RECENT DEVELOPMENTS IN RETALIATION AND WHISTLEBLOWING LAW

This paper focuses on diverse and timely topics concerning retaliation and whistleblowing – most especially recent legal developments under the anti-retaliation provisions of the Sarbanes–Oxley Act of 2002 and the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010.

I. DOES *NASSAR* RENDER THE "CAT'S PAW" DOCTRINE ARTICULATED IN *STAUB* INAPPLICABLE IN TITLE VII RETALIATION CASES?

In *Staub v. Proctor Hosp.,* 131 S. Ct. 1186 (2011), Vincent Staub sued his former employer, Proctor Hospital, under USERRA, 38 U.S.C. § 4301 *et seq*. Staub alleged that his termination was motivated by Proctor's hostility to his obligations as a member of the United States Army Reserve, which required him to devote a certain number of weeks and weekends per year to training. Specifically, he claimed that although the vice president of human resources, who lacked such hostility, made the decision to terminate him, her decision was influenced by Staub's supervisors, who possessed enmity to his military obligations. *Id*. at 1190.

The Seventh Circuit characterized Staub's claim as a "cat's paw case," or one in which Staub sought to hold his employer liable for the animus of a nondecisionmaker. *Staub v. Proctor Hosp.*, 560 F.3d 647, 651 (7th Cir. 2009). Under Seventh Circuit precedent, an employer would be held liable in such a circumstance only if the nondecisionmaker exerted such "singular influence" over the decisionmaker as to make the decision no more than a rubber stamp of the nondecisionmaker's recommendation. *Id*. The decisionmaker would not be considered a pawn of the nondecisionmaker, however, if he or she conducted an independent investigation into the relevant facts before rendering the adverse decision. *Id*. at 656–57.

Applying this test, the Seventh Circuit observed that the vice president of human relations considered Staub's past employment incidents, in addition to the supervisors' opinions, before rendering her ultimate decision. *Id*. at 659. Thus, the court held that a reasonable jury could not have concluded that the decision to terminate Staub was a product of "blind reliance." *Id*. Although the decision was influenced by the supervisors' opinions, it was not "'wholly dependent'" upon them, and thus Proctor was not liable. *Id*. (internal quotation omitted).

The Supreme Court reversed. It rejected the "singular influence" test and stated that the correct test of employer liability was one of proximate cause. 131 S. Ct. at 1194. The Court further found unpersuasive Proctor's argument that a decisionmaker's "independent investigation (and rejection) of the employee's allegations of discriminatory animus" relieves an employer of fault. *Id*. at 1193. It declined to adopt a "hard-and-fast rule" that a decisionmaker's independent investigation would be sufficient to negate the effect of a nondecisionmaker's discrimination. *Id*. The Court explained:

> [I]f the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action ... then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.... The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.

Id. at 1193.

The Supreme Court described USERRA as a statute "very similar to Title VII." 131 S. Ct. at 1191. USERRA provides that "[a]n employer shall be considered to have engaged in [prohibited] actions ... if the person's membership ... in the services ... is a motivating factor in the employer's action." 38 U.S.C. § 4311(c). Likewise, Title VII prohibits employment discrimination "because of ... race," among other grounds, and provides that the complaining party establishes an unlawful employment practice when it demonstrates that race "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e–2(a), (m). Thus, under *Staub*, proximate cause necessary to establish a Title VII claim requires only some direct relation between the injury asserted and injurious conduct alleged, and excludes only those links that are too remote, purely contingent, or indirect. *See McKenna v. City of Philadelphia*, 649 F.3d 171, 178 (3d Cir. 2011) (applying *Staub* in Title VII context), *cert. denied*, 132 S. Ct. 1918 (2012); *see also Crowe v. ADT Sec. Servs., Inc*., 649 F.3d 1189, 1194–95 (10th Cir. 2011) (same); *Davis v. Omni–Care, Inc*., 482 Fed. Appx. 102, 2012 WL 1959367, at *7 n. 8 (6th Cir. June 1, 2012) (same).

In *Gross v. FBL Financial Services, Inc*., 557 U.S. 167, 176, 129 S. Ct. 2343, 2350 (2009), the Supreme Court held that the language "because of" in the Age Discrimination in Employment Act ("ADEA") means that a plaintiff must prove that discrimination was the "but-for" cause of the adverse employment action. *See id*. ("To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."); *see also id*. (explaining that the claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome") (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706, 123 L.Ed.2d 338 (1993)); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984) ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it.").

Based on *Gross*, some courts have held that that *Staub's* "proximate causation" standard does not permit the application of the "cat's paw" doctrine in cases under the ADEA. *See, e.g., Sims v. MVM, Inc.*, 704 F.3d 1327, 1336 (11th Cir. 2013) ("Because the ADEA requires a "but-for" link between the discriminatory animus and the adverse employment action as opposed to showing that the animus was a "motivating factor" in the adverse employment decision, we hold that *Staub's* "proximate causation" standard does not apply to cat's paw cases involving age discrimination."); *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 949–50 (10th Cir. 2011) (same);

Wojtanek v. Dist. No. 8, Int'l Ass'n of Machinists & Aero. Workers, 435 Fed. Appx. 545, 549 (7th Cir. 2011) (same). *See also Holliday v. Commonwealth Brands, Inc.*, 483 Fed. Appx. 917, 922 n. 2 (5th Cir. 2012) (expressing doubt about the theory's application to ADEA claims), *cert. denied*, 133 S. Ct. 1272 (2013).

Rather, for a cat's paw like theory to apply in cases that require "but for" causation, such as ADEA cases, courts have held that the biased supervisor's animus must be "a 'but-for' cause of, or a determinative influence on," the employer's ultimate decision. *See Sims*, 704 F.3d at 1337. Several courts have held that this requires a showing that the decision maker merely "rubberstamped" the biased supervisor's recommendation, applying the adverse action without any independent investigation. *See Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999); *see also Simmons*, 647 F.3d at 950, *cited with approval in Sims*, 704 F.3d at 1336.

