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The Impact of Sarbanes-Oxley on the Practice of Labor and Employment Law

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I. Introduction

The Sarbanes-Oxley Act (“SOX”) was passed in 2002, in response to corporate and accounting scandals of astounding size and audacity. Some of the notorious cases referenced below formed part of the impetus behind SOX; others show that similar problems continue to reverberate.

- **WorldCom, Inc.** -- company’s income overstated by \$11 billion, balance sheet overstated by over \$75 billion, loss to shareholders estimated at over \$200 billion¹
- **Enron Corp.** -- once the seventh-largest company in the country, now the second-largest bankruptcy, behind WorldCom;² ten former directors paid \$13 million personally to settle allegations of permitting release of documents containing material misstatements about company finances;³ four former Merrill Lynch bankers convicted of conspiracy and wire fraud in sham sale to inflate earnings⁴
- **Tyco International, Inc.** -- two executives accused of looting company of over \$600 million in unauthorized pay⁵
- **HealthSouth** -- earnings overstated by \$2.64 billion between 1996 and 2002;⁶ founder Richard Scrushy the first CEO to be prosecuted under the Sarbanes-Oxley Act of 2002⁷
- **Krispy Kreme Doughnuts, Inc.** -- company announced restatement of 2004 earnings by between \$3.8 and 4.9 million, warned it may default on \$91 million in loans; shareholder lawsuit accuses company of inflating revenue figures by doubling shipments⁸
- **U.S. Foodservice** -- earnings overstated by \$700 million or more;⁹ rebates from food suppliers overstated, with suppliers falsely corroborating the overstatements in letters to auditors¹⁰

¹ *SEC v. WorldCom, Inc.*, 273 F. Supp. 2d 431 (S.D.N.Y. 2003).

² Kristen Hays, *Enron seeking bankruptcy closure, executives await trial*, The Daily Record (Baltimore, MD), Dec. 29, 2004, at 3A.

³ Rebecca Smith and Jonathan Weil, *Ex-Enron Directors Reach Settlement*, The Wall Street Journal, Jan. 10, 2005, at C3.

⁴ *Bond Hiked to \$2M for Ex-Merrill Exec Convicted in Enron Case*, The Wall Street Journal Online, Jan. 11, 2005.

⁵ Erik Ahlberg, *Tyco Using Television Ads to Polish Tarnished Image*, The Wall Street Journal Online, Jan. 4, 2005.

⁶ Jay Reeves, *Jury selection begins in fraud trial of former HealthSouth CEO Scrushy*, The Daily Record (Baltimore, MD), Jan. 6, 2005, at 7B.

⁷ Laurence Viele Davidson and David Voreacos, *Scrushy defense hangs on casting HealthSouth accusers as liars*, The Daily Record (Baltimore, MD), Jan. 5, 2005, at 7B.

⁸ Michael Barbaro, *Krispy Kreme Restatements to Reduce 2004 Profit*, The Washington Post, Jan. 5, 2005, at E01.

⁹ Kathleen Johnston Jarboe, *Two former U.S. Foodservice executives settle SEC charges*, The Daily Record (Baltimore, MD), Jan. 13, 2005, at 3A.

This paper discusses the whistleblower section of SOX, situations in which it could be relevant, emerging issues in the caselaw, and some ethical considerations for labor and employment lawyers.

II. The Sarbanes-Oxley Act Whistleblower Provisions

A. Overview

The Public Company Accounting Reform and Investor Protector Act of 2002, popularly known as the Sarbanes-Oxley Act, contains titles on the establishment of a Public Company Accounting Oversight Board, auditor independence, corporate responsibility, enhanced financial disclosures, analyst conflicts of interest, corporate and criminal fraud accountability, and white-collar crime penalty enhancements, among others.¹¹ Title VIII of Sarbanes-Oxley, the Corporate and Criminal Fraud Accountability Act of 2002,¹² contains the whistleblower provisions. These provisions protect employees who report financial irregularities, creating another significant exception to the employment at will doctrine. The SOX procedures also include novel remedies, such as immediate reinstatement ordered upon a finding of merit in the complaint, and the option to sue in federal court if the administrative procedures have not been completed within 180 days.

B. Covered Parties and Protected Conduct

The whistleblower section of SOX applies to any company with a class of securities registered under § 12 of the Securities Exchange Act of 1934, or that is required to file reports under § 15(d) of the Securities Exchange Act of 1934.¹³ No officer, employee, contractor, subcontractor or agent of such a company may discharge, demote, suspend, threaten, harass, or in any other

¹⁰ *Id.*; Kathleen Johnston Jarboe, *U.S. Foodservice probe ensnares nine outsiders*, The Daily Record (Baltimore, MD), Jan. 14, 2005, at 3A.

¹¹ Pub. L. No. 107-204, 116 Stat. 745 (2002). These are discussed more fully in the accompanying paper presented by Steven Wheelless, *Is Gordon Gekko (Wall Street) Really Gone? Practical and Ethical Issues of Importance to Labor and Employment Attorneys Under Sarbanes-Oxley*.

¹² 18 U.S.C. § 1514A.

¹³ 18 U.S.C. § 1514A(a), referring to 15 U.S.C. § 78l and 15 U.S.C. § 78o(d).

manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee of: (1) providing information or assisting in an investigation regarding conduct which the employee reasonably believes violates statutes on mail, wire, bank or securities fraud, any rule or regulation of the Securities and Exchange Commission, or any federal law relating to fraud against shareholders; or (2) filing or causing to be filed or participating in a proceeding relating to any such alleged violations.¹⁴ The whistleblower is covered by the statute when providing information to a federal regulatory or law enforcement agency, a member or committee of Congress, or a person with supervisory authority over the employee.¹⁵

C. Enforcement Procedures at OSHA

Enforcement authority for SOX was given to the Department of Labor's Occupational Safety and Health Administration ("OSHA"), which administers 13 other whistleblower laws. In promulgating regulations for the procedures to handle discrimination complaints under SOX, the Department of Labor considered the regulations implementing whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), codified at 29 C.F.R. Part 1979, the Surface Transportation Assistance Act ("STAA"), codified at 29 C.F.R. Part 1978, and the Energy Reorganization Act ("ERA"), codified at 29 C.F.R. Part 24.¹⁶ The statute provides that proceedings under Sarbanes-Oxley will be governed by the rules, procedures and burdens of proof of AIR 21, 49 U.S.C. § 42121(b).¹⁷

D. Filing a Complaint, *Prima Facie* Showing

OSHA published final regulations setting out procedures and time frames for handling SOX whistleblower complaints on August 24, 2004.¹⁸ Whistleblower complaints under SOX must be

¹⁴ 18 U.S.C. § 1514A(a).

