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WHISTLER'S NOCTURNE IN BLACK AND GOLD-THE FALLING ROCKET: WHY THE SARBANES-OXLEY WHISTLEBLOWER PROVISION FALLS SHORT OF THE MARK

I. INTRODUCTION

In the wake of corporate scandals that robbed investors of billions of dollars, such as, Enron, WorldCom, and Tyco, the Corporate and Criminal Fraud Accountability Act of 2002, also known as the Sarbanes-Oxley Act,¹ was passed to combat the lack of individual responsibility by placing greater accountability on high-level executives, lawyers and accountants.² Congress responded to a need for regulation of publicly traded companies, in matters involving fraud, by creating criminal and civil regulations for certain corporate malfeasance through the enactment of the Sarbanes-Oxley Act.³ Among the Act's numerous criminal and civil statutes is a whistleblower provision, § 806(a), enacted in 18 U.S.C. § 1514A, that seeks to protect employees from retaliatory employment practices under enumerated circumstances.⁴

Since the passage of Sarbanes-Oxley, there have only been a small number of claims litigated in court, and only a handful of claims have been decided by administrative law judges - mostly in the employer's favor.⁵ Inaccurate claims have the potential to adversely affect the com-

1. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of Title Eighteen of the United States Code); *see also infra* Part I.C.

2. John R. Boatright, *Individual Responsibility and the Sarbanes-Oxley Act*, 6 N.Y. ST. B.A. GOV., L. & POLICY J. 37, 37 (2004). "In introducing this legislation, President George W. Bush intended to help usher in a "new ethic of personal responsibility in the business community." *Id.* (citing Press Release, President Bush, President Announces Tough New Enforcement Initiatives for Reform (July 9, 2002), at <http://www.whitehouse.gov/news/releases/2002/07/20020709-4.html>).

3. *See generally id.* "An emphasis on individual responsibility is reflected in four provisions on the Sarbanes-Oxley Act (SOX). Sections 302 and 404 require that top executives certify the accuracy of certain reports and the effectiveness of internal control systems. Section 304 mandates the return of incentive compensation in the event of a restatement. And Title IX, known as the White Collar Penalty Enhancement Act, greatly increased the fines and sentences for fraud and other misconduct." *Id.* at 37.

4. *See infra* Part III.

5. *See Halloum v. Intel Corp.*, OALJ Case No. 2003-SOX 00007 (Mar. 4, 2004); *Flood v.*

pany's financial well being and stock price, with rippling effects on the market and investor confidence.

This paper addresses the efficacy of the Sarbanes-Oxley Whistleblower provision, for both the employer and employee, through a comparison of the whistleblower provision with other existing retaliation and whistleblower statutes,⁶ and through an analysis of the adequacy of employer protection in the event of false or inaccurate allegations of violations of law made by the employee. The issues involve the preliminary administrative process and proof structures of § 1514A and other statutes, including Title VII, which is the model proof structure for most employment discrimination claims.⁷ In addition, the paper will examine the issues that arise in a mixed-motive situation, where more than a retaliatory motivation for the challenged employment practice on the part of the employer exists.⁸ Furthermore, this paper will view the issues that emerge from an assessment of the reasonableness of the employee's fraud allegations which served as the impetus for the employer's retaliatory conduct.

A. The Enron Scandal

During the 2001 fiscal year, the share value of Enron stock fell from 85 dollars a share to 30 cents.⁹ This was largely a result of individual Enron executives, who turned a blind eye to questionable accounting practices in order to cause the overvaluation of the price of the company's stock.¹⁰ Executives began leveraging loans against the company's weak balance sheet, and manipulating the numbers in the financial statements.¹¹

Cendant Corp., OALJ Case No. 2004-SOX 00016 (Feb. 23, 2004); Welch v. Cardinal Bankshares Corp., OALJ Case No. 2003-SOX 00015 (Jan. 28, 2004); Carnero v. Boston Science Corp., OALJ Case No. 2004-SOX 00022 (Jan. 22, 2004); Cissom v. A.G. Edwards & Sons, Inc. OALJ Case No. 2004-SOX 00028 (Mar. 10, 2003).

6. See *infra* Parts II.C, VI.D.

7. See *infra* Part II.A.

8. See *infra* Part VI.A-C.

9. See Wikipedia, *Enron Corporation*, at <http://en.wikipedia.org/wiki/Enron> (last visited Nov. 1, 2005).

10. *Id.*

11. See Floyd Norris, *Did Ken Lay Understand What Was Happening at Enron?*, N.Y. TIMES, Nov. 16, 2001, at C1. See generally, *Time: Behind the Enron Scandal*, TIME, available at www.time.com/time/2002/enron/ (last visited Nov. 17, 2004) (providing a general overview of the Enron Scandal and its aftermath).

Exactly three years after the eruption of the scandal, investor losses ran into the billions, and tens of thousands of jobs were lost.¹² Both criminal and civil investigations by the Department of Justice, Securities and Exchange Commission, and New York State Attorney General's Office were launched. These investigations have led to convictions and fines, and even raised allegations of White House involvement and executive privilege.¹³

B. Sarbanes-Oxley Act

The Enron Scandal not only shocked American investors, but also had repercussions throughout the world.¹⁴ As the investigations into Enron, WorldCom, Tyco, Citigroup and other industry giants were under way, the public demanded reform.¹⁵ Similar to the financial crisis of the 1920s, a "watershed" developed.¹⁶ In response to the public's cry for reform, Congress passed the Public Company Accounting Reform and Investor Protection Act of 2002, commonly known as the Sarbanes-Oxley Act.¹⁷

This Act created "a framework of government oversight of the accounting profession and its practices, impose[d] a number of certification requirements on corporate officers, restrict[ed] a number of corporate practices involving trading of securities by and loans to corporate officers, impose[d] reporting duties on lawyers, and *provide[d] protection for employees who disclose violations of law perpetrated by corpo-*

12. See Larry Cata Backer, *Symposium Enron and Its Aftermath: The Sarbanes-Oxley Act: Federalizing Norms for Officer, Lawyer, and Accountant Behavior*, 76 ST. JOHN'S L. REV. 897, 904 (2002); see also John Paul Lucci, *Enron -The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211 (2003). "The Enron Corporation ("Enron") debacle was a disaster for its executives, employees, accountants, investment bankers, and defrauded investors. Everyone from employees to underwriters and even corporate executives suffered as a result of Enron's fallout. The carnage did not stop with Enron, Financial Scandals involving WorldCom, Quest, Global Crossing, Tyco, and Enron ultimately cost shareholders \$460 billion." *Id.* at 211.

13. See Akil Reed Amar, *Cheney, Enron, and the Constitution*, TIME ONLINE EDITION, Feb. 2, 2002, at <http://www.time.com/time/nation/article/0,8599,198829,00.html> (last visited Nov. 17, 2004) (discussing Vice-President Dick Cheney's use of executive privilege in order to refuse disclosure of the contents of meetings held with Enron executives in the West Wing pertaining to their discussions about American energy policy).

14. See generally, *After Enron - agenda for reform 2002: Reforms to restore confidence in business*, Financial Times, Feb. 18, 2002, at <http://specials.ft.com/afr2002/FT3Q1GZOUXC.html> (last visited Nov. 17, 2004).

15. See *id.*

16. See *id.*

17. Backer, *supra* note 12, at 897.

rate officers and directors.”¹⁸ Additionally, this Act requires more than simple due diligence from corporate officers and directors.¹⁹ The executives must now exercise both “care and judgment” as well as conduct their due diligence in a more significant manner.²⁰ The Act was designed “to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.”²¹

This investor protection would be fostered through the utilization of a whistleblower provision.²² In turn, this provision protects individuals who come forward to disclose corporate malfeasance or fraud to specified investigators and authorities.²³ Even at its inception, many people thought that the Sarbanes-Oxley Act was simply a reactionary response to the investor confidence crisis that ensued following Enron, without addressing and fixing the actual problems of misbehavior by individuals within the corporation or altering actual legal duties.²⁴ The question of whether excessive liability and burdens are placed on the corporation as a whole, rather than targeting individuals within the corporation, requires a lengthy analysis that exceeds the scope of this paper.²⁵

II. WHISTLEBLOWER PROVISIONS

A. Introduction

Traditionally, under well-established common law, all businesses in the United States were governed by the employment-at-will doctrine, “an employer-employee relationship in absence of a contract and of in-

18. *Id.* See also, Thomas G. Eron, 2002-2003 Survey of New York Law: Employment Law, 54 SYRACUSE L. REV. 991, 1031-34 (2004) (emphasis added) (“Sarbanes-Oxley was designed to increase the reliability and accuracy of corporate reporting, accounting, and auditing practice”).