In *Nassar v. Univ. of Texas Southwestern Med. Ctr.*, 133 S. Ct. 2517 (2013), the Supreme Court addressed the proper causation standard applicable to retaliation claims. The Court held that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened "motivating factor" causation test stated in 42 U.S.C. § 2000e-2(m). *See also Sayger v. Riceland Foods, Inc*., 735 F.3d 1025, 1030–32 (8th Cir. 2013) (holding that to show causal connection in § 1981 retaliation action, claimant must prove that employer's desire to retaliate was but-for cause of his or her termination). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer. In other words, Title VII retaliation claims require the same proof of causation (but-for) that ADEA claims require. Because, as noted above, a number of courts have held that cat's paw doctrine as articulated in *Staub* does not apply to the ADEA, on the theory that it is incompatible with but-for causation, then this same incompatibility may now be found to apply to Title VII retaliation claims. *See Goodsite v. Norfolk Southern Ry. Co.*, __ Fed. Appx. __, 2014 WL 4192786 at n.7 (6th Cir. 2014) (based on *Nassar*, "it would appear that, at a minimum, the cat's paw theory of liability must be modified in Title VII retaliation cases.").

II. 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-RETALIATION 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, most 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 courts 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." (citing *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)).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).

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.

The Fifth Circuit has continued to apply the "step outside the role" requirement rigorously. *See, e.g., Lasater v. Texas A & M University-Commerce*, No. 11–11068, 2012 WL 5246602, at *4 (5th Cir. Oct. 24, 2012) (department head's report to internal auditor regarding potentially improper use of "comp time" as part of routine audit did not constitute protected activity under the FLSA because, among other reasons, such reports were within the plaintiff's role and responsibilities as part of her job).

Other courts invoking and applying the "step outside the role" rule 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 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.").

This trend in the case law seems to be growing. For example, in *Brush v. Sears Holdings Corp*., 466 Fed. Appx. 781 (11th Cir. 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 784. 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 787 (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*.

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. So far, it has not, although the Tenth Circuit Court of Appeals did suggest in *dicta* that it is at least arguable that *Crawford* has abrogated this line of authority. *See Weeks v. Kansas*, 503 Fed. Appx. 640, 643 (10th Cir. 2012) (relying on this rule to reject in-house lawyer's retaliation claim, and finding that the lawyer waived any argument that *Crawford* abrogated this line of authority by failing to raise Crawford in the district court).

Finally, there is a question whether this line of authority applies to SOX retaliation claims. In *Riddle v. First Tennessee Bank*, No. 3:10–cv–0578, 2011 WL 4348298, at *8 (M.D. Tenn. Sept. 16, 2011), *aff'd*, NO. 11-6277, 2012 WL 3799231 (6th Cir. Aug. 31, 2012), the district court held that this line of authority did apply to a SOX claim, but did so without analysis or meaningful discussion. The Sixth Circuit affirmed on other grounds. In contrast, the Administrative Review Board takes the opposite view. *See Robinson v. Morgan–Stanley*, Case No. 07–070, 2010 WL 348303, at *8 (ARB Jan. 10, 2010) ("[Section 1514A] does not indicate that an employee's report or complaint about a protected violation must involve actions outside the complainant's assigned duties."), and at least one federal district court has followed the ARB on this point. *See Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012) (rejecting employer's argument that the employee's SOX claim had to be dismissed because she never stepped outside her role).

III. 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*., No. 99-C-0774-C, 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 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.").

In May 2012, the Second Circuit Court of Appeals followed the cases cited above, and held that an employee conducting an internal investigation into harassment complaints was not protected by the "participation clause" of the anti-retaliation provision of Title VII, when the investigation was triggered by a purely internal complaint, and not an EEOC charge. *See Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41, 49-51 (2d Cir. 2012). In its decision, the Second Circuit observed that its decision was consistent with every other appellate court's determination on this issue:

> Every Court of Appeals to have considered this issue squarely has held that participation in an internal employer investigation not connected with a formal EEOC proceeding does not qualify as protected activity under the participation clause. *See Hatmaker*, 619 F.3d at 746–47; *Total Sys. Servs*., 221 F.3d at 1174; *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990). The Courts of Appeals for the Fifth and Sixth Circuits have also suggested that, for conduct to be protected by the participation clause, it must occur in connection with a formal EEOC proceeding. *See Abbott*, 348 F.3d at 543; *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000).

Id. at 49.

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 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.

In *Hilton v. Yoon S. Shin*, Civil Action No. 11–cv–02241–AW, 2012 WL 1552797, at *4-5 (D. Md. Apr. 30, 2012), the district court relied on *Crawford* to conclude that a sexual harassment victim who rejected the company president's sexual advances "opposed" discrimination for purposes of the opposition clause, even though she never complained about the harassment to anyone. The court stated, "[i]f refusing a supervisor's order to fire someone for discriminatory reasons constitutes opposition [which is something the *Crawford* court had said in its opinion], it would seem to follow that refusing to submit to the sexual pressures of the company president constitutes opposition, especially for the purpose of a motion to dismiss." *Id*. at *4.

In *Sayger v. Riceland Foods, Inc*., 735 F.3d 1025, 1032 (8th Cir. 2013), a white worker was interviewed by his employer about an African-American coworker's internal complaint of alleged racial discrimination. The white worker confirmed the racial discrimination in his interview. Later, he was fired, and sued for retaliation under Section 1981. The Eighth Circuit Court of Appeals relied on *Crawford* to conclude that the white plaintiff had engaged in protected oppositional activity when he substantiated the racial discrimination complain of his African-American coworker during his interview.

IV. DODD-FRANK UPDATE

A. Who Can Qualify As A Whistleblower?

1. Although Dodd-Frank Explicitly Defines A "Whistleblower" In A Way That Only Includes Those Who Provide Information To The SEC, An Exception Has Been Carved Out By Some – But Not All – Courts That Is Rooted In A "Catch-All" Part Of The Law

The Dodd-Frank Act was passed in 2010. According to the SEC, the elements of a retaliation claim under the Dodd–Frank Act are (1) that the plaintiff engaged in a protected activity; (2) that the plaintiff suffered an adverse employment action; and (3) that the adverse action was causally connected to the protected activity. *See* Securities and Exchange Commission, Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34–64545 (May 25, 2011), at 18 n.41.

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 arguable apparent conflict, the anti-retaliation provisions of the Dodd-Frank Act protect whistleblowers from retaliation in three categories of circumstances, one of which 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, some courts have held that 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, according to those courts' logic, 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 what it believed to be the apparent conflict:

> 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.

