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"Why I Oughta . . ." Resist Retaliation or Risk Being a Stooge

J.W. Marriott Houston

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I. INTRODUCTION

This paper focuses on diverse and timely topics concerning retaliation and whistleblowing. It especially focuses on legal developments under the anti-retaliation provisions of the Sarbanes–Oxley Act of 2002 and the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010. Our hope is that you will learn something new from this presentation, and use this paper as a helpful resource in your daily practice.

II. *NASSAR* MODIFIES THE "CAT'S PAW" DOCTRINE ARTICULATED IN *STAUB* WHEN APPLIED TO TITLE VII RETALIATION CASES, BUT DOES NOT RENDER IT ENTIRELY INAPPLICABLE

In *Staub. v. Proctor Hosp.*, 562 U.S. 411, 131 S. Ct. 1186 (2011), Vincent Staub sued his former employer, Proctor Hospital, under USERRA, 38 U.S.C. § 4301 *et seq*. Staub alleged that his termination was motivated by Proctor's hostility to his obligations as a member of the United States Army Reserve, which required him to devote a certain number of weeks and weekends per year to training. Specifically, he claimed that although the vice president of human resources, who lacked such hostility, made the decision to terminate him, her decision was influenced by Staub's supervisors, who possessed enmity to his military obligations. *Id*. at 1190.

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

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

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

[I]f the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action ... then the employer will not be liable. But the supervisor's

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biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.... The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.

Id. at 1193.

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

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

Based on *Gross*, courts have held that that *Staub's* "proximate causation" standard does not permit the wholesale application of the "cat's paw" doctrine as articulated in *Staub* in cases under the ADEA. *See, e.g., Sims v. MVM, Inc.*, 704 F.3d 1327, 1336 (11th Cir. 2013) ("Because the ADEA requires a "but-for" link between the discriminatory animus and the adverse employment action as opposed to showing that the animus was a "motivating factor" in the adverse employment decision, we hold that *Staub's* "proximate causation" standard does not apply to cat's paw cases involving age discrimination."); *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 949–50 (10th Cir. 2011) (same); *Wojtanek v. Dist. No. 8, Int'l Ass'n of Machinists & Aero. Workers*, 435 Fed. Appx. 545, 549 (7th Cir. 2011) (same). *See also Holliday v.*

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Commonwealth Brands, Inc., 483 Fed. Appx. 917, 922 n. 2 (5th Cir. 2012) (expressing doubt about the theory's application to ADEA claims), *cert. denied*, 133 S. Ct. 1272 (2013).

Rather, for a cat's paw like theory to apply ADEA cases, courts have held that the biased supervisor's animus must be "a 'but-for' cause of, or a determinative influence on," the employer's ultimate decision. *See Sims*, 704 F.3d at 1337; *Godwin v. Wellstar Health Sys., Inc.*, No. 14–11637, 2015 WL 3757354, at *11 (11th Cir. June 17, 2015) (using cat's paw analysis in ADEA case requiring but-for causation). Several courts have held that this requires a showing that the decision maker merely "rubberstamped" the biased supervisor's recommendation, applying the adverse action without any independent investigation. *See Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999); *see also Simmons*, 647 F.3d at 950, *cited with approval in Sims*, 704 F.3d at 1336.

In *Nassar v. Univ. of Texas Southwestern Med. Ctr.*, 133 S. Ct. 2517 (2013), the Supreme Court addressed the proper causation standard applicable to retaliation claims. The Court held that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened "motivating factor" causation test stated in 42 U.S.C. § 2000e-2(m). *See also Sayger v. Riceland Foods, Inc.*, 735 F.3d 1025, 1030–32 (8th Cir. 2013) (holding that to show causal connection in § 1981 retaliation action, claimant must prove that employer's desire to retaliate was but-for cause of his or her termination). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer. In other words, Title VII retaliation claims require the same proof of causation (but-for) that ADEA claims require.

The courts of appeals to specifically consider the issue have found that the "cat's paw" theory can apply in a Title VII retaliation cases, but that the biased supervisor's animus must be "a 'but-for' cause of, or a determinative influence on," the employer's ultimate decision – merely being a "motivating factor" is not good enough. *See E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1070 (6th Cir. 2015); *Ward v. Jewell*, 772 F.3d 1199, 1203, 1205 (10th Cir. 2014); *Seoane–Vazquez v. Ohio State Univ.*, 577 Fed. Appx. 418, 428 (6th Cir. 2014) (holding that cat's paw liability will only lie in the retaliation context if the claimant can show that the non-decision maker's "retaliatory actions were a but-for cause" of the decision maker's decision to take adverse action); *Goodsite v. Norfolk Southern Ry. Co.*, 573 Fed. Appx. 572, 585, n.7 (6th Cir. 2014) (based on *Nassar*, "it would appear that, at a minimum, the cat's paw theory of liability must be modified in Title VII retaliation cases.").

In the *New Breed Logistics* case, the Sixth Circuit U.S. Court of Appeals affirmed a jury verdict for the EEOC in a Title VII retaliation case, and held that the evidence supported a finding of retaliation based on the cat's paw doctrine, even under a "but-for" causation standard. 783 F.3d at 1070. Likewise, in *Zamora v. City Of Houston*, 798 F.3d 326 (5th Cir. 2015), *cert. denied*, No. 15-868 (May 16, 2016), the Fifth Circuit U.S. Court of Appeals affirmed a jury verdict for the plaintiff in a Title VII retaliation case, and held that the evidence supported a finding of retaliation based on the cat's paw doctrine, even under a "but-for" causation standard.

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III. ENCOURAGING AN EMPLOYEE TO REAPPLY CAN UNDERMINE A RETALIATION CLAIM

In appropriate circumstances, employers should consider extending offers to reapply to employees when they are terminated. The best place to do this is in the termination letter. So long as the offer is *bona fide*, the employer can argue that it significantly undermines a retaliation claim – an argument that some courts have agreed with. *See, e.g.*, *Cooper v. Wyndham Vacation Resorts, Inc.*, 570 F. Supp. 2d 981, 988 (M.D. Tenn. 2008) (fact that the employer suggested that the sales representative, who was fired for excessive absenteeism after she filed a workers' compensation claim, could later reapply for a job undercut her claim of retaliation); *Oguezuonu v. Genesis Health Ventures, Inc.*, 415 F. Supp. 2d 577, 588 (D. Md. 2005) (granting summary judgment against retaliation claim and relying on the fact that plaintiff's "termination letter invites her to reapply when she is able to return to work"); *Greene v. Dialysis Clinic, Inc.*, 159 F. Supp. 2d 228, 240 (M.D.N.C. 2001) (granting summary judgment for the defendant on a retaliatory discharge claim in part because the defendant invited the plaintiff to reapply for a position when one became available).

IV. DENYING DISCRIMINATION CAN BE PROOF OF RETALIATION IF AN EMPLOYER USES THE WRONG WORDS

It is not unusual for supervisors to attribute some sinister, underhanded, bad faith, strategic motive to employees who complain about alleged discrimination. Perhaps this is because employees sometimes make complaints out of such motives. Or, maybe it is because it is a natural defense mechanism. But, in any event, supervisors should generally refrain from stating that they believe a complaining employee is using their age, sex, race, or other protected characteristic to manufacture a meritless claim, shield themselves from legitimate discipline, or for other bad faith or strategic purposes. Otherwise, such statements could be used as proof of retaliation.

For example, in *Burnell v. Gates Rubber Co.*, 647 F.3d 704 (7th Cir. 2011), Eddie Burnell, Jr., the African-American plaintiff had a long history of repeatedly complaining about perceived racial discrimination. His most recent complaint was in early 2006. In December 2006, Burnell was given a disciplinary warning. He complained about that discipline. This time, however, Burnell did not contend the discipline was a product of racial discrimination. But, in response to Burnell's complaint about that discipline, the plant manager of Gates Rubber, Shahram Totonchian, accused the plaintiff of "playing the race card" and told him to find another job if he did not enjoy working at Gates Rubber. *Id*. at 707. The next day, after Burnell refused to sign another disciplinary warning, he was terminated.

The district court granted summary judgment against Burnell's race discrimination and retaliation claims. But, the Seventh Circuit U.S. Court of Appeals reversed the trial court's ruling on Burnell's retaliation claim. *Id*. at 709-10. The Court of Appeals noted Burnell's long history of complaints about perceived racial discrimination. It then stated that, "[g]iven Burnell's prior complaints of racial discrimination, Totonchian's statement is evidence that those complaints caused Burnell's discharge." *Id*. at 710. The Court concluded by stating, "Burnell certainly hasn't proven causation by a preponderance of the evidence, but his history of

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complaints and Totonchian's "race card" statement are enough to allow Burnell to survive summary judgment on his retaliation claim."

V. MANY COURTS HAVE HELD THAT HUMAN RESOURCES PERSONNEL AND OTHER MANAGERS MUST "STEP OUTSIDE" THEIR NORMAL JOB DUTIES TO ENGAGE IN PROTECTED OPPOSITIONAL ACTIVITY UNDER TITLE VII AND OTHER ANTI-RETALIATION LAWS – BUT THE SECOND AND FOURTH CIRCUITS HARSHLY REJECTED THIS VIEW IN AUGUST 2015

Employers sometimes fear that human resources personnel or other managers involved in employee relations may themselves bring claims of retaliation. This can be worrisome for many fairly obvious reasons. But, many courts have imposed a higher standard for human resources personnel to engage in protected oppositional activity under Title VII and other similar laws. This line of cases has also been extended to managers not employed in a human resources capacity, who happen to become involved in an employee relations matter as part of their ordinary job duties. Recently, however, several circuit courts of appeals have rejected this line of cases, thus resulting in a split of authority, which is explained below.

When human resources managers provide their opinions regarding personnel decisions, how to handle discrimination complaints, or other normal human resources related issues, many courts have held that is not protected from retaliation under Title VII and other similar laws. Rather, most courts hold that for human resources managers to engage in protected oppositional activity under Title VII and other similar laws, they must step outside their job's normal role, and clearly establish that they are engaging in protected oppositional or participative activities other than the normal work involved with their job. *See, e.g.*, *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (personnel manager who reported FLSA related problem to employer did not step outside of her job's role, and thus did not engage in protected activity); *Correa v. Mana Prods., Inc.*, 550 F. Supp. 2d 319, 330 (E.D.N.Y. 2008) (relying on *McKenzie* to dismiss a Title VII retaliation claim based on the rationale that "[i]n order for employees in human resources positions to claim retaliation they need to first clearly establish that they were engaged in protected activities other than the general work involved in their employment."); *Cyrus v. Hyundai Motor Mfg. Ala., LLC*, No. 2:07-cv-144, 2008 WL 1848796 (M.D. Ala. Apr. 24, 2008) (relying on *McKenzie* to conclude that "[because in reporting misconduct to Duckworth in August 2005 Plaintiff was merely doing his job, not engaging in protected conduct, Plaintiff cannot establish a *prima facie* case."); *Bradford v. UPMC*, No. 02:04CV0316, 2008 WL 191706 (W.D. Pa. Jan. 18, 2008) (in a case involving a plaintiff who was an HR professional, stating "[i]t appears to this Court, however, that Plaintiff's first form of alleged protected activity, *i.e.*, reports about EEO investigations, does not constitute "protected activity." Courts have held that an employee must "step outside" her normal role in order to be considered as opposing unlawful activity." (citing *Claudio-Gotay v. Bectom-Diskinson Caribe, Ltd*., 375 F.3d 99, 102 (1st Cir. 2004), *cert. denied*, 534 U.S. 1120 (2005); *Vidal v. Romallo Bros. Printing, Inc.*, 380 F. Supp. 2d 60 (D.P.R. 2005); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486 (10th Cir. 1996)). The Fifth Circuit succinctly explained the basis for this rule, and extended it to the context of a supervisor who was not employed in a human resources role, but

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claimed retaliation under the FLSA when he was terminated shortly after passing along an FLSA related complaint to the human resources department:

> [A] part of any management position often is acting as an intermediary between the manager's subordinates and the manager's own superiors. The role necessarily involves being mindful of the needs and concerns of both sides and appropriately expressing them. Voicing each side's concerns is not only not adverse to the company's interests, it is exactly what the company expects of a manager.
>
> If we did not require an employee to "step outside the role" or otherwise make clear to the employer that the employee was taking a position adverse to the employer, nearly every activity in the normal course of a manager's job would potentially be protected activity under [Section 215(a)(3) of the FLSA]. An otherwise typical at-will employment relationship could quickly degrade into a litigation minefield, with whole groups of employees – management employees, human resources employees, and legal employees, to name a few – being difficult to discharge without fear of a lawsuit. For those reasons, we agree that an employee must do something outside of his or her job role in order to signal to the employer that he or she is engaging [in] protected activity . . .

Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 628 (5th Cir. 2008).[1]

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

Other courts invoking and applying the "step outside the role" rule include, for example: *Pettit v. Steppingstone, Center for the Potentially Gifted*, 429 Fed. Appx. 524, 530 n.2 (6th Cir. 2011) ("To the degree that Pettit's FLSA complaints were made in the course of performance of human resource job duties assigned to her and undertaken for the purpose of protecting the interests of the employer, they do not constitute protected activity under § 215(a)(3)."); *Samons v. Cardington Yutaka Techs.*, Civ. A. No. 08-988, 2009 WL 961168 at *7 (S.D. Ohio Apr. 7, 2009) (finding that plaintiff did not step outside her role as human resources manager where she alerted the company about alleged FLSA violations as part of her job duties and did not complain about these alleged violations on behalf of herself or other women employees from a standpoint adversarial to the company); *Cook v. CTC Comm'ns Corp.*, Civ. A. No. 06-58, 2007 WL

[1] In *Rangel v. Omni Hotel Management Corp*., No. SA–09–CV–0811, 2010 WL 3927744 (W.D. Tex. Oct. 4, 2010), the magistrate judge limited *Hagan* to its FLSA-related facts, holding that extending the rule in *Hagan* to employment discrimination complaints would "strip Title VII protection from "whole groups of employees-management employees, human resources employees, and legal employees, to name a few" – employees who are in the best positions to advise employers about compliance." *Id*. at *5.

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3284337, at *6 (D. N.H. Oct. 30, 2007) (holding that in order to show protected activity, the plaintiff had to establish that she acted outside of her role as a human resources manager when she advocated on behalf of an employee's USERRA rights); and *Hill v. Belk Stores Svcs., Inc.*, Civ. A. No. 06-398, 2007 WL 2997556, at *1 (W.D.N.C. Oct. 12, 2007) ("actions within the scope of an employee's duties are not protected for purpose of Title VII.").

The Eleventh Circuit adopted this line of authority in *Brush v. Sears Holdings Corp*., 466 Fed. Appx. 781 (11th Cir. 2012) (unpublished), the Eleventh Circuit applied this rule to a plaintiff who held the position of Loss Prevention District Coach. The plaintiff had investigated the alleged rape and sexual harassment of an employee. *Id*. at 784. Sears terminated the plaintiff's employment shortly after her investigation was complete. She then sued Sears, claiming retaliation. Citing *McKenzie* and *Hagan*, the Eleventh Circuit applied what it called the "manager rule" – that to qualify as "protected activity" an employee must cross the line from being an employee "performing her job . . . to an employee lodging a personal complaint." *Id*. at 787 (citing *McKenzie*, 94 F.3d at 1486). Applying that rule, the court found that the plaintiff never crossed that line, and affirmed the district court's grant of summary judgment against her retaliation claim. *Id*.

One district court case in which the judge stated his belief that this line of authority has been abrogated or significantly weakened by the U.S. Supreme Court's decision in *Crawford v. Metro. Gov't of Nashville and Davidson Cnty.*, 555 U.S. 271, 129 S. Ct. 846 (2009), which is discussed at length later in this paper. *See, e.g., Schanfield v. Sojitz Corp. of America*, 663 F. Supp. 2d 305, 342 (S.D.N.Y. 2009) ("I thus decline to accept Defendants' argument that Schanfield's retaliation complaint must be dismissed because it was his job as an internal auditor to identify litigation risks."). And, in *dicta*, the Tenth Circuit Court of Appeals did implicitly suggest that it is at least arguable that *Crawford* has abrogated this line of authority. *See Weeks v. Kansas*, 503 Fed. Appx. 640, 643 (10th Cir. 2012) (relying on this rule to reject in-house lawyer's retaliation claim, and finding that the lawyer waived any argument that *Crawford* abrogated this line of authority by failing to raise *Crawford* in the district court). On the other hand, The First Circuit Court of Appeals assumed that this rule survived *Crawford*. *See Collazo v. Bristol–Myers Squibb Mfg., Inc.*, 617 F.3d 39, 49 (1st Cir. 2010) ("assum[ing]," without deciding, that even post-*Crawford*, "to engage in protected conduct under Title VII's retaliation provision, an employee must step outside his ordinary employment role of representing the company and take action adverse to the company").

In August 2015, the so-called "manager's rule" and cases in that line of authority suffered a major blow in two circuit court of appeals cases. In the case of *DeMasters v. Carilion Clinics*, 796 F.3d 409 (4th Cir. 2015). In *DeMasters*, the district court had granted a motion to dismiss against an EAP consultant whose employer had fired him because he had allegedly taken the side of an employee who had claimed same sex sexual harassment and encouraged the employee to pursue his harassment claim. The district court largely based its holding on the so-called "manager rule," and found that, based on that rule, DeMasters could not prevail, because his allegedly protected activity (supporting and encouraging the employee in his harassment complaint) was done within the scope of his job as an EAP consultant. DeMasters appealed, and the Fourth Circuit U.S. Court of Appeals reversed, and rejected the so-called "manager rule,"

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stating that the manager rule "has no place in Title VII litigation." *Id*. at 424. In reaching this conclusion, the Fourth Circuit stated its belief that public policy militated against the rule, as did the overall structure of Title VII. *Id*. at 423. The court also claimed to be joining the Sixth Circuit U.S. Court of Appeals in its rejection of the "manager rule" in Title VII cases in *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000) (holding that merely because an affirmative action official at a school may have had a contractual duty to advocate for women and minorities did not defeat her retaliation claim).