¹⁵ *Id.*

¹⁶ 68 Fed. Reg. 31860 (May 28, 2003).

¹⁷ 18 U.S.C. § 1514A(b)(2).

¹⁸ 69 Fed. Reg. 52104 (Aug. 24, 2004); 29 C.F.R. § 1980.100 *et seq.*

filed within 90 days after an alleged violation occurs (when a discriminatory decision has been both made and communicated to the claimant).¹⁹ The Act applies both to companies and to their representatives, thus individual supervisors or managers may be liable for violations.²⁰ The statute and regulations apply to many more types of retaliatory conduct than simple suspension or termination. No company or company representative (referred to in SOX as a “named person”) may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because of protected activity.²¹ A named person is deemed to have violated the Act if it intimidates, threatens, restrains, coerces, blacklists, or in any other manner discriminates against an employee in the terms and conditions of employment because of protected activity.²²

Complaints should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides, but may be filed with any OSHA officer or employee.²³ On receiving a complaint, the Assistant Secretary of Labor for Occupational Safety and Health notifies the employer or company representative named in the complaint of the filing of the complaint and the allegations in it.²⁴ The complaint must make a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.²⁵ OSHA will investigate if the complaint alleges facts and evidence sufficient to raise an inference that the employer or representative knew or suspected the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action. If the employer or representative demonstrates by clear and

¹⁹ 29 C.F.R. § 1980.103(d).

²⁰ 29 C.F.R. § 1980.102.

²¹ 29 C.F.R. § 1980.102(a).

²² 29 C.F.R. § 1980.102(b).

²³ 29 C.F.R. § 1980.103(c).

²⁴ 29 C.F.R. § 1980.104.

²⁵ 29 C.F.R. § 1980.104(b).

convincing evidence that it would have taken the same unfavorable personnel action without the protected activity, no investigation will be conducted.²⁶

E. Finding of Reasonable Cause

The named person (the employer or representative involved) may submit written statements and documentary evidence to the Assistant Secretary within 20 days of the filing of the complaint.²⁷ Within 60 days of the filing of the complaint, the Assistant Secretary is supposed to issue written findings on whether or not there is reasonable cause to believe that the named person discriminated against the complainant.²⁸ If the Assistant Secretary concludes that there is reasonable cause to believe a violation has occurred, he or she can order immediate reinstatement pending further proceedings.²⁹ Where appropriate, economic reinstatement may be used in lieu of actual reinstatement. Remedies also include restoration to seniority status, back pay with interest, and special damages, including litigation costs, expert witness fees and reasonable attorneys' fees. Upon a finding of reasonable cause, the Assistant Secretary notifies the named person of the substance of the evidence developed during the investigation.³⁰ The named person has 10 days to submit a written response in support of its position, including witness statements and legal and factual arguments.

F. Request for ALJ Hearing

The Assistant Secretary's findings become effective 30 days after receipt, unless a party files an objection and a request for hearing.³¹ If a timely objection is filed, the preliminary order is stayed except for the portion requiring preliminary reinstatement.³² If a hearing is requested it is

²⁶ 29 C.F.R. § 1980.104(c).

²⁷ 29 C.F.R. § 1980.104(c).

²⁸ 29 C.F.R. § 1980.105.

²⁹ 29 C.F.R. § 1980.105(a)(1).

³⁰ 29 C.F.R. § 1980.104(e).

³¹ 29 C.F.R. § 1980.105(c); 29 C.F.R. § 1980.106(a).

³² 29 C.F.R. § 1980.106(b)(1).

held before an administrative law judge from the Department of Labor.³³ Generally the Assistant Secretary will not appear as a party in the proceeding, and the parties will be represented by private counsel.³⁴ The Assistant Secretary has discretion to participate, however, and may do so in cases involving important or novel legal issues, large numbers of employees, or egregious violations.³⁵

If the complainant demonstrates that protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint, an administrative law judge may rule that a violation has occurred.³⁶ Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same action in the absence of protected behavior.³⁷ If the ALJ orders reinstatement, that portion of the order is effective immediately and may not be stayed.³⁸

G. Petitions for Review to Administrative Review Board, Courts of Appeal

Parties desiring to seek review of an ALJ's decision must file a petition for review with the Administrative Review Board.³⁹ The Administrative Review Board ("ARB") has the discretion to accept a case for review or not to accept it. The ALJ's decision becomes final in 10 days if no petition is filed. If a petition is filed, the ALJ's decision becomes final 30 days after the filing, unless the ARB accepts the case for review.⁴⁰ The ARB reviews the factual determinations of an ALJ under the substantial evidence standard.⁴¹ Once the ARB issues a decision, it is reviewable in the United States Court of Appeals for the Circuit where the violation allegedly occurred.⁴²

H. Settlements Subject to DOL Approval

³³ 29 C.F.R. § 1980.107.

³⁴ 68 Fed. Reg. 31862 (May 28, 2003).

³⁵ 29 C.F.R. § 1980.108(a)(1); 68 Fed. Reg. 31862 (May 28, 2003).

³⁶ 29 C.F.R. § 1980.109(a).

³⁷ *Id.*

³⁸ 29 C.F.R. § 1980.109(c).

³⁹ 29 C.F.R. § 1980.110.

⁴⁰ 29 C.F.R. § 1980.110(b).

⁴¹ *Id.*

⁴² 29 C.F.R. § 1980.112.

A complaint may be withdrawn, but the Assistant Secretary determines whether the withdrawal will be approved.⁴³ If the complaint is withdrawn during the investigative phase, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.⁴⁴ If the Assistant Secretary has already made findings or issued an order, the settlement must be approved by the tribunal that has the case, either the administrative law judge or the Administrative Review Board.⁴⁵

I. *De Novo* Review in Federal Court

If the Administrative Review Board has not issued a final decision within 180 days of the filing of the complaint, and the delay is not due to the bad faith of the complainant, complainant may bring an action in federal district court.⁴⁶ This allows the complainant to start over. The complainant must notify the ALJ or the ARB, depending on where the case is pending, of his intention to file a complaint in federal court 15 days in advance.⁴⁷

III. Situations Where SOX Could Apply

The people most likely to be in a position to have viable whistleblower complaints under SOX would be middle management or higher level employees. Those dealing with financial transactions and accounting practices would typically be the best placed to have knowledge of conduct they might reasonably believe to violate securities laws, SEC rules, or laws relating to fraud. Yet even rank and file bargaining unit employees might acquire knowledge that could bring them within the protections of SOX. Consider the following possibilities:

- inventory listed in warehouses that is not really there
- fraudulent manifests or bills of lading, shipping real merchandise to fictitious customers

⁴³ 29 C.F.R. § 1980.111(a).