Some other federal district courts have followed *Egan* on this point. *See, e.g., Genberg v. Porter*, NO. 11-CV-02434-WYD-MEH, 2013 WL 1222056, at *10 (D. Colo. Mar. 25, 2013), and cases cited therein.

The so-called "catch-all" provision of the Dodd-Frank Act also covers whistleblowers who make "disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 (15 U.S.C. § 7201 *et seq*.) . . . ." 15 U.S.C. § 78u–6(h)(1)(A)(iii). In *Kramer v. Trans-Lux Corp*., No. 3:11cv1424(SRU), 2012 WL 4444820 (D. Conn., Sept. 25, 2012), the district court relied on this part of Dodd-Frank's anti-retaliation provision to hold that SOX retaliation claimants may also seek relief through Dodd-Frank. This is extremely significant because it allows a claimant who never made a report to the SEC to: (1) avoid the OSHA exhaustion requirement imposed under SOX; (2) enjoy the benefit of a longer statute of limitations than is available under SOX; and (3) receive potentially higher damages, as Dodd-Frank allows for liquidated damages while SOX does not. In rejecting the employer's argument that this holding was problematic because it allowed for an "end around" SOX, the court stated:

> Trans–Lux argues that the SEC's rule is an impermissible construction of the statute because it would allow potential plaintiffs to pursue under the Dodd–Frank Act retaliation claims they would have otherwise pursued under Sarbanes–Oxley. This is problematic, Trans–Lux asserts, because the Dodd–Frank Act has a longer statute of limitations than Sarbanes–Oxley, and no exhaustion requirement. Yet the Dodd–Frank Act appears to have been intended to expand upon the protections of Sarbanes–Oxley, and thus the claimed problem is no problem at all.

Id. at *5.

Many other district courts followed *Kramer's* holding to permit a "SOX claim through Dodd-Frank" even where the plaintiff made no report of any kind to the SEC. *See Murray v. UBS Securities, LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *3-4 (S.D.N.Y. May 21, 2013), and cases cited therein. *See also infra*.

On the other hand, in July 2013, the Fifth Circuit U.S. Court of Appeals blew this argument out of the water. It agreed with the defendant's arguments in *Kramer*, and held that, to have a Dodd-Frank retaliation claim, one must have provided information relating to a violation of the securities laws to the SEC – meaning that a claimant who has made a report to the SEC that is covered by SOX may have a Dodd-Frank retaliation claim (in addition to a SOX retaliation claim), but one who never made any such report to the SEC would not have a Dodd-Frank retaliation claim. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013).

Just days after *Asadi* was decided, a district court judge in Colorado followed *Asadi*, and agreed that only individuals who provide information to the SEC can be "whistleblowers" under Dodd-Frank. *See Wagner v. Bank of America Corp*., Civil Action No. 12–cv–00381–RBJ2013 WL 3786643, at *5-6 (D. Colo. July 19, 2013); *see also Verfuerth v. Orion Energy Systems, Inc.,* No. 14–C–352, 2014 WL 5682514 (E.D. Wis. Nov. 4, 2014) (following *Asadi*); *Banko v. Apple Inc.*, No. 13–cv–2977, 2013 WL 7394596, at *6 (N.D. Cal. Sept. 27, 2013) ("Because plaintiff did not file a complaint to the SEC, he is not a 'whistleblower' under the Dodd–Frank Act."). However, most other district courts have disagreed with *Asadi*. *See Connolly v. Remkes*, Case No.: 5:14–CV–01344–LHK, 2014 WL 5473144 (N.D. Cal. Oct. 28, 2014) (rejecting *Asadi*); *Bussing v. COR Clearing, LLC,* __ F. Supp. 2d __, NO. 8:12-CV-238, 2014 WL 2111207, at *10-12 (D. Neb. May 21, 2014) (rejecting *Asadi* and being very critical of the decision); *Berman v. Neo@Ogilvy LLC*, No. 14–CV–00523, 2014 U.S. Dist. LEXIS 115078, at *21–22 (S.D.N.Y. Aug. 15, 2014) (disagreeing with *Asadi*); *Englehart v. Career Educ. Corp.*, No. 8:14–CV–444–T–33 EAJ, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014) (rejecting *Asadi*); *Yang v. Navigators Group, Inc.,* __ F. Supp. 2d __, NO. 13-CV-2073 NSR, 2014 WL 1870802, *13 (S.D.N.Y. May 8, 2014) (deferring to SEC's interpretation and rejecting *Asadi*); *Khazin v. TD Ameritrade Holding Corp*., Civil Action No. 13–4149 (SDW)(MCA), 2014 WL 940703 (D. N.J. Mar. 11, 2014) ("Nevertheless, based on this Court's construction of the statute—consistent with the majority approach on the issue—internal reporting of potential violations is sufficient to qualify as a whistleblower under the Dodd–Frank Act's anti-retaliation provision."); *Azim v. Tortois Capital Advisors, LLC*, No. 13–2267, 2014 WL 707235, at *3 (D. Kan. Feb. 24, 2014) (declining to follow *Asadi*); *Ahmad v. Morgan Stanley & Co*., 2 F. Supp. 3d 491 (S.D.N.Y. 2014) (finding Dodd-Frank Act's whistleblower protection statute ambiguous and deferring to the SEC's "reasonable interpretation," but holding complaint to be otherwise deficient); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 148 (S.D.N.Y. 2013) (relying on SEC regulation and rejecting *Asadi*); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) ("This court respectfully disagrees [with *Asadi*] and instead adopts the SEC's interpretation of the relevant provisions of Dodd–Frank."). Depending on how this conflict is resolved in various jurisdictions, it could result in a dramatic reduction of OSHA charges of SOX retaliation and a significant increase in federal court SOX litigation brought through Dodd-Frank.

2. An Employee May Be A Whistleblower for Purposes Of Dodd-Frank's Anti-Retaliation Provisions, Even If He Or She Is Not A Whistleblower For Purposes Of Dodd-Frank's Bounty Provisions

Under the "bounty" provision, a whistleblower who provides "original information" to the SEC is entitled to an award of portions of money recovered by the SEC. *See* 15 U.S.C. § 78u–6(b). As explained above, the statute defines "original information" in part as information "not known to the [SEC] from any other source." 15 U.S.C. § 78u–6(a)(3)(B). And the SEC's regulations provide that "original information" must be "[p]rovided to the [SEC] for the first time after July 21, 2010 (the date of enactment of the Dodd–Frank [Act])." 17 C.F.R. § 240.21F–4(b)(iv).