19. Backer, *supra* note 12, at 908.

20. *Id.* The “care and judgment” should focus on three primary areas: (1) internal corporate controls, (2) ethical rules, and (3) the composition and functioning of the board of directors and the audit committee of the board. *Id.*

21. H.R. REP. NO. 107-610, at 1 (2002). See also 148 CONG. REC. S 1783 at *1786 (2002) (stating that “this bill provides tools that will improve the ability of investigators and regulators to collect and preserve evidence which proves fraud. That means ensuring that corporate whistleblowers are protected and that those who destroy evidence of fraud are punished”).

22. 18 U.S.C § 1514A (2002).

23. *Id.*

24. Boatright, *supra* note 2, at 37.

25. “The question of whether to hold individuals or corporations responsible is addressed by the Coase theorem, which holds that if transactions costs are negligible, then it will not matter how liability is allocated.” *Id.* at 38. Boatright provides a detailed discussion of the benefits of placing liability on corporations, rather than on the individual.

definite duration is terminable at the will of either party.”²⁶ Simply stated, employers can fire their employees at any time and for any reason.²⁷ Even if the employer fired an employee for “a morally bad reason” they could not be punished under the law.²⁸

Over the years, common and statutory laws, both federal and state, have carved out numerous exceptions to the employment-at-will doctrine based on reasons of compelling public interest.²⁹ One such exception has been enacted in the form of state and federal whistleblower provisions, which will be discussed in the following section.³⁰ It is important to recognize that the employment-at-will doctrine still remains the default rule for most jurisdictions examination of employment law.³¹

B. The Whistleblower

A “whistleblower,” or “[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency,”³² is protected by statute in order to promote a particular public policy.³³ Considering whistleblower statutes developed from the codification of common law, there are explicit public policy requirements incorporated into these statutes.³⁴ Such public policy concerns may not be limited to only illegal acts, but may pertain to behavior that the whistleblower considers immoral or contrary to public interest.³⁵

Whistleblower statutes typically include a “good faith” requirement, which can be defined in numerous ways depending on the applicable jurisdiction: absence of malice, honesty of intention, and reason-

26. Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 550 (2004).

27. *Id.* at 550-51.

28. *Id.* at 551.

29. *Id.* See also Eron, *supra* note 18, at 993 (discussing an exception to the at-will doctrine for attorneys abiding compulsion to abide by the Code of Professional Responsibility).

30. See *infra* Part II.C.

31. *Id.*

32. BLACK'S LAW DICTIONARY 1627 (8th ed. 2004). After looking at several editions of Black's Law Dictionary it is interesting to notice the evolution of the definition of the word “whistleblower.” For instance, in Black Law Dictionary's 5th Edition there is no reference to the word whistleblower, however, in the 6th Edition there is a reference, but it is much broader than the 8th Edition's definition. See Black's Law Dictionary 1596 (6th ed. 1990).

33. Cavico, *supra* note 26, at 552.

34. *Id.* at 564. The term “whistleblower” derives from “the act of an English bobby blowing the whistle upon becoming aware of the commission of a crime to alert other law enforcement officers and the public within the zone of danger.” *Id.* at 548.

35. *Id.* Due to the difficulty in defining morality and ethics, except in certain professions, it is rare that states will use these terms as a standard. *Id.* at 562.

able belief.³⁶ In a majority of jurisdictions, a whistleblower does not receive absolute discretion and protection when alleging violations of law.³⁷ “The central good faith question to be answered is whether the employee made the whistleblowing report for a proper purpose, that is, to expose legal wrongdoing, as opposed to merely protecting oneself or one’s co-workers.”³⁸ Simply stated, in order for the court to determine a whistleblower’s good faith, it must not only look at the content of the report, but also at the whistleblower’s motivation.³⁹

It is also important to keep in mind that which is plainly evident from the case law involving other whistleblower statutes. A whistleblower is bound to comply strictly with the terms of the statute in order to garner its protection.⁴⁰ If a whistleblower fails to pay close attention to the details of the provision, in particular the administrative adjudication that must be sought prior to filing a federal claim, then he may be left unprotected to the retaliatory conduct of his employer.⁴¹

C. Whistleblower Statutes

There are a number of federal and state statutes that, similar to § 1514A, prohibit employers from retaliating against employees who “blow the whistle.”⁴² Some statutes protect against retaliation for exposing illegal employment practices: Title VII,⁴³ ADA,⁴⁴ and ADEA.⁴⁵ Other statutes protect against exposing illegal activities conducted during the operation of business, such as Sarbanes-Oxley and other statutes

36. *Id.* at 565.

37. *Id.* at 566.

38. *Id.*

39. *Id.*

40. *Id.* at 554.

41. *Id.*

42. *Id.* at 552 (discussing the “Model Whistleblower Protection Act,” which similarly to Sarbanes-Oxley “protects employees in the private sector who not only disclose designated wrongdoing, but who also object to or refuse to participate in such activity or who assist or participate in pertinent legal proceedings”). See generally, Government Accountability Project, at <http://www.whistleblower.org/model.htm> (last visited Nov. 29, 2004) (developed by the Government Accountability Project (GAP), whose mission is to protect the public interest through the promotion of government and corporate accountability, the advancement of occupational free speech and ethical conduct, and the defense of whistleblowers). This website is a great resource in the study of the latest whistleblower provisions as well as a theatrical analysis of its policy, benefits, and costs. *Id.*

43. 42 U.S.C. § 2000e-3 (2000).

44. 42 U.S.C. § 12203 (2000).

45. 42 U.S.C. § 623 (2000).

to be discussed later in this article.⁴⁶ These statutes attempt to foster a workplace that is not only fair and just, but profitable and equitable for the totality of society.

1. Whistleblower Protection Act

The Whistleblower Protection Act (WPA),⁴⁷ an amendment to the Civil Service Reform Act,⁴⁸ was enacted in 1989.⁴⁹ It attempted to protect federal employees who alert the public of the illegal or dangerous activities of the government by forbidding the federal government from taking or threatening adverse action against a federal employee because the employee disclosed information that he or she reasonably believed showed a violation of law, gross mismanagement, a gross waste of funds, abuse of authority or substantial and specific danger to public health or safety.⁵⁰

In order to state a claim, a federal employee must show “a protected disclosure, knowledge by the retaliating official, and concrete causation of the retaliation by the protected whistleblower activity.”⁵¹ This Act applies to the entire federal government, but similar to Sarbanes-Oxley, it requires that employees exhaust administrative remedies.⁵² Although the scope of this Act may seem rather broad because protection is extended to a variety of situations, it is rather narrow since it is strictly limited to federal employees.

Prior to the enactment of the Whistleblower Protection Act, the then existing federal law provided an individual right of action for employees against their employers in certain cases of reprisals that could be brought before the Merit Systems Protection Board.⁵³ Congress also established the Office of Special Counsel of the Board to protect federal

46. See *infra* Parts II.C.1-4, D, VI.A-D.

47. The Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 (1989).

48. The Civil Service Reform Act of 1978, 5 U.S.C. § 1101 (1978).

49. Wayne N. Outten, Scott Moss, Piper Hoffman & Claire Shubik, *When Your Employee Thinks You Acted Disloyally: The Guarantees and Uncertainties of Retaliation Law*, 693 PRACTICING L. INST.: LITIG. & ADMIN. PRACTICE COURSE HANDBOOK SERIES – LITIG. 151, 163 (2003).

50. *Id.* at 163-64.

51. *Id.* at 164.