⁴⁴ 29 C.F.R. § 1980.111(d)(1).

⁴⁵ 29 C.F.R. § 1980.111(d)(2).

⁴⁶ 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a).

⁴⁷ 29 C.F.R. § 1980.114(b).

- shipping nonexistent merchandise to real customers, or falsifying the amounts delivered (such as showing 100 cases of shrimp delivered when only 50 were)
- listing goods as damaged which are not damaged, allowing purchase or salvage at below market prices
- collecting insurance proceeds on damaged or destroyed goods which are not in fact damaged or destroyed
- recognizing revenue or receivables for unshipped or nonexistent products⁴⁸
- requiring erroneous information to be submitted on logs or reports
- discrepancies in cash collections or receipts, or in sales returns
- falsifying test results or quality inspections
- manipulating the market for the product, as in the California energy crisis⁴⁹
- processing checks or payments differently than advertised
- inflated productivity figures
- exaggerating to customers the capabilities of a product

Goods and services bought or sold must be accounted for in any business. Where reports are required to be filed and statistics generated, there is a potential opportunity for deception. The many possible forms of fraud are limited only by the creativity of those who engineer them.

⁴⁸ In *Marrie v. SEC*, 374 F.3d 1196 (D.C. Cir. 2004), the company involved in the underlying audit, Cal Micro, attempted to make its revenue as high as possible to maintain the impression of growth after it lost a major customer. The SEC found that it fraudulently: recognized revenue and receivables for unshipped or nonexistent products; falsified sales records, invoices and shipping documents, such as by shipping merchandise to nonexistent customers; overstated net assets and income, while understating net loss; and treated returned products as bad debt, instead of as a deduction from revenues, in order to inflate reported revenue. 374 F.3d at 1199. (The court overturned the SEC's order barring two accountants who had failed to discover the fraud from practicing before it, because it found that the SEC's recklessness standard was unclear at the time of the audit, and the SEC's clarifications had improperly been applied retroactively.)

⁴⁹ In *Milano v. Perot Systems Corp.*, 2004 WL 2360031 (N.D. Tex. 2004), a securities fraud case, the defendant provided consulting services to California's energy system operator. Plaintiffs alleged that the defendant used its knowledge of the energy system to offer other clients strategies to generate increases in the price of electricity, or to create congestion in the energy market so as to profit from congestion fees. (The court dismissed two counts of the

IV. Emerging Issues/Case Summaries⁵⁰

A. Jurisdiction

In *Flake v. New World Pasta Co.*,⁵¹ the ALJ held that SOX unambiguously limits jurisdiction to companies that have a class of securities registered under § 12 of the Securities Exchange Act of 1934 (“SEA”) or that are required to file reports under § 15(d) of that Act. The company had filed such reports, but was not required to do so under the statute, as the filing requirement is automatically suspended if the securities are held by fewer than 300 persons. On appeal the complainant argued that § 1514A should be interpreted to include any publicly traded company, regardless of size or value, because Congress had all publicly traded companies in mind when it drafted the whistleblower provision. The ARB held that Congress intended to limit SOX jurisdiction to companies that met one of the above two requirements, and upheld the dismissal.⁵²

Employees of subsidiary companies that do not meet one of the two above requirements have been found to be covered by SOX if the parent entity is covered. In *Morefield v. Exelon Serv., Inc.*,⁵³ the ALJ, stating that SOX should not be read in “too pinched” a fashion, determined that the term “employees of publicly traded companies” includes employees of the subsidiaries of those publicly traded companies. He reasoned that subsidiaries are an integral part of a publicly traded company, inseparable from it for purposes of evaluating the integrity of its financial information, and must be treated as such. The ALJ in *Gonzalez v. Colonial Bank*⁵⁴ noted that the parent and the

complaint as time-barred, ruling that § 804 of Sarbanes-Oxley did not apply retroactively, and dismissed the third count for failure to plead sufficient facts to support a strong inference of scienter.)

⁵⁰ SOX cases at the Department of Labor are available on the website for the Office of Administrative Law Judges, www.oalj.dol.gov. The section entitled Whistleblower Collection includes all the SOX decisions. The Office of Administrative Law Judges also publishes a newsletter summarizing cases at <http://www.oalj.dol.gov/PUBLIC/WBLOWER/REFRNC/wnew012005.htm#sox>.

⁵¹ 2003-SOX-18 (ALJ July 7, 2003).

⁵² *Flake v. New World Pasta Co.*, 03-126 (ARB Feb. 25, 2004), 2004 WL 384738 (DOL Adm. Rev. Bd.). See also *Roulett v. American Capital Access*, 2004-SOX-78 (ALJ Dec. 27, 2004), in which the ALJ also dismissed the complaint because the employer was not a publicly traded company with a class of securities registered under § 12 of the SEA, nor was it required to file reports under § 15(d).

⁵³ 2004-SOX-2 (ALJ Jan. 28, 2004), at 2.

⁵⁴ 2004-SOX-39 (ALJ Aug. 17, 2004 and Aug. 20, 2004).

subsidiary companies shared both management and function. Therefore, the complainant was a covered employee under SOX. Similarly, in *Platone v. Atl. Coast Airlines Holdings, Inc.*,⁵⁵ the ALJ held that even though the complainant was an employee of a company that was not publicly traded, because the holding company was publicly traded, there was sufficient commonality of management between the two companies, and corporate names were used interchangeably, the complainant was a covered employee under SOX.