In one Dodd-Frank retaliation case, the defendants argued that the plaintiff was not covered by the law's anti-retaliation provisions, because she did not provide "original information" to the SEC after the law's enactment. In rejecting that argument, the court stated:

> The language of Dodd-Frank's anti-retaliation provision, however, does not require an individual to provide "original information." The anti-retaliation provision uses only the unmodified term "information." And there is nothing else in the statute to suggest that the anti-retaliation provision applies only to individuals who provide information that would make them eligible for an award. To the contrary, the SEC's implementing regulations make clear that the "anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award." 17 C.F.R. § 240.21F–2(b)(1)(iii). Thus, to the extent Defendants argue that Ott is not covered by the anti-retaliation provision because she did not provide "original information" to the SEC after Dodd–Frank's enactment, the argument is without merit.

Ott v. Fred Alger Management, Inc., No. 11 Civ. 4418 LAP, 2012 WL 4767200, at *5 (S.D.N.Y. Sept. 27, 2012).

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).

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

Dodd-Frank includes some favorable provisions for whistleblowers, as compared to Sarbanes-Oxley. Some of those provisions are described below.

1. 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. § 78u–6(h)(1)(B)(i).

2. 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. § 78u–6(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*.

3. 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 interest; and (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. 15 U.S.C. § 78u–6(h)(1)(C).

C. Extraterritorial Application Of Dodd–Frank's Anti–Retaliation Provision

In *Asadi v. G.E. Energy (USA), LLC*, Civil Action No. 4:12–345, 2012 WL 2522599, at *7 (S.D. Tex. June 28, 2012), the district court held that "Dodd–Frank's Anti–Retaliation Provision *per se* does not apply extraterritorially." The claimant, a dual United States - Iraqi citizen, was employed in Jordan as the GE-Iraq Country Executive by GE Energy (USA), LLC, a wholly owned, direct subsidiary of General Electric Company. *Id*. at *1 * n.4.

The *Asadi* court held that it need not decide whether the Act's protections extended to individuals whose disclosures were not made to the SEC. *Id*. at *3. Instead, the court first considered whether the Act's anti-retaliation provision applied extraterritorially. Relying on the presumption against extraterritoriality recently applied by the Supreme Court in *Morrison v. Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010), and the Act's explicit grant of extraterritorial jurisdiction for certain enforcement actions other than the anti-retaliation provisions, the *Asadi* court held that the anti-retaliation protection of the Act did not apply extraterritorially. *Id*. at *4.

The *Asadi* plaintiff argued that even if the Act's anti-retaliation protection did not apply extraterritorially, he was eligible for protection, apparently based in large part on an e-mail from GE Energy which terminated his employment "as an at-will employee, as allowed under U.S. law" and stated that "[a]s a U.S. based employee you will be terminated in the U.S." *Id*. at * 5 & n.46. In contrast to its extended discussion of extraterritorial application, the court dismissed this factual argument in a single paragraph, noting that the plaintiff admitted that "the majority of events giving rise to the suit occurred in a foreign country," the e-mail was sent to plaintiff in Jordan, related to his employment in Jordan, and noted that a letter would be sent to his home in Jordan." *Id*. at *5. As discussed above, the district court's decision in *Asadi* was affirmed on different grounds in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013).

In *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 183 (2nd Cir. 2014), the Second Circuit held that the whistleblower anti-retaliation provision of the Dodd–Frank Act, 15 U.S.C. § 78u–6(h), does not apply extraterritorially.

V. SARBANES-OXLEY UPDATE

A. *Parexel* And Its Prodigy

1. The Pre-*Parexel* Landscape

SOX Section 806, protects employees from retaliation when they engage in the following activities:

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a).

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.

Id.; *see also Harp v. Charter Comm., Inc.,* 558 F.3d 722, 723 (7th Cir. 2009) (same); *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).

Under SOX, a plaintiff's activity is "protected" only if the employee "provide[s] information ... regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1); *see also Perez v. Progenics Pharmaceuticals, Inc.*, 965 F. Supp. 2d 353 (S.D.N.Y. 2013). "To demonstrate that a plaintiff engaged in a protected activity, a plaintiff must show that he 'had both a subjective belief and an

objectively reasonable belief that the conduct he complained of constituted a violation of relevant law.'" *Welch*, 536 F.3d at 275; *see also Fraser v. Fiduciary Trust Co. Int'l*, 396 Fed. Appx. 734, 735 (2d Cir. 2010) (affirming district court's grant of summary judgment where "record evidence would not permit a factfinder to conclude that [plaintiff] held both a subjective and objectively reasonable belief that [plaintiff] was reporting conduct covered by [Sarbanes–Oxley]"). "In assessing the reasonableness of a plaintiff's belief regarding the illegality of the particular conduct at issue, courts look to the basis of the knowledge available to a reasonable person in the circumstances with the employee's training and experience." *Sharkey v. J.P. Morgan Chase & Co.*, 805 F. Supp. 2d 45, 55 (S.D.N.Y. 2011) (internal quotation marks omitted); *Pardy v. Gray*, No. 07–CV–6324, 2008 WL 2756331, at *5 (S.D.N.Y. July 15, 2008) ("It is sufficient for a plaintiff to show that she reasonably believed, based on the knowledge available to her, considering her training and the circumstances, that her employer was violating the applicable federal law."); *see also Harp v. Charter Comm., Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) ("Objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." (internal quotation marks omitted)).

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), *cert. denied*, 129 S. Ct. 1985 (2009) ; *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).

"The words 'a contributing factor' mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Pardy v. Gray*, No. 07 Civ. 6324(LAP), 2008 WL 2756331, at *5 (S.D.N.Y. July 15, 2008) (Preska, J.) (citing *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)); *Allen v. Administrative Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008) (stating in a SOX case that "[a] contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."). The Tenth Circuit referred to the "contributing factor" standard as being "broad and forgiving." *Lockheed Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121 (10th Cir. 2013). In *Lockheed*, the court stated that the "contributing factor" standard was intended to overrule existing case law that required whistleblowers to prove that their protected

conduct was a "significant," "motivating," "substantial," or "predominant" factor in an unfavorable personnel action in order to prevail. *Id*. at 1136.