In *Littlejohn v. City of New York*, 795 F.3d 297 (2nd Cir. 2015), the Second Circuit U.S. Court of Appeals relied on *Crawford* and rejected the so-called "manager rule" in the context of a plaintiff who was a Director of her employer's Equal Employment Opportunity Office, stating:

> To the extent an employee is required as part of her job duties to report or investigate other employees' complaints of discrimination, such reporting or investigating by itself is not a protected activity under § 704(a)'s opposition clause, because merely to convey others' complaints of discrimination is not to oppose practices made unlawful by Title VII. But if an employee—even one whose job responsibilities involve investigating complaints of discrimination—actively "support[s]" other employees in asserting their Title VII rights or personally "complain[s]" or is "critical" about the "discriminatory employment practices" of her employer, that employee has engaged in a protected activity under § 704(a)'s opposition clause.

Id. at 318.

In December 2015, the Ninth Circuit decided *Rosenfield v. GlobalTranz Enterpr., Inc.*, 811 F.3d 282 (9th Cir. 2015), an FLSA retaliation case brought by a human resources manager. The district court had dismissed the case on summary judgment, applying the "manager rule." In a 2-1 decision, the Ninth Circuit reversed the district court, finding that a material issue of fact existed on whether or not the human resources manager had engaged in protected activity under the FLSA. Rather than adopt or reject the "manager rule," the Ninth Circuit held that the FLSA's anti-retaliation provision requires that the plaintiff give "fair notice" of a an assertion of rights protected by the statute and a call for their protection, and the plaintiff's status as a manager is one factor relevant to determining whether such notice was provided, but is not alone dispositive. Rather, a fact specific inquiry is necessary. In this particular case, the facts showed that the plaintiff's role as human resources manager did not actually involved FLSA compliance. Nevertheless, the plaintiff repeatedly made complaints that the employer was not complying wit the FLSA. Eventually, the plaintiff was fired. On these facts, the Ninth Circuit held that the plaintiff's role as a human resources manager did not bar her FLSA retaliation claim.

Finally, there is a question whether the so-called "manager rule" applies to SOX retaliation claims. In *Riddle v. First Tennessee Bank*, No. 3:10–cv–0578, 2011 WL 4348298, at *8 (M.D. Tenn. Sept. 16, 2011), *aff'd*, No. 11-6277, 2012 WL 3799231 (6th Cir. Aug. 31, 2012), the district court held that this line of authority did apply to a SOX claim, but did so without analysis or meaningful discussion. The Sixth Circuit affirmed on other grounds. In contrast, the Administrative Review Board takes the opposite view. *See Robinson v. Morgan–Stanley*, Case

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No. 07–070, 2010 WL 348303, at *8 (ARB Jan. 10, 2010) ("[Section 1514A] does not indicate that an employee's report or complaint about a protected violation must involve actions outside the complainant's assigned duties."), and at least one federal district court has followed the ARB on this point. *See Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012) (rejecting employer's argument that the employee's SOX claim had to be dismissed because she never stepped outside her role).

VI. CAN SENDING A LITIGATION HOLD NOTICE CONSTITUTE ACTIONABLE RETALIATION? THE ARB AND FIFTH CIRCUIT U.S. COURT OF APPEALS BOTH SAY "YES"

Anthony Menendez was the former Director of Technical Accounting Research & Training at Halliburton, Inc., where he was charged with monitoring and researching technical accounting issues as well as advising field accountants. After issuing a memorandum taking a position against what he believed were current violations of generally accepted accounting principles, Menendez's supervisor allegedly told him in a meeting regarding the memo that he was not a "team player," that he was insensitive to Halliburton's politics, and that he should collaborate more with his colleagues on such issues. *Menendez v. Halliburton, Inc*., No. 09-002, 2011 WL 4439090, at *2 (ARB Sept. 13, 2011).

Menendez contacted the SEC as well as the company's "confidential" whistleblower hotline with his concern that the company was engaging in "questionable" accounting practices with respect to revenue recognition. After receiving the SEC complaint, Halliburton's General Counsel sent out document hold notices to various employees that identified Menendez. *Id*. at *3. The General Counsel may have believed he was merely complying with the company's obligations to retain potentially relevant documents, but Menendez regarded it (and other e-mails that identified him as the complainant) as being "outed" to his coworkers. Specifically, when Menendez realized his identity had been revealed, he testified that he was stunned, and that it was likely the worst day of his life. *Id*. He testified that his coworkers began avoiding him, he was soon isolated at work, and Halliburton eventually placed him on administrative leave for the remainder of the investigations.

Both the SEC and the company's audit committee found no basis for Menendez's questionable accounting allegations. *Id*. at *4. Menendez was then reassigned from directly reporting to the chief accounting officer to reporting to the director of external reporting. He subsequently resigned, claiming he believed he was demoted by being required to report to a lower ranking officer. Menendez then filed a complaint with the Department of Labor under Section 806 of the SOX claiming he was retaliated against as a whistleblower and suffered an "adverse action."

Regarding Menendez's specific claim of being "outed," Halliburton argued that exposing Menendez's identity to his co-workers had no "tangible consequence" to Menendez in part because those co-workers already knew that Menendez was the whistleblower. The ARB rejected a requirement that there be a "tangible consequence" in order for adverse action to be found and adopted the standard set forth in its decision in *Williams v. American Airlines, Inc*., No. 09-018 (ARB Dec. 29, 2010) that an "adverse action" encompasses any "nontrivial

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unfavorable employment action," either as a single event or in combination with other actions. The ARB refused to apply the narrower standard from *Burlington N. & Santa Fe Railroad Co. v. White*, 548 U.S. 53 (2006), that an adverse action is one that would deter a reasonable worker from engaging in the protected activity. However, the ARB noted that *Burlington* does serve as "a helpful guide for the analysis of adverse actions under SOX." *Menendez*, 2011 WL 4439090 at *10.

The ARB stated: "SOX Section 806's plain language states that no company 'may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.' By explicitly proscribing non-tangible activity, this language bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers." *Id*. at *9.

The ARB found that because Section 301 of SOX requires a company to have a procedure for the anonymous receipt of complaints, Menendez had a right to confidentiality that was a "term and condition of his employment." According to the ARB, Halliburton denied Menendez that right when it "outed" him in its e-mails, resulting in an adverse action. The ARB concluded that "a reasonable employee in Menendez's position would be deterred from filing a confidential disclosure regarding misconduct if there existed the prospect that his identity would be revealed to the very people implicated in the alleged misconduct." *Id*. at *16.

The *Menendez* case indicates that the DOL will set a low threshold for SOX retaliation against a whistleblower. Although it remains to be seen whether many federal courts will follow the ARB in applying the lower standard for adverse action, employers should be cautious in taking action in response to an employee's claim of financial misconduct. At least one federal court has expressly agreed with, and followed *Menendez* so far. *See Guitron v. Wells Fargo Bank, N.A.*, No. C 10-3461 CW, 2012 WL 2708517, at *16 (N.D. Cal. July 6, 2012) (plaintiff's poor reviews and suspension were actionable under the *Menendez* standard).

The *Menendez* case also indicates the need for employers to train executives and members of legal and human resources departments on internal complaint procedures to ensure that those procedures are specifically being followed, particularly with respect to confidentiality. That a litigation hold notice could be used to find, in part, that an adverse action occurred likely did not occur to Halliburton at the time its General Counsel sent the notice. Other companies' in-house lawyers need to be wary of falling into this same trap.

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

Expecting to be overruled by the ARB again, however, the judge also supplied two fallback findings in favor of Menendez — one awarding him just $1,000 in damages, and an

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

Halliburton appealed the ARB's ruling to the Fifth Circuit U.S. Court of Appeals. In November 2014, the Fifth Circuit U.S. Court of Appeals decided *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254 (5th Cir. 2014), and affirmed the ARB's decision in all respects. The Fifth Circuit's decision is a sweeping victory for the SOX plaintiffs' bar. In March 2015, the Fifth Circuit declined to rehear the case *en banc*, by an eight to seven vote. In affirming the ARB's decision, the Fifth Circuit held that:

> The undesirable consequences, from a whistleblower's perspective, of the whistleblower's supervisor telling the whistleblower's colleagues that he reported them to authorities for what are allegedly fraudulent practices, thus resulting in an official investigation, are obvious. It is inevitable that such a disclosure would result in ostracism, and, unsurprisingly, that is exactly what happened to Menendez following the disclosure. Furthermore, when it is the boss that identifies one of his employees as the whistleblower who has brought an official investigation upon the department, as happened here, the boss could be read as sending a warning, granting his implied imprimatur on differential treatment of the employee, or otherwise expressing a sort of discontent from on high. Moreover, in Menendez's workplace, collaboration with colleagues was valued. Menendez's supervisor scolded him for not collaborating with his colleagues enough and told him to be more of a "team player." In an environment where insufficient collaboration constitutes deficient performance, the employer's disclosure of the whistleblower's identity and thus targeted creation of an environment in which the whistleblower is ostracized is not merely a matter of social concern, but is, in effect, a potential deprivation of opportunities for future advancement.

Id. at 262.

The court also rejected Halliburton's argument that Menendez could not prevail because it did not act with a wrongful motive when it sent out the litigation hold notice, stating, "Regardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing." (citation and alteration omitted). We reject Halliburton's argument that the Review Board committed legal error by failing to require proof that the company had a "wrongful motive." *Id*. at 263.

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VII. SEEMINGLY CLEAR TERMINATION DECISIONS CAN BECOME CLOSE CALLS WHEN THE EMPLOYEE HAS BEEN PARTICIPATING IN PROTECTED ACTIVITIES

Case law has long held that the rights afforded to employees by anti-retaliation provisions are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors. *Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1234 (5th Cir. 1976) (citing *Corriveau & Routhier Cement Block, Inc. v. NLRB*, 410 F.2d 347, 350 (1st Cir. 1969)); *cf. Hamilton v. Southwestern Bell Tel. Co*., 136 F.3d 1047, 1052 (5th Cir. 1998) (noting that anti-retaliation laws "are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors."). In actual practice however, the line is not always so clear. The cases summarized in this section teach that what sometimes appear to be clear termination decisions can become anything but, once seen through the lens of a retaliation analysis.

A. Expressing A Desire To Kill A Supervisor: *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012)

In *Coleman*, the plaintiff, a long-term African-American employee, made complaints of alleged unlawful discrimination against her new white supervisor at the Postal Service. *Id*. at 842. She then took a leave of absence for psychiatric problems. *Id*. at 843. While on the leave of absence she told a psychiatrist that she had homicidal thoughts towards her white supervisor. *Id*. The psychiatrist then reported the plaintiff's thoughts to the supervisor. *Id*. The supervisor reported the "threat" to the police. *Id*. Around the same time, while still on leave, the plaintiff filed two EEOC complaints against her white supervisor. *Id*. Several months later, while the plaintiff was still suspended from work pending investigation, she was terminated for violating the Postal Services' policy against making threats of violence. *Id*. at 844. The plaintiff then filed a grievance over her termination, and an arbitrator ordered her returned to work. *Id*. After that, the plaintiff filed a lawsuit, alleging race discrimination, sex discrimination, and retaliation under Title VII. The district court granted the Postal Service's motion for summary judgment, and the plaintiff appealed. *Id*. at 844-45.

The Seventh Circuit U.S. Court of Appeals reversed the district court's grant of summary judgment. The court found that:

- Two white workers who allegedly held a knife to the neck of an African-American employee, who were suspended, but not terminated, were appropriate comparators to prove disparate treatment. The court explained at length its standard for proving disparate treatment through such comparisons, and articulated a pragmatic approach that does not turn on overly technical distinctions. *Id*. at 846-52, 858-59.

- The close timing between the plaintiff's protected activities and her subsequent alleged mistreatment, suspension, and termination, supported her retaliation claim. *Id*. at 860-61.

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- Evidence suggested that the plaintiff's alleged "threat" was not a "true threat," and even if it was, "a number of background facts cast doubt on the assertion that [she] was dangerous." *Id*. at 855-56.

- The Postal Service admittedly had options short of termination to gauge the plaintiff's propensity for violence, such as seeking a "fitness for duty" certificate. *Id*. at 856-57.

- The arbitrator's ruling, while not preclusive, supported the plaintiff's claim that the Postal Service's basis for termination was pretextual. *Id*. at 853-57.

- The fact that the plaintiff made the statement to her psychiatrist somehow favored the plaintiff because "[i]t would be troubling to think that anyone who confides to her psychiatrist that she has fantasized about killing her boss could automatically be subject to termination for cause." *Id*. at 856.

B. Expressing A Desire To Knock Out A HR Manager's Teeth: *Miller v. Illinois Dept. of Transp*., 643 F.3d 190 (7th Cir. 2011)

Miller requested an accommodation under the ADA. After much wrangling back and forth, it was denied. Angie Ritter, an IDOT personnel manager, allegedly told Miller "we don't grant requests." Two months later, on his first day back at work after a company-mandated leave of absence that was related to his request for accommodation, Miller was at an IDOT office, where he encountered Ritter. Referring to Ritter, Miller then said to another employee: "Right there is Arch enemy Number 1. I have never hit a woman. Sometimes I would like to knock her teeth out."

IDOT construed Miller's comment as a threat, informed Miller that he had been relieved of duty, and instructed him to go home. Shortly thereafter, Miller was formally discharged for making a threat of violence against another employee and for disruptive behavior. Miller grieved his discharge, and the parties submitted to arbitration. Miller was found to have engaged in "conduct unbecoming" but was returned to work, without back pay or benefits. Miller then filed suit under the ADA, and for retaliatory discharge. Miller presented evidence that a crew leader, named Steve Maurizio, had threatened violence against his co-workers on more than one occasion – including one incident in which he threatened to kill three co-workers – but unlike Miller, was not disciplined or terminated for his behavior. The district court granted summary judgment against both claims.

The Seventh Circuit U.S. Court of Appeals reversed the district court's grant of summary judgment. As for the retaliation claim, the court stated:

> In reviewing the evidence, we cannot second-guess IDOT's employment decisions to the extent that they were innocently unwise or unfair. But Miller has presented sufficient evidence from which a finder of fact could genuinely call into question IDOT's honesty. First, a reasonable jury could find that Miller's statement about Ritter was not a "threat" at all, or that even if IDOT properly

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> construed it as such, its decision to terminate Miller was a disingenuous overreaction to justify dismissal of an annoying employee who asserted his rights under the ADA. Miller presented evidence that Maurizio himself had had a genuinely violent workplace outburst but was not terminated, and yet Miller was terminated for a much milder comment on his first day back at work. Also, Ritter's comment to Miller that "we don't grant requests" could be construed by a reasonable jury as showing a general hostility to requests for accommodation under the ADA. There is more here than "mere temporal proximity." *Cf. Stone*, 281 F.3d at 644 (noting that mere temporal proximity between the protected conduct and the allegedly retaliatory act "will rarely be sufficient in and of itself to create a triable issue"). The combination of the ambiguity of the asserted threat, the response to Maurizio's violent outburst, the hostility toward Miller's request for accommodation, and the timing provided sufficient evidence to permit a reasonable trier of fact to infer pretext and retaliatory intent. The question must be decided at trial rather than on summary judgment.

Id. at 200-01.

C. Failing To Satisfy A Performance Improvement Plan's Objective Sales Production Goals That Were Put In Place Before The Employee Engaged In Protected Activity: *Smith v. Xerox Corp.*, 371 Fed. Appx. 514 (5th Cir. Mar. 2010) and *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010)

Kim Smith was employed by Xerox Corporation for approximately 22 years before she was terminated in January 2006. She worked as an Office Solutions Specialist, responsible for supporting Xerox dealers, or "agents," who placed and serviced copying equipment in North Texas. For the majority of her employment, Smith received positive evaluations. By all accounts she was a very good employee who only two years before her termination was named to Xerox's prestigious President's Club, an annual award that is bestowed on only the top eight performing employees in the country.

In January 2005, Steve Jankowski took over as manager of Xerox's Central Region, which included the territory assigned to Smith. At the same time, the sales territories within Smith's region were realigned. As a result, Smith's territory and the number of agents that she supported were reduced. At that time, Smith's sales performance began to decline.

In June 2005, Jankowski sent Smith a formal warning letter, which outlined various deficiencies in Smith's performance and placed her on a 90-day warning period. The letter indicated that Smith was currently at only 63% of her revenue goals and that she was "below expectations" in several areas. Jankowski later revised the letter to correct certain errors therein and re-started the warning period. The 90-day period was the first step in Xerox's Performance Improvement Process ("PIP") and was set to end on October 25, 2005. Smith refused to sign the warning letter because she believed it was inaccurate. Instead, she sought a meeting with Jankowski's supervisor, Jack Thompson, and also complained to a Xerox human resources manager, Joe Villa, all to no avail.

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On October 27, 2005, at the conclusion of Smith's warning period, Jankowski placed Smith on a 60-day probationary term, which was to expire on December 28, 2005. Jankowski's letter to Smith informing her of the probation stated in part that Smith had met approximately only 70% of her revenue plan and had also failed in other performance areas. The letter warned Smith that failure to meet a satisfactory performance level, including making up her entire year's shortfall and meeting 100% of her revenue plan, could result in termination of employment at the conclusion of the probationary period, or sooner if there were no evidence of improvement in the early stages of the period.

On November 4, 2005, Smith responded in writing to Jankowski's letter. She agreed that she was not at her plan goals but disagreed with Jankowski's assessment of other performance areas. She contended that the goals set for her did not reflect the "real world sales environment," including the decrease in her territory, and that she was not being treated the same as other employees or given the same amount of time usually offered when someone misses her sales numbers. Smith asked Jankowski to reconsider the length of her time on probation. Jankowski indicated on November 8, 2005, that he did not believe he was treating Smith differently from any other employee on the team and that he would not reconsider his position on the length of Smith's probation.