On the other hand, in *Hughart v. Raymond James & Assoc.*,⁵⁶ the ALJ stated that because the complaint did not name the parent, SOX would be applicable to the employing subsidiary only if the parent and the subsidiary were so intertwined as to represent one entity. Thus, a complainant at a non-publicly traded entity should name the publicly traded affiliates as well as his own employer.⁵⁷

B. Timeliness of Complaint

A complaint must be filed within 90 days of the alleged retaliation. *Reddy v. Medquist, Inc.*⁵⁸ and cases cited therein. Each discrete act constitutes a separate actionable event or practice, and a charge must be filed within 90 days of that event; a complainant cannot rely on continuous conduct to extend the filing period.⁵⁹

The limitations period for a termination begins to run on the date the decision is made and communicated to the complainant. In both *Lawrence v. AT&T Labs*⁶⁰ and *Flood v. Cedant Corp.*,⁶¹ the employers had notified the employees that they would be terminated unless they found other positions with the respondents by a certain date. Although there was a possibility of avoiding

⁵⁵ 2003-SOX-27 (ALJ Apr. 30, 2004), at 44.

⁵⁶ 2004-SOX-9 (ALJ Dec. 17, 2004).

⁵⁷ See *id.*; see also *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, 2004-SOX-11 (ALJ July 6, 2004), at 8-9.

⁵⁸ 2004-SOX-35 (ALJ June 10, 2004.)

⁵⁹ *Walker v. Aramark Corp.*, 2003-SOX-22 (ALJ Aug. 26, 2003) (citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061 (2002)).

⁶⁰ 2004-SOX-65 (ALJ Sept. 9, 2004).

⁶¹ 2004-SOX-16 (ALJ Feb. 23, 2004).

termination, that did not prevent the statute of limitations from running. The complaints were ruled untimely because limitations began to run from the time of the decisions to terminate, not from the actual terminations. An employer who successfully dangles the possibility of averting termination in front of the complainant for 90 days can thus consume the entire limitations period.

Complainants who spend too much time trying to reverse the decision or find another placement in house risk losing their right to file a complaint.

C. Equitable Tolling

In *Moldauer v. Canandaigua Wine Co.*,⁶² the complainant had signed a severance agreement releasing any discrimination claims he might have, but then lodged several complaints against the employer, asserting that the agreement did not release his right to pursue a whistleblower complaint. He argued that the 90-day statute of limitations should be equitably tolled for three reasons: (1) his severance agreement was a ploy to prevent him from suing under SOX; (2) he raised the precise claim in incorrect forums; and (3) he was prevented from filing a claim within the SOX limitations period because he did not learn of his rights despite his due diligence. The ALJ found that the complainant was not lulled into inaction by the severance agreement, thus there was no equitable estoppel. He did not raise the same whistleblowing claims in the wrong forums, he raised different claims, which did not warrant equitable tolling of the SOX claim. Because he was represented by counsel, he was deemed to have constructive notice of the statute's complaint procedures, and there was no authority for tolling limitations based on ignorance of the law. Limitations are also not tolled during discussions of severance or settlement.⁶³

D. Presumption of Receipt

In *Murray v. TXU Corp.*,⁶⁴ the issue was whether the Secretary of Labor received the complaint within 90 days. Because the complainant's counsel invoked the presumption that

⁶² 2003-SOX-26 (ALJ Nov. 14, 2003).

properly-addressed, paid-for and mailed documents have been received, and the employer did not rebut the presumption, the court found that the complaint had been timely filed. The defendant also argued that the plaintiff had contributed to DOL's failure to investigate within 180 days by filing with the wrong OSHA office and not pushing for speedy action by DOL. The court found that these omissions fell far short of the proof necessary to show that the Secretary's delay was due to the bad faith of the complainant. The court also rejected a motion seeking a stay to permit the Secretary to investigate the complaint.

[N]othing in the statute suggests that a claimant's access to the federal courts should be postponed when his complaint seems to have fallen through the proverbial cracks. Indeed, a more reasonable reading of [the] statute suggests the opposite.⁶⁵

E. Exhaustion

Although a plaintiff does not have to wait for the hearing and appeal process to conclude before filing suit, the plaintiff must at least file an administrative complaint. In *Willis v. Vie Financial Group, Inc.*,⁶⁶ the plaintiff filed a complaint with OSHA over threats to terminate him and being stripped of job responsibilities, but failed to file another complaint after he was actually terminated. The court held that the exhaustion requirement of SOX precluded recovery for the termination, since it was never presented to the agency. The claim was allowed to proceed over the diminished responsibilities, since that was an adverse change in working conditions.

F. Notice to the Other Side

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, set forth in 29 C.F.R. Part 18, apply in SOX proceedings.⁶⁷ Those rules in turn apply the Federal Rules of Civil Procedure in situations not controlled by the OALJ

⁶³ *Halpern v. XL Capital, Ltd.*, 2004-SOX-54 (ALJ June 7, 2004), at 3.

⁶⁴ 279 F. Supp. 2d 799 (N.D. Tex. 2003).

⁶⁵ *Id.* at 805.

⁶⁶ 2004 WL 1774575 (E.D. Pa. 2004).

⁶⁷ 29 C.F.R. § 1980.100(b).

rules. In *Steffenhagen v. Securitas Sverige, AR*,⁶⁸ the ALJ dismissed the SOX complaint because the claimant failed to perfect service of his initial complaint on the respondents. Failure to serve copies of objections to OSHA's preliminary finding has been treated more leniently. In *Lerbs v. Buca Di Beppo, Inc.*⁶⁹ and *Richards v. Lexmark Int'l, Inc.*,⁷⁰ the ALJs found that the respondents were not prejudiced in any way by improper service of the hearing requests, and refused to dismiss the complaints.

G. Complainant's *Prima Facie* Case⁷¹

To prevail on a SOX claim, the complainant must show 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. *Collins v. Beazer Homes USA, Inc.*⁷² The complaint must allege the existence of facts and evidence to make a *prima facie* showing of these elements.⁷³ The standard of proof for each element is preponderance of the evidence. *Welch v. Cardinal Bankshares Corp.*⁷⁴

1. Protected Activity

A plaintiff need not show an actual violation of the law, only that she reasonably believed there was a violation of one of the enumerated laws or regulations.⁷⁵ The complainant's belief is measured under both subjective and objective standards, i.e., she must have actually believed that the employer was in violation of the relevant laws or regulations, and that belief must be

⁶⁸ 2003-SOX-24 (ALJ Aug. 5, 2003).

⁶⁹ 2004-SOX-8 (ALJ Dec. 30, 2003).

⁷⁰ 2004-SOX-49 (ALJ Oct. 1, 2004).