52. *Id.*

53. 5 U.S.C. § 1221(a). The Merit Systems Protection Board is a quasi-judicial body with whom whistleblowers can file claims of retaliation. As established in § 1204(a), the Board's purpose is to “hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board, and has the power to order a federal agency or employee to comply with its order. 5 U.S.C. § 1204(a).

employees from prohibited personnel action.⁵⁴ Despite being established to protect employees, an overwhelming majority of allegations received by the Office of Special Counsel were dismissed. There were concerns that the procedures and systems that were established for handling the whistleblower claims were not only inadequate for addressing whistleblower claims, but also had the effect of discouraging whistleblowing by federal employees.⁵⁵ The Whistleblower Protection Act sought to make it easier for federal employees to prove retaliation by reducing the burden-of-proof employees were required to show the agency.⁵⁶ The stated purpose of the Amendment was to provide incentives to federal employees to blow the whistle, and report waste and mismanagement within the various governmental agencies.⁵⁷

2. Federal Aviation Act

The Wendell H. Ford Aviation Investment Act for the 21st Century (hereinafter "AIR 21") extended whistleblower protection to employees in the aviation industry, particularly for airline employees and airline subcontracted employees.⁵⁸ This whistleblower provision is similar to Sarbanes-Oxley considering employees alleging retaliation can also show the protected activity was a contributing factor in the employment termination.⁵⁹ This similarity is not surprising since the Sarbanes-Oxley whistleblower provision was modeled after AIR 21's provision, and ex-

54. 5 U.S.C. §§ 1211-1212. The Office of Special Counsel (OSC) is empowered to "receive and investigate allegations or prohibited personnel action," and if necessary, may bring a petition for corrective action. 5 U.S.C. § 1212(a)(2)(A). There are two ways by which a whistle blowing employee can bring a claim of retaliation before the Board. Under certain circumstances, a tenured employee may bring a claim directly to the Board in the form of an appeal from an adverse agency personnel action. Non-tenured employees must follow the alternative route; they must make "a § 1206(c)(1)(B) petition for 'corrective action' by the OSC." *Wren v. Merit Systems Protection Bd.*, 681 F.2d 867, 873 (1982). Therefore, if the employees carry a weighty burden, the OCS effectively acts as a bar for non-tenured employees.

55. 135 Cong. Rec. S2804-01 (daily ed. Mar. 16, 1989) (statement of Sen. Adams).

56. *Id.* The Whistleblower Protection Act, in amending the Civil Service Reform Act, sought to assist federal whistleblowers by also allowing them "to appeal directly to the merit board within 60 days of the OSC terminating the investigation or within 120 days of seeking corrective action from the OSC. In addition, the measure restrict[ed] the OSC from acting in a manner that [was] contrary to the complainant's interest such as leaking evidence or information about the complainant to the employer." *Id.*

57. *Id.*

58. Wendell H. Ford Aviation Investment Act for the 21st Century § 519, 49 U.S.C. § 42121(b) (2003 Supp.).

59. Eron, *supra* note 18, at 1032. Compare 18 U.S.C. § 1514A(b)(2), with 49 U.S.C. § 42121(b)(2)(B)(i). See also, 49 U.S.C. § 42121(b)(2)(B)(ii).

plicitly requires the procedures for AIR 21 be followed for a § 1514A claim. Nevertheless, if the defendant demonstrates through clear and convincing evidence that he would have “taken the same unfavorable personal action” given the employee’s performance, then he is not liable.⁶⁰

3. False Claims Act

Under the False Claims Act, individuals may bring civil suits against the United States Government in a few select areas.⁶¹ An employee subject to an adverse retaliatory action for disclosing their employer’s false claim against the federal government is protected as a whistleblower.⁶² Consequently, the False Claims Act protects an employee from reporting their employer to the federal government.⁶³ However, the employee must be in an actual employment relationship with his employer;⁶⁴ the employee must have some form of contractual relationship with the employer.

4. State Whistleblower Statutes

The New York State Legislature would not eliminate the employment-at-will doctrine, but it was willing to alleviate malfeasance through the passage of whistleblower provisions.⁶⁵ In 1984, the New York State Legislature passed the Civil Service Law § 75-b.⁶⁶ This Statute grants whistleblower protections for public employees who disclose certain information to other government entities.⁶⁷ It does not provide protection for public employees “who disclose governmental misconduct or perceived misconduct to members of the media,” or other non-governmental organizations.⁶⁸

60. Enron, *supra* note 18, at 1032. This is an example of a mixed motive. *See also*, Cavico, *supra* note 26 at 563-64 (providing a detailed analysis of “mixed motive.”).

61. Outten, *supra* note 49, at 167; 31 U.S.C. § 3730.

62. Outten, *supra* note 49, at 167

63. *Id.* at 169.

64. *Id.*

65. William A. Herbert, *Protections for Public Employees Who “Blow the Whistle” Appear to be Inadequate*, 76 N.Y. St. B.A. L.J. 20, 20 (2004). This article provides a comprehensive discussion and analysis of existing statutes and case law shielding public employees from retaliation, and comes to the conclusion that they are inadequate in preventing the “natural and inherent fear of reprisal felt by most employees.” *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

Nevertheless, the type of disclosure protected is broad and not limited to the reporting of health and safety violations, like its private sector counterpart, Labor Law § 740.⁶⁹ This statute, although limited in scope, broadly interprets the word “employer,” to encompass “any person, firm, partnership, institution, corporation, or association that employs one or more employees.”⁷⁰

D. Retaliation Claim Under Title VII

Sarbanes-Oxley is still in its infancy. When cases first began to appear in federal court, there was no existing case law that treated whistleblower claims under the Act. Courts turned to existing case law that dealt with whistleblower actions created by other federal statutes, and looked at the analysis used by courts in Title VII retaliation claims.⁷¹

When an employer terminates a whistleblower for his role in a federal investigation of fraudulent corporate behavior on the part of the employer, he is, in the most general sense, engaging in retaliatory behavior. Title VII addresses the need to protect employees who respond to Title VII violations in the workplace by either opposing the unlawful practice or by participating in an investigation, proceeding or hearing.⁷² The retaliation provision, in pertinent part, reads as follows:

69. N.Y. LAB. LAW § 740 (McKinney 2003); Herbert, *supra* note 65, at 20.

70. N.Y. LAB. LAW § 740 (McKinney 2003).

71. See Collins v. Beazer Homes USA, Inc., 334 F. Supp.2d 1365, 1381 (N.D. Ga. 2004); Willis v. Vie Financial Group, Inc. No. 04-435, 2004 U.S. Dist. LEXIS 15753, at *1, *10-15 (E.D. Pa. 2004).

72. The Supreme Court has recognized the need for private enforcement of discrimination statutes. In a recent case involving a Title IX violation, the Supreme Court ruled that whistleblowers are protected from retaliation resulting from their reports of violations of Title IX, which prohibits discrimination on the basis of sex by recipients of federal education funding. Jackson v. Birmingham Bd. of Educ., 2005 U.S. LEXIS 2928, at *1, *19 (2005). The Court emphasized the importance of protecting whistleblowers who report Title IX violations:

Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX’s enforcement scheme would unravel. Recall that Congress intended Title IX’s private right of action to encompass claims of a recipient’s deliberate indifference to sexual harassment. Accordingly, if a principal sexually harasses a student, and a teacher complains to the school board but the school board is indifferent, the board would likely be liable for a Title IX violation. But if Title IX’s private right of action does not encompass retaliation claims, the teacher would have no recourse if he were subsequently fired for speaking out. Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied.

Id. at *25-26.

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment. . .because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.⁷³

Section 704(a) of Title VII extended protection to employees who engaged in those specified activities from the retaliatory conduct of their employers, expressly creating for them a private action for wrongful termination.⁷⁴ As shall be discussed later, distinctions between the underlying purposes and goals of Title VII and Sarbanes-Oxley may affect the degree to which Sarbanes-Oxley claims ought to rely on Title VII analysis.

III. THE ELEMENTS OF THE SARBANES-OXLEY WHISTLEBLOWER PROVISION

A. Introduction

Under § 1514A, for an employee to invoke whistleblower protection, the employer must meet certain defining criteria enumerated in the statute.⁷⁵ Similar to other whistleblower provisions, this criteria is often very specific and complicated. The stringency of these defining criteria can often determine the effectiveness or inefficiency of a whistleblower provision.

B. Requirements

To qualify as an employer, the company must either hold a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or must be required under Section 15(d) of the Securities Exchange Act to file reports.⁷⁶ Employer status is further extended by the statute to include “any officer, employee, contractor, subcontractor, or agent of such company.”⁷⁷

73. See 42 U.S.C. § 2000e-3(a) (2004).

74. *Id.*

75. 18 U.S.C. § 1514A.

76. 18 U.S.C. § 1514A(a).

77. *Id.*

As set forth in the statute, an employer is prohibited from engaging in certain discriminatory conduct in retaliation for an employee's performance of an enumerated protected conduct.⁷⁸ Such prohibited employment practices include discharging, demoting, suspending, threatening, harassing or discriminating against the employee in some form in the terms and conditions of his employment.⁷⁹

In furtherance of the goal of Sarbanes-Oxley to gather information on corporate fraud, the whistleblower provision seeks to protect certain activities by an employee responding to his employer's malfeasance. Protected conduct encompasses behavior by the employee where he provides information, causes information to be provided or assists in an investigation "regarding any conduct which the employee *reasonably believes* constitutes a violation of sections 1341, 1343, 1344, or 1348 [of the Sarbanes-Oxley Act], any rule of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."⁸⁰ For protection to attach, the information pertaining to the violation must be provided to an authoritative body specified by the statute.⁸¹ Additionally, an employee is protected in filing, causing to be filed, testifying, participating in or assisting in a proceeding filed or about to be filed, with the knowledge of the employer, pertaining to an alleged violation of one of the aforementioned rules.⁸²

C. Jurisdiction

Initial jurisdiction in adjudicating a discrimination claim under § 1514A(a) is conferred upon the Secretary of Labor.⁸³ However, according to the 180 day rule, jurisdiction may transfer from the Secretary of Labor to a federal district court.⁸⁴ According to the 180 rule, the federal court can gain jurisdiction if a final decision is not issued by the Secre-

78. *Id.*

79. *Id.*

80. § 1514A(a)(1).

