WHISTLEBLOWER RETALIATION AND DOCUMENT DESTRUCTION: BEWARE THE CIVIL AND CRIMINAL SANCTIONS OF SARBANES-OXLEY

Paul D. Frederickson

In the last decade of the twentieth century, the economy and financial markets of the United States boomed with confidence. State and federal governments generated surpluses. Billions of investment dollars poured in from around the world. With annual double-digit stock market returns, insurance-company and pension-plan portfolios got fat, and workers dreamed of early retirement. Ambitious investors quit their jobs to pursue wealth as stock market day traders. Financial markets seemed immune from down-side risk, and the future looked bright.

The turn of the century saw dramatic changes. The collapse of Enron (America's seventh largest company)[1] in 2001 soon was followed by almost daily revelations of wrongdoing in corporate America. Headlines of scandal at well-known companies, such as Enron, WorldCom, Global Crossing, Adelphia Communications, ImClone Systems, Tyco International and many others, became common. Suspicions of accounting irregularities, "cooking the books," and securities fraud led to investigations and prosecutions of well-known corporations and their leaders. Even the trusted accounting firm Arthur Andersen & Co. and media icon Martha Stewart were not immune from investigation and prosecution. Growing doubts about the reliability of corporate earnings reports and accounting data in general led to a crisis of confidence and the collapse of the stock market. Plummeting values for mutual funds, pension plans and individual portfolios left many investors shaken and wondering what happened. Investor confidence became so low that in June 2002, $18 billion was removed from U.S. stock funds, the third largest withdrawal in history.[2]

Congress was under pressure to act quickly. In an effort to restore confidence in the financial markets, Congress passed the Sarbanes-Oxley Act of 2002 (SOX), effective July 30, 2002.[3] The Act, also known as the Public Company Accounting Reform and Investor Protection Act, was passed "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes."[4]

Title I of SOX mandates the creation of a Public Company Accounting Oversight Board to inspect, investigate and discipline public accounting firms and

' Associate Professor of Law and Finance, Finance and Business Law Team Leader, Thrivent Financial for Lutherans Professor of Business Administration, College of Business Administration, University of Wisconsin Oshkosh.

[1] Ethan Zelizer, Student Article, *The Sarbanes-Oxley Act: Accounting for Corporate Corruption*, 15 LOY. CONSUMER L. REV. 27,34 (2002).

[2] Joseph F. Morrissey, *Catching the Culprits: Is Sarbanes-Oxley Enough?*, 2003 COLUM. BUS. L. REV. 801,806(2003).

[3] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204,116 Stat. 745 (codified in scattered sections of 11,15, 18, 28, and 29 U.S.C) [hereinafter SOX].

[4] SOX, preamble.

persons associated with the firms.[5] Titles II and III of SOX establish new requirements for audit committees and auditors, place restrictions on non-audit services and limit conflicts of interest between auditors and companies being audited. The principal executive officer (CEO) and principal financial officer (CFO) now must certify, based on their knowledge and under penalty of personal liability, that the annual and quarterly reports do not contain untrue statements of material fact or material omissions. They also must certify, based on their knowledge, that the financial statements and financial information are not misleading and fairly represent the financial condition of the company.[5] It is now illegal for any manager or officer fraudulently to influence, to coerce, or to manipulate an audit.[7] Most personal loans to directors and officers now are prohibited.[8] SOX creates and enhances civil and criminal penalties for corporate and criminal fraud,[9] white collar crime,[10] securities fraud," mail and wire fraud,[12] alteration and destruction of documents,[13] and obstruction of justice.[14] The United States Sentencing Commission is directed to review, amend and enhance the Federal Sentencing Guidelines for obstruction of justice and criminal fraud.[15]

SOX has increased the regulation, accountability and potential liability of officers, directors, corporate and public accountants, and other finance and investment professionals involved in financial reporting and the sale of securities. People from other areas within a corporation may mistakenly believe that they are not affected by SOX and need not be concerned about the lengthy and complex statute. Managers, supervisors and employees from human resources, operations, MIS, and marketing may be surprised to learn that they, as well as their colleagues in accounting and finance, all face increased rights and responsibilities, and potential liability, under some sections of SOX. This article focuses on three lesser-known sections of SOX that create new rights and responsibilities and increase the risk of liability for managers and employees throughout the corporation.

I. CIVIL WHISTLEBLOWER PROTECTION

A. *Background*

Gathering evidence and prosecuting wrongdoers can be difficult for government agencies without the cooperation of employees knowledgeable about the policies and practices of the company being investigated. The importance of

[5] SOX §§104,105.
[6] SOX §302.
[7] SOX §303.
[8] SOX §402.
[9] SOX, Title Vili.
[10] SOX, Title IX.
[11] SOX §807.
[12] SOX §903.
[13] SOX §§802,1102.
[14] SOX §805.
[15] *Id.*

employee cooperation was demonstrated dramatically when *Time Magazine* named three corporate Whistleblowers, Cynthia Cooper of WorldCom, Coleen Rowley of the FBI, and Sherron Watkins of Enron, "Persons of the Year 2002."[16] Finding employees willing to cooperate with investigators can be difficult, because employees who help with government investigations, or inform regulators of wrong doing ("whistleblowers") often have been viewed as traitors to the organization, been ostracized, and faced the loss of job and benefits. Although there are several state and federal statutes, and state common law, that protect selected whistleblowers, there is no across-the-board protection of whistleblowers at either the state or the federal level. Recognizing the importance of whistleblowers to government investigators, and the need to protect whistleblowers from retaliation, Congress incorporated additional whistleblower protection into the Act.[17] Corporations, and employee agents of the corporation, now face additional civil and criminal sanctions for retaliation under SOX.

B. *Whistleblower Protection Under SOX§806*

Section 806 of SOX is entitled "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud."[18] The Congressional Record labels Section 806 "Whistleblower protection for employees of publicly traded companies."[19] The details of this section are examined below.

The companies subject to sanctions under section 806 are any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §780(d))."[20] This includes companies registered with the SEC and required to file annual and quarterly reports. Companies listed on national stock exchanges are covered, as well as most other publicly traded companies.[21] The people who face personal liability are "any officer, employee, contractor, subcontractor or agent of such company."[22]

Under section 806, no company or company representative "may discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act

[16] Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: Cynthia Cooper, Coleen Rowley and Sherron Watkins*, TIME, Dec. 22,2002, at 30.

[17] "Congress has long employed the inside whistleblower as a first line of defense against various types of abuses which it deems unacceptable. Moreover, it understands the risks it beckons the whistleblower to accept, and it endeavors to protect them." Morefield v. Exelon Services, Inc., 2004-SOX-2 (ALJ Jan. 28, 2004), at 2.

[18] Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, §806(a), 116 Stat. 802 (codified at 18 U.S.C. §1514A) [hereinafter SOX §806], reprinted in Appendix, *infra* page 121.

[19] CONG. REC. S7418 (daily ed. July 26,2002).

[20] SOX §806(a).

[21] Corporations with fewer than 300 shareholders are not covered under SOX §806. *See, e.g.*, Flake v. New World Pasta Co., ARB No. 03-126, ALJ No. 2003-S0x-18 (ARB Feb. 25, 2004).

[22] SOX §806(a).

[defined below] done by the employee."[23] "A company or company representative 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."[24]

Employees who provide information or assist in an investigation by "(A) a federal regulatory or law enforcement agency; (B) any member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)" engage in protected activity.[25] To file, testify, participate or assist in a proceeding against an employer also is protected activity. Information or assistance must be provided under the employee's reasonable belief that the employer's action "constitutes a violation of [18 U.S.C.] section 1341,[26] 1343,[27] 1344,[28] or 1348,[29] any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."[30] To gain protection for participation in a proceeding against an employer, the proceeding also must relate to the same sections, rules, regulations and provisions.[31]

Any employee who believes he or she has been discriminated against in violation of the Act may file a complaint with the Secretary of Labor. "No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations."[32] "The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee."[33]

[23] *Id.*

[24] Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2000, Title VIII of the Sarbanes-Oxley Act of 2002, 29 C.F.R. pt. 1980 (2003) at §1980.102(a).

[25] SOX §806(a)(l).

[26] 18 U.S.C. §1341 (2005) Frauds and swindles.

[27] 18 U.S.C. §1343 (2005) Fraud by wire, radio, or television.

[28] 18 U.S.C. §1344 (2005) Bank fraud.

[29] 18 U.S.C. §1348 (2005) Securities fraud.

[30] SOX §806(a)(2).

[31] SOX §806(a)(1).

[32] 29 C.F.R. §1980.103(b).

[33] 29 C.F.R. §1980.103(c). OSHA was given investigative authority because it has developed expertise in investigating whistleblower cases. The first Federal whistleblower protection came under the Occupational Safety and Health Act. Since then, Congress has given OSHA authority to enforce 13 other federal whistleblower statutes, including Sarbanes-Oxley. *See* U. S. Dept. OF LABOR, *DOL Whistleblower Statutes* (visited Jan. 26, 2004), http://www.oalj.dol.gov.; Clean Air Act, 42 U.S.C. §7622; Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9610; Energy Reorganization Act, 42 U.S.C. §5851; Federal Water Pollution Control Act, 33 U.S.C. §1367; Federal Water Pollution Control Act, 33 U.S.C. §1369; Pipeline Safety Improvement Act of 2002, P.L. No. 107-355, 116 Stat. 2985, §60129; Safe Drinking Water Act, 42 U.S.C. §300j-9; Sarbanes-Oxley Act of 2002, P.L. 107-204, §806, 18 U.S.C. & 1514A; Solid Waste Disposal Act, 42 U.S.C. §6971; Surface Transportation Assistance Act, 49 U.S.C. §31105 (employee protection provision); Surface Transportation

After receiving the complaint, the Assistant Secretary of Labor for Occupational Safety and Health will notify the appropriate parties of the complaint. OSHA investigators will be assigned. They will review the complaint and, where appropriate, interview the complainant. The complaint will be dismissed if the complainant has failed to make "a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."[34]

Within 20 days of notification of the complaint, the employer may submit to the Assistant Secretary a written statement, affidavits and documents presenting and substantiating its position. The employer also may request a meeting with the Assistant Secretary to present its position. Notwithstanding the showing of a *prima facie* case by the employee, if the employer "demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct, no further investigation of the complaint will be conducted."[35]

If the employer fails to demonstrate its case with clear and convincing evidence, the Assistant Secretary will conduct a more thorough investigation. Collecting statements from parties and witnesses, and gathering documents and other evidence all may be part of the investigation.[36] "After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.[37] If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she will accompany the findings with a preliminary order providing relief to the complainant."[38] The

Assistance Act, 49 U.S.C. §31101 (definitions); Surface Transportation Assistance Act of 1982,49 U.S.C. app. §2305 (old provision); Toxic Substances Control Act, 15 U.S.C. §2622; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), §519, 49 U.S.C. §42121. *See also* Eugene Scalia, *The SEC Isn't the Only Agency Involved in Enforcing Sarbanes-Oxley,* LEGAL TIMES, May 19, 2003, at 35 (Eugene Scalia is the former Solicitor of Labor for the Department of Labor). Sarbanes-Oxley whistleblower claims are now the most common OSHA claim other than traditional occupational safety and health claims. John Scalia, *Whistleblower Provisions Are Making Labor Judges Wrestle with Securities Law,* LEGAL TIMES, April 19,2004, at 46.