⁷¹ Some cases list five elements of the *prima facie* case, with the first element being that the employee is covered by the statute. In *Carnero v. Boston Scientific Corp.*, 2004 WL 1922132 (D. Mass. 2004), the court stated that SOX does not apply outside the United States. It dismissed the claim of a foreign national working in Argentina for a U.S. firm. In *Concone v. Capital One Fin. Corp.*, 2005-SOX-6 (ALJ Dec. 3, 2004), the ALJ ruled that a foreign national whose entire employment was outside the United States was not a "covered employee" under SOX, but that SOX should protect foreign nationals who work in the United States.

⁷² 334 F. Supp. 2d 1365, 1375 (N.D. Ga. 2004).

⁷³ 29 C.F.R. § 1980.104(b)(1); *Hopkins v. ATK Tactical Sys.*, 2004-SOX-19 (ALJ May 27, 2004).

⁷⁴ 2003-SOX-15 (ALJ Jan. 28, 2004), at 35.

⁷⁵ *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376 (N.D. Ga. 2004).

reasonable.⁷⁶ General inquiries do not constitute protected activity; there must be some degree of specificity, some particular concerns stated which reasonably identify a respondent's conduct that the complainant believes to be illegal.⁷⁷ The accuracy of the allegations is immaterial; a belief that an activity was illegal can be reasonable even when it turns out to be entirely wrong.⁷⁸ In *Welch v. Cardinal Bankshares Corp.*,⁷⁹ the ALJ stated that the complainant's belief that the respondent had violated SOX was objectively reasonable because outside auditors had made the changes that the complainant suggested were necessary to correct misleading overstatements of income.

If the allegations do not relate to fraud against shareholders, the claim is likely to be dismissed. In *Reddy v. Medquist, Inc.*,⁸⁰ the complainant alleged that she was terminated after complaining that the employer was manipulating the line count in its documents, causing transcriptionists to lose income. The ALJ found that the complaints concerned internal company policy, not actual violations of federal law, and dismissed the complaint for failure to make a *prima facie* showing that the complainant engaged in protected activity. A complaint alleging retaliation for reporting wrongful release of sludge water into the ground water system was dismissed for failing to allege activity protected by SOX in *Hopkins v. ATK Tactical Sys.*⁸¹ In *Tuttle v. Johnson Controls, Battery Division*,⁸² the complainant reported that significant numbers of the company's batteries were defective. The ALJ did not view this as fraud against the employer's shareholders, ruled that the complainant had not engaged in protected activity, and granted the respondent's motion for summary decision. In *Heaney v. GBS Prop. LLC*,⁸³ the ALJ found that the complainant's concerns over a purchaser's use of an unlicensed home inspector and the

⁷⁶ *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8 (ALJ June 15, 2004), at 11.

⁷⁷ *Id.*

⁷⁸ *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004), at 10.

⁷⁹ 2003-SOX-15 (ALJ Jan. 28, 2004), at 37.

⁸⁰ 2004-SOX-35 (ALJ June 10, 2004).

⁸¹ 2004-SOX-19 (ALJ May 27, 2004).

⁸² 2004-SOX-76 (ALJ Jan. 3, 2005).

⁸³ 2004-SOX-72 (ALJ Dec. 2, 2004).

respondent's refusal to intervene in a dispute between the complainant and another agent were not protected activity. Another concern, that the employer had built a condominium in violation of certain codes which could be bank fraud against the mortgage lenders, might have been protected activity, but there was no temporal proximity between the expression of those concerns and his termination, and no evidence of retaliation.

Protected activity includes a broader category of conduct than informing government or higher officers of misdeeds. In *Getman v. Southwest Sec., Inc.*,⁸⁴ the complainant stock analyst refused to raise her rating of a stock when pressured to do so by her managers, who hoped to get the client's investment banking business if the analyst issued a "strong buy" recommendation. The ALJ held that pressuring the complainant was attempted fraud, and because her refusal was "in the presence of her managers," she had engaged in protected whistleblowing activity.⁸⁵ In *Hendrix v. American Airlines, Inc.*,⁸⁶ the ALJ found that the complainant engaged in protected activity under SOX because he participated in the investigation of an employee whom the complainant reasonably believed was committing fraud against the respondent and its shareholders. The respondent argued that the complainant had only witnessed the protected activity of someone else who actually reported the fraudulent activity, but because SOX protects an employee who provides information or *otherwise assists* in the investigation of fraudulent activity, it protected the complainant.

The amount involved in the fraud need not reach the "materiality" standard that applies in securities violations for a whistleblower to be protected. In *Henrich v. Ecolab, Inc.*,⁸⁷ the complainant raised concerns that certain inventory was improperly accounted for as "good bulk" rather than "inventory at risk," thereby inflating the value of the inventory. The respondent argued that this was not protected activity because the inventory was of such relatively low value that the

⁸⁴ 2003-SOX-8 (ALJ Feb. 2, 2004).

⁸⁵ *Id.* at 15.

⁸⁶ 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004), at 10.

⁸⁷ 2004-SOX-51 (ALJ Nov. 23, 2004).

concerns were immaterial to the company's accounting procedures. The ALJ found that the low value of the inventory had no bearing on whether complainant could pursue a claim. Although OSHA had considered a materiality standard during notice and comment rulemaking, it found it inappropriate to specify a percentage or formula for use in defining protected activity. The ALJ found this rejection of a specific measure to be the strongest authority against a materiality requirement.⁸⁸ The ALJ in *Morefield v. Exelon Serv., Inc.*⁸⁹ stated that whether or not the complainant had engaged in protected activity was not dependent on whether a third party was misled or defrauded, the amount in question was large or small, or the claimant identified a specific rule, law, or regulation violated. The complainant had reported internal accounting deficiencies and manipulation of financial results to make a subsidiary's performance appear better than the actual results. Whistleblowers may anticipate the deception buried in internal documents which can eventually taint public disclosures, and whistleblower protection extends to violation of any law or rule relating to fraud against stockholders.

2. Employer Knowledge of Protected Activity

When a complainant's supervisors know of the protected activity, that knowledge is imputed to the respondent. In *Collins v. Beazer Homes USA, Inc.*,⁹⁰ the complainant was fired by a supervisor who may not have been aware of her previous protected activity. Nevertheless, the court said that an employer cannot bring in a manager to be the "sole decision maker for the purpose of terminating a complainant" as that would "eviscerate the protection afforded to employees" by SOX.⁹¹ In *Henrich v. Ecolab, Inc.*,⁹² the ALJ found that because the complainant's immediate supervisors knew of his protected activity, that knowledge could be imputed to the outside

⁸⁸ 2004-SOX-51 (ALJ Nov. 23, 2004), at 9.