81. § 1514A(a)(1)(A)-(C). Specifically, for protection to attach, the information must be provided to one of the following: (a) a Federal regulatory or law enforcement agency (b) a Congressional committee or any member of Congress (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 terminated misconduct)." *Id.*

82. § 1514A(a)(2).

83. § 1514A(b)(1)(A).

84. § 1514 A(b)(1)(B).

tary of Labor within 180 days of complainant's filing.⁸⁵ Once jurisdiction transfers, the complainant may bring his whistleblower cause of action to an appropriate federal district court for *de novo* review of his claim.⁸⁶

D. Procedures/Prima Facie Case

The procedures established by § 1514A for adjudicating a claim under the whistleblower provision follow the complaint procedures enumerated by the whistleblower provision of the Aviation Investment Reform Act for the 21st Century (AIR 21).⁸⁷ In making out his *prima facie* case, the complainant is required to demonstrate that his protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint."⁸⁸ Courts have interpreted "demonstrate" as requiring the plaintiff prove his case by a preponderance of the evidence.⁸⁹ The complainant, therefore, must show by a preponderance of the evidence that (1) he engaged in protected activity; (2) the employer had knowledge of the protected activity; (3) complainant suffered an unfavorable employment action; and (4) circumstances exist to sufficiently suggest the protected activity was a contributing factor in the employment decision.⁹⁰

Once the plaintiff has met his burden of proving his case, a rebuttable inference of discrimination is raised. The defendant is afforded an opportunity to avoid an investigation by the Secretary of Labor by rebutting the inference. The inference of discrimination is rebutted, and an investigation avoided, if the employer can demonstrate, "by clear and convincing evidence," that he would have taken the same personnel action, even absent the employee's protected activity.⁹¹ Additionally, such a showing by the defendant employer would preclude the complainant from receiving any relief prescribed by the statute.⁹²

85. *Id.* Jurisdiction will not transfer to Federal court if it is shown that the delay was due to the claimant's bad faith. However, the amount in controversy has no bearing on an appropriate federal district court gaining jurisdiction. *Id.*

86. *Id.*

87. See § 1514A(b). The rules and procedures governing whistleblower claims under the AIR Act were codified in 49 U.S.C. § 42121(b).

88. § 42121(b)(2)(B)(iii).

89. *Collins*, 334 F. Supp. 2d at 1375 n.13.

90. *Id.* at 1375.

91. 49 U.S.C. § 42121(b)(2)(B)(ii).

92. § 42121(b)(2)(B)(iv).

E. Friends of the Whistleblower Provision

1. Section 1107: Retaliation Against Informants

Section 1514A modified employment law by establishing a private action for employees who are victims of retaliation as a result of providing information concerning violations of law.⁹³ Congress also included a statute in the Sarbanes-Oxley Act that criminalized employer retaliation, with some differences between the elements of the civil action and the criminal offense.⁹⁴ Under § 1513(e), “[w]hoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense” commits a criminal offense.⁹⁵

Originally enacted in 1982, § 1513 was to provide protection for witnesses and informants.⁹⁶ Subsection (e) was added as an amendment to § 1513 in 2002 to extend the protection for informants against retaliation.⁹⁷ Prior to the addition of subsection (e), informants were not protected against retaliation directed at intangible property.⁹⁸ Only retaliation that resulted in bodily injury to another person or resulted in damages to the tangible property of another person was proscribed by the statute.⁹⁹ Therefore, no crime was committed by an employer who terminated an employee acting as an informant, because employment was not considered “tangible property.” Subsection (e) added protection to whistleblowers by criminalizing any retaliation that interfered with the employee’s employment.¹⁰⁰

Noticeable differences exist between sections 1514A and 1513. First, § 1513(e) is broader in scope than § 1514A. Section 1513 does not require as narrow a causal relationship between the employee’s whistleblowing activities and the employer’s retaliation as does § 1514A. The

93. See § 1514A.

94. See Sarbanes-Oxley Act § 1107, 18 U.S.C. § 1513 (2004).

95. *Id.*

96. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(a), 96 Stat. 1248, 1250 (1982) (codified as amended at 18 U.S.C. § 1513 (2002)).

97. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1107, 116 Stat. 745, 810 (codified as amended at 18 U.S.C. § 1513 (2002)).

98. See Victim and Witness Protection Act of 1982, § 4(a), 96 Stat. at 1250.

99. See *id.*

100. See Sarbanes-Oxley Act of 2002, § 1107, 116 Stat. at 810.

whistleblower protection in § 1514A only covers retaliation directed at the employee who informed authorities about violations of law.¹⁰¹ Under § 1514A, no employer “may discharge, demote, suspend, threaten, harass, or in any other matter discriminate against an employee in the terms and conditions of employment because of any lawful act *done by the employee*.”¹⁰² Section 1513, on the other hand, does include narrow language that would seem to limit its application to situations involving retaliation against the actual informants.¹⁰³ The language of § 1513(e) prohibits an employer from taking “any action harmful to *any person*, including interference with the lawful employment or livelihood of *any person*.”¹⁰⁴ In a situation where a husband and wife both work for the same employer, and the wife is fired because of her husband’s whistleblowing activity, neither party would have a civil action under § 1514A, but a criminal action could still be brought against the employer under § 1513(e).

Another noticeable difference is the broad language adopted by § 1513 in not specifically defining to whom the statute applies.¹⁰⁵ Section 1514A is limited to corporations with publicly traded registered securities, as well as to the company’s officers, employees, contractors, subcontractors, and any other such agent.¹⁰⁶ However, § 1513 employs the non-specific and all inclusive language of “[w]hoever.”¹⁰⁷ Under this broad application, any employer, federal or private, employing any number of employees can be held criminally liable, regardless of whether the company has registered securities.¹⁰⁸ Section 1513(e) would seem to also extend to acts of retaliation against employees reporting Title VII violations to the EEOC.¹⁰⁹

2. Section 301(m): Standards Relating to Audit Committees

Fear of reprisal for reporting violations internally is a real concern that is reflected in the statutes of Sarbanes-Oxley. Section 1514A pro-

101. See § 1514A(a).

102. *Id.* (emphasis added).

103. See § 1513(e).

104. *Id.*

105. See *id.*

106. § 1514A.

107. § 1513.

108. *Id.*

109. 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, 1070-75 (2004).

protects employees from retaliation by the employer because the employee provided information to a person with supervisory authority over the employee regarding conduct the employee reasonably believed to be in violation of securities law.¹¹⁰ The person with supervisory authority over the employee may be some other person working for the employer with authority to "investigate, discover, or terminate misconduct."¹¹¹

This fear of reprisal is also implicitly recognized in § 301 of the Sarbanes-Oxley Act, which as a matter of corporate responsibility, amended the standards relating to company auditing committees.¹¹² Section 301, hereinafter referred to as § 78j-1, was amended to include subsection (m), which established standards relating to audit committees.¹¹³ Members of the audit committee are required to be members of the board of directors of the issuing company, and must be independent.¹¹⁴ The responsibilities of the auditing committee include "the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters," and they are required to establish procedures for performing these tasks.¹¹⁵

Fear of reprisal would discourage employees from submitting complaints to the auditing committee. To combat this fear and to encourage the filing of complaints, auditing committees are required to "establish procedures for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."¹¹⁶ This second requirement of facilitating the anonymous submission of the complaint serves the employer's interests, as well as the employee. The obvious benefit to the employee is that he is assured protection from retaliation in the form of anonymity. Employers also benefit from procedures that encourage employees to submit concerns because it affords the employer an opportunity to cure internal defects. Furthermore, should the company fail to comply with the auditing committee standards established in § 78j-1(m), the company will be prohibited from listing any securities on the market.¹¹⁷

110. § 1514A(a)(1)(C).

111. *Id.*

112. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775-76 (codified as amended at 15 U.S.C. § 78j-1 (2002)).