On November 17, 2005, Smith notified Jankowski that she had filed a discrimination charge against Xerox with the EEOC. Smith charged in her EEOC complaint that Jankowski had placed her in the PIP with the intention of terminating her employment and that he had done so based on her age, gender, and race. Smith's letter advised Jankowski of the law's prohibition of an employer taking action against an employee in retaliation for filing such charges. Smith was terminated in January 2006 at the conclusion of her probationary period, at which point she had achieved approximately 74% of her revenue goals.

Smith sued Xerox and a jury found in her favor on her retaliation claim. The district court, however, granted Xerox's motion for judgment as a matter of law. Smith appealed. On appeal, the Fifth Circuit Court of Appeals found that there was sufficient evidence to support the jury's verdict in Smith's favor on her retaliation claim because:

- Evidence showed Jankowski was a difficult manager who did not like employees who stood up to him, and especially did not like Smith, thus leading to the inference that he is the sort of person who would retaliate. *Smith*, 371 Fed. Appx. at 516.

- Xerox's policies generally state that counseling and coaching of employees should occur prior to the issuance of formal warning letters, yet Xerox offered no documentation supporting Jankowski's claim that he counseled Smith before placing her on probation. *Id.* at 517.

- There was evidence from which a reasonable jury could have concluded that Jankowski had started the termination process just days after Smith filed her EEOC charge, and well before the expiration of her 60-day probationary term. *Id*. at 517-18.

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- Just two weeks after Smith filed her EEOC charge, Jankowski issued her a "letter of concern" over two arguably trivial issues, and did so without talking to Smith to get her side of the story first – which Xerox's own human resources manager, Joe Villa, testified was a violation of Xerox policy and looked like retaliation to him. *Id*. at 519. "Following so closely on the heels of Smith's EEOC complaint, the letter was certainly probative of Jankowski's attitude toward Smith and provided further context for Jankowski's decision to seek Smith's termination." *Id*.

The Fifth Circuit rejected Xerox's reliance on *Clark County School District v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508 (2001). In *Clark County*, the plaintiff was transferred to a new position only one month after filing a lawsuit, and her retaliation claim relied solely on this temporal proximity. The evidence showed, however, that plaintiff's transfer was contemplated by the manager before he knew about the suit. The Supreme Court held that employers "need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Id*. at 272, 121 S. Ct. at 1511. The Fifth Circuit stated: "Smith, unlike the plaintiff in *Clark County*, has not presented evidence only of temporal proximity. Smith was a long-tenured employee with no disciplinary history prior to 2005 who was subjected not only to termination shortly following the EEOC complaint but also to suspicious new charges of wrongdoing for arguably minor incidents following that complaint." *Smith*, 371 Fed. Appx. at 520. Summing the case up, the Fifth Circuit held:

> We think the evidence was sufficient for the jury to conclude that Jankowski's animus toward Smith boiled over due to the filing of the EEOC complaint, which provided a motivating factor for the termination. In sum, Jankowski failed to follow Xerox policies as far as documentation prior to placing Smith in the disciplinary process; the termination process itself was set in motion by the transmittal of the termination request within days of the EEOC charge even though Smith was supposed to be on probation for 60 days; a subsequent letter of concern followed closely after the EEOC charge and leveled new and potentially serious accusations for incidents that were arguably minor and easily explained; and Villa admitted that the letter of concern was suspicious and indicative of retaliatory motivation.

Id.

VIII. POSITIVE TREATMENT OF AN EMPLOYEE AFTER THEIR PROTECTED ACTIVITY IS OFTEN – BUT NOT ALWAYS – REGARDED BY COURTS AS POTENT PROOF OF NON-RETALIATION

The most difficult retaliation cases to defend are often ones where a long-term employee had a spotless record and positive performance reviews for years, engaged in protected activity, and then promptly began being written up and their performance reviews plummeted. *See, e.g., Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 43 (5th Cir. 1992) (affirming a jury verdict in a

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retaliation case involving a long-term employee, and stating "[w]e find it surprising that suddenly, after Shirley filed her EEOC complaint, problems with her work surfaced.").

On the other hand, where employers take favorable action towards an employee after they have engaged in protected activity, courts often regard that evidence as powerful proof of non-retaliation. A case demonstrating this point is *Brady v. Houston Independent School Dist*., 113 F.3d 1419, 1424 (5th Cir. 1997). There, the Fifth Circuit U.S. Court of Appeals reversed a jury verdict for the plaintiff in a retaliation case, stating:

> Brady's case suffers from other critical flaws. During the eighteen month period between Brady's protected statements and the Appellants' alleged retaliation, Mahaffey and Cortese gave Brady positive evaluations and twice recommended that she be promoted. This fact is utterly inconsistent with an inference of retaliation, and we fail to understand why two individuals allegedly harboring a retaliatory motive against Brady would take affirmative steps to secure a job promotion for her.

Id.

Other courts have reached similar conclusions. For example, in *Moticka v. Weck Closure Systems*, 183 Fed. Appx. 343, 353 (4th Cir. 2006), the court affirmed summary judgment against a retaliation claim, stating:

> Here, the inference of retaliatory motive is undercut, not only by the length of time between the protected activity and adverse action (nearly two years), but also by the favorable treatment Moticka received from July 2000 until her termination. First, because Moticka had not complied with the FMLA's notice requirement in requesting her leave, Weck could have denied her leave when it was initially requested, but it did not do so. Next, Weck gave her more paid leave than was required under its short-term disability policy (payments ended on February 15, 2001, rather than on January 19, 2001). Finally, by allowing Moticka thirty-four weeks of leave, Weck gave Moticka more leave than required under its FMLA and short-term disability policies. These facts are not consistent with an intent to retaliate against Moticka. Because Moticka has failed to make out a *prima facie* case of retaliation, the district court properly granted Weck's motion for summary judgment on Moticka's retaliation claim.

In another example, in *Satterfield v. Board of Trustees University of Alabama*, No. 2:11–cv–3057–JHH, 2012 WL 3139693, at *5 (N.D. Ala. July 31, 2012), the district court granted the employer's motion for summary judgment against the plaintiff in a retaliation case, emphasizing that "*after* Satterfield complained about discriminatory comments made by a coworker, and despite the below-average performance review, he was shortly thereafter promoted with a 26% pay increase; he was provided with schooling (and continues to attend technical school) on HVAC maintenance at the expense of UAB. . . . This context matters. Although some actions taken by UAB may have been perceived by Satterfield as adverse, the totality of the picture of

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actions taken by UAB before, during, and after the complaint was made make clear that UAB did not subject Satterfield to retaliation." *Id.* (citations omitted, italics in original).

But, this view of things is not absolute. For example, in *Feder v. Bristol-Myers Squibb Co.*, 33 F. Supp. 2d 319, 339 (S.D.N.Y. 1999), the employer argued that its favorable post-complaint treatment of the plaintiff precluded a retaliation claim, but, on the specific facts of that case, the court disagreed, stating:

> Defendant argues that its favorable treatment of Feder after her EEOC charge precludes any inference of retaliatory motive. There is a question, however, whether that favorable treatment was an effort to avert or undermine a claim of retaliation. After all, BMS has not explained why Feder, who had not reported to Weg when she ran licensing, was given a direct reporting relationship – along with a new title and direct contact with the chairman and chief executive officer – after Feder filed her charge and after a major part of her responsibilities was removed from her. On this record, the trier of fact would be entitled to infer that defendant's favorable treatment was intended to mask a retaliatory motive.

IX. COURTS ARE SPLIT ON THE AVAILABILITY OF EMOTIONAL DISTRESS AND PUNITIVE DAMAGES IN FLSA RETALIATION CLAIMS

A. Emotional Distress Damages

The damages provision of the anti-retaliation section of the FLSA states in relevant part:

> Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

29 U.S.C. § 216(b).

Circuit courts that have addressed the issue have held that "legal or equitable relief" includes emotional distress damages. *See Moore v. Freeman*, 355 F.3d 558, 563–64 (6th Cir. 2004) (emotional distress damages are recoverable under the anti-retaliation provision of the FLSA); *Broadus v. O.K. Indus., Inc*., 238 F.3d 990, 992 (8th Cir. 2001) (emotional distress damages are recoverable in Equal Pay Act retaliation case); *Lambert v. Ackerley*, 180 F.3d 997, 1017 (9th Cir. 1999) (reversing and remanding emotional distress award of $75,000 under anti-retaliation provision of FLSA for determination of appropriate amount of emotional distress damages); *Avitia v. Metro. Club of Chicago., Inc*., 49 F.3d 1219, 1228–29 (7th Cir. 1995) (citing *Travis v. Gary Cmty. Mental Health Ctr., Inc*., 921 F.2d 108, 111–12 (7th Cir. 1990)) (emotional distress damages are recoverable under the anti-retaliation provision of the FLSA); *Bogacki v. Buccaneers Ltd. Partnership*, 370 F. Supp. 2d 1201 (M.D. Fla. 2005) (same).

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The Fifth Circuit U.S. Court of Appeals has yet to address whether emotional distress damages are available in a FLSA retaliation claim. Several district courts within the Fifth Circuit have held that they are not available. *See Douglas v. Mission Chevrolet*, 757 F. Supp. 2d 637, 639-40 (W.D. Tex. 2010) (granting the defendant's motion to dismiss plaintiff's claims for emotional distress damages in a FLSA anti-retaliation claim); *Rumbo v. Southwest Convenience Stores, LLC*, No. EP–10–CA–184–FM (W.D. Tex. July 19, 2010) (same). On the other hand, several district courts have held that they are available. *See Saldana v. Zubha Foods, LLC*, Cv. No. SA:13–CV–00033–DAE, 2013 WL 3305542, at *6 (W.D. Tex. June 28, 2013); *Little v. Technical Specialty Products, LLC*, 940 F. Supp. 2d 460, 479 (E.D. Tex. 2013).

B. Punitive Damages

Federal appellate courts that have considered the issue are split on whether a plaintiff can recover punitive damages in a FLSA retaliation claim. *Compare Travis*, 921 F.2d at 111–12 (punitive damages are available in an FLSA retaliation claim), *with Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933–35 (11th Cir. 2000) (punitive damages are not available in a FLSA retaliation claim). The Fifth Circuit U.S. Court of Appeals has yet to address whether punitive damages are available under an anti-retaliation claim brought pursuant to the FLSA. However, in both *Douglas* and *Rumbo*, *supra*, district courts within the Fifth Circuit held that punitive damages are not recoverable in a FLSA retaliation claim. Similarly, in *Lee v. U.S. Sec. Associates, Inc.*, No. A–07–CA–395–AWA, 2008 WL 958219, at *7 (W.D. Tex. April 8, 2008), the court concluded that punitive damages are not recoverable in a FLSA retaliation claim, reasoning that "[w]hile the Fifth Circuit has not addressed the issue, when it interpreted the very similar language in the ADEA, it held that punitive damages are not available under that statute." (citing *Dean v. Am. Sec. Ins. Co.*, 559 F.2d 1036, 1039 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066, 98 S. Ct. 1243 (1978) (footnoted omitted). The Ninth Circuit has affirmed an award of punitive damages in a FLSA-retaliation case but did not address the issue of whether the statute allows punitive damages. *Lambert*, 180 F.3d at 1011 ("Although the Seventh Circuit's reasoning [in *Travis*] is persuasive, we do not reach the question because the defendants have waived the issue of the availability of punitive damages by failing to raise it below.").

District courts are also split on this issue. Some district courts have held that punitive damages are recoverable in a FLSA retaliation claim. *See, e.g., Jones v. Amerihealth Caritas*, 95 F. Supp. 3d 807, Civ. Action No. 14-4689, 2015 WL 1033824, at *9 (E.D. Pa. Mar. 6, 2015) ("This Court finds Judge Pollak's well-reasoned opinion in *Marrow* persuasive and agrees that punitive damages are available for retaliation claims under the EPA and FLSA."); *Wolfe v. Clear Title, LLC*, 654 F. Supp. 2d 929, 937 (E.D. Ark. 2009) (holding that punitive damages are available in FLSA retaliation cases); *Marrow v. Allstate Security & Investigative Servs., Inc.*, 167 F. Supp. 2d 838, 842-46 (E.D. Pa. 2001) (same). Other district courts have held they are not. *See, e.g., Allen v. Garden City Co–Op, Inc.*, 651 F. Supp. 2d 1249 (D. Kan. 2009) (holding punitive damages unavailable under FLSA's anti-retaliation provision); *Johnston v. Davis Sec., Inc.*, 217 F. Supp. 2d 1224 (D. Utah 2002) (same); *Huang v. Gateway Hotel Holdings*, 520 F. Supp. 2d 1137, 1143 (E.D. Mo. 2007) (same); *Lanza v. Sugarland Run Homeowners Ass'n, Inc.*, 97 F. Supp. 2d 737, 739-42 (E.D. Va. 2000) (same); *Waldermeyer v. ITT Consumer Fin. Corp.*, 782 F. Supp. 86, 88 (E.D. Mo. 1991) (same).

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X. STANDARDS FOR PROTECTION FROM RETALIATION OFTEN DIFFER DRAMATICALLY DEPENDING ON WHETHER THE "OPPOSITION" OR "PARTICIPATION" CLAUSE APPLIES

Section 704(a), the anti-retaliation provision of Title VII provides, in pertinent part:

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

42 U.S.C. § 2000e-3(a)

Commentators have noted that "[i]t is essential to the analysis of § 704(a) to recognize its two different clauses . . . . The distinction is significant because the levels of statutory protection differ." Barbara L. Schlei & Paul Grossman, Employment Discrimination Law 533 (2d ed. 1983); *see also Proulx v. Citibank*, 659 F. Supp. 972 (S.D.N.Y. 1987) (same); *cf. Robinson v. Southeastern Pa. Transp. Auth.*, 982 F.2d 892, 896 n. 4 (3d Cir. 1993) (noting that courts have distinguished between the activities protected by the two clauses of 42 U.S.C. § 2000e-3(a)). Specifically, courts have broken this provision down into two areas of protected activity: (1) oppositional activity – *i.e.*, opposing a practice made unlawful by Title VII; and (2) participatory activity – participating in any manner in an investigation, proceeding, or hearing under Title VII. As explained below, the levels of protection from retaliation vary depending on the type of employee activity.

A. Oppositional Activity Must Be Based On A Good-Faith, Reasonable Belief, And The Activity Itself Must Be Reasonable, Or Else It Loses Its Protection

1. There Is A Good-Faith Reasonable Belief Requirement For Oppositional Activity To Be Protected

As an initial matter, to be protected as oppositional activity, the plaintiff must show that he or she took some step in opposition to a form of discrimination that the statute prohibits – for example, made an internal complaint. Circuit courts have uniformly held that the plaintiff need not show that the practice he or she opposed was in fact a violation of the statute; he or she may be mistaken in that regard and still claim the protection of the statute. *See, e.g., Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 441 (7th Cir. 2010) (citing *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002)); *but see Royal v. CCC & R Tres Arboles, L.L.C.*, 736 F.3d 396, 401 n.2 (5th Cir. 2013) (stating in dicta that to be protected from retaliation Title VII "appears to require that the employer's practice *actually be unlawful* under Title VII.") (citing 42 U.S.C. § 2000e–3(a) (defining unlawful retaliation as "discriminating against any individual ... because he opposed any practice made an unlawful employment practice by [Title VII]....").) (italics in original). However, to be protected from retaliation, his or her opposition must be based on a good-faith and reasonable belief that he or she is opposing unlawful conduct. *See, e.g., Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 747 (7th Cir. 2010), *cert. denied*, 131 S. Ct.

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1603 (2011). If the plaintiff does not honestly believe he or she is opposing a practice prohibited by the statute, *id*. at 747–48, or if his or her belief is objectively unreasonable, *Lang v. Nw. Univ*., 472 F.3d 493, 495 (7th Cir. 2006), then his or her opposition is not protected by the statute. *See Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) (plaintiff's belief of racial discrimination was objectively unreasonable; thus, his internal complaints of same were not protected from retaliation). To show that he or she opposed an unlawful employment practice, a plaintiff must demonstrate that he or she had a "reasonable belief that the employer was engaged in unlawful employment practices." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007).

In addition, to be protected as oppositional activity, the employee's underlying complaint must be one that, if true, a reasonable person would believe to be prohibited by Title VII. Thus, if the employee's complaint is not based on any factor protected from discrimination by law, it is not protected oppositional activity. *See, e.g.*, *Smith v. Lafayette Bank & Trust Co.*, 674 F.3d 655, 658 (7th Cir. 2012) ("General complaints, such as Smith's, do not constitute protected activity under the ADEA because they do not include objections to discrimination based on her age.") (citation omitted); *Richards v. JRK Property Holdings*, No. 10-101252010, WL 5186675, at *2 (5th Cir. Dec. 20, 2010) (plaintiff who asserted that she was terminated for refusing to falsify documents did not state a viable Title VII retaliation claim); *Helton v. Southland Racing Corp*., 600 F.3d 954, 961 (8th Cir. 2010) ("Because [plaintiff] acknowledged that she said nothing in that call about race discrimination, her conversation was not protected conduct under Title VII, and so any action taken in response to that conversation cannot be actionable under Title VII."); *Richard v. Cingular Wireless L.L.C.*, 233 Fed. Appx. 334, 338 (5th Cir. 2007) (affirming summary judgment because plaintiff's complaint of general mistreatment was not protected from retaliation); *Harris-Childs v. Medco Health Solutions, Inc.*, 169 Fed. Appx. 913, 916 (5th Cir. 2006) (generalized complaints of mistreatment not protected); *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006) ("Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient.") (citing *Gleason v. Mesirow Fin., Inc*., 118 F.3d 1134, 1147 (7th Cir. 1997)).