"A plaintiff need not prove that her protected activity was the primary motivating factor in her termination, or that the employer's articulated reason was pretext in order to prevail." *Barker*, 888 F. Supp. 2d at 300 (citation omitted). Thus, in SOX retaliation cases, so long as the plaintiff produces more than mere temporal proximity, courts tend to find sufficient evidence to survive summary judgment under the "contributing factor" standard. *See, e.g., Van Asdale v. Int'l Game Tech*., 577 F.3d 989, 1003-04 (9th Cir. 2009) (close timing between protected activity and decision to terminate, combined with evidence of plaintiff's good job performance that belied employer's performance-based reason for termination, created an issue of fact on this element in a SOX case); *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 451 (S.D.N.Y. 2013) (evidence that plaintiff was marginalized after he engaged in SOX-protected activity until his termination five months later was sufficient to survive summary judgment); *accord Lockheed Martin Corp.*, 717 F.3d at 1136 (sufficient evidence that protected activity was a contributing factor between the claimant's complaint and constructive discharge, despite passage of twenty months between the date the plaintiff filed her ethics complaint and the date she resigned); *Barker*, 888 F. Supp. 2d at 300-01 (sufficient causal connection existed despite five month gap between reporting and termination, where in between plaintiff was overlooked for assignments and given unfavorable reviews).

On the other hand, in a SOX case, "temporal proximity alone is usually insufficient to constitute evidence that would prove that an employer retaliated against an employee for engaging in alleged protected activity." *Riddle v. First Tennessee Bank, Nat. Ass'n*, 497 Fed. Appx. 588, 596 (6th Cir. 2012). And, if the decision to terminate was clearly made before the plaintiff engaged in any SOX-protected activity, then summary judgment for the employer is proper on this element. *See, e.g., Boyd v. Accuray, Inc.*, 873 F. Supp. 2d 1156, 1170 (N.D. Cal. 2012) (no proof protected activity was a contributing factor in termination decision, where undisputed evidence showed the decision to terminate was made nine days before the plaintiff engaged in any alleged SOX-protected activity). Likewise, if none of the decisionmakers knew of the plaintiff's allegedly protected activity, then this element cannot be satisfied, unless the "cat's paw" doctrine (explained above) applies. *Compare Boyd*, 873 F. Supp. 2d at 1170 (dismissing SOX claim where the plaintiff failed to show that anyone with supervisory authority over plaintiff "knew or suspected, actually or constructively, that the [Plaintiff] engaged in the protected activity") *with Lockheed Martin Corp.*, 717 F.3d at 1136 (applying "cat's paw" doctrine in affirming decision in SOX claimant's favor). Similarly, if both timing and an unrelated intervening event that provides a legitimate basis for termination exist, then the contributing factor standard will not be satisfied. *See Feldman v. Law Enforcement Associates Corp.*, 752 F.3d 339, 350 (4th Cir. 2014) (affirming summary judgment in employer's favor on basis that plaintiff did not satisfy the contributing factor standard as a matter of law).

Until *Parexel* was decided, the vast majority of SOX claimants – more than 95% – lost their cases, often because the Administrative Law Judge ("ALJ"), Administrative Review Board ("ARB"), or federal district or appellate 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 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.
- 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., Barrett v. E-Smart Technologies, Inc*., Nos. 11-088 12-013, 2013 WL 1856718 (ARB Apr. 25, 2013) (affirming ALJ's liability finding and damages award of more than $1.2 million against employer under *Parexel* standard); *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 Appeals Court Decisions That Discuss *Parexel*

As set forth below, *Parexel* has generally been followed by the appellate courts to consider it.

a. *Wiest v. Lynch*, 710 F.3d 121 (3rd Cir. 2013)

In this case, the plaintiff filed a complaint alleging retaliation under Section 806 after having reported concerns about certain corporate expenditures. The district court granted the defendants' motion to dismiss. The district court held that the plaintiff failed to adequately allege that he 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 district court denied the motion for numerous reasons, including its belief that an ARB decision is not binding authority on a United States district court. *Id*. at 126. Wiest filed an appeal.

In a 2-1 decision issued on March 19, 2013, the Third Circuit U.S. Court of Appeals reversed the district court. The Third Circuit held that the ARB's rejection of the "definitive and specific" standard [in *Parexel*] is entitled to *Chevron* deference." *Id*. at 131 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984) ("If ... the court determines Congress has not directly addressed the precise question at issue ... the question for the court is whether the agency's answer is based on a permissible construction of the statute.")). Moreover, it concluded that, based on *Parexel*: (1) the District Court erred by requiring that an employee's communication reveal the elements of securities fraud, including intentional misrepresentation and materiality; and (2) the District Court erred in holding that to constitute protected activity, the information contained within an employee's communication must implicate "a reasonable belief of an *existing* violation." *Id*. at 132-33. After applying what the Third Circuit considered to be the correct legal standard, it found that the plaintiff had alleged sufficient facts to make out a SOX retaliation claim, and remanded the case to district court for further proceedings. *Id*. at 135-38.One justice dissented, arguing that *Parexel* was wrongly decided by the ARB, and was not

entitled to deference. That justice's position is in line with pre-*Parexel* cases from other circuit courts that adopted the "definitive and specific" standard, such as *Day v. Staples*, 555 F.3d 42 (1st Cir. 2009) and *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009).

b. *Lockheed Martin Corp. v. Administrative Review Bd., U.S. Dept. of Labor*, 717 F.3d 1121 (10th Cir. 2013)

In this case, the Tenth Circuit held that the claimant had engaged in protected activity under SOX when she made a complaint relating to mail fraud and wire fraud, even though the alleged fraud was not related to fraud on shareholders. *Id*. 1131. In doing so, it relied upon *Parexel*'s same conclusion, and gave the *Parexel* decision *Chevron* deference, stating that "[b]ecause the Board's interpretation of Section 806 is based on a permissible construction of the statute, we hold an employee complaint need not specifically relate to shareholder fraud to be actionable under the Act." *Id*. at 1131-32.

c. *Nielsen v. AECOM Technology Corp.*, 762 F.3d 214 (2nd Cir. 2014)

In *Nielsen*, the Second Circuit declined to decide whether *Parexel* deserved *Chevron* deference, but did conclude that it was at least entitled to, "respect according to its persuasiveness" pursuant to *Skidmore v. Swift & Co*., 323 U.S. 134, 65 S. Ct. 161, 89 L.Ed. 124 (1944). *Id*. at *4. Based on that deference, the Second Circuit agreed that "in accord with the ARB's interpretation in *Sylvester*, that the "definitively and specifically" requirement is not in keeping with the language of the statute." *Id*. at *6.