113. *Id.*

114. 15 U.S.C. § 78j-1(m)(3)(A).

115. § 78j-1(m)(4)(A).

116. § 78j-1(m)(4)(B).

117. § 78j-1(m)(1)(A).

IV. GENERAL INEFFICIENCIES OF SARBANES-OXLEY

A. Introduction

Almost three years after the passage of Sarbanes-Oxley, the verdict is still out whether Sarbanes-Oxley and its whistleblower provision, § 1514A, will be able to prevent the next Enron. One thing that is clear, however, concerning the development and utilization of Sarbanes-Oxley and § 1514A, is that it has not been greatly utilized since its inception.¹¹⁸ This section will discuss some reasons why Sarbanes-Oxley and its whistleblower provision, § 1514A, are inadequate in protecting fraud and corporate malfeasance as the statute is written today.

B. Statutory Guidelines Too Stringent

1. Scope of the Parties

In general, the primary reason for a whistleblower statute is to protect a particular public policy in part due to the structure of our traditional business system, which is almost exclusively governed by the "employment-at-will-doctrine."¹¹⁹ In this specific circumstance, the primary concern is the prevention of corporate malfeasance and restoration of investor confidence. However, explicit in the language of Sarbanes-Oxley is that a whistleblower can only bring his claim to three bodies: the government, Congress or his supervisor.¹²⁰ These three strict limitations create a rigid system, which greatly infringes on the whistleblower's flexibility in reporting legal violations if she feels reporting to one of the enumerated categories would place her in professional jeopardy.

118. See *infra* Part V. Nevertheless, it is important to keep in mind that one should not overstate this trend because it is common for new statutes to get little attention or utilization, however, one should also remember that fact does not change the fact that Sarbanes-Oxley was still poorly conceived to meet its purported purpose.

119. See *supra* notes 26-28 and accompanying text. More simply, because employers can fire their employees for any reason, or for no reason, the government has to provide a specific protection. *Id.*

120. 18 U.S.C. §§ 1514A(a)(1)(A) (C) (2004) ("(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with a supervisory authority over the employee [or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct]"). *Id.*

Whatever the reason may be, there could certainly be a legitimate allegation of fraud for which the potential whistleblower will not come forward if she is not comfortable with whom she must direct her complaints. Consequently, many legitimate avenues for complaint are not open to a whistleblower under § 1514A. "For example, an employee that conveys the information to the press or an inferior employee may not be subject to the protection of the Act, since these groups are not included within the class of persons to which information may be conveyed."¹²¹

As discussed earlier, § 301 of the Sarbanes-Oxley Act amended § 78j-1 to include subsection (m), which required audit committees to establish procedures for receiving, retaining and treating complaints received by employees regarding "accounting, internal accounting controls, or auditing matters" of the employer company.¹²² Additionally, auditing committees are further required to "establish procedures for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."¹²³

Fear of reprisal would discourage employees from submitting complaints to the auditing committee.¹²⁴

Section 301, however, has been challenged as not going far enough to meet the needs the amendment was intended to satisfy.¹²⁵ Professor Miriam A. Cherry, in her article, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, charges that Sarbanes-Oxley's inclusion of subsection (m) was inadequate since "§ 301 fails to specify what types of procedures are adequate."¹²⁶ Words with indeterminate meaning, such as "retention" and "treatment," are left undefined by the Act, with the potential effect that no action will be taken in response to the filing of complaints with the audit committees.¹²⁷ "Thus, like the proverbial tree in the forest, whistleblowers can report problems under the Act, but there is no guarantee that anyone- on the audit committee or otherwise- will necessarily hear them."¹²⁸

121. Backer, *supra* note 12, at 940. Surprising, considering substantial amount of government malfeasance is exposed by the media: Watergate, Iran Contra, etc.

122. § 78j-1(m)(4)(A). See *supra* Part III.E.2.

123. § 78j-1(m)(4)(B).

124. See *supra* Part III.E.2.

125. See Cherry, *supra* note 109, at 1070-75.

126. *Id.* at 1071.

127. *Id.*

128. *Id.* In essence, Professor Cherry is calling for more specific guidelines for audit committees to follow when addressing employee complaints. While narrowly tailored procedures may compel audit committees to respond to complaints, it necessarily comes at the cost of providing

2. Statutory Deadline

In order for an employee to be covered under Sarbanes-Oxley, she must “file a complaint with the Secretary of Labor within ‘90 days after the date on which the violation occurs.’”¹²⁹ This provision does not provide ninety days after the violation is discovered, but rather ninety days after the “violation occurs.”¹³⁰ This limitation drastically affects the feasibility of the Act for a number of reasons. First, in complex corporate transactions, it is often very difficult to determine at what point a violation occurs, especially if the party is not in a managing role. Second, even if a violation occurs and is discovered within three months, the question must be raised as to whether this gives a party enough time to decide whether to become a whistleblower.

It is important to keep in mind that the whistleblower provision is not only meant to protect the whistleblower, but more importantly, it is implemented to protect the governmental policy.¹³¹ Under the aforementioned statutory constraints, “[m]any employees otherwise entitled to protection will find themselves unable to rely on the protection of the Sarbanes-Oxley Act for waiting too long to assert their rights.”¹³² The governmental policy is not served.

3. Standard of Reasonableness

Employees (a broadly defined term) of companies that hold a class of securities under Section 12 of the Securities Exchange Act, or of those companies required under Section 15(d) of the Securities Exchange Act of 1934, are protected under Sarbanes-Oxley Act for aiding

companies with the flexibility of creating procedures that best suit their needs and fit their capabilities. Moreover, underlying this call for stricter guidelines is a presumption that companies have little incentive to establish proper procedures. However, other features of Sarbanes-Oxley encourage companies to properly comply with § 301(m). As noted previously, a number of whistleblower statutes, both state and federal, include a “first report” requirement, wherein a whistleblower is required to “first report” the violation of law to the employer so as to provide an opportunity for the employer to cure the defect. Should the whistleblower fail to make this “first report,” he cannot invoke the protection of the whistleblower statute. See Part VI.D. Noticeably absent from § 1514A is a “first report” requirement. Therefore, the only opportunity a company has for curing any defects before external intervention is involved is through the establishment of adequate procedures for the proper handling of employee complaints.

129. Backer, *supra* note 12, at 940 (citations omitted).

130. § 1514A(b)(2)(D).

131. See *supra* notes 33-35 and accompanying text.

132. Backer, *supra* note 12, at 941. See *infra* note 158 and accompanying texts (exhibiting how the defense used the statutory requirement as an argument for a motion to dismiss).

in an investigation “regarding any conduct which the employee *reasonably believes* constitutes a violation” of federal securities law.¹³³ However, the “Act does not make clear whether a subjective or objective standard is to be used.”¹³⁴ In accordance with most judicial interpretations of this issue, an “objective” standard will emerge.¹³⁵ Unfortunately, this has the potential of greatly limiting whistleblower action considering employees fear that their belief may not be reasonable.

V. FEDERAL CASES DEALING WITH CLAIMS FILED UNDER § 1514A

A. Introduction

To date, since the enactment of Sarbanes-Oxley in 2002, only a few cases have been decided in federal courts on the merits. Three such cases addressing causes of actions created by § 1514A include *Murray v. TXU Corp.*, *Willis v. VIE Financial Group, Inc.*, and *Collins v. Beazer Homes U.S.A., Inc.*¹³⁶ This section will examine how each case addressed the whistleblower claims, and the manner in which they applied the statutory rules and procedures for handling the claims.

B. *Murray v. TXU Corp.*

The first case arising in federal court, in which the plaintiff alleged a violation of the Sarbanes-Oxley whistleblower provisions, was brought by William J. Murray against the defendant TXU Corp.¹³⁷ In *Murray v. TXU Corp.*, the employer filed a motion to dismiss for lack of subject matter jurisdiction.¹³⁸ The employer alternatively filed a motion to stay so as to permit the Secretary of Labor time to investigate the employee’s claims.¹³⁹ Both motions were denied by the court.

133. § 1514A(a).

134. Backer, *supra* note 12, at 940.

135. *Id.*

136. *Collins*, 334 F. Supp. 2d 1365; *Willis v. Vie Financial Group, Inc.* 2004 U.S. Dist. LEXIS 15753 (E.D. Pa. 2004); *Murray v. TXU Corp.*, 279 F. Supp. 2d 799 (N.D. Tex. 2003).

137. *Murray*, 279 F. Supp. 2d at 801.

138. *Id.*

139. *Id.* at 801 & n.1, 805.