2. Oppositional Activity Must Be Reasonable In The Manner It Is Exercised, Or Else It Loses Its Protection

Even if the plaintiff's activity qualifies as "oppositional," not all oppositional activity by an employee is protected from employer retaliation. Rather, in order to qualify for the protection, the manner in which an employee expresses his opposition to an allegedly unlawful practice must be reasonable. *See Niswander v. Cincinnati Ins. Co*., 529 F.3d 714, 721 (6th Cir. 2008); *Rollins v. State of Florida Dep't of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989). If the employee's conduct in opposing the practice is found to be unreasonable, it falls outside the protection of the law. Therefore the relevant determination is whether the employee's conduct is reasonable in light of the circumstances. *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980). "[T]he employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare." *Id*. The First Circuit Court of Appeals explained that this test "balance[s] the

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purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 230 (1st Cir. 1976). *See also Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998); *Kavanaugh v. Sperry Univac*, 511 F. Supp. 705, 707 (N.D. Ill. 1981). Thus, for example, an employee may lawfully be terminated if they lie (or even if their employer merely honestly believes in good faith that they lied) in making an internal complaint of discrimination. *See EEOC v. Total System Services, Inc*., 221 F.3d 1171, 1176 (11th Cir. 2000).

In *Jefferies*, the plaintiff was an African-American female who, while employed by the defendant, copied and disseminated confidential employment records that tended to document her belief that she was a victim of discrimination. After her termination, Jefferies sued for unlawful retaliation, arguing that her conduct was protected because she had been attempting to bring attention to an employment practice that allegedly discriminated against her. *Jefferies*, 615 F.2d at 1036. After weighing "the employer's right to run his business" against Jefferies's right "to express [her] grievances and promote [her] own welfare," the Fifth Circuit determined that the plaintiff's form of opposition was unprotected. *Id*. The court found that Jefferies's conduct was clearly unreasonable in the light of the circumstances and her employer legitimately discharged her because of it. *Id*.

As *Jefferies* teaches, employee conduct, although fairly characterized as protest of or opposition to practices made unlawful by a law, "may nevertheless be so detrimental to the position of responsibility held by the employee that the conduct is unprotected." *Douglas v. DynMcDermott Petroleum Operations Co*., 144 F.3d 364, 374 (5th Cir. 1998). The law "was not meant to immunize insubordinate, disruptive, or nonproductive behavior at work." *Smith v. Tex. Dep't of Water Res*., 818 F.2d 363, 365-66 (5th Cir. 1987).

The Sixth Circuit's *Niswander* decision also involved an employee's use of confidential information to support her discrimination claim. There, the Sixth Circuit set out the following rule:

> [W]e believe that the following factors are relevant in determining whether Niswander's delivery of the confidential documents in question was reasonable: (1) how the documents were obtained, (2) to whom the documents were produced, (3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct, (4) why the documents were produced, including whether the production was in direct response to a discovery request, (5) the scope of the employer's privacy policy, and (6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.

Niswander, 529 F.3d at 726.

Applying this test, the court found as a matter of law that Niswander's turning over of the documents to the lawyer was not protected opposition activity:

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> The only factors that arguably weigh in Niswander's favor are factors one and two, but even those do not weigh heavily in her favor. Although she had access to the documents through her employment, Niswander did not innocently acquire the documents in the same manner as the plaintiff in *Kempcke* [*v. Monsanto Co*., 132 F.3d 442 (8th Cir. 1998)], who came across evidence of potential age discrimination in a company computer that had been issued to him. *See Kempcke*, 132 F.3d at 445. Rather than innocently stumbling upon evidence of illegal employment practices, Niswander specifically searched through the CIC documents that she had at her home office for the purpose of uncovering evidence of retaliation. Such behavior cannot be classified as truly innocent acquisition.

Niswander, 529 F.3d at 727. *See also Johnson v. Portfolio Recovery Assocs., LLC*, 682 F. Supp. 2d 560, 581-82 (E.D. Va. 2009) (adopting *Niswander* factors and also concluding that "Plaintiff's act of sharing Defendant's confidential information with his attorney is not protected activity covered by the opposition clause.").

B. Participation In Protected Activity Generally Need Not Be Based On A Good-Faith, Reasonable Belief To Be Protected, And Need Not Be Reasonable In The Manner Exercised, Although The Law Is Not Uniform On These Points

1. Courts Generally Hold That The Participation Clause Does Not Include A Good-Faith Reasonable Belief Requirement, Although The Seventh Circuit Disagrees

Courts that have interpreted the "participation clause" have held that it offers much broader protection to Title VII employees than does the "opposition clause." *See, e.g., Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003) ("[C]ourts have consistently recognized [that] the explicit language of § 704(a)'s participation clause is expansive and seemingly contains no limitations."); *Booker v. Brown & Williamson Tobacco Co*., 879 F.2d 1304, 1312 (6th Cir. 1989) (noting that "courts have generally granted less protection for opposition than for participation" and that the participation clause offers "exceptionally broad protection"); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (stating that the opposition clause serves "a more limited purpose" and is narrower than the participation clause); *Pettway v. American Cast Iron Pipe Co*., 411 F.2d 998, 1006 n.18 (5th Cir. 1969) (noting that the participation clause provides "exceptionally broad" protection for employees covered by Title VII).

The Seventh Circuit Court of Appeals stands out, however, for having arguably merged standards for protection under the two clauses. In 2004, the Seventh Circuit held that an employee who makes a knowingly false and malicious allegation of discrimination in an EEOC charge may be terminated, even though filing a charge is normally covered activity under the "participation" clause. *See Mattson v. Caterpillar, Inc*., 359 F.3d 885 (7th Cir. 2004). In *Mattson*, the employer concluded – based on unusually strong evidence – that the plaintiff had manufactured a false EEOC charge against his supervisor in an admitted bad faith effort to get her fired. *Id*. at 888. So, it fired Mattson for filing the bogus EEOC charge in bad faith.

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Mattson sued, claiming retaliation. Mattson argued that an employer may never fire an employee for filing an EEOC charge, regardless of whether it was filed in good or bad faith. The Seventh Circuit disagreed, stating that the charge was not protected because it was "not only unreasonable and meritless, but also motivated by bad faith." *Id*. at 892. The court emphasized that this was a rare case, and that its holding was narrow and limited. *Id*. However, in *dicta*, the court did state that it believed that the "good faith reasonableness" requirement of the oppositional clause – meaning that to be protected, such claims must be made in good faith and be objectively reasonable – applied to the participation clause too. *Id*. In other words, according to *Mattson*, an employee who files an EEOC charge without a good-faith and reasonable basis for doing so, has not engaged in protected activity under the participation clause.

Contrary to the Seventh Circuit, most courts have not imposed a "good faith reasonableness" rule on participatory activity. The leading case taking an opposing view is *Pettway*, 411 F.2d at 1007. In *Pettway*, the Fifth Circuit U.S. Court of Appeals noted that the EEOC complaint procedure was designed to give vulnerable employees the ability to protest unjust employment practices against their much more powerful and resourceful employers without fear of reprisal. *Id*. at 1005. Moreover, it reasoned that this protection against retaliation would "acquire [ ] a precarious status" if employers were entitled to discipline employees upon determining that an employee's charge was unreasonable. *Id*. In addition, it emphasized the fact that charges are typically drafted by the legally uneducated, and thus should be given special leeway. *Id*. Given these and other considerations, the Court ultimately declined to make the protections given to an EEOC charge contingent on the contents of that charge, and held that such a charge would be protected even if it contained false, and/or malicious content. *Id*. at 1007. Thus, the *Pettway* court declined to read a good-faith and reasonableness requirement into the protections afforded to the participation clause.

A majority of courts that have considered the issue have been sympathetic to the *Pettway* rule. *See, e.g*., *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) ("As for the participation clause, 'there is nothing in its wording requiring that the charges be valid, nor even an implied requirement that they be reasonable.'") (*quoting* 3 Arthur Larson & Lex K. Larson, Employment Discrimination § 87.12(b), at 17–95 (1994)); *Slagle v. County of Clarion*, 435 F.3d 262, 268 (3rd Cir. 2006) ("Once a plaintiff files a facially valid complaint, the plaintiff will be entitled to the broad protections of § 704(a), as interpreted by the EEOC and by numerous courts . . . the EEOC Compliance Manual states that a plaintiff is protected under the participation clause 'regardless of whether the allegations in the original charge were valid or reasonable.'"); *Johnson v. University of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000) ("The exceptionally broad protections of the participation clause extends to persons who have participated in any manner in Title VII proceedings . . . Protection is not lost if the employee is wrong on the merits of the charge . . . nor is protection lost if the contents of the charge are malicious or defamatory as well as wrong."); *Glover v. South Carolina Law Enforcement Division*, 170 F.3d 411, 414 (4th Cir. 1999) ("Reading a reasonableness test into section 704(a)'s participation clause would do violence to the text of that provision and would undermine the objectives of Title VII."); *Booth v. Pasco County, Fla*., 829 F. Supp. 2d 1180, 1201 (M.D. Fla. 2011) ("For the above reasons, this Court declines to read a good faith and reasonableness requirement into the participation clause.").

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There are, however, still some generally agreed limits on protection for activities under the participation clause. One, for example, involves the situation where an employee files a facially defective EEOC charge of discrimination that really has nothing to do with any protected characteristic. In *Slagle v. County of Clarion*, 435 F.3d 262 (3d Cir. 2006) the plaintiff-employee filed an EEOC charge stating that "the Respondent discriminated against me because of whistleblowing, in violation of my Civil Rights, and invasion of privacy." *Id*. at 263. The EEOC notified the employee that it dismissed his charge because "the facts [he] alleg[ed] failed to state a claim under any of the statutes enforced by the Commission." *Id*. The employee was later fired, and sued for retaliation. The Third Circuit Court of Appeals rejected his claim that his EEOC charge constituted protected participatory activity, stating: "[a]ll that is required [to be protected under the participation clause] is that plaintiff allege in the charge that his or her employer violated Title VII by discriminating against him or her on the basis of race, color, religion, sex, or national origin, in any manner. Slagle did not do so, and therefore he cannot assert a claim for retaliation for filing that charge." *Id*. at 268.

2. Courts Generally Hold That The Manner In Which Participatory Activity Is Exercised Need Not Be Reasonable To Be Protected, Although Again The Seventh Circuit Disagrees

As discussed above, oppositional activity that is unreasonable (*e.g.*, stealing the employer's confidential information) is not protected from retaliation. This issue usually does not apply in "participation" cases, which instead usually involves activities such as filing EEOC charges. But, in *Randolph v. ADT Sec. Services, Inc.*, No. Civ.A. DKC 09-1790, 2011 WL 3476898 (D. Md. Aug. 8, 2011), the plaintiffs attached allegedly confidential information from their employer to a FLSA complaint with the Maryland state Department of Labor. *Id*. at *2. When the employer found out, it fired the plaintiffs for disclosing "company confidential information to a third party." *Id*. The plaintiffs sued for retaliation. The employer argued that the plaintiffs' disclosure of its allegedly confidential information was not "reasonable," and thus their complaints to the state DOL were not protected. *Id*. at *5. The court rejected the employer's argument, holding that – reasonable or not – as participatory activities, they were *per se* protected. *Id*. at *6. The court observed that:

> The distinction between opposition and participation is important because the level of protection varies in participation clause and opposition clause cases. *See Laughlin*, 149 F.3d at 259 n. 4 ("[T]he scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause."). While protected activity under the opposition clause must be "reasonable," the Fourth Circuit has specifically refused to apply any reasonableness requirement in the participation clause context. *See Glover v. S. Carolina Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) ("The plain language of the participation clause itself forecloses us from improvising such a reasonableness test."); *Kubicko*, 181 F.3d at 554 ("Application of § 704's participation clause . . . does not turn on the substance of an employee's testimony."); *see also Cumbie v. Gen. Shale Brick, Inc.*, 302 Fed. Appx. 192, 194 (4th Cir. 2008) ("[W]hen an individual engages in activities constituting

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> participation, such activity is protected conduct regardless of whether that activity is reasonable."); *Martin v. Mecklenburg Cnty*., 151 Fed. Appx. 275, 279 (4th Cir. 2005) (explaining that it was "of no moment" that employee's statements arguably bore no relevance to pending Title VII action, so long as statements were given in meeting related to that Title VII proceeding); *accord Slagle v. Cnty. of Clarion*, 435 F.3d 262, 268 (3d Cir. 2006) (listing cases establishing that participation clause activity is essentially an absolute protection).

Id. at *6 (footnote omitted).

The court's ruling in *Randolph* is consistent with cases such as *Pettway* and *Booker*, *supra*. However, again the Seventh Circuit takes a different view. In *Hatmaker v. Memorial Medical Center*, 619 F.3d 741 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1603 (2011), the Seventh Circuit held that even participatory activity must be reasonable to be protected, stating:

> An employer is forbidden to discriminate against an employee who participates in an investigation of employment discrimination. But participation doesn't insulate an employee from being discharged for conduct that, if it occurred outside an investigation, would warrant termination. *Scruggs v. Garst Seed*, 587 F.3d 832, 838 (7th Cir. 2009); *Kaytor v. Electric Boat Corp*., 609 F.3d 537, 553-54 (2d Cir. 2010); *Gaujacq v. EDF, Inc*., 601 F.3d 565, 577-78 (D.C. Cir. 2010). This includes making frivolous accusations, or accusations grounded in prejudice. For it "cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussions simply because the investigation was about sexual harassment. To do so would leave employers with no ability to fire employees for defaming other employees or the employer through their complaint when the allegations are without any basis in fact." *Gilooly v. Missouri Dept. of Health & Senior Services*, 421 F.3d 734, 740 (8th Cir. 2005).
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> * * *
>
> Some courts disagree. They think that even defamatory and malicious accusations made in the course of an EEOC investigation cannot be a lawful ground for discipline. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980) (but in so holding, *Womack* is inconsistent with the Eighth Circuit's later decision in *Gilooly*). To these courts "participated in any manner" in an investigation seems to mean "participated by any and all means" rather than participated in any capacity, whether formally or informally, whether as complainant or as a witness, and at whatever stage of the investigation. But these courts can't actually believe that forging documents and coercing witnesses to give false testimony are protected conduct. And if they don't believe that, why do they think lying is protected? Lying in an internal investigation is disruptive of workplace discipline and in tension with the requirement that opposition to an

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> unlawful practice (the making of which is protected by the first clause of section 2000e-3, *see Crawford v. Metropolitan Govt. of Nashville & Davidson County*, __ U.S. __, __, 129 S. Ct. 846, 850-51 (2009)) be based on an honest and reasonable belief that the employer may be violating Title VII. *Magyar v. Saint Joseph Regional Medical Center*, 544 F.3d 766, 771 (7th Cir. 2008); *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752-53 (7th Cir. 2002); *Manoharan v. Columbia University College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988).

Id. at 745-46.

C. Courts Are Split On Whether Participation In An EEOC Investigation By Giving Statements *Against* The Complainant Is Protected From Retaliation

In *Twisdale v. Snow*, 325 F.3d 950 (7th Cir. 2003), the Seventh Circuit refused to extend Title VII's protection to Twisdale who, as chief of the Internal Revenue Service's Quality Measurement Branch, participated in an EEOC investigation but opposed the claimant's position. The court acknowledged that, "[r]ead literally," § 2000e-3(a) protected Twisdale. 325 F.3d at 952. However, the court determined that "everyone concerned in the administration of Title VII and cognate federal antidiscrimination statutes had assumed that the retaliation provision was for the protection of the discriminated against, and not their opponents." *Id*. Essentially, the court interpreted the statute as imposing a requirement that a participant in an EEOC proceeding also oppose the discriminatory employment practice to receive protection from retaliation. *Id*. at 952-53.

In *Kelley v. City of Albuquerque*, 542 F.3d 802 (10th Cir. 2008), the court refused to follow the Seventh Circuit's holding, stating "[w]e decline to apply *Twisdale* here, *inter alia*, because it impermissibly collapses the opposition and participation clauses of the statute. As the court noted:

> The distinction between participation clause protection and opposition clause protection is significant because the scope of protection is different. Activities under the participation clause are essential to the machinery set up by Title VII. As such, the scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause. . . . Therefore, requiring that the participant in an EEOC proceeding also oppose a retaliatory employment practice runs counter to the statutory scheme.

Kelley, 542 F.3d at 815 n. 11.

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XI. WHEN IS AN EMPLOYEE'S PARTICIPATION IN AN INTERNAL INVESTIGATION "PROTECTED ACTIVITY" UNDER TITLE VII?

A. Participation In A Purely Internal Investigation Is Not Covered By Title VII's Participation Clause

Under the participation clause of Title VII, employers are prohibited from retaliating against an employee who participates in any manner in an investigation, proceeding, or hearing under Title VII or assists a fellow employee in his or her Title VII action. 42 U.S.C. § 2000e-3(a). The Seventh Circuit has held that "[t]he 'investigation' to which section 2000e-3 refers does not include an investigation by the employer, as distinct from one by an official body authorized to enforce Title VII." *Hatmaker v. Memorial Medical Center*, 619 F.3d 741, 747-48 (7th Cir. 2010) (noting that "[t]o bring an internal investigation within the scope of the clause we would have to rewrite the statute"); *see also EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (finding that "[participation] clause protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; it does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC"). In other words, "the participation clause is meant to protect employees who take part in or otherwise assist in an EEOC investigation; it is only those investigations that are conducted 'under' Title VII procedures." *Olsen v. Marshall & Ilsley Corp*., No. 99-C-0774-C, 2000 WL 34233699, at *18 (W.D. Wis. 2000) (citing *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 259 (4th Cir. 1998)); *Tuthill v. Consolidated Rail Corp.*, No. Civ. A. 96-6868, 1997 WL 560603, *4 (E.D. Pa. Aug. 26, 1997) ("Title VII's definition of 'protected activity' does not include participation in an internal investigation"), *aff'd*, 156 F.3d 1255 (3rd Cir. 1998); *Morris v. Boston Edison Co*., 942 F. Supp. 65, 71 (D. Mass. 1996) ("[a]ll the activity described as being protected under the participation clause relates to actions taken in outside, formal statutorily created proceedings.").

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

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

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Id. at 49.