B. Other Recent Significant SOX Decisions

1. The ARB Holds That The Determination Of Whether The Claimant Satisfied The "Contributing Factor" Standard Is To Be Made Without Considering The Employer's Controverting Evidence

On October 9, 2014 the ARB issued a split 2-1 panel decision in *Fordham v. Fannie Mae*, No. 12-061, 2014 WL 5511070 (ARB Oct. 9, 2014), reversing in part and remanding an administrative law judge's post-hearing dismissal of a former employee's Section 806 whistleblower retaliation claim. The claim was brought by a former IT technical risk specialist who worked in the employer's SOX Technology Department. Noting that its decision addressed a matter of first impression, the ARB attempted to clarify the ARB's, ALJs' and reviewing courts' approaches to how Section 806's two separate burdens of proof should be applied. The ARB held:

> The determination whether a complainant has met his or her initial burden of proving that protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on the evidence submitted by the complainant, in disregard of any evidence submitted by the respondent in support

> of its affirmative defense that it would have taken the same personnel action for legitimate, non-retaliatory reasons only. Should the complainant meet his or her evidentiary burden of proving "contributing factor" causation, the respondent's affirmative defense evidence is then to be taken into consideration, subject to the higher "clear and convincing" evidence burden of proof standard, in determining whether or not the respondent is liable for violation of SOX's whistleblower protection provisions.

The ARB in *Fordham* reversed and remanded the ALJ's dismissal order because the ARB determined the ALJ committed reversible error by improperly "weighing evidence offered by Fannie Mae in support of its affirmative defense…against [the] complainant's causation evidence" of how her SOX-protected activity purportedly was a contributing factor in the employer's adverse employment action against her. According to the ARB, mixing and weighing the evidence in this fashion impermissibly resulted in applying to the employer's evidence the lower preponderance of the evidence standard that is only properly applicable to the complainant's evidence, rather than applying the higher clear and convincing evidence standard required to be applied to the employer's evidence. As the ARB further clarified:

> …should a respondent seek to avoid liability by producing evidence of a legitimate, non-retaliatory basis or reason for the personnel action at issue, the respondent must prove, not by a preponderance of the evidence, but *by clear and convincing evidence*, that its evidence of a non-retaliatory basis or reason for its action was the sole basis or reason for its action; that it would have taken the same personnel action based the demonstrated non-retaliatory reasons even if the complainant had not engaged in the protected activity.

A potential problem with applying the ARB's holding is that evidence in many cases is not easily compartmentalized. Often evidence that establishes a legitimate reason for terminating an employee (the defense's burden) will deprive the complainant of the quantum of proof necessary to demonstrate that the activity protected by SOX was a contributing factor in the adverse employment action (the complainant's burden). The decision contains a strong dissent, which may lay the groundwork for judicial review by a federal appellate court.

2. In March 2014, The U.S. Supreme Court Broadly Holds In *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014) That Section 806 Of SOX Applies To Private Businesses

SOX's anti-retaliation provision, Section 806, prohibits a public company or an "officer, employee, contractor, subcontractor, or agent of such company" from "discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating" against "an employee," because that employee blew the whistle on mail fraud, wire fraud, bank fraud, securities fraud, shareholder fraud, or any SEC rule or regulation.

Until the *Lawson* case, no court had addressed the meaning of the term "an employee." In *Lawson*, the plaintiffs worked for private companies that provided services for Fidelity mutual

funds. The plaintiffs' actual employers were privately held companies, but served as contractors to the publicly held mutual funds, which have no employees of their own.

The plaintiffs filed civil actions in the U.S. District Court of Massachusetts under SOX. The first plaintiff claimed that she was forced to resign because she internally raised concerns about cost accounting methodologies related to the mutual funds, while the second plaintiff alleged that his employer terminated him for pointing out inaccuracies in a mutual fund SEC filing. The defendants moved to dismiss, arguing that SOX applies only to employees of public companies, not employees of privately owned entities (like many mutual funds' investment advisers).

The district court denied the defendants' motion, but sent the question to the U.S. Court of Appeals for the First Circuit for immediate review. The First Circuit disagreed with the district court and held in favor of the defendants. It read "an employee" to refer only to an employee of a publicly held company, not employees of private businesses like the plaintiffs. The First Circuit noted that if employees of contractors and subcontractors were included within the scope of SOX, then so too would employees of a publicly held company's "officers," "employees" and "agents," a conclusion the court of appeals declined to reach.

A few months later, the ARB reached a different finding. In *Spinner v. David Landau & Assocs. LLC*, No. 10-111, 2012 WL 2073374 (ARB May 31, 2012), the ARB held that an auditor who was fired by a privately held firm could bring a SOX claim, because the privately held firm had provided compliance services to a public company. The ARB found that the term "an employee" referred not only to employees of the publicly held company, but also employees of its contractors and subcontractors – though not the employees of "officers," "employees" and "agents" of a public company.

With this split between a court of appeals and the DOL, the Supreme Court agreed to hear the plaintiffs' appeal in *Lawson*. In March 2014, the Court rejected both the First Circuit's view and that of the ARB, instead reaching the broadest possible interpretation of statutory coverage: that SOX applies to employees of publicly held companies, employees of contractors and subcontractors, and even employees of a public company's "officers," "employees" and "agents." *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014).

In reaching this conclusion, the Court started with the anti-retaliation language of SOX. The Court "boiled it down," reducing the anti-retaliation provision to say only that "no contractor may discharge an employee" for blowing the whistle. Simplified in that way, the Court concluded that the "employee" referenced had to be the employee of the contractor, not the employee of the publicly traded company. As further support for this conclusion, the Court noted that SOX says one cannot "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee," and these are all actions that an employer takes against its own employee, not against the employee of another company. SOX also provides for reinstatement, a remedy that a contractor could not grant to another company's employee.