In assessing the defendant's motion to dismiss, the court in *Murray* outlined the conditions that would deprive the district court of jurisdiction. According to the court's decision:

[a] federal district court lacks jurisdiction under § 806 of the Sarbanes-Oxley Act if (1) the plaintiff failed to file a complaint with the Secretary of Labor within ninety days of the alleged violation; (2) the Secretary issued a final decision within 180 days of the filing of a § 806 complaint; (3) the plaintiff filed suit in a federal district court less than 180 days after filing such a complaint; or (4) there is a showing that the Secretary failed to issue a final decision within 180 days due to the plaintiff's bad faith.¹⁴⁰

The defendant challenged the court's jurisdiction on two grounds. First, the defendant argued the complaint was not filed in a timely manner with the Secretary, specifically claiming the complaint was not received by an authorized member of the Department of Labor.¹⁴¹ Second, the defendant asserted jurisdiction was lacking because the plaintiff "caused or contributed to the Department of Labor not having the requisite 180 days to investigate his complaint."¹⁴²

The court found that the defendant had the burden of rebutting the presumption that the complaint was filed timely by presenting evidence that the complaint was not properly received.¹⁴³ Concluding the defendant failed to meet this burden, the court found that the complaint was filed in a timely manner with the Secretary by the plaintiff, and it was filed more than 180 days before suit was brought in federal court.¹⁴⁴ Moreover, the court determined there was insufficient evidence offered by the defendant that would show the delay was attributable to plaintiff's bad faith.¹⁴⁵

The Secretary of Labor is required to issue a written notice to the person named in the complaint and to the employer, informing the recipient of the notice of the filing of the complaint by the employee, as well as the allegations contained therein, the substance of the complainant's evidence supporting the allegations, and the opportunities available to the defendant.¹⁴⁶ In arguing bad faith on the part of the plaintiff con-

140. *Id.* at 802.

141. *Id.* at 802-03.

142. *Id.* at 804.

143. *Id.* at 803.

144. *Id.* at 804.

145. *Id.*

146. § 1514A(b)(2); § 49 U.S.C § 42121(b)(2)(A).

tributed to the delay, TXU Corp. suggested that the “delay was caused by Plaintiff’s failure to contact the Secretary after not receiving the written report that came due sixty days after he filed his complaint.”¹⁴⁷ The court was not persuaded by the defendant’s suggestions and refused to find “bad faith” on the part of the plaintiff.¹⁴⁸ While “not holding the Secretary’s feet to the irons might well delay a final decision,” reasoned the court, “[i]t is also plain that such failures or omissions do not by themselves indicate bad faith.”¹⁴⁹ The plaintiff is not required to act as the Secretary of Labor’s overseer in ensuring the Secretary follows the statutory requirements in a timely fashion.

Based on these findings, the court denied defendant’s motion to dismiss.¹⁵⁰ In addition, the court denied the motion to stay, finding no basis in the statutory framework that would prevent a claimant’s access to federal court if his claim were to fall “through the proverbial cracks.”¹⁵¹

C. Willis v. VIE Financial Group, Inc.

A more comprehensive analysis of a Sarbanes-Oxley whistleblower claim was conducted by the court in *Willis v. VIE Financial Group, Inc.*¹⁵² Whistleblower claims were filed by two plaintiffs who were both employees of Vie Financial Group, Inc. (hereinafter “Vie”). Both plaintiffs, Julian Willis and Mick Caliri, alleged their employer, Vie, retaliated against them for reporting violations of federal securities laws and NASD licensing requirements to individuals possessing supervisory authority over the plaintiffs, as well as registering a complaint with the company’s board of directors.¹⁵³ Willis claimed Vie violated § 1514A by “threatening to terminate him, stripping him of his job responsibilities, and terminating him.”¹⁵⁴ In Caliri’s claim, he alleged the whistleblower provision was violated when he was placed on administrative leave and subsequently terminated.¹⁵⁵

In response to Willis’s claim alleging a violation based on a threat to terminate and his termination, Vie argued this portion of his claim

147. *Murray*, 279 F. Supp. 2d at 804.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 805.

152. *Willis v. Vie Financial Group, Inc.* 2004 U.S. Dist. LEXIS 15753 (E.D. Pa. 2004).

153. *Id.* at *1-4.

154. *Id.* at *5.

155. *Id.*

should be dismissed for failure to satisfy the administrative exhaustion requirements of § 1514A.¹⁵⁶ As to the remainder of Willis's claim and Caliri's claim, the defendant argued the claims should be dismissed for failure to state a claim.¹⁵⁷ The court treated both motions by the defendant as a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).¹⁵⁸

The primary issue that arose before the court in *Willis* was whether recovery for a separate and distinct act of retaliation that arose after an administrative complaint was filed, but was not presented to the administrative agency for investigation, was precluded by the exhaustion requirements of § 1514A.¹⁵⁹ This issue necessitated an analysis by the court of the administrative scheme of the whistleblower provision.

The Court in *Willis* characterized the "administrative scheme underlying the Sarbanes-Oxley Act" as "judicial in nature, and is designed to resolve the controversy on its merits."¹⁶⁰ From the time of the alleged violation, complainant has 90 days to file a complaint with the Occupational Safety and Health Administration (OSHA), and if no administrative decision is delivered within 180 days of the filing, the plaintiff is free to bring his claim in federal court.¹⁶¹ From the time of the initial filing, OSHA has 60 days to issue written findings of whether reasonable cause exists to believe the employer retaliated against the employee in violation of the Act, and will include a preliminary order for relief if reasonable cause is found.¹⁶² Both parties may file objections and request a hearing, which is to be scheduled before an Administrative Law Judge (ALJ).¹⁶³ Following the issuance of a decision by the ALJ, both parties may file a petition for review by the Administrative Review Board, which is limited to a review of only the ALJ's factual findings under the substantial evidence standard.¹⁶⁴ Once the Board issues a final order, the

156. *Id.*

157. *Id.*

158. *Id.* at *5 n.3. Defendant argued that the motion to dismiss for failing to satisfy the administrative exhaustion requirements involved a jurisdictional issue, and as such, should have been treated as a motion to dismiss for lack of subject-matter jurisdiction, pursuant to Rule 12(b)(1). The court disagreed, noting that "[t]he Third Circuit treats motions based on administrative exhaustion arguments as motions for failure to state a claim under Rule 12(b)(6)." *Id.*

159. *Id.* at *1.

160. *Id.* at *15.

161. *Id.* at *7.

162. *Id.* at *8.

163. *Id.* at *9.

164. *Id.*

complainant and respondent have 60 days to file a petition for review in the Court of Appeals.¹⁶⁵

Only by exhausting the requisite administrative procedures for his claim may the complainant seek relief in federal court. This requirement advances the judicial nature of the administrative scheme. Any appeal made by either party before the Court of Appeals will be based on the case record, which is comprised of the proceedings before the ALJ.¹⁶⁶ Therefore, the Court of Appeals may review only those claims that appear in the case record, and may not review any claim that has not been administratively exhausted. Furthermore, the “de novo review” of claims, which the Court of Appeals is empowered to perform, does not extend to claims that have not been administratively exhausted.¹⁶⁷

Willis’ claim with respect to his termination was a discrete act from the other retaliatory conduct, i.e. the threat of termination and loss of job responsibilities, which formed the basis of the complaint he filed with OSHA. He never filed an administrative complaint with OSHA with respect to his termination.¹⁶⁸ Accordingly, the court granted defendant’s motion to dismiss with respect to Willis’ claim based on termination, for failing to exhaust administrative procedures.¹⁶⁹ However, the court denied defendant’s motion to dismiss Willis’ claim with respect to the threat of termination and loss of job responsibilities, and Vie’s motion to dismiss Caliri’s claim.¹⁷⁰

D. Judy Collins v. Beazer Homes U.S.A., Inc.

Murray and *Willis* dealt with various motions to dismiss, and as such, the courts’ analysis of claims arising under the Sarbanes-Oxley

165. *Id.*

166. *Id.* at *16.

167. *Id.*

168. *Id.* at *9.

169. *Id.* at *21. In reaching its decision, the court relied on the Supreme Court’s ruling in *National Railroad Passenger Corp. v. Morgan*. The Supreme Court in *Morgan* held that “the Title VII exhaustion requirement ‘precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period’ even when the acts are ‘related to acts alleged in timely filed complaints.’” According to the Supreme Court, “[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act.” *Id.* at *10-11 (citations omitted).