B. Participation In An Internal Investigation Triggered By An EEOC Charge Is Covered By Title VII's Participation Clause

On the other hand, an internal employer investigation initiated as a result of an EEOC charge is typically held to constitute an "investigation" within the meaning of the "participation" clause. As stated in *Clover v. Total System Services, Inc*., 176 F.3d 1346, 1353 (11th Cir. 1999):

> [A]n employer receiving a form notice of charge of discrimination knows that any evidence it gathers after that point and submits to the EEOC will be considered by the EEOC as part of the EEOC investigation. Though this is an indirect means of gathering evidence relevant to investigating a charge of discrimination, the EEOC considers employer-submitted evidence on an equal footing with any evidence it gathers from other sources. Because the information the employer gathers as part of its investigation in response to the notice of charge of discrimination will be utilized by the EEOC, it follows that an employee who participates in the employer's process of gathering such information is participating, in some manner, in the EEOC's investigation.

C. Participation In An Internal Investigation – Even If Not Triggered By An EEOC Charge – May Still Be Covered By Title VII's Opposition Clause Under The U.S. Supreme Court's Holding In *Crawford*

In *Crawford v. Metro. Gov't of Nashville and Davidson Cnty.*, 555 U.S. 271, 129 S. Ct. 846 (2009), the Supreme Court addressed the opposition clause's application to witnesses in an employer's internal investigation. The case arose following an investigation by Metro into rumors of sexual harassment. During the investigation, long-time Metro employee Vicky Crawford was asked by a human-resources officer whether she had witnessed inappropriate behavior by another Metro employee, Gene Hughes. In response, Crawford described several incidents of sexually harassing behavior by Hughes. Crawford was subsequently fired, as were the two other employees who also had reported sexual harassment by Hughes.

Crawford filed suit, claiming that her dismissal violated Title VII because it was allegedly in retaliation for her report of Hughes's behavior. The district court granted summary judgment for Metro, concluding that Title VII's anti-retaliation provision did not cover the conduct at issue because Crawford had not "instigated or initiated any complaint" against Hughes, but had "merely answered questions by investigators." The Sixth Circuit agreed, concluding that "opposition" under Title VII "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation."

To resolve a conflict among the federal courts of appeals, the Supreme Court granted certiorari. In a decision authored by Justice Souter, the Supreme Court reversed and remanded for further proceedings, concluding that Crawford's conduct was covered by the "opposition clause" of Title VII's anti-retaliation provision, which (as set out earlier in this paper) makes it unlawful for an employer to discriminate against an employee "because he has opposed any

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practice made . . . unlawful . . . by this subchapter." 42 U.S.C. § 2000e-3(a). At the crux of the Court's opinion was the meaning of the term "oppose," which is not defined in the statute itself. The Court held that the word "oppose" "carries its ordinary meaning," citing definitions such as "to resist or antagonize," "to confront," and "to be hostile or adverse to, as in opinion." The Court concluded that providing a disapproving account of an employee's sexually obnoxious behavior may qualify as resistant or antagonistic, citing an EEOC guideline, and observed that communicating a belief that an employer has engaged in employment discrimination virtually always constitutes opposition to that activity. In support of the Court's decision, Justice Souter announced,

> "Oppose" goes beyond "active, consistent" behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it . . . . And we would call it "opposition" if an employee took a stand against an employer's discriminatory practices not by "instigating" action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons . . . . There is, then, no reason to doubt that a person can "oppose" by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.

Crawford, 129 S. Ct. at 851.

The Supreme Court thus rejected the Sixth Circuit's interpretation of the "opposition clause" as requiring active, consistent, opposing activities, including the initiation or instigation of a complaint. Under the rule announced in *Crawford*, opposition includes not only those who report discrimination on their own initiative, but also those who report discrimination in response to an investigator's question. The Court expressly did not address the scope and reach of the "participation clause" under Title VII's anti-retaliation provision, which many observers had expected the Court to do under the facts of the case.

In *Collazo v. Bristol–Myers Squibb Mfg., Inc.*, 617 F.3d 39 (1st Cir. 2010), the First Circuit U.S. Court of Appeals relied on *Crawford* to conclude that merely repeatedly accompanying a coworker to the human resources department to file complaints about sexual harassment, followed by employer action that would be perceived as materially adverse by a reasonable worker, can state a retaliation claim under the opposition clause. *Id*. at 46-48. A similar result was reached in *DeMasters v. Carilion Clinics*, 796 F.3d 409, 418-19 (4th Cir. 2015), where an EAP consultant who undertook various efforts to assist another employee who claimed sexual harassment, and then complained about the employer's handling of the complaint, was held to have engaged in protected conduct under the *Crawford* standard.

In *Hilton v. Yoon S. Shin*, Civil Action No. 11–cv–02241–AW, 2012 WL 1552797, at *4-5 (D. Md. Apr. 30, 2012), the district court relied on *Crawford* to conclude that a sexual harassment victim who rejected the company president's sexual advances "opposed"

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discrimination for purposes of the opposition clause, even though she never complained about the harassment to anyone. The court stated, "[i]f refusing a supervisor's order to fire someone for discriminatory reasons constitutes opposition [which is something the *Crawford* court had said in its opinion], it would seem to follow that refusing to submit to the sexual pressures of the company president constitutes opposition, especially for the purpose of a motion to dismiss." *Id*. at *4.

Along those same lines, in *E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1068 (6th Cir. 2015), the Sixth Circuit Court of Appeals held that "a demand that a supervisor cease his/her harassing conduct constitutes protected activity covered by Title VII." The court noted that the Fifth Circuit had suggested that the contrary was true, but it rejected that Fifth Circuit case as wrongly decided, stating:

> In *Frank v. Harris County*, 118 Fed. Appx. 799, 804 (5th Cir. 2004), the Fifth Circuit held that the plaintiff "provide[d] no authority for the proposition that a single 'express rejection' to [a harassing supervisor] constitutes as a matter of law a protected activity." In reaching this conclusion, the Fifth Circuit neither assessed the language of the opposition clause of Title VII nor indicated why a complaint to the harassing supervisor would not fall within the confines of the provision. *See generally id*. Therefore, we are not persuaded by *Frank*.

Id.

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

In *E.E.O.C. v Rite Way Svc., Inc.*, 819 F.3d 235 (5th Cir. 2016), the Fifth Circuit held that the above-mentioned "reasonable belief" standard applied to retaliation claims brought by third-party witnesses. In other words, merely being a witness who supported the complainant in an internal company sexual harassment investigation was not enough to constitute protected conduct. Rather, to be protected under Title VII, the witness must have reasonably believed that the situation they were providing information about constituted a violation of Title VII. The EEOC argued based on *Crawford* that it was enough that the witness "opposed" conduct "by responding to someone else's question." The Court rejected that argument, stating that "creating a lower threshold for reactive plaintiffs bringing retaliation claims would be at odds with *Crawford's* reasoning that the language of the opposition clause does not permit courts to treat reactive opposition any differently than proactive opposition."

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XII. RETALIATION AND THE EXHAUSTION REQUIREMENT: A CONFLICT IS BREWING

In *Gupta v. East Texas State Univ.*, 654 F.2d 411 (5th Cir. 1981), the Fifth Circuit Court of Appeals held that "it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court." *Id.* at 414. The Court reasoned that requirting Gupta to file another charge for retaliation would have done nothing but create additional procedural technicalities when a single filing would comply with the intent of Title VII. *Id*. The court believed that eliminating that needless procedural barrier would deter employers from attempting to discourage employees from exercising their rights under Title VII. *Id*. Similar results have been reached by other circuits considering the same situation. *See Clockedile v. New Hampshire Dep't of Corr.,* 245 F.3d 1, 4 (1st Cir. 2001) (noting that most circuits have permitted retaliation claims where only the discrimination charge was made to the agency, and collecting cases from every Circuit but the D.C.); *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992) (holding that retaliation claim may be raised for the first time in federal court); *Carter v. South Cent. Bell*, 912 F.2d 832 (5th Cir. 1991) (reasoning that because other Title VII claims were properly before court, jurisdiction existed over retaliatory termination claim as well); *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991) (holding that retaliation claim was "reasonably related" to prior sex discrimination claim); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) (holding that allegations of retaliation for the filing of an EEOC charge is discrimination "like or reasonably related to . . . and growing out of such allegations."), *superseded on other grounds by statute, Rush v. McDonald's Corp*., 966 F.2d 1104, 1119–20 (7th Cir. 1992); *Brown v. Hartshorne Public Sch. Dist. No. 1*, 864 F.2d 680 (10th Cir. 1988) (holding that retaliation arising out of first EEOC filing was "reasonably related" to that filing, obviating the need for a second EEOC charge); *Baker v. Buckeye Cellulose Corp*., 856 F.2d 167 (11th Cir. 1988) (adopting reasoning of *Gupta*); *Kirkland v. Buffalo Bd. of Educ*., 622 F.2d 1066 (2d Cir. 1980) (holding that act of retaliation was "directly related" to plaintiff's initiation of litigation and that no second EEOC charge was necessary); Kelly Koenig Levi, *Post Charge Title VII Claims: A Proposal Allowing Courts to Take "Charge" When Evaluating Whether to Proceed or to Require a Second Filing*, 18 Ga. St. U.L. Rev. 749, 768-69 (2002) (noting that most courts have allowed claims of retaliation based on the act of filing the original charge despite the failure to include the retaliation claim in a charge).

Some courts, however, have questioned whether *Gupta's* holding and logic are still valid in light of the Supreme Court's decision in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002). In *Morgan*, the Supreme Court held that Title VII plaintiffs could not use a "continuing violation" theory to assert claims that were barred because they were based on employer acts outside the 300–day statutory window for filing an EEOC charge. *Id*. at 113–14, 122 S. Ct. 2061. After *Morgan*, "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Id*. at 114, 122 S. Ct. 2061. Although *Morgan* involved incidents that took place before the EEOC charge was filed, courts have extended it to exclude any acts that occurred after filing from piggybacking onto an earlier-filed charge. *See, e.g., Martinez v. Potter*, 347 F.3d 1208,

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1210–11 (10th Cir. 2003); *McKenzie v. St. Tammany Parish School Bd.*, Civil Action No. 04-0420-SS, 2006 WL 2054391, at *2, *3 (E.D. La. July 19, 2006); *Prince v. Rice*, 453 F. Supp. 2d 14, 23–24 (D.D.C. 2006); *Romero–Ostolaza v. Ridge*, 370 F. Supp. 2d 139, 148-50 (D.D.C. 2005).

Courts in the Fifth Circuit have continued to apply *Gupta* after *Morgan*. *See, e.g.*, *Eberle v. Gonzales*, 240 Fed. Appx. 622, 2007 WL 1455928 (5th Cir. May 18, 2007) (discussing *Gupta's* rationale and holding); *Miller v. Southwestern Bell Telephone Company*, 51 Fed. Appx. 928 (5th Cir. 2002) (holding that, under *Gupta*, the plaintiff need not file an additional charge with the EEOC for a retaliation claim "growing out of" his initial charge so long as the retaliation occurs after the filing of the initial charge); *Finnie v. Lee County, Miss*., No. 1:10-cv-64–A–S, 2012 WL 124587, at *26 (N.D. Miss. Jan. 17, 2012) (discussing *Morgan*, but following *Gupta* because it is still binding in the Fifth Circuit); *Stevenson v. Verizon Wireless LLC*, Civil Action No. 3:08-CV-0168-G, 2009 WL 129466 (N.D. Tex. Jan. 16, 2009) (discussing *Morgan*, yet still applying *Gupta*); *Cooper v. Wal–Mart Transportation, LLC*, 662 F. Supp. 2d 757 (S.D. Tex. Sept. 24, 2009) (same); *Lightfoot v. OBIM Fresh Cut Fruit Co*., Civil Action No. 4:07-CV-608-BE, 2008 WL 4449512, at *3 (N.D. Tex. Oct. 2, 2008) (applying *Gupta* but distinguishing it on the facts); *Ocampo v. Laboratory Corp. of America*, No. Civ. SA04CA538-FB, 2005 WL 2708790, at *7 (W.D. Tex. Sept. 6, 2005) ("Assuming the claims based on the charge of age discrimination are properly before the Court, and given [*Gupta*], Ocampo was not required to file a second charge of discrimination."); *Green v. Louisiana Casino Cruises, Inc*., 319 F. Supp. 2d 707, 710–11 (M.D. La. 2004) (citing *Gupta* and two later Fifth Circuit cases for the proposition that "a plaintiff is not required to exhaust administrative remedies before seeking review of a retaliation claim that grows out of an earlier EEOC charge")*; see also Houston v. Army Fleet Services, LLC*, 509 F. Supp. 2d 1033 (M.D. Ala. 2007) (citing *Gupta*, which is binding in the Eleventh Circuit as well); *White v. Potter*, Civil Action No. 1:06-CV-1759-TWT, 2007 WL 1330378, at *7 (N.D. Ga. Apr. 30, 2007) (finding *Gupta's* policy rationale persuasive, recognizing the D.C. District Court's post-*Morgan* opinions as rejecting *Gupta's* holding, but deciding not to follow the D.C. decisions "given that *Gupta* is binding precedent in [the Eleventh] Circuit").

On the other hand, relying on *Morgan*, some courts outside of the Fifth Circuit have rejected *Gupta* and its logic entirely, or in part, and have held that administrative remedies must be separately exhausted for claims of retaliation based on an earlier-filed EEOC charge that is already properly before the court. *See Eisenhour v. Weber County*, 744 F.3d 1220, 1227 (10th Cir. 2014) (new rule in Tenth Circuit requires separate exhaustion of retaliation claims arising out of a prior charge); *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 851-53 (8th Cir. 2012) (relying on *Morgan* to conclude that each retaliatory incident is a separate act "for which administrative remedies must be exhausted"), *cert. dismissed*, No. 12-854, R46-0092013 WL 140297 (U.S. Mar. 1, 2013); *Martinez*, 347 F.3d at 1211 (Tenth Circuit case abolishing *Gupta* exception); *Wedow*, 442 F.3d 661, 672–76 (8th Cir. 2006) (narrowing the exhaustion requirement); *Weber v. Battista*, 494 F.3d 179, 182–84 (D.C. Cir. 2007) (discussing other circuits' treatment of the issue); *Prince*, 453 F. Supp. 2d at 23–24 (rejecting *Gupta* exception in light of *Morgan*); *Romero–Ostolaza*, 370 F. Supp. 2d at 148–50 (same).

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The Seventh Circuit, and courts within it, continue to apply the *Gupta*-like exception, even post-*Morgan*. *See, e.g., Horton v. Jackson County Bd. Of County Commissioners*, 343 F.3d 897, 898 (7th Cir. 2003) ("retaliation for complaining to the EEOC need not be charged separately from the discrimination that gave rise to the complaint"); *Edlebeck v. Trondent Development Corp.*, No. 09 C 7462, 2011 WL 862891, at *4 (N.D. Ill. Mar. 8, 2011) ("Because these allegations arise out of events that occurred after Edlebeck filed his EEOC charge on September 25, 2008, Edlebeck's failure to include his retaliation claim in the EEOC charge does not preclude him from pursuing the claim in federal court."); *Riley-Jackson v. Casino Queen, Inc.*, No. 07-CV-0631-MJR, 2011 WL 941407, at *3 (S.D. Ill. Feb. 27, 2011) (applying *Gupta*-like exception and noting that requiring the plaintiff to file an additional EEOC charge for acts that occurred after her original EEOC filing would merely lead to an "increased burden for both the EEOC and the employer.") (citation omitted); *Kind v. Gonzales*, No. 05 C 0793, 2006 WL 1519579, at *8 n. 8 (N.D. Ill. May 30, 2006) ("Defendant rightly recognizes the Seventh Circuit's teaching that retaliation claims are within the scope of an EEO charge when the retaliation arose after, and in response to, the initial EEO filing and was reasonably related to that filing, obviating the need for a second EEO charge") (internal quotations omitted); *Hopper v. Legacy Property Mgmt. Services, L.L.C.*, No. 04-CV-1099, 2006 WL 1388832, at *8 (E.D. Wis. May 16, 2006) ("Hopper's failure to file a new EEOC complaint or to amend her complaint to include new allegations of retaliation and constructive discharge is not fatal to her judicial complaint."); *Schwartz v. Bay Industries, Inc*., 274 F. Supp. 2d 1041, 1046 (E.D. Wis. 2003) (denying defendant's motion to dismiss a retaliatory discharge claim that was omitted from the EEOC charge). In an unpublished decision, a divided panel of the Sixth Circuit also held that *Morgan* did not require a fresh EEOC charge for a later act of retaliation. *Delisle v. Brimfield Township Police Dep't*, 94 Fed. Appx. 247, 252-54 (6th Cir. 2004).

The Fifth Circuit, and other courts, agree that *Gupta* does not apply, however, if the alleged retaliation occurred before the Charging Party ever filed any EEOC charge. *See Eberle v. Gonzales*, 240 Fed. Appx. 622, 2007 WL 1455928 (5th Cir. May 18, 2007); *McCray v. DPC Industries, Inc.*, 942 F. Supp. 288, 295 (E.D. Tex. 1996) ("The situation in *Gupta* is distinguishable from this case because McCray's retaliation claim does not grow out of a previously filed EEOC charge. The alleged retaliation about which McCray complains occurred before McCray ever went to the EEOC. Thus, the *Gupta* rule does not apply."); *Swearnigen-El v. Cook County Sheriff's Dept.*, 602 F.3d 852, 864-65 (7th Cir. 2010) (same); *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 482-83 (7th Cir. 1996) (same).

