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## Whistleblower Protections under the Sarbanes-Oxley Act: A Primer and a Critique

### Cover Page Footnote

Associate Professor of Law, City University of New York, Baruch College, Zicklin School of Business. This Article is dedicated to my husband

## ARTICLE

# WHISTLEBLOWER PROTECTIONS UNDER THE SARBANES-OXLEY ACT: A PRIMER AND A CRITIQUE

*Valerie Watnick\**

### INTRODUCTION

In the wake of scandals involving Enron, Arthur Andersen and other corporations, Congress enacted the landmark Corporate and Criminal Fraud Accountability Act, more famously known as the Sarbanes-Oxley Act (hereinafter the “Act” or “Sarbanes-Oxley”).<sup>1</sup> Sarbanes-Oxley provided for sweeping reforms in the way that publicly held corporations account for and make public disclosures under federal securities laws.<sup>2</sup> President George W. Bush signed the bill into law and

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1. Pub. L. No. 107-204 (2002) (codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.A.) [hereinafter Sarbanes-Oxley].

2. *See id.* Sarbanes-Oxley created a new federal agency, the Public Accounting Oversight Board, which altered the way accounting and consulting firms are permitted to practice, altered corporate governance practices (by requiring that all public companies have independent audit committees) and imposed broader and more severe criminal penalties for accounting and securities fraud. Numerous articles and commentaries have already been written about Sarbanes-Oxley, but the Author believes this to be the first law review Article compiling an extensive history of whistleblower decisions under the Act. *See, e.g.,* Jennifer Wheeler, *Securities Law: Section 307 of the Sarbanes-Oxley Act: Irreconcilable Conflict with the ABA’s Model Rules and the Oklahoma Rules of Professional Conduct?*, 56 OKLA. L. REV. 461 (2003); Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the ‘Delete’ Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 AM. CRIM. L. REV. 67 (2004); Miriam A. Cherry, *Whistling the Dark? Corporate Fraud, Whistleblowers and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029 (2004); Robert C. Brighton, Jr., *Sarbanes-Oxley: A Primer for Public Companies, and Their Officers and Directors, and Audit Firms*, 28 VILL. L. REV. 605 (2004); Samantha Ahuja, *What Do I Do Now? A Lawyer’s Duty Post-Sarbanes-Oxley*, 38 VAL. U. L. REV.

touted the Act as a “far-reaching” reform of American business practices.<sup>3</sup> In attempting to reform American business practices, Congress pressed corporate officers, directors, and other employees into service, enlisting them as “foot soldiers” in the fight against corporate fraud. Congress did so by requiring those who witness corporate fraud to report what they know about it<sup>4</sup> and by offering commiserate protection from retaliation under the “whistleblower protection” provisions contained within Sarbanes-Oxley.<sup>5</sup> Yet, despite Sarbanes-Oxley being touted as a new bulwark against corporate fraud, the courts continue to weaken these whistleblower provisions<sup>6</sup> and newspapers continue to report scandals involving corporate fraud.<sup>7</sup> It seems that those who might blow the whistle and protect corporate shareholders are not coming forward soon enough to prevent corporate fraud<sup>8</sup> and whistleblower protections have not accomplished their intended purpose. The question then is: are the administrative procedures and legal standards inherent in Sarbanes-Oxley such that the whistleblower protections are more illusory than functional?

This Article sets out to answer this question, critically examining the whistleblower protections afforded employees under Sarbanes-Oxley. Part I of the Article considers the statutory language, the

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1263 (2004); Lauren C. Cohen, Note, *In-House Counsel and the Attorney-Client Privilege: How Sarbanes-Oxley Misses the Point*, 9 STAN. J.L. BUS. & FIN. 297 (2004); Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty and the Sarbanes-Oxley Act*, 76 ST. JOHN'S L. REV. 875 (2002) (published in the aftermath of the Enron scandal and in the same year as the Sarbanes-Oxley Act).

3. President George W. Bush, *Remarks at Signing of the Sarbanes-Oxley Act of 2002*, 38 WKLY COMP. PRES. DOC. 31, 1283 (Jul. 30, 2002).

4. *See* Sarbanes-Oxley.

5. *See id.* Congress also requires companies to set up procedures for receiving and retaining reports of such fraud. *See* Sarbanes-Oxley § 301 (codified at 15 U.S.C.A. § 78j-1 (West Supp. 2003)).

6. Lynne Bernabei & Jason Zuckerman, *Protect the Whistleblower*, NAT'L LAW J., (Jun. 19, 2006).

7. *See, e.g.*, Reni Gertner, *Litigation Over Option Backdating Increases*, ST. LOUIS DAILY RECORD, Sept. 2, 2006.

8. Sarbanes-Oxley specifies that whistleblower complaints are supposed to be confidential and anonymous, and that companies are supposed to set up procedures for the treatment of these complaints. *See* Sarbanes-Oxley § 301. Because such procedures are not specified in the Act, treatment can mean something insignificant such as filing and reviewing. *See* Cherry, *supra* note 2, at 1071-72.

legislative history, and the regulations pursuant to the Act. Part II then examines recent decisions by the U.S. Department of Labor in Sarbanes-Oxley whistleblower cases (cases under the Act are initially adjudicated by the Department of Labor)<sup>9</sup> and the overall framework for implementation of the law. The manner in which Sarbanes-Oxley relates to state law, particularly the doctrine of at-will employment, is discussed in Part III. Part IV considers the breadth and effectiveness of the Sarbanes-Oxley whistleblower protections and the existing legal and corporate cultural framework. Finally, Part V proposes suggestions for improving current whistleblower protections under Sarbanes-Oxley so that they will accomplish their intended legislative purposes.

This article concludes that rulings on Sarbanes-Oxley complaints, and the implementation of existing regulations adopted by the Department of Labor to date, are evidence that Sarbanes-Oxley whistleblower protections are not nearly strong enough to protect whistleblowing employees, and to bring about the changes envisioned by Congress.<sup>10</sup> Rather, the existing legal framework imposes undue waiting periods on whistleblowers, and does not compel corporations to root out fraud.<sup>11</sup> Moreover, in May 2006, the already anemic framework suffered another blow in the Second Circuit.<sup>12</sup> In *Bechtel v. Competitive Technologies*, the Circuit Court questioned the viability of all-important Sarbanes-Oxley provisions that call for immediate reinstatement of a whistleblowing employee who establishes “reasonable cause”<sup>13</sup> before a hearing that his termination was in retaliation for his whistleblowing.<sup>14</sup> This decision, holding the reinstatement remedy under Sarbanes-Oxley unenforceable in a federal court, strikes a deadly blow to whistleblowing employees and the Sarbanes-Oxley whistleblower provisions

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9. See 18 U.S.C. § 1514A(b) (2002).

10. See *infra* notes 54-58, 180-202 and accompanying text.

11. Indeed, at least one article, partially written to reassure corporation counsels, noted that “the avalanche” of whistleblower claims that some predicted has not come to fruition. See Grotta Glassman, *Sarbanes Oxley Whistleblower Protection—Two Years Later—What Hath Enron Wrought?*, METRO. CORP. COUNSEL, Feb. 2005 N.E. Ed., p. 23.

12. *Bechtel v. Competitive Tech. Inc.*, 448 F.3d 469 (2d Cir. 2006).

13. *Id.* at 472-73; see also 18 U.S.C. § 1514A (b)(2) (adopting 49 U.S.C. § 42121(b) (2000)).

14. See 18 U.S.C. § 1514A (b)(2) (adopting 49 U.S.C. § 42121(b)). See also *Bechtel*, 448 F.3d at 472-74.

generally.<sup>15</sup> What *Bechtel* makes abundantly clear is that as the Act is being implemented, the Sarbanes-Oxley whistleblower provisions will not protect and encourage corporate whistleblowers.<sup>16</sup>

Normatively, it appears that meaningful changes must occur on three levels to protect and encourage whistleblowers to “whistle” early on and to thereby prevent corporate fraud: (i) there must be more exacting implementation of the existing Sarbanes-Oxley regulations; (ii) administrative tribunals and courts must give effect to the intent of the statute—to actually protect whistleblowers; and (iii) years after the “Enron wake-up call,” public companies must still reform their business cultures to encourage the free flow of information and reporting of wrongdoing.

Whistleblower protection is a critical part of both Sarbanes-Oxley and fraud prevention.<sup>17</sup> Loyal employees with information to report about their corporate employer will only come forward readily—to protect investors and individual shareholders against corporate fraud—when they believe that their livelihoods will be protected in an immediate and real way. Only when all employees are watching—and no one is afraid to blow the whistle—will the incidence of fraud in public corporations drop to an acceptable level.

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15. See *Bechtel*, 448 F.3d at 473-75; see also *infra* notes 144-45, 147 and accompanying text. This decision holding the reinstatement remedy potentially unenforceable seems to be in line with current judicial thinking. On May 30, 2006, the United States Supreme Court held that a public employee claiming retaliation for speaking against an employer decision had not engaged in protected speech sufficient to claim retaliation for the communications he had made. See *Garcetti v. Ceballos*, No. 04-473 (U.S. May 30, 2006). While *Garcetti* was not a Sarbanes-Oxley whistleblower case, it does not bode well for future whistleblowers that will come before this Court.

16. See, e.g., *Bechtel*, 448 F.3d at 473-74; Bernabei & Zuckerman, *supra* note 6, at 1; *infra* notes 180-202 and accompanying text.

17. See 148 Cong. Rec., S. 7418-21 (daily ed. Jul. 26, 2002); *infra* notes 54-58 and accompanying text.

I. THE WHISTLEBLOWER PROVISIONS OF  
THE SARBANES-OXLEY ACT OF 2002A. Overview

The whistleblower protections in Sarbanes-Oxley<sup>18</sup> provide in § 806<sup>19</sup> in pertinent part:<sup>20</sup>

§ 1514A. Civil action to protect against retaliation in fraud cases.

(a) Whistleblower Protection For Employees of Publicly Traded Companies. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a 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, 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

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18. See Sarbanes-Oxley; see also *supra* note 1 and accompanying text.

19. See 18 U.S.C. § 1514A (2002).

20. Sarbanes-Oxley requires publicly traded companies to convene standing audit committees composed of independent directors and at least one financial expert. These committees have the power to hire, compensate and fire the corporation's auditors. These committees are also charged with establishing procedures for handling whistleblower complaints. See Sarbanes-Oxley § 301.

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.

Sarbanes-Oxley thus provides redress to an employee wronged under the Act in that an employee may bring an enforcement action by filing a complaint with the Department of Labor within 90 days of the alleged wrongful action<sup>21</sup> by the employer.<sup>22</sup> The employee, if successful, is entitled to such relief as is necessary to make him whole, including back pay, reinstatement,<sup>23</sup> and compensatory damages.<sup>24</sup> While the statute initially provided specifically that any action for relief

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21. What constitutes “wrongful” action for purposes of the Sarbanes-Oxley whistleblower provisions is discussed below. *See infra* notes 122-24 and accompanying text.

22. *See* 18 U.S.C. § 1514A(b). The Department of Labor has at times broadly construed the Act to meet its remedial purpose, allowing in appropriate cases the equitable tolling of the 90-day period that a complainant has to file his claim for relief. *See Lerbs v. Buca di Beppo, Inc.*, 2003 DOLSOX LEXIS 29, \*7-9 (Dec. 30, 2003). On the other hand, the Department of Labor has at times strictly construed Sarbanes-Oxley, requiring that the “named person” (the employer) be a “publicly traded company” within the meaning of the statute, and disallowing a claim where the respondent employer had initially filed a registration statement, but had not later been required to file public financial reports pursuant to federal securities laws. *See* 18 U.S.C. § 1514A(b); *Flake v. New World Pasta Co.*, 2003 DOLSOX LEXIS 38, \*13 (July 7, 2003) (holding that respondent employer was not a “publicly traded company” within Sarbanes-Oxley since it had not filed certain public financial reports). Likewise, the Department of Labor has consistently held that Sarbanes-Oxley will not be retroactively applied where the “protected activity” and “adverse employment action” were taken prior to the effective date of Sarbanes-Oxley. *See Gilmore v. Parametric Tech.*, 2003 DOLSOX LEXIS 51, \*12-14 (Feb. 6, 2003); *Greenwald v. UBS Paine Webber, Inc.*, 2003 DOLSOX LEXIS 50, \*1 (Apr. 17, 2003). Sarbanes-Oxley is still relatively new, and it remains to be seen how the Department of Labor will treat whistleblowers in the long-term. A definite trend, however, can already be observed in the Department’s “defense-leaning tendency.” *See infra* notes 180-202 and accompanying text.

23. At least two distinct courts have held that damages under the Act might include “reputational” damages sufficient to make the employee whole. *See Hanna v. W.L.I. Communities*, 348 F. Supp. 2d 1332, 34 (S.D. Fla. 2004), *Mahony v. Keyspan Corp* 2007 U.S. Dist. LEXIS 22042 (S.D.N.Y. 2007). *But see infra* notes 144-45, 147 and accompanying text. Reinstatement might include economic reinstatement, or reinstatement to the complainant’s actual job depending on the circumstances of the case. *See Procedures for the Handling of Discrimination Complaints Under the Sarbanes-Oxley Act of 2002*, 69 Fed. Reg. 52,104-08.

24. *See* 18 U.S.C. § 1514A(c).



would be governed by the burdens of proof previously applicable to the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (“AIR 21”)<sup>25</sup> and initially adopted the rules and procedures from AIR 21,<sup>26</sup> the Occupational Safety and Health Administration in December 2004 issued final rules and procedures for the specific handling of discrimination complaints under Sarbanes-Oxley.<sup>27</sup>

*B. Procedural Framework for Whistleblower Proceedings  
Under Sarbanes-Oxley*

The rules and procedures detail the handling of a Sarbanes-Oxley complaint from inception to hearing and appeal.<sup>28</sup> From the outset, the statute itself calls for an investigation, a preliminary order of reinstatement<sup>29</sup> if there is a “reasonable cause” to believe the complaint has merit, and a hearing if requested by either party.<sup>30</sup>

The procedures further provide that a “[c]omplaint will be dismissed if it fails to make a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.”<sup>31</sup>

The initial procedures only require a complainant to raise an inference that his protected conduct was a contributing factor in the

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25. 49 U.S.C. § 42121(b) (2000).

26. 18 U.S.C. § 1514A(b). The procedures and burden of proof made expressly applicable to a Sarbanes-Oxley whistleblower complaint originate in 49 U.S.C. § 42121(b).

27. Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 29 C.F.R. § 1980.100 (2004). Since these procedures and the language of Sarbanes-Oxley are similar to those found in AIR 21 (Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b) (“AIR 21”)), the ERA (The Energy Reorganization Act, 42 U.S.C. § 5851(b)(3)(D) (“ERA”)), and the Surface Transportation Assistance Act (“STAA”) and because cases under Sarbanes-Oxley are still limited, cases under AIR 21, STAA, and the ERA are discussed in this article where applicable. *See* Halloum v. Intel Corp., Case No. 2003-SOX-0007, at 10 (Mar. 4, 2004) (noting that the implementing regulations for Sarbanes-Oxley are patterned after the ERA, the STAA, and AIR 21); *see also supra* notes 25-26 and accompanying text.

28. *See* 29 C.F.R. § 1980.100.

29. *See infra* notes 144-45 and accompanying discussion.

30. 18 U.S.C. § 1514A(b)(2) (adopting 49 U.S.C. § 42121(b)).

31. 69 Fed. Reg. at 52,104, 52,106.

employer's decision.<sup>32</sup> If he does this, then an investigation of the claim will proceed unless the employer can show by clear and convincing evidence that it had a legitimate, non-discriminatory reason for terminating the complainant.<sup>33</sup> Since the Sarbanes-Oxley administrative procedure was designed to be an expedited proceeding,<sup>34</sup> the rules state that a Respondent has 20 days from receipt of the complaint to meet with OSHA and present evidence in support of its position.<sup>35</sup> *The procedures do not provide for the OSHA investigator to share this evidence with the complainant.*<sup>36</sup> If the OSHA investigator has "reasonable cause" to believe that the "named person [the respondent employer] has violated the Act and therefore that preliminary relief for the complainant is warranted, OSHA again contacts the named person with notice of this determination."<sup>37</sup> The rules then require that the named person be given ten business days to provide written evidence, meet with the investigator and provide legal and factual arguments against a preliminary award of relief.<sup>38</sup> *Again, the procedures do not give the complainant a commensurate right to meet with the OSHA investigator or to provide written evidence arguing in favor of a preliminary award for relief.*<sup>39</sup>

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32. *Id.* In typical discrimination cases, an inference of discrimination is shown by offering evidence that the employer treated the complainant in a disparate manner. *See Adams v. Zucker Ent., Inc.*, 2005 WL 1397551 (2005).

33. *See* 69 Fed. Reg. at 52,106. (outlining that once the complaint is filed, the Assistant Secretary must notify the Respondent, also known as the "named person"); *see also* 18 U.S.C. § 1514A(a).

34. *See* 69 Fed. Reg. at 52,107.

35. *See id.*

36. *See id.* at 52,106-07.

37. *Id.* at 52,107.

38. *See id.* This Section of the Sarbanes-Oxley regulations was designed to provide due process protection to the Respondent in accord with the United States Supreme Court's decision under the whistleblower provisions of the STAA. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). While this section may also provide due process to the complainant who may not be in danger of suffering direct deprivation of property at the hands of the government, *see Goldberg v. Kelly*, 397 U.S. 254, 261 (1970), this Section certainly tips the balance in favor of the employer by allowing only the respondent to submit written evidence and to at least a rudimentary hearing with the investigator prior to a preliminary determination. *See Goldberg*, 397 U.S. at 267. As is discussed later in this article, lengthening the procedure will favor the employer in most instances. *See infra* notes 39, 203-08, 269-78 and accompanying text.

39. *See* 69 Fed. Reg. at 52,106-07. Prior to their finalization, the "Government

Within 60 days of the filing of the complaint, the investigator is to make a determination on behalf of the Assistant Secretary that either preliminary relief is warranted, or the complaint lacks merit.<sup>40</sup> If the Assistant Secretary determines that preliminary relief is warranted, he may order that the employee be reinstated.<sup>41</sup> Either party may file objections to the preliminary determination of the Assistant Secretary within 30 days of receipt of the investigator's findings and request a hearing before an administrative law judge ("ALJ").<sup>42</sup>

At the hearing on the objections to the preliminary determination of the Assistant Secretary, an employee bringing a Sarbanes-Oxley whistleblower claim must ultimately show by a preponderance of the evidence<sup>43</sup> that: (1) he engaged in protected activity under Sarbanes-Oxley; (2) that the employer was aware of the protected activity; (3) that he suffered an adverse employment action; and (4) that the protected activity was likely a contributing factor in the employer's decision to take adverse action.<sup>44</sup> Since there is seldom direct evidence of

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Accountability Project" argued that the implementing rules for Sarbanes-Oxley were biased in favor of the employer. *See id.* at 52,107.

40. 69 Fed. Reg. at 52,108. The Assistant Secretary has not made consistently a determination within the 60-day deadline. *See infra* note 48 and accompanying text; 69 Fed.Reg. at 52,108.

41. The validity and enforceability of an investigator's order of reinstatement have been called into question by the Second Circuit's May 2006 decision in *Bechtel*. *See Bechtel*, 448 F.3d at 472-75; *see also infra* notes 144-45, 147 and accompanying text.

42. 18 U.S.C. § 1514A(b)(2) (adopting 49 U.S.C. § 42121(b)(2)); 69 Fed. Reg. at 52,108.

43. The United States Supreme Court's *McDonnell Douglas* burden shifting analysis closely parallels the AIR 21 test for determining whether a whistleblower under Sarbanes-Oxley can initially make out a prima facie case. *See infra* notes 59-65 and accompanying text. *See also* *Halloum v. Intel Corp.*, Case No. 2003-SOX-7, at 9-10 (ALJ March 4, 2004), *aff'd* ARB Case No. 04-068 (ALJ Jan. 31, 2006) (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (applying a burden shifting analysis to discrimination complaints under Title VII of the Civil Rights Act of 1964)). The analysis is instructive on the ultimate question as to whether a complainant can prove illegal retaliatory action. *See Halloum*, 2003-SOX-7 at 9; *infra* notes 59 to 65 and accompanying text.

44. *See Welch v. Cardinal Bankshares Corp.*, Case No. 2003-SOX-15, at 34 (ALJ Jan. 28, 2004) (citing *Macktal v. Dep't of Labor*, 171 F.3d 1137 (8th Cir. 1993)); *Zinn v. Univ. of Mo.*, 1993-ERA-34 (Sec'y Jan. 18, 1996). Each of the elements of a Sarbanes-Oxley whistleblower claim is discussed in detail in this article. *See infra* notes 67-124 and accompanying text.

discrimination against a whistleblower, whistleblowing employees may prove a nexus between the protected activity and the adverse employment action inferentially.<sup>45</sup>

After a hearing, the ALJ will issue a decision in the matter and that decision will become the final decision of the Secretary of Labor unless a timely petition for review is filed with the Administrative Review Board ("ARB").<sup>46</sup> Sarbanes-Oxley further provides that if the Secretary of Labor has not issued a final decision within 180 days of the initial filing by the employee, the employee may bring an appropriate action for *de novo* review and appropriate relief in federal court.<sup>47</sup>

The catch in all of these carefully crafted procedures is that they are not being closely followed.<sup>48</sup> Most Sarbanes-Oxley cases are lingering

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45. See *Woodman v. WWOR TV, Inc.*, 411 F.3d 69, 83 (2d Cir. 2005) (noting that direct evidence of discrimination is not required in an age discrimination case under Title VII of the Civil Rights Act of 1964 and that discrimination can be shown with circumstantial evidence); *Richards v. Lenmark Int'l Inc.*, Case No. 2004-SOX-00049, at 13; *Getman v. SW. Sec., Inc.*, Case No. 2003-SOX-0008 at 15 (ALJ Feb. 2, 2004) (seldom direct evidence of intent), *rev'd on other grounds*, ARB 04-059 (ARB July 29, 2005); see *infra* notes 220-24 and accompanying text.

46. See 69 Fed. Reg. at 52,111.

47. See 18 U.S.C. § 1514A(b); 69 Fed. Reg. at 52,111. The complainant can bring an action in federal court for *de novo* review of his complaint if there is no showing that the Secretary's failure to issue a final decision is not due to the bad faith of the complainant. 18 U.S.C. § 1514A(b). In *Murray v. TXU Corp.*, the U.S. District Court for the Northern District of Texas held that while failing to comply with procedures in the C.F.R. and "not holding the Secretary's feet to the irons" might delay a decision, such falls "far short" of showing that the plaintiff acted in bad faith. See *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 804 (N.D. Tex. 2003). In *Murray*, the court was willing to hear complainant's case *de novo*. See *Murray*, 279 F. Supp. 2d at 804. Additionally, the right to file in federal court is not absolute, even if the complainant has acted in good faith. A federal court may refuse to hear a whistleblower case on a *de novo* basis if it would not be an efficient use of resources to do so. In other words, if the Department of Labor has expended significant resources on a matter and appears close to making a decision, a federal court can exercise its discretionary right to refuse to take the matter into its jurisdiction. Finally, the District Court may take judicial notice of the administrative record in a Sarbanes-Oxley proceeding that has been removed to its jurisdiction. See *McClendon v. Hewlett-Packard Co.*, WL 2847224 (D. Idaho 2005) (noting administrative proceeding in *McClendon v. Hewlett-Packard Co.*, 2005-SOX-3 (ALJ)).

48. See Office of Administrative Law Judges, U.S. Dep't of Labor, available at <http://www.oalj.dol.gov> (last visited Apr. 24, 2007) (cataloguing and digesting cases by date). See, e.g., *McIntyre v. Merrill Lynch, Inc.*, ARB 2003-SOX-23, (ARB Jul. 27,

longer than the mandated 180 days.<sup>49</sup> While these dispute processes overall may not be inordinately long in the context of the U.S. judicial and administrative dispute resolution systems, they are too long to achieve Congress's goal of protecting whistleblowing workers and preventing corporations from retaliating against them. Indeed, the ordinary employee cannot afford a long period without a paycheck.<sup>50</sup> If losing his livelihood without appropriate protection is to be the consequence of his "whistleblowing," the employee will simply choose not to report what he reasonably perceives as violations of federal securities laws.<sup>51</sup> If he does report, a prolonged waiting period will in turn encourage corporations, who know that there is no reason to expect a prompt administrative response to adverse action against whistleblowers, to gloss over or cover up their wrongdoing, instead of correcting it. If the legislative thinking behind an expedited proceeding was to encourage and protect whistleblowers that find themselves out of work, and to compel companies to take their complaints seriously—and it surely was<sup>52</sup>—such planning is not coming to fruition when proceedings to correct retaliation against whistleblowers take a year or more to resolve.<sup>53</sup>

### C. The Legislative History and Intent of Sarbanes-Oxley

In a Section-by-Section analysis of the Sarbanes-Oxley Act, the Senate indeed reported that the purpose of the whistleblower protection contained in Section 806 was to provide federal protection to employees that report evidence of fraud to supervisors or federal officials.<sup>54</sup> The

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2005) (Final Decision & Order filed); *Willy v. Ameriton Props., Inc.*, Case No. 2003-SOX-9 (Jun. 27, 2003) (discussing steps taken in the proceedings); *Halloum v. Intel Corp.*, 2003-SOX-7 (ARB Jan. 31, 2006) (Final decision and order approximately three years after initial complaint); *Getman v. Sw. Sec., Inc.*, ARB 2003-SOX-8 (ARB Jul. 29, 2005) (Final Decision & Order approximately two years after initial complaint).

49. *See supra* note 48 and accompanying text.

50. *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 258-59 (1987) (noting that the eventual potential recovery of backpay may not be enough incentive to encourage reporting of violations).

51. *See id.*

52. *See Bechtel v. Competitive Tech. Inc.*, 448 F.3d at 484-85 (Straub, J., dissenting); *see also infra* notes 54-58, 145-48 and accompanying text.

53. *See supra* note 48 and accompanying text.

54. *See* 148 Cong. Rec., S. 7418-21; 18 U.S.C. § 1514(A) (2002).

protections were intended to ensure that companies take such complaints seriously and avoid the temptation to sweep them under the boardroom rugs.

The Senate noted that prior to Sarbanes-Oxley, employees reporting fraud had to rely on the “vagaries” of state law for protection.<sup>55</sup> The Senate further noted that most corporate employers knew exactly what they could do within state law to avoid a suit by a whistleblowing employee.<sup>56</sup> The Senate’s report also states that U.S. laws need to encourage and protect those who report fraudulent activity that can “damage innocent investors in publicly traded companies.”<sup>57</sup> The whistleblower provisions of Sarbanes-Oxley were thus touted as the “single most effective measure possible to prevent recurrence of the Enron debacle and similar threats to the nation’s financial markets.”<sup>58</sup>

## II. WHISTLEBLOWER CASES DECIDED BY THE DEPARTMENT OF LABOR AND FEDERAL COURTS

### A. Introduction

At a hearing on the merits of a Sarbanes-Oxley whistleblower claim, an administrative law judge will employ a burden shifting

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55. See 148 Cong. Rec., S. 7418-21. For example, New York’s whistleblower law only protects employees that report an actual violation of a law or regulation and only if the violation creates a specific danger to the public health or safety. See N.Y. LAB. LAW

§ 740 (1984). Indeed, in New York, an employee who reports corporate fraud has no state law protection against retaliation. See *Bordell v. Gen. Elec. Co.*, 88 N.Y.2d 869, 871; see also Sandra Mullings, *Is There Whistleblower Protection of Private Employees in New York?*, 69 Feb. N.Y. St. B.J. 36, 37 (1997) (noting that as of 1997, only 16 states had whistleblower statutes, only ten of those protected employees when they had a reasonable belief that a statute or rule had been violated and that in the other six states, whistleblowing employees have to show that they have reported an actual violation of state law or regulation).

56. See 148 Cong. Rec., S. 7418-21. Anecdotally, it has been reported that within 48 hours of Sherron Watkins of Enron writing her whistleblowing memo to Ken Lay, the Chairman of Enron was given a memo that indicated Ms. Watkins could be fired and that she was not protected under state law. See ROBERT PRENTICE, *STUDENT GUIDE TO THE SARBANES-OXLEY ACT* 53 (Thomson-West 2005).