170. *Id.* at *21. Defendant’s threat of termination and reduction of Willis’s job responsibilities were found to be a violation of § 1514A, as they constituted a change in the employment conditions, as defined by the statute. In regards to Caliri’s claim, although he himself did not provide information to a person with supervisory authority, his causing information to be provided to persons with supervisory authority over him, as alleged in his amended complaint, was sufficient to establish a cause of action under the Act. *Id.* at *18-19.

whistleblower provisions was primarily limited to the administrative scheme. *Judy Collins v. Beazer Homes U.S.A., Inc.* involved a summary judgment motion, and was the first court decision to engage in a more expansive analysis of a § 1514A claim on the merits.¹⁷¹ In addition to reviewing the administrative and jurisdictional aspects of a § 1514A claim, the court examined the legal burdens of proof carried by each of the parties to the suit.¹⁷²

Beazer Homes Corp. (hereinafter “Beazer Home”) offered Judy Collins the position of Director of Marketing for its Jacksonville, Florida division, with the following provision.¹⁷³ She “would be subject to a ninety day assessment review period during which ‘either [she] or the Company may decide to terminate employment without giving a reason.’”¹⁷⁴ Collins accepted the offer.¹⁷⁵ Soon after starting with the Company, Collins began having conflicts with her manager and a co-worker.¹⁷⁶ These conflicts concerned payment practices Collins suspected of being improper, and were conveyed to persons in authoritative positions.¹⁷⁷ After a series of meetings with company executives, the President of the Jacksonville division, Marty Shaffer, ultimately terminated Collins within the ninety day review period, citing the irreconcilable differences between Collins and her co-worker and their seniority.¹⁷⁸ Following her termination on August 19, 2002, Collins filed a complaint with OSHA in October 2002.¹⁷⁹ She subsequently filed a complaint under Sarbanes-Oxley in federal district court on May 20, 2003.¹⁸⁰

Collins alleged in her complaint that Beazer Homes retaliated against her for reporting violations of the Company’s internal accounting controls in violation of securities laws.¹⁸¹ Beazer Homes, in support of its summary judgment motion, contends that plaintiff did not engage in a protected activity, but that even if it was a protected activity, it was not a contributing factor in the decision to terminate her.¹⁸²

171. 334 F. Supp. 2d at 1372 n.3.

172. *See id.* at 1374-81.

173. *Id.* at 1368.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 1369.

178. *Id.* at 1369-70.

179. *Id.* at 1370.

180. *Id.*

181. *Id.* at 1372.

182. *Id.*

In the beginning of the court's analysis of the legal burdens of proof, the court noted that Sarbanes-Oxley uses the legal burdens of proof set forth in AIR.¹⁸³ The plaintiff must prove her *prima facie* case by showing through "a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action."¹⁸⁴ Once the plaintiff proves her *prima facie* case, the burden shifts to the defendant employer to "demonstrate by clear and convincing evidence that it 'would have taken the same unfavorable personnel action in the absence of [protected] behavior.'"¹⁸⁵

A plaintiff does not need to point to an actual violation of securities or federal law in order to invoke protected status for her activity. Rather, she is only required to show she "reasonably believed" there was a violation of a law enumerated in the statute, and is not required to identify the code or section she believes her employer has violated.¹⁸⁶ The court looks towards the legislative history of Sarbanes-Oxley in determining the standard for measuring the reasonableness of the employee's belief. According to the legislative history of the Act, the reasonableness test "is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts."¹⁸⁷ The employee need not be an accountant, or possess substantial knowledge of Securities and federal law, to reasonably believe the employer has violated an enumerated law.¹⁸⁸

Collins satisfied her burden of proving element two of the *prima facie* case, showing "the employer knew of the protected activity."¹⁸⁹ She had made a series of complaints to her supervisors, held meetings with executives, emailed the Vice President of Sales and Marketing and the Chief Executive Officer of Beazer U.S.A., and met with Marty Shaffer, the President of the Jacksonville division who ultimately terminated her.¹⁹⁰ In her meetings and emails, Collins had conveyed her concerns about improper payment and accounting procedures. The court,

183. *Id.* at 1374.

184. *Id.* at 1375.

185. *Id.* at 1376.

186. *Id.* at 1376-77.

187. *Id.* at 1376.

188. *See id.* at 1377.

189. *Id.* at 1375.

190. *Id.* at 1378.

therefore, found that defendants were aware of Collin's protected activity.¹⁹¹

Element three of the *prima facie* case, whether plaintiff suffered an unfavorable personnel action, was clearly satisfied when she was terminated.

As part of the *prima facie* case, the plaintiff is required to prove circumstances from which an inference may be drawn that the protected activity was a contributing factor in the unfavorable personnel action. "Contributing factor" was defined as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."¹⁹² The court in *Collins* found that the "temporal proximity between the time when Plaintiff made her complaints and the time she was terminated is sufficient to establish circumstances" that would imply the protected activity was a contributing factor to the unfavorable employment decision.¹⁹³ The proximity in time between Collins' first complaint to Jennifer Jones, Vice President of Human Resources, and her termination fourteen days later, provided the requisite circumstances that would suggest her protected conduct was a contributing factor in the unfavorable employment decision.¹⁹⁴

Once the employee has proven her *prima facie* case, if the employer wishes to avoid liability, he must show by clear and convincing evidence that he would have taken the same unfavorable employment decision absent the protected activity of the employee.¹⁹⁵ The *Collins* court notes that whether defendant would have made the same employment decision absent the protected activity "presents a close question," but does not set forth any specific guidelines for assessing whether the defendant has met his burden.¹⁹⁶ Ultimately, the court refused to find as a matter of law that plaintiff had not met his burden, nor that the defendant had met his.

191. *Id.*

192. *Id.* at 1379. Inclusion of the term "contributing factor" in § 1221(e)(1) was meant to overrule the existing whistleblower case law that required the plaintiff show the protected activity was a "significant," "motivating," "substantial," or "predominant factor" in the unfavorable personnel action. *Id.*

193. *Id.*

194. *Id.*

195. § 42121(b)(2)(B)

196. *Collins*, 334 F. Supp. 2d at 1381.

VI. COMPARING SARBANES-OXLEY WITH
TITLE VII'S PROTECTION AGAINST RETALIATION
AND STATE WHISTLEBLOWER PROTECTION

A. Title VII Retaliatory Claims

Title VII and Sarbanes-Oxley share a number of similarities in design and structure. Given the paucity of case law on § 1514A claims, Title VII case law may supply § 1514A claims with some guidance. In terms of the substantive matters involved by the two acts, both provide employees with protection from the retaliatory actions of their employers.¹⁹⁷ Both provisions protect employees who are engaged in similar enumerated activities.¹⁹⁸ However, the procedures involved in establishing a claim under the two acts differ. The intended goals of the acts and their underlying purposes are quite distinct from one another, which may explain the procedural disparity.

*B. Contrasting Plaintiff and Defendant's
Burden Under Title VII and § 1514A*

Similar to the Sarbanes-Oxley's whistleblower provision, Title VII protects the following activities: (1) involvement in an outside investigation; (2) opposition to an activity made unlawful by statute; (3) participation in an investigation, hearing, or proceeding against the employer.¹⁹⁹ Where legitimate and illegitimate motives were involved in the adverse employment decision, the plaintiff making out a Title VII claim must demonstrate that the prohibited factor was a *motivating component* in the employment decision.²⁰⁰ A factor is a motivating component of the employment decision if, at the time the decision was made, one of the reasons for that decision was a prohibited factor.²⁰¹

Once the plaintiff has pointed to a motivating factor, the burden is shifted to the employer to prove an affirmative defense. The employer can only escape liability by showing he would have taken the same adverse action despite the prohibited factor.²⁰² It would not be enough for

197. See § 2000e-3(a); § 1514A.

198. See § 2000e-3(a); § 1514A.

199. § 2000e-3(a).

200. 42 U.S.C. § 2000e-2(m).

201. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

202. *Id.* at 252.

the employer to show the decision would have been justified, in part, by a legitimate reason. The employer is required to demonstrate that the legitimate reason alone would have resulted in the same decision.²⁰³ As to the burden of proof required of the employer, the Supreme Court expressly rejected a "clear and convincing" evidence standard in favor of a "preponderance of the evidence" standard.²⁰⁴

When making a § 1514A claim, the plaintiff must show that a protected activity was the "contributing factor in the unfavorable employment personnel action alleged in the complaint."²⁰⁵ The "contributing factor" standard is identical, except in name, to the "motivating factor" standard. "[T]he words 'a contributing factor' . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."²⁰⁶ By implication, an employer cannot excuse his retaliatory conduct by pointing to some legitimate cause for the adverse decision. In federal court, the plaintiff must prove by a preponderance of the evidence that the protected activity was a "contributing factor," before he can shift the burden to the employer.²⁰⁷

An employer defending a § 1514A claim, like an employer defending a Title VII mixed-motive claim, can escape liability only "if the employer can demonstrate,²⁰⁸ by clear and convincing evidence," that the same personnel action that adversely affected the employee would have been taken even if the employee had not engaged in the protected activ-

203. *Id.*

204. *Id.* at 252-53.