[34] 29 C.F.R. §1980.104(b). The complaint and interview "must allege the existence of facts and evidence to make a *prima facie* showing as follows: (i) The employee engaged in a protected activity or conduct; (ii) The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity; (iii) The employee suffered an unfavorable personnel action; and (iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." 29 C.F.R. §1980.104(b)(l). "Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action." 29 C.F.R. §1980.104(bX2). See *also* Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365 (2004) (using the SOX *prima facie* case analysis in a federal district court); Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1573 (analyzing these factors under provisions of the Energy Reorganization Act.).

[35] 29 C.F.R. §1980.104(c).
[36] 29 C.F.R. § 1980.104(d&e).
[37] 29 C.F.R. §1980.105(a).
[38] 29 C.F.R. §1980.105(a)(l).

preliminary order may mandate job reinstatement as well as other remedies allowed under the Act.[39]

A party seeking to challenge the findings and preliminary order "must file any objections and request a hearing on the record within 30 days of receipt of the findings and preliminary order.[40]... If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement."[41] A hearing will be conducted before an administrative law judge [hereinafter ALJ], *de novo*, on the record.[42] Formal rules of evidence will not apply.[43] Some discovery may be allowed, but can be limited by the ALJ. Each party will represent itself. The Assistant Secretary may participate as a party at its discretion.[44]

Remedies may be available to the employee or the employer. "If the administrative law judge concludes that the party charged has violated the law, the order will provide all relief necessary to make the employee whole."[45] Compensatory damages can include (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) the amount of back pay, with interest; and (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.[46] If the administrative law judge determines the complaint was frivolous or brought in bad faith, the judge may award reasonable attorney's fees, not exceeding $1,000.[47]

A party objecting to a decision has ten business days from the date of the decision to file a written petition for review with the Administrative Review Board. If the petition is accepted, the Board will review the factual determinations of the ALJ under the substantial evidence standard. The final decision of the Board will be issued within 120 days of the conclusion of the hearing.[48]

> Within 60 days after the issuance of a final order, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation occurred or the circuit in which the complainant resided on the date of the violation.[49]
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> If the board has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been

[39] *Id.*
[40] 29 C.F.R. §1980.106(a).
[41] 29 C.F.R. §1980.1060).
[42] 29 C.F.R. §1980.107(b).
[43] 29 C.F.R. §1980.107(d).
[44] 29 C.F.R. §1980.108(a).
[45] 29 C.F.R. §1980.109(b).
[46] *Id.*
[47] *Id.*
"29 C.F.R. §1980.110.
[49] 29 C.F.R. §1980.112(a).

> delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States.[50]

C. *Case Law Interpreting SOX§806*

As of January 2005, no SOX whistleblower case has been tried on the facts before a federal district court.[51] However, 2003 and 2004 saw the first four cases in which ALJs conducted complete hearings on the facts and applied SOX §806 to render decisions and award remedies.[52] The hearings have lasted up to two days, and the ALJs' lengthy decisions are published by the Department of Labor.[53] Although they do not provide the legal precedent of a federal court decision, they are examples of the types of cases being filed and likely will influence the outcome of future ALJ hearings.[54] These four ground-breaking cases are summarized below and are used to make observations and recommendations later in the article.[55]

1. Welch v. Cardinal Bankshares Corporation[56]

Welch was Chief Financial Officer of Cardinal Bankshares, a bank holding company, and its subsidiary, Bank of Floyd. Because Cardinal had approximately 600 shareholders, was publicly traded on NASDAQ, and was required to file annual and quarterly reports with the SEC, it was a corporation subject to regulation under SOX §806.[57] As CFO, Welch reported directly to R. Leon Moore, the President/CEO and Chairman of the Board of Directors of Cardinal. On several occasions, Welch sent e-mails and memoranda to Moore warning of insider trading by officers of Cardinal, improper journal entries leading to overstated earnings, and questionable quarterly reports to be filed with the SEC. In letters to a member of Cardinal's auditing firm and to Moore, Welch again expressed his concerns about accounting irregularities and reporting inaccuracies and refused to sign a representation letter prepared by the auditors and required by SOX. In addition, Welch refused to certify the financial statements in the 10-QSB statement for the second quarter of 2002. CFO certification of financial statements is now required by SOX.[58]

Welch also sent e-mails to an examiner for the State Bureau of Financial Institutions and to the SEC. In his e-mail to the SEC, Welch stated that as CFO he had observed a number of questionable activities, including stock purchases by Moore, that he would classify as insider trading, and improper journal entries

[50] 29 C.F.R. §1980.114(a).

[51] *But see* Collins v. Beazer Homes USA, Inc., 334 F.Supp.2d 1365 (N.D.Ga. 2004) ("Plaintiffs claims are among the first to reach the federal courts on the merits," motion for summary judgment denied.)

[52] Several other cases have gone before ALJs to be decided on procedural grounds.

[53] *Available at* http://vww.oalj.dol.gov.

[54] *See infra* Part IV.

[55] *See infra* Part II.D-E.

[56] Welch v. Cardinal Bankshares Corp., **2003-S0x-15** (ALJ Jan. 28,**2004).**

[57] SOX §806(a).

[58] SOX §302.

totaling $195,000, which inflated Cardinal's earnings. The e-mail also stated that Welch refused to be Moore's "yes man," even though he realized that "this will most likely cost me my job."[59]

Welch called a meeting of Cardinal's top officers to discuss his concerns. According to Welch, he was motivated by his belief that failure to correct known problems could be construed as fraud under Sarbanes-Oxley, while prompt corrective action could help avoid deception and liability. He informed the participants that he was going to present information on the Sarbanes-Oxley Act and about the potential penalties they faced individually and as a company for violating SOX. He also stated that he believed three people in the room were "parties to fraudulent acts."[60] When Welch informed those present that he intended to tape record the meeting on the advice of his attorney, CEO Moore, citing "bank policy," attempted to turn off the recorder. Moore announced that on the advice of legal counsel, the meeting was terminated and everyone was to leave. Some of the officers left and others stayed. Welch continued the recorded meeting, explaining both orally and in written documentation why he had refused to certify the financial statements, and warning them of the substantial fines and imprisonment under SOX for anyone who certifies an inaccurate statement.[61] Welch also stated that his opinions and actions were the result of consultations with his own attorney.

Shortly after the meeting, Welch received a memorandum from Moore instructing him to meet with the corporate attorney the next week to investigate Welch's allegations of fraud and other "serious matters." It also stated that because the meeting would involve an "internal company matter, you will not be permitted to have outside counsel present."[62] On the date of the meeting Welch went to Moore's office. Cardinal's external auditor and corporate attorney were present. Welch informed them he could not meet with them until after he had consulted with his attorney, who was out of town. Later that same day, Welch received a second memorandum instructing him to meet with the corporate attorney. Welch replied by e-mail with a request to postpone the meeting for one day. Welch wrote, "I want to stress the point - I am not refusing to meet with Mr. Densmor. I simply must obtain legal advice on how to proceed."[63] Soon thereafter Welch received a memorandum from the corporate attorney instructing him to turn over the tape of his SOX meeting by 4:00 pm that afternoon. Welch e-mailed he could not produce the tape because it was in the possession of his attorney. One hour later, Welch received a letter stating that he was suspended for refusing to meet with Cardinal's legal counsel "on two scheduled occasions today."[64]

[59] *Welch*, 20Û3-SOX-15 (AU Jan. 28,2004), at 4.

" *Id.* at 14.

[61] "[A]nyone who certifies an inaccurate statement 'shall be fined not more than $1 million dollars or imprisoned not more than 10 years' and, if they do so willfully, 'they can be fined not more than $5 million dollars or 20 years in prison.'" *Welch*, 2Û03-SOX-15 (AU Jan. 28, 2004), atl4, reporting on SOX §906(c).

[62] *Welch*, 2003-S0x-15 (AU Jan. 28,2004), at 15.

[63] *Id.* at 16.

[64] *Id.*

Welch was discharged one week later. He filed a complaint with the Department of Labor. After the complaint was denied by OSHA, Welch filed an appeal with the Office of Administrative Law Judges. A formal hearing was conducted on August 25 and 26, 2003, at the United States District courthouse in Roanoke, Virginia.

The ALJ recognized that, because SOX is relatively new, relying on case authority interpreting other whistleblower statutes is appropriate. ALJ Purcell outlined the following procedure:

> When a whistleblower case proceeds to a formal hearing before an ALJ, a complainant must demonstrate by a preponderance of the evidence that protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint. Once a complainant meets this burden, he is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.
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> Accordingly, in a Sarbanes-Oxley "whistleblower" case, complainant must establish by a preponderance of evidence that:
> (1) he engaged in protected activity as defined by the Act; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action, such as discharge; and (4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. The foregoing creates an inference of unlawful discrimination. With respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation.[65]
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> If Complainant fulfills this burden of proof, Respondent may avoid liability under Sarbanes-Oxley by producing sufficient evidence to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action. Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than a preponderance of the evidence and less than beyond a reasonable doubt.[66]

The ALJ ruled that (1) Welch had engaged in protective activity and (2) the employer was aware of the activity. Welch reported the activity to the SEC, the state bank examiner, auditors, the CEO and other officers, through e-mail, memorandums and meetings. No conclusion was drawn as to whether Cardinal actually had violated the designated statutes. For ALJ Purcell, "[t]he statutory language makes it very clear that Complainant is not required to show the reported conduct actually

[65] *Id.* at 35 (citations omitted), *see* 29 C.F.R. §1980.104(b), *supra* note 34.