The decisional landscape as of May 2012 regarding this evolving issue was accurately summarized in May 2012 by the court in *Fentress v. Potter*, No. 09 C 2231, 2012 WL 1577504, at *2 (N.D. Ill. May 4, 2012):

> The circuits have split over whether *Morgan* abrogated the exception to the exhaustion requirement for claims that a plaintiff suffered retaliation for filing an administrative charge. *Compare Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 303 (4th Cir. 2009) (holding that the exception was not abrogated); *Wedow v. City of Kan. City*, 442 F.3d 661, 673–74 (8th Cir. 2006) (same); *Delisle v. Brimfield Twp. Police Dep't*, 94 Fed. Appx. 247, 252–54 (6th Cir. 2004) (same), *with Martinez v.*

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Potter, 347 F.3d 1208, 1210–11 (10th Cir. 2003) (holding that the exception was abrogated). Although the Seventh Circuit has not squarely addressed the issue, it favorably cited the exception in *Horton*, 343 F.3d at 898, which was decided a year after the Supreme Court handed down *Morgan*. Given these post-*Morgan* tea leaves from the Seventh Circuit, as well as the three-to-one circuit split against abrogation, the court concludes that the exception remains valid. *See Luna v. United States*, 454 F.3d 631, 636 (7th Cir. 2006); *Gacy v. Welborn*, 994 F.2d 305, 310 (7th Cir. 1993). This appears to be the unanimous view of district judges within the Seventh Circuit, including one judge since elevated to the court of appeals. *See Mandewah v. Wis. Dep't of Corr.*, 2009 WL 1702089, *3 (E.D. Wis. June 17, 2009); *Hill v. Potter*, 2009 WL 901462, at *8 n. 6 (N.D. Ill. Mar. 31, 2009); *Troutt v. City of Lawrence*, 2008 WL 3287518, at *12 (S.D. Ind. Aug.8, 2008) (Hamilton, J.); *Spellman v. Seymour Tubing, Inc.*, 2007 WL 1141961, at *3–4 (S.D. Ind. Apr. 12, 2007); *Kruger v. Principi*, 420 F. Supp. 2d 896, 906–07 (N.D. Ill. 2006).

See also Finch v. City of Indianapolis, No. 1:08-CV-00432-DML, 2012 WL 3294959, at *16 (S.D. Ind. Aug. 10, 2012) ("Although the Tenth Circuit views *National Railroad* as requiring an EEOC charge for every act on which a Title VII claim is based, including a charge of retaliation for having gone to the EEOC in the first place, *Martinez v. Potter*, 347 F.3d 1208, 1210–11 (10th Cir. 2003), other circuits have held, or signaled their agreement, that *National Railroad* does not abrogate the *McKenzie*-type "exception" to administrative exhaustion.").

In August 2012, however, the Eighth Circuit weighed in, and joined the Tenth Circuit, in concluding that *Morgan* required exhaustion of all claims, even post-EEOC filing retaliation claims. *See Richter*, 686 F.3d at 851-53. So, the predicted conflict is indeed brewing, and eventually the U.S. Supreme Court will have to decide the issue.

XIII. UPDATE ON THIRD-PARTY RETALIATION: *THOMPSON* AND BEYOND

A. ***Thompson***

In *Thompson v. North American Stainless, LP*, 562 U.S. 170, 131 S. Ct. 863 (2011), the U.S. Supreme Court addressed a retaliation claim under Title VII of the Civil Rights Act. Eric Thompson, the plaintiff, was engaged to be married to Miriam Regalado and both were employed at North American Stainless ("NAS"). *Id*. at 867. Ms. Regalado filed an EEOC charge alleging sex discrimination against NAS, and three weeks later NAS fired her fiancée, Mr. Thompson. Mr. Thompson filed an EEOC charge, and then sued NAS, contending that NAS fired him to retaliate against Ms. Regalado for filing her EEOC charge. *Id*. The United States Supreme Court first concluded that Mr. Thompson's status as Ms. Regalado's fiancée was a relationship close enough to potentially fit within Title VII's prohibition against third party retaliation. *Id*. at 868–69. Second, the *Thompson* Court concluded that Mr. Thompson was a "person aggrieved" within the meaning of Title VII because he was employed by the same employer as the original EEOC claimant and injuring him was the employer's intended means of harming the claimant; in the Court's phrase, Mr. Thompson was within the "zone of interests" sought to be protected by Title VII. *Id*. at 870.

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B. Post-*Thompson* Cases

1. Dating Relationship

In *Harrington v. Career Training Inst. Orlando, Inc*., No. 8:11–cv–1817–T–33MAP, 2011 WL 4389870, at *2 (M.D. Fla. Sept. 21, 2011), ruling on a motion to dismiss, the court found that *Thompson* could potentially apply to a mere dating relationship, stating "[i]n rendering its binding decision in *Thompson*, the Court declined to bar claims for third party reprisals, such as the one at issue in this action. Accordingly, consistent with *Thompson*, the Court denies the Motion to Dismiss."

Similarly, in *Lard v. Alabama Alcoholic Beverage Control Bd*., No. 2:12-CV-452-WHA, 2012 WL 5966617, at *4 (M.D. Ala. Nov. 28, 2012), the district court held that an employee's retaliation claim premised on the theory that the employer retaliated against him because of his coworker and girlfriend's complaints of racial discrimination in the workplace stated a claim under *Thompson*, and therefore denied the employer's motion to dismiss.

2. Best Friend

In *Ali v. District of Columbia Government*, 810 F. Supp. 2d 78 (D.D.C. 2011), the employer allegedly threatened to fire the plaintiff's best friend and coworker, Marcus Craig, if he continued to proceed with his internal religious discrimination complaint. In denying the employer's motion for summary judgment against the plaintiff's retaliation claim, the court found this threat was actionable as retaliation under the *Burlington N*. standard. *Id*. at 89-90. It relied on *Thompson* in reaching this conclusion, stating:

> To be sure, there are factual differences between this case and *Thompson*: Craig was threatened with termination rather than actually fired, and he was Ali's "best friend," not his fiancé. Dove Dep. at 41. It is thus unclear precisely where this case falls on the continuum between "firing a close family member," which "will almost always meet the *Burlington* standard," and "inflicting a milder reprisal on a mere acquaintance," which "will almost never do so." *Thompson*, 131 S. Ct. at 868. Even so, to stave off summary judgment, Ali need only show that a reasonable juror could conclude that the threat "*well might* have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington*, 548 U.S. at 68, 126 S. Ct. 2405 (quoting *Rochon*, 438 F.3d at 1213) (emphasis added); *see Fallon v. Potter*, 277 Fed. Appx. 422, 429 n. 29 (5th Cir. 2008) (stating that, under *Burlington*, whether an action is materially adverse "is a fact issue for the jury"). This burden is "not onerous." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089 (1981). Common sense suggests, and *DeMedina* and *Thompson* support the conclusion that, a reasonable worker would be deterred from pursuing a discrimination complaint by a credible threat to fire a close friend.

Id. at 89-90 (footnotes omitted).

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3. Spouses Employed At Two Different Employers

In *McGhee v. Healthcare Services Group, Inc*., No. 5:10-CV-279-RS-EMT, 2011 WL 5299660 (N.D. Fla. Nov. 2, 2011), the court extended *Thompson* to a situation involving two different employers. McGhee was employed by Healthcare Services Group ("Healthcare"). Healthcare was under contract with Sovereign Healthcare of Bonifay ("Bonifay") as a vendor. McGhee's position was to oversee the cleanliness of the Bonifay facility. McGhee's wife was employed by Bonifay, and in May of 2009 she filed a charge of discrimination with the EEOC, alleging that Bonifay discriminated against her on the basis of her disability. McGee alleged that in retaliation for his wife's protected activity he was terminated by his employer, Healthcare, at the request of Bonifay. McGee sued both Healthcare and Bonifay for retaliation.

Healthcare and Bonifay contended that *Thompson* was not applicable to the case because McGee was employed by Healthcare and his wife was employed by Bonifay. But, the court rejected that argument on summary judgment, stating:

> Although Plaintiff and his wife were employed by different entities, *Thompson* gives no indication that this prohibits recovery. Plaintiff's employer was a subcontractor of Bonifay, and Plaintiff's physical workplace was at the Bonifay facility. The two employers and their employees are clearly intertwined, and under Plaintiff's version of the facts Bonifay used its relationship with Healthcare to retaliate against Plaintiff's wife for her protected activity. Allowing employers to induce their subcontractors to fire the subcontractor's employees in retaliation for the protected activity of a spouse would clearly contravene the purpose of Title VII. It is easy to conclude that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her husband would be fired by his employer. *See Thompson*, at 868. Therefore, under the test set forth in *Thompson* Plaintiff's interests fall within the "zone of interests" of those intended to be protected by Title VII.

Id. at *3.

In *Crawford v. George & Lynch, Inc*., No. Civ.A. 10-949-GMS-SR, 2012 WL 2674546, at *3 (D. Del. July 5, 2012), the court refused to extend *McGhee* or *Thompson* to a situation where the plaintiff – a corporate entity – claimed that the employer terminated its contract in retaliation for a sexual harassment complaint made by its owner, stating, "accepting Plaintiffs' argument that an employer's termination of a contract with a business entity owned by an employee constitutes retaliation for the employee's protected conduct, would result in a new and substantial expansion of the law on third party reprisal claims under Title VII."

4. *Thompson* Extends To The ADEA

In *Dembin v. LVI Services, Inc*., 822 F. Supp. 2d 436, 438-39 (S.D.N.Y. 2011) and *Hovsepyan v. Blaya*, 770 F. Supp. 2d 259, 269 (D.D.C. 2011), the district courts held that *Thompson* applies to retaliation claims brought under the Age Discrimination in Employment Act. This is not surprising, because the ADEA's anti-retaliation provision is related to the anti-

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retaliation provision of Title VII, and cases interpreting the latter provision are frequently relied upon in interpreting the former. *See Passer v. American Chemical Society*, 935 F.2d 322, 330 (D.C. Cir. 1991) (citations omitted); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1441 (9th Cir. 1990) ("Those circuits that have considered ADEA retaliation claims have generally adopted the analysis used in Title VII cases without comment.") (*citing Powell v. Rockwell Int'l Corp*., 788 F.2d 279, 284-85 (5th Cir. 1986)) (other citations omitted).

5. District Courts Differ On Whether *Thompson* Extends To The FMLA

On June 19, 2012, the court in *Lopez v. Four Dee, Inc*., No. 11–CV–1099, 2012 WL 2339289, at *2 (E.D.N.Y. June 19, 2012), extended *Thompson* to permit a claim of third-party retaliation under the FMLA.

In contrast, the very next day, in *Gilbert v. St. Rita's Professional Services, LLC*, 2012 WL 2344583, at *6 (N.D. Ohio June 20, 2012), the court refused to extend *Thompson* to the FMLA, concluding, "[g]iven the difference in statutory text between the FMLA and Title VII, as well as *Thompson's* specific focus on language excluded from the FMLA, this Court finds the FMLA does not allow for causes of action under a third-party theory." The court did not address the contrary holding in *Lopez*, presumably because it was understandably unaware of the day-old decision.

On December 11, 2012, in *Augustus v. AHRC Nassau*, No. 11 CV 15 MKB, 2012 WL 6138484, *9 (E.D.N.Y. Dec. 11, 2012), the court cited *Lopez* with approval, and permitted a third-party FMLA retaliation claim to proceed, over the employer's motion for summary judgment.

XIV. CAN A COUNTERCLAIM CONSTITUTE UNLAWFUL RETALIATION?

Because of *Burlington Northern's* expansive interpretation of what employer actions may be actionable under a retaliation theory, the question of whether employer-initiated lawsuits or counter-claims can form the basis of a retaliation claim has been resurrected as a particularly hot topic. *See Mohamed v. Sanofi–Aventis Pharmaceuticals*, No. 06–CV–1504, 2009 WL 4975260, at *25 (S.D.N.Y. Dec. 22, 2009) ("In the wake of *Burlington Northern*, there is now a 'substantial question' as to the validity of precedent holding that a post-termination lawsuit or counterclaim may not be an adverse employment action.").). At this time, the case law on this subject is far from uniform.

Some cases hold that so long as the employer's counterclaims had some basis in law and fact, they cannot be found to be retaliatory as a matter of law. For example, in *Grimsley v. Charles River Laboratories, Inc*., 467 Fed. Appx. 736, 738 (9th Cir. 2012), the Ninth Circuit found that an employer's counterclaims were not actionable as retaliation under Title VII or the ADEA, because they had a basis in law and fact. Apparently applying this generally pro-employer standard, in *Ramos v. Hoyle*, No. 08-21809-CIV, 2009 WL 2151305, at *9-11 (S.D. Fla. July 16, 2009), the district court nevertheless ruled for the plaintiff in a FLSA retaliation case where the evidence showed that the employer brought the counterclaims out of an admittedly retaliatory motive, *and* the counterclaims were objectively baseless. *See also Torres*

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v. Gristede's Operating Corp., 628 F. Supp. 2d 447, 473 (S.D.N.Y. 2008) (holding in FLSA case that bad faith or groundless legal proceedings are actionable retaliation).

In *Gross v. Akin, Gump, Strauss, Hauer, & Feld, LLP*, 599 F. Supp. 2d 23, 32 (D.D.C. 2009), the court granted summary judgment against the employee's retaliation claim that was premised upon the employer's counterclaim, stating:

> As a threshold matter, Gross is no longer an employee of Akin Gump, and he was not an employee when Akin Gump filed its counterclaims. Akin Gump only filed its counterclaims after Gross's discovery request revealed evidence of his alleged wrong-doing. Gross was terminated in October 2004; Akin Gump filed its counterclaims in September 2007, nearly three years later. For this reason alone, Gross does not fit within the group of people *Burlington* seeks to protect. Furthermore, *Burlington's* reasoning for protecting employees was to prevent employers from dissuading employees from filing discrimination charges. *Id*. Given that Akin Gump's counterclaim was filed after Gross filed suit for age discrimination, there is no way Akin Gump's counterclaim could dissuade Gross from filing his claim.
>
> The D.C. Circuit has never found that the filing of a counterclaim constitutes an adverse employment action. Moreover, other federal courts have specifically held that counterclaims cannot, as a matter of law, constitute an adverse employment action. *See Earl v. Electro-Coatings of Iowa, Inc.*, 2002 WL 32172298, at *2 (N.D. Iowa Oct. 29, 2002) (unpublished) ("Although many different post-termination actions may constitute retaliation, this court holds that, ordinarily, a counterclaim may not. Initially, the court notes that a counterclaim is not to be considered an employment-related action. Only in the rare case will conduct that occurs within the scope of litigation amount to retaliation." (citing *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998))); *Beltran v. Brentwood N. Healthcare Ctr., LLC*, 426 F. Supp. 2d 827, 833-34 (N.D. Ill. 2006) ("[I]f the mere filing of a counterclaim were sufficient to give rise to a retaliation claim, then every defendant in an FLSA, Title VII or ADA lawsuit who asserts a counterclaim would be subject to a retaliation claim."). Filing a counterclaim is different from initiating a lawsuit against a complaining employee, as "filing a counterclaim will not chill plaintiffs from exercising and enforcing their statutory rights because by the time the employer files its counterclaim, plaintiffs have already made their charges and initiated a lawsuit." *Beltran*, 426 F. Supp. 2d at 834 (citing *EEOC v. K & J Mgmt. Inc*., 2000 WL 34248366, at *4 (N.D. Ill. 2000) (unpublished)).

Id. at 33-34.

Likewise, in *Schanfield v. Sojitz Corp. of America*, 663 F. Supp. 2d 305 (S.D.N.Y. 2009), the district court refused to permit the plaintiff to premise a Title VII retaliation claim upon the employer's counterclaim, stating:

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> While I can conceive of cases in which being sued would qualify as an adverse employment action, in this case the counterclaims have merit; I can see nothing in Title VII or any other anti-discrimination statute that should prevent an employer from bringing a legitimate claim against a current or former employee simply because that employee has complained about what the employee believes to be discriminatory behavior.

Id. at 342.

On the other hand, some courts have focused less on whether a counterclaim or lawsuit was entirely baseless, and more on whether it was brought with retaliatory motive. In *Spencer v. International Shoppes, Inc.*, 902 F. Supp. 2d 287, 299 (E.D.N.Y. 2012), the magistrate judge issued a lengthy opinion, in which she ultimately found that the employer could potentially be held liable for suing the plaintiff in state court after the plaintiff sued the employer in federal court under Title VII. The magistrate judge opined that the proper standard was simply to decide whether or not the employer filed the state court suit out of retaliatory animus, without regard to the validity or invalidity of the employer's suit.

Similarly, in *Penberg v. HealthBridge Management*, 823 F. Supp. 2d 166, 192 (E.D.N.Y. 2011), the court analyzed whether the defendant's counterclaim for breach of fiduciary duty and its decision to pursue sanctions for destruction of evidence contained on plaintiff's computer constituted retaliation for the employee's discrimination suit. Although the defendant argued that it had legitimate reasons for filing its counterclaim and pursuing sanctions, the court declined to grant summary judgment because, *inter alia*, "the timing of defendant's counterclaim and related demands on plaintiff ... raised a triable issue of fact regarding whether defendant added its counterclaim with retaliatory intent." *Id*. at 193. *See also Nesselrotte v. Allegheny Energy, Inc.*, No. 06–CV–1390, 2009 WL 703395, at *14 (W.D. Pa. Mar. 16, 2009) (denying summary judgment on plaintiff's retaliation claim because, *inter alia*, the temporal proximity of the defendant's decision to sue plaintiff's husband's company raised an issue of fact); *Illiano v. Mineola Union Free School Dist.*, 585 F. Supp. 2d 341, 352 (E.D.N.Y. 2008) (denying motion to dismiss claim based on retaliatory defamation suit where employer threatened to sue plaintiff if she sought to vindicate her rights).

Courts are not inclined to find that an employer's compulsory counterclaims – as opposed to permissive counterclaims – are not actionable as retaliation unless they are totally baseless. *See Torres*, 628 F. Supp. 2d at 474 ("[A] compulsory counterclaim is not actionable for retaliation unless it is totally baseless."); *Eng–Hatcher v. Sprint Nextel Corp.*, No. 07–CV–7350, 2008 WL 4865194 (S.D.N.Y. Oct. 31, 2008) (citing *Ergo v. International Merchant Servs., Inc.*, 519 F. Supp. 2d 765, 781 (N.D. Ill. 2007) ("[W]here an employer seeks to amend a pleading to assert a compulsory counterclaim to avoid the risk of being foreclosed from raising the claim in a subsequent action, that conduct cannot constitute retaliation, unless the counterclaim is 'totally baseless.'").