57. See 148 Cong. Rec., S. 7418-21.

58. *Id.*

analysis that is similar to, but not exactly like, the burden shifting analysis laid down by the United States Supreme Court in *McDonnell Douglas v. Green*.<sup>59</sup> In a hearing, the whistleblower must first prove each of the elements of his claim by a preponderance of the evidence.<sup>60</sup> If he meets this burden, the employer may still defend by proving with clear and convincing evidence that it had a legitimate, non-discriminatory motive for its personnel action, and it would have taken the same action even if complainant had not engaged in the protected activity.<sup>61</sup> Even if the Respondent meets this burden, the complainant can still ultimately prevail at a hearing if he can then show by a preponderance of the evidence that the employer's stated legitimate

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59. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *infra* notes 60-65 and accompanying text. In *McDonnell Douglas*, the United States Supreme Court held that a discrimination plaintiff in a Title VII discrimination case would bear the initial burden to prove the elements of his *prima facie* case by a preponderance of the evidence. See *id.* at 802. If he were able to meet this burden, the burden would then shift to the employer to *articulate* a legitimate reason for its actions. See *Halloum v. Intel Corp.*, 2003-SOX-0007 at 10. If the employer could succeed in this relatively low burden, the employee could then still succeed if he could prove that the employer's reason was a mere pretext. See *McDonnell Douglas*, 411 U.S. at 807; *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000) (noting that employer in a discrimination case has mere burden to produce, not persuade as to its legitimate reasons for acting). These burdens are different in Sarbanes-Oxley wherein an employer is required to prove (rather than articulate or produce under *McDonnell Douglas*) by clear and convincing evidence a legitimate reason for its adverse action against an employee. See *Halloum*, Case No. 2003-SOX-0007 at 10; *McDonnell Douglas*, 411 U.S. at 802.

60. See *Halloum*, Case No. 2003-SOX-0007 at 10. A Sarbanes-Oxley whistleblower claim is heard at trial *de novo*. At a hearing, there is no need to decide whether the complainant has made out a *prima facie* case as this finding is related to procedural dismissal at the investigative stage of a proceeding. *Id.* The *Halloum* court noted that while the *McDonnell Douglas* model of analysis was not exactly the same as the required analysis under Sarbanes-Oxley, the "*McDonnell Douglas* model nonetheless serves as an analytical tool to help determine the ultimate issue of whether Complainant suffered forbidden discrimination." *Id.*; see *supra* notes 58-59 and accompanying text.

61. See *Welch v. Cardinal Bankshares Corp.*, Case No. 2003-SOX-15 at 37. The courts have recognized that the "clear and convincing evidence" standard is higher than a preponderance of the evidence, but lower than beyond a reasonable doubt. *Id.* (citing *Yule v. Burns Int'l Security Serv.*, Case No. 1993-ERA-12 (Sec'y May 24, 1995); *Halloum*, Case No. 2003-SOX-0007 at 10; see *supra* note 126, 128-30 (describing the clear and convincing evidence standard to be applied in Sarbanes-Oxley cases).

reason is not the real reason, but a “pretext” for the discriminatory action.<sup>62</sup> A complainant can show pretext by showing that the Respondent lacks credibility<sup>63</sup> or that the protected activity influenced the employer to take adverse action against the employee.<sup>64</sup> The complainant bears the ultimate burden of showing that his protected activity contributed to the employer’s decision to take adverse action against him.<sup>65</sup> Each of the elements of the claim and the defenses are discussed below with citations to representative cases.<sup>66</sup>

### B. Protected Activity

A “whistleblowing” employee<sup>67</sup> must first establish that he has engaged in “protected activity.”<sup>68</sup> Within the remedial nature of the statute, “protected activity” is broadly defined to include the reporting of information to Congress, any investigative agency of the federal government, or a supervisor at the employer itself; that the employee reasonably believes relates to federal securities, mail, wire or other fraud, a violation of Securities and Exchange Commission (“SEC”) rules

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62. See *Getman v. Sw. Sec., Inc.*, Case No. 2003-SOX-000008 at 18-19, *rev'd on other grounds*, ARB 04-059 (ARB July 29, 2005).

63. *Id.*

64. See *infra* notes 125-30 and accompanying text.

65. See *Halloum*, Case No. 2003-SOX-0007 at 10.

66. See *infra* notes 67-147 and accompanying text.

67. As a threshold question, a person making a claim under Sarbanes-Oxley must generally show that he is an employee of a publicly traded company. 18 U.S.C. § 1514A. In a landmark decision, the United States Court of Appeals for the First Circuit has held that a person is not an “employee” of a publicly traded company within the Act if he is foreign worker employed by an overseas subsidiary of a publicly traded U.S. company. See *Carnero v. Boston Sci. Corp.*, 433 F.3d 1, 17-18 (1st Cir. 2006); *Beck v. Citicorp., Inc.*, Case No. 2006-SOX-00003 (August 1, 2006) (holding that the court lacked jurisdiction where the complainant was employed in Germany when the adverse action took place).

68. See *Welch v. Cardinal Bankshares Corp.*, Case No. 2003-SOX-15 at 34 (citing *Macktal v. U.S. Dep't of Labor*, 171 F.3d 1137 (Fed. Cir. 1993)). In *Welch*, the ALJ issued a recommended decision and order after a hearing, ordering reinstatement. *Id.* at 34. This order has yet to be enforced. As of June 9, 2006, however, the Administrative Review Board held that the order of reinstatement should not be stayed (as requested by the employer) and that reinstatement should proceed, but that it could include economic reinstatement. *Id.* It has been more than two years since the ALJ's decision in *Welch* and complainant still had not had any relief as of June 2006. *Id.*



or any other fraud against the shareholders.<sup>69</sup> The courts and the administrative tribunals within the U.S. Department of Labor<sup>70</sup> have held that it is not necessary that the information reported actually amount to a crime,<sup>71</sup> but only that the suspect actions have been committed and are reasonably believed by the reporting person to be a criminal fraud or other violation of federal securities law.<sup>72</sup>

In *Collins v. Beazer*, plaintiff brought her case in federal district court<sup>73</sup> under Sarbanes-Oxley based on her “reasonable belief” that a violation of federal securities laws or regulations had occurred.<sup>74</sup> Plaintiff, a director of marketing at a public company, Beazer Homes USA, Inc., reported that the division in which she worked: was knowingly overpaying and engaging in business with an outside person because of a personal relationship between management and the outside person; that a manager was overpaying sales agents who were the manager’s personal friends; and that “kickbacks” were being paid for lumber purchases.<sup>75</sup>

The court noted that the plaintiff was not required to show an “actual violation” of federal securities law, but only that she “reasonably believed” that there was a violation of one of the federal laws or regulations enumerated in Sarbanes-Oxley.<sup>76</sup> The court noted

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69. 18 U.S.C. § 1514A.

70. See *Barnes v. Raymond James Assocs.*, Case No. 2004-SOX-58 (ALJ January 10, 2005) (complainant did not prove her reasonable belief that information reported constituted violation of law).

71. In *Getman*, the ARB reversed the ALJ’s holding and held that complainant Getman, a financial analyst at Southwest, had not engaged in “protected activity” when she publicly refused to change a stock rating. See *Getman v. Sw. Sec., Inc.*, ARB Case No. 04-059 (ALJ Feb. 2, 2004) (*rev’g* Case No. 2003-SOX-00008).

72. See *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376 (N.D. Ga. 2004) (citing *Passaic Valley Sewerage Comm’rs v. United States Dep’t of Labor*, 992 F.2d 474 (3d Cir. 1993)); 18 U.S.C. § 1514A(a)(1).

73. Plaintiff Collins first filed her case with the Department of Labor and then later removed her case to the federal district court for the Northern District of Georgia when the Secretary did not make a final determination within the required 180 days. See *Collins*, 334 F. Supp. 2d at 1373-74.

74. *Id.* at 1376.

75. *Id.* at 1376-77.

76. *Id.* at 1376 (citing *Passaic Valley*, 992 F.2d. 474). “The legislative history of Sarbanes-Oxley states that the reasonableness test ‘is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts.’” 148 Cong. Rec., S. 7418, 7420 (citing *Passaic Valley*, 992 F.2d 474). The threshold is

further that this standard is intended to encompass all good faith reporting by employees,<sup>77</sup> and that given the “broad remedial nature” of Sarbanes-Oxley, it is not necessary for a plaintiff to identify the specific code section he believes the corporation has violated.<sup>78</sup> Thus defendant could not win summary judgment simply by asserting that Collins’ claims were too vague and did not rise to the level of those proffered by Sherron Watkins in the Enron debacle.<sup>79</sup>

Other cases have similarly noted that an employee can engage in “protected activity” under Sarbanes-Oxley by reporting alleged securities law violations within the company to a person or body in a supervisory role.<sup>80</sup> In *Richards v. Lexmark International, Inc.*, the tribunal also took an expansive view of reporting activity where complainant reported that problems existed with inventory accounting to his direct supervisor,<sup>81</sup> reasonably believing that such accounting problems amounted to violations of federal and state anti-fraud laws.<sup>82</sup>

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intended to include “all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.” *Id.* at 1376. *See also* Mahony v. Keyspan Corp 2007 U.S. Dist. LEXIS 22042 (S.D.N.Y. 2007) (reasonable belief possible even where plaintiff lacked expertise to be sure of accounting irregularities but relied on reports from the Director of Financial Accounting).

77. *Id.* at 1376.

78. *Id.* at 1377. However, in *Reddy v. Medquist, Inc.*, Case No. 2004-SOX-35 at 8-9, ARB Case No. SOX 04-123 (ARB Sep. 30, 2005), the administrative review board found that the complainant, a medical transcriptionist, who had complained about the irregular “counting” of her lines for purposes of her pay did not amount to protected activity under the relevant whistleblower statute.

79. *Collins*, 334 F. Supp. 2d at 1376; *see also supra* note 76 and accompanying text.

80. *Richards v. Lexmark Int’l, Inc.*, 2004 DOLSOX LEXIS 106, \*39 (Oct. 1, 2004). *See also Collins*, 334 F. Supp. 2d at 1377-78. The statute protects internal reporting as long as reports are made to “a person with supervisory authority over the employee.” 18 U.S.C. § 1514A(a)(1)(C) (2002). The Eastern District of New York recently denied the respondent company’s motion for summary judgment where the employee made the whistle “audible” by connecting the CEO with the financial officer who suspected accounting inaccuracies. *Mahony v. Keyspan Corp* 2007 U.S. Dist. LEXIS 22042 at 3 (S.D.N.Y. 2007). *But see Fraser v. Fid. Trust Co. Int’l.*, 417 F. Supp. 2d 310 (plaintiff’s whistleblowing attempts barren of any allegations that would alert defendants that he believed company was violating federal law related to fraud on shareholders).

81. *Richards*, 2004 DOLSOX 106, at \*13-14.

82. *Id.* at \*38.

The administrative law judge rejected respondent Lexmark's motion for summary judgment urging that Richard's reports of accounting problems at Lexmark were not "protected activity" within Sarbanes-Oxley.<sup>83</sup>

The *Richards* decision raises interesting and as yet unanswered questions under Sarbanes-Oxley about whether an employee must report his suspicions to someone other than his immediate supervisor. For example, where an employee innocently reports suspected violations to his superior and then his superior turns out to have been involved in the fraud, does this involvement change the employee's status in some way? Was he still engaged in good faith reporting?<sup>84</sup> Does the fact that an employee's reporting which was done in good faith, but in hindsight appears to have gone into the "black hole" of his corrupt immediate supervisor,<sup>85</sup> affect the application of the Sarbanes-Oxley whistleblower provisions?<sup>86</sup> The Author is not aware of any reported cases dealing with these types of entirely plausible factual scenarios and Sarbanes-Oxley whistleblower protection triggers.

Finally, while the *Collins* and *Richards* courts appeared to take an expansive view of reporting activity,<sup>87</sup> other more recent cases present a troubling judicial view of what is protected reporting under Sarbanes-Oxley.<sup>88</sup> These courts limit the definition of "fraud" under Sarbanes-Oxley to reporting that raises specific concerns about shareholder fraud *vis a vis* federal law.<sup>89</sup> In turn, at least one of these cases limits Sarbanes-Oxley whistleblower provisions so that reports about

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83. *Id.*

84. *Id.* at \*39.

85. *See Richards v. Lexmark Int'l, Inc.*, 2006 DOLSOX 71, at \*1; *see also* Dan W. Goldfine, *Plan Ahead Before Trouble Walks In*, 13 BUS. L. TODAY 27 (2004) (discussing situations where either company counsel or management or both may be involved in wrongdoing).

86. *See, e.g., Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376 (N.D. Ga. 2004); *Richards*, 2006 DOLSOX LEXIS 71 at \*14.

87. *See Collins*, 334 F. Supp. 2d at 1376; *Richards*, 2004 DOLSOX LEXIS 106 at \*37-38.

88. *See, e.g., Bishop v. PCS Admin. (USA)*, 2006 U.S. Dist. LEXIS 37230 \*29-32 (N.D. Ill. 2006); *Wengender v. Robert Half Int'l, Inc.*, 2006 DOLSOX LEXIS 32, \*28-34 (Mar. 30, 2006). *Cf. Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, 2006 DOLSOX LEXIS 59, \*35-36 (May 31, 2006).

89. *See Bishop*, 2006 U.S. Dist. LEXIS 37230 at \*29-32; *Wengender*, 2006 DOLSOX LEXIS 32 at \*29-32. *Cf. Klopfenstein*, 2006 DOLSOX LEXIS 113 at \*35-36.

accounting irregularities would not trigger whistleblower protection.<sup>90</sup>

C. Employer Must be Aware of Employee's Protected Activity

The second element of a whistleblower case is that the employer must be aware of the employee's protected activity when it takes adverse action against the employee.<sup>91</sup> For example, if an employee reported to the federal government, unbeknownst to the corporate employer, and then the employer acted against the employee, the employee could not then claim retaliation under the Act. Cases have held however that constructive or actual knowledge will be sufficient to satisfy this element of the claim.<sup>92</sup>

While simple in theory, the question of who has knowledge when they act against an employee sometimes contains intricacies not accounted for in the statute or the cases decided to date. For example, does a corporate board of directors have constructive knowledge when it terminates a whistleblowing employee? What about counsel to the board or the corporation? Can they have constructive knowledge of whistleblowing activity sufficient to make the respondent liable under Sarbanes-Oxley? In any event, the U.S. Department of Labor has made it clear that an employer may not use a "straw-man" to take retaliatory action against employees,<sup>93</sup> and that "constructive knowledge can be attributed to the ultimate decision-makers<sup>94</sup> where the complainant's immediate supervisor had actual knowledge of complainant's protected activities."<sup>95</sup>

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90. See, e.g., *Wengender*, 2006 DOLSOX LEXIS 32 at \*15.

91. See *Richards v Lexmark Int'l, Inc.*, 2004 DOLSOX LEXIS 106, \*34, 39 (Oct. 1, 2004).

92. See, e.g., *Henrich v. Ecolab, Inc.*, 2004 DOLSOX LEXIS 83, \*21-23 (Nov. 23, 2004). But see *Anderson v. Jaro Transp. Servs.*, 2005 DOL Ad. Rev. Bd. LEXIS 128, \*13-14 (Nov. 30, 2005) (noting that complainant's immediate supervisor did not know about his protected activity until after she fired him as a basis for the employer's defense even where contractor who hired complainant's employer, and indirectly complainant, knew of protected activity).

93. *Henrich*, at \*24-25; *Platone v. Atl. Coast Airlines Holdings, Inc.*, 2004 DOLSOX LEXIS 69, at \*82-83 (Apr. 30, 2004).

94. But see *Anderson*, at \*13 (noting that immediate supervisory company lacked knowledge of protected activity, even where company that hired it to do work did know of complaint).

95. *Henrich*, at \*21-23.

In some cases, however, the employer may really not know that the employee has filed a complaint outside the company and thus it would not be proper to find a basis for retaliatory discrimination.<sup>96</sup> Where an inference can be drawn that the employer did know that the employee had made a report of illegal activity, the Department of Labor has held that the employee will have met its burden to prove this element of the claim.<sup>97</sup>

*D. Protected Activity a “Contributing Factor” in  
Adverse Employment Action*

Perhaps the most significant and most difficult factor to prove in a Sarbanes-Oxley whistleblower case is the “contributing factor,” or the causation, element of the claim.<sup>98</sup> Administrative law judges in the Department of Labor have repeatedly discussed this element of an employee’s claim in Sarbanes-Oxley decisions and in other whistleblower actions under statutes similar to Sarbanes-Oxley, but have not made clear exactly what an employee must do to meet his burden.<sup>99</sup> In reported cases, the tribunals have noted that the law does not specifically require an employee to prove that his protected activity was a “motivating” or “significant” factor in the decision to take adverse action against him.<sup>100</sup>

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96. Peck v. Safe Air Int’l, Inc., ALJ No. 2001-AIR-3, at 10-11 (Jan. 30, 2004), available at [http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB\\_DECISIONS/AIR/01AIR03C.HTM](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB_DECISIONS/AIR/01AIR03C.HTM) (finding that two managers ultimately responsible for firing of employee did not know about employee’s complaint to the Federal Aviation Administration under AIR 21 (49 U.S.C. § 42121)).

97. Lederhaus v. Paschen, No. 1991-ERA-13, at 4 (Oct. 26, 1992), available at [http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB\\_DECISIONS/ERA/91ERA13C.HTM](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB_DECISIONS/ERA/91ERA13C.HTM).

98. Marano v. Dep’t of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (noting that employee had to prove that protected activity was a “contributing factor” in employer’s adverse decision under the Whistleblower Protection Act for federal employees).

99. The ERA, the STAA and AIR are similar to Sarbanes-Oxley in procedures and proof. See *supra* notes 25-27 and accompanying text; see also *infra* notes 109-110 and accompanying text.

100. Marano, 2 F.3d at 1140 (holding that “motivating” or “significant” was previously the standard under the federal Whistleblower Protection Act). See also Platone v. Atl. Coast Airlines Holdings, Inc., 2004 DOLSOX LEXIS 69, at \*62 (Apr. 30, 2004).

The words a “contributing factor” . . . means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a “significant,” “motivating,” “substantial,” or “predominant,” factor in a personnel action in order to overturn that action.<sup>101</sup>

A whistleblower need only show that his protected activity had a role in the decision to act adversely toward him.<sup>102</sup> For reasons discussed below, this element of a Sarbanes-Oxley whistleblower claim presents particular evidentiary challenges for employees claiming retaliatory action under the Act.<sup>103</sup>

It is thus difficult, at least initially, for an employee to prove by direct evidence that his protected activity was a contributing factor in his termination.<sup>104</sup>

The U.S. Department of Labor Office of Administrative Law Judges has held that where an adverse action closely follows a report made by an employee, the “sequence of events” can support an inference of causation.<sup>105</sup> More broadly, the Department of Labor has held that

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101. *Marano*, 2 F.3d at 1140 (interpreting the whistleblower provisions of the Whistleblower Protection Act, 5 U.S.C. §§ 1214(b)(4)(B)(i), 1221(e)(1) (1989)). The court specifically noted that this test specifically overruled existing case law requiring the whistleblower to show that his protected conduct was a “significant,” “motivating,” “substantial,” or “predominant” factor in a personnel action.” *Id.*

102. *See id.* at 1140. *See also Platone*, at \*81-82.

103. *See, e.g., Henrich v. Ecolab, Inc.*, 2004 DOLSOX LEXIS 83, \*24-25 (Nov. 23, 2004) (noting that complainant had not proved that his protected activities were a contributing factor in his termination); *Robinson v. Nw. Airlines, Inc.*, ARB No. 04-041, at 9 (Nov. 30, 2005), *available at* [http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/AIR/04\\_041.AIRP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/AIR/04_041.AIRP.PDF) (holding that because six months had passed since the complainant had written a letter detailing security violations to the Federal Aviation Authority and the adverse action, and because complainant had engaged in questionable conduct during that six month period, the letter detailing the security violations was not a contributing factor in employer’s decision to take adverse action against complainant); *Reines v. Venture Bank and Venture Financial Group*, Case No. 2005-SOX-00112 at 59-60 (ALJ Mar. 13, 2007).

104. *See Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997) (noting that in reviewing Secretary’s decision for substantial evidence no direct evidence of retaliation was available in ERA whistleblower case).

105. *Lederhaus v. Paschen*, No. 1991-ERA-13, 5 (Oct. 26, 1992), *available at* [http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB\\_DECISION](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB_DECISION)

“temporal proximity between the protected activities and the adverse action may be sufficient to establish the inference that the protected activity was a motivation for the adverse action.”<sup>106</sup> In at least one case, temporal proximity has been interpreted to mean a period as long as a year between the reporting activities and the adverse action.<sup>107</sup> Moreover, in the period before the protected activity (where the complainant is in good standing) and during the protected activity, the employer would be best served in defeating a Sarbanes-Oxley whistleblower claim by showing the occurrence of some intervening performance event that would justify its adverse action against the employee and could not possibly be related to the protected activity.<sup>108</sup>

In one such case, the complainant reported safety violations under the STAA,<sup>109</sup> a statute similar to Sarbanes-Oxley in procedure and proof,

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S/ERA/91ERA13C.HTM.

106. *Thomas v. Arizona Pub. Serv. Co.*, 1989-ERA-00019, 10 (Sept. 17, 1993), available at [http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB\\_DECISIONS/ERA/89ERA19A.HTM](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB_DECISIONS/ERA/89ERA19A.HTM). The Department of Labor has also held close proximity in time of a complainant’s reporting and his discharge does not require finding of retaliation where the discharge was credibly “explained by a non-retaliatory motive.” *Barnes v. Raymond James & Assocs.*, 2005 DOLSOX LEXIS 2, at \*33-34 (Jan. 10, 2005) (complainant discharged where supervisor learned she was leaving to work for a competitor).

107. *Thomas*, 1989-ERA-00019, at 10. See also *Mahony v. Keyspan Corp* 2007 U.S. Dist. LEXIS 22042 at 4 (S.D.N.Y. 2007) (noting that time between protected activity and adverse action is just one factor for a jury to consider).

108. *Getman v. Sw. Sec., Inc.*, 2004 DOLSOX LEXIS 71, at \*66-71 (Feb. 2, 2004) (noting that employer had not indicated that complainant had performance issues until after she refused to change stock rating and that respondent’s general dishonesty added to determination that her protected activity contributed to decision to terminate), *rev’d on other grounds*, 2005 DOLSOX 18 (Jul. 29, 2005). But see *Bechtel v. Competitive Techs., Inc.* 2005 DOLSOX LEXIS 44, \*108, 111 (Oct. 5, 2005) (finding employee bonus prior to termination not enough to show “pretext” even when given with an accompanying complimentary note from management). The administrative court explained that its decision in *Bechtel* not to find that the employer had acted on pretext was at least partially based on the fact that the bonus had been given for work on a specific project. *Id.* at \*111-12. See *Sussberg v. K-Mart Holding Corp.*, 2-05-CV-70378 at 17 (E.D. MI.) (Nov. 15, 2006) (discussing effect of interviewing clients).

109. *Anderson v. Jaro Transp. Servs.*, 2005 DOL Ad. Rev. Bd. LEXIS 128, at \*1 (Nov. 30, 2005). The STAA generally prohibits an employer from taking adverse action against an employee who operates a commercial motor vehicle for making a safety-related complaint or refusing to operate a vehicle for fear of serious injury. 49 U.S.C. § 31105(a)(1)(B)(i)-(ii) (2006).

and also governed by the rules of AIR 21.<sup>110</sup> The complainant reported that a new company rule requiring truck drivers to pick up and deliver their loads within six hours created a safety issue under STAA.<sup>111</sup> Complainant told his supervisor that the new six-hour rule would create safety issues if he picked up loads in the late evening and was too tired to drive six hours.<sup>112</sup> After Anderson reported these concerns, he was warned twice for being late in delivering loads and for sleeping off the road in his truck.<sup>113</sup> In December 2002, Anderson's supervisor terminated his employment,<sup>114</sup> citing the fact that he had made late deliveries, and had been parking his fully loaded trucks off route, between the time of Anderson's safety complaints and his termination.<sup>115</sup>

Based on these facts, the ARB found that the employer had not violated the STAA even though the employee had made safety complaints and was fired within six months of making such complaints.<sup>116</sup> This was so even though the employer's purported legitimate reasons for termination were directly related to the employee's safety concerns: actually constituting the basis for his complaints about safety; and even though the adverse action occurred within six months of the protected activity.<sup>117</sup> In *Anderson*, the very actions that resulted in his termination—pulling off the road to sleep and keeping loads longer than the six hours allowed by company rules—were also the very subject of complainant's safety reporting.<sup>118</sup> Yet, these actions, according to the ARB, were sufficient *legitimate* reasons for the employer's adverse action, and oddly enough, they were enough to show that the employee's reporting of safety concerns had *not* been the causal factor<sup>119</sup> in his termination.<sup>120</sup> The *Anderson* case illustrates

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110. See *supra* notes 25-27 and accompanying text.

111. *Anderson*, at \*3.

112. *Id.* at \*2-3.

113. *Id.* at \*3-4.

114. *Id.* at \*4.

115. *Id.* at \*3-4.

116. See *id.* at \*15-16.

117. *Id.* at \*8-9 (describing STAA whistleblower provisions generally); see also *supra* notes 25-27.

118. See *Anderson*, at \*3-4.

119. In *Anderson*, the Administrative Review Board applied a standard of proof slightly different than that which has been applied under Sarbanes-Oxley. *Id.* at \*10 (stating that complainant had to prove by a preponderance of the evidence that the



the extreme uphill battle a complainant must overcome in proving that his protected activity ultimately was a contributing factor in the adverse employment action against him.<sup>121</sup>

#### E. Adverse Employment Action

The Department of Labor has indicated that any negative employment action will satisfy this element of a whistleblower claim “if it is reasonably likely to deter employees from making protected disclosures.”<sup>122</sup> A complainant need not prove termination or suspension from the job, or even a reduction in salary or responsibilities.<sup>123</sup> For example, even being placed on a possible “lay-off” list has been said to qualify as adverse employment action, even where the employee was not ultimately laid off.<sup>124</sup>

#### F. The Employer’s Burden to Rebut

While the employee bears the initial burden of proving the elements of his case by a preponderance of the evidence under Sarbanes-Oxley,<sup>125</sup> the employer can still beat back the claim of discrimination by

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protected activity was the “reason for the adverse action”). The ARB effectively held that Anderson had to prove that the employee’s reporting was the causal factor in the employer’s decision to act adversely toward complainant. *Id.* at \*15.

120. *See id.* at \*15-16.

121. In addition to finding that Anderson did not prove a causal link between his reporting and his termination, the ARB found that the employer’s reasons for taking adverse action were also legitimate—even though they were the same actions that related to Anderson’s safety complaints. *Id.* at \*3-4, 15-16.

122. The Office of Administrative Law Judges has held, however, that a company’s filing of a lawsuit against an employee is not an “adverse action” under the Act. *Vodicka v. Dobi Med. Int’l, Inc.*, 2005 DOLSOX LEXIS 101, \*23-28 (Dec. 23, 2005).

123. *Halloum v. Intel Corp.*, 2006 DOLSOX LEXIS 5, at \*14-15 (Jan. 31, 2006). *See Mahony v. Keyspan Corp* 2007 U.S. Dist. LEXIS 22042 at 4 (S.D.N.Y. 2007) (noting that isolation within company and a change in performance evaluations might be found to be retaliation).

124. *Hendrix v. Am. Airlines, Inc.*, 2004 DOLSOX LEXIS 87, at \*37-38 (Dec. 9, 2003). *See also Anderson*, at \*11-12 (discussing “blacklisting” by a supervisor or disseminating adverse information that affirmatively prevents a person from finding employment as a possible adverse employment action and noting that the lower tribunal held such conduct to be an adverse action within the meaning of the STAA).

125. *See supra* notes 29-46, 60, and accompanying text.

proffering “clear and convincing evidence” of legitimate motives for its adverse actions.<sup>126</sup> In such a case, where there exist both legitimate and illegitimate motives for the adverse action, the court may engage in what has frequently been called a “dual motive analysis.”<sup>127</sup> In these cases, if the employer can show by clear and convincing evidence that it would have taken the same action in the absence of the protected activity by the employee,<sup>128</sup> the burden will shift back to the employee to ultimately persuade the trier of fact that the offered reasons are a mere “pretext” for the real cause of the adverse action: the protected conduct.<sup>129</sup> Alternatively, the employee can show that his conduct was at least a contributing factor in the employer’s decision to take adverse action.<sup>130</sup>

Cases where the employer offers what it calls “clear and convincing evidence” of a legitimate reason for adverse action put the employee in an untenable position.<sup>131</sup> In most instances an employee bringing a

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126. See *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1375-76 (N.D. Ga. 2004); *Welch v. Cardinal Bankshares Corp.*, 2004 DOLSOX LEXIS 41, at \*146-148, 196 (Jan. 28, 2004) (holding that employer failed to meet its burden of proving by clear and convincing evidence that it would have fired Welch even if he had not engaged in the protected activity); *supra* note 61 and accompanying text.