[66] *Id.* at 36 (citations omitted).

constituted a violation of the law, but only that he reasonably believed Respondent violated one of the enumerated laws and regulations."[67] Looking at the totality of the facts, the AT T ruled that it was reasonable for Welch to believe that statutes had been violated, *i.e.*, two journal entries totaling $195,000 had been improperly recorded.[58]

It was clear to the ALJ that Welch's suspension and subsequent termination were (3) an adverse employment action. ALJ Purcell also found (4) the protected activity was a contributing factor in the discharge. "I note that proximity in time between Welch's protected activity and the adverse action is itself sufficient to create an inference of unlawful discrimination."[69] Welch's numerous activities over six to seven weeks were all close enough to the termination to infer that they were contributing factors.

The ALJ next ruled that Cardinal did not prove with clear and convincing evidence that it would have fired Welch regardless of his protected activity. Cardinal argued that Welch was fired for failing to meet with the corporate counsel and a member of the audit committee without his attorney. The ALJ was not convinced by this argument. He found it more plausible that CEO Moore, knowing that Welch would not come to a meeting without his attorney, mandated the meeting for the purpose of creating a justification to fire Welch.[70]

Because Cardinal had failed to rebut the inference of liability with clear and convincing evidence, Welch was granted his statutory remedies. Cardinal was ordered to reinstate Welch to his former CFO position, without loss of pay and benefits. In addition, Cardinal was ordered to pay Welch back pay with interest, litigation costs and expenses, including expert witness fees, and reasonable attorney's fees, with the amounts to be decided at a future hearing. In addition, Cardinal was ordered to purge Welch's personnel file of any reference to the disciplinary action, and Welch's actions were not to be used against him in future employment opportunities at Cardinal, or in providing references to other potential employers.[71]

2. Getman v. Southwest Securities, Inc.[72]

As a research analyst for Southwest Securities, Margot Getman was expected to conduct research and to write reports containing investment recommendations that would be used by the sales force and provided to investors as part of their comprehensive investment services. Getman prepared a research report on Cholestech, Inc., part of the healthcare technology sector she was hired to cover. As was the custom at Southwest, Getman presented her report to a review committee. In her report and presentation, Getman recommended that investors "accumulate" Cholestech stock. The "accumulate" rating was not a strong rating, and

[67] *Id.* at 36.
[68] *Id.* at 37.
[w] *Id.* at 42.
[70] *Id.* at 44.
[71] *Id.* at 47-48.
[72] 20Q3-SOX-8 (AU Feb. 2,2004).

several committee members questioned her about the rating. Two committee members were working on an investment banking deal with Cholestech that would generate significant revenues for Southwest. The impact of the "accumulate" rating was that Southwest would not be included in any banking deal with Cholestech. Getman concluded that the committee was dissatisfied with her recommendation to "accumulate" and preferred a "strong buy" recommendation. As a result of the intense questioning, Getman felt pressured to change her rating. She concluded the meeting by telling the committee that it could put a stronger "buy" rating on the stock, but that she would not sign her name to the report. Although all her prior research reports had been published, her report on Cholestech was never published.

After the meeting, Getman found her work environment changed dramatically. Her supervisor began to regularly challenge her decisions and her work practices. Six months later, on July 31, 2002, she was terminated.[73] She felt that she was fired for refusing to change her "accumulate" recommendation, and filed a SOX retaliation complaint with the Department of Labor. After an investigation of the complaint, OSHA notified the parties that it found no violation of the Act's employee protection provisions. Getman objected to the findings and filed for an administrative hearing.

ALJ Paul H. Teitler used a *prima facie* case and burden-of-proof analysis almost identical to that used in *Welch.*[1]* He first had to decide whether Getman had engaged in protected activity. Teitler concluded, "the action of pressuring Complainant to give the stock a higher rating was therefore attempted fraud because it represents the dissemination of'false information into the market.'"[75] She "refused to change her rating and thereby refused to engage in the illegal activity suggested by her managers."[76] Southwest argued that Getman was not protected, because she never "blew the whistle." Teitler rejected this argument. "To accept Respondent's position would require that Complainant report Respondent's actions to some authority outside of the company. The Act does not require such action by a complainant. Complainant's refusal to change her rating, done in the presence of her managers, was an act of whistleblowing protected by the Act."[77]

After a thorough *prima facie* analysis, the ALJ concluded that Getman had proved by a preponderance of evidence that her protected activity was a contributing factor to her discharge and that Southwest, despite citing several areas of weak performance, had not proved with clear and convincing evidence a nondiscriminatory reason for the termination. Under the Act, Getman was entitled to reinstatement with the same seniority status that she would have had, but for the discrimination. Getman did not seek reinstatement, but was awarded damages of back pay in the amount of $169,041.62, moving expenses of $3,800, plus interest on

[73] Southwest may wish it had fired her two days earlier, because the termination date, July 31, 2002, was only one day after the effective date of SOX, July 30,2002.

[74] Welch v. Cardinal Bankshares Corp., 2003-S0x-15 (AU Jan. 28, 2004).

[75] *Getman,* 2003-SOX-8 (AU Feb. 2, 2004) at 13.

[76] *Id.* at 15.

[77] *Id.*

back pay from the date payments were due as wages until the actual date of payment, payable at the IRS interest rate.[78]

3. Platone v. Atlantic Coast Airlines[79]

Stacy M. Platone was the manager of Labor Relations at Atlantic Coast Airlines (ACA). As part of her job, Platone began tracking "flight loss pay," a complicated system that allowed union pilots to be reimbursed for their costs and lost pay while engaged in official union activity. Platone discovered that the flight loss pay was not being accounted for properly and that some union pilots were receiving pay to which they were not entitled under the contract. She estimated the cost to ACA to be $20,000 to $25,000 per month. She shared her discovery with her supervisor, Mr. Rogers. At first she was told to pass the information along to the accounting department for further investigation, but later she was told not to draft a letter to the union about her concerns and to do nothing more with the matter. At that time, ACA was struggling financially and in the midst of a complicated renegotiation of the labor contract with the pilots' union. Because some of the pilots under suspicion were members of the union negotiating committee, some in management feared that pressing the matter at that time could complicate the negotiations. In her subsequent complaint, Platone claimed that management hoped that, if it allowed some of the union leaders to get away with improper compensation, the union would be more willing to make concessions during the upcoming negotiations.[80]

Evidence presented by Platone (but questioned by ACA) suggests that union leadership was upset by Platone digging into flight loss pay and making an issue of it. Key union leaders informed supervisor Rogers that they would no longer work with the company as long as Platone was employed there. Soon after, Rogers received a phone call from Captain John Swigart, former chairman of the pilot's union, and negotiator on previous union contracts. Swigart had received a call from the current union chairman warning that Platone was being investigated by ACA and indicating that she should be worried about her job. Swigart asked Rogers why Platone was being investigated, and admitted he was concerned about her because he was "dating her."[81] In fact, Platone and Swigart were involved in an ongoing close personal relationship ("romantic relationship") that Platone had not disclosed when she was hired. Rogers claimed that this was the first time he became aware of the relationship. Platone claimed that Rogers was aware of the relationship all along.

Rogers reported the relationship to top management, who became concerned, because Platone's position made her privy to confidential and sensitive information known only to management. Management feared that her close relationship with an influential union figure could compromise that information. A few days later, Platone was told she was being terminated, because her relationship

[78] *See* Internal Revenue Code, 28 U.S.C. §6621.
[79] 2003-SOX-27 (AU Apr. 30,2004).
[80] *Id.* at 17.
[81] *Id.* at 12.

with Captain Swigart created a conflict of interest. Her failure to disclose the relationship when hired created a lack of trust and confidence in her being able to remain in that position. Platone contended she was fired for revealing a plan by management to improperly funnel the airline's money to members of the pilot's union.

Platone filed a SOX whistleblower complaint with the Department of Labor. After an investigation, OSHA issued two letters advising the parties that Platone's complaint "lacked merit." Platone appealed and a formal hearing was held before ALJ Linda S. Chapman in Washington, D.C.

On the issue of whether or not Platone had engaged in protected activity, ALJ Chapman concluded, "I find that the Complainant's suspicions were reasonable and that she had good grounds to believe that a fraud was being perpetrated on the airline as well as ACAI's stockholders."[82] "[S]he had a rational and reasonable belief that Mr. Rogers, and perhaps others at ACA were complicit in a scheme to compensate pilots improperly, in hopes of gaining contract concessions. Such a scheme, by its very nature, would involve the use of the mail and wires, and could constitute fraud on ACAI shareholders. . . . Thus, I find that Ms. Platone engaged in protected activity under the Sarbanes-Oxley Act when she reported her suspicions to Mr. Rogers [supervisor], and then to Ms. Bauman" [Director of Employee Services].[83]

The ALJ also concluded that Platone had presented her *prima facie* case. Rogers's involvement and awareness of Platone's actions created knowledge on the part of ACA. Her termination was an adverse action under SOX §806. Platone's actions were, in the judgment of ALJ Chapman, a contributing factor to the actions of Rogers that led to Platone's termination.

Despite proof of the *prima facie* case, ACA still can prevail if it can show that it has a legitimate nondiscriminatory reason for firing Platone and can demonstrate by clear and convincing evidence that it would have fired her regardless of whether she had engaged in protected activity. The ALJ agreed with ACA's argument that it had a legitimate reason to fire Platone, *i.e.,* her relationship with Captain Swigart. However, ALJ Chapman found this to be a case of dual or mixed motive. "The dual motive test comes into play, if as here, the complainant establishes a *prima facie* case, and there is evidence of both legitimate and improper motives for the adverse action."[84] "[T]he employer may avoid liability only by demonstrating by clear and convincing evidence that the action would have been taken on the basis of a legitimate motive alone."[85] 'It is the employer's motivation that is under scrutiny."[86] Even though evidence was presented that the ultimate decision makers at ACA may not have been aware of the protected activity, Rogers was aware of the activity. The ALJ concluded that Rogers probably knew of the relationship between

[82] *Id.* at 22. ACAI is the NASDAQ symbol for Atlantic Coast Airlines Holdings, Inc., the parent company of subsidiary Atlantic Coast Airlines (ACA).
[83] *Id.* at 24.
[84] *Id.* at 28.
[85] *Id.*
[86] *Id.*

Platone and Swigart long before the controversy, but made no issue of it until it became a convenient way to get rid of Platone.

> I find that Mr. Rogers initiated the process that resulted in Ms. Platone's suspension and termination and made sure that it took place, in order to remove what he perceived as an obstacle to successful cost-cutting concessionary negotiations with the union.
> Under these circumstances, I find that the Respondent has failed to meet its burden to show by clear and convincing evidence that it would have suspended and terminated Ms. Platone on the basis of her relationship with Captain Swigart alone, and thus the Complainant is entitled to relief under the Act.[87]

It was ordered that Platone be paid back pay and interest plus all costs and expenses, including attorney fees, reasonably incurred in connection with this proceeding.[88]

4. Halloum v. Intel Corporation[89]

Ammar Halloum was hired as one of five group managers at an Intel chip manufacturing plant. During Halloum's first year probationary period, Paul Callaghan, the leader of the plant's manufacturing group, observed several performance problems. These included Halloum's excessive absence, long vacations, missed meetings, lack of preparation for meetings, minimal contribution at meetings, lack of understanding of the manufacturing process and unwillingness to take steps to leam the manufacturing process. On several occasions, Callaghan gave Halloum oral reviews on his performance and included suggestions on how to improve, but Halloum found the meetings uncomfortable and asked Callaghan to discontinue them. Each January, Intel evaluated employees. Callaghan rated Halloum "improvement required," Intel's lowest rating. Because he received an "improvement required" rating, by company policy, Halloum also received a Corrective Action Plan (CAP). In the plan, he had to correct specific deficiencies and meet prescribed goals within 90 days or be terminated.

After receiving the CAP, Halloum e-mailed human resources and complained that Callaghan had harassed him and treated him unfairly, and demanded that the CAP be rescinded and that Callaghan be fired. Human resources conducted an investigation in response to the complaint. Halloum pressured his subordinates to testify favorably on his behalf. He also surreptitiously tape-recorded about 25 conversations with his subordinates in violation of company policy. At the conclusion of the investigation, Halloum was told no grounds had been found to

[87] *id.*
[88] *Id.* at 29.
[89] 20Q3-SOX-7 (AU Mar. 4, 2004).

support his harassment complaint and warned that taping conversations and pressuring subordinates were grounds for termination. Soon after, Halloum began a medical leave of absence, based on stomach symptoms and work-related stress. While on medical leave, Halloum sent a letter to the SEC, claiming that Callaghan had instructed him to delay payment on invoices until subsequent quarters to enable Intel to meet Wall Street expectations. He also sent a letter to Intel's CEO alleging that Callaghan had discriminated against him based on national origin (Middle Eastern) and religion (Muslim), and had instructed him to engage in investor fraud.

The SEC required a self investigation and report. Intel's senior litigation counsel assembled an external accounting team and retained outside counsel to conduct the self-investigation. Intel independently conducted its own investigation of the complaint. Both groups found that Halloum's allegations were unfounded. Halloum's misunderstanding of accounting led him to confuse invoices with purchase requests. The SEC was convinced and took no regulatory action after receiving the report.

After more than five months on medical leave, Halloum returned to work. At that time his management and supervisory responsibilities were removed and he no longer had a support staff. He received a revised CAP with additional performance requirements before he could return to his supervisory role. Believing that he was being set up for failure, Halloum resigned and filed a complaint with the Department of Labor. As in the previous three cases, OSHA dismissed the complaint. Halloum then petitioned the Office of Administrative Law Judges in San Francisco, California, for a formal hearing.

ALJ William Dorsey first found that Halloum had engaged in a protected activity by sending a letter to the SEC. Even though he never dealt with invoices and the allegations most likely were inaccurate, the ALJ was convinced Halloum believed he was asked to delay invoices. "The accuracy or falsity of the allegations is immaterial: the plain language of the regulations only requires reasonable belief that shareholders were being defrauded to trigger the Act's protections. ... He satisfied his initial burden he engaged in protected activity."[90]

The employer had knowledge of the protected activity, because Halloum's allegations to the SEC also were contained in a letter to Intel's CEO. The original employee evaluation and CAP were found not to be a SOX §806 unfavorable personnel action, because they occurred prior to the SEC and CEO letters. The loss of supervisory responsibilities and subordinates and the modified CAP setting up Halloum for failure were ruled to be unfavorable personnel actions. Because of the short period of time between the letters and the new CAP, the ALJ inferred the disclosures contributed to the unfavorable action. For ALJ Dorsey, "[m]ore than just the timings the unreasonable nature of the two new assignments also leads me to infer retaliation. Setting Complainant up to fail by adding unreasonable goals to his CAP carried a none-too-subtle message of management's displeasure that would

[90] *Id.* at 10.

make others think twice about disclosing suspicious corporate wrongdoing to the government."[91]

As in the previous cases, the ALJ analyzed this as a dual motive case. To defeat Halloum's successful presentation of his *prima facie* case, "Intel had to prove by clear and convincing evidence that the CAP modifications would have been the same if Complainant never made his disclosures to the SEC and CEO."[92] Intel argued it modified the CAP because of Halloum's failure to meet performance expectations and his violation of company policies. It was undisputed that Halloum taped employee conversations in violation of company policy. For ALJ Dorsey, "[i]t was Employer's prerogative to modify complainant's CAP as a means of enforcing this policy. Imposing unattainable goals is a somewhat ham-fisted way of doing so, but had it terminated Complainant outright, it would have been within its rights. The modifications accomplished the same thing indirectly."[93] "Convincing evidence showed that Halloum coerced his support staff to report favorably on his performance and that they feared coercion on his return. "He lost his management responsibilities as a result of his conduct, not due to his whistle blowing. . . . Viewing the evidence as a whole, Complainant failed to persuade me that Employer retaliated against him for whistle blowing."[94] "I find Intel had legitimate business reasons for the employment actions it took, and dismiss the complaint."[95]

D. *Observations and Recommendations for Employees*

The above four cases were decided after a hearing on the facts. Over the past three years, several additional SOX §806 cases have been decided on the basis of procedural aspects of the law. My review of all cases published by the Department of Labor and included in its Sarbanes-Oxley Act (SOX) Whistleblower Digest[96] leads to the following observations, recommendations and conclusions.

1. Be Attentive to the Statutory Timelines

SOX requires that an action "shall be commenced no later than 90 days after the date on which the violation occurs."[97] The time periods runs from "when the discriminatory decision has been both made and communicated to the complainant."[98] The Department has been strict with the timelines and unwilling to grant extensions. In *Flood* v. *Cedant Corporation*," the complainant filed his claim

[91] *Id.* at 12.
[92] *Id. M* 13.
[93] *Id.*
[94] *Id.* at 13-14.
[95] *Id.* at 1.
[96] U.S. Dept. OF LABOR, *Sarbanes-Oxley Act (SOX) Whistleblower Digest* (last updated Oct. 5, 2004), http://www.oalj.dol.gov/PUBLlC/wblower/REFRNC/sox.htm.
[97] SOX §806(bX2)(D).
[98] 29 C.F.R. §1980.103(d).
[99] 2004-SQX-16 (AU Feb 23,2004).

96 days after he became aware of his termination. The complaint was dismissed by OSHA and upheld by an ALJ, because it was not filed in a timely manner.[100]

If the complaint is filed in a timely manner, the statutory timeline is very tight for completing the process. The Department has only 180 days to reach a final decision on the complaint. This requires strict adherence to timelines by all parties, investigators and reviewers. At least two cases have been dismissed because complainants failed to prosecute in a timely manner. The Administrative Review Board has been unwilling to grant extensions, even when the delays appear to be due to attorney error or oversight. [101]

If a final decision has not been issued within 180 days, and it is not due to bad faith or delay on the part of the complainant, "the complainant may bring an action for *de novo* review in the appropriate district court of the United States."[102] In *F. Baron Stone* v. *Duke Energy Corp.,*[m] the district court granted a motion to stay the proceedings before the Secretary of Labor, even though the Secretary had expended resources on the matter, because more than 180 days had passed, there was no final decision, and there was no indication of bad faith or delay on the part of the plaintiff.[104] These tight timelines are likely to motivate all involved, OSHA investigators, the ALJs and the Administrative Review Board, to move the parties and process along quickly.

The timing of the whistleblower activity is also important. After termination or other adverse employment action, an employee might be tempted to blow the whistle internally or to an external agency. In *Harvey* v. *Home Depot, Inc.,*[m] an employee filed a grievance after suspension and termination. For ALJ Richard T.Stansell-Gamm, "the SOX employee protection provisions essentially shelter an employee from employment discrimination in retaliation for his or her protected activities, while the complainant is an employee of the respondent."[106] Blowing the whistle after the discharge will not create a SOX cause of action, because the discharge was not retaliation for the whistleblowing.

2. Not All Companies Are Subject to Retaliation Liability Under SOX §806

Companies that are not publicly traded do not face liability under this section.[107] In *Flake v. New World Pasta Company,*[108] the complainant argued that the

[100] *See also* Moldauer v. Canandaigua Wine Co., 2003-SOX-26 (ALJ, Nov. 14, 2003); Walker v. Aramark Corp., ARB No. 04-006, AU No. 2003-SOX-22 (ARB Nov. 13,2003).

[101] *See* Melendez v. Exxon Chemical Americas, ARB No. 03-153, ALJ No. 1993-ERA-6(ARB Mar 30, 2004); Steffenhagen v. Securities Sverige, AR, ARB No. 03-139, ALJ No. 2003-SOX-24 (ARB Jan.13, 2004).

[102] 29 C.F.R. 1980.114.

[103] No. 3:03-CV-256 (W.D.N.C. June 10, 2003) (AU No. 2003-SOX-12).

[104] *See also* Correda v. McDonald's Corp., 2004-SOX-7 (AU Jan. 23, 2004); Willy v. Ameritron Properties, Inc., 2003-Sox-9 (AU June 27,2003).

[105] 2004-SOX-36 (AU May 28, 2004).

[106] *Id.* at 4.

[107] *See, e.g.,* Powers v. Pinnacle Airlines Inc., 2003-A1R-12 (AU March 5 2003).

ALJ should interpret this section "to include any publicly traded company, regardless of size or value, because Congress had all publicly traded companies in mind when drafting the whistleblower provision."[109] This argument was rejected, because it was contrary to the specific language of the statute. "[T]he whistleblower protection provisions of Sarbanes-Oxley cover only companies with securities registered under §12 or companies required to file reports under §15(d) of the exchange."[110] Because New World Pasta had fewer than 300 shareholders, it was ruled an exempt company, not subject to liability under SOX §806, and the complaint was dismissed.

3. Not All Whistleblowers Are Protected Under SOX §806

In *Reddy* v. *Medquist*,[111] an employee complained to management alleging the manipulation of line counts in documents, causing transcriptionists to lose money. The ALJ explained that SOX §806 requires her complaint to management raise "violations of sections 1341, 1343, 1344, or 1348, any regulation of the Securities and Exchange commission or any provision of Federal law relating to fraud against shareholders."[112] Because her complaint concerned only internal company policy, and failed to allege actual violations of federal law, the ALJ ruled she had not engaged in protected activity under the Act.