Finally, there is the issue of exhaustion. The issue is rarely discussed in the case law. However, *McDonald–Cuba v. Santa Fe Protective Servs., Inc.*, 644 F.3d 1096, 1101 (10th Cir. 2011) focuses on that point. There, the court did not reach the question of whether the

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employer's counterclaim was actionable under a Title VII retaliation theory. Rather, it held that, even if it is actionable, the plaintiff must first exhaust administrative remedies with the EEOC. Accordingly, the court dismissed the plaintiff's retaliation claim without prejudice.

XV. DODD-FRANK

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") is a relatively new law that has not yet generated a substantial number of appellate court decisions. Therefore, this section of the paper primarily focuses on the whistleblower incentive and anti-retaliation provisions of the statute itself, and the implementing regulations issued in May 2011. *See* 15 U.S.C. § 78u–6 *et seq*.; *Securities Whistleblower Incentives and Protections*, 76 Fed.Reg. 34,300 (June 13, 2011) (codified at 17 C.F.R. §§ 240.21F–1 to 240.21F–17). However, there have been a number of cases (mostly from district courts) decided under Dodd-Frank to date, and they are discussed herein.

An outstanding article that covers the law and final regulations in comprehensive fashion is *Dodd-Frank and the SEC Final Rule: From Protected Employee To Bounty Hunter*, ST001 ALI-ABA 1487 (July 28-30, 2011), which was written by Littler Mendelson, P.C. lawyers John S. Adler, Edward T. Ellis, Barbara E. Hoey, Gregory C. Keating, Kevin M. Kraham, Amy E. Mendenhall, Kenneth R. O'Brian, and Carole F. Wilder. This section of the paper was originally partially derived from that article.

A. Introduction

The whistleblower and bounty hunter provisions of Dodd-Frank make internal auditing, reporting and compliance programs a higher priority than ever for covered employers. The SEC regulations implementing Dodd-Frank, released on May 25, 2011, clearly reflect that the government's objective is to stimulate reporting of violations of the federal securities laws through financial incentives to employees who discover such violations. The Dodd-Frank regulations are a law enforcement tool that signals a further progression in the SEC's approach to rooting out corporate corruption. Ten years ago, Congress passed the Sarbanes-Oxley Act of 2002 ("SOX") in response to the breakdown in internal corporate controls demonstrated most dramatically in the Enron prosecution. Dodd-Frank is a step farther on that continuum, by financially incentivizing employees to come directly to the SEC with information regarding shareholder fraud.

Dodd-Frank also provides enhanced employment protection for the whistleblower providing the information. In presenting the new regulations, SEC Chairperson Mary L. Schapiro stated that "for an agency with limited resources like the SEC, I believe it is critical to be able to leverage the resources of people who have first-hand information about potential violations" of the securities laws. Consistent with that goal, the final regulations:

- Broaden the range of people who may qualify as whistleblowers;
- Promise to pay informant/whistleblowers for "original source" information that leads to a successful enforcement action by the SEC;

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- Require only a "reasonable belief" that the information provided "relates to a possible securities law violation";

- Simplify the reporting process for whistleblowers; and

- Do not require an employee to make an internal complaint before reporting alleged unlawful conduct to the SEC, including complaints for unlawful retaliation.

As proof of its commitment to enforcing its new program, the SEC leased 900,000 square feet of space for its expanding offices and has staffed a newly created "Office of the Whistleblower." http://www.sec.gov/foia/docs/oig-553.pdf. The SEC has also allotted more than $450 million to its investor protection fund, out of which whistleblower awards will be paid.

The SEC also created the "Office of the Whistleblower" to administer the SEC's whistleblower program under Dodd-Frank. The Chief Officer of the Office of the Whistleblower is Sean McKessy, a former in-house lawyer with Altria Group, Inc., AOL Inc., and Caterpillar, Inc. He had previously worked as Senior Counsel in the SEC's Division of Enforcement from 1997 to 2000. McKessy has five lawyers working for his office, and a staff of investigators. McKessy has reported that he has been very encouraged by the percentage of high quality tips that his office has received through the portal his office opened to gather tips through the internet. Between the day his office opened in August 2011, and the end of the fiscal year, September 30, 2011, his office received 334 whistleblower complaints – an average of about seven per day. McKessy's office is required by law to issue an annual report every November reflecting its activities, results, and bounties paid.

In August 2012, the SEC made its first award to an employee-informant pursuant to the whistleblower provisions of Dodd-Frank. According to the SEC, a whistleblower's assistance led to court-ordered sanctions against an organization totaling more than $1 million, of which $150,000.00 has been collected thus far. The informant has been paid $50,000.00 to date and stands to gain more as the SEC collects additional money. The informant's award derives from the DFA's so-called "bounty" provisions. These provisions are described in further detail below. They authorize the SEC to award employee whistleblowers between 10-30% of a sanction that exceeds $1 million, if the SEC determines that the whistleblower's information was high-quality, based on original information, and led to a successful SEC enforcement action.

According to the SEC's announcement in August 2012, after it announced its first bounty award, the whistleblower provided information and cooperation of the sort it hoped the bounty program would attract. In accordance with Dodd-Frank's anti-retaliation and identity protection provisions, the SEC did not disclose the whistleblower's identity. The SEC's release is silent as to whether the sanctioned organization had an effective internal reporting ("hot-line") process, whether the employee reported the matter internally, or whether the employee bypassed any internal reporting process at the organization. Sean McKessy, stated: "The fact that we made the first payment after just one year of operation shows that we are open for business and ready to pay people who bring us good, timely information." The SEC keeps whistleblower identities

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secret so it typically shares minimal information about the tipster or case when announcing an award.

On June 12, 2013, the SEC announced that it was awarding three whistleblowers a total of 15 percent of the money that the SEC ultimately collects from its enforcement action against sham hedge fund Locust Offshore Management LLC and its CEO Andrey C. Hicks, who defrauded investors of $2.7 million. As with the first SEC whistleblower award order in 2012, this order did not identify the whistleblowers but stated that two of them provided information that prompted the SEC to open an investigation and stop the scheme before more investors were harmed. The third whistleblower confirmed much of the information the others had provided and identified key witnesses. A fourth application for an award was denied because the information provided did not lead to or significantly contribute to its enforcement action, as required by law. In August and September 2013, more than $25,000.00 was distributed to the three aforementioned whistleblowers.

On October 1, 2013, the SEC announced an award of more than $14 million to a whistleblower whose information led to an SEC enforcement action that recovered substantial investor funds.

On June 3, 2014, the SEC announced that it awarded two whistleblowers more than $875,000 for their tips that helped the agency bring an enforcement action. The two individuals will split the money evenly. Sean McKessy, said the two individuals provided original information and help that "enabled the SEC to investigate and bring a successful enforcement action in a complex area of the securities market."

On September 22, 2014, the SEC announced that a foreign tipster will collect a record whistleblower award of more than $30 million under the Dodd-Frank bounty program, more than twice as much as the highest previous award. Andrew Ceresney, director of the SEC's enforcement division, said in a statement that "this whistleblower came to us with information about an ongoing fraud that would have been very difficult to detect." The $30 million to $35 million award could have been even bigger if the tipster had acted faster, according to the heavily redacted SEC order making the award. The agency reduced the award because the tipster delayed reporting the misconduct after first learning of it, according to the order, which also blanks out the length of the delay. "I was very concerned that investors were being cheated out of millions of dollars and that the company was misleading them about its actions," the anonymous tipster said in a statement released from Washington law firm Phillips & Cohen LLP, which said it represented the person. "Deception had become an accepted business practice."

On April 22, 2015, the SEC announced an award of more than a million dollars to a compliance professional who provided information that assisted the SEC in an enforcement action against the whistleblower's company. The award involved a compliance officer who had a reasonable basis to believe that disclosure to the SEC was necessary to prevent imminent misconduct from causing substantial financial harm to the company or investors. "When investors or the market could suffer substantial financial harm, our rules permit compliance officers to receive an award for reporting misconduct to the SEC," said Andrew Ceresney, Director of the SEC's Division of Enforcement. "This compliance officer reported misconduct

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after responsible management at the entity became aware of potentially impending harm to investors and failed to take steps to prevent it." This was the second award the SEC made to an employee with internal audit or compliance responsibilities.

As the above-mentioned awards to whistleblowers illustrates, the financial incentives laid out in the SEC regulations suggest that covered employers are now and will continue to face some or all of the following:

- Increased use of their internal ethics and compliance reporting procedures, because the regulations reward the use of those procedures;

- A need for prompt and efficient corporate responses to internal complaints, because effective internal responses are rewarded by the SEC, the U.S. Department of Justice prosecution principles, and the Federal Sentencing Guidelines;

- An increase in SEC and DOL investigations generally, because the bounty hunter system does not discourage reporting of questionable claims of wrongdoing; and

- The need for prompt, proper, and well-documented Human Resources responses to employee complaints, because the Dodd-Frank whistleblower provisions can be used by employees as a shield against performance management and legitimate employer discipline.

B. Who Can Qualify As A Whistleblower?

1. The Basic Definition Of A Whistleblower Under Dodd-Frank

The Dodd–Frank Act defines a whistleblower making disclosures under the SEC's jurisdiction as follows: "The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u–6(a)(6).

To qualify as a whistleblower under Dodd-Frank, an individual must be "an employee of a public company or subsidiary whose financial information is included in the consolidated financial statements of a public company or the employee of a nationally recognized statistical rating organization." 17 C.F.R. pts. 240 & 249, Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934. ("Final Rules"), at 17. The Final Rules define a whistleblower as one who possesses a "reasonable belief" that the information provided "relates to a possible securities law violation." The "reasonable belief" standard, also applicable in SOX and other whistleblower contexts, is intended to put "potential whistleblowers on notice that meritless submissions cannot be the basis for anti-retaliation protection." Final Rules at 218. The SEC notes that it included this phrase to deter frivolous claims so it could focus on more meritorious submissions and because of its concern about the cost of such claims to employers, not only in terms of the costs of litigation, but also because of "inefficiencies stemming from

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some employers' decisions not to take legitimate disciplinary action due to the threat of bad faith anti-retaliation litigation." *Id.* at 219.

The use of the term "possible violation" in the definition of whistleblower in the Final Rules is also significant. In the proposed rules, the SEC had used the word "potential," but changed it to "possible violation" that "has occurred, is ongoing, or is about to occur" to be more precise and clarify that whistleblower status applies to those who provide "information about possible violations, including possible future violations, of the securities laws." *Id.* at 12. The SEC rejected the use of the terms "probable violation" or "likely violation," stating that it thought that such a "higher standard" was "unnecessary" and would "make it difficult for the staff to promptly assess whether to accord whistleblower status to a submission." *Id.* at 13. In the SEC's view, the language it adopted was sufficient to ensure that "frivolous submissions would not qualify for whistleblower status." *Id.*

The SEC also decided not to limit the scope of the term "possible violations" by including a requirement that the information provided relate to a "material" violation of the securities laws. In keeping with its objective of encouraging informants, the Final Rules express the SEC's concern that a materiality threshold might limit the number of reports made. The SEC states that "it is preferable for individuals to provide us with any information they possess about possible securities violations (irrespective of whether it appears to relate to a material violation) and for us to evaluate whether the information warrants action." *Id.* at 14.

In September 2013, The Chief of the SEC's Office of the Whistleblower stated in an interview with the Wall Street Journal that the Office is "actively looking" for the appropriate case to pursue a retaliation claim and is specifically looking for a case in which an employee was retaliated against for making a report in good faith that turns out to be wrong. *See* Rachel Louise Ensign, Wall Street Journal, September 24, 2013, "Q&A: Sean McKessy, Chief, SEC's Office of the Whistleblower"," available at http://blogs.wsj.com/riskandcompliance/2013/09/24/q-a-sean-mckessy-chief-of-the-secs-office-of-the-whistleblower. Consistent with this statement, in June 2014, the SEC issued an order against Paradigm Capital Management, Inc., a registered investment adviser, and its principal for engaging in principal trades without effective client disclosure and consent, and for retaliating against an employee who reported such prohibited trading to the SEC. This was the first time that the SEC brought an enforcement action for violations of Dodd-Frank's anti-retaliation provisions. Paradigm agreed to pay $2.2 million to settle the charges without admitting or denying wrongdoing.

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

According to the SEC, the elements of a retaliation claim under the Dodd–Frank Act are (1) that the plaintiff engaged in a protected activity; (2) that the plaintiff suffered an adverse employment action; and (3) that the adverse action was causally connected to the protected activity. *See* Securities and Exchange Commission, Implementation of the Whistleblower

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Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34–64545 (May 25, 2011), at 18 n.41.

As mentioned above, the Dodd–Frank Act defines a whistleblower making disclosures under the SEC's jurisdiction as follows: "The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u–6(a)(6) (emphasis added). But, on the other hand, in an arguable apparent conflict, the anti-retaliation provisions of the Dodd-Frank Act protect whistleblowers from retaliation in three categories of circumstances, one of which does not necessarily require reporting to the SEC, as follows:

> No employer may discharge . . . or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 (15 U.S.C. § 7201 *et seq*.), the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq*.), including section 10A(m) of such Act (15 U.S.C. § 78f(m)), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Id. § 78u–6(h)(1)(A).

By their own terms, the first two anti-retaliation categories protect whistleblowers who report potentially illegal activity to the SEC or who work with the SEC directly, in some manner, concerning potential securities violations. By contrast, some courts have held that the third category does not require that the whistleblower have interacted directly with the SEC – only that the disclosure, to whomever made, was "required or protected" by certain laws within the SEC's jurisdiction. *See Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011). Thus, for example, according to those courts' logic, if one of the referenced laws in section (iii) either (a) required an employee to report a potential securities violation internally; or (b) protected an employee's disclosure of that information to another federal agency or federal law enforcement officer, § 78u–6(h)(1)(A)(iii) would prohibit retaliation against that whistleblower by the whistleblower's employer. As the *Egan* court explained in harmonizing what it believed to be the apparent conflict:

> A literal reading of the definition of the term 'whistleblower' in 15 U.S.C. § 78u–6(a)(6) would effectively invalidate § 78u–6(h)(1)(A)(iii)'s protection of whistleblower disclosures that do not require reporting to the SEC . . . .

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> [These] contradictory provisions of the Dodd–Frank Act are best harmonized by reading 15 U.S.C. § 78u–6(h)(1)(A)(iii)'s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u–6(a)(6)'s definition of a whistleblower as one who reports to the SEC. Therefore, Plaintiff must either allege that his information was reported to the SEC, or that his disclosures fell under the four categories of disclosures delineated by 15 U.S.C. § 78u–6(h)(1)(A)(iii) that do not require such reporting: those under the Sarbanes–Oxley Act, the Securities Exchange Act, 18 U.S.C. § 1513(e), or other laws and regulations subject to the jurisdiction of the SEC.

Egan, 2011 WL 1672066, at *5.

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

With respect to the scope of part (iii), the "catch-all" anti-retaliation protections extend only to any "law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u–6(h)(1)(A)(iii). "Thus, where an employee reports a violation of a federal law by the employer, the DFA only protects that employee against retaliation if the federal violation falls within the SEC's jurisdiction." *Nollner v. Southern Baptist Convention, Inc*., 852 F. Supp. 2d 986, 994 (M.D. Tenn. 2012). Furthermore, "a plaintiff seeking relief under anti-retaliation provision part (iii) must demonstrate that the disclosure at issue relates to a violation of federal securities laws." *Id*. at 994. In addition, anti-retaliation provision part (iii) only protects disclosures that are "required or protected" by laws, rules, or regulations within the SEC's jurisdiction. Thus, an employee is not protected from retaliation under the "catch-all" provision if the disclosure at issue – even if it relates to an actual legal violation by the employer – concerns a disclosure that is not "required" or otherwise "protected" by a law, rule, or regulation within the SEC's jurisdiction. *Id.* at 994-95 (citing *Egan*, 2011 WL 1672066, at *6 ("[M]erely alleging the violation of a law or rule under the SEC's purview is not enough; a plaintiff must allege that a law or rule in the SEC's jurisdiction explicitly requires or protects disclosure of that violation.")).

In the 2012 *Nollner* decision, the court dismissed the plaintiffs' (a husband and wife's) Dodd-Frank retaliation claims under the "catch-all" section set out in § 78u–6(h)(1)(A)(iii). The court set out the standard for a claim under the catch-all section:

> Harmonizing all of these provisions, as the court must, a plaintiff seeking protection under § 78u–6(h)(1)(A)(iii) must at least show the following: (1) he or she was retaliated against for reporting a violation of the securities laws, (2) the plaintiff reported that information to the SEC or to another entity (perhaps even internally) as appropriate; (3) the disclosure was made pursuant to a law, rule, or regulation subject to the SEC's jurisdiction; and (4) the disclosure was "required or protected" by that law, rule, or regulation within the SEC's jurisdiction.

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Id. at 995.

In applying the standard, the *Nollner* court observed that the plaintiffs' claims were based on the allegation that the defendant had violated the Foreign Corrupt Practices Act ("FCPA"), and that they had been retaliated against after they reported the alleged FCPA violations to their employer. *See Nollner*, 852 F. Supp. 2d at 995-96. The FCPA applies, *inter alia*, to any "issuer" or "domestic concern," as defined by the Act. The defendant was not an "issuer," but it was a "domestic concern." *Id*. The Department of Justice ("DOJ") has sole responsibility for all criminal enforcement of the FCPA. *Id*. As to civil enforcement, the SEC has enforcement responsibility over FCPA violations by issuers, while the DOJ has enforcement responsibility over FCPA violations by domestic concerns and other non-issuer entities subject to the FCPA. *Id*. Accordingly, as the court stated, "because the defendants are not issuers, only the DOJ – not the SEC – has jurisdiction over them with respect to FCPA violations." *Id*. at 996. Therefore, the plaintiffs' Dodd-Frank claims under the "catch-all" section had to be dismissed:

> Here, because the defendants are not "issuers" for purposes of the FCPA, they are not "subject to the jurisdiction" of the SEC with respect to FCPA violations. Moreover, the violations reported by Mr. Nollner do not "relate to violations of the securities laws" (*i.e*., he is not a "whistleblower" under the DFA) and do not concern actions by a company otherwise subject to SEC jurisdiction. Thus, even assuming the allegations to be true, the Nollners may not maintain DFA retaliation claims premised on their reporting of potential FCPA violations by the defendants. Therefore, the court will dismiss the DFA claim with prejudice.