⁸⁹ 2004-SOX-2 (ALJ Jan. 28, 2004).

⁹⁰ 334 F. Supp. 2d 1365 (N.D. Ga. 2004).

⁹¹ *Id.* at 1378.

⁹² 2004-SOX-51 (ALJ Nov. 23, 2004), at 10.

executives who had ultimate authority regarding the complainant's employment status. Similarly, in *Platone v. Atl. Coast Airlines Holdings, Inc.*,⁹³ the ALJ attributed constructive knowledge to the firing manager, saying that the law will not permit the respondent to insulate itself from liability by creating "layers of bureaucratic ignorance" between the whistleblower's direct line of management and the final decision-maker.⁹⁴

3. Unfavorable Action

In *Hendrix v. American Airlines, Inc.*,⁹⁵ the ALJ analyzed various decisions regarding the meaning of "adverse action" under different statutes, and specifically looked at the concept of tangible job consequence. She concluded that Title VII decisions provided helpful guidance, but adverse action must be more broadly construed under whistleblower statutes than under the civil rights laws. The ALJ also looked to the law of the circuit in which the claim arose. She applied the Tenth Circuit's expansive definition of adverse action and found that the complainant's placement on a layoff list constituted an adverse action, although the complainant suffered no tangible job consequence as the layoff never took place. The ALJ found that vague claims of verbal abuse, assignment to a second shift, and denial of access to computer resources were inconveniences an employee might face in the normal workplace, and were not so severe that they altered the terms of the complainant's employment.

In *Dolan v. EMC Corp.*,⁹⁶ the ALJ stated that an adverse employment action must have some tangible job consequence, such as a lower salary, jeopardized job security, or some other tangible job detriment. The complainant argued that the respondent's refusal to withdraw a negative performance evaluation and a performance improvement plan was an adverse employment action. The ALJ found that since there was no tangible job detriment, the evaluation could not be

⁹³ 2003-SOX-27 (ALJ Apr. 30, 2004).

⁹⁴ *Id.* at 24.

⁹⁵ 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004).

⁹⁶ 2004-SOX-1 (ALJ Mar. 24, 2004).

considered an adverse employment action, nor could the failure to remove it.⁹⁷ By contrast, in *Halloum v. Intel Corp.*,⁹⁸ the ALJ found that a modified corrective action plan imposed on the employee was an unfavorable employment action. The original plan was not, but the modified plan set him up for failure by assigning him unattainable tasks.

Not everything a complainant dislikes is an adverse employment action. In *Harvey v. The Home Depot, Inc.*,⁹⁹ the complainant argued that the respondent's refusal to accept his complaint sent by registered mail was an unfavorable personnel action that violated fiduciary duties. He also claimed that the employer was blacklisting him, which is a recognizable adverse action, but the judge found that refusing to accept mail was not an act of blacklisting, did not affect his employment conditions, and was not actionable. In *Kingoff v. Maxim Group LLC*,¹⁰⁰ the employee complained that the employer forced him to execute a promissory note, initiated an arbitration case against him, sent him threatening or harassing letters, and committed other egregious but unspecified actions. The ALJ ruled that those matters could not be considered because they had not been raised in the complaint before him, but referred them back to OSHA to be processed as additional complaints.

4. Contributing Factor

Temporal proximity between the protected activity and the adverse action creates an inference that the activity was a contributing factor in the action. In *Collins v. Beazer Homes USA, Inc.*,¹⁰¹ the court found that the proximity in time between plaintiff's complaints and her termination provided the circumstances to suggest that protected activity was a contributing factor. In *Richards*

⁹⁷ Given the expansive definition of prohibited retaliation in the SOX regulations and the statute, which is broader than in most other statutes, the judge's ruling, which relies on other statutes, appears to be incorrect. Actions such as harassment could certainly be adverse without causing "tangible job detriment." See 29 C.F.R. § 1980.102(a), (b).

⁹⁸ 2003-SOX-7 (ALJ Mar. 4, 2004), at 12.

⁹⁹ 2004-SOX-77 (ALJ Nov. 24, 2004).

¹⁰⁰ 2004-SOX-57 (ALJ July 21, 2004).

¹⁰¹ 334 F. Supp. 2d 1365, 1379 (N.D. Ga. 2004).

v. Lexmark Int'l, Inc.,¹⁰² the fact that complainant was terminated one day after reporting accounting problems raised an inference that the adverse action was motivated by protected activity. Where years passed between the protected activity and the termination, an ALJ found that complainant did not prove that the activity was a contributing factor.¹⁰³

In *Getman v. Southwest Sec., Inc.*,¹⁰⁴ the ALJ found the strongest evidence that protected activity was a contributing factor in the complainant's termination to be the respondent's dishonesty regarding a number of key issues.

H. Defenses

The named person may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the protected activity. *Collins v. Beazer Homes USA, Inc.*¹⁰⁵ "Clear and convincing" evidence is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt.¹⁰⁶ In cases where employees themselves falsified records, violated corporate policy by covertly recording conversations, violated revenue recognition policies, or had preexisting poor evaluations, respondents proved by clear and convincing evidence that they would have taken the adverse employment actions even absent protected activity.¹⁰⁷

In a mixed motive case, the respondent must prove by clear and convincing evidence that it would have taken the action based on the legitimate motive alone. In *Platone v. Atl. Coast Airlines Holdings, Inc.*,¹⁰⁸ the employer terminated the complainant after she questioned lost flight pay paid

¹⁰² 2004-SOX-49 (ALJ Oct. 1, 2004), at 15. *See also* 29 C.F.R. § 1980.104(b)(2).

¹⁰³ *Heaney v. GBS Properties LLC*, 2004-SOX-72 (ALJ Dec. 2, 2004).

¹⁰⁴ 2003-SOX-8 (ALJ Feb. 2, 2004), at 11, 17. The ALJ noticed discrepancies between the employer's response to OSHA, which admitted a certain meeting occurred, and its briefs, which denied it. Those inconsistencies harmed the employer's credibility in general and made it non-credible on issues related to the meeting.

¹⁰⁵ 334 F. Supp. 2d 1365, 1380 (N.D. Ga. 2004); *see also* 29 C.F.R. § 1980.104(c).

¹⁰⁶ *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004), at 13.

¹⁰⁷ *Henrich v. Ecolab, Inc.*, 2004-SOX-51 (ALJ Nov. 23, 2004); *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004); *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, 2004-SOX-11 (ALJ July 6, 2004); *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (ALJ Dec. 9, 2004).

¹⁰⁸ 2003-SOX-27 (ALJ Apr. 30, 2004).

to pilots on union business, although it claimed that she was fired because of her undisclosed romantic relationship with a former leader of the pilots' union. The ALJ stated that although respondent had a legitimate, non-pretextual reason for the discharge, there was also a discriminatory reason, and the employer had to show by clear and convincing evidence that the action would have been taken on the basis of the legitimate motive alone. "The employer bears the risk that the influence of legal and illegal motives cannot be separated."¹⁰⁹ It was not possible to separate the legitimate and the improper motives, and thus respondent failed to demonstrate that its motive for firing complainant was unrelated to her protected activity.

I. Damages and Other Remedies

Relief provided under SOX is designed to make the employee whole, and includes reinstatement, back pay, interest, and compensatory damages including attorneys' fees. In *Platone v. Atl. Coast Airlines Holdings, Inc.*,¹¹⁰ the ALJ stated that the complainant has the burden of establishing the amount owed, but unrealistic exactitude is not required, and uncertainties should be resolved against the discriminating party. There the ALJ awarded pay, lost vacation time, and medical expenses that would have been covered under the plan. The cutoff point for the back pay would be the date when complainant was hired elsewhere at a commensurate rate of pay, and respondent was responsible for pay and medical expenses in the future until that date. The ALJ declined to award damages for 401(k) participation because the complainant had not worked long enough to be eligible, and there was no way of knowing how much salary she would have deferred or even if she would have participated. The ALJ also denied payment for unused holidays, which were not normally paid for, and flight benefits, which did not accrue on a schedule and could not be quantified.

¹⁰⁹ *Id.* at 28.

¹¹⁰ 2003-SOX-27 (ALJ July 13, 2004), at 2.

In the same case the complainant's attorney did not present any evidence on the prevailing market rate for the type of complex litigation done before the ALJ. The ALJ consulted a published survey of law firm rates for guidance. Taking into account that information, the lead attorney's experience, the complexity of the issues presented, and the quality of the presentation at trial, the ALJ found that the attorney's hourly rates were within the market rate and reasonable. However, the ALJ reduced the total hours billed by 15% because the complainant's attorney used some block entries with vague descriptions, which did not provide an adequate means upon which to judge the reasonableness of the time expended.

Damages for loss of reputation are recoverable. *Hanna v. WCI Communities*¹¹¹ involved an individual who had voiced concerns that the company's business plan was not reasonable or realistic, and could mislead the investing public. The court found that the language stating that a prevailing employee is entitled "to all relief necessary to make the employee whole" in 18 U.S.C. § 1514A(c)(1) should be read to include damages for loss of reputation. A successful plaintiff could not be made whole without being compensated for injury to reputation that harmed plaintiff's future earning capacity. The court deferred ruling on whether the plaintiff had a right to a jury trial, which like the question of damages for loss of reputation was an issue of first impression.

J. Confidentiality Agreements

Broad confidentiality agreements cannot be used to prohibit employees from providing whistleblower-type information about unlawful acts. The court in *In re JDS Uniphase Corporation Securities Litigation*¹¹² granted a motion to limit the extremely comprehensive confidentiality agreements signed by former employees, and permitted them to answer questions asked by plaintiffs' counsel about the company's business practices. The court said that it would be against

¹¹¹ 2004 WL 2931132 (S.D. Fla. 2004).

¹¹² 238 F. Supp. 2d 1127 (N.D. Cal. 2002).

public policy for parties to agree not to reveal facts relating to alleged or potential violations of law.¹¹³ According to the court, the Sarbanes-Oxley Act

demonstrates the public policy in favor of allowing even current employees to assist in securities fraud investigations. It certainly does not establish a public policy in favor of allowing employers to muzzle their employees with overbroad confidentiality agreements.¹¹⁴

To the extent that the agreement could be read as prohibiting an employee from providing information about company wrongdoing, it was unenforceable.¹¹⁵

K. Mandatory Arbitration Agreements

Claims under SOX are not exempt from agreements to arbitrate employment disputes. The plaintiff in *Boss v. Salomon Smith Barney Inc.*¹¹⁶ alleged that he was ordered to share a draft research report with Salomon's investment bankers and pressured to change the report. He had signed an agreement with Salomon agreeing to arbitration as the exclusive forum for resolving all employment disputes, and also executed a U-4 application for registration with the National Association of Securities Dealers (NASD) agreeing to arbitration of any dispute or controversy with his firm. The court ruled that nothing in SOX indicated an intent to exempt SOX claims from mandatory arbitration. It found his claims arbitrable, and compelled arbitration before the NASD.

L. Adequate Remedy as a Defense

Sometimes employers attempt to use SOX as a shield against common law wrongful termination claims. The theory is that the existence of a statutory remedy precludes resorting to a common law wrongful termination claim for violation of public policy. In *Parexel International Corp. v. Feliciano*,¹¹⁷ the employee alleged that the employer retaliated against him when he refused to pirate a website. The employer argued that the claim of wrongful termination was barred

¹¹³ *Id.* at 1135.

¹¹⁴ *Id.* at 1136.

¹¹⁵ *Id.* at 1137.

¹¹⁶ 263 F. Supp. 2d 684, 19 IER Cases 1796 (S.D.N.Y. 2003).

¹¹⁷ 2004 WL 2980386 (E.D. Pa. 2004).

because SOX provided an adequate statutory remedy for the employee's complaint. The court found, however, that SOX does not specifically address retaliation for refusal to engage in illegal activity. As SOX did not provide an adequate remedy for this aspect of the employee's wrongful termination claim, the court denied the employer's motion to dismiss.

M. Availability of Court Remedy When OSHA Does Not Act Promptly

The statute allows an employee to bring an action in federal court for *de novo* review if the Secretary has not issued a final decision within 180 days of the filing of the complaint.¹¹⁸ What if the Secretary has not acted at all? In *Hanna v. WCI Communities*,¹¹⁹ the employee filed a complaint, and nothing happened for over 180 days. He then gave the required 15-day notice that he was filing an action in federal court, and OSHA issued a preliminary finding of no reasonable cause. Under the SOX procedures he could have appealed the preliminary finding to an ALJ, and the employer argued that he was obliged to do so. The court disagreed, relying on the plain meaning of the statute, which authorizes a federal court complaint to be filed if there has been no final decision within 180 days. The complainant did not have a duty to complete the OSHA procedures and attempt to convert the preliminary order into a final order. At the time he filed suit, the case was not even at the second step of the three-step process for obtaining a final decision from DOL (the preliminary finding, the ALJ hearing, and the ARB appeal).

Congress presumably passed this statute to prevent the Department of Labor from unnecessarily delaying relief for Sarbanes-Oxley plaintiffs.¹²⁰

The court refused to penalize the plaintiff for complying with the plain language of the statute.

In *Stone v. Duke Energy Corporation*,¹²¹ the Secretary issued a preliminary finding of no reasonable cause, plaintiff appealed, and a hearing before an ALJ was scheduled, but plaintiff filed

¹¹⁸ 18 U.S.C. § 1514A(b)(1)(B).

¹¹⁹ 2004 WL 2931133 (S.D. Fla. 2004).

¹²⁰ *Id.* at *6.

¹²¹ 2004 WL 1834597 (W.D.N.C. 2004).

suit before the hearing. The ALJ stated that he would retain jurisdiction until a district court judge ruled that the district court had jurisdiction. Plaintiff sought an order staying the DOL proceeding, and the court granted it, noting that its remedies were not limited under the statute, and equitable remedies were specifically authorized. The Secretary had done little more than an initial investigation, had not issued a final decision, and the statute authorized bringing an action after 180 days elapsed. The ALJ's attempt to retain control of the proceeding yielded to the district court's jurisdiction.

V. Ethical Considerations

A. Who is the Client?

Federal agents come to gather records at the company premises. There is no search warrant, but company lawyers give permission to search. The indicted CEO then moves to suppress the evidence. Will the motion be granted?¹²²

Complainant is the former general counsel of the company, and supervised matters he assigned to outside counsel. After being fired, he moves to disqualify outside counsel and her firm from representing the company on his SOX claim, because she has knowledge about his work, and he intends to call her as a witness. Will the motion be granted?¹²³

B. Lawyer Reporting

Under SOX corporate officers must now sign statements, subject to serious criminal penalties, that the company's reports are accurate. Lawyers report to corporate officers about litigation pending against the corporation, including NLRB proceedings, discrimination claims, wage and hour cases, class actions of any sort -- the normal stuff of a labor and employment practice -- as well as any other litigation (environmental, securities, commercial) that the company may be defending. In the past, the reporting process in some instances may have been desultory,

with pieces of serious litigation kept off the table. Misstating the status or the seriousness of these matters could now be a felony. Will the corporate officers make their reporting officers, general counsel, other legal officers, and outside counsel sign certifications that their reports of the material litigation liabilities of the company are accurate? How far down the chain will those reporting requirements, and the penalties for violating them, be pushed? What if a letter in the file from outside counsel outlines the seriousness of a matter, but it is not reflected in the reports to higher officers? What if the report mentions 20 cases, but there are really 2,000? Or what if the report mentions a sex discrimination case filed by six plaintiffs, then a motion for class certification is granted and the plaintiff class is now 1.6 million? What if the company and its auditor neglected to mention the class action, and this affected the price of the stock?

C. Violation by Counsel's Investigation

A SOX complaint should trigger an internal investigation of the concerns raised by the complainant. Too zealous an investigation, such as forceful questioning by counsel, could stray into the area of intimidation or harassment, or could be perceived as such. Retaliation prohibited under SOX includes restraint and coercion, as well as any type of intimidation or harassment. This is an area where an attorney's investigation could conceivably create the actionable retaliation.

D. Pressure to Waive Attorney-Client Privilege

As noted by Steve Wheelless in his accompanying paper,¹²⁴ the SEC and the Justice Department consider waiver of the privilege when deciding how cooperative a corporation has been and whether to bring charges against it. A company may face pressure to waive the privilege.¹²⁵

¹²² HealthSouth CEO Richard Scrushy lost this motion since the lawyers properly gave permission to search. Dan Morse, *Scrushy Asks to See HealthSouth Records for Trial*, The Wall Street Journal, Jan. 21, 2005, at B6.

¹²³ The motion was denied in *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Oct. 19, 2004).

¹²⁴ Steven Wheelless, *Is Gordon Gekko (Wall Street) Really Gone? Practical and Ethical Issues of Importance to Labor and Employment Attorneys Under Sarbanes-Oxley*, at 11-12.

VI. Conclusion

In view of how common these issues are, the Sarbanes-Oxley whistleblower provisions create a significant new exception to employment at will. SOX gives employees retaliated against for reporting fraud substantial new federal remedies, uniform nationwide, in addition to those that already existed in certain state laws.¹²⁶ In some respects these remedies are more attractive and the procedures more expeditious than those available under the National Labor Relations Act -- immediate reinstatement, pre-hearing, and two possible avenues for seeking relief, an administrative complaint, and a federal court action if the administrative process bogs down. How companies represent the litigation they are involved in will be one of the crucial issues for labor and employment lawyers and their new best friends, the securities lawyers.

Endnotes -- Memorable Quotes

Prosecutors said Tyco's Kozlowski and Swartz stole \$170 million by hiding unauthorized bonuses and secretly forgiving loans to themselves, and pocketed \$430 million by lying about the state of the company's finances to pump up Tyco stock. Defense lawyers said Kozlowski and Swartz earned every penny they got from Tyco.¹²⁷

Bernard Ebbers and Scott Sullivan of WorldCom disagreed about how much to reveal publicly about the company's woes. According to a witness, at one meeting Sullivan told Ebbers, "We have to stop lying."¹²⁸

¹²⁵ Eugene Scalia, *Emerging Issues Under the Sarbanes-Oxley "Whistleblower" Provision*, Proceedings of ABA Annual Meeting, Aug. 9, 2004, at 6.

¹²⁶ State and federal whistleblower laws relating to the disclosure of information by employees are summarized in 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 (2004). According to Cherry, state whistleblower law is "murky, piecemeal, disorganized, and varies from jurisdiction to jurisdiction," and the federal approach to whistleblower protection before Sarbanes-Oxley was similarly piecemeal. *Id.* at 1049.

¹²⁷ *2 fallen corporate stars go on trial today; Ex-Tyco CEO Kozlowski being retried with CFO*, The Baltimore Sun, Jan. 18, 2005, at 9D.

¹²⁸ Susan Pulliam and Almar Latour, *Trial of Worldcom's Ebbers Will Focus on Uneasy Partnership*, The Wall Street Journal, Jan. 12, 2005, at 1A.