The Court also noted that Congress enacted SOX in the wake of the Enron debacle. In debating that law, Congress observed that Enron's contractors were "complicit in, if not integral to, the

shareholder fraud and subsequent cover-up." Enron's fraud continued for so long in part because these contractors were able to retaliate against and even discharge employees who tried to report corporate misconduct, without any legal consequences. Turning to the plaintiffs' situation, the Court also observed that limiting SOX to employees of publicly held companies would essentially exempt the mutual fund industry from the SOX anti-retaliation provisions since publicly held mutual funds do not have any employees and instead are managed by privately held investment advisers. Putting this all together, the Court found that "an employee" must include employees of contractors.

One issue of interest to practitioners in this area was whether the Court would grant deference to the ARB's interpretation of SOX. The majority opinion did not issue a ruling on this point, though it was skeptical of the argument that it is the SEC that should interpret SOX rather than the ARB. The three dissenting Justices did say that the ARB's interpretations would not be entitled to deference, thus leaving the question open for another day at the Supreme Court level.

The *Lawson* decision is a sweeping victory for the plaintiff's bar. As noted by Littler Mendelson, P.C.:

> While the *Lawson* case presented a "mainstream application" of SOX – finance professionals allegedly blowing the whistle on fraud at a mutual fund – the Court's decision sweeps far, far wider. First, the Court did not adopt any limitation to the word "contractor." Thus, SOX could reach not only employees of law firms, accounting firms or investment advisers, but also employees of companies that have nothing to do with compliance or fraud, such as cleaning or construction companies. Second, SOX references "subcontractors" of publicly held companies. Even if a company only did business with other private companies, its employees could still file claims under SOX if the company contracted with a company that contracted with a public company. In short, virtually every business in the United States could face liability under SOX's anti-retaliation section. Even more broadly, SOX also prohibits "officers," "employees" and "agents" of publicly held companies from retaliating against their employees. Thus, if a parent who works at a publicly held company hires a babysitter, that babysitter could have a federal cause of action against that parent under SOX. Similarly, a housekeeper or gardener working for an officer of a publicly held company would be eligible to file a SOX claim for retaliation.
>
> These somewhat remarkable outcomes were pointed out by a vigorous dissent in Lawson. The majority opinion acknowledged that "housekeepers or gardeners" would fall within SOX's protections, but dismissed these concerns as "more theoretical than real." As for the massive number of privately held companies that could now face SOX litigation, the Court found that those concerns "are [no] more than hypothetical." The Court concluded, "if we are wrong," then "Congress can easily fix the problem by amending [SOX]."

Supreme Court's First Sarbanes-Oxley Decision Promises Expansion of Coverage to Most Privately Held Businesses (Mar. 6, 2014), written by Ed Ellis, Gregory Keating, and Stephen Melnick.

Lawson has its limits, however, as demonstrated by the post-*Lawson* case of *Gibney v. Evolution Marketing Research, LLC*, __ F. Supp. 2d __, Civil Action No. 14–1913, 2014 WL 2611213 (E.D. Pa. June 11, 2014). In *Gibney*, the district court distinguished *Lawson* and concluded that the plaintiff's claims fell outside the scope of SOX, although the court said this was "a close question."

The plaintiff in the *Gibney* case was employed by Evolution, a private marketing and research company that has a contract to provide consulting services for Merck & Co., the public pharmaceutical giant. The plaintiff alleged that he learned that Evolution was fraudulently billing Merck in violation of the consulting contract. He objected to these billing practices and shortly thereafter was terminated. Evolution moved to dismiss on the grounds that the plaintiff was not a protected person under SOX because his complaint did not relate to the actions of a public company.

The district court first described the Supreme Court's decision in *Lawson* and its focus on SOX's goal of preventing fraud by public companies and the unusual structure of mutual funds. The court recognized that this case presented the possible need to apply a potential "limiting principle" that the *Lawson* court left for another day. The court recognized that the case "at least touches on" the need to protect shareholders because Evolution's alleged fraud on Merck ultimately defrauds Merck's shareholders. Nonetheless, the Court concluded that the allegations fell outside the scope of SOX because: (1) the unusual structure of the mutual fund industry was not present in this case and (2) more importantly, there was no allegation of fraud by Merck, but rather Merck was alleged to have been the victim. The court said nothing in SOX or *Lawson* suggested that SOX applies any time an action "has some attenuated, negative effect on the revenue of a publicly-traded company." The court said SOX was not intended to reach the scenario here: "where there are allegations of fraudulent conduct between two companies who are party to a contract, and one of those companies just happens to be publicly-held."

3. The ARB Finds For The Employer Based On Clear And Convincing Proof That It Would Have Terminated The Employee Notwithstanding Her SOX-Protected Activity

The *Zinn* case began over five years ago, when an in-house attorney, Angelina Zinn, alleged that her employer retaliated against her after she raised potential SEC reporting violations to her supervisors. Zinn claimed that shortly after she raised her concerns, her employer required her to submit to a drug test, reduced her responsibilities, and started monitoring her job performance more closely. Zinn was ultimately fired for alleged insubordination and poor productivity.

After a hearing, the ALJ ruled in favor of the employer, but in 2012 the ARB vacated the order. *See Zinn v. American Commercial Lines, Inc.,* No. 10-029, 2012 WL 1102507, at *4-5 (ARB Mar. 28, 2012). The ARB ruled that an employee does not have to prove that the employer's

reasons for taking adverse action are false and a pretext for retaliation, as she would ordinarily have to do under federal employment discrimination statutes. Instead, the ARB held that once the employee makes a bare showing that she engaged in protected activity and suffered adverse action related to that activity, the employer must show by "clear and convincing evidence" that it would have made the same decision absent the protected activity. The ARB explained that an ALJ must weigh the evidence as a whole in assessing whether an employer met the "clear and convincing" standard. The case was sent back to the ALJ who, after submission of additional briefing and evidence, again found for the employer.