Id. at 997-98 (footnote omitted).

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

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

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Id. at *5.

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

Just days after *Asadi* was decided, a district court judge in Colorado followed *Asadi*, and agreed that only individuals who provide information to the SEC can be "whistleblowers" under Dodd-Frank. *See Wagner v. Bank of America Corp.*, Civil Action No. 12–cv–00381–RBJ2013 WL 3786643, at *5-6 (D. Colo. July 19, 2013). Some other district courts have also followed *Asadi*. *See Puffenbarger v. Engility Corp.*, Case No. 1:15–cv–188, 2015 WL 9686978, at *9 (E.D. Va. Dec. 31, 2015) (following *Asadi*); *Wiggins v. ING U.S., Inc.* 2015 WL 3771646, at *10 (D. Conn. June 17, 2015) (following *Asadi*); *Lutzeier v. Citigroup Inc.*, 305 F.R.D. 107, 110 (E.D. Mo. 2015) ("The Court agrees with the reasoning of the Fifth Circuit and holds that under the plain language of the Dodd–Frank Act an employee must make a report to the SEC to qualify for the anti-retaliation whistleblower protection."); *Verfuerth v. Orion Energy Systems, Inc.*, No. 14–C–352, 2014 WL 5682514 (E.D. Wis. Nov. 4, 2014) (following *Asadi*); *Banko v. Apple Inc.*, No. 13–cv–2977, 2013 WL 7394596, at *6 (N.D. Cal. Sept. 27, 2013) ("Because plaintiff did not file a complaint to the SEC, he is not a 'whistleblower' under the Dodd–Frank Act.").

However, many district courts have disagreed with *Asadi*. *See Wadler v. Bio-Rad Laboratories, Inc.*, Case No. 15-cv-02356-JCS, 2015 WL 6438670, (N.D. Cal., Oct. 23, 2015) (rejecting *Asadi*); *Dressler v. Lime Energy*, Civ. No. 3:14–cv–07060 (FLW)(DEA), 2015 WL 4773326, at *16 (D.N.J. Aug. 13, 2015) (rejecting *Asadi* in a lengthy analysis); *Somers v. Digital Realty Trust, Inc.*, No. C-14-5180, 2015 WL 4483955 (N.D. Cal. July 22, 2015) (rejecting *Asadi* in a lengthy analysis); *Connolly v. Remkes*, Case No.: 5:14–CV–01344–LHK, 2014 WL 5473144 (N.D. Cal. Oct. 28, 2014) (rejecting *Asadi*); *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 732-33 (D. Neb. 2014) (rejecting *Asadi* and being very critical of the decision); *Englehart v. Career Educ. Corp.*, No. 8:14–CV–444–T–33 EAJ, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014) (rejecting *Asadi*); *Yang v. Navigators Group, Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014) (deferring to SEC's interpretation and rejecting *Asadi*); *Khazin v. TD Ameritrade Holding Corp.*, Civil Action No. 13–4149 (SDW)(MCA), 2014 WL 940703 (D. N.J. Mar. 11, 2014) ("Nevertheless, based on this Court's construction of the statute—consistent with the majority approach on the issue—internal reporting of potential violations is sufficient to qualify as a whistleblower under the Dodd–Frank Act's anti-retaliation provision."); *Azim v. Tortois Capital Advisors, LLC*, No. 13–2267, 2014 WL 707235, at *3 (D. Kan. Feb. 24, 2014) (declining to follow *Asadi*); *Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491 (S.D.N.Y. 2014) (finding Dodd-Frank Act's whistleblower protection statute ambiguous and deferring to the SEC's "reasonable interpretation," but holding complaint to be otherwise deficient); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 148 (S.D.N.Y. 2013) (relying on SEC regulation and rejecting *Asadi*); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass.

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2013) ("This court respectfully disagrees [with *Asadi*] and instead adopts the SEC's interpretation of the relevant provisions of Dodd–Frank.").

On August 4, 2015, in response to the growing disagreement among courts in the wake of the *Asadi* decision, the SEC issued an interpretive rule clarifying that for purposes of Dodd-Frank's employment retaliation protections, "an individual's status as a whistleblower does not depend on adherence to the reporting procedures specified in Rule 21F-9(a)." In issuing its clarification, the SEC stated that the definition of "whistleblower" for purposes of Dodd-Frank's employment retaliation provision is "ambiguous" but that the SEC's interpretation "best comports with our overall goals in implementing the whistleblower program." The SEC further states that "by providing employment retaliation protections for individuals who report internally first to a supervisor, compliance official, or other person working for the company that has authority to investigate, discover, or terminate misconduct, our interpretive rule avoids a two-tiered structure of employment retaliation protection that might discourage some individuals from first reporting internally in appropriate circumstances and, thus, jeopardize the investor-protection and law-enforcement benefits that can result from internal reporting."

On September 10, 2015, in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2nd Cir. 2015), the U.S. Court of Appeals for the Second Circuit rejected *Asadi* in a 2-1 decision and held that Dodd-Frank's anti-retaliation provision can protected purely internal reports. In reaching that conclusion, the majority took note of the SEC's interpretive rule issued in August 2015.

3. Individuals Who Have A Legal Or Contractual Duty To Report Violations Are Excluded From The Definition Of A Whistleblower Under Dodd-Frank

To qualify for receipt of an award under Dodd-Frank, a whistleblower must have "voluntarily" provided "original information" to the SEC that led to a successful enforcement action. The rules explain that an individual who reports information to the SEC pursuant to some legal or contractual duty has not done so "voluntarily" and therefore is not eligible for an award. Individuals who provide information following a request, inquiry or demand from the SEC or as part of an investigation by Congress or the Public Company Accounting Oversight Board or any self-regulatory body relating to the subject matter of the report are also deemed not to have "voluntarily" reported.

4. Individuals In Compliance-Related Roles Are Presumptively, But Not Totally, Excluded From The Definition Of A Whistleblower Under Dodd-Frank

Dodd-Frank defines original information as information that is:

- "Derived from the independent knowledge or analysis of a whistleblower";
- "Not known to the SEC other than by the whistleblower as the original source of the information"; and

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- "Not exclusively derived from an allegation made in a judicial or administrative hearing, in a government report, hearing, audit, or investigation, or from the news media, unless a whistleblower is the source of the information."

15 U.S.C. § 78u–6(a)(3).

The Final Rules apply this definition to exclude several categories of professionals who obtain information about violations because of their compliance-related roles:

- Attorneys, including in-house counsel, and non-attorneys who learn information from an attorney-client communication.

- Officers, directors, trustees or partners of an entity if they obtained the information because another person informed them of allegations of misconduct, or they learned the information in connection with the entity's processes for identifying, reporting, and addressing potential non-compliance with the law. Officers or other designated persons are not precluded from recovery as whistleblowers if they actually observe the violations rather than, for example, learning of them through an employee report. Also, notably, the SEC removed non-officer supervisors from the list of designated persons.

- Employees whose principal duties involve compliance or internal audit responsibilities, as well as employees of outside firms that are retained to perform internal compliance or internal audit work.

- Those employed or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of the law.

- Employees of a public accounting firm who acquire information through an audit or other engagement required under the federal securities laws relating to an alleged violation by the engagement client.

As set forth below, however, there are some exceptions to the exclusions from the definition of a whistleblower.

5. Exceptions To The Exclusions From The Definition Of A Whistleblower Under Dodd-Frank

The categories of individuals listed above may nevertheless be eligible for whistleblower status under certain circumstances. For attorneys, the Final Rules include an exception for attorney disclosures permitted under state bar rules. These rules vary, but most permit disclosures necessary to prevent the commission of a crime or fraud. The exception for permitted attorney disclosures applies equally to non-attorneys who receive the information in an attorney-client communication. Final Rules at 59.

Individuals in the other excluded categories listed above may be considered whistleblowers in the following circumstances:

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- If they can demonstrate they have a "reasonable basis" to believe that disclosure of the information to the SEC is necessary to prevent "conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors." *Id.* at 145. This is similar to the crime-fraud exception applicable to reports by attorneys. The SEC explains that "in most cases" a whistleblower who seeks to collect an award on the basis of this exception will need to demonstrate that management or governance personnel at the entity were "aware of the imminent violation and were not taking steps to prevent it." *Id.* at 74.

- If they have a reasonable basis to believe that the "relevant entity is engaging in conduct that will impede an investigation," such as impermissibly influencing witnesses or destroying documents. *Id.* at 145-46.

- 120 days after (a) providing information to the entity's audit committee, chief legal or compliance officer or his supervisor, or (b) receiving information under circumstances indicating the audit committee, chief legal or compliance officer, or supervisor was already aware of the information.

In late August 2014, the SEC announced that, for the first time, it had made a whistleblower award to an employee who performed audit and compliance functions at a company. As the SEC noted in its order in the case, although its regulations generally preclude whistleblower awards to employees whose principal duties involve compliance or internal audit responsibilities, there is an exception to this rule where the employee first reports the alleged violation internally and then waits at least 120 days before contacting the SEC. *See* 17 CFR § 240.21F-4(b)(iii)(B); 17 CFR § 240.21F-4(b)(v)(C). That is what happened in this case. According to the SEC, the whistleblowing employee reported concerns about wrongdoing to appropriate personnel within the company, including a supervisor. But when the company took no action within 120 days, the employee reported the same information to the SEC. The SEC awarded the employee $300,000, 20% of the $1.5 million monetary sanctions it collected from the employer. On April 22, 2015, the SEC announced an award of more than a million dollars to another compliance professional who provided information that assisted the SEC in an enforcement action against the whistleblower's company.

The Final Rules also clarify that an individual cannot collect an award on the basis of information obtained from someone who is excluded from eligibility for an award as a whistleblower. There is an exception to this rule, however, for information that the original source could permissibly report or if the whistleblower is providing information about possible violations involving the person from whom the information was obtained. For example, if an auditor learns from a colleague about his involvement in a client's securities law violation, the auditor could report the violation to the SEC and collect an award as a whistleblower if the report led to a successful enforcement action.

6. Criminal Violators Can Be Whistleblowers Under Dodd-Frank

Rejecting the suggestion by some commenters that the rules exclude from "whistleblower" status those who are themselves guilty of violations, the SEC notes that

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"[i]nsiders regularly provide law enforcement authorities with early and invaluable assistance in identifying the scope, participants, victims, and ill-gotten gains" from fraudulent schemes. *Id.* at 195. In further support of its position, the SEC states "[t]his basic law enforcement principle is especially true for sophisticated securities fraud schemes which can be difficult for law enforcement authorities to detect and prosecute without insider information and assistance from participants in the scheme or their coconspirators." *Id.* at 194-95. However, under the statute itself, a fraud participant cannot be a Dodd-Frank whistleblower if he or she was convicted of criminal conduct relating to the fraud. 15 U.S.C. § 78u–6(c)(2)(B).

In response to public policy concerns about rewarding wrongdoers, the Final Rules provide that the SEC will not count monetary sanctions against the whistleblower or any entity "whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated" in determining whether the $1,000,000 threshold for an award has been met. Final Rules at 195. In addition, any award the whistleblower receives will be decreased by amounts attributable to the whistleblower's conduct.

The rules also deny whistleblower status to those who obtain information "where a domestic court determines that the whistleblower obtained the information in violation of federal or state criminal law." *Id.* at 80. The SEC rejected recommendations to extend this provision to information obtained in violation of civil law. The exclusion also does not apply to information obtained in violation of a protective order.

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

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

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

> The language of Dodd-Frank's anti-retaliation provision, however, does not require an individual to provide "original information." The anti-retaliation provision uses only the unmodified term "information." And there is nothing else in the statute to suggest that the anti-retaliation provision applies only to individuals who provide information that would make them eligible for an award. To the contrary, the SEC's implementing regulations make clear that the "anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award." 17 C.F.R. § 240.21F–

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2(b)(1)(iii). Thus, to the extent Defendants argue that Ott is not covered by the anti-retaliation provision because she did not provide "original information" to the SEC after Dodd–Frank's enactment, the argument is without merit.

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

C. Whistleblower Anti-Retaliation Provisions Under Dodd-Frank

Other important sections of the Final Rules relate to the retaliation protections for whistleblowers under Dodd-Frank, which broadly prohibits employers from discharging, demoting, suspending, threatening, directly or indirectly harassing, or "in any other manner" discriminating against a whistleblower in the terms or conditions of employment. 15 U.S.C. § 78u–6(h)(1)(A).

1. Expansion Of Who Is Protected

The Final Rules expressly state that the retaliation protections under Dodd-Frank apply regardless of whether a whistleblower is ultimately entitled to an award. Final Rules at 18. This is another provision that the SEC states is intended not to "unduly deter whistleblowers from coming forward with information." Thus, in order to be protected by the anti-retaliation provisions, the complainant need only have a "reasonable belief" that the information being provided relates to a "possible" violation of the federal securities laws. *Id.* at 15.

This approach is similar to that taken in *Sylvester v. Parexel Int'l LLC*, No. 07-123, 2011 WL 2165854 (ARB May 25, 2011) (*en banc*), a decision by the DOL Administrative Review Board interpreting the whistleblower protection provisions under SOX, that is discussed later in this paper. The SEC's Final Rule on Dodd-Frank, and the *Parexel* decision, significantly expand those who are considered to have engaged in protected activity.

2. Expansion Of Protected Activity

Dodd-Frank provides whistleblower retaliation protection to any of the following activities:

- Providing information to the SEC;
- Initiating, testifying, or assisting in an investigation, or a judicial or administrative action of the SEC based on or related to information provided by the whistleblower; and
- Making disclosures required or protected under SOX or any other law, rule or regulation subject to the SEC's jurisdiction.

15 U.S.C. § 78u–6(h)(1)(A)(iii).

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

The combination of the Final Rules and the provisions of the statute itself make Dodd-Frank very hospitable to whistleblower retaliation claims.

a. Direct Access To Federal Court

The SEC added a provision to the Final Rules expressly stating that it has authority to enforce the anti-retaliation provisions of the Act. *Id.* at 18. Thus, in contrast to SOX, which has only one avenue for a whistleblower retaliation complaint (filing a complaint with the DOL) under Dodd-Frank an employee can bring a complaint to either the SEC or the DOL, or file a claim directly in federal court. 15 U.S.C. § 78u–6(h)(1)(B)(i).

b. A Long Statute Of Limitations

The Dodd-Frank Act itself provides a more expansive statute of limitations than SOX for a retaliation claim. Under SOX, an employee has 180 days to file a retaliation claim with the DOL (prior to its revision, that was 90 days). In contrast, under Dodd-Frank, an employee has six years from the date of the retaliatory action, or three years from when "facts material to the right of action are known or reasonably should have been known," to file a retaliation claim in federal court. 15 U.S.C. § 78u–6(h)(1)(B)(iii). However, as an outer limit, Dodd-Frank imposes a maximum limitations period of 10 years after the date on which the violation occurs. *Id*.

4. Damages For Retaliation In Violation Of Dodd-Frank

A prevailing claimant in a Dodd-Frank retaliation case is entitled to relief which "shall include": (i) reinstatement with the same seniority status that the individual would have had, but for the discrimination; (ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. 15 U.S.C. § 78u–6(h)(1)(C).

D. <u>Procedural Aspects Of The Whistleblower Bounty</u>

1. Procedures For Submitting Information To The SEC Have Been Simplified

The Final Rules make it significantly easier for individuals to submit information to the SEC concerning allegations of alleged violations of federal securities laws. A person who wishes to file a whistleblower complaint with the SEC, must submit a Form TCR (Tip, Complaint or Referral) ("TCR") to the SEC on-line, or by fax or mail. https://denebleo.sec.gov/TCRExternal/questionnaire.xhtml. The TCR elicits basic identifying information about the alleged whistleblower and his or her concerns, including information used to determine whether or not the alleged conduct suggests a violation of federal securities law. The TCR requires that the purported whistleblower answer certain threshold questions to determine eligibility to receive an award. The whistleblower (or counsel, in the case of an

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anonymous submission) must sign the TCR under penalty of perjury. Final Rules at 154. The TCR has been revised to allow for joint submissions by more than one alleged whistleblower.

In its commentary, the SEC contends that the TCR has been revised to encourage internal compliance and reporting. As discussed further below, however, nothing in the Final Rules, requires a whistleblower to use an employer's internal compliance and reporting systems before filing a complaint with the SEC. *Id.* at 155. Nevertheless, the TCR now asks a purported whistleblower to provide details about any prior actions taken regarding the complaint, and requires the whistleblower to indicate whether he or she has reported the alleged violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available internal complaint mechanism. *Id.*

2. Calculating An Award Under The "Bounty Program"

If an SEC action results in sanctions totaling $1 million or more, the whistleblower is eligible to receive between 10% and 30% of any penalty recovered in a judicial or administrative action. *Id.* For purposes of an award, the Final Rules make clear that the SEC will aggregate two or more smaller actions that arise from the same nucleus of operative facts to "make whistleblower awards available in more cases." If there are multiple whistleblowers, the total compensation for all cannot exceed 30%. For example, one whistleblower could potentially receive an award equal to 25% of the penalty, and another could receive an award equal to 5% of the penalty, but they could not each receive an award equal to 30% of the penalty imposed. *Id.* at 118.

In determining the amount of the award, the SEC will consider the following criteria that may increase the award:

- The significance of the information provided by the whistleblower;
- The assistance provided by the whistleblower;
- Law enforcement interest in making a whistleblower award; and
- Participation by the whