FLSA because the complaints she made prior to her termination were not made to any governmental authority but were instead informal complaints made internally to her employer. Son argues that the Supreme Court's decision in *Kasten v. Saint–Gobain Performance Plastics* has eliminated this argument and abrogated existing Second Circuit law to the contrary.
>
> Son mischaracterizes the holding in *Kasten*. There, the Supreme Court held that oral complaints to a government agency constitute protected activity under the FLSA, which courts had previously interpreted as applying only to written complaints made to a government agency. The Court specifically refrained from

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> deciding whether the FLSA protects either oral or written complaints made informally to an employer.
>
> As a result, the Second Circuit's rule holding that complaints to employers do not qualify as a protected activity controls – the FLSA applies only to "retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor." The only retaliatory treatment alleged by Son is her termination following her complaints to Kim and Youn. Therefore, because Son's complaints were made informally to her employer and not to a government agency, she did not engage in protected activity under the FLSA and so cannot make out a *prima facie* retaliation claim. For this reason, defendants' motion to dismiss the retaliation claim is granted.

Id. at *3-4 (footnotes omitted).

IX. SEVERANCE AGREEMENTS GENERALLY CANNOT INDEPENDENTLY GIVE RISE TO VALID RETALIATION CLAIMS, BUT THEY SHOULD STILL BE HANDLED WITH CARE

Employers must be careful with how their severance and release agreements are drafted, both to ensure they are effective, and that they do not stimulate retaliation claims. An extreme example is *EEOC v. Lockheed Martin*, 444 F. Supp. 2d 414 (D. Md. 2006). In that case, Denise Isaac was let go as part of a mass layoff when Comcast merged with Lockheed Martin. Isaac, along with other laid-off employees, was offered a separation package in exchange for her signed agreement to release the company of all claims. In relevant part, the release stated:

> **Claims Released.** Subject only to the exclusions noted in the previous paragraph, I agree to waive and fully release any and all claims of any nature whatsoever (known and unknown), promises, causes of action or similar rights of any type ("Claims") that I may now have or have had with respect to any of the Released Parties listed below. These Claims released include … claims for other personal remedies or damages sought in any legal proceeding or charge filed with any court, federal, state, or local agency either by me or by a person claiming to act on my behalf or in my interest.

Isaac refused to sign the release agreement but demanded severance pay, and filed a charge with the EEOC alleging that she was terminated due to her age, race and gender. The employer responded that no severance would be paid without Isaac's signature of the release and withdrawal of her EEOC charge. Isaac refused to do either; the company consequently refused to pay her severance.

In a lawsuit initiated by the EEOC, the court found: (1) that Lockheed Martin had retaliated against Isaac by conditioning her severance benefits on her signature of the company's release clause and withdrawal of charge; and (2) that the release clause itself was *facially* retaliatory. First, the court determined that even though employers indeed did not have to provide departing employees severance, those that decided to do so could not provide the benefit in a discriminatory fashion. Specifically, the district court held that "Lockheed might well have

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been free to offer severance benefits to no one, but it cannot provide them only to employees who refrain from participating in protected activity." *Id*. at 419. In Isaac's case, the court found that the severance was withheld in retaliation of her filing and refusal to withdraw her EEOC charge. Second, the court held that Lockheed Martin's release clause was *facially* retaliatory, meaning that Isaac would not even have to make a *prima facie* case of retaliation in order to win. The court took particular issue with the release's general broadness ("I agree to waive and fully release any and all claims of any nature whatsoever") and specific language barring "*any* charge." The court found that such language unlawfully interfered with the EEOC's investigatory and enforcement functions and ran afoul of federal anti-discrimination laws.

The Sixth Circuit Court of Appeals issued a more employer-favorable decision on the issue in *EEOC v. Sundance Rehab. Corp*., 466 F.3d 490 (6th Cir. 2006). Similar to the *Lockheed Martin* case, the *Sundance Rehab. Corp.* case involved a mass lay-off and a separation agreement that offered severance pay in exchange for the employees' signed promise not to sue or file any administrative charges against the company. Although an Ohio district court concluded that the release clause was facially discriminatory, the Sixth Circuit disagreed. It held that although the company's release clause contained an unenforceable provision prohibiting employees from pursuing administrative charges, it was nevertheless facially permissible. The court reasoned that a severance agreement containing a release clause cannot in and of itself be retaliatory because it constitutes merely an offer for benefits – benefits employees are not entitled to receive in the first place and are free to accept or reject. Thus, the Sixth Circuit held, the EEOC failed to establish that the employer took any actual "adverse employment action" against the employees, a required element of any retaliation claim.

Other cases also tend to indicate the *Lockheed Martin* case is an outlier, both in terms of the factual scenario, and the legal positions the court took. For example, in *EEOC v. Nucletron Corp*., 563 F. Supp. 2d 592 (D. Md. 2008), Peter Dove, upon his termination, was offered a severance payment conditioned on his agreement not to file a discrimination suit or charge. *Id*. at 595. The severance agreement also contained a confidentiality provision. Because Dove refused to sign the severance agreement, he did not receive the severance benefits, and he was not bound by any proposed restrictions. *Id*. at 596. The EEOC sued, asserting that the mere offer of such a severance agreement constituted "facial retaliation" because several portions of it (*i.e*., the portion that required an employee to waive his right to file or participate in an EEOC discrimination charge) were unenforceable. *Id*. at 597. The district court in Maryland, however, determined that "[t]he mere offer of the severance package . . . does not fit the definition of retaliation under Title VII," because the employer had not actually taken a "sufficiently adverse employment action." *Id*. at 599.

In another case out of Maryland, *Prelich v. Medical Resources, Inc*., __F. Supp. 2d __, Civil Action No. ELH–10–3394, 2011 WL 3678853 (D. Md. Aug. 19, 2011), the defendant terminated plaintiff's employment, stating that her position "was being eliminated due to a reduction in force." *Id*. at *2. In conjunction with the termination, defendant offered plaintiff a severance payment in exchange for her signature on a release (the "Release"), by which she would relinquish the right to institute "'any action or complaint of any type in any administrative forum or court of law . . .' in order to receive the proposed severance." *Id.* at *2 (quoting Release). The Release also required plaintiff to "maintain the confidentiality of the fact and

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terms of the Release or risk repayment of the proposed severance." *Id*. The plaintiff refused to sign the Release. *Id*. Instead, she sued, claiming the release was facially retaliatory under Title VII. The court dismissed the case, stating "[i]f the mere offer of the *Nucletron Corp.* severance agreement was not an actionable, adverse employment action, the mere offer of the Release here is not an adverse employment action." *Id*. at *12. *See also Gerner v. County of Chesterfield, Va.,* 765 F. Supp. 2d 770 (E.D. Va. 2011) (rejecting retaliation claim because, "[u]nlike the immediate case, the employee in *Lockheed Martin* was negotiating the terms of her release from employment under a contract providing for severance benefits. Plaintiff here was negotiating a waiver of any cause of action against the County in exchange for severance benefits"); *Perez v. Faurecia Interior Systems, Inc.*, C.A. No. 6:08-4046-HMH-WMC, 2009 WL 2227510, at *5 (D.S.C. July 22, 2009) (Based on the facts of this case, "[t]he mere offer of the severance agreement is insufficient to constitute discrimination in the retaliation context." *E.E.O.C. v. Nucletron Corp*., 563 F. Supp. 2d 592, 598 (D. Md. 2008). Faurecia did not require Perez to withdraw her EEOC charge in order to receive severance benefits. *See E.E.O.C. v. Lockheed Martin Corp.*, 444 F. Supp. 2d 414, 417-18 (D. Md. 2006) (holding that employer conditioning receipt of severance benefits on employee withdrawing her EEOC charge constitutes retaliation); *see also E.E.O.C. v. Sundance Rehab. Corp*., 466 F.3d 490, 501 (6th Cir. 2007) (explaining that employees were not deprived of performing any protected activity by the mere offer of a severance agreement). Furthermore, there is no indication in the record that Faurecia has withheld any severance pay after Perez filed a charge with the EEOC. *See Nucletron Corp*., 563 F. Supp. 2d at 599 (explaining that employer's action "only reaches the level of retaliation if it denies severance benefits that are otherwise promised or owed or if the employer sues to enforce the agreement")); *Burden v. Isonics Corp*., No. 09–cv–01028–CMA–MJW, 2009 WL 3367071, at *7 (D. Colo. Oct. 15, 2009) (same).

Even more recently, in *Mitchell v. MG Industries, Inc*., __ F. Supp. 2d __, NO. CIV.A. 05-4073, 2011 WL 4549411 (E.D. Pa. Sept. 30, 2011), the court followed *Sundance Rehab. Corp*., and rejected *Lockheed Martin*. In April through May 2004, MG offered eligible employees a severance package in the event of a Change in Control. The plan was tailored according to the employees' salary and length of service with MG. In exchange for the benefits, MG required its eligible employees to sign a General Release and Waiver of Claims, which was set forth in the severance package materials. Shortly thereafter, on May 12, 2004, one of the plaintiffs, Muller, filed his claim with the EEOC. On October 29, 2004, Muller was terminated. On that date, Muller was notified he was eligible for the severance package provided he signed the General Release and Waiver of Claims. Rather than signing the Release as it was, Muller edited the agreement so that it carved out his ADEA claims. Despite requests urging Muller to sign the Release as written, Muller did not. As a result, MG did not provide him with any severance benefits.

Muller sued, claiming that the refusal to pay him severance was retaliation for his refusal not to dismiss his EEOC charge. In rejecting his claim, the court held that, "[i]n these circumstances, Muller's retaliation claim fails because MG denied him severance benefits only after he refused to sign the same general Release and Waiver required of all MG employees seeking similar benefits, and Muller therefore cannot show benefits were denied because of his EEOC charge rather than his failure to sign the release." *Id*. at *10 (citations omitted). Finally, in rejecting the plaintiff's reliance on the *Lockheed Martin* decision, the court stated:

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> Muller argues *EEOC v. Lockheed Martin*, 444 F. Supp. 2d 414 (D. Md. 2006), is controlling on the issue of his retaliation claim. *Lockheed Martin* relies on *Hishon* in finding severance pay to be a benefit that is "part and parcel" of employment relationships. Here, again, this is not the case. Muller was informed of the severance package only months before his termination. His severance package cannot therefore be considered "part and parcel" of his employment relationship with MG. *See EEOC v. SunDance Rehab. Corp*., 466 F.3d 490 (6th Cir. 2006). Moreover, there is no argument concerning whether the release in Lockheed Martin was a uniform general release that was offered to all eligible employees across the board, as the Release was in this case. Finally, the doctrine of *stare decisis* does not compel one district court judge to follow the decision of another. Where a second judge believes that a different result may obtain, independent analysis is appropriate. *See generally Threadgill v. Armstrong World Indus., Inc*., 928 F.2d 1366, 1371 (3d Cir. 1991) (internal quotation marks and citation omitted); *Yniguez v. State of Ariz*., 939 F.2d 727, 736–37 (9th Cir. 1991) (noting that district judge's decision is "not even binding on the same judge in a subsequent action"); *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987) ("[A single district court decision] is not binding on the circuit, or even on other district judges in the same district."); *Mosel Vitelic Corp. v. Micron Tech., Inc*., 162 F. Supp. 2d 307, 311 (D. Del. 2000) ("[W]hile the opinion of one district judge may be found to be persuasive, it is not binding on another district judge (even if that judge happens to sit in the same district).").

Id. at *11 n.10.

X. IF AN EMPLOYEE ENGAGES IN MORE PROTECTED ACTIVITY AFTER AN EMPLOYER TAKES SOME ACTION AGAINST THEM, DOES THAT MEAN THAT THE EMPLOYER'S ACTION WAS NOT MATERIALLY ADVERSE, AND THUS NOT ACTIONABLE AS RETALIATION?

As we all know now, an employer's actions are "materially adverse" – and thus actionable as retaliation – if they are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006). While the standard is sensitive to the particular circumstances of each case, it prescribes an objective inquiry that does not turn on a plaintiff's personal feelings about those circumstances. *Id*. at 68-69. Each case is "judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Id*. at 71.

In *Bush v. Regis Corp*., 257 Fed. Appx. 219, 222 (11th Cir. 2007) and *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 Fed. Appx. 437, 441-42 (5th Cir. 2007), the Courts of Appeals determined that the plaintiffs had not shown that the challenged allegedly retaliatory actions (written warnings) might dissuade a reasonable employee from filing a charge in part because the plaintiffs had not in fact been deterred from subsequently filing charges of discrimination. Therefore, in each case the allegedly retaliatory actions were found not to be

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materially adverse, so the plaintiffs could not bring suit based upon them. Some other courts have endorsed this logic in dismissing retaliation claims for failure to satisfy the "materially adverse" standard. *See, e.g., Johnson v. Watkins,* 803 F. Supp. 2d 561, 570-71 (S.D. Miss. 2011) ("In the present case, many of the disputed incidents, even assuming they occurred as Johnson described them, would be nothing more than petty slights that would not dissuade a reasonable worker from making a complaint. In fact, none of them had that effect on Johnson – she filed her Charge of Discrimination after the final disputed incident."); *Baloch v. Norton*, 517 F. Supp. 2d 345, 356 (D.D.C. 2007) ("As the plaintiff filed four additional administrative complaints between August and November 2003, he can hardly maintain that the leave restrictions deterred him from exercising his rights.").

However, the logic of these cases was rejected in *Turrentine v. United Parcel Service, Inc*., 645 F. Supp. 2d 976 (D. Kan. 2009). As the court stated in that case:

> As plaintiff aptly points out, however, every plaintiff asserting a claim of retaliation has, by virtue of Title VII's exhaustion requirements, necessarily filed a charge of discrimination concerning the allegedly retaliatory act. To suggest, then, that a plaintiff's filing of a charge of discrimination precludes a finding that a reasonable person might be dissuaded from filing a charge of discrimination defies logic. While the court leaves open the possibility that circumstances might exist in which a particular plaintiff's pursuit of his or her remedies might be relevant to a finding of whether a challenged action is materially adverse, *see Somoza v. University of Denver*, 513 F.3d 1206, 1214 (10th Cir. 2008) (stating, *in dicta*, without citation, that "the fact that an employee continues to be undeterred in his or her pursuit of a remedy ... may shed light as to whether the actions are sufficiently material and adverse to be actionable"), defendant has not persuaded the court that those circumstances are present here.

Id. at 989-90. *See also Chowdhury v. Bair*, 604 F. Supp. 2d 90, 97 (D.D.C. 2009) (stating that the standard is whether a reasonable person would be dissuaded from engaging in protected activity, whether or not the plaintiff was); *LeBlanc v. Greater Baton Rouge Port Com'n*, 676 F. Supp. 2d 460, 475 n. 49 (M.D. La. 2009) (distinguishing *DeHart* on the basis that the court there "did not merely rely on the fact that the plaintiff filed a charge of discrimination several weeks after the written warning" in finding that no materially adverse action had been taken against the plaintiff).

XI. STANDARDS FOR PROTECTION FROM RETALIATION OFTEN DIFFER DRAMATICALLY DEPENDING ON WHETHER THE "OPPOSITION" OR "PARTICIPATION" CLAUSE APPLIES

Section 704(a), the anti-retaliation provision of Title VII provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

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42 U.S.C. § 2000e-3(a).

Commentators have noted that "[i]t is essential to the analysis of § 704(a) to recognize its two different clauses . . . . The distinction is significant because the levels of statutory protection differ." Barbara L. Schlei & Paul Grossman, Employment Discrimination Law 533 (2d ed. 1983); *see also Proulx v. Citibank*, 659 F. Supp. 972 (S.D.N.Y. 1987) (same); *cf. Robinson v. Southeastern Pa. Transp. Auth*., 982 F.2d 892, 896 n. 4 (3d Cir. 1993) (noting that courts have distinguished between the activities protected by the two clauses of 42 U.S.C. § 2000e-3(a)). Specifically, courts have broken this provision down into two areas of protected activity: (1) oppositional activity – *i.e*., opposing a practice made unlawful by Title VII; and (2) participatory activity – participating in any manner in an investigation, proceeding, or hearing under Title VII. As explained below, the levels of protection from retaliation vary depending on the type of employee activity.