In *Lerbs* v. *Buca Di Beppo, Inc.*,[113] a cash manager inquired to management about the propriety of reclassifying outstanding cash balances to accounts payable. He also questioned the accounting for employee meals purchased from a company- owned restaurant at $2,000 per day. In addition, he frequently complained about hiring former employees of Buca's auditors, Deloitte and Touche. The ALJ ruled that the inquiry about reclassification of cash balances was not actionable, because "general inquiries do not constitute protected activity."[114] The ALJ explained that a complainant must "show that he reasonably believed the respondent violated one of the laws and regulations enumerated in the Act. ... he must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable."[115] Because the complainant acknowledged he did not believe that hiring former auditors was illegal, his complaints about hiring were not protected activity. Concerning the accounting for employee meals, the ALJ concluded that the meals were reasonably priced, there was no evidence of unlawful or improper activity and there was no evidence to show why the complainant would have a reasonable belief that there was unlawful activity. The case was dismissed for failure to show engagement in protected activities under the Act.

[108] ARB No. 03-126, AU No. 2003-S0x-18 (ARB Feb. 25,2004)
[m] *Id.* at 4.
[110] *Id.* at 3.
[111] 2004-SOX-35 (AU June 10,2004).
[112] *Id.* at 3, explaining SOX §806(a).
[113] 2004-SOX-8 (AU June 15,2004).
[114] *Id.* at 12.
[115] *Id.* at 11.

In *Hopkins* v. *ATK Tactical Systems*,[116] an employee filed complaints with OSHA and the EPA alleging that poor maintenance of machinery led to an immense sludge buildup and the eventual release of thousands of gallons of sludge water into the ground water. The ALJ reasoned, "the legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision ... the provision was designed to protect employees involved 'in detecting and stopping actions which they reasonably believe are fraudulent.' ... an element of intentional deceit that would impact shareholders or investors is implicit."[117] Because the complaint did not address any kind of fraud, did not involve transactions relating to securities, and did not involve intentional deceit or fraud against shareholders or investors, it was ruled the employee had not engaged in protected activity under the ACT.[118]

4. Expect that the OSHA Investigators Will Rule in Favor of the Employer and Deny the Employee Complaint.

In my review of all cases reported in the Department of Labor Sarbanes- Oxley Act (SOX) Whistleblower Digest,[119]1 did not find one case reported in which, after its preliminary investigation, the OSHA investigator found in favor of the employee complainant.[120] Many cases were dismissed on procedural grounds, such as failure to file a timely complaint.[121] Others were dismissed based on the employees' failure to engage in protected activity.[122] It was also common that, even if the employee did engage in protected activity, the investigator found for the employer, because "there was clear and convincing evidence that whatever actions the Respondent took were for legitimate non-discriminatory reasons."[1]" '

The reason for such unanimity in favor of the employer perhaps can be traced to the procedures and timelines created by the Act. OSHA procedures require that the inspectors must dismiss the case "unless the complainant has made a *prima facie* showing that protected behavior or conduct was a contributing factor in the

[116] 2004-S0x-19 (AU May 27, 2004).

[117] *Id.* at 5.

[118] The ALJ recognized that "the allegations appear to fall within one or more of the environmental whistleblower statutes" also enforced by OSHA. She refused to remand to OSHA, because the complaints were not filed in a timely manner under any of the statutes, *id.* at 6-7.

[119] U.S. DEPT. OF Labor, *Sarbanes-Oxley Act (SOX) Whistleblower Digest* (last updated Oct. 5, 2004), http://www.oalj.dol.gov/PUBLIC/wblower/REFRNC/sox.htm.

[120] In December 2003, a Labor Department official reported that, through November 2003, 169 SOX whistleblowers had filed charges with OSHA, making them the most common category of whistleblower complaint before OSHA. Investigators completed 79 investigations; 77 were decided in favor of the employer, and only two found merit in the employee's allegation. Sixteen claims were settled before completion of the investigation. Forty-five complainants appealed for a hearing before an AU. Stewart S. Manela, *Blowing the Whistle on Fraud in Companies: So Far, Most Charges under Sarbanes-Oxley Employee Protections Are Not Upheld,* Nat'L L. J., March 8,2004, at SI.

[121] *See, e.g.*. Powers v. Pinnacle Airlines Inc., 2003-AIR-12 (AU March 5 2003).

[122] *See, e.g.*, Reddy v. Medquist, Inc., 2004-SOX-35 (AU June 10, 2004); Hopkins v. ATK Tactical Systems, 2004-S0x-19 (AU May 27, 2004).

[123] Powers v. Pinnacle Airlines Inc., 2003-AIR-12 (AU March 5 2003), at 1.

unfavorable personnel action alleged in the complaint."[124] Even if the employee has made a *prima facie* showing, no further investigation is to be conducted if the employer "demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct."[125] Most modem employers are skilled at providing evidence of legitimate, nondiscriminatory reasons for firing an employee or taking other adverse action. The investigators may be motivated to find for the employer, because, if they find the employer has failed to present clear and convincing evidence, OSHA procedures require a more thorough investigation. Additional time, effort and expense will be required (not to exceed 60 days from the filing of the complaint.)[126] After the completion of the investigation and any preliminary orders, either party can file an objection and request a hearing before an ALJ. The hearing will be conducted *de novo,* on the record. Given the 180-day time limit for all Department action, any time spent on the investigation is time not available for the hearing, or the possible appeal to the Administrative Review Board. Given the limited number of OSHA inspectors and the fact that the department sometimes has experienced difficulty completing the process in 180 days,[127] there is procedural disincentive to rule for the employee and prolong the investigation.

5. ALJ Hearings Offer Hope for Employees.

Despite the likely denial of the complaint by the OSHA inspectors, employees still can hope for a favorable decision in a hearing before an ALJ. As of July 2004, there were four cases in which an ALJ has ruled on the merits after a full administrative hearing on the facts. In three of the four cases, the employers were not able to prove with clear and convincing evidence that the firings were unrelated to the protected activity.[128] In only one of the four cases was the ALJ convinced that the firing was "not due to any whistleblowing."[129] A possible explanation for the apparent preference for the employee version of events again may be procedural. The employee needs only to prove with a preponderance of evidence that the protected activity was a contributing factor in the unfavorable personnel action. The employer

[124] 29 C.F.R. 1980.104(b).

[125] 29 C.F.R. 1980.104(c).

[126] 29 C.F.R. 1980.105(a).

[127] *See, e.g.,* Baron v. Duke Energy Corp., No. 3:03-CV-256 (W.D.N.C. June 10, 2003) (AU No. 2003- SOX-12); Corrada v. McDonald's Corp., 2004-SOX-7 (AU Jan. 23, 2004); Willy v. Ameritron Properties, Inc., 2003-Sox-9 (AU June 27,2003).

[128] *See* Getman v. Southwest Securities, Inc., 2003-SOX-8 (AU Feb. 2, 2004); Platone v. Atlantic coast Airlines, 2003-SOX-27 (AU Apr. 30, 2004); Welch v. Cardinal Bankshares Corp., 2003-SOX-15 (AU Jan. 28,2004).

[129] Halloum v. Intel Corp., 2003-SOX-7 (AU Mar. 4,2004).

must prove by clear and convincing evidence[130] that it would have taken the same unfavorable personnel action in the absence of any protected behavior.[131]

E. *Observations and Recommendations for Employers*

1. Expect Employees to Be Creative in Filing Retaliation Complaints Under SOX §806

It has not taken long for employees to discover SOX §806 as a possible cause of action.[132] Several types of predictable retaliation claims have been filed. Examples include a letter to a CEO complaining about questionable accounting practices,[133] an e-mail to the SEC alleging insider trading,[134] a refusal to certify financial statements,[135] and a meeting with the FBI.[136]

Given the newness of SOX, employees and their attorneys have not been reluctant to make their case based on more creative assertions of protected activity. Examples include a securities analyst who refused to change a stock rating,[137] a manager who investigated and reported improper payments to union pilots,[138] an employee who alleged that transcriptionists were being short-changed by improper line counts,[139] an employee who reported illegal dumping of sewage to the EPA,[140] and an employee who filed a grievance with the state bar association.[141] Because of the hard feelings and financial loss often associated with employee discharge, it is likely that displaced employees will continue to creatively test the boundaries of protected activity under SOX §806.

2. Expect that the Department of Labor Will Continue to Define Protected Activity Broadly

a. Both External and Internal Whistleblowers Are Protected.

In *Getman* v. *Southwest Securities*,[142] a securities analyst refused to change her "accumulate" rating on a security despite pressure from management to do so.

[130] "Although "clear and convincing" has not been defined with precision, courts have held that as an evidentiary standard it requires a burden higher than 'preponderance of the evidence' but lower than 'beyond a reasonable doubt.'" *Getman*, 2003-SOX-8 (AU Feb. 2,2004), at 10.

[131] 29 C.F.R. 1980.190(a).

[132] *See, e.g.*, *Getman*, 2003-SOX-8 (AU Feb. 2, 2004). Complainant was fired on July 31, 2002, one day after the effective date of SOX.

[133] *Welch*, 2003-SOX-15 (ALJ Jan. 28,2004).

[134] *Id.*

[135] *Id.*

[136] Moldauer v. Canandaigua Wine Co., 2003-SOX-26 (AU, Nov. 14,2003).

[137] *Getman*, 2003-SOX-8 (AU Feb. 2,2004).

[138] Platone v. Atlantic Coast Airlines, 2003-SOX-27 (AU Apr. 30,2004).

[139] Reddy v. Medquist, Inc., 2004-SOX-35 (AU June 10,2004).

[140] Hopkins v. ATK. Tactical Systems, 2004-S0x-19 (AU May 27,2004).

[141] Harvey v. Home Depot, Inc., 2004-SOX-36 (AU May 28, 2004).

[142] 2003-SQX-8 (AU Feb. 2, 2004).

She never complained to an external organization or participated in any type of investigation or prosecution. Her employer argued she had not engaged in protected activity because she never "blew the whistle." "She did not provide information regarding the alleged violation in support of an investigation."[143] The ALJ disagreed with this argument. In interpreting SOX §806 and its regulations,[144] he concluded the Act "provide[s] protection to both employees who report violations to their supervisors and employees who have taken part in a proceeding against an employer."[145]

b. Even Inaccurate Whistleblowing May Be Protected

In *Halloum v. Intel Corp.,*[1*6] a manager reported to the SEC and to his CEO that he had been instructed to delay payments of invoices until subsequent quarters to enable Intel to meet Wall Street expectations. The SEC required Intel to conduct a costly internal investigation. The auditors and corporate counsel ultimately concluded the allegations were unfounded. The manager, who was inexperienced with accounting and did not work with invoices, likely confused invoices with the purchase requests that he handled regularly. Despite the inaccurate allegation, the ALJ concluded that the manager had engaged in protected activity.

> The Act protects employees who provide information to authorities in the executive branch, to Congress, or to the employer, that the employee reasonably believes show the employer violated federal laws against stockholder fraud. 29 C.F.R. §1980.102(b)(1). .. . The accuracy or falsity of the allegations is immaterial: the plain language of the regulations only requires reasonable belief that shareholders were being defrauded to trigger the Act's protections.... I find Complainant believed he had been asked to delay invoices, even though he never dealt with invoices. He satisfied his initial burden to prove he engaged in protected activity.[147]

c. Complaints About Internal Accounting Irregularities That Do Not Show Up on External Reports May Be Protected Activity

In *Morefield* v. *Exelon Services, Inc.,*[m] a Vice President of Finance complained to top management about accounting irregularities, such as improper

[143] *Id.* at 14.

[144] 29 C.F.R. pt 1980.

[145] *Getman,* 2003-SOX-8 (ALJ Feb. 2, 2004), at 14-15.

[146] 2003-SOX-7 (ALJ Mar. 4, 2004).

[147] *Id.* at 10, *see also* Collins v. Beazer Homes USA, Inc., 334 F.Supp.2d 1365 (N.D. Ga. 2004) ("plaintiff is not required to show an actual violation of the law,. . . even where the employee's perceived oversights were a matter of employee misunderstanding").

[145] 2004-SQX-2 (ALJ Jan 28,2004).

treatment of leases, improper balance sheet adjustments and manipulation of the budget. These occurred at a small subsidiary of Exelon. The employer argued the manipulated information was all internal, was not shared with investors, lenders or other third parties, and had no material effect on the quarterly or annual statements of Exelon. The ALJ disagreed with the employer's contention that there was no protected whistleblower activity. "I find no basis in the Act for concluding that the manipulation a whistleblower identifies as inappropriate must actually appear in an external report or statement before the Act's protections are triggered."[149]

d. Complaints Involving Relatively Small Sums May Be Protected Activity.

In *Morefield,* the employer also argued that there was no protected whistleblowing, because the sums in question (about $2 million) involve less than
0. 0001% of corporate revenue. The ALJ again disagreed. "Sarbanes-Oxley places no minimum dollar value on the protected activity it covers."[150] The manipulation "might not be criminal in nature, but it very well might reveal flaws in the internal controls that could implicate whistleblower coverage for *seemingly paltry sums.*"[151]

3. Even with a Legitimate Reason to Terminate, an Employer Still Can Be Held Liable

In *Platone v. Atlantic Coast Airlines,*[152] a manager investigated and reported improper reimbursements to union pilots. She was fired after senior management discovered she was involved in a personal relationship with the former head of the labor union. The ALJ found "that the Respondent had a legitimate, non-pretextual reason for dismissing Ms. Platone: her failure to disclose her relationship with Captain Swigart."[153] Despite a legitimate motive for dismissal, the airline still was held liable. "Where there is evidence of both legitimate and improper motives for the adverse action[,] [the] employer bears the risk that the influence of legal and illegal motives cannot be separated."[154] Under dual or mixed motive analysis, "the employer may avoid liability only by demonstrating by clear and convincing evidence that the action would have been taken on the basis of a legitimate motive alone."[155] It is essential that an employer document the legitimate reasons for discharging an employee and make sure there is no connection between the legitimate and the improper motives. It will be difficult, but not impossible, for many employers to prove with clear and convincing evidence the lack of dual motives.[156]

[1, 9] *Id.* at 5.
[150] *Id.*
[151] /¿.emphasis added.
[152] 20Û3-SOX-27 (AU Apr. 30, 2004).
[153] *Id.* at 28.
['»] *Id.*
[S5] *Id.*
[156] *See id., but see* Halloum v. Intel Corp., 20Q3-SOX-7 (ALJ Mar. 4,2004).

4. Finding a Legitimate Reason for Discharge, After the Discharge, Will Not Protect an Employer from Liability.

In *Halloum* v. *Intel Corp.,*[151] the employer discovered, while preparing for litigation, that the complainant had misrepresented moving expenses. The ALJ concluded, "An employer's after-acquired evidence of wrongdoing that could have resulted in discharge does not bar an employee from prevailing in a retaliation case."[158]

5. Be Careful with Performance Reviews and Resulting Action Plans.

Many companies engage in a formal performance-evaluation process. Can an unfavorable performance evaluation be an adverse employment action under the Act? In *Dolan* v. *EMC Corp.,*[159] an employee reported to human resources a series of billing schemes designed to inflate revenues. Later, in the annual performance evaluation, the employee received a rating of "partially meets goals," the second lowest rating. As part of a whistleblower complaint, the employee demanded that the low rating be rescinded and removed from the file. The ALJ ruled against the employee.

> An adverse employment action must have some tangible job consequence. Unfavorable performance evaluations, absent tangible job consequences, do not constitute an adverse employment action. .. . Although the performance evaluation is negative, Complainant has not indicated that it resulted in lower salary, directly jeopardized his job security, or caused any tangible job detriment. The performance evaluation can not therefore be considered an adverse employment action. If the job performance evaluation is not an adverse employment action, then *a fortiori* Respondent's refusal to remove complainant's performance evaluation from the file is not an adverse employment action.[160]

In *Halloum* v. *Intel Corp*.,[161] an employee, as part of an annual performance evaluation, received the lowest rating, "improvement needed." Intel requires that all employees receiving this rating must receive a "Corrective Action Plan" (CAP) specifying deficiencies and prescribing goals that must be achieved within 90 days, or the employee will be terminated. Not long after the negative rating, the employee notified the SEC and the corporate CEO of questionable invoice practices. The ALJ reasoned that this negative performance review and CAP could not be illegal retaliation, because it occurred before the protected activity. "The CAP was a

[157] 2Û03-SOX-7 (AU Mar. 4,2004).
[158] *Id.* at 14.
[155] 2Û04-SOX-1 (AU Mar. 24, 2004).
[m] *Id.* at31.
[161] 2003-SOX-7 (AU Mar. 4, 2004).

preexisting remedy for earlier inadequate performance. Halloum's disclosures after Intel imposed it did not immunize him from management efforts he disliked, or convert them into forbidden discrimination."[162]

At a date subsequent to the SEC and CEO disclosures, the employer revised the CAP to remove supervisory responsibilities, permanently reassign subordinates, and add new assignments. The ALJ concluded that the removal of responsibilities and subordinates was an unfavorable personnel action under the Act. In addition, he questioned the new assignments. "The modified CAP set Complainant up for failure by assigning him unattainable tasks. The certain failure to achieve the modified CAP goals would result in his termination, so they not only adversely affected the terms of his employment, they would deter other employees from daring to make protected disclosures. Complainant proved the modifications to his original CAP were unfavorable employment actions."[163]

6. For Threatened Employees, SOX May Motivate Whistleblowing and Other Defensive Behavior.

Employees facing discharge or other disciplinary action now may be motivated to set up a case for retaliation to be used as a defense against discharge, as a bargaining chip in the event of discharge or to improve the odds of reinstatement or other remedies. In some of the cases, it appears that employees have gone to great lengths to set up their cases, by reporting wrongdoing to multiple sources and making sure it was done in a way that would prove the action was taken. In *Halloum*, soon after a negative performance review, an employee e-mailed human resources to complain about discrimination, and contacted the SEC and the CEO to inform them of improper accounting for invoices. In addition, the employee secretly taped conversations with subordinates on at least 25 occasions. In *Moldauer* v. *Candaigua Wine Co.*,[154] soon after signing a severance agreement, the employee met with the Department of Fair Housing to complain about discrimination, met with the FBI and filed a complaint with the SEC to report alleged accounting irregularities.

Welch v. *Cardinal Bankshares*[165] is evidence that SOX may be motivating some of the actions desired by Congress. Welch, a CFO, was concerned about questionable accounting practices and inaccurate financial reports and quarterly statements. After the passage of SOX, Welch sent letters to the SEC auditors, CEO and numerous other top managers informing them of his concerns. In addition, he refused to sign quarterly reports he considered inaccurate. He admitted that, prior to SOX, he had signed quarterly statements that were submitted to the Federal Reserve that he believed to be inaccurate. When asked why he signed the documents then, but was unwilling to do so now, he replied, "I would have been terminated. . . . Until Sarbanes-Oxley came along I didn't have any legal standing to support my positions

[162] *Id.* at 11.
[163] *Id.* at 12.
[164] 2003-SOX-26 (ALJ, Nov. 14,2003).
[165] 2003-SOX-15 (AU Jan. 28, 2004).

or to protect me."[166] Welch also was well aware that SOX provided significant fines and imprisonment for false certification. In testimony, "Welch stated that the act not only exposed him to this risk, but also promised to protect his employment, and provided him with the legal authority to back his position."[167]

In addition to formally reporting his concerns to numerous people, Welch took defensive actions. He regularly consulted with his attorney to plan his activities at work. He held meetings with other employees, informing them of their rights and responsibilities under SOX. He tape recorded some of his meetings and conversations with other employees. He wanted to have his attorney present at a meeting called by the CEO, but this was denied. He later refused twice to attend a hastily scheduled meeting in the CEO's office with the corporate counsel and external auditor without first consulting with his attorney. These actions were seen as unacceptable to his CEO and led to his discharge. They also led to his reinstatement under SOX §806. From the employer's perspective, this section is likely to continue to motivate defensive behavior, which sometimes can conflict with the interests of the organization.

7. Employers May Be Ordered to Reinstate Unwanted Employees

Reinstatement is one of the remedies available under the Act. In *Welch*, the ALJ ordered "reinstatement with Cardinal without loss of seniority and benefits. . . . [H]e is entitled to be reinstated to his former position as Cardinal's CFO without loss of seniority and without loss of any benefits to which he was entitled prior to his discharge."[168] Welch was returned to his position, even though he had accused his employer of creating false financial statements and reports, accused three managers of securities fraud at a company meeting, refused to meet with corporate counsel and an external auditor and reported to the SEC that his boss had engaged in insider trading. It seems likely that an employee in this situation will return to an unwelcome environment and find it difficult to continue his job.

8. Subsidiaries Can Get Parent Companies into Trouble

Is a parent corporation liable when a subsidiary retaliates against a whistleblower? The ALJs have reached conflicting conclusions on this question. In *Powers* v. *Pinnacle Airlines*,[169] an employee complaint was filed against Pinnacle Airlines, a subsidiary of Northwest Airlines. The complaint was dismissed, because Pinnacle is not a publicly traded corporation, as required by SOX §806. Northwest Airlines was not named as a party. The ALJ reasoned as follows:

[166] *Id.* at 11.
[167] *Id.* at 12.
[168] *Id.* at 48.
[169] 2003-AIR-12 (AU March 5 2003).

> The Complainant filed her complaint at the OSHA level against Pinnacle, not Northwest Airlines, Inc. The plaintiff can not get around the fact that her employer, Pinnacle, is not a publicly traded company by unilaterally adding another corporate entity that is publicly traded, i.e., Northwest Airlines, Inc. as a respondent, after the investigation and determination by OSHA.
>
> It appears that the Complainant . .. ignores the general principle of corporate law that a parent corporation is not liable for the torts of its affiliate. Nor has the Complainant even alleged any facts that would justify piercing the corporate veil and ignoring the separate corporate entities.[170]

The ALJ in *Morefield* v. *Exelon Services*[171] "respectfully disagree[d]" with the "dicta" in *Pinnacle Airlines.* "Considered in context, it seems clear that Congress intended the term 'employees of publicly traded companies' in Section 806 to include the employees of the subsidiaries of publicly traded companies."[172] "I conclude that the employees of non-public subsidiaries of publicly traded companies are covered by the whistleblower protection provisions of Sarbanes-Oxley."[173] "Nothing in the Act persuades me that Congress intended to wall off from Sarbanes- Oxley whistleblower protection vast segments of corporate America that reside under the umbrella of publicly traded companies."[174]

The *Morefield* decision seems more consistent with the spirit and objective of SOX. Given the abuse of the corporate format, including the use of subsidiaries to "cook the books," by companies like Enron, and the significance of Whistleblowers in exposing Enron and its progeny, it is difficult to imagine that Congress intended to exclude employees of subsidiaries from protection. If there is a conflict in these two cases, perhaps it will have to wait for a judicial resolution. Until then, parent corporations should develop policies and procedures under the assumption that they may be liable for the whistleblower retaliation of subsidiaries.

II. NEW CRIMINAL SANCTIONS UNDER SOX

The risk of corporate and personal accountability is not limited to civil liability. Sarbanes-Oxley also imposes criminal sanctions on managers and corporations for retaliating against whistleblowers.[175] Criminal sanctions also have been increased for the destruction, alteration, or falsification of records.[176] Managers face significant new personal risk, in that they now can be imprisoned for retaliating against a whistleblower.

[m] *Id.* at 4.
[171] 2004-SOX-2 (AU Jan 28, 2004).
[172] *Id.* at 2.
[173] *Id.* at 3.
[174] *Id.* at 4.
[175] SOX §1107, 18 U.S.C. § 1513(e).
[176] SOX §802,18 U.S.C. §1519.

A. Criminal Whistleblower Protection

Retaliating against a witness, a victim, or an informant has long been a crime. Subsections (a) and (b) of 18 U.S.C. §1513 make retaliation by killing or causing bodily injury a crime.[177] SOX added section (e) to expand criminal liability for retaliation.

> (e) Whoever 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, shall be fined under this title or imprisoned not more than 10 years, or both.[178]

Although there is not yet any case law interpreting this new section, the language of the statute creates several significant differences between criminal and civil liability for retaliation.

Corporate civil liability is limited to publicly held corporations that are required to register and file reports to the SEC. Personal civil liability is limited to officers, employees, contractors, subcontractors or agents of the retaliating company.[179] The criminal statute places liability on "whoever" retaliates.[180] This may include any corporation, public or private; as well as any partnership, sole proprietorship or non-profit organization. Any person, either inside or outside an organization, also may be subjected to criminal prosecution.

For civil liability, an injured employee files a complaint with the Department of Labor, who investigates (through OSHA), adjudicates, and assigns relief.[181] A criminal prosecution must be initiated by the federal government. One or more federal agencies may be involved initially. For example, in a whistleblowing case involving securities fraud, the SEC may be involved in an investigation of the alleged fraud. However, the Department of Justice ultimately will be responsible for the criminal prosecution for both the securities-fraud charge and the criminal retaliation charge.

For civil liability, the whistleblowing activity must relate to frauds and swindles, fraud by wire, radio or television, bank fraud, securities fraud, violations of SEC rules and regulations or any federal law relating to fraud against shareholders.[182] For criminal liability, the retaliatory action must be "for providing to a law enforcement officer any truthful information relating to the commission or

[177] 18 U.S.C. §1513 (entitled Retaliating against a witness, victim or an informant).
[178] SOX §1107, 18 U.S.C. §1513(e).
[175] SOX §806(a).
[180] SOX §1107.
[181] SOX §806(b), *see also* 29 C.F.R. §1980.103(c), and *supra* note 33.
[182] *See supra* notes 26-30.

possible commission of any federal offense."[183] This would include the securities, bank and wire fraud of the civil statute, but creating liability for "any Federal offense" is much broader and could include such diverse actions as violations of federal environmental laws, hiring illegal aliens or a manager's use of illegal drugs.

Civil liability applies in both internal and external whistleblowing cases.[184] Criminal liability appears to apply only to external whistleblowing, when truthful information is provided to a law enforcement officer.[185] Civil liability requires only that an employee reasonably believe that the law has been violated. Retaliation for a false allegation, reasonably believed, can result in civil liability.[186] The criminal statute requires providing "truthful information." Whether this requires actual truth or only a reasonable or good faith belief of truth is not clear under the statute. Prosecutors may argue for the good faith standard of truthfulness, but only judicial interpretation will decide the issue. Perhaps the criminal judges will be persuaded by the logic of the civil cases. However, given the higher stakes of criminal liability, they may interpret the statute to require actual truth.

The civil act requires that no company or its agent "may discharge, demote, suspend, threaten, harass, or in any manner discriminate against an employee in the terms and conditions of employment."[187] The criminal act again is broader, outlawing "any action harmful to any person, including interference with the lawful employment or livelihood of any person."[188] The "any person" standard does not limit liability to retaliation against an employee. Retaliation against a whistleblowing competitor or concerned citizen conceivably could result in conviction. The degree of harm required by the statute is not clear. Whether prosecutors will prosecute and courts convict over trivial amounts of harm remains unresolved until future litigation.

Civil liability requires only that the employee show the whistleblowing activity was a "contributing factor" to the adverse action.[189] The criminal act creates a higher burden of proof. Prosecutors must prove that the harmful action was taken "knowingly, with intent to retaliate."[190]

Civil liability requires that the employer "make the employee whole," through reinstatement, back pay with interest and coverage of litigation costs, witness and attorney fees.[191] Criminal penalties can include fines up to $250,000 for individuals[192] and $500,000 for organizations.[193] Individuals also may be imprisoned

[183] SOX §1107.

[184] *See supra* notes 142-145 and accompanying text.

[185] SOX §1107.

[186] 29 C.F.R. §1980.102(b)(l), *see also supra* notes 146-147 and accompanying text.

[187] SOX §806(a).

[188] SOX §1107.

[189] 29 C.F.R. § 1980.102(b)(l).

[1,0] SOX §1107.

[191] SOX §806(c).

[192] 18 U.S.C. 3571(b)(3). Effective Jan 25, 2003, the United States Sentencing Commission increased the Sentencing Guidelines base offense level for obstruction of justice/retaliation offenses from 12 to 14, 18 U.S.C. app. §2J1.2. *See generally,* Ronald H. Levine & Michelle L. Ostrelich, *Whistleblower Retaliation under Sarbanes-Oxley: It's a Crime!,* BUS. CRIMES L. REPORTS, May 16, 2003, at 1; *Suffer Penalties*

for not more than ten years.[194] Under federal sentencing guidelines, a conviction will mean that some imprisonment is likely.[195]

B. Destruction, Alteration or Falsification of Records

Given the high risk and cost of either civil or criminal liability a potential defendant may be motivated to destroy, alter or falsify records. This will make matters worse, because SOX has created even greater liability in Section 802, "Criminal Fraud for Altering Documents":

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.[196]

Destruction or alteration of evidence creates a separate cause of action when it relates to "the investigation or proper administration of any matter within the jurisdiction of any agency of the United States"[197] or to the "contemplation of any such matter."[198] Liability could result under this statute even in the absence of civil or criminal liability for whistleblower retaliation. However, adding document destruction to a criminal retaliation charge not only increases the maximum

Ahead for Corporate Criminals, U.S. GOV INFO / RESOURCES NEWSLETTER, (Jan. 16, 2003), http://usgovinfo.about.com/library/weekly/aa011603a.htm. At level 14, the Sentencing Commission sets the minimum fine for an individual at $4,000 and the maximum fine at $40,000, U.S. SENTENCING GUIDELINES MANUAL, §5E1.2(c)(3) (2003).

[193] 18 U.S.C. §3571(c)(3). At level 14, the Commission sets the fine for organizations at $85,000. U.S. SENTENCING GUIDELINES MANUAL, §8C2.4(d) (2003). The fine could be higher or lower, depending on the culpability score of the organization. At a culpability score of 10, the fine will be two to four times higher ($170,000-$340,000), U.S. SENTENCING GUIDELINES MANUAL, §8C2.6 (2003).

[194] SOX §1107.

[195] Base level 14 is in zone D of the sentencing table where "the minimum term shall be satisfied by a sentence of imprisonment." 18 U.S.C. app. §5C1.1(f) (Matthew Bender & Co. 2004), *see also* U.S. SENTENCING GUIDELINES MANUAL, Ch.5, Pt. A - Sentencing Table. Zone D offenses also are not eligible for a sentence of probation. 18 U.S.C. S. app. §5B1.1, Application Notes 2 (Matthew Bender & Co. 2004). Even with a three-level reduction for acceptance of responsibility, at level 11 the offender is still only in zone C where probation is not an option. At least half of the term still must be satisfied by imprisonment.
18 U.S.C. app. §5C1.1(d) (Matthew Bender & Co. 2004). At level 14, the guidelines stipulate 15-21 months imprisonment for offenders with a category I (the lowest category) criminal history, U.S. SENTENCING GUIDELINES MANUAL, Ch.5, Pt. A - Sentencing Table.

[196] SOX §802, 18 U.S.C. §1519, Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.

[197] *Id.*

[m] *Id.*

imprisonment to twenty years, it also increases the range of sentencing under the federal sentencing guidelines.[199]

This section not only outlaws destruction and alteration of evidence, it also makes illegal the falsification of any document or record with the intent to impede, obstruct or influence any agency of the United States.[200] This would include the Department of Labor investigating or adjudicating a case of whistleblower retaliation under SOX. It also could include investigations and adjudications by the Environmental Protection Agency, National Labor Relations Board, Equal Employment Opportunity Commission, Occupational Safety and Health Administration, Federal Trade Commission, and many other federal agencies. An agency need not even be aware of a potential agency matter or have begun an investigation. If the falsification or destruction of tangible evidence is carried out in "contemplation of any such matter or case," it violates this section, and the perpetrator of the fraud risks fine and imprisonment up to twenty years.[201]

III. JUDICIAL REVIEW OF AGENCY INTERPRETATION AND ADJUDICATION

Are cases such as *Welch*,[101] *Getman*,[203] *Platone*,[M] and *Halloum*[205] significant in the evolution of the law? Because agencies are not bound by the doctrine of *stare decisis* to the same degree as the courts,[206] decisions by ALJs do not create binding precedents for the Department of Labor or for the courts. Nevertheless, Department of Labor policies and procedures, and ALJ adjudications are likely to influence judicial appeals and the evolution of the law. In *United States* v. *Mead Corporation*[101] the Supreme Court recognized the influence of agency rules and rulings.

> [A]gencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind

[1W] Obstruction of justice, including document destruction, alteration or falsification, is also given a base level offense of 14 by the U.S. Sentencing Commission. 18 U.S.C. app. §2J1.2(a) (Matthew Bender & Co. 2004). "If the offense resulted in substantial interference with the administration of Justice," there is a three-level increase. "If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning or preparation," there is a two-level increase. A combined five-level increase would place the sentencing guideline at 30-37 months, approximately three years imprisonment. 18 U.S.C. app. §2J1.2(b) (Matthew Bender & Co. 2004).

[200] SOX §802.

[201] *Id.*.

[202] Welch v. Cardinal Bankshares Corp., 2003-S0x-15 (AU Jan. 28,2004).

[203] Getman v. Southwest Securities, Inc., 2003-SOX-8 (AU Feb. 2,2004).

[204] Platone v. Atlantic Coast Airlines, 2003-SOX-27 (ALJ Apr. 30, 2004).

[205] Halloum v. Intel Corp., 2003-SOX-7 (ALJ Mar. 4,2004).

[206] *See* Food Marketing Institute v. Interstate Commerce Commission 587 F.2d 1285, 1290 (1978); *see also* Federal Communication Commission v. WOKO, Inc., 329 U.S. 223 ("[W]e cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.").

[207] 253 U.S. 218 (2001).

> judges to follow them, they certainly may influence courts facing questions the agencies have already answered. "[T]he well- reasoned views of agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'"[208] and "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[209]

In *Mead,* and in the standard-setting case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*[210] the Supreme Court has recognized the importance of judicial deference to an agency administering its own statute. The proper extent of judicial deference has been widely debated in the courts and in the commentaries.[211] The spectrum of judicial deference has ranged from "great respect at one end" to "near indifference at the other."[212] The *Mead* majority agreed with the summation of Justice Jackson in *Skidmore* v. *Swift &* Co:[213]

> The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control.[214]

The amount of judicial deference to the Department of Labor in any given case is likely to vary depending on the level of judicial review. If the Secretary of Labor has not issued a final decision within 180 days of when the complaint was filed, the complainant can bring an action for *de novo* review in the appropriate federal district court.[215] In a *de novo* review, "the court should make an independent

[208] *Id.* at 227 (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (quoting Skidmore v. Swift & Co., 323 U.S. 134,139-140 (1944)).

[209] *Mead* at 227-228 (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837,844(1984)).

[210] 467 U.S. 837(1984).

[211] *See generally* James F. Smith, *Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada,* 73 TEMPLE L. REV. 503 (2000); *but see* Kerne H. O. Matsubra, *Domicile Under Immigration and Nationality Act Section 212(c): Escaping the Chevron "Trap" of Agency Deference,* 82 CALIF. L. REV. 1595 (1994); John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times,* 73 FORDHAM L. REV. 1103 (2004); and Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 DUKE L. J. 511 (a published speech by Justice Antonin Scalia, U.S. Supreme Court).

[212] U.S. v. Mead Corp., 253 U.S. 218,228 (2001) (citations omitted).

[213] 323 U.S. 134(1944).

[214] U.S. v. Mead Corp., 253 U.S. 218, 228 (2001) (quoting Skidmore v. Swift & Co. 323 U.S. 134, 140 (1944)).

[215] SOX §806(b)(lXB), *see also* 29 C.F.R. §1980.114.

determination of the issues"[216] and is not obligated to give any special weight to determinations of the agency on the issue.[217]

If a final decision is made by the Department of Labor within 180 days of the filing of the complaint, an appeal for judicial review must go to the appropriate U. S. Court of Appeals.[218] When reviewing a trial-like adjudication, as in *Welch*,[219] *Getman*[220] *Platone*,[221] and *Halloum*,[222] the circuit court's standard for judicial review, under the Administrative Procedure Act, is the deferential "substantial evidence test." After review of the whole record, the agency action is to be upheld, unless it is unsupported by substantial evidence.[223] Case precedent defines substantial evidence as something less than the weight or preponderance of evidence,[224] but "more than a scintilla" of evidence;[225] "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[226] The reviewing court will uphold the ruling of the administrative agency, if it is supported by evidence on which the administrative agency could reasonably base the decision. Although the appellate court is left with considerable judicial discretion, substantial evidence review creates a high probability the agency's decision will be upheld.[227]

Department of Labor and ALJ interpretations of the SOX statute likely will be subjected to the two step analysis developed by the Supreme Court in *Chevron U.S.A, Inc.* v. *Natural Resources Defense Council, Inc.*[228]* In step one, the court of appeals will ask if the intent of Congress is clear in the statute. If the intent is clear, the court must give effect to the unambiguously expressed intent of Congress, and not defer to a contrary interpretation by the agency. In step two, if the court determines that Congress has not spoken directly or that the statute is silent or ambiguous, then the agency interpretation of the statute should be given deference, as long as it is not arbitrary and capricious, but a reasonable interpretation of the statute.[229]

Although *stare decisis* does not bind ALJs to be consistent in future decisions, it is likely that they and the Department of Labor will strive for consistency. As the Supreme Court recognized in *Skidmore*,[230] the weight a court

[216] U.S. v. First City National Bank of Houston, 386 U.S. 361,368 (1967).

[m]*Id.* at 368.

[218] 29 C.F.R. §1980.112 (The petition for review should be filed in the circuit where the violation allegedly occurred, or in the circuit of the complainant's residence at the time of the violation.).

[219] Welch v. Cardinal Bankshares Corp., 2003-SOX-15 (AU Jan. 28, 2004).

[220] Getman v. Southwest Securities, Inc., 2003-SOX-8 (AU Feb. 2,2004).

[221] Platone v. Atlantic Coast Airlines, 2003-SOX-27 (AU Apr. 30,2004).

[222] Halloum v. Intel Corp., 2003-SOX-7 (AU Mar. 4, 2004).

[223] Administrative Procedure Act, 5 U.S.C. §706 (2)(E) (2005).

[224] *See* Consolo v. Fed. Mar. Comm'n, 383 U.S. 607,620 (1966).

[225] NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

[226] Consolidated Edison Co. v. NLRB, 305 U.S. 197,229 (1938). *See also* Smith, *supra* note 211, at 538.

[227] *See generally* Smith, *supra* note 226.

[228] 467 U.S. 837 (1984).

[229] *Id.* at 842-845. *See generally* Smith, *supra* note 211, at 531-534, *but see* Matsubra, *supra* note 211, at 1617; Reese, *supra* note 211, at 1191-1198; and Scalia, *supra* note 211 (presenting a contrarian view of judicial deference).

[230] Skidmore v. Swift & Co., 323 U.S. 134,140 (1944).

will give to a judgment will depend upon "its consistency with earlier and later pronouncements" as well as other factors.[231] Inconsistency by the Department of Labor or an ALJ may allow an appellate court to set aside an agency action under the Administrative Procedure Act, on the grounds that the action was "arbitrary, capricious, [or] an abuse of discretion."[232] It is possible, perhaps even likely, that the logic and outcomes of ALJ adjudications like *Welch*,[233] *Getman*,[234] *Platone*[235], and *Halloum*[236] will influence the evolution of judicial interpretation of SOX.

IV. CONCLUSION

The Sarbanes-Oxley Act arose out of the ashes of Enron. In an effort to protect whistleblowers and discourage document destruction, new civil and criminal sanctions have been added to the arsenals of government prosecutors and individual litigants.

Whistleblowers have been given additional rights and protections. Managers face new responsibilities and risks. The Act's new civil liability law[237] is evolving rapidly in the Department of Labor. It will continue to evolve as cases are litigated in the federal courts. Some decisions or practices established by the Department of Labor may be changed by judicial interpretation of the statute. Managers should be alert to this continuing evolution of the law to limit corporate and personal civil liability.

However, the risk of corporate and personal accountability is not limited to civil liability. Sarbanes-Oxley also imposes new criminal sanctions on managers and organizations that retaliate against whistleblowers[238] or destroy, alter or falsify physical evidence.[239] Managers face significant new personal risk of fine and imprisonment. The exercise of prosecutorial discretion, and judicial interpretation of the statute, will shape the evolution of this new criminal law. Because of the absence of prosecution in the three years after passage of SOX, the evolution has not begun and is likely to be slower than the civil law evolution. However, caution still is advised. No manager should overlook the considerable risk of being the first to be convicted of criminal whistleblower retaliation. To be the first person imprisoned, with the sentence enhanced because of document destruction, is a fate all should strive to avoid.

[231] *Id.*
[232] 5 U.S.C. §706 (2)(A) (2005).
[233] Welch v. Cardinal Bankshares Corp., 2003-SOX-15 (AU Jan. 28, 2004).
[234] Getman v. Southwest Securities, Inc., 2003-SOX-8 (AU Feb. 2, 2004).
[235] Platone v. Atlantic Coast Airlines, 2003-SOX-27 (AU Apr. 30, 2004).
[236] Halloum v. Intel Corp., 2003-SOX-7 (AU Mar. 4, 2004).
[237] SOX §806.
[238] SOX §1107.
[239] SOX §802.

Appendix

Sarbanes-Oxley Act of 2002, Pub. L. 107-204, Section 806(a) (to be codified at 18 U.S.C. §1514A)

SEC. 806. PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

(a) IN GENERAL.—Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

"§ 1514A. Civil action to protect against retaliation in fraud cases "(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

"(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

"(A) a Federal regulatory or law enforcement agency;

"(B) any Member of Congress or any committee of Congress; or "(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

"(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

"(b) ENFORCEMENT ACTION.—

"(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by— "(A) filing a complaint with the Secretary of Labor; or

"(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

"(2) PROCEDURE.—

"(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code. "(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

"(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

"(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

"(c) REMEDIES.—

"(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

"(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

"(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

"(B) the amount of back pay, with interest; and

"(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

"(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.".