127. Overall v. Tenn. Valley Auth., No. 1997-ERA-53, at 33 (Apr. 30, 2001), available at [http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB\\_DECISIONS/ERA/97ERA53D.HTM](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB_DECISIONS/ERA/97ERA53D.HTM) (holding employer failed to meet the clear and convincing evidence standard for being “relieved of liability under the ERA in a dual motive case”); *Yule v. Burns Int’l Sec. Serv.*, 1993-ERA-12, 4-5 (May 24, 1995), available at [http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB\\_DECISIONS/ERA/93ERA12D.HTM](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB_DECISIONS/ERA/93ERA12D.HTM) (noting that dual motive analysis applied where illegitimate motives played part in Burns’ decision).

128. *Halloum*, 2006 DOLSOX LEXIS 5, \*16-17. See also *Thomas v. Ariz. Pub. Serv. Co.*, 1989-ERA-00019, at 10-11 (Sept. 17, 1993) (indicating employer had to articulate existence of legitimate reasons for adverse action). See also *Yule*, at 6-7.

129. *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 934-35 (11th Cir. 1995) (deciding case under the Energy Reorganization Act containing whistleblower provisions similar to those contained within Sarbanes-Oxley, but requiring the employee’s reporting conduct be a “motivating” factor in the respondent’s decision to terminate). See *supra* notes 98-102 and accompanying text.

130. *Platone v. Atl. Coast Airlines Holdings, Inc.*, 2004 DOLSOX LEXIS 69, at \*81-82 (Apr. 30, 2004) (determining that protected activity played a role in the decision to terminate complainant).

131. *Bechtel v. Competitive Techs., Inc.*, 2005 DOLSOX LEXIS 44, at \*101-103 (Oct. 5, 2005). *Bechtel* is a case with a long and tortured history. In *Bechtel*, the OSHA investigator first found in favor for the employee and ordered preliminary reinstatement. After a hearing, the administrative law judge found that the employer

Sarbanes-Oxley whistleblower claim is also an “at will” employee who can be fired for just about any reason—at any time—and so most any reason offered by the employer can be deemed “legitimate” by the tribunal.<sup>132</sup> Thus, the level of protection offered to at-will employees by state employment law—as to what constitutes proper dismissal—is the ultimate determinant of how much protection whistleblowing employees<sup>133</sup> will actually receive under Sarbanes-Oxley.<sup>134</sup>

For example, in *Bechtel v. Competitive Technologies, Inc.*, it appears that the complainant had been doing at least a reasonably good job prior to the time when he engaged in a “protected activity.”<sup>135</sup> With regard to reporting requirements, complainant “raised issues that he believed needed to be disclosed to the SEC” as well as the “need to report potential litigation, [and] the need to disclose a change the in compensation plan” and the appropriateness of some of Respondent’s representations.<sup>136</sup> Nonetheless, even after OSHA had ordered that complainant Bechtel be reinstated<sup>137</sup> and even in the face of recent

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had put forth clear and convincing evidence of a non-discriminatory motivation for the termination of complainant Bechtel. In the meantime, the employee had applied to the federal district court for an order requiring the employer to reinstate the employee complainant. The district court ordered such reinstatement and the employer appealed the district court decision. The U.S. Court of Appeals for the Second Circuit reversed the district court’s decision, issuing a landmark ruling holding that the preliminary order of reinstatement remedy referred to in the Sarbanes-Oxley Act is most likely not enforceable by a federal court. *Bechtel v. Competitive Techs. Inc.*, 448 F.3d 469, 473-75 (2d Cir. 2006).

132. See *Bechtel*, 2005 DOLSOX LEXIS 44, at \*108, 111 (stating that at the hearing stage of proceedings, awarding a bonus to an employee prior to termination not enough to show “pretext” even when given with an accompanying complimentary note from management). The court explained that its decision in *Bechtel* not to find that the employer had acted on pretext was at least partially based on the fact that the bonus had been given for work on a specific project. *Id.* at \*111-12.

133. See, e.g., *Wieder v. Skala*, 80 N.Y.2d 628, 633-38 (1992); *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 300 (1983).

134. The level of protection for Sarbanes-Oxley whistleblowing claimants does not appear to date to be very high. See *infra* notes 180-202 and accompanying text regarding state laws.

135. *Bechtel*, 2005 DOLSOX LEXIS 44, at \*10.

136. *Id.* at \*99.

137. See *Bechtel*, 2005 DOLSOX LEXIS 44 at \*3. But see *Bechtel v. Competitive Techs. Inc.*, 448 F.3d 469, 472-74 (2d Cir. 2006).

positive commendations by the employer,<sup>138</sup> the ALJ did not find in complainant Bechtel's favor at a hearing.<sup>139</sup> While the ALJ found that Bechtel's reporting activities did contribute to his discharge,<sup>140</sup> the Respondent was able to put forth "clear and convincing evidence" of a reason for discharge wholly unrelated to the protected activity.<sup>141</sup> Because respondent was able to point to financial reasons for complainant's termination—something most any employer might legitimately claim—complainant was unable to prove that respondent's legitimate reasons were pretextual.<sup>142</sup> This was so even though Mr. Bechtel received a bonus, shares of stock, and positive performance analysis just prior to his termination.<sup>143</sup>

In the meantime, Bechtel had already applied to the United States District Court for the District of Connecticut for enforcement of the investigator's preliminary order of reinstatement made before the ALJ hearing.<sup>144</sup> Ultimately, the Second Circuit determined that because the order of reinstatement was not a "final order," the court lacked jurisdiction to enforce it.<sup>145</sup>

*Bechtel* illustrates again the extreme difficulty a Sarbanes-Oxley complainant has in proving his case at a hearing where he is an employee at will, and where any reason for his discharge can be viewed as a legitimate one.<sup>146</sup> Additionally in *Bechtel*, the Second Circuit struck a mighty blow to the Sarbanes-Oxley whistleblower protections in refusing to enforce the preliminary reinstatement order,<sup>147</sup> further discouraging would be whistleblowers from reporting what they know.

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138. *Bechtel*, 2005 DOLSOX LEXIS 44 at \*10.

139. *Id.* at \*117-118.

140. *Id.* at \*100.

141. *Id.* at \*107.

142. *Id.* at \*108-112.

143. *Id.*

144. *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469, 471 (2d Cir. 2006). The *Bechtel* case is currently pending before the ARB.

145. *Id.* at 472-74. The district court had held the order of reinstatement order enforceable. *Id.* at 473. The circuit court dissent in *Bechtel* argued that the majority opinion contravenes the clear intent of Congress. *Id.* at 484-85 (Straub, J., dissenting) ("The language and history of the Act . . . evince a strong [c]ongressional preference for reinstatement as a means of encouraging whistleblowing.").

146. See *supra* notes 142-43 and accompanying text.

147. See *Bechtel*, 448 F.3d at 472-74.

III. THE INTERPLAY BETWEEN SARBANES-OXLEY AND EXISTING STATE  
LAW: NEW YORK, NEW JERSEY, AND TEXAS COMPARED

Although Congress sought to improve protections for whistleblowers with Sarbanes-Oxley,<sup>148</sup> most employees involved in whistleblower proceedings will be “at-will” employees. It is this state law “at-will” underpinning that creates the biggest overall obstacle for whistleblowers under Sarbanes-Oxley and the biggest impediment to successful implementation of the legislatively stated goal—that of encouraging employees to openly report evidence of corporate fraud.<sup>149</sup>

At its most extreme, the doctrine of at-will employment generally provides that an employee with no set period of employment may be discharged at any time for any reason except a discriminatory reason.<sup>150</sup> In other words, an employee in a state that is less protective of employees may properly be dismissed for “wearing a red shirt.”<sup>151</sup> The difficulty for the employee thus comes in trying to prove that the real reason for the adverse action was discrimination or retaliation, rather than “the red shirt”—as even the “red shirt” is generally enough reason to fire an at-will employee.

Sarbanes-Oxley impacts state law by disallowing adverse action against an employee where the employee’s protected activity contributed to the decision to act adversely.<sup>152</sup> In this manner, Sarbanes-Oxley adds another illegal reason to the list for firing the at-will employee in all state jurisdictions.<sup>153</sup> Likewise, the employer would be forced to state some other reason for its adverse action, although almost any reason could be deemed legitimate by a reviewing tribunal.<sup>154</sup> And of course, employees in all states continue to benefit from state employment laws

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148. See *supra* notes 54-58 and accompanying text.

149. See *supra* notes 54-58 and accompanying text.

150. See *Wieder v. Skala*, 80 N.Y.2d 628, 633 (1992); *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 300 (1983).

151. See, e.g., *Murphy*, 58 N.Y.2d at 297-98 (dismissing employee’s tort based claim for discharge where employer had discharged employee for reporting accounting improprieties prior to the effective date of Sarbanes-Oxley).

152. See *supra* notes 21-22 and accompanying text.

153. Of course, the supremacy clause of the United States Constitution requires that the Sarbanes-Oxley Act trump state employment at-will doctrine where an employee’s actions are so protected. See U.S. CONST. art. VI, cl. 2.

154. See, e.g., *Anderson v. Jaro Transp. Servs.*, 2005 DOL Ad. Rev. Bd. LEXIS 128, \*15-17 (Nov. 30, 2005).

that do not contradict or contravene the intent or language of the Sarbanes-Oxley Act.<sup>155</sup> Many of these state whistleblower laws are, however, narrowly drawn or offer little protection for those blowing the whistle on securities fraud.<sup>156</sup>

In New York, for example, the state whistleblower statute only protects employees from retaliation when the employee reports a violation that specifically affects the public health.<sup>157</sup> Employees are otherwise left largely unprotected under the state's common law,<sup>158</sup> while *employers* are heavily protected by the common law doctrine of at will employment.<sup>159</sup> For example, the New York State Court of Appeals reaffirmed its longstanding commitment not to imply obligations into the employer/employee relationship absent some authority to do so from the legislature in *Murphy v. American Home Products*.<sup>160</sup> In *Murphy*, the Court refused to recognize the tort of "abusive discharge" in the employee at will relationship<sup>161</sup> and refused to even imply an obligation of good faith into the relationship.<sup>162</sup>

Similarly, an employee physician brought a claim in New York state court against her employer for wrongful discharge after she refused to share other employees' confidential medical information with the employer in *Horn v. New York Times*.<sup>163</sup> The Court refused to find that the contract had implied terms where doing so would not further the underlying agreement of the parties.<sup>164</sup> The court held that the physician employee was really engaged in a managerial role, charged with

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155. See, e.g. N.Y. LAB. LAW § 740(2) (2006) (protecting whistleblowing employees in New York State that report violations that create a threat to public health or safety). See also U.S. CONST. art. VI, cl. 2.

156. See, e.g., N.Y. LAB. LAW § 740(2).

157. *Id.*

158. See, e.g., *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 300-01 (1983).

159. See, e.g. *Remba v. Fed. Employment and Guidance Serv.*, 149 A.D.2d 131, 134 (1st Dept. 1989), *aff'd*, 76 N.Y.2d 801 (1991); *Weider v. Scala*, 80 N.Y.2d 628, 633 (1992) (implying exception to at-will employment contract where implied obligation would further employment contract's underlying terms); *Horn v. New York Times*, 100 N.Y.2d 85, 95 (2003) (declining to find exception to at-will employment agreement and holding in favor of employer even where employee presented sympathetic facts).

160. *Murphy*, 58 N.Y.2d at 300-02.

161. *Id.*

162. *Id.* at 304-05.

163. *Horn*, 100 N.Y.2d at 95.

164. *Id.* at 94.

determining whether employees' injuries were work-related.<sup>165</sup> Any medical care that she actually gave, the court reasoned, was ancillary to the managerial role she played.<sup>166</sup> The court thus held that not disclosing patient confidences was not central to her role as an employee, and implying the obligation of confidentiality would not be in "furtherance" of the employer/employee relationship.<sup>167</sup> Absent legislative change, the court in *Horn* refused to imply such an obligation into the contract.<sup>168</sup> *Horn* thus illustrates a situation where New York's highest court allowed an employer to legally dismiss the plaintiff, an at-will employee, even though the *employer's* conduct appeared to be unethical and the employee appeared to be acting properly.<sup>169</sup>

In contrast, under New Jersey law, at-will employees receive greater protection against adverse actions when they are acting specifically to serve the public good. A New Jersey court noted that New Jersey's whistleblower statute protected an employee who blew the whistle about his employer's use of unlicensed workers in *Donofry v. Autotote Systems, Inc.*<sup>170</sup> Other New Jersey courts, however, have noted that where an employee acts merely in his own interests and only *indirectly* serves the public good, he will not be protected by New Jersey's whistleblower statute and will be subject to the vagaries and lesser protections of New Jersey state common law.<sup>171</sup>

Similarly under Texas law, for example, the at-will employee gets little protection from state law. In Texas, the at-will relationship can be terminated despite the whistleblowing status of the person or persons subject to termination.<sup>172</sup> One Texas court held that a law firm was not

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165. *Id.* at 95.

166. *Id.*

167. *Murphy*, 58 N.Y.2d at 304-05 (citing *Wood v. Duff-Gordon*, 222 N.Y. 88 (1917)).

168. *See Horn*, 100 N.Y.2d at 94.

169. *Id.*; *but see Fraser v. Fid. Trust Co. Intl.*, 417 F. Supp. 2d 310, 324-25 (S.D.N.Y. 2006) (allowing breach of contract claim alongside Sarbanes-Oxley whistleblower claim where employee manual stated that employees were responsible for reporting illegal conduct).

170. *Donofry v. Autotote Sys., Inc.*, 795 A.2d 260 (N.J. Super. Ct. App. Div. 2001) (applying the Conscientious Employees' Projection Act ("CEPA"), N.J. STAT. ANN. § 34:19-3 (West 1988)).

171. *Demas v. Nat'l Westminster Bank*, 712 A.2d 693, 696 (N.J. Super. Ct. App. Div. 1998); *see also Green v. Jersey City Bd. of Educ.*, 828 A.2d 883 (N.J. 2003).

172. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998).

liable in tort to a lawyer/whistleblower who reported overbilling of the firm's clients in *Bohatch v. Butler and Binion*.<sup>173</sup>

In summary, if the corporate whistleblower is not specifically protected by a state whistleblower statute, he must rely on state common law, which will generally offer little protection, or ultimately on Sarbanes-Oxley protection. The problem thus becomes one of circular reasoning, in that Sarbanes-Oxley actually allows an employer to escape liability if the employer can show that he discharged the employee for a legitimate reason.<sup>174</sup> Since almost *any* reason is a legitimate reason under many states laws, the employer can simply urge that the employee was fired for reasons other than his reporting and escape liability under Sarbanes-Oxley.<sup>175</sup>

In the final analysis, the only way the Sarbanes-Oxley whistleblower can survive an employer's proof of legitimate action is if he can get the court to engage in a "dual motive" analysis.<sup>176</sup> Having decided that both discriminatory and the non-discriminatory motives played a part in the decision to terminate the whistleblower, the tribunal can decide whether the employer would have dismissed the employee if not for the whistle blowing activity. If the tribunal determines that absent the whistleblowing activity, the employer would not have acted adversely toward the employee, even though the employee also had a legitimate reason for action, then the court will rule in favor of the employee.<sup>177</sup> The problem is that courts and administrative tribunals have not routinely engaged in the "dual motive"<sup>178</sup> analysis. The result is that the employer simply offers what would otherwise be a legitimate reason for its adverse action against the employee, thereby vitiating any real Sarbanes-Oxley whistleblower protection.<sup>179</sup> It thus appears that the convergence of the at-will employment doctrine and the burden set out for a Sarbanes-Oxley whistleblower, leave the whistleblower largely

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173. *Id.* at 546-47.

174. *See* *Bechtel v. Competitive Tech., Inc.*, Case No. 2005 SOX 33, at 39-40 (A.L.J. Mar. 29, 2005).

175. *Id.*

176. *See* *Platone v. Atlantic Coast Airlines Holdings, Inc.*, Case No., 2003 SOX 27, at 28 (A.L.J. Apr. 30, 2004).

177. *Id.*

178. *See, e.g.* *Bechtel v. Competitive Tech. Inc.*, 448 F.3d 469, 472-75 (2d Cir. 2006).

179. *See supra* notes 174-75 and accompanying text.



unprotected.

#### IV. THE BREADTH AND EFFECTIVENESS OF SARBANES-OXLEY WHISTLEBLOWER PROTECTIONS

##### *A. Sarbanes-Oxley Statistics to Date*

The U.S. Department of Labor's own statistics bear out this lack of protection for Sarbanes-Oxley whistleblowers.<sup>180</sup> As of June 2005, the Department of Labor had compiled a comprehensive list of statistics on Sarbanes-Oxley cases. As of that month, 492 whistleblower cases had been filed under Sarbanes-Oxley and 99 of those cases<sup>181</sup> were still pending before OSHA in the investigative stage of the proceedings.<sup>182</sup> Of the total number filed, 58 cases had been voluntarily withdrawn before OSHA issued any findings.<sup>183</sup> Some of these 58 cases have likely been filed in federal court, as is allowed pursuant to Sarbanes-Oxley, if more than 180 days had passed before a final decision in the matter.<sup>184</sup> OSHA investigators had completed 393 cases,<sup>185</sup> with 289 of those dismissed for lack of merit.<sup>186</sup> *Thus, as of June 2005, OSHA had dismissed prior to a hearing almost 82% of the cases that it had decided under Sarbanes-Oxley.*<sup>187</sup>

*Only 64 of the cases before OSHA were found to have merit.*<sup>188</sup> Of

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180. Telephone Interview with Nilgen Tolek, Dir. of Office of Investigative Assistance, Occupation Safety and Health Admin. (June 13, 2005) [hereinafter Tolek Interview] (describing the status of cases filed under Sarbanes-Oxley); Telephone Interview with Nilgen Tolek, Dir. of Office of Investigative Assistance, Occupation Safety and Health Admin. (June 16, 2005) [hereinafter Tolek Interview II] (describing the status of cases filed under Sarbanes-Oxley).

181. Tolek Interview II, *supra* note 180 and accompanying text (describing the status of cases filed under Sarbanes-Oxley).

182. Tolek Interview, *supra* note 180 and accompanying text (describing the status of cases filed under Sarbanes-Oxley).

183. Tolek Interview, *supra* note 180 and accompanying text.

184. 69 Fed. Reg. at 52,117 (part 1980.114).

185. Tolek Interview, *supra* note 180.

186. *Id.*

187. *See id.*

188. Tolek Interview, *supra* note 180. The total cases reported include all those filed with OSHA under Sarbanes-Oxley and some of these cases have multiple complainants. Determinations made by OSHA are counted separately for each complainant. Thus there exists a discrepancy between the number of cases filed, and

those found to have merit, the parties settled 49 prior to a hearing.<sup>189</sup> These statistics indicate that it is very difficult for a complainant to succeed at the initial stage of the Sarbanes-Oxley proceedings, the stage in which OSHA makes its initial determination before a hearing.<sup>190</sup>

Once a complainant requests a hearing before an administrative law judge, he fairs even worse.<sup>191</sup> The Office of Administrative Law Judges reported that, as of April 2005,<sup>192</sup> it had docketed 155 total cases under Sarbanes-Oxley, and decided 119 cases.<sup>193</sup> As of June 2005, *only four out of the 119 total whistleblower complainants under Sarbanes-Oxley had been successful at a hearing.*<sup>194</sup> Nineteen of the cases were settled, and 24 chose to pursue their claims in federal court,<sup>195</sup> where the author only knows of a handful of successful plaintiffs who have survived motions for summary judgment by the corporate employer<sup>196</sup> and one

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those in which OSHA has made a determination. *Id.*

189. Tolek Interview, *supra* note 180.

190. *See id.* For example, Sarbanes-Oxley plaintiff Mahoney recently survived an employer's motion for summary judgment in the district court proceeding where his case had previously been found to lack merit by OSHA. *Mahony v. Keyspan Corp* 2007 U.S. Dist. LEXIS 22042 at 2, 5 (S.D.N.Y. 2007).

191. Sarbanes-Oxley Whistleblower Complaints Docketed Before the U.S. Department of Labor, Office of Administrative Law Judges, Statistical Overview as of April 28, 2005 (on file with author) [hereinafter OALJ Statistical Overview].

192. According to a senior attorney with the Office of Administrative Law Judges, statistics on the number and disposition of future cases and decisions since June 2005 will not be compiled in the near future. Telephone Interview with Tod Smith, Senior Attorney, Office of Administrative Law Judges (January 24, 2006) [hereinafter Smith Interview I].

193. Sarbanes-Oxley Whistleblower Complaints Docketed Before the U.S. Department of Labor, Office of Distractive Law Judges, Statistical Overview as of April 28, 2005 (on file with author) [hereinafter OALJ Statistical Overview]. Of the 289 cases dismissed by the Secretary before a hearing, the parties only requested that the Office of Administrative Law judges take jurisdiction for purposes of a hearing in 155 of these complaints.

194. OALJ Statistical Overview, *supra* note 193.

195. *Id.*

196. *See Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1380-81 (N.D. Ga. 2004); *Fraser v. Fid. Trust Co. Intl.*, 417 F. Supp. 2d 310, 322-23, 325 (S.D.N.Y. 2006) (holding that complainant's reporting did not have to rise to level of that reported by Sherron Watkins to trigger protection of statute); *Romanek v. Deutsche Asset Mgmt.*, No. C05-2473 (N.D. Cal. 2006) (denying summary judgment where complainant raised fact issue concerning causation element of Sarbanes-Oxley claim); *Mahony v. Keyspan Corp* 2007 U.S. Dist. LEXIS 22042 (S.D.N.Y. 2007); *supra* note

other widely publicized case that had been scheduled for trial, but has been reportedly settled as of this writing.<sup>197</sup>

### B. The Appearance of Bias

The statistics from the pending and past administrative proceedings in Sarbanes-Oxley whistleblower cases point to a problem.<sup>198</sup> A complainant has only a small statistical chance of success prior to a hearing,<sup>199</sup> and if a complainant does request a hearing after a determination of his claim by OSHA, it appears that he has an even smaller chance of success, as only *four of the 119* cases docketed for hearing have resulted in a positive outcome for the complainant.<sup>200</sup> There thus appears to be an inherent bias against the complainant at the investigative and hearing stages of the proceedings.<sup>201</sup> Employees are having a difficult time refuting their employer's defenses in Sarbanes-Oxley whistleblower proceedings.<sup>202</sup>

In addition to the fact that there appears to be an inherent bias against employees in Sarbanes-Oxley whistleblower cases, there are other substantive and procedural problems with the Sarbanes-Oxley whistleblower provisions. These problems are discussed in Parts IV.C and IV.D below.

### C. Procedural Problems Inherent in Sarbanes-Oxley Whistleblower Proceedings

#### 1. Timing

Given that the Sarbanes-Oxley administrative procedure was designed to be an expedited proceeding,<sup>203</sup> the respondent employer theoretically has 20 days from receipt of the complaint to meet with

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197. Sudeep Reddy, *TXU Opts to Settle Whistleblower Suit*, DALLAS MORNING NEWS, June 10, 2005. For more information, see *Murray v. TXU Corp.*, 279 F. Supp. 2d 799 (N.D. Tex. 2003).

198. OALJ Statistical Overview, *supra* note 193.

199. *Id.*

200. *See id.*

201. *See Id.*

202. *See supra* notes 180-202 and accompanying text.

203. *See* 69 Fed. Reg. at 52,107.

OSHA and present evidence in support of its position.<sup>204</sup> If the OSHA investigator believes that the respondent employer has violated the Act, and that preliminary relief for the complainant is warranted,<sup>205</sup> OSHA notifies the employer, who is then supposed to have ten business days to respond with legal and factual arguments in support to of its position,<sup>206</sup> arguing against a preliminary award of relief.<sup>207</sup>

Ideally, these proposed time frames might help level a playing field stacked heavily in favor of the employer. While the employer will often have more resources, the one advantage the employee has in a whistleblower proceeding, at least initially, is that he is intimately familiar with the facts surrounding the adverse action against him. Such familiarity with the facts would be extremely helpful in a fast-paced proceeding. Yet the implementing regulations, laying out these strict time guidelines, are not being enforced by the U.S. Department of Labor.<sup>208</sup> When the Department of Labor grants the parties extra time, contrary to the implementing procedures, these extensions most often benefit the employer and hurt the employee, who is likely unemployed and in dire need of immediate relief.

## 2. Access to Information and Witnesses and One-Sided Submissions

The initial implementing procedures for the investigation also stack the odds against the employee because they allow employers to make submissions to OSHA to which the employee has no access, and to which he does not have the opportunity to respond.<sup>209</sup> These submissions can be damaging, and in some cases may contain inaccuracies that will lead to a decision adverse to the employee. Perhaps more importantly, the employer has open access to current employee “witnesses,” who have every motivation to support the employer and make sworn statements on its behalf at every stage in the

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204. 69 Fed. Reg. at 52,106.

205. 69 Fed. Reg. at 52,107.

206. *Id.*

207. *Id.* This section is expressly stated to provide due process protection to the Respondent in accord with the United States Supreme Court’s decision under another whistleblower statute, the STAA. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

208. *See supra* note 48 and accompanying text.

209. 69 Fed. Reg. at 52,106.

investigative proceeding. Such statements put current employees in good stead and allow current employees to avoid siding with a former whistleblowing employee who is now suing their employer.

3. Is the Administrative Proceeding a Forced Waiting Period?

Finally, the administrative proceeding before OSHA might be considered a forced waiting period for the Sarbanes-Oxley complainant. While it is true that the Sarbanes-Oxley complainant can file a complaint in Federal Court if the Secretary of Labor has not issued a final decision within 180 days of the filing, many complainants may endure the wait and do just this. Since a multitude of Sarbanes-Oxley whistleblower cases will not be investigated and completed to final decision in 180 days,<sup>210</sup> the complainant is literally required to endure a one-sided prolonged administrative proceeding with no real hope of quick satisfaction before he may seek redress in federal court. This aspect of Sarbanes-Oxley wastes administrative resources and frustrates vigilant good faith litigants—litigants who may now be now out of work and without incoming resources. Indeed, the length of the OSHA administrative proceeding may actually force the complaining employee to take positions he might otherwise have resisted.<sup>211</sup>

D. Applying Burden Shifting to Sarbanes-Oxley Whistleblower Cases and Issues of Proof: Substantive Problems In Whistleblower Cases

While general discrimination law is not specifically applicable to Sarbanes-Oxley cases,<sup>212</sup> a complaining party under Sarbanes-Oxley, just as in a garden-variety discrimination case, must somehow prove that he was treated wrongly. A Sarbanes-Oxley plaintiff must initially prove his case at a hearing by a preponderance of the evidence.<sup>213</sup> As in past types of discrimination cases, this then causes a burden shifting analysis.<sup>214</sup> Whereas the burden shifting analysis in discrimination cases

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210. See *supra* note 48 and accompanying text.

211. See e.g. Tolek Interview, *supra* note 180.

212. Stone & Webster Eng'g Corp., 115 F.3d 1568, 1572 (11th Cir. 1997).

213. 18 U.S.C. § 1514A(b)(2)(C) (expressly incorporating burdens of proof contained in 49 U.S.C. 42121 (b)); see *supra* notes 26-28, 60 and accompanying text.

214. See 18 U.S.C. § 1514A(b).

was originally determined by the U.S. Supreme Court in *McDonnell Douglas*,<sup>215</sup> under Sarbanes-Oxley, the evidentiary framework is provided by statute and is slightly less onerous for the employee.<sup>216</sup> Initially, suffice it to say that the Sarbanes-Oxley plaintiff must prove that he was treated adversely, and that his protected activities contributed to the decision to treat him wrongly and must do this by a “preponderance of the evidence.”<sup>217</sup> The employer must then present “clear and convincing evidence” of a legitimate reason for its adverse action.<sup>218</sup> If the employer succeeds in this proof, the employee must ultimately bear the burden of showing by a preponderance of the evidence that the reason proffered by the employer is pretextual.<sup>219</sup>

### I. Issues of Proof

Past discrimination cases are illustrative, if not for the exact application of the complainant’s burden of proof, then for the kinds of evidence a complainant may use to show he was treated differently, and ultimately, wrongfully.<sup>220</sup> In past discrimination cases, the courts have noted that a plaintiff may prove discrimination, lacking any direct evidence, with circumstantial evidence<sup>221</sup> such as proof of disparate treatment<sup>222</sup> or with proof of a pattern of past discrimination.<sup>223</sup> As

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215. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

216. 18 U.S.C. § 1514A(b) (expressly incorporating standards in 49 U.S.C. 42121 (b)(2)(A) (“AIR 21”); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1374-75 (N.D. Ga. 2004). The framework in Sarbanes-Oxley whistleblower cases thus requires the complainant to bear the burden of proving his case by a preponderance of the evidence. If he succeeds, the employer may rebut the presumption of discrimination with clear and convincing evidence that its actions were supported by legitimate non-discriminatory motives. 18 U.S.C. § 1514A(b) (expressly incorporating standards in 49 U.S.C. 42121 (b)(2)(A) (“AIR 21”); *see supra* notes 26-28 and accompanying text. The difference between the two frameworks is more fully discussed *infra* note 236.

217. 18 U.S.C. § 1514A(b) (expressly incorporating standards in AIR 21, 49 U.S.C. § 42121 (b)(2)(A). Cases under AIR 21 adopt the preponderance of the evidence standard. *See supra* note 213.

218. *See* 18 U.S.C. § 1514A(b).

219. *See* *Halloum v. Intel Corp.*, 2003-SOX-7 at 13/21 (ALJ Mar. 4, 2004).

220. *See e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003); *Riley v. Emory Univ.*, 2005 WL 1395045, at \*2 (11th Cir. Jun. 14, 2005).

221. *See e.g.*, *Desert Palace, Inc.*, 539 U.S. at 100-101 (acknowledging the utility of circumstantial evidence in discrimination cases).

222. *See e.g.*, *Riley v. Emory Univ.*, 2005 WL 1395045, at \*2 (11th Cir. Jun. 14,

these kinds of evidence are often not available to a whistleblowing employee—since he may be the first to “blow the whistle”—the ability to beat back an employer’s “clear and convincing” evidence of legitimate motives is more limited for the “whistleblowing” employee under Sarbanes-Oxley.<sup>224</sup>

Moreover, employers appear ready and able to offer up seemingly “legitimate” reasons for their adverse employment actions.<sup>225</sup> They are able to find some fault of an employee (as one would expect, since we are dealing with human subjects) and defeat most whistleblower claims.<sup>226</sup> In this way, employers appear able to easily defeat Sarbanes-Oxley whistleblower claims.<sup>227</sup>

This is not surprising given that within the confines of many states’ common law, almost any seemingly sensible reason for discharge of an at-will employee will suffice.<sup>228</sup> Although the courts have noted that Congress intended an employer to have a difficult time proving that a “legitimate” reason existed for an adverse action taken against a whistleblowing employee protected by Sarbanes-Oxley and other federal whistleblower laws,<sup>229</sup> this does not appear to be the case.<sup>230</sup>

## 2. Burden Shifting Under Sarbanes-Oxley

The burden-shifting framework under Sarbanes-Oxley also presents difficulties for the whistleblower,<sup>231</sup> both because he is an employee at

2005).

223. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

224. See *infra* notes 263-64, 280, 282 and accompanying text.

225. See *e.g.*, Bechtel v. Competitive Tech., Inc., 2005-SOX-00033, at 39-40 (citing financial reasons as basis for complainant’s discharge).

226. See OALJ Statistical Overview, *supra* note 193.

227. See *id.*

228. Indeed, employers are often known to successfully claim a bad attitude as a reason for discharge. See, *e.g.*, Platone v. Atl. Coast Airlines Holdings, Inc., 2004 DOLSOX LEXIS 69, at \*84 (Apr. 30, 2004); Yule v. Burns Int’l Sec. Serv., 1993-ERA-12, at 6-7 (May 24, 1995), available at [http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB\\_DECISIONS/ERA/93ERA12D.HTM](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB_DECISIONS/ERA/93ERA12D.HTM) (noting “insubordination” as basis for termination).

229. Stone & Webster Eng’g Corp. v. Herman, 115 F.3d 1568, 1572 (11th Cir. 1997).

230. See, *e.g.*, Bechtel v. Competitive Tech., Inc., 2005 DOLSOX LEXIS 44 at \*101-07. See also OALJ Statistical Overview, *supra* note 191.

231. See, *e.g.*, Platone, 2004 DOLSOX LEXIS 69; Welch v. Cardinal Bankshares

will, as are most other plaintiffs in discrimination suits, and because he is in a unique position. This is so in that in the vast majority of cases, there will have been no past whistleblowing and no history or pattern of discrimination to draw on in proving his case.<sup>232</sup> Lacking these similarly situated persons, and faced with a seemingly legitimate reason for adverse action by the employer,<sup>233</sup> the “whistleblowing” complainant has extreme difficulty ever rebutting the employer’s clear and convincing evidence of its legitimate motive for adverse action.<sup>234</sup>

Moreover, while it is somewhat rare for an employer to be unaware of an employee’s status in a Title VII discrimination case,<sup>235</sup>—it would be very difficult, for example, for an employer to claim it did not know an employee’s sex or race—it is much more common for an employer in a “whistleblowing” situation to claim that it was unaware of the employee’s protected status when it acted adversely against him.<sup>236</sup>

These evidentiary difficulties are borne out in the Sarbanes-Oxley cases decided to date.<sup>237</sup> While a few complainants have been successful in proving their cases at an initial hearing, most have not because their employer puts forth evidence of a “legitimate,” non-discriminatory motive for the adverse action.<sup>238</sup> Employers may be able

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Corp., 2004 DOLSOX LEXIS 41 (Jan. 28, 2004).

232. This stands in contrast to cases determined under Title VII of the Civil Rights Act of 1964. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) (noting that statistics as to petitioner employer’s past hiring practices conformed to a “general pattern” of discrimination).

233. *See supra* notes 128-32 and accompanying text.

234. *See* OALJ Statistical Overview, *supra* note 191 (citing statistics on the resolution of OSHA cases before and after hearings); Tolek Interview *supra* note 180.

235. *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 80 (2d Cir. 2005) (noting that normally an employer would have reason to know a complaining employee’s age, but here the decision to terminate was made by officials at an acquiring company who had apparently never met complainant or reviewed her personnel file).

236. *See* Overall v. Tenn. Valley Auth., 1997-ERA-53 at 9 (Apr. 30, 2001), available at [http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB\\_DECISIONS/ERA/97ERA53D.HTM](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB_DECISIONS/ERA/97ERA53D.HTM) (noting employer managers alleged they were unaware of complainant’s activity when he was laid off). Cases arising under the ERA closely parallel the *McDonnell Douglas* framework in terms of burdens of proof. *Id.* at 12 (noting that employer had articulated a legitimate reason for its actions).

237. *See supra* notes 180-203 and accompanying text.

238. *See, e.g.,* Bechtel v. Competitive Tech., Inc., 2005 DOLSOX LEXIS 44, at \*102-104 (Oct. 5, 2005); Taylor v. Wells Fargo, Tex., 2005 DOLSOX LEXIS 7, at \*35-38 (Feb. 14, 2005) (holding that respondent prevails despite complainant’s



to easily offer what might be seen as “clear and convincing” evidence of such reasons, even if in the form of affidavits or testimony of current employees.<sup>239</sup> In the face of these “witness” statements, from those current employees obviously hoping to please and certainly hoping not to anger their current employers, the whistleblowing employee has great difficulty proving that the stated “legitimate motive” is a pretext for the real reason for the termination.<sup>240</sup>

In one example, a complainant was terminated after she reported missing serviceable tags for aircraft parts, a protected report under AIR 21, and after receiving numerous commendations and raises for her good work at the company in *Parshley v. America West Airlines*.<sup>241</sup> The employer countered, alleging that she had been selected for termination based on performance issues and for cost-cutting purposes.<sup>242</sup> The employer made these assertions although no performance issues were noted in her personnel files prior to her termination, and the employer subsequently hired an outside employee to fill Parshley’s place.<sup>243</sup> The court nonetheless accepted the employer’s testimony as credible<sup>244</sup> and decided that Parshley could not meet her ultimate burden of proof, even where the employer’s hiring of a new outside person belied the employer’s stated reason for termination.<sup>245</sup>

While *Parshley* illustrates just how the burden-shifting framework of Sarbanes-Oxley might present unique problems for the whistleblower

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demonstration that her protected activity was a factor in respondent’s retaliation); *Halloum v. Intel Corp.*, 2004 DOLSOX LEXIS 73, at \*47-48 (Mar. 4, 2004) (noting that judges may draw inferences of causation of employer’s retaliatory action from the facts of the case).

239. See, e.g., *Bechtel*, 2005 DOLSOX LEXIS 44, at \*101-08; *Parshley v. Am. W. Airlines*, No. 2002-AIR-10, at 52-53 (A.L.J. Aug. 5, 2002), available at [http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ALJ\\_DECISION\\_S/AIR/02AIR10B.HTM](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ALJ_DECISION_S/AIR/02AIR10B.HTM).

240. See, e.g., *Taylor*, at \*35-36 (noting even if retaliation was a factor in adverse action against employee, respondent put forth a legitimate non-discriminatory motive for its adverse action); *Halloum*, at \*47-55 (noting that although retaliatory action inferred ultimate decision for respondent in that respondent proved legitimate motive).

241. *Parshley*, at 53-54.

242. *Id.* at 54.

243. *Id.* at 55.

244. *Id.* at 54-55.

245. *Id.* at 55.

under Sarbanes-Oxley<sup>246</sup> a small handful of cases that have been decided thus far have actually parsed through employer's explanations and come to equitable decisions.<sup>247</sup> In these cases, the court has looked closely at an employer's motivations, specifically noting that a "whistleblowing" employee may sometimes "touch a nerve"<sup>248</sup> with his activities. Although there may be no direct evidence of a past discriminatory pattern by the employer or direct evidence that an employer took adverse action based on the protected activity, the investigating and ultimate reporting may have caused the employer to look upon the employee with disfavor.<sup>249</sup>

In *Platone*, the court held that even though the airline for which Platone worked could have legitimately terminated her because she was romantically involved with another employee (involvement that was prohibited by her employer),<sup>250</sup> her reporting nonetheless contributed to the decision to fire her.<sup>251</sup> The court held that the company had to bear the risk that the legal and illegal motives could not be separated.<sup>252</sup> Thus employing a "dual motive" analysis,<sup>253</sup> the administrative law judge found that where Platone demonstrated that her reporting activities contributed to the decision to take adverse action against her, the decision would be in favor of the employee.<sup>254</sup> The court noted that it is not enough that under the circumstances *in retrospect*, the employer made its decision on legitimate grounds.<sup>255</sup> Rather, the employer's

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246. *Id.* at 53-55.

247. *See, e.g., Platone v. Atl. Coast Airlines*, 2004 DOLSOX LEXIS 69, at \*86-87 (Apr. 30, 2004); *Welch v. Cardinal Bankshares Corp.*, 2004 DOLSOX LEXIS 41, at \*184-196 (Jan. 28, 2004) (holding that respondent employer could not present clear and convincing evidence of legitimate reason for termination).

248. *Platone*, at \*77.

249. *Id.* at \*81 (noting that Platone's supervisors were unhappy that she was "looking into the flight loss issue").

250. *Id.* at \*84.

251. *Platone*, at \*81-82; *see also* Asst. Sec'y of Labor for Occupational Safety and Health v. Morin Transp., Inc., Case No. 92-STA-41, at 5 (Oct. 1, 1993), [http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB\\_DECISIONS/STA/92STA41B.HTM](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ARB_DECISIONS/STA/92STA41B.HTM) (discussing dual motive analysis).

252. *Platone*, at \*85.

253. *Id.* at \*84-86.

254. *Id.* at \*87.

255. *Id.* at \*85.

motivation at the time it made its decision is what must be considered.<sup>256</sup> The *Platone* court was unwilling to accept the employer's testimony that there was discontent with the complainant, and general performance issues without some additional contemporaneous proof, such as that which might be found in a personnel file or other periodic reporting file.<sup>257</sup>

### E. Practical Difficulties for Sarbanes-Oxley Whistleblowers

In addition to facing the procedural and substantive difficulties inherent in the Sarbanes-Oxley administrative proceeding, the whistleblowing complainant also faces unique practical challenges that make it difficult for him to meet his burden of proof.

#### 1. Disgraced and Out of Work

In a typical whistleblowing situation, the whistleblower has reported what he knows to his superior, who may or may not be involved in the alleged corporate fraud, or reported the same to the board of directors, and is now potentially disgraced and out of work. It is at this juncture—psychologically weakened and potentially publicly disgraced—that he must become ready and poised to fight a corporate giant.<sup>258</sup>

#### 2. Inequity in Resources

As discussed above, Sarbanes-Oxley complainants have enjoyed little success.<sup>259</sup> This is not a surprise when one considers the vast inequity in resources between the employees and the public companies involved in a Sarbanes-Oxley whistleblower proceeding.<sup>260</sup> Given vast resources, it appears that these large employers can easily beat back accusations of improper termination based on whistleblowing so that the

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256. *Id.*

257. *See id.* at \*85-86.

258. Sarbanes-Oxley by definition only applies to “whistleblowing” in “publicly traded” companies, entities that are by nature large corporate entities. Sarbanes-Oxley § 806 (codified at 18 U.S.C. § 1514A(a)).

259. *See supra* notes 180-202 and accompanying text.

260. *See supra* note 258 and accompanying text.

employee may never have the opportunity to produce enough evidence to make it beyond the investigative stage of the proceedings.<sup>261</sup> Alternatively, the employer's resources allows it to mount an aggressive defense at the hearing stage, where it can readily offer what might be deemed "clear and convincing evidence" of its legitimate reason for adverse action.<sup>262</sup>

### 3. Witnesses are not Available or Willing to Testify

Another difficult and potentially insurmountable obstacle for the Sarbanes-Oxley whistleblower is that he is uniquely situated as an outsider with information to report *vis a vis* his former co-workers and the corporation. Indeed, the situation that leads him to have "whistleblowing" information in the first place may have put him at odds with his colleagues, superiors and the board of directors of the corporation. The damaging information did not likely just come to rest on his desk. A whistleblower may have sought the information out over time; he may have been perceived as an uncooperative person,<sup>263</sup> or "not a team player" as he indirectly or directly disagreed with corporate action or inaction in some manner. His role may be defined by his unwillingness to go along, and he is thus described as "uncooperative." Moreover, this may be a game of egg and chicken: which came first, the "uncooperative" attitude or the unwillingness to engage in unethical and potentially illegal fraudulent behavior?<sup>264</sup>

Finally, an angry employee, because he does not like a general "unethical atmosphere," may actually find reason to "sniff around," further alienating himself from his co-workers and superiors. As he engages in this hunt for information, he alienates himself further<sup>265</sup> from those in positions of power and becomes even more intent on finding

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261. See *supra* notes 32-39, 186-187 and accompanying text.

262. But see *Stone & Webster Eng'g Corp.*, 115 F.3d 1568, 1572 (11th Cir. 1997).

263. See *Platone v. Atl. Coast Airlines*, 2004 DOLSOX LEXIS 69, at \*75-76 (Apr. 30, 2004).

264. *Getman v. Sw. Sec., Inc.*, 2004 DOLSOX LEXIS 71, at \*60, 68 (Feb. 2, 2004) (noting the employer did not complain of poor performance until after the analyst refused to change a stock rating), *rev'd on other grounds*, 2005 DOLSOX LEXIS 18 (Jul. 29, 2005); see also *infra* note 265 and accompanying text.

265. See, e.g., *Platone*, at \*77 (noting that Platone "did in fact touch a nerve" with her investigation).

something wrong at the corporation. Indeed, he may relish the idea of “ratting the company out.” The position of the corporate whistleblower is thus different than the classic discrimination case, in that his case of retaliatory discrimination may develop over time, and he may actually be directly pitted against those persons in power who are engaged in wrongdoing. On the contrary, it is reasonable to assume that in many classic discrimination claimants, such as those that lay claim under Title VII,<sup>266</sup> claimants are not initially antagonistic toward those in supervisory roles.

#### 4. Mandatory Arbitration Agreements

Further complicating matters for the Sarbanes-Oxley whistleblower is the fact that he may have signed a mandatory arbitration agreement with his employer. At least one court has held that a Sarbanes-Oxley whistleblower claim is subject to mandatory arbitration even though the Sarbanes-Oxley proceeding is a statutory discrimination proceeding.<sup>267</sup> One commentator has posited that applying these mandatory arbitration agreements to Sarbanes-Oxley plaintiffs weakens employee positions because arbitration generally favors employers.<sup>268</sup>

The above procedural, substantive and practical difficulties make it difficult for a corporate whistleblower to succeed. If employees are willingly to witness and report fraud, changes are needed in the implementing procedures of Sarbanes-Oxley, the effectuation of those procedures, and in the manner in which the employer’s burden of proof is met.

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266. Title VII of the Civil Rights Act of 1964.

267. *Boss v. Salomon Smith Barney, Inc.*, 263 F. Supp. 2d 684, 685 (S.D.N.Y. 2003). The United States Supreme Court has also held that mandatory arbitration agreements may apply to compel arbitration in employee discrimination cases. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119-23 (2001). The Supreme Court limited its decision somewhat in *Equal Employment Opportunity Comm. v. Waffle House, Inc.*, 534 U.S. 279, 294-98 (2002) (holding that employment discrimination claim could proceed in EEOC even where the employee was party to a mandatory arbitration agreement). Overall, it appears that the Supreme Court favors enforcement of mandatory arbitration agreements even in the context of an employee’s discrimination claims.

268. Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1082-83 (2004).

V. SUGGESTIONS FOR THE FUTURE OF THE SARBANES-OXLEY  
WHISTLEBLOWER PROVISIONSA. Adherence to the Regulatory Timelines

The Department of Labor presently does not closely adhere to the timelines provided under Sarbanes-Oxley.<sup>269</sup> Given that the Sarbanes-Oxley administrative procedure was designed to be an expedited proceeding,<sup>270</sup> OSHA should adhere strictly to the administrative timelines contained in the implementing regulations.<sup>271</sup> The Respondent thus would have a limited twenty days from receipt of the complaint to meet with OSHA and present evidence in support to of its position.<sup>272</sup> If the OSHA investigator then believed that the respondent employer had violated the Act, and that preliminary relief for the complainant was warranted,<sup>273</sup> the employer would only have another very limited period of ten business days to respond and argue against the preliminary award of relief.<sup>274</sup>

If OSHA would adhere to these timelines, it would initially level the playing field in that the employee, while most often having fewer resources than the corporation, has better knowledge of the facts surrounding the adverse action against him.<sup>275</sup> Moreover, the indignant employee is most likely strongest initially, while the corporate giant has been taken by surprise. In contrast, the corporate respondent will begin to investigate once sued, and mount a defense with its vast resources. As it does so, the corporate employer will grow stronger and the employee, who is now most likely out of work, and growing financially and emotionally less strong, will lose morale and the will to fight.

As the proceedings progress, within 60 days of the filing of the complaint, the investigator is supposed to make a determination on behalf of the Assistant Secretary that either preliminary relief is

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269. See *supra* note 48 and accompanying text.

270. See Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, 69 Fed. Reg. 52,104-05 (Aug. 24, 2004) (to be codified at 29 C.F.R. pt. 1980).

271. *Id.* at 52,106-07.

272. *Id.* at 52,107.

273. *Id.*

274. *Id.*

275. See *supra* notes 269-72, *infra* note 276 and accompanying text.

warranted, or that the complaint lacks merit.<sup>276</sup> Again, adhering to this schedule would also benefit the employee, who knows the facts surrounding his adverse employment action best, and would not allow the corporate employee to fully gain the advantage of its vast resources. Adhering to this strict time schedule would also allow the employee to continue to have income if he were granted relief from the administrator, including immediate reinstatement as per the regulations.<sup>277</sup> If, on the other hand, the expeditious proceeding did not result in a favorable outcome for the employee, he could still demand a hearing before the Office of Administrative Law Judges. Finally, expeditiously wrapping up the initial investigative stage of proceedings would allow a hearing to proceed quickly, also to the general benefit of the employee – and again leveling what appears to be a very unequal playing field.<sup>278</sup> The employee would also benefit from the more expeditious proceeding as the employee likely has few witnesses to prepare, since former co-employees (current employees of the corporation) are not likely to testify on his behalf, while the employer has many potential witnesses and must develop a more complicated case for hearing.

*B. Make the Employer's Burden Even More Onerous*

As stated above, the employer can beat back the whistleblower's claim if it can show clear and convincing evidence of a legitimate reason for its action against the employee. This is often easy for it to do given the employer's access to a cadre of potential "witnesses" within its current employee ranks. To redress this inequity, employers could be required to present at least some documentary evidence to support its

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276. Preliminary decisions by the Assistant Secretary that are supposed to be made by the 60-day deadline are not made readily available. 69 Fed. Reg. at 52,108. The Department of Labor has not, however, consistently made a determination within the 180-day deadline. See U.S. Dept. of Labor, Office of Administrative Law Judges, available at <http://www.oalj.dol.gov> (last visited Apr. 24, 2007) (cataloguing and digesting cases by date); see also *supra* note 48 and accompanying text.

277. 69 Fed. Reg. at 52,108. The viability of a preliminary order of reinstatement has been called into question by the *Bechtel* decision. *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469, 472-75 (2d Cir. 2006); *supra* notes 144-45, 147 and accompanying text.

278. See 18 U.S.C. § 1514A(b)(2) (adopting the rules and procedures set forth in 49 U.S.C. § 42121(b)(2)); see also Procedures for the Handling of Discrimination Complaints, 69 Fed. Reg. at 52,108.

adverse action and to defend an employee's case of retaliatory action. I am not suggesting a statutory change, as it is clear that Congress has not required "direct" evidence in Sarbanes-Oxley whistleblower cases, nor has it done so in other discrimination cases.<sup>279</sup> Rather, I am suggesting a normative shift in perception as to what constitutes "clear and convincing evidence" in the case of whistleblowing employees under Sarbanes-Oxley.

This shift in perception, requiring more stringent proof from employers to meet the "clear and convincing evidence" standard, is necessary in that the Sarbanes-Oxley whistleblower is uniquely situated. The Sarbanes-Oxley complainant may have blown the whistle about securities fraud and other crimes. Indeed, he may find that he cannot bear the ultimate burden of persuasion because his immediate past superior, who might be able to attest to his past good work, is under investigation or indictment, and is either unwilling or unable to support the former employee. Moreover, it may be that many of the whistleblowing employee's former colleagues participated in the fraud, are witnesses to the fraud, or are facing criminal or other legal charges in connection with the alleged fraud.

Indeed, the Sarbanes-Oxley complainant may be cut off from all contact with his former colleagues, these former colleagues refusing to get involved either on the advice of counsel, or for fear of "engaging" with a whistleblower. It will often be difficult for a whistleblower complainant to convince any of his former co-workers to talk to him or to testify on his behalf for fear of termination<sup>280</sup> or criminal reprisals. In at least one case, a whistleblowing employee resorted to the use of an affidavit from the CEO of a company with which she had had business dealings to refute the testimony of her direct supervisor.<sup>281</sup> In many instances, however, it will not be possible for a whistleblower to get an employee of another company to vouch for him since even the "outsider" will fear damaging his own relationships with the respondent employer in the process. Additionally, many lower level personnel never have contact with anyone outside the company who would be in a position to vouch for their good work. Yet, these lower level employees

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279. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-99 (2003).

280. *Getman v. Sw. Sec., Inc.*, 2004 DOLSOX LEXIS 71, at \*68-70 (Feb. 2, 2004), *rev'd on other grounds*, 2005 DOLSOX LEXIS 18 (Jul. 29, 2005).

281. *Id.* at \*69 (noting that complainant beat back claims that she was not a competent employee with an affidavit of an officer from another company).



may be the first to witness corporate fraud in a workplace.

The potential criminal ramifications involved in a Sarbanes-Oxley complaint, the often sweeping investigations that accompany whistleblower complaints under Sarbanes-Oxley, and corporate employees' general unwillingness to take the side of a former employee whistleblower all make it difficult—if not impossible—for Sarbanes-Oxley whistleblowers to obtain the help of former colleagues.<sup>282</sup> Sarbanes-Oxley whistleblowers, thus by the nature of what they report on, find themselves in a unique and particularly isolating position *vis a vis* other employees of the corporation.

C. Allow Employee-Access to Employer-Submissions  
During the OSHA Investigation

An anomaly of the Sarbanes-Oxley procedures allows OSHA to keep employer submissions from employees during the investigative stage of the OSHA proceedings.<sup>283</sup> Given the employees' stature—out of work, potentially disheartened, and without resources—this is a critical stage of the proceeding.<sup>284</sup> At this stage, OSHA has a remedy that was intended to be very powerful: the power to order reinstatement of the employee.<sup>285</sup> In many cases, the employer may not want the employee to return to work and an order of reinstatement would be an enormous boon to an employee wishing to settle a dispute with his employer. Yet employers are permitted to submit statements to OSHA during this investigative stage that are not given to the complainant.<sup>286</sup> This unfair aspect of the process should be modified to allow access to submissions for both parties, as the current system does not further efforts to get to the true facts of a dispute.<sup>287</sup>

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282. See OALJ Statistical Overview, *supra* note 193.

283. See 69 Fed. Reg. at 52,106-07; see also *supra* notes 34-39 and accompanying text.

284. See 69 Fed. Reg. at 52,106-07.

285. *But see* *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469, 472-75 (2d Cir. 2006) (questioning the viability of the reinstatement order); *supra* notes 144-45, 147 and accompanying text. See *supra* note 68 for a discussion of the *Welch* case and the reinstatement order therein.

286. See 69 Fed. Reg. at 52,106-07; *supra* notes 34-39 and accompanying text.

287. See 69 Fed. Reg. at 52,106-07; *supra* notes 34-39 and accompanying discussion. Indeed, the United States Supreme Court has said that an airing of factual concerns, however brief, serves due process in the proper context and may avoid

D. Corporate Culture

Corporations must educate employees about corporate compliance issues, and make clear to them that they have a new role in corporate America as “foot soldiers” in the battle against corporate fraud and corporations.<sup>288</sup> Public corporations need to do more to make their employees aware of anonymous reporting hotlines, and make sure those hotlines connect to outside independent persons.<sup>289</sup> They must encourage employees, even those at non-managerial levels, to raise serious questions with their supervisors or, if the situation requires it, with the independent board of directors. Reporting potential violations in house—even to executive management—may not be sufficient, where executive management may be involved in the fraud.<sup>290</sup> The difficulty of course is that there may be occasions where a non-managerial employee may not even know he has come upon corporate irregularity or fraud, let alone whether to report these findings to his boss or a higher authority, who may end up being involved.<sup>291</sup> The best way to solve this problem is to encourage open communication throughout the organization, and to have a reporting line directly to the outside board of directors or outside counsel.

CONCLUSION

When it passed Sarbanes-Oxley, Congress intended to protect whistleblowers once they had blown the whistle. Past cases demonstrate that whistleblowers have been largely unsuccessful when challenging

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erroneous determinations. See *Goldberg v. Kelly*, 397 U.S. 254, 266-68 (1970).

288. Mechanisms for reporting potential violations should be well publicized. Teresa T. Kennedy et al., *About That Compliance Thing . . . Creating and Evaluating Effective Compliance Programs*, 28 (2004) available at <http://www.kpmginsights.com/pdf/compliancething.pdf>.

289. *Id.* at 40.

290. L. Dennis Kozlowski, former chairman and chief executive of Tyco International was, for example, indicted and convicted of larceny and conspiracy. See, e.g., Andy Wickstrom, *Last Straw*, N.Y. TIMES, Aug. 27, 2006, at C2. To whom would a lower level employee at Tyco have safely reported if he had had evidence of the crimes committed at Tyco before the government had such information?

291. See Damon Darlin & Miquel Helft, *H.P. Before a Skeptical Congress*, N.Y. TIMES, Sept. 29, 2006, at C1 (questioning top executives in possible criminal fraud at Hewlett-Packard).

their employer's adverse actions against them. The implementing regulations under the Act need to be followed more closely and courts need to carefully scrutinize an employer's asserted legitimate reasons for acting against a whistleblowing employee. Until these modest but effective changes in the implementation of the Sarbanes-Oxley whistleblower provisions are made, and corporate culture more widely embraces open communication, whistleblowers will not be willing to blow the whistle in America. This is a great loss, as after all, it is those who work in the corporations every day that first bear witness to the transgressions that so often culminate in massive corporate fraud.