A. Oppositional Activity Must Be Based On A Good-Faith, Reasonable Belief, And The Activity Itself Must Be Reasonable, Or Else It Loses Its Protection

1. There Is A Good-Faith Reasonable Belief Requirement For Oppositional Activity To Be Protected

As an initial matter, to be protected as oppositional activity, the plaintiff must show that he or she took some step in opposition to a form of discrimination that the statute prohibits – for example, made an internal complaint. The plaintiff need not show that the practice he or she opposed was in fact a violation of the statute; he or she may be mistaken in that regard and still claim the protection of the statute. *See, e.g., Pickett v. Sheridan Health Care Ctr*., 610 F.3d 434, 441 (7th Cir. 2010) (citing *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002)). However, his or her opposition must be based on a good-faith and reasonable belief that he or she is opposing unlawful conduct. *See, e.g., Hatmaker v. Mem'l Med. Ctr*., 619 F.3d 741, 747 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1603 (2011). If the plaintiff does not honestly believe he or she is opposing a practice prohibited by the statute, *id*. at 747–48, or if his or her belief is objectively unreasonable, *Lang v. Nw. Univ*., 472 F.3d 493, 495 (7th Cir. 2006), then his or her opposition is not protected by the statute. *See also Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) (plaintiff's belief of racial discrimination was objectively unreasonable; thus, his internal complaints of same were not protected from retaliation). To show that he or she opposed an unlawful employment practice, a plaintiff must demonstrate that he or she had a "reasonable belief that the employer was engaged in unlawful employment practices." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007).

In addition, to be protected as oppositional activity, the employee's underlying complaint must be one that, if true, a reasonable person would believe to be prohibited by Title VII. Thus, if the employee's complaint is not based on any factor protected from discrimination by law, it is not protected oppositional activity. *See, e.g.*, *Smith v. Lafayette Bank & Trust Co.*, __ F.3d __, NO. 10-3556, 2012 WL 833163, at *2 (7th Cir. Mar 13, 2012) ("General complaints, such as Smith's, do not constitute protected activity under the ADEA because they do not include objections to discrimination based on her age.") (citation omitted); *Richards v. JRK Property Holdings*, No. 10-101252010, WL 5186675, at *2 (5th Cir., Dec. 20, 2010) (plaintiff who

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asserted that she was terminated for refusing to falsify documents did not state a viable Title VII retaliation claim); *Helton v. Southland Racing Corp*., 600 F.3d 954, 961 (8th Cir. 2010) ("Because [plaintiff] acknowledged that she said nothing in that call about race discrimination, her conversation was not protected conduct under Title VII, and so any action taken in response to that conversation cannot be actionable under Title VII."); *Richard v. Cingular Wireless L.L.C.*, 233 Fed. Appx. 334, 338 (5th Cir. 2007) (affirming summary judgment because plaintiff's complaint of general mistreatment was not protected from retaliation); *Harris-Childs v. Medco Health Solutions, Inc.*, 169 Fed. Appx. 913, 916 (5th Cir. 2006) (generalized complaints of mistreatment not protected); *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006) ("Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient.") (citing *Gleason v. Mesirow Fin., Inc*., 118 F.3d 1134, 1147 (7th Cir. 1997)).

2. Oppositional Activity Must Be Reasonable In The Manner It Is Exercised, Or Else It Loses Its Protection

Even if the plaintiff's activity qualifies as "oppositional," not all oppositional activity by an employee is protected from employer retaliation. Rather, in order to qualify for the protection, the manner in which an employee expresses his opposition to an allegedly unlawful practice must be reasonable. *See Niswander v. Cincinnati Ins. Co*., 529 F.3d 714, 721 (6th Cir. 2008); *Rollins v. State of Florida Dep't of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989). If the employee's conduct in opposing the practice is found to be unreasonable, it falls outside the protection of the law. Therefore the relevant determination is whether the employee's conduct is reasonable in light of the circumstances. *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980). "[T]he employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare." *Id*. The First Circuit Court of Appeals explained that this test "balance[s] the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 230 (1st Cir. 1976). *See also Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998); *Kavanaugh v. Sperry Univac*, 511 F. Supp. 705, 707 (N.D. Ill. 1981). Thus, for example, an employee may lawfully be terminated if they lie (or even if their employer merely honestly believes in good faith that they lied) in making an internal complaint of discrimination. *See EEOC v. Total System Services, Inc*., 221 F.3d 1171, 1176 (11th Cir. 2000).

In *Jefferies*, the plaintiff was an African-American female who, while employed by the defendant, copied and disseminated confidential employment records that tended to document her belief that she was a victim of discrimination. After her termination, Jefferies sued for unlawful retaliation, arguing that her conduct was protected because she had been attempting to bring attention to an employment practice that allegedly discriminated against her. *Jefferies*, 615 F.2d at 1036. After weighing "the employer's right to run his business" against Jefferies's right "to express [her] grievances and promote [her] own welfare," the Fifth Circuit determined that the plaintiff's form of opposition was unprotected. *Id*. The court found that Jefferies's conduct

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was clearly unreasonable in the light of the circumstances and her employer legitimately discharged her because of it. *Id*.

As *Jefferies* teaches, employee conduct, although fairly characterized as protest of or opposition to practices made unlawful by a law, "may nevertheless be so detrimental to the position of responsibility held by the employee that the conduct is unprotected." *Douglas v. DynMcDermott Petroleum Operations Co*., 144 F.3d 364, 374 (5th Cir. 1998). The law "was not meant to immunize insubordinate, disruptive, or nonproductive behavior at work." *Smith v. Tex. Dep't of Water Res*., 818 F.2d 363, 365-66 (5th Cir. 1987).

The Sixth Circuit's *Niswander* decision also involved an employee's use of confidential information to support her discrimination claim. There, the Sixth Circuit set out the following rule:

> [W]e believe that the following factors are relevant in determining whether Niswander's delivery of the confidential documents in question was reasonable: (1) how the documents were obtained, (2) to whom the documents were produced, (3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct, (4) why the documents were produced, including whether the production was in direct response to a discovery request, (5) the scope of the employer's privacy policy, and (6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.

Niswander, 529 F.3d at 726.

Applying this test, the court found as a matter of law that Niswander's turning over of the documents to the lawyer was not protected opposition activity:

> The only factors that arguably weigh in Niswander's favor are factors one and two, but even those do not weigh heavily in her favor. Although she had access to the documents through her employment, Niswander did not innocently acquire the documents in the same manner as the plaintiff in *Kempcke* [*v. Monsanto Co*., 132 F.3d 442 (8th Cir. 1998)], who came across evidence of potential age discrimination in a company computer that had been issued to him. *See Kempcke*, 132 F.3d at 445. Rather than innocently stumbling upon evidence of illegal employment practices, Niswander specifically searched through the CIC documents that she had at her home office for the purpose of uncovering evidence of retaliation. Such behavior cannot be classified as truly innocent acquisition.

Niswander, 529 F.3d at 727. *See also Johnson v. Portfolio Recovery Assocs., LLC*, 682 F. Supp. 2d 560, 581-82 (E.D. Va. 2009) (adopting *Niswander* factors and also concluding that "Plaintiff's act of sharing Defendant's confidential information with his attorney is not protected activity covered by the opposition clause.").

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B. Participation In Protected Activity Generally Need Not Be Based On A Good-Faith, Reasonable Belief To Be Protected, And Need Not Be Reasonable In The Manner Exercised, Although The Law Is Not Uniform On These Points

1. Courts Generally Hold That The Participation Clause Does Not Include A Good-Faith Reasonable Belief Requirement, Although The Seventh Circuit Disagrees

Courts that have interpreted the "participation clause" have held that it offers much broader protection to Title VII employees than does the "opposition clause." *See, e.g., Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003) ("[C]ourts have consistently recognized [that] the explicit language of § 704(a)'s participation clause is expansive and seemingly contains no limitations."); *Booker v. Brown & Williamson Tobacco Co*., 879 F.2d 1304, 1312 (6th Cir. 1989) (noting that "courts have generally granted less protection for opposition than for participation" and that the participation clause offers "exceptionally broad protection"); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (stating that the opposition clause serves "a more limited purpose" and is narrower than the participation clause); *Pettway v. American Cast Iron Pipe Co*., 411 F.2d 998, 1006 n.18 (5th Cir. 1969) (noting that the participation clause provides "exceptionally broad" protection for employees covered by Title VII).

The Seventh Circuit Court of Appeals stands out, however, for having arguably merged standards for protection under the two clauses. In 2004, the Seventh Circuit held that an employee who makes a knowingly false and malicious allegation of discrimination in an EEOC charge may be terminated, even though filing a charge is normally covered activity under the "participation" clause. *See Mattson v. Caterpillar, Inc*., 359 F.3d 885 (7th Cir. 2004). In *Mattson*, the employer concluded – based on unusually strong evidence – that the plaintiff had manufactured a false EEOC charge against his supervisor in an admitted bad faith effort to get her fired. *Id*. at 888. So, it fired Mattson for filing the bogus EEOC charge in bad faith. Mattson sued, claiming retaliation. Mattson argued that an employer may never fire an employee for filing an EEOC charge, regardless of whether it was filed in good or bad faith. The Seventh Circuit disagreed, stating that the charge was not protected because it was "not only unreasonable and meritless, but also motivated by bad faith." *Id*. at 892. The court emphasized that this was a rare case, and that its holding was narrow and limited. *Id*. However, in *dicta*, the court did state that it believed that the "good faith reasonableness" requirement of the oppositional clause – meaning that to be protected, such claims must be made in good faith and be objectively reasonable – applied to the participation clause too. *Id*. In other words, according to *Mattson*, an employee who files an EEOC charge without a good-faith and reasonable basis for doing so, has not engaged in protected activity under the participation clause.

Contrary to the Seventh Circuit, most courts have not imposed a "good faith reasonableness" rule on participatory activity. The leading case taking an opposing view is *Pettway*, 411 F.2d at 1007. In *Pettway*, the Fifth Circuit U.S. Court of Appeals noted that the EEOC complaints procedure was designed to give vulnerable employees the ability to protest unjust employment practices against their much more powerful and resourceful employers

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without fear of reprisal. *Id*. at 1005. Moreover, it reasoned that this protection against retaliation would "acquire [ ] a precarious status" if employers were entitled to discipline employees upon determining that an employee's charge was unreasonable. *Id*. In addition, it emphasized the fact that charges are typically drafted by the legally uneducated, and thus should be given special leeway. *Id*. Given these and other considerations, the Court ultimately declined to make the protections given to an EEOC charge contingent on the contents of that charge, and held that such a charge would be protected even if it contained false, and/or malicious contents. *Id*. at 1007. Thus, the *Pettway* Court declined to read a good-faith and reasonableness requirement into the protections afforded to the participation clause.

A majority of courts that have considered the issue have been sympathetic to the *Pettway* rule. *See, e.g*., *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) ("As for the participation clause, 'there is nothing in its wording requiring that the charges be valid, nor even an implied requirement that they be reasonable.'") (*quoting* 3 Arthur Larson & Lex K. Larson, Employment Discrimination § 87.12(b), at 17–95 (1994)); *Slagle v. County of Clarion*, 435 F.3d 262, 268 (3rd Cir. 2006) ("Once a plaintiff files a facially valid complaint, the plaintiff will be entitled to the broad protections of § 704(a), as interpreted by the EEOC and by numerous courts . . . the EEOC Compliance Manual states that a plaintiff is protected under the participation clause 'regardless of whether the allegations in the original charge were valid or reasonable.'"); *Johnson v. University of Cincinnati,* 215 F.3d 561, 582 (6th Cir. 2000) ("The exceptionally broad protections of the participation clause extends to persons who have participated in any manner in Title VII proceedings . . . Protection is not lost if the employee is wrong on the merits of the charge . . . nor is protection lost if the contents of the charge are malicious or defamatory as well as wrong."); *Glover v. South Carolina Law Enforcement Division*, 170 F.3d 411, 414 (4th Cir. 1999) ("Reading a reasonableness test into section 704(a)'s participation clause would do violence to the text of that provision and would undermine the objectives of Title VII."); *Booth v. Pasco County, Fla*., __ F. Supp. 2d __, __, NO. 8:09-CV-2621-T-30TBM, 2011 WL 5358672, at *16 (M.D. Fla. Oct 28, 2011) ("For the above reasons, this Court declines to read a good faith and reasonableness requirement into the participation clause.").

There are, however, still some generally agreed limits on protection for activities under the participation clause. One, for example, involves the situation where an employee files a facially defective EEOC charge of discrimination that really has nothing to do with any protected characteristic. In *Slagle v. County of Clarion*, 435 F.3d 262 (3d Cir. 2006) the plaintiff-employee filed an EEOC charge stating that "the Respondent discriminated against me because of whistleblowing, in violation of my Civil Rights, and invasion of privacy." *Id*. at 263. The EEOC notified the employee that it dismissed his charge because "the facts [he] alleg[ed] failed to state a claim under any of the statutes enforced by the Commission." *Id*. The employee was later fired, and sued for retaliation. The Third Circuit Court of Appeals rejected his claim that his EEOC charge constituted protected participatory activity, stating: "[a]ll that is required [to be protected under the participation clause] is that plaintiff allege in the charge that his or her employer violated Title VII by discriminating against him or her on the basis of race, color, religion, sex, or national origin, in any manner. Slagle did not do so, and therefore he cannot assert a claim for retaliation for filing that charge." *Id*. at 268.

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2. Courts Generally Hold That The Manner In Which Participatory Activity Is Exercised Need Not Be Reasonable To Be Protected, Although Again The Seventh Circuit Disagrees

As discussed above, oppositional activity that is unreasonable (*e.g.*, stealing the employer's confidential information) is not protected from retaliation. This issue usually does not apply in "participation" cases, which instead usually involves activities such as filing EEOC charges. But, in *Randolph v. ADT Sec. Services, Inc.*, NO. CIV.A. DKC 09-1790, 2011 WL 3476898 (D. Md. Aug. 08, 2011), the plaintiffs attached allegedly confidential information from their employer to a FLSA complaint with the Department of Labor. *Id*. at *2. When the employer found out, it fired the plaintiffs for disclosing "company confidential information to a third party." *Id*. The plaintiffs sued for retaliation. The employer argued that the plaintiffs' disclosure of its allegedly confidential information was not "reasonable," and thus their complaints to the DOL were not protected. *Id*. at *5. The court rejected the employer's argument, holding that – reasonable or not – as participatory activities, they were *per se* protected. *Id*. at *6. The court observed that:

> The distinction between opposition and participation is important because the level of protection varies in participation clause and opposition clause cases. *See Laughlin*, 149 F.3d at 259 n. 4 ("[T]he scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause."). While protected activity under the opposition clause must be "reasonable," the Fourth Circuit has specifically refused to apply any reasonableness requirement in the participation clause context. *See Glover v. S. Carolina Law Enforcement Div*., 170 F.3d 411, 414 (4th Cir. 1999) ("The plain language of the participation clause itself forecloses us from improvising such a reasonableness test."); *Kubicko*, 181 F.3d at 554 ("Application of § 704's participation clause . . . does not turn on the substance of an employee's testimony."); *see also Cumbie v. Gen. Shale Brick, Inc*., 302 Fed. Appx. 192, 194 (4th Cir. 2008) ("[W]hen an individual engages in activities constituting participation, such activity is protected conduct regardless of whether that activity is reasonable."); *Martin v. Mecklenburg Cnty*., 151 Fed. Appx. 275, 279 (4th Cir. 2005) (explaining that it was "of no moment" that employee's statements arguably bore no relevance to pending Title VII action, so long as statements were given in meeting related to that Title VII proceeding); *accord Slagle v. Cnty. of Clarion*, 435 F.3d 262, 268 (3d Cir. 2006) (listing cases establishing that participation clause activity is essentially an absolute protection).

Id. at *6 (footnote omitted).

The court's ruling in *Randolph* is consistent with cases such as *Pettway* and *Booker*, *supra*. However, again the Seventh Circuit takes a different view. In *Hatmaker v. Memorial Medical Center*, 619 F.3d 741 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1603 (2011), the Seventh Circuit held that even participatory activity must be reasonable to be protected, stating:

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> An employer is forbidden to discriminate against an employee who participates in an investigation of employment discrimination. But participation doesn't insulate an employee from being discharged for conduct that, if it occurred outside an investigation, would warrant termination. *Scruggs v. Garst Seed*, 587 F.3d 832, 838 (7th Cir. 2009); *Kaytor v. Electric Boat Corp*., 609 F.3d 537, 553-54 (2d Cir. 2010); *Gaujacq v. EDF, Inc*., 601 F.3d 565, 577-78 (D.C. Cir. 2010). This includes making frivolous accusations, or accusations grounded in prejudice. For it "cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussions simply because the investigation was about sexual harassment. To do so would leave employers with no ability to fire employees for defaming other employees or the employer through their complaint when the allegations are without any basis in fact." *Gilooly v. Missouri Dept. of Health & Senior Services*, 421 F.3d 734, 740 (8th Cir. 2005).
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> * * *
>
> Some courts disagree. They think that even defamatory and malicious accusations made in the course of an EEOC investigation cannot be a lawful ground for discipline. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980) (but in so holding, *Womack* is inconsistent with the Eighth Circuit's later decision in *Gilooly*). To these courts "participated in any manner" in an investigation seems to mean "participated by any and all means" rather than participated in any capacity, whether formally or informally, whether as complainant or as a witness, and at whatever stage of the investigation. But these courts can't actually believe that forging documents and coercing witnesses to give false testimony are protected conduct. And if they don't believe that, why do they think lying is protected? Lying in an internal investigation is disruptive of workplace discipline and in tension with the requirement that opposition to an unlawful practice (the making of which is protected by the first clause of section 2000e-3, *see Crawford v. Metropolitan Govt. of Nashville & Davidson County*, __ U.S. __, __, 129 S. Ct. 846, 850-51 (2009)) be based on an honest and reasonable belief that the employer may be violating Title VII. *Magyar v. Saint Joseph Regional Medical Center*, 544 F.3d 766, 771 (7th Cir. 2008); *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752-53 (7th Cir. 2002); *Manoharan v. Columbia University College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988).

Id. at 745-46.

C. Courts Are Split On Whether Participation In An EEOC Investigation By Giving Statements *Against* The Complainant Is Protected From Retaliation

In *Twisdale v. Snow*, 325 F.3d 950 (7th Cir. 2003), the Seventh Circuit refused to extend Title VII's protection to Twisdale who, as chief of the Internal Revenue Service's Quality

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Measurement Branch, participated in an EEOC investigation but opposed the claimant's position. The court acknowledged that, "[r]ead literally," § 2000e-3(a) protected Twisdale. 325 F.3d at 952. However, the court determined that "everyone concerned in the administration of Title VII and cognate federal antidiscrimination statutes had assumed that the retaliation provision was for the protection of the discriminated against, and not their opponents." *Id*. Essentially, the court interpreted the statute as imposing a requirement that a participant in an EEOC proceeding also oppose the discriminatory employment practice to receive protection from retaliation. *Id*. at 952-53.

In *Kelley v. City of Albuquerque*, 542 F.3d 802 (10th Cir. 2008), the court refused to follow the Seventh Circuit's holding, stating "[w]e decline to apply *Twisdale* here, *inter alia*, because it impermissibly collapses the opposition and participation clauses of the statute. As the court noted:

> The distinction between participation clause protection and opposition clause protection is significant because the scope of protection is different. Activities under the participation clause are essential to the machinery set up by Title VII. As such, the scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause. . . . Therefore, requiring that the participant in an EEOC proceeding also oppose a retaliatory employment practice runs counter to the statutory scheme.

Kelley, 542 F.3d at 815 n. 11.

XII. WHEN IS AN EMPLOYEE'S PARTICIPATION IN AN INTERNAL INVESTIGATION "PROTECTED ACTIVITY" UNDER TITLE VII?

A. Participation In A Purely Internal Investigation Is Not Covered By Title VII's Participation Clause

Under the participation clause of Title VII, employers are prohibited from retaliating against an employee who participates in any manner in an investigation, proceeding, or hearing under Title VII or assists a fellow employee in his or her Title VII action. 42 U.S.C. § 2000e-3(a). The Seventh Circuit has held that "[t]he 'investigation' to which section 2000e-3 refers does not include an investigation by the employer, as distinct from one by an official body authorized to enforce Title VII." *Hatmaker v. Memorial Medical Center*, 619 F.3d 741, 747-48 (7th Cir. 2010) (noting that "[t]o bring an internal investigation within the scope of the clause we would have to rewrite the statute"); *see also EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (finding that "[participation] clause protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; it does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC"). In other words, "the participation clause is meant to protect employees who take part in or otherwise assist in an EEOC investigation; it is only those investigations that are conducted 'under' Title VII procedures." *Olsen v. Marshall & Ilsley Corp.*, 2000 WL 34233699, at *18 (W.D. Wis. 2000) (citing *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 259 (4th Cir. 1998)); *Tuthill v. Consolidated Rail Corp.*, No. Civ. A. 96-6868, 1997 WL 560603, *4 (E.D. Pa. Aug. 26, 1997) ("Title VII's

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definition of 'protected activity' does not include participation in an internal investigation"), *aff'd,* 156 F.3d 1255 (3rd Cir. 1998); *Morris v. Boston Edison Co*., 942 F. Supp. 65, 71 (D. Mass. 1996) ("[a]ll the activity described as being protected under the participation clause relates to actions taken in outside, formal statutorily created proceedings.").

B. Participation In An Internal Investigation Triggered By An EEOC Charge Is Covered By Title VII's Participation Clause

On the other hand, an internal employer investigation initiated as a result of an EEOC charge is typically held to constitute an "investigation" within the meaning of the "participation" clause. As stated in *Clover v. Total System Services, Inc*., 176 F.3d 1346, 1353 (11th Cir. 1999):

> [A]n employer receiving a form notice of charge of discrimination knows that any evidence it gathers after that point and submits to the EEOC will be considered by the EEOC as part of the EEOC investigation. Though this is an indirect means of gathering evidence relevant to investigating a charge of discrimination, the EEOC considers employer-submitted evidence on an equal footing with any evidence it gathers from other sources. Because the information the employer gathers as part of its investigation in response to the notice of charge of discrimination will be utilized by the EEOC, it follows that an employee who participates in the employer's process of gathering such information is participating, in some manner, in the EEOC's investigation.

C. Participation In An Internal Investigation – Even If Not Triggered By An EEOC Charge – May Still Be Covered By Title VII's Opposition Clause Under The U.S. Supreme Court's Holding In *Crawford*

In *Crawford v. Metro. Gov't of Nashville and Davidson Cnty.*, 555 U.S. 271, 129 S. Ct. 846 (2009), the Supreme Court addressed the opposition clause's application to witnesses in an employer's internal investigation. The case arose following an investigation by Metro into rumors of sexual harassment. During the investigation, long-time Metro employee Vicky Crawford was asked by a human-resources officer whether she had witnessed inappropriate behavior by another Metro employee, Gene Hughes. In response, Crawford described several incidents of sexually harassing behavior by Hughes. Crawford was subsequently fired, as were the two other employees who also had reported sexual harassment by Hughes.

Crawford filed suit, claiming that her dismissal violated Title VII because it was allegedly in retaliation for her report of Hughes's behavior. The district court granted summary judgment for Metro, concluding that Title VII's anti-retaliation provision did not cover the conduct at issue because Crawford had not "instigated or initiated any complaint" against Hughes, but had "merely answered questions by investigators." The Sixth Circuit agreed, concluding that "opposition" under Title VII "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation."

To resolve a conflict among the federal courts of appeals, the Supreme Court granted certiorari. In a decision authored by Justice Souter, the Supreme Court reversed and remanded

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for further proceedings, concluding that Crawford's conduct was covered by the "opposition clause" of Title VII's anti-retaliation provision, which (as set out earlier in this paper) makes it unlawful for an employer to discriminate against an employee "because he has opposed any practice made . . . unlawful . . . by this subchapter." 42 U.S.C. § 2000e-3(a). At the crux of the Court's opinion was the meaning of the term "oppose," which is not defined in the statute itself. The Court held that the word "oppose" "carries its ordinary meaning," citing definitions such as "to resist or antagonize," "to confront," and "to be hostile or adverse to, as in opinion." The Court concluded that providing a disapproving account of an employee's sexually obnoxious behavior may qualify as resistant or antagonistic, citing an EEOC guideline, and observed that communicating a belief that an employer has engaged in employment discrimination virtually always constitutes opposition to that activity. In support of the Court's decision, Justice Souter announced,

> "Oppose" goes beyond "active, consistent" behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it . . . . And we would call it "opposition" if an employee took a stand against an employer's discriminatory practices not by "instigating" action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons . . . . There is, then, no reason to doubt that a person can "oppose" by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.

Crawford, 129 S. Ct. at 851.

The Supreme Court thus rejected the Sixth Circuit's interpretation of the "opposition clause" as requiring active, consistent, opposing activities, including the initiation or instigation of a complaint. Under the rule announced in *Crawford*, opposition includes not only those who report discrimination on their own initiative, but also those who report discrimination in response to an investigator's question. The Court expressly did not address the scope and reach of the "participation clause" under Title VII's anti-retaliation provision, which many observers had expected the Court to do under the facts of the case.

In *Collazo v. Bristol–Myers Squibb Mfg., Inc*., 617 F.3d 39 (1st Cir. 2010), the First Circuit U.S. Court of Appeals relied on *Crawford* to conclude that merely repeatedly accompanying a coworker to the human resources department to file complaints about sexual harassment, followed by employer action that would be perceived as materially adverse by a reasonable worker, can state a retaliation claim under the opposition clause. *Id*. at 46-48.

XIII. RETALIATION AND THE EXHAUSTION REQUIREMENT: A CONFLICT IS BREWING

In *Gupta v. East Texas State Univ.*, 654 F.2d 411 (5th Cir. 1981), the Fifth Circuit Court of Appeals held that "it is unnecessary for a plaintiff to exhaust administrative remedies prior to

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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." *Id.* at 414. The Court reasoned that having required Gupta to file another charge for retaliation would have done nothing but create additional procedural technicalities when a single filing would comply with the intent of Title VII. *Id*. The court believed that eliminating that needless procedural barrier would deter employers from attempting to discourage employees from exercising their rights under Title VII. *Id*. Similar results have been reached by other circuits considering the same situation. *See Clockedile v. New Hampshire Dep't of Corr.,* 245 F.3d 1, 4 (1st Cir. 2001) (noting that most circuits have permitted retaliation claims where only the discrimination charge was made to the agency, and collecting cases from every Circuit but the D.C.); *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992) (holding that retaliation claim may be raised for the first time in federal court); *Carter v. South Cent. Bell*, 912 F.2d 832 (5th Cir. 1991) (reasoning that because other Title VII claims were properly before court, jurisdiction existed over retaliatory termination claim as well); *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991) (holding that retaliation claim was "reasonably related" to prior sex discrimination claim); *Malhotra v. Cotter & Co*., 885 F.2d 1305, 1312 (7th Cir. 1989) (holding that allegations of retaliation for the filing of an EEOC charge is discrimination "like or reasonably related to . . . and growing out of such allegations."), *superseded on other grounds by statute*, *Rush v. McDonald's Corp*., 966 F.2d 1104, 1119–20 (7th Cir. 1992); *Brown v. Hartshorne Public Sch. Dist. No. 1*, 864 F.2d 680 (10th Cir. 1988) (holding that retaliation arising out of first EEOC filing was "reasonably related" to that filing, obviating the need for a second EEOC charge); *Baker v. Buckeye Cellulose Corp*., 856 F.2d 167 (11th Cir. 1988) (adopting reasoning of *Gupta*); *Kirkland v. Buffalo Bd. of Educ*., 622 F.2d 1066 (2d Cir. 1980) (holding that act of retaliation was "directly related" to plaintiff's initiation of litigation and that no second EEOC charge was necessary); Kelly Koenig Levi, *Post Charge Title VII Claims: A Proposal Allowing Courts to Take "Charge" When Evaluating Whether to Proceed or to Require a Second Filing*, 18 Ga. St. U.L. Rev. 749, 768-69 (2002) (noting that most courts have allowed claims of retaliation based on the act of filing the original charge despite the failure to include the retaliation claim in a charge).

Some courts, however, have questioned whether *Gupta's* holding and logic are still valid in light of the Supreme Court's decision in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002). In *Morgan*, the Supreme Court held that Title VII plaintiffs could not use a "continuing violation" theory to assert claims that were barred because they were based on employer acts outside the 300–day statutory window for filing an EEOC charge. *Id*. at 113–14, 122 S. Ct. 2061. After *Morgan*, "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Id*. at 114, 122 S. Ct. 2061. Although *Morgan* involved incidents that took place before the EEOC charge was filed, courts have extended it to exclude any acts that occurred after filing from piggybacking onto an earlier-filed charge. *See, e.g., Martinez v. Potter*, 347 F.3d 1208, 1210–11 (10th Cir. 2003); *McKenzie v. St. Tammany Parish School Bd*., 2006 WL 2054391, at *2, *3 (E.D. La. Jul. 19, 2006); *Prince v. Rice*, 453 F. Supp. 2d 14, 23–24 (D.D.C. 2006); *Romero–Ostolaza v. Ridge*, 370 F. Supp. 2d 139, 148-50 (D.D.C. 2005).

Courts in the Fifth Circuit have continued to apply *Gupta* after *Morgan*. *See, e.g., Eberle v. Gonzales*, 240 Fed. Appx. 622, 2007 WL 1455928 (5th Cir. May 18, 2007) (discussing

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Gupta's rationale and holding); *Miller v. Southwestern Bell Telephone Company*, 51 Fed. Appx. 928 (5th Cir. 2002) (holding that, under *Gupta*, the plaintiff need not file an additional charge with the EEOC for a retaliation claim "growing out of" his initial charge so long as the retaliation occurs after the filing of the initial charge); *Finnie v. Lee County, Miss*., No. 1:10-cv-64–A–S, 2012 WL 124587, at *26 (N.D. Miss. Jan. 17, 2012) (discussing *Morgan*, but following *Gupta* because it is still binding in the Fifth Circuit); *Stevenson v. Verizon Wireless LLC*, Civil Action No. 3:08-CV-0168-G, 2009 WL 129466 (N.D. Tex. Jan. 16, 2009) (discussing *Morgan*, yet still applying *Gupta*); *Cooper v. Wal–Mart Transportation, LLC*, 662 F. Supp. 2d 757 (S.D. Tex. Sept. 24, 2009) (same); *Lightfoot v. OBIM Fresh Cut Fruit Co*., Civil Action No. 4:07-CV-608-BE, 2008 WL 4449512, at *3 (N.D. Tex. Oct. 2, 2008) (applying *Gupta* but distinguishing it on the facts); *Ocampo v. Laboratory Corp. of America*, No. Civ. SA04CA538-FB, 2005 WL 2708790, at *7 (W.D. Tex. Sept. 6, 2005) ("Assuming the claims based on the charge of age discrimination are properly before the Court, and given [*Gupta*], Ocampo was not required to file a second charge of discrimination."); *Green v. Louisiana Casino Cruises, Inc*., 319 F. Supp. 2d 707, 710–11 (M.D. La. 2004) (citing *Gupta* and two later Fifth Circuit cases for the proposition that "a plaintiff is not required to exhaust administrative remedies before seeking review of a retaliation claim that grows out of an earlier EEOC charge")*; see also Houston v. Army Fleet Services, LLC*, 509 F. Supp. 2d 1033 (M.D. Ala. 2007) (citing *Gupta*, which is binding in the Eleventh Circuit as well); *White v. Potter*, Civil Action No. 1:06-CV-1759-TWT, 2007 WL 1330378, at *7 (N.D. Ga. Apr. 30, 2007) (finding *Gupta's* policy rationale persuasive, recognizing the D.C. District Court's post-*Morgan* opinions as rejecting *Gupta's* holding, but deciding not to follow the D.C. decisions "given that *Gupta* is binding precedent in [the Eleventh] Circuit").

On the other hand, relying on *Morgan*, some courts outside of the Fifth Circuit have rejected *Gupta* and its logic entirely, or in part, and have held that administrative remedies must be separately exhausted for claims of retaliation based on an earlier-filed EEOC charge that is already properly before the court. *See Martinez*, 347 F.3d at 1211 (abolishing *Gupta* exception); *Wedow*, 442 F.3d 661, 672–76 (8th Cir. 2006) (narrowing the exhaustion requirement); *Weber v. Battista*, 494 F.3d 179, 182–84 (D.C. Cir. 2007) (discussing other circuits' treatment of the issue); *Prince*, 453 F. Supp. 2d at 23–24 (rejecting *Gupta* exception in light of *Morgan*); *Romero–Ostolaza*, 370 F. Supp. 2d at 148–50 (same).

The Seventh Circuit, and courts within it, continue to apply the *Gupta*-like exception, even post-*Morgan*. *See, e.g., Horton v. Jackson County Bd. Of County Commissioners*, 343 F.3d 897, 898 (7th Cir. 2003) ("retaliation for complaining to the EEOC need not be charged separately from the discrimination that gave rise to the complaint"); *Edlebeck v. Trondent Development Corp.*, NO. 09 C 7462, 2011 WL 862891, at *4 (N.D. Ill. Mar. 8, 2011) ("Because these allegations arise out of events that occurred after Edlebeck filed his EEOC charge on September 25, 2008, Edlebeck's failure to include his retaliation claim in the EEOC charge does not preclude him from pursuing the claim in federal court."); *Riley-Jackson v. Casino Queen, Inc.*, NO. 07-CV-0631-MJR, 2011 WL 941407, at *3 (S.D. Ill. Feb 27, 2011) (applying *Gupta*-like exception and noting that requiring the plaintiff to file an additional EEOC charge for acts that occurred after her original EEOC filing would merely lead to an "increased burden for both the EEOC and the employer.") (citation omitted); *Kind v. Gonzales*, No. 05 C 0793, 2006 WL 1519579, at *8 n. 8 (N.D. Ill. May 30, 2006) ("Defendant rightly recognizes the Seventh

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Circuit's teaching that retaliation claims are within the scope of an EEO charge when the retaliation arose after, and in response to, the initial EEO filing and was reasonably related to that filing, obviating the need for a second EEO charge") (internal quotations omitted); *Hopper v. Legacy Property Mgmt. Services, L.L.C.*, No. 04-CV-1099, 2006 WL 1388832, at *8 (E.D. Wis. May 16, 2006) ("Hopper's failure to file a new EEOC complaint or to amend her complaint to include new allegations of retaliation and constructive discharge is not fatal to her judicial complaint."); *Schwartz v. Bay Industries, Inc*., 274 F. Supp. 2d 1041, 1046 (E.D. Wis. 2003) (denying defendant's motion to dismiss a retaliatory discharge claim that was omitted from the EEOC charge). In an unpublished decision, a divided panel of the Sixth Circuit also held that *Morgan* did not require a fresh EEOC charge for a later act of retaliation. *Delisle v. Brimfield Township Police Dep't*, 94 Fed. Appx. 247, 252-54 (6th Cir. 2004).

The Fifth Circuit, and other courts, agree that *Gupta* does not apply, however, if the alleged retaliation occurred before the Charging Party ever filed any EEOC charge. *See Eberle v. Gonzales,* 240 Fed. Appx. 622, 2007 WL 1455928 (5th Cir. May 18, 2007); *McCray v. DPC Industries, Inc.,* 942 F. Supp. 288, 295 (E.D. Tex. 1996) ("The situation in *Gupta* is distinguishable from this case because McCray's retaliation claim does not grow out of a previously filed EEOC charge. The alleged retaliation about which McCray complains occurred before McCray ever went to the EEOC. Thus, the *Gupta* rule does not apply."); *Swearnigen-El v. Cook County Sheriff's Dept.*, 602 F.3d 852, 864-65 (7th Cir. 2010) (same); *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 482-83 (7th Cir. 1996) (same).

XIV. UPDATE ON THIRD-PARTY RETALIATION: *THOMPSON* AND BEYOND

A. ***Thompson***

In *Thompson v. North American Stainless, LP*, __ U.S. __, 131 S. Ct. 863 (2011), the U.S. Supreme Court addressed a retaliation claim under the Title VII of the Civil Rights Act. Eric Thompson, the plaintiff, was engaged to be married to Miriam Regalado and both were employed at North American Stainless ("NAS"). *Id*. at 867. Ms. Regalado filed an EEOC charge alleging sex discrimination against NAS, and three weeks later NAS fired her fiancée, Mr. Thompson. Mr. Thompson filed an EEOC charge, and then sued NAS, contending that NAS fired him to retaliate against Ms. Regalado for filing her EEOC charge. *Id*. The United States Supreme Court first concluded that Mr. Thompson's status as Ms. Regalado's fiancée was a relationship close enough to potentially fit within Title VII's prohibition against third party retaliation. *Id*. at 868–69. Second, the *Thompson* Court concluded that Mr. Thompson was a "person aggrieved" within the meaning of Title VII because he was employed by the same employer as the original EEOC claimant and injuring him was the employer's intended means of harming the claimant; in the Court's phrase, Mr. Thompson was within the "zone of interests" sought to be protected by Title VII. *Id*. at 870.

B. Post-*Thompson* Cases

1. Dating Relationship

In *Harrington v. Career Training Inst. Orlando, Inc*., No. 8:11–cv–1817–T–33MAP, 2011 WL 4389870, at *2 (M.D. Fla. Sept. 21, 2011), ruling on a motion to dismiss, the court

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found that *Thompson* could potentially apply to a mere dating relationship, stating "[i]n rendering its binding decision in *Thompson,* the Court declined to bar claims for third party reprisals, such as the one at issue in this action. Accordingly, consistent with *Thompson,* the Court denies the Motion to Dismiss."

2. Best Friend

In *Ali v. District of Columbia Government*, 810 F. Supp. 2d 78 (D.D.C. 2011), the employer allegedly threatened to fire the plaintiff's best friend and coworker, Marcus Craig, if he continued to proceed with his internal religious discrimination complaint. In denying the employer's motion for summary judgment against the plaintiff's retaliation claim, the court found this threat was actionable as retaliation under the *Burlington N.* standard. *Id*. at 89-90. It relied on *Thompson* in reaching this conclusion, stating:

> To be sure, there are factual differences between this case and *Thompson*: Craig was threatened with termination rather than actually fired, and he was Ali's "best friend," not his fiancé. Dove Dep. at 41. It is thus unclear precisely where this case falls on the continuum between "firing a close family member," which "will almost always meet the *Burlington* standard," and "inflicting a milder reprisal on a mere acquaintance," which "will almost never do so." *Thompson*, 131 S. Ct. at 868. Even so, to stave off summary judgment, Ali need only show that a reasonable juror could conclude that the threat "*well might* have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington*, 548 U.S. at 68, 126 S. Ct. 2405 (quoting *Rochon*, 438 F.3d at 1213) (emphasis added); *see Fallon v. Potter*, 277 Fed. Appx. 422, 429 n. 29 (5th Cir. 2008) (stating that, under *Burlington*, whether an action is materially adverse "is a fact issue for the jury"). This burden is "not onerous." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089 (1981). Common sense suggests, and *DeMedina* and *Thompson* support the conclusion that, a reasonable worker would be deterred from pursuing a discrimination complaint by a credible threat to fire a close friend.

Id. at 89-90 (footnotes omitted).

3. Spouses Employed At Two Different Employers

In *McGhee v. Healthcare Services Group, Inc*., NO. 5:10-CV-279-RS-EMT, 2011 WL 5299660 (N.D. Fla. Nov 2, 2011), the court extended *Thompson* to a situation involving two different employers. McGhee was employed by Healthcare Services Group ("Healthcare"). Healthcare was under contract with Sovereign Healthcare of Bonifay ("Bonifay") as a vendor. McGhee's position was to oversee the cleanliness of the Bonifay facility. McGhee's wife was employed by Bonifay, and in May of 2009 she filed a charge of discrimination with the EEOC, alleging that Bonifay discriminated against her on the basis of her disability. McGee alleged that in retaliation for his wife's protected activity he was terminated by his employer, Healthcare, at the request of Bonifay. McGee sued both Healthcare and Bonifay for retaliation.

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Healthcare and Bonifay contended that *Thompson* was not applicable to the case because McGee was employed by Healthcare and his wife was employed by Bonifay. But, the court rejected that argument on summary judgment, stating:

> Although Plaintiff and his wife were employed by different entities, *Thompson* gives no indication that this prohibits recovery. Plaintiff's employer was a subcontractor of Bonifay, and Plaintiff's physical workplace was at the Bonifay facility. The two employers and their employees are clearly intertwined, and under Plaintiff's version of the facts Bonifay used its relationship with Healthcare to retaliate against Plaintiff's wife for her protected activity. Allowing employers to induce their subcontractors to fire the subcontractor's employees in retaliation for the protected activity of a spouse would clearly contravene the purpose of Title VII. It is easy to conclude that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her husband would be fired by his employer. *See Thompson*, at 868. Therefore, under the test set forth in *Thompson* Plaintiff's interests fall within the "zone of interests" of those intended to be protected by Title VII.

Id. at *3.

4. *Thompson* Extends To The ADEA

In *Dembin v. LVI Services, Inc*., __ F. Supp. 2d __, NO. 11 CIV. 1888 JSR, 2011 WL 5374148 (S.D.N.Y. Nov. 8, 2011) and *Hovsepyan v. Blaya*, 770 F. Supp. 2d 259, 269 (D.D.C. 2011), the district courts held that *Thompson* applies to retaliation claims brought under the Age Discrimination in Employment Act. This is not surprising, because the ADEA's anti-retaliation provision is related to the anti-retaliation provision of Title VII, and cases interpreting the latter provision are frequently relied upon in interpreting the former. *See Passer v. American Chemical Society*, 935 F.2d 322, 330 (D.C. Cir. 1991) (citations omitted); *Merrick v. Farmers Ins. Group,* 892 F.2d 1434, 1441 (9th Cir. 1990) ("Those circuits that have considered ADEA retaliation claims have generally adopted the analysis used in Title VII cases without comment.") (*citing Powell v. Rockwell Int'l Corp*., 788 F.2d 279, 284-85 (5th Cir. 1986)) (other citations omitted).

XV. THE FDA FOOD SAFETY MODERNIZATION ACT

On January 4, 2011, President Obama signed the FDA Food Safety Modernization Act (FSMA), which seeks to promote food safety by enacting strict safety standards in the food industry. In addition to the enactment of safety standards, Section 402 of the FSMA ensures sweeping protections for whistleblowers in the industry. The FSMA whistleblower protection applies to any "entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food." The anti-retaliation provisions protect any employee of a covered entity who provides to the employer, the federal government, or the Attorney General of a State information that the employee reasonably believes constitutes a violation of the FSMA; testifies or is about to testify about any such violation; assists or participates in any such proceeding; or objects to or refuses to participate in any activity that the employee reasonably believes is a violation of the FSMA.

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The Secretary of Labor is charged with enforcing the FSMA's whistleblower protections, including awarding the appropriate relief. If after receiving a retaliation or whistleblower complaint the Secretary concludes that there is reasonable cause to believe that a violation of Section 402 has occurred, the Secretary may issue among other relief an order reinstating the employee and providing for back pay. If the Secretary has not issued a final decision within 210 days after filing of the complaint, the employee may file a complaint in federal district court seeking reinstatement, back pay, and "compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorneys' fees." Food Safety Modernization Act, Pub. L. No. 111-353, § 402(b)(4)(B)(iii.), 124 Stat 3885, 3970.

The whistleblower provisions of the FSMA became effective immediately upon the law being signed by President Obama. Given its sweeping nature and broad protections, any entity potentially covered by the FSMA – which includes essentially any entity in the food industry – should consider adopting strong anti-retaliation policies (including the provision of alternative avenues for an employee to complain), advising its managers and supervisors of the company's anti-retaliation prohibitions, and providing training to all managers and supervisors educating them on the policy and on ways to avoid even the appearance of retaliation.

XVI. DODD-FRANK

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") is a relatively new law that has not yet generated a substantial number of court decisions. Therefore, this section of the paper primarily focuses on the whistleblower incentive and anti-retaliation provisions of the statute itself, and the implementing regulations issued in May 2011. *See* 15 U.S.C. § 78u–6 *et seq*.; *Securities Whistleblower Incentives and Protections*, 76 Fed.Reg. 34,300 (June 13, 2011) (codified at 17 C.F.R. §§ 240.21F–1 to 240.21F–17). However, there have been a few cases decided under Dodd-Frank to date, and they are discussed herein.

An outstanding article that covers the law and final regulations in comprehensive fashion is *Dodd-Frank and the SEC Final Rule: From Protected Employee To Bounty Hunter*, ST001 ALI-ABA 1487 (July 28-30, 2011), which was written by Littler Mendelson, P.C. lawyers John S. Adler, Edward T. Ellis, Barbara E. Hoey, Gregory C. Keating, Kevin M. Kraham, Amy E. Mendenhall, Kenneth R. O'Brian, and Carole F. Wilder. This section of the paper is substantially derived from that article.

A. Introduction

The whistleblower and bounty hunter provisions of Dodd-Frank make internal auditing, reporting and compliance programs a higher priority than ever for covered employers. The SEC regulations implementing Dodd-Frank, released on May 25, 2011, clearly reflect that the government's objective is to stimulate reporting of violations of the federal securities laws through financial incentives to employees who discover such violations. The Dodd-Frank regulations are a law enforcement tool that signals a further progression in the SEC's approach to rooting out corporate corruption. Ten years ago, Congress passed the Sarbanes-Oxley Act of 2002 ("SOX") in response to the breakdown in internal corporate controls demonstrated most dramatically in the Enron prosecution. Dodd-Frank is a step farther on that continuum, by

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financially incentivizing employees to come directly to the SEC with information regarding shareholder fraud.

Dodd-Frank also provides enhanced employment protection for the whistleblower providing the information. In presenting the new regulations, SEC Chairperson Mary L. Schapiro stated that "for an agency with limited resources like the SEC, I believe it is critical to be able to leverage the resources of people who have first-hand information about potential violations" of the securities laws. Consistent with that goal, the final regulations:

- Broaden the range of people who may qualify as whistleblowers;
- Promise to pay informant/whistleblowers for "original source" information that leads to a successful enforcement action by the SEC;
- Require only a "reasonable belief" that the information provided "relates to a possible securities law violation";
- Simplify the reporting process for whistleblowers; and
- Do not require an employee to make an internal complaint before reporting alleged unlawful conduct to the SEC, including complaints for unlawful retaliation.

As proof of its commitment to enforcing its new program, the SEC leased 900,000 square feet of space for its expanding offices and has staffed a newly created "Office of the Whistleblower." http://www.sec.gov/foia/docs/oig-553.pdf. The SEC has also allotted more than $450 million to its investor protection fund, out of which whistleblower awards will be paid.

The financial incentives laid out in the SEC regulations suggest that covered employers will face some or all of the following:

- Increased use of their internal ethics and compliance reporting procedures, because the regulations reward the use of those procedures;
- A need for prompt and efficient corporate responses to internal complaints, because effective internal responses are rewarded by the SEC, the U.S. Department of Justice prosecution principles, and the Federal Sentencing Guidelines;
- An increase in SEC and DOL investigations generally, because the bounty hunter system does not discourage reporting of questionable claims of wrongdoing; and
- The need for prompt, proper, and well-documented Human Resources responses to employee complaints, because the Dodd-Frank whistleblower provisions can be used by employees as a shield against performance management and legitimate employer discipline.

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B. Who Can Qualify As A Whistleblower?

1. The Basic Definition Of A Whistleblower Under Dodd-Frank

The Dodd–Frank Act defines a whistleblower making disclosures under the SEC's jurisdiction as follows: "The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u–6(a)(6).

To qualify as a whistleblower under Dodd-Frank, an individual must be "an employee of a public company or subsidiary whose financial information is included in the consolidated financial statements of a public company or the employee of a nationally recognized statistical rating organization." 17 C.F.R. pts. 240 & 249, Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934. ("Final Rules"), at 17. The Final Rules define a whistleblower as one who possesses a "reasonable belief" that the information provided "relates to a possible securities law violation." The "reasonable belief" standard, also applicable in SOX and other whistleblower contexts, is intended to put "potential whistleblowers on notice that meritless submissions cannot be the basis for anti-retaliation protection." Final Rules at 218. The SEC notes that it included this phrase to deter frivolous claims so it could focus on more meritorious submissions and because of its concern about the cost of such claims to employers, not only in terms of the costs of litigation, but also because of "inefficiencies stemming from some employers' decisions not to take legitimate disciplinary action due to the threat of bad faith anti-retaliation litigation." *Id.* at 219.

The use of the term "possible violation" in the definition of whistleblower in the Final Rules is also significant. In the proposed rules, the SEC had used the word "potential," but changed it to "possible violation" that "has occurred, is ongoing, or is about to occur" to be more precise and clarify that whistleblower status applies to those who provide "information about possible violations, including possible future violations, of the securities laws." *Id.* at 12. The SEC rejected the use of the terms "probable violation" or "likely violation," stating that it thought that such a "higher standard" was "unnecessary" and would "make it difficult for the staff to promptly assess whether to accord whistleblower status to a submission." *Id.* at 13. In the SEC's view, the language it adopted was sufficient to ensure that "frivolous submissions would not qualify for whistleblower status." *Id.*

The SEC also decided not to limit the scope of the term "possible violations" by including a requirement that the information provided relate to a "material" violation of the securities laws. In keeping with its objective of encouraging informants, the Final Rules express the SEC's concern that a materiality threshold might limit the number of reports made. The SEC states that "it is preferable for individuals to provide us with any information they possess about possible securities violations (irrespective of whether it appears to relate to a material violation) and for us to evaluate whether the information warrants action." *Id.* at 14.

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2. Although Dodd-Frank Explicitly Defines A "Whistleblower" In A Way That Only Includes Those Who Provide Information To The SEC, A Narrow Exception Has Been Carved Out That Is Rooted In A "Catch-All" Part Of The Law

a. Dodd-Frank's "Catch-All" Provision Providing Whistleblower Status To Employees Who Make Certain Internal Disclosures

As mentioned above, the Dodd–Frank Act defines a whistleblower making disclosures under the SEC's jurisdiction as follows: "The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u–6(a)(6) (emphasis added). But, on the other hand, in an apparent conflict, the anti-retaliation provisions of the Dodd-Frank Act protect whistleblowers from retaliation in three categories of circumstances, one of which that does not necessarily require reporting to the SEC, as follows:

> No employer may discharge . . . or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 (15 U.S.C. § 7201 *et seq*.), the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq*.), including section 10A(m) of such Act (15 U.S.C. § 78f(m)), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Id. § 78u–6(h)(1)(A).

By their own terms, the first two anti-retaliation categories protect whistleblowers who report potentially illegal activity to the SEC or who work with the SEC directly, in some manner, concerning potential securities violations. By contrast, the third category does not require that the whistleblower have interacted directly with the SEC – only that the disclosure, to whomever made, was "required or protected" by certain laws within the SEC's jurisdiction. *See Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011). Thus, for example, if one of the referenced laws in section (iii) either (a) required an employee to report a potential securities violation internally; or (b) protected an employee's disclosure of that information to another federal agency or federal law enforcement officer, § 78u–6(h)(1)(A)(iii) would prohibit retaliation against that whistleblower by the whistleblower's employer. As the *Egan* court explained in harmonizing the apparent conflict:

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> A literal reading of the definition of the term 'whistleblower' in 15 U.S.C. § 78u–6(a)(6) would effectively invalidate § 78u–6(h)(1)(A)(iii)'s protection of whistleblower disclosures that do not require reporting to the SEC . . . .
>
> [These] contradictory provisions of the Dodd–Frank Act are best harmonized by reading 15 U.S.C. § 78u–6(h)(1)(A)(iii)'s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u–6(a)(6)'s definition of a whistleblower as one who reports to the SEC. Therefore, Plaintiff must either allege that his information was reported to the SEC, or that his disclosures fell under the four categories of disclosures delineated by 15 U.S.C. § 78u–6(h)(1)(A)(iii) that do not require such reporting: those under the Sarbanes–Oxley Act, the Securities Exchange Act, 18 U.S.C. § 1513(e), or other laws and regulations subject to the jurisdiction of the SEC.

Egan, 2011 WL 1672066, at *5.

With respect to the scope of part (iii), the "catch-all" anti-retaliation protections extend only to any "law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u–6(h)(1)(A)(iii). "Thus, where an employee reports a violation of a federal law by the employer, the DFA only protects that employee against retaliation if the federal violation falls within the SEC's jurisdiction." *Nollner v. Southern Baptist Convention, Inc*., __ F. Supp. 2d __, __, Nos. 3:12–cv–00040, 3:12–cv–00043, 2012 WL 1108923, at *6 (M.D. Tenn. Apr. 3, 2012). Furthermore, "a plaintiff seeking relief under anti-retaliation provision part (iii) must demonstrate that the disclosure at issue relates to a violation of federal securities laws." *Id*. at *7. In addition, anti-retaliation provision part (iii) only protects disclosures that are "required or protected" by laws, rules, or regulations within the SEC's jurisdiction. Thus, an employee is not protected from retaliation under the "catch-all" provision if the disclosure at issue – even if it relates to an actual legal violation by the employer – concerns a disclosure that is not "required" or otherwise "protected" by a law, rule, or regulation within the SEC's jurisdiction. *See Nollner*, 2012 WL 1108923, at *7 (citing *Egan*, 2011 WL 1672066, at *6 ("[M]erely alleging the violation of a law or rule under the SEC's purview is not enough; a plaintiff must allege that a law or rule in the SEC's jurisdiction explicitly requires or protects disclosure of that violation.")).

In the *Nollner* decision, which was issued on April 3, 2012, the court dismissed the plaintiffs' (a husband and wife's) Dodd-Frank retaliation claims under the "catch-all" section set out in § 78u–6(h)(1)(A)(iii). The court set out the standard for a claim under the catch-all section:

> Harmonizing all of these provisions, as the court must, a plaintiff seeking protection under § 78u–6(h)(1)(A)(iii) must at least show the following: (1) he or she was retaliated against for reporting a violation of the securities laws, (2) the plaintiff reported that information to the SEC or to another entity (perhaps even internally) as appropriate; (3) the disclosure was made pursuant to a law, rule, or regulation subject to the SEC's jurisdiction; and (4) the disclosure was "required or protected" by that law, rule, or regulation within the SEC's jurisdiction.

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Id. at *7.

In applying the standard, the *Nollner* court observed that the plaintiffs' claims were based on the allegation that the defendant had violated the Foreign Corrupt Practices Act ("FCPA"), and that they had been retaliated against after they reported the alleged FCPA violations to their employer. *See Nollner*, 2012 WL 1108923, at *8. The FCPA applies, *inter alia*, to any "issuer" or "domestic concern," as defined by the Act. The defendant was not an "issuer," but it was a "domestic concern." *Id*. The Department of Justice ("DOJ") has sole responsibility for all criminal enforcement of the FCPA. *Id*. As to civil enforcement, the SEC has enforcement responsibility over FCPA violations by issuers, while the DOJ has enforcement responsibility over FCPA violations by domestic concerns and other non-issuer entities subject to the FCPA. *Id*. Accordingly, as the court stated, "because the defendants are not issuers, only the DOJ – not the SEC – has jurisdiction over them with respect to FCPA violations." *Id*. at *9. Therefore, the plaintiffs' Dodd-Frank claims under the "catch-all" section had to be dismissed:

> Here, because the defendants are not "issuers" for purposes of the FCPA, they are not "subject to the jurisdiction" of the SEC with respect to FCPA violations. Moreover, the violations reported by Mr. Nollner do not "relate to violations of the securities laws" (*i.e*., he is not a "whistleblower" under the DFA) and do not concern actions by a company otherwise subject to SEC jurisdiction. Thus, even assuming the allegations to be true, the Nollners may not maintain DFA retaliation claims premised on their reporting of potential FCPA violations by the defendants. Therefore, the court will dismiss the DFA claim with prejudice.

Id. at *10 (footnote omitted).

b. Will Dodd-Frank's "Catch-All" Provision Swallow SOX?

The "catch-all" provision in Dodd-Frank section 78u–6(h)(1)(A)(iii) could potentially be interpreted to permit many, or all, alleged SOX whistleblowers to bring their SOX claims through Dodd-Frank. Such an interpretation would permit claimants to escape the administrative scheme under SOX, and instead file directly in federal court; take advantage of a longer statute of limitations; and obtain more generous damages than those permitted by SOX. Whether courts will permit this result, based on an interpretation of 78u–6(h)(1)(A)(iii), will likely be decided over the next few years.

If courts do sanction this sort of "end around SOX" strategy, it could dramatically reduce OSHA charges of SOX retaliation, and increase federal court SOX litigation. On the other hand, if the ARB continues its recent trend of issuing more favorable decisions to SOX complainants than courts usually do, then SOX claimants may prefer to pursue administrative relief, even if they could sue through the Dodd-Frank "catch-all" provision. Whether or not the ARB will continue its generally pro-complainant trend for years into the future may be largely dependent on who wins the presidential election this year.

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3. Individuals Who Have A Legal Or Contractual Duty To Report Violations Are Excluded From The Definition Of A Whistleblower Under Dodd-Frank

To qualify for receipt of an award under Dodd-Frank, a whistleblower must have "voluntarily" provided "original information" to the SEC that led to a successful enforcement action. The rules explain that an individual who reports information to the SEC pursuant to some legal or contractual duty has not done so "voluntarily" and therefore is not eligible for an award. Individuals who provide information following a request, inquiry or demand from the SEC or as part of an investigation by Congress or the Public Company Accounting Oversight Board or any self-regulatory body relating to the subject matter of the report are also deemed not to have "voluntarily" reported.

4. Individuals In Compliance-Related Roles Are Excluded From The Definition Of A Whistleblower Under Dodd-Frank

Dodd-Frank defines original information as information that is:

- "Derived from the independent knowledge or analysis of a whistleblower";
- "Not known to the SEC other than by the whistleblower as the original source of the information"; and
- "Not exclusively derived from an allegation made in a judicial or administrative hearing, in a government report, hearing, audit, or investigation, or from the news media, unless a whistleblower is the source of the information."

15 U.S.C. § 78-u6(a)(3).

The Final Rules apply this definition to exclude several categories of professionals who obtain information about violations because of their compliance-related roles:

- Attorneys, including in-house counsel, and non-attorneys who learn information from an attorney-client communication.
- Officers, directors, trustees or partners of an entity if they obtained the information because another person informed them of allegations of misconduct, or they learned the information in connection with the entity's processes for identifying, reporting, and addressing potential non-compliance with the law. Officers or other designated persons are not precluded from recovery as whistleblowers if they actually observe the violations rather than, for example, learning of them through an employee report. Also, notably, the SEC removed non-officer supervisors from the list of designated persons.
- Employees whose principal duties involve compliance or internal audit responsibilities, as well as employees of outside firms that are retained to perform internal compliance or internal audit work.

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- Those employed or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of the law.

- Employees of a public accounting firm who acquire information through an audit or other engagement required under the federal securities laws relating to an alleged violation by the engagement client.

5. Exceptions To The Exclusions From The Definition Of A Whistleblower Under Dodd-Frank

The categories of individuals listed above may nevertheless be eligible for whistleblower status under certain circumstances. For attorneys, the Final Rules include an exception for attorney disclosures permitted under state bar rules. These rules vary, but most permit disclosures necessary to prevent the commission of a crime or fraud. The exception for permitted attorney disclosures applies equally to non-attorneys who receive the information in an attorney-client communication. Final Rules at 59.

Individuals in the other excluded categories listed above may be considered whistleblowers in the following circumstances:

- If they can demonstrate they have a "reasonable basis" to believe that disclosure of the information to the SEC is necessary to prevent "conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors." *Id.* at 145. This is similar to the crime-fraud exception applicable to reports by attorneys. The SEC explains that "in most cases" a whistleblower who seeks to collect an award on the basis of this exception will need to demonstrate that management or governance personnel at the entity were "aware of the imminent violation and were not taking steps to prevent it." *Id.* at 74.

- If they have a reasonable basis to believe that the "relevant entity is engaging in conduct that will impede an investigation," such as impermissibly influencing witnesses or destroying documents. *Id.* at 145-46.

- 120 days after (a) providing information to the entity's audit committee, chief legal or compliance officer or his supervisor, or (b) receiving information under circumstances indicating the audit committee, chief legal or compliance officer, or supervisor was already aware of the information.

The Final Rules also clarify that an individual cannot collect an award on the basis of information obtained from someone who is excluded from eligibility for an award as a whistleblower. There is an exception to this rule, however, for information that the original source could permissibly report or if the whistleblower is providing information about possible violations involving the person from whom the information was obtained. For example, if an auditor learns from a colleague about his involvement in a client's securities law violation, the auditor could report the violation to the SEC and collect an award as a whistleblower if the report led to a successful enforcement action.

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6. Criminal Violators Can Be Whistleblowers Under Dodd-Frank

Rejecting the suggestion by some commenters that the rules exclude from "whistleblower" status those who are themselves guilty of violations, the SEC notes that "[i]nsiders regularly provide law enforcement authorities with early and invaluable assistance in identifying the scope, participants, victims, and ill-gotten gains" from fraudulent schemes. *Id.* at 195. In further support of its position, the SEC states "[t]his basic law enforcement principle is especially true for sophisticated securities fraud schemes which can be difficult for law enforcement authorities to detect and prosecute without insider information and assistance from participants in the scheme or their coconspirators." *Id.* at 194-95. However, under the statute itself, a fraud participant cannot be a Dodd-Frank whistleblower if he or she was convicted of criminal conduct relating to the fraud. 15 U.S.C. § 78-u6(c)(2)(B).

In response to public policy concerns about rewarding wrongdoers, the Final Rules provide that the SEC will not count monetary sanctions against the whistleblower or any entity "whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated" in determining whether the $1,000,000 threshold for an award has been met. Final Rules at 195. In addition, any award the whistleblower receives will be decreased by amounts attributable to the whistleblower's conduct.

The rules also deny whistleblower status to those who obtain information "where a domestic court determines that the whistleblower obtained the information in violation of federal or state criminal law." *Id.* at 80. The SEC rejected recommendations to extend this provision to information obtained in violation of civil law. The exclusion also does not apply to information obtained in violation of a protective order.

C. Whistleblower Anti-Retaliation Provisions Under Dodd-Frank

Other important sections of the Final Rules relate to the retaliation protections for whistleblowers under Dodd-Frank, which broadly prohibits employers from discharging, demoting, suspending, threatening, directly or indirectly harassing, or "in any other manner" discriminating against a whistleblower in the terms or conditions of employment. 15 U.S.C. § 78-u6(h)(1)(A).

1. Expansion Of Who Is Protected

The Final Rules expressly state that the retaliation protections under Dodd-Frank apply regardless of whether a whistleblower is ultimately entitled to an award. Final Rules at 18. This is another provision that the SEC states is intended not to "unduly deter whistleblowers from coming forward with information." Thus, in order to be protected by the anti-retaliation provisions, the complainant need only have a "reasonable belief" that the information being provided relates to a "possible" violation of the federal securities laws. *Id.* at 15.

This approach is similar to that taken in *Sylvester v. Parexel Int'l LLC,* No. 07-123, 2011 WL 2165854 (ARB May 25, 2011) (*en banc*), a decision by the DOL Administrative Review Board interpreting the whistleblower protection provisions under SOX, that is discussed later in

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this paper. The SEC's Final Rule on Dodd-Frank, and the *Parexel* decision, significantly expand those who are considered to have engaged in protected activity.

2. Expansion Of Protected Activity

Dodd-Frank provides whistleblower retaliation protection to any of the following activities:

- Providing information to the SEC;
- Initiating, testifying, or assisting in an investigation, or a judicial or administrative action of the SEC based on or related to information provided by the whistleblower; and
- Making disclosures required or protected under SOX or any other law, rule or regulation subject to the SEC's jurisdiction.

15 U.S.C. § 78-u6(h)(1)(A)(iii).

3. More Avenues For Enforcement And An Expanded Statute Of Limitations

The combination of the Final Rules and the provisions of the statute itself make Dodd-Frank very hospitable to whistleblower retaliation claims.

a. Direct Access To Federal Court

The SEC added a provision to the Final Rules expressly stating that it has authority to enforce the anti-retaliation provisions of the Act. *Id.* at 18. Thus, in contrast to SOX, which has only one avenue for a whistleblower retaliation complaint (filing a complaint with the DOL) under Dodd-Frank an employee can bring a complaint to either the SEC or the DOL, or file a claim directly in federal court. 15 U.S.C. § 78-u6(h)(1)(B)(i).

b. A Long Statute Of Limitations

The Dodd-Frank Act itself provides a more expansive statute of limitations than SOX for a retaliation claim. Under SOX, an employee has 180 days to file a retaliation claim with the DOL (prior to its revision, that was 90 days). In contrast, under Dodd-Frank, an employee has six years from the date of the retaliatory action, or three years from when "facts material to the right of action are known or reasonably should have been known," to file a retaliation claim in federal court. 15 U.S.C. § 78-u6(h)(1)(B)(iii). However, as an outer limit, Dodd-Frank imposes a maximum limitations period of 10 years after the date on which the violation occurs. *Id*.

4. Damages For Retaliation In Violation Of Dodd-Frank

A prevailing claimant in a Dodd-Frank retaliation case is entitled to relief which "shall include": (i) reinstatement with the same seniority status that the individual would have had, but for the discrimination; (ii) 2 times the amount of back pay otherwise owed to the individual, with

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interest; and (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. 15 U.S.C. § 78-u6(h)(1)(C).

D. Procedural Aspects Of The Whistleblower Bounty

1. Procedures For Submitting Information To The SEC Have Been Simplified

The Final Rules make it significantly easier for individuals to submit information to the SEC concerning allegations of alleged violations of federal securities laws. A person who wishes to file a whistleblower complaint with the SEC, must submit a Form TCR (Tip, Complaint or Referral) ("TCR") to the SEC on-line, or by fax or mail. https://denebleo.sec.gov/TCRExternal/questionnaire.xhtml. The TCR elicits basic identifying information about the alleged whistleblower and his or her concerns, including information used to determine whether or not the alleged conduct suggests a violation of federal securities law. The TCR requires that the purported whistleblower answer certain threshold questions to determine eligibility to receive an award. The whistleblower (or counsel, in the case of an anonymous submission) must sign the TCR under penalty of perjury. Final Rules at 154. The TCR has been revised to allow for joint submissions by more than one alleged whistleblower.

In its commentary, the SEC contends that the TCR has been revised to encourage internal compliance and reporting. As discussed further below, however, nothing in the Final Rules, requires a whistleblower to use an employer's internal compliance and reporting systems before filing a complaint with the SEC. *Id.* at 155. Nevertheless, the TCR now asks a purported whistleblower to provide details about any prior actions taken regarding the complaint, and requires the whistleblower to indicate whether he or she has reported the alleged violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available internal complaint mechanism. *Id.*

2. Calculating An Award Under The "Bounty Program"

If an SEC action results in sanctions totaling $1 million or more, the whistleblower is eligible to receive between 10% and 30% of any penalty recovered in a judicial or administrative action. *Id.* For purposes of an award, the Final Rules make clear that the SEC will aggregate two or more smaller actions that arise from the same nucleus of operative facts to "make whistleblower awards available in more cases." If there are multiple whistleblowers, the total compensation for all cannot exceed 30%. For example, one whistleblower could potentially receive an award equal to 25% of the penalty, and another could receive an award equal to 5% of the penalty, but they could not each receive an award equal to 30% of the penalty imposed. *Id.* at 118.

In determining the amount of the award, the SEC will consider the following criteria that may increase the award:

- The significance of the information provided by the whistleblower;
- The assistance provided by the whistleblower;

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- Law enforcement interest in making a whistleblower award; and
- Participation by the whistleblower in internal compliance systems.

The following criteria that may decrease an award will also be considered:

- Culpability of the whistleblower;
- Unreasonable reporting delay by the whistleblower; and
- Interference with internal compliance and reporting systems by the whistleblower. *Id.* at 123.

No single criterion is determinative or mandatory.

Whistleblowers can appeal the denial of an award directly to a United States Circuit Court of Appeals, but cannot appeal the size of an award that is within the statutory range. *See* 15 U.S.C. § 78u-6(f).

E. Implications Of The Final Rules On Internal Reporting Procedures

1. Internal Reporting Is Not Required

Internal reporting procedures have been an important part of corporate compliance programs at virtually all regulated companies for many years, and took on an even more prominent role after the enactment of Sarbanes Oxley. With the advent of Dodd-Frank – and its enhanced penalties and larger bounties – the need for strong internal reporting and investigatory systems has become even more acute. Indeed, most companies have enhanced these processes in the past year in the hope that they will learn of a problem before a whistleblower reports it to the authorities. The final Dodd-Frank regulations, however, seem to send a mixed message to companies and whistleblowers regarding internal reporting programs. Although the Final Rules do not require an employee to report an alleged securities violation to the employer first, they do contain some provisions that the SEC states will "expand upon the incentives for whistleblowers to report internally."

The decision not to require employees to report alleged violations internally prior to complaining to the SEC was the subject of much criticism by business and securities groups. The Association of Corporate Counsel harshly criticized this "no internal exhaustion" rule, stating that "[t]he SEC's bounty rule is a Pandora's box that, when opened, is likely to create new and even unanticipated harms once the floodgates are open, and we question whether the SEC even has the capacity to handle a torrent of new reports," adding that "the final SEC rules undermine internal compliance program[s] by preventing companies from addressing festering allegations of misconduct." Press Release, Association of Corporate Counsel Frustrated by Today's SEC Ruling on Whistleblowing Bounty Provisions of Dodd-Frank Law (May 25, 2011), http://www.acc.com.

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The SEC explains its rationale for not mandating internal reporting is to induce prompt reporting of possible securities violations and enhance its enforcement capabilities:

> [T]he broad objective of the whistleblower program is to enhance the Commission's law enforcement operations by increasing the financial incentives for reporting and lowering the costs and barriers to potential whistleblowers, so that they are more inclined to provide the Commission with timely, useful information that the Commission might not otherwise have received.

Final Rules at 105.

Noting that internal reporting will not always advance its goals, the SEC states that "providing information to persons conducting an internal investigation, or simply being contacted by them, may not, without more, achieve the statutory purpose of getting high-quality, original information about securities violations directly into the hands of Commission staff." *Id.* at 34. In this regard, the SEC also points out that not all internal reporting systems are created equal, stating "while many employers have compliance processes that are well-documented, thorough, and robust, and offer whistleblowers appropriate assurances of confidentiality, others do not." *Id.* at 91. It is concerned that a company notified of a violation prior to an SEC investigation might destroy documents or attempt to tamper with witnesses. *Id.* at 104. Thus, the SEC concludes, there are cases where internal disclosures "could be inconsistent with effective investigation or the protection of whistleblowers." *Id.*

The SEC also emphasizes its belief that mandatory internal reporting might discourage some potential whistleblowers from reporting at all. The SEC explained that it believes that there are a significant number of whistleblowers who would respond to the financial incentive offered by the whistleblower program by reporting only to the Commission, but who would not come forward either to the Commission or to the entity if the financial incentive were coupled with a mandatory internal reporting requirement. *Id.* at 103.

In addition, the SEC believes that, because of the greater potential for financial reward, the cases most likely to go to the SEC without internal reporting are those "involving clear fraud or other instances of serious securities law violations by senior management." *Id.* at 232, n. 456. The SEC's view is that the benefit to the public of bringing such cases directly to it is so great that it justifies bypassing the internal compliance system.

2. Although Not Required, The Final Rules Encourage And Reward Internal Reporting

Although the Final Rules do not make internal reporting mandatory, the SEC also plainly states, in several places throughout the regulations, its interest in promoting strong internal compliance and reporting systems rather than undermining them. The SEC believes that, even without requiring whistleblowers to report internally first, most are likely to do so anyway. The SEC cites sources as varied as the National Whistleblower Center and the New England Journal of Medicine for the proposition that the vast majority of whistleblowers first present their problems to management before consulting counsel or communicating with a government agency. *Id.* at 230, n. 452. The SEC supports this limited empirical data by pointing out that

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whistleblowers are frequently motivated by non-monetary incentives, including "cleansing the conscience," punishing wrong-doers, simply doing the right thing for the sake of a general increase in social welfare, or self-preservation. Whistleblowers are frequently motivated by concern about their continued employment or personality conflicts with superiors or other employees. They blow the whistle as a weapon in the workplace battle and only later recognize the possibility of financial gain. Another obvious reason for employees to continue to raise their complaints internally is because Dodd-Frank whistleblower retaliation protection only attaches if the employer knows that the employee has engaged in protected activity. Internal reporting aids in that respect. *Id.* at 90-91.

More significantly, the SEC has included provisions in the Final Rules that it believes create "strong incentives for employees to continue to use their employer's internal compliance systems." Noting that "the federal securities laws [are] promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct by company officers or employees," the SEC emphasizes its goal is "to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials first while still preserving their rights under the Commission's whistleblower program."

The Final Rules encourage internal reporting in the following ways:

- Probably the most favorable provision is Rule 21F-6 which provides for "credit in the calculation of award amounts to whistleblowers who utilize established internal procedures" to report misconduct. *Id.* at 92, n.197. That provision also makes it clear that an award may be decreased if a whistleblower is found to have intentionally interfered with internal compliance or reporting systems. *Id.* at 125.

- The rules further incentivize internal reporting by making a whistleblower eligible for an award based on "information that the whistleblower reports through the company's internal reporting system." *Id.* at 42. The award is available whether the company first reports the information to the SEC, or someone else (another employee) first reports to the SEC. In this way, the SEC explains, it is not rewarding the first employee to report a violation and penalizing the person who uses an internal reporting system to advise the company of a potential violation. In such a circumstance, "the whistleblower who had first reported internally will be considered the first whistleblower." *Id.* at 90.

- The SEC states that in "appropriate cases" – and being careful to protect the identity of the whistleblower – it may contact a company, describe the allegations and "give the company an opportunity to investigate the matter and report back." *Id.* at 92. Thus, it explains, "we do not expect our receipt of whistleblower complaints to minimize the importance of effective company processes for addressing allegations of wrongful conduct." *Id.* In addition, a company will be rewarded for self-reporting a violation even after an SEC investigation has begun. *Id.* at 77.

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3. Internal Reporting Alone May Constitute Protected Conduct, If The Report Was Communicated To The SEC By Others, Or The Internal Report Falls Within The "Catch-all" Provision

In *Egan v. TradingScreen, Inc*., NO. 10 CIV. 8202 LBS, 2011 WL 1672066 (S.D.N.Y. May 4, 2011), the court addressed whether the plaintiff must personally transmit his complaint to the SEC for it to be protected under Dodd-Frank. Egan was the company's head of sales for the Americas. In early 2009, he allegedly learned that the CEO was diverting corporate assets to another company that he solely owned. In January 2010, believing that the CEO's behavior was jeopardizing the company's business, Plaintiff reported it to the President of the company, who then contacted the Board of Directors (Board). The Board hired an outside law firm to conduct an investigation, in which Plaintiff participated. The investigation confirmed Plaintiff's allegations. Shortly thereafter, the CEO terminated Egan's employment.

The court considered whether Dodd-Frank's anti-retaliation provisions require a plaintiff *personally* to report information to the SEC. Though Egan never personally and directly reported any information to the SEC, he claimed he was protected since he initiated the inquiry and disclosed information in interviews with the law firm conducting the investigation. Egan claimed he was "acting jointly" with the law firm because he expected the law firm to report the information to the SEC. The court agreed with Egan, noting that "[t]he plain text of the statute merely requires that the person seeking to invoke the private right of action have acted with others in such reporting, not that he or she led the effort to do so." It thus found Egan's cooperation with the law firm's investigation sufficient to allow him to invoke Dodd-Frank's protections – provided he demonstrate that the law firm did in fact provide the information to the SEC. Thus, the court refused to dismiss Egan's case. Instead, it gave him permission to file an amended complaint pursuant to its opinion.

Egan then filed an amended complaint, but still did not specifically allege in his pleading that the law firm actually did provide the information to the SEC. Accordingly, at that point, Egan's lawsuit was dismissed for failure to state a claim under Dodd-Frank. *See Egan v. TradingScreen, Inc*., NO. 10 CIV. 8202 LBS, 2011 WL 4344067 (S.D.N.Y. Sep 12, 2011).

Note also that, as explained earlier in this paper, an internal report may be protected under Dodd-Frank if it was "required or protected under the Sarbanes–Oxley Act of 2002 (15 U.S.C. § 7201 *et seq*.), the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq*.), including section 10A(m) of such Act (15 U.S.C. § 78f(m)), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u–6(h)(1)(A)(iii).

F. Other Anti-Retaliation Laws Created Or Strengthened By Dodd-Frank

Dodd-Frank amended SOX's anti-retaliation provision. Those amendments are discussed in section XVII.C of this paper. Immediately below is a summary of other anti-retaliation laws, aside from SOX, that Dodd-Frank created or strengthened.

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1. Private Cause Of Action For Retaliation Under Dodd-Frank Section 1057, Relating To The Consumer Financial Protection Act of 2010

Dodd-Frank prohibits retaliation against "any individual performing tasks related to the offering or provision of a consumer financial product or service" who has engaged in protected activity. Dodd-Frank Act §1057. Protected activity includes: (i) providing information about potential violations of financial consumer protection laws to the employer, the newly created Bureau of Consumer Financial Protection, or any other state, local, or federal, government authority or law enforcement agency; (ii) testifying in connection with financial consumer protection enforcement proceedings; (iii) commencing a proceeding under federal consumer financial law; or (iv) objecting to or refusing to participate in any activity that the employee reasonably believed to be in violation of any financial consumer protection law.

Dodd-Frank requires financial services employees to administratively exhaust whistleblower retaliation claims by filing a complaint with the U.S. Department of Labor within 180 days after the date of the alleged retaliation. As with SOX retaliation claims, this complaint will trigger a multiple stage process, which may involve an investigatory phase, a written determination by the Labor Department of whether reasonable cause exists to believe that the complaint has merit, a preliminary order of relief, and a hearing on the record. As with SOX retaliation claims, the employee's burden during this process is to establish that the protected activity was a "contributing factor" in the alleged "unfavorable personnel action."

The employer may rebut the employee's case with "clear and convincing" evidence that it would have taken the same action in the absence of the protected activity. Remedies for retaliation include reinstatement, back pay, compensatory damages, and award costs and expenses. If the Labor Department fails to issue a final order within 210 days after the filing of the complaint, or within 90 days after receipt of the reasonable cause determination, the employee may bring an action in U.S. District Court, in which either party may request a jury trial.

If the Labor Department issues a final order within the prescribed time limits, "any person adversely affected or aggrieved" by the final order may file a petition for review with the U.S. Court of Appeals. Financial services employees may not waive these rights. Further, pre-dispute arbitration agreements covering these claims are invalid, except if contained in a collective bargaining agreement. This union exception applies only to financial services employees, but Dodd-Frank expressly permits the Bureau of Consumer Financial Protection to eliminate the exception by rule if the bureau determines that arbitration agreements in collective bargaining agreements are inconsistent with the purposes of Dodd-Frank.

2. Amendment Of The Commodity Exchange Act

Section 748 amends the Commodity Exchange Act to create a whistleblower incentive program and whistleblower protection provision that are substantially similar to the SEC reward program and anti-retaliation provision contained in section 922.

Under section 748, the amount of a reward is determined by the Commodity Futures Trading Commission ("CFTC") and unlike section 922, a whistleblower may appeal any

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determination regarding an award, not just rewards outside of the 10 to 30 percent range. Protected conduct under Section 748 includes providing information to the CFTC in accordance with the whistleblower incentive provision and "assisting in any investigation or judicial or administrative action of the [CFTC] based upon or related to such information."

On August 4, 2011, the CFTC approved its Final Rule implementing the whistleblower and bounty hunter provisions applicable to the Commodity Exchange Act under Section 748 the 2010 Dodd-Frank. The Final Rule establishes a "Commodity Whistleblower Incentives and Protection" program nearly identical to the whistleblower incentive and protection program created under Section 922 of the Dodd-Frank Act, which provides financial incentives for employees to report violations of federal securities laws.

3. Amendment Of The False Claims Act

The False Claims Act ("FCA") is a whistleblower law that allows a private individual with knowledge of past or present fraud committed on the federal government to sue on the government's behalf and recover a portion of any damages award. *See* 31 U.S.C. §§ 3729-3733. Dodd-Frank broadens the FCA to cover conduct by persons "associated" with a whistleblower in furtherance of an FCA whistleblower action. Dodd-Frank Act §1079B(c). Dodd-Frank also now clarifies that the statute of limitations for an FCA retaliation claim is three years. 31 U.S.C. § 3730(h)(3). Note, however, that the bar against arbitration found in Dodd-Frank, and the amended SOX, does not apply to claims under the FCA. *See James v. Conceptus, Inc.*, __ F. Supp. 2d __, __, Civil Action No. H–11–1183, 2012 WL 845122, at *5-6 (S.D. Tex. Mar. 12, 2012) (FCA does not prohibit arbitration); *Ruhe v. Masimo Corp.*, No. SACV 11–00734–CJC(JCGx), 2011 WL 4442790, at *4 (C.D. Cal. Sept. 16, 2011) (explaining that Dodd–Frank's anti-arbitration amendments extend only to the two statutes it specifically amended in this regard, SOX and the Commodity Exchange Act).

In 2009, Congress had strengthened the FCA's anti-retaliation provision by providing for individual liability and broadening the scope of coverage to include contractors and agents. *See* Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624-625.

XVII. SARBANES-OXLEY UPDATE

A. *Parexel* And Its Prodigy Over The Last Year

1. The Pre-*Parexel* Landscape

29 C.F.R. § 1980.104(b)(1) sets out the *prima facie* elements of a SOX whistleblower claim:

> (i) the employee engaged in a protected activity or conduct; (ii) the [employer] knew or suspected, actually or constructively, that the employee engaged in the protected activity; (iii) the employee suffered an unfavorable personnel action; and (iv) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

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Id.; *see also Gale v. U.S. Dept. of Labor*, 384 Fed. Appx. 926, 929 (11th Cir. 2010) (same); *Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (same); *Mozingo v. South Financial Group, Inc.*, 520 F. Supp. 2d 733, 740 (D.S.C. 2007) (same).

SOX does not follow the familiar Title VII *McDonnell Douglas* burden-shifting framework. Rather, in a SOX retaliation case:

> [A]n employee bears the initial burden of making a *prima facie* showing of retaliatory discrimination; the burden then shifts to the employer to rebut the employee's *prima facie* case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity.

Welch v. Chao, 536 F.3d 269, 275 (4th Cir. 2008); *see also* 18 U.S.C. § 1514A(b) ("An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code."); 49 U.S.C. § 42121(b)(ii) ("[N]o investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."); *see also Livingston v. Wyeth, Inc*., 520 F.3d 344, 352–53 (4th Cir. 2008) (setting out SOX affirmative defense standard).

Until *Parexel* was decided, the vast majority of SOX claimants lost their cases, often because the AJL, ARB, or court concluded that they had not engaged in protected activity under the law. The decisions commonly reached that conclusion by finding that the alleged fraud that the claimant complained of was not material, that the complaint did not specifically and definitively relate to one of the six categories listed in SOX Section 806 or fraud on shareholders, or that the complaint was about supposed fraud that may occur in the future, but had not yet occurred. *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65. (2007).

2. *Parexel*

In *Sylvester v. Parexel Int'l LLC,* No. 07-123, 2011 WL 2165854 (ARB May 25, 2011), the Administrative Review Board ("ARB") dramatically shifted the standards for "protected activity" under Section 806 of SOX in favor of claimants. In this case, the complainants reported to company managers that their co-workers failed to properly record test times for clinical drug trials that the company performed on behalf of drug manufacturers; that management responded that it "was no big deal"; and that they then were subjected to various forms of retaliation. The ALJ dismissed the complaint, finding that Complainants failed to establish they engaged in SOX-protected whistleblower activity. However, the ARB reversed, making the following significant holdings:

- The federal pleading standards do not apply to SOX whistleblower claims initiated with OSHA.
- An employee's complaint need not "definitively and specifically" relate to the categories listed in Section 806, and need not relate to fraud on shareholders.

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- The "reasonable belief" standard does not require that the complainant actually communicate the reasonableness of his or her belief to management or other authorities.

- Section 806 protects complaints about a violation of law that has not yet occurred, provided that the employee reasonably believes, based on facts known to him or her, that the violation is about to be committed.

- A complainant need not establish the elements of fraud, including materiality.

These holdings contradicted many prior rulings from ALJs, federal courts, and the ARB itself.

3. Post-*Parexel* ARB Decisions – An Avalanche Of Favorable Decisions For SOX Complainants

Parexel was decided on May 25, 2011. Since May 25, 2011, the ARB has continued to follow *Parexel* in numerous cases, to the great benefit of SOX claimants. *See, e.g., Zinn v. American Commercial Lines, Inc.,* No. 10-029, 2012 WL 1102507, at *4-5 (ARB Mar. 28, 2012) (relying on *Parexel* to conclude that the ALJ "legally erred in analyzing the evidence of Zinn's objective reasonableness of a violation of pertinent law, thus warranting a remand . . . [partially because] an allegation of shareholder fraud is not a necessary component of protected activity under Section 806 of the SOX"); *Prioleau v. Sikorsky Aircraft Corp*., No. 10-060, 2011 WL 6122422, at *5-7 (ARB Nov. 9, 2011) (reversing ALJ's decision against complainant based largely on *Parexel*); *Menendez v. Halliburton, Inc*., No. 09-002, 2011 WL 4439090, at *8 (ARB Sept. 13, 2011) (relying on *Parexel* in affirming ALJ's conclusion that the complainant engaged in SOX-protected activity); *Funke v. Federal Express Corp*., No. 09-004, 2011 WL 3307574, at *7 (ARB July 8, 2011) (reversing ALJ's decision against complainant based in part on *Parexel*); *Inman v. Fannie Mae*, No. 08-060, 2011 WL 2614298, at *6-7 (ARB June 28, 2011) (reversing ALJ's decision against complainant based on *Parexel* and stating that "an allegation of fraud is not a necessary component of protected activity under Section 806."); *Mara v. Sempra Energy Trading, LLC*, No. 10-151, 2011 WL 2614345, at *6-7 (June 28, 2011) (reversing ALJ's decision against complainant based on *Parexel*).

4. Post-*Parexel* Federal Court Decisions That Mention *Parexel*

a. *Sharkey*

On August 19, 2011, in *Sharkey v. J.P. Morgan Chase & Co*., 805 F. Supp. 2d 45 (S.D.N.Y. 2011), the district court cited to *Parexel* with approval for the proposition that a heightened pleading standard does not apply to SOX whistleblower cases. *Id*. at 53, 57. In so doing, the court denied the defendants' motion to dismiss. This was the first federal court decision to cite to *Parexel*.

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b. *Wiest*

On November 16, 2011, in *Wiest v. Lynch*, NO. CIV.A. 10-3288, 2011 WL 5572608 (E.D. Pa. Nov. 16, 2011), the district court suggested that *Parexel* will not necessarily be adopted without question by federal courts. In that case, the plaintiffs filed a complaint alleging retaliation under Section 806 after having reported concerns about certain corporate expenditures. The court held that plaintiffs failed to adequately allege that they engaged in protected activity, and emphasized that Section 806 only protects employees who provide information regarding conduct they "reasonably believe" violates one of the laws enumerated in Section 806, and that the complaint must "definitively and specifically" relate to such laws. Following the dismissal of the complaint, the plaintiffs moved for reconsideration, relying on the ARB's decision in *Parexel* rejecting the "definitively and specifically" standard. The court denied the motion for numerous reasons, including the fact that "[a]n ARB decision is not binding authority on a United States district court." *Id*. at *4. The court instead followed the First, Fourth, Fifth and Ninth Circuits in strictly applying the "definitively and specifically" standard. In an interesting footnote, the court stated:

> At oral argument, counsel for the Wiests briefly argued that this Court must accord the ARB's interpretation of § 1514A *Chevron* deference. Tr. at 8–9; *see Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Although the Court acknowledges that some courts of appeals have given deference to ARB interpretations of law, *see, e.g., Welch v. Chao*, 536 F.3d 269, 275–76 (4th Cir. 2008), the Court need not examine whether *Chevron* deference is appropriate here because the Plaintiff's complaint is insufficient without regard to the ARB's interpretation of SOX 806 in *Parexel*.

Id. at *4 n. 7.

c. *Gladitsch*

On March 21, 2012, in *Gladitsch v. Neo@Ogilvy*, No. 11 Civ. 919 DAB, 2012 WL 1003513 (S.D.N.Y. Mar. 21, 2012), the district court cited *Parexel* with approval for the proposition (that some courts have rejected) that protected activity under SOX Section 806, 18 U.S.C. § 1514A(a)(1), is not limited to reporting fraud against shareholders, but rather prohibits an employer from retaliating against an employee who complains about any of the six enumerated categories of misconduct under that section, whether or not they involve reporting fraud against shareholders. *Id*. at *7.

Other courts taking this same position include *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 518 (S.D.N.Y. 2008) (employee's reporting of employer's fraudulent scheme to evade social security taxes deemed protected activity, regardless of relation to shareholder fraud); *Sharkey v. J.P. Morgan Chase & Co*., 805 F. Supp. 2d 45, 57 (S.D.N.Y. 2011) (SOX prohibits an employer from retaliating against an employee who complains about any of the six enumerated categories of misconduct), and *Reyna v. ConAgra Foods, Inc*., 506 F. Supp. 2d 1363, 1381 (M.D. Ga. 2007) (finding that § 1514A "clearly protects an employee against retaliation based upon that employee's reporting of mail fraud or wire fraud regardless of whether that fraud involves a shareholder of the company").

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Courts taking a contrary position (all pre-*Parexel*) include *Bishop v. PCS Admin., (USA), Inc*., No. 05 Civ. 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 § 1514A) (citations omitted), and *Livingston v. Wyeth, Inc*., 2006 WL 2129794 *10 (M.D.N.C. July 28, 2006) ("To be protected under Sarbanes-Oxley, an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud."), *aff'd*, 520 F.3d 344 (4th Cir. 2008). The Fifth Circuit U.S. Court of Appeals expressly declined to rule on this issue in *Allen v. Administrative Review Bd*., 514 F.3d 468, 480 n. 8 (5th Cir. 2008) ("Because the issue is not before us, we express no opinion on whether the first five enumerated categories of protected activity found in § 1514A require some form of scienter related to fraud against shareholders.") (citations omitted).

B. Other Recent Significant SOX Decisions

1. The ARB Rules That Employer Breaches Of SOX-Mandated Confidentiality May Themselves Give Rise To Liability, Even If The Employee Did Not Suffer A Traditional Adverse Employment Action

Last year, the ARB adopted a new standard governing "adverse employment actions" in some types of cases brought under Section 806 in the case of *Menendez v. Halliburton, Inc*., No. 09-002, 2011 WL 4439090 (ARB Sept. 13, 2011). This case also contains a serious cautionary tale for employers in how they handle litigation hold notices for complaints made by current employees.

The case involves Anthony Menendez, the former Director of Technical Accounting Research & Training at Halliburton, Inc., where he was charged with monitoring and researching technical accounting issues as well as advising field accountants. After issuing a memorandum taking a position against what he believed were current violations of generally accepted accounting principles, Menendez's supervisor allegedly told him in a meeting regarding the memo that he was not a "team player," that he was insensitive to Halliburton's politics, and that he should collaborate more with his colleagues on such issues. *Id*. at *2.

Menendez contacted the SEC as well as the company's "confidential" whistleblower hotline with his concern that the company was engaging in "questionable" accounting practices with respect to revenue recognition. After receiving the SEC complaint, Halliburton's General Counsel sent out document hold notices to various employees that identified Menendez. *Id*. at *3. The General Counsel may have believed he was merely complying with the company's obligations to retain potentially relevant documents, but Menendez regarded it (and other e-mails that identified him as the complainant) as being "outed" to his coworkers. Specifically, when Menendez realized his identity had been revealed, he testified that he was stunned, and that it was likely the worst day of his life. *Id*. He testified that his coworkers began avoiding him, he was soon isolated at work, and Halliburton eventually placed him on administrative leave for the remainder of the investigations.

Both the SEC and the company's audit committee found no basis for Menendez's questionable accounting allegations. *Id*. at *4. Menendez was then reassigned from directly reporting to the chief accounting officer to reporting to the director of external reporting. He

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subsequently resigned, claiming he believed he was demoted by being required to report to a lower ranking officer. Menendez then filed a complaint with the Department of Labor under Section 806 of the SOX claiming he was retaliated against as a whistleblower and suffered an "adverse action."

Regarding Menendez's specific claim of being "outed," Halliburton argued that exposing Menendez's identity to his co-workers had no "tangible consequence" to Menendez in part because those co-workers already knew that Menendez was the whistleblower. The ARB rejected a requirement that there be a "tangible consequence" in order for adverse action to be found and adopted the standard set forth in its decision in *Williams v. American Airlines, Inc.*, No. 09-018 (ARB Dec. 29, 2010) that an "adverse action" encompasses any "nontrivial unfavorable employment action," either as a single event or in combination with other actions. The ARB refused to apply the narrower standard from *Burlington N. & Santa Fe Railroad Co. v. White*, 548 U.S. 53 (2006), that an adverse action is one that would deter a reasonable worker from engaging in the protected activity. However, the ARB noted that *Burlington* does serve as "a helpful guide for the analysis of adverse actions under SOX." *Menendez,* 2011 WL 4439090 at *10.

The ARB stated: "SOX Section 806's plain language states that no company 'may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.' By explicitly proscribing non-tangible activity, this language bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers." *Id*. at *9.

The ARB found that because Section 301 of SOX requires a company to have a procedure for the anonymous receipt of complaints, Menendez had a right to confidentiality that was a "term and condition of his employment." According to the ARB, Halliburton denied Menendez that right when it "outed" him it its e-mails, resulting in an adverse action. The ARB concluded that "a reasonable employee in Menendez's position would be deterred from filing a confidential disclosure regarding misconduct if there existed the prospect that his identity would be revealed to the very people implicated in the alleged misconduct." *Id*. at *16.

The *Menendez* case indicates that the DOL will set a low threshold for SOX retaliation against a whistleblower. Although it remains to be seen whether federal courts will follow the ARB in applying the lower standard for adverse action, employers should be cautious in taking action in response to an employee's claim of financial misconduct. The case also indicates the need for employers to train executives and members of legal and human resources departments on internal complaint procedures to ensure that those procedures are specifically being followed, particularly with respect to confidentiality. That a litigation hold notice could be used to find, in part, that an adverse action occurred likely did not occur to Halliburton at the time its General Counsel sent the notice. Other companies' in-house lawyers need to be wary of falling into this same trap.

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2. The ARB Rules That An Employee's Misappropriation Of Confidential Information May Qualify As Protected Activity Under SOX

In *Vannoy v. Celanese Corp*., No. 09-1118, 2011 WL 4690624 (ARB Sept. 28, 2011), the ARB ruled that a whistleblower's misappropriation of confidential information in violation of a confidentiality agreement might still qualify as protected activity.

Vannoy was the former administrator of the company's expense reimbursement program. He filed an internal complaint asserting that the company's system of administering its electronic expense reimbursement and corporate credit card system, and alleged misuse of employee credit cards, posed financial risk to the company. Unbeknownst to the company, Vannoy submitted a complaint under the IRS Whistleblower Reward Program, with which he disclosed the information he had misappropriated.

Following his discharge, Vannoy filed a complaint with the OSHA under Section 806. OSHA dismissed the complaint, as did an ALJ, but the ARB ruled in Complainant's favor. The ARB recognized the tension between employer confidentiality policies and employee whistleblower bounty programs, which preclude companies from enforcing or threatening to enforce confidentiality agreements to prevent whistleblowers from cooperating with the SEC. The ARB directed the ALJ to conduct an evidentiary hearing to determine whether the information the complainant misappropriated was the kind of "original information" Congress intended to protect and whether the method of transfer of information was protected lawful conduct within the scope of SOX.

3. The Ninth Circuit Holds That SOX Does Not Protect Reports Of Alleged Corporate Fraud To The Media

In *Tides v. Boeing Co*., 644 F.3d 809, 815 (9th Cir. 2011), the United States Court of Appeals for the Ninth Circuit held that the whistleblower provisions of SOX do not protect employees of publicly traded companies who disclose information to the media. Instead, the Court held, SOX protects employees only if they disclose certain types of information to the three groups identified in the statute: (1) federal regulatory and law enforcement agencies, (2) Congress and (3) employee supervisors.

Tides was brought by two former employees of Boeing Company who worked at Boeing's information technology SOX audit team. This team was responsible for helping the Company comply with SOX's requirement to assess annually the effectiveness of Boeing's internal controls and procedures for financial reporting. Plaintiffs allegedly believed that Boeing managers fostered a hostile work environment, pressuring them to rate the Company's internal controls as "effective" despite problems with these controls. Plaintiffs allegedly communicated their concerns to a reporter from the Seattle Post-Intelligencer despite knowing about Boeing's policy restricting the release of Company information to the media. Using this information, the Post-Intelligencer published an article, "Computer Security Faults Put Boeing at Risk," on July 17, 2007.

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Prior to the publication of the article, Boeing began suspecting that several employees were releasing Company information to the media and began monitoring plaintiffs' work computers and email accounts. After the publication of the article, Boeing's human resources personnel interviewed each plaintiff separately. They both admitted to providing the Post-Intelligencer reporter Company documents and information about Boeing's SOX audit practices. At the completion of the internal investigation, plaintiffs were terminated for disclosing Boeing's information to non-Boeing persons without following appropriate procedures and failing to refer the news media's inquiries to the Company's communications department in violation of Company policies.

After their terminations, plaintiffs filed SOX whistleblower complaints that were consolidated in court. Boeing moved for summary judgment dismissing the case, arguing (among other things) that the SOX whistleblower provisions did not protect employees from disclosures to the media. The United States District Court for the Western District of Washington granted Boeing's motion and dismissed the case with prejudice. Plaintiffs appealed.

The Ninth Circuit affirmed. The court held that the plain language of the statute covers only disclosures made to federal regulatory and law enforcement agencies, Congress and employee supervisors. The protections do not cover disclosures made to the media. The court rejected plaintiffs' argument that media disclosures should be covered because such reports might ultimately cause information to be communicated to the appropriate governmental authorities. Had Congress wanted to protect reports to the media, the court reasoned, it would have listed the media in the statute or more broadly protected "any disclosure" of specified information, as it did with the Whistleblower Protection Act, 5 U.S.C. § 2302. Although a review of legislative history was not necessary because of the unambiguous language of SOX, the Court also noted that this history supported its conclusions.

4. The First Circuit Holds That SOX Coverage Is Limited To Employees Of Public Companies

In *Lawson v. FMR LLC*, __F.3d __, 2012 WL 335647 (1st Cir. Feb. 3, 2012), the plaintiffs alleged that their former employers, private companies that contracted with public companies, had retaliated against them for raising concerns about potential federal securities laws violations. The district court denied the defendants' motions to dismiss, holding that the SOX whistleblower protection provision applies not only to employees of public companies, but also to employees of private companies that contract or subcontract with public companies. In an interlocutory appeal, a divided panel of the First Circuit reversed. Becoming the first federal court of appeals to address the issue, the First Circuit held in a lengthy opinion that the SOX whistleblower protection provision applies only to employees of public companies, not to employees of private companies that contract with public companies.

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5. The ARB Holds That SOX Section 806 Has No Extraterritorial Application

The ARB ruled in a 3-2 *en banc* decision that Section 806 of SOX has no extraterritorial application. *Villanueva v. Core Labs., NV*, No. 09-108, 2011 WL 7021145 (ARB Dec. 22, 2011).

Villanueva, a Colombian national, was the CEO of Saybolt de Colombia Limitada ("Saybolt"), an indirect subsidiary of Core Laboratories ("Core"), a Dutch company whose securities are registered under the Securities Exchange Act and traded on the New York Stock Exchange. Core had an office in Houston, and Complainant alleged that Core controlled Saybolt's business. Villanueva further alleged that he complained of a tax evasion scheme that violated Columbian law to Core executives located in Houston, and that they retaliated against him by, among other things, terminating his employment.

Villanueva filed a claim under Section 806 of SOX, which OSHA and an ALJ dismissed. The ARB affirmed the dismissal, principally relying on *Morrison v. National Australian Bank, Ltd*., 130 S. Ct. 2869, 2877 (2010), to evaluate whether Section 806 has an extraterritorial reach and to examine whether the fraudulent activity Villanueva reported would trigger an extraterritorial application of Section 806. The ARB was persuaded that Section 806 does not apply extraterritorially, noting that Section 806(a)(1) refers only to domestic securities laws, criminal laws and financial regulations, and is silent to its extraterritorial application. Likewise, the ARB found that Section 806 did not cover Villanueva's claim because of the foreign nature of the alleged fraud. More specifically, the ARB ruled that dismissal was warranted because Villanueva did not show that Core's U.S. accounting policy was fraudulent, identify any domestic financial statement that was fraudulent or otherwise point to a violation of U.S. law. But, in a footnote, the ARB stated that, in addition to considering where the fraud occurred (which was the driving factor in this case) the following should be considered: the location of the job and the employer; the location of the retaliatory act; and the nationality of the laws allegedly violated that the complainant was retaliated against for reporting.

C. Dodd-Frank's 2010 Revisions To SOX, Two Years Later

1. SOX's Coverage Of Subsidiaries Of Publically Traded Companies Whose Financial Information Is Included In Consolidated Financial Statements

Dodd-Frank Section 929A clarified that the whistleblower protection provision of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A, applies to employees of subsidiaries of publicly-traded companies "whose financial information is included in the consolidated financial statements of [a publicly] traded company." Prior to this amendment some courts found that publicly-traded companies were not covered by SOX because the parent company that filed reports with the SEC had few, if any, direct employees, and instead employed most of its workforce through non-publicly traded subsidiaries. *See, e.g., Rao v. Daimler Chrysler Corp*., No. 06-13723, 2007 WL 1424220 (E.D. Mich. May 14, 2007). The report of the Senate Committee on Banking, Housing, and Urban Affairs accompanying Dodd–Frank explained that section 929A of that Act amended § 1514A(a) "to make clear that subsidiaries and affiliates of

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issuers may not retaliate against whistleblowers." S.Rep. No. 111–176, at 114 (2010). The committee believed such a clarification was necessary because "[t]he language of [§ 1514A(a)] may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer." *Id*.

In *Gladitsch v. Neo@Ogilvy*, No. 11 Civ. 919 DAB, 2012 WL 1003513 (S.D.N.Y. Mar. 21, 2012), the plaintiff asserted a SOX retaliation claim that arose before the date this amendment took effect. The companies the plaintiff had worked for were subsidiaries of WPP PLC, a publicly traded media communications services company. The subsidiary companies' financial information were consolidated in WPP PLC's financial statements. The defendants argued that because the plaintiff did not work for the publically traded company itself, her SOX retaliation claim had to be dismissed under the pre-amendment cases holding that only employees of publicly traded companies themselves are covered by SOX, not such companies' subsidiaries. But the district court refused to dismiss the plaintiff's claims, holding that "[b]ecause it is a "clarifying" amendment, functioning to correct a misinterpretation rather than effect a substantive change in the law, Section 929A applies to pending cases." *Id*. at *4 (citing *Johnson v. Siemens Building Technologies, Inc.*, Case No. 08–032, 2011 WL 1247202, at *11 (ARB Mar. 31, 2011)).

Section 922(b) further expanded the coverage of section 806 of SOX to include employees of nationally recognized statistical ratings organizations, including A.M. Best Company, Inc., Moody's Investors Service, Inc., and Standard & Poor's Ratings Service.

2. SOX's 180 Day Statute Of Limitations

Section 922(c) increased the statute of limitations for SOX whistleblower claims from 90 to 180 days and clarified that SOX retaliation plaintiffs can elect to try their cases in federal court before a jury. Courts have addressed, but largely not ruled on, whether Dodd-Frank's change in the statute of limitations applicable to SOX is retroactive. *See, e.g., Riddle v. Dyncorp Int'l Inc*., 666 F.3d 940, 944 (5th Cir. 2012) (concluding that Dodd–Frank's statute of limitations can be applied to a pending case, unless the effect would be to revive a claim that expired before the statute's effective date); *Saunders v. District of Columbia*, 789 F. Supp. 2d 48, 52 n. 3 (D.C.C. 2011) (considering the retroactive application of Dodd–Frank's statute of limitations, but declining to reach a decision on the merits); *Lindsay v. Technical Coll. Sys. of Georgia*, 2011 WL 1157456, at *6 (N.D. Ga. Mar. 29, 2011) (considering the retroactive application of Dodd–Frank's statute of limitations, but declining to reach a decision on the merits); *Citgo Petroleum Corp. v. Bulk Petroleum Corp*., 2010 WL 3212751, at *8 n. 4 (N.D. Okla. Aug. 12, 2010) (holding that Dodd–Frank's extension of the limitations period of the Equal Credit Opportunity Act should not be applied retroactively because there is no clear indication in the Act that is to be applied retroactively).

3. SOX's Ban Of Arbitration Agreements

In addition, section 922(c) of Dodd-Frank declared void any "agreement, policy form, or condition of employment, including a predispute arbitration agreement" which waives the rights and remedies afforded to SOX whistleblowers. 18 U.S.C. § 1514A(e) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a

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dispute arising under this section."). Most courts have held this provision is not retroactive, although one has held that it is retroactive.

In *Henderson v. Masco Framing Corp*., 2011 WL 3022535 (D. Nev. July 22, 2011), the Plaintiff entered into a pre-dispute arbitration agreement with his employer, which governed all claims under federal law, including SOX whistleblower claims. The agreement was entered prior to the passage of Dodd-Frank, which prohibited such agreements. Plaintiff later filed a wrongful termination suit under Section 806 of SOX. He moved to compel arbitration, and the court focused on whether Dodd-Frank applies retroactively. It noted that one court, *Pezza v. Investors Capital Corp*., 767 F. Supp. 2d 225 (D. Mass. 2011), gave retroactive application to this provision, and found the pre-Dodd-Frank arbitration agreement could not be enforced. The *Henderson* court, however, rejected the *Pezza* court's approach and stressed that the presumption against retroactivity is particularly strong where, as in this case, a retroactive application would eliminate established contractual rights. Accordingly, the court granted the employee's motion to compel arbitration.

In January 2012, the court in *Holmes v. Air Liquide USA LLC*, Civil Action No. H–11–2580, 2012 WL 267194 (S.D. Tex. Jan. 30, 2012), agreed with the *Henderson* court, holding as follows:

> The Court begins its analysis by agreeing with both the *Pezza* and *Henderson* courts that the portions of Dodd–Frank addressing predispute arbitration do not evidence any intent to apply retroactively. Thus, the Court proceeds to considering whether the presumption against retroactivity is rebutted in this case. Ultimately, the Court cannot agree with the holding in *Pezza* that the portions of Dodd–Frank at issue affect only procedural rights. Instead, as the court held in *Henderson*, this Court finds that the rights of contracting parties are substantive, and that a statute affecting those rights undoubtedly impairs rights that existed at the time the parties acted. As the court in *Henderson* explained, retroactive application in this case "would not merely affect the jurisdictional location in which [the parties'] claims could be brought; it would fundamentally interfere with the parties' contractual rights and would impair the 'predictability and stability' of their earlier agreement." 2011 WL 3022535, at *13 (quoting *Landgraf*, 511 U.S. at 271). Indeed, *Landgraf* explicitly mentioned "contractual or property rights" as "[t]he largest category of cases in which . . . the presumption against retroactivity has been applied," as these are areas "in which predictability and stability are of prime importance." 511 U.S. at 271. Because Dodd–Frank would have a "genuinely 'retroactive' effect," 511 U.S. at 277, the Court concludes that neither 7 U.S.C. § 26(n)(2) nor 18 U.S.C. § 1514A(e) affects the enforceability of the arbitration agreement between Plaintiff and Defendants.

Id. at *6 (footnote omitted).

In March 2012, in *Taylor v. Fannie Mae*, __ F. Supp. 2d __, __, No. 11–cv–1189 (RCL) 2012 WL 928170 (D.D.C. Mar. 20, 2012), the district court also agreed with *Henderson*, and granted the defendant's motion to compel arbitration, holding that it

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would not be permissible to retroactively apply the bar against arbitration agreements under SOX. *Id*. at *3.

D. Damages Under SOX

1. Courts Hold SOX Does Not Provide For Mental Anguish Damages

An employee prevailing on a claim brought under Section 1514A shall be entitled to "all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). Compensatory damages under Section 1514A include "(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) the amount of back pay, with interest; and (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." § 1514A(c)(2).

Courts have consistently held that Section 1514A does not provide for any type of non-pecuniary damages, including mental anguish and punitive damages. *See Murray v. TXU Corp*., No. Civ.A.3:03–CV–0888–P, 2005 WL 1356444, at *3–*4 (N.D. Tex. 2005) (noting the original draft of the remedies provision of section 1514A provided explicitly for punitive damages, but subsequent drafts removed the language, providing force that such terms no longer applied); *see also Walton v. Nova Info. Sys*., 514 F. Supp. 2d 1031, 1035 (E.D. Tenn. 2007) ("Notably, the provision of [Section 1514A] makes no mention of any type of damages considered non-pecuniary, damages such as injury to reputation, mental and physical distress or punitive damages."). In *Hemphill v. Celanese Corp*., NO. CIV.A.3:08CV2131-B, 2009 WL 2949759, at *5 (N.D. Tex. Sept. 14, 2009), the district court dismissed the SOX plaintiff's claims for "mental anguish damages, future earnings and benefits, and exemplary and punitive damages," holding that they were not available under SOX as a matter of law.

Courts have also held that generally non-pecuniary damages for reputational injuries are not available, as they would be akin to damages for emotional distress, and allowance for such damages would expand the scope of remedies articulated in and intended by SOX. *See Jones v. Home Federal Bank*, NO. CV09-336-CWD, 2010 WL 255856 at *6 (D. Idaho Jan. 14, 2010); *Hanna v. WCI Communities, Inc*., 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004). However, those same courts have held that reputational injury damages may be available where they are specifically for reputational injuries that caused a decrease in the plaintiff's future earning capacity, as granting such relief could be consistent with SOX's goal of making the plaintiff whole. *See Jones*, 2010 WL 255856 at *6; *Hanna*, 348 F. Supp. 2d at 1334.

2. The ARB Disagrees, And Holds That SOX Permits The Award Of Mental Anguish Damages

Contrary to the court decisions addressing the issue, the ARB takes the position that compensatory damages for mental distress are available under SOX. In *Kalkunte v. DVI Financial Services, Inc.*, Nos. 05-139, 05-140, 2009 WL 564738, at *13 (ARB Feb. 27, 2009), the ARB affirmed the ALJ's award of $22,000 to a prevailing claimant in a SOX case for "pain, suffering, mental anguish, the effect on her credit [because of her loss of employment] and the humiliation that she suffered." Following *Kalkunte*, Administrative Law Judges have also granted prevailing SOX claimants damages for mental anguish and emotional distress. *See, e.g.,*

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Brown v. Lockheed Martin Corp., 2008-SOX-00049, 2010 WL 2054426, at *59 (ALJ Jan. 15, 2010) (awarding prevailing SOX claimant $75,000.00 for "emotional pain and suffering, mental anguish, embarrassment, and humiliation"), *aff'd*, No. 10-050, 2011 WL 729644 (ARB Feb. 28, 2011).

XVIII. CONCLUSION

Title VII was passed in 1964. Yet, as set forth in this paper, nearly fifty years later, courts are still not in complete agreement with one another regarding the appropriate legal standards for analyzing retaliation claims. Now, a new wave of laws – Dodd-Frank and the amended SOX whistleblowing provisions – are in effect, and the ARB and courts are frequently issuing divergent and seemingly contradictory rulings regarding those laws.

Rest assured that all anti-retaliation and whistleblower laws – the old, the new, and those yet to come – will continue to keep generations of employment lawyers busy for many years to come. As employment lawyers ply their trade, and blaze new trails, I hope this paper and presentation are helpful to them, and to you.

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