205. § 42121(b)(B)(i).

206. *Collins*, 334 F. Supp. 2d at 1379. Even though the court noted that the contributing factor "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," the "motivating" test referred to by the court is likely not the same as the one discussed in mixed-motive cases. *Id.* The enactment of § 2000e-2(m) was meant to overrule the stricter standard of "substantial motivating factor" that came out of the plurality decision of *Price Waterhouse v. Hopkins*. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93-94 (2003).

207. *Collins*, 334 F. Supp. 2d at 1375. Section 42121(b)(B) does not expressly prescribe the burden of proof the plaintiff must meet in satisfying his burden, but only includes the words, "if the complainant *demonstrates*" (emphasis added). The court in *Collins* noted that the 11th Circuit had agreed with the administrative interpretation of the term "demonstrated" in the whistleblower protection provisions of the ERA to mean "proved by a preponderance of the evidence." *Id.* at 1375 n.13.

208. Even though the term "demonstrates" is used to describe both the complainant and employer's burden, only by the employer is the term "demonstrates" followed by the modifying clause, "by clear and convincing evidence." See § 42121(b)(B). Similarly, under the whistleblower protection provision of the ERA, the modifying clause, "by clear and convincing evidence," only follows the term "demonstrates" in the provision establishing the employer's burden. 42 USCS § 5851(b)(3)(D).

ity.²⁰⁹ This “clear and convincing evidence” burden that is placed on the § 1514A employer is greater than that placed on the Title VII employer.

*C. Comparison of the Objectives
Underlying Title VII and § 1514A*

The discrepancy in burdens may be attributed to the differences between the two acts’ objectives. Title VII’s goal is to provide for equal opportunities in the work place, by proscribing the consideration of certain immutable employee features in the employment decision process. However, Sarbanes-Oxley aims to prevent, monitor, and investigate corporate fraud and securities violations. In achieving this objective, it is essential for the outside investigators to be able to work with employees within the company, and so there is a greater interest in ensuring they not be terminated or suffer some other adverse personnel action. This is reflected by the difference in remedies available to the successful claimants under Title VII and § 1514A.

In choosing the preponderance of the evidence burden for the employer in *Price Waterhouse v. Hopkins* over the clear and convincing standard, the Supreme Court noted that the latter burden was not common in civil litigation.²¹⁰ The Court expounded:

Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action, action more dramatic than entering an award of money damages or other conventional relief, against an individual.²¹¹

Successful complainants under § 1514A, unlike Title VII plaintiffs, are not awarded punitive damages, but may only receive compensatory damages so as to make them whole.²¹² The employee is limited to receiving compensatory damages in the form of reinstatement, back pay with interest and compensation for any special damages that resulted from the discrimination.²¹³

209. § 42121(b)(B)(ii).

210. *Price Waterhouse*, 490 U.S. at 253.

211. *Id.*

212. *See* § 1514A(c).

213. *Id.*

D. State Whistleblower Protection

States have dealt with the whistleblower issue in varying ways, leading to "inconsistent treatment from state to state."²¹⁴ In approaching the whistleblower dilemma, states have either extended protection only to government employees or have provided, in varying degree, protection to some private employees. Other states have refrained from offering any whistleblower protection.

Florida is among a number of states that have carved out an exception to the employment-at-will doctrine by offering comprehensive protection to whistleblower employees of private employers.²¹⁵ Greater concern for the employers' interests and welfare is infused into Florida's whistleblower statute, with due consideration for the employee's plight. Under Florida's whistleblower statute, an employee must show an actual violation of statutory law, not simply a reasonable belief of the occurrence of some such violation.²¹⁶ While the "actual violation" requirement may come off as being more stringent than the "reasonable belief of a violation" requirement of Sarbanes-Oxley, the Florida statute tempers this stringency by only requiring the employee show the existence of a *de minimis* violation.²¹⁷ Therefore, under Florida law, even a more than reasonable suspicion of a violation would not justify the employee running to a government agency.

Private employers in Florida are further protected from incurring any harm from whistleblower activity, even where the employee can point to a real violation of statutory law with a first notice requirement. Employers are provided with an opportunity to preserve their reputation by requiring the employee to first inform the employer of the statutory violation and to allow the employer some time to rectify the problem.²¹⁸

As discussed earlier, Sarbanes-Oxley was intended to lead to the prevention, monitoring and investigation of acts of possible corporate fraud and violations of securities regulation.²¹⁹ Aside from protecting employees against retaliation for reporting corporate fraud, procedural elements of § 1514A allow for an investigation before the employer has an opportunity to send potentially incriminating documents through the

214. David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA. LAB. & EMP. L.J. 109, 131 (1995).

215. FLA. STAT. §§ 448.101-105(2004).

216. *Id.* §§ 448.101-102.

217. *Id.*

218. *Id.* § 448.102(1).

219. See 148 CONG. REC. S1783, 1785-86 (2002).

shredder. Preserving evidence of fraud is a vital concern of Sarbanes-Oxley. A number of state whistleblower statutes require employees, as an initial matter, to first notify supervisors of violations of law.²²⁰ Some of these state statutes require the employee make the "first report" to the supervisor in the form of a written notice.²²¹

Section 1514A does not condition whistleblower protection on the employee submitting a first report of the violation to his supervisor.²²² Additionally, employers are not afforded by Sarbanes-Oxley an opportunity to first correct the alleged securities fraud violation prior to the involvement of a public body.²²³ As a result, the employer may not have the opportunity to "avoid unnecessary harm to its reputation" or to prepare for a hearing or trial.²²⁴ Omitting a first report requirement, in addition to possibly resulting in harm to the company's reputation, further places the company in financial jeopardy where a wrongful accusation is made by an employee.²²⁵ Sarbanes-Oxley was intended to remedy the corporate fraud problems exposed by "Enron's fall."²²⁶ The noticeable absence of the "first report" requirement may be to avoid giving the employer an opportunity to destroy documents before an investigation, as occurred during the Enron scandal.

220. See, e.g. N.Y. LAB. LAW § 740(3) (Consol. 2004) (refusing whistleblower protection to employees who did not bring the "activity, policy or practice in violation of a law, or a rule or regulation promulgated pursuant to law. . . to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct such activity, policy or practice."); N.J. STAT. § 34:19-4 (2004) (requiring the first report to the supervisor be in the form of a written notice."); FLA. STAT. § 448.102(2004).

221. See, e.g. N.J. STAT. § 34:19-4; FLA. STAT. § 448.102(1).

222. See § 1514A.

223. *Id.*

224. Cavico, *supra* note 26, at 570-71 (noting the significance of a "first report" requirement as a condition precedent to bringing a whistleblower claim). Cavico refers to the statutory notice requirement as a "value-maximizing element to many legislative schemes," serving as a sort of gate-keeping device that holds back a flood of suppositional wrongful discharge litigation. In his view, the whistleblower statutes were intended to protect only those employees who were retaliated against by their employer for engaging in activities protected by the statute, and not those who merely considered their employers' legal practices immoral and unethical. Accordingly, the notice requirements serve that intended purpose. *Id.* at 588.

225. Culp, *supra* note 214, at 133. Culp recommends a heavier burden be placed on employees who blow the whistle externally before receiving protection, because "[i]n such a case, there is a significant possibility of harm to the company's reputation and to its financial viability for wrongful accusations." *Id.*

226. See 148 CONG. REC. S1783 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy).

VII. CONCLUSION

Sarbanes-Oxley's whistleblower protection differs in design and purpose from other existing whistleblower statutes, and places the employer in a tighter corner than do the other whistleblower laws. As we discussed in earlier sections, Sarbanes-Oxley's whistleblowers have an easier time gaining protection than do employees under other whistleblower acts. Conversely, Sarbanes-Oxley does not provide employers protection from false allegations of unlawful behavior in as effective a manner as do other existing whistleblower and anti-retaliation statutes. Employers are not afforded an opportunity to cure defects, and face a heavier burden in defending their actions than is customary in civil litigation. These differences may be understood by the circumstances that led to the enactment of Sarbanes-Oxley, as well as, from the underlying goals of the Act. Whistleblowers have been given special advantages under the Act that strengthen the government's ability to investigate fraud, but what remains to be seen is whether the employer has been placed in too vulnerable a position.

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