In December 2013, the ARB agreed that the employer met the "clear and convincing" evidence standard by showing that Zinn had been fired for insubordination and poor performance. *Zinn v. American Commercial Lines, Inc.,* No. 13-021, 2013 WL 6971141, at *8 (ARB Dec. 17, 2013) ("*Zinn II*"). The evidence the ARB relied on largely consisted of e-mails from Zinn herself, wherein she admitted that her work was suffering, that she was "burned out." *Id*. at *6. In addition, while Zinn alleged she was drug tested in retaliation for her SOX-protected activity, she admitted that her speech was slurred at work, and that medication she was on made her appear to be under the influence of drugs or alcohol. *Id*. Finally, Zinn's own e-mails proved that she was insubordinate in refusing to attend a meeting, and instead taking the day off due to alleged stress. *Id*. at *7.

The *Zinn II* opinion shows that employers can satisfy the "clear and convincing" standard in some circumstances, where there is abundant undisputed evidence of the legitimate reasons for the employee's termination.

4. 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, And In November 2014 The Fifth Circuit Affirms

In September 2011, 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 involved 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 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 in 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 many 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. At least one federal court has expressly agreed with, and followed *Menendez* so far. *See Guitron v. Wells Fargo Bank, N.A.*, NO. C 10-3461 CW, 2012 WL 2708517, at *16 (N.D. Cal. July 6, 2012) (plaintiff's poor reviews and suspension were actionable under the *Menendez* standard).

The *Menendez* 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.

The ARB remanded the case back to the ALJ to determine whether Halliburton's action had a retaliatory motive and, if so, whether the company could defend itself by showing "clear and convincing evidence" that it would have acted against Menendez anyway. Once again the ALJ dismissed Menendez's case, rejecting as "metaphysically impossible" the idea that Halliburton could provide evidence to prove a hypothetical scenario. Instead, the judge seized on an alternate phrasing in the ARB's order and found that Halliburton had provided "clear and convincing evidence" that its unveiling of Menendez had "legitimate business reasons."

Expecting to be overruled by the ARB again, however, the judge also supplied two fallback findings in favor of Menendez — one awarding him just $1,000 in damages, and an alternative that awarded him $30,000 in damages for emotional harm. In March 2013, the ARB fulfilled the judge's prophecy and entered judgment for Menendez, giving him the higher damages amount of $30,000.00. Without such an award, the ARB said, Menendez would have no remedy for retaliation by Halliburton that "so poisoned his work environment that he felt compelled to resign from the job he had loved." The board cited Section 806 of SOX, which requires that protected employees who experience retaliation get "all relief necessary to make [them] whole." *Menendez v. Halliburton, Inc*., No. 12-026, 2013 WL 1385561 (ARB Mar. 20, 2013).

Halliburton appealed the ARB's ruling to the Fifth Circuit U.S. Court of Appeals. In November 2014, the Fifth Circuit U.S. Court of Appeals decided *Halliburton, Inc. v. Admin. Rev. Bd.*, __ F.3d __, No. 13-60323 (5th Cir. Nov. 11, 2014), and affirmed the ARB's decision in all respects.

5. The ARB Holds That SOX Section 806 Has No Extraterritorial Application, And In 2014 The Fifth Circuit Affirms On Different Grounds

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), *aff'd*, *Villanueva v. U.S. Dept. of Labor*, 743 F.3d 103 (5th Cir. 2014).

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.

In February 2014, the Fifth Circuit affirmed the ARB's decision. *See Villanueva v. U.S. Dept. of Labor*, 743 F.3d 103 (5th Cir. 2014). The Fifth Circuit affirmed on different grounds. The Fifth Circuit held that, irrespective of whether Section 806 of SOX has extraterritorial application, the plaintiff's complaint must involve an alleged violation of U.S. law to be protected under Section 806. In this case, the Court found that the plaintiff's complaint only alleged violations of Columbian law, and so the complaints were not protected from retaliation under Section 806.

C. Damages Under SOX

1. Until Recently, Courts Had Generally Held That SOX Does Not Provide For Mental Anguish Damages, But Now A Couple Have Recently Found That It Does

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).

Until 2013, Courts generally 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. June 7, 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 had also generally held that 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 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.

In 2013, in the case of *Lockheed Martin Corp. v. Administrative Review Bd., U.S. Dept. of Labor*, 717 F.3d 1121, 1138-39 (10th Cir. 2013), the Tenth Circuit bucked this approach, and indicated that such damages may be available based on the logic that SOX's language indicated that the specific types of relief mentioned in the statute were "not meant as an exhaustive list of all the relief available to a successful claimant." That same year, a district court in Virginia relied on *Lockheed* to conclude that compensatory damages for mental distress were permitted under SOX, and awarded the plaintiff $100,000.00 for such damages. *Jones v. SouthPeak Interactive Corp. of Delaware*, 982 F. Supp. 2d 664, 678-82 (E.D. Va. 2013).

Then, in November 2014, in the case of *Halliburton, Inc. v. Admin. Rev. Bd.*, __ F.3d __, No. 13-60323 (5th Cir. Nov. 11, 2014), the Fifth Circuit engaged in an extended analysis, and concluded the SOX did provide for emotional distress damages, and upheld a $30,000.00 emotional harm award.

2. The ARB Regularly Holds That SOX Permits The Award Of Mental Anguish Damages

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. For example, in *Brown v. Lockheed Martin Corp*., 2008-SOX-00049, 2010 WL 2054426, at *59 (ALJ Jan. 15, 2010), *aff'd*, No. 10-050, 2011 WL 729644 (ARB Feb. 28, 2011) the ALJ awarded, and the ARB affirmed, $75,000.00 in damages to a prevailing SOX claimant for "emotional pain and suffering, mental anguish, embarrassment, and humiliation." As mentioned, in the appeal to the Tenth Circuit, the court declined to rule on whether such damages were available under SOX, but seemed to believe that they were. *See Lockheed Martin Corp. v. Administrative Review Bd., U.S. Dept. of Labor*, 717 F.3d 1121, 1138-39 (10th Cir. 2013) (noting that SOX's "shall include" language indicated that the specific types of relief mentioned in the statute "was not meant as an exhaustive list of all the relief available to a successful claimant.").

VI. CONCLUSION

Title VII was passed in 1964. Yet, as set forth in this paper, fifty years later, courts are still not in complete agreement with one another regarding the appropriate legal standards for analyzing retaliation claims, and many unsettled issues remain.

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 is helpful to them, and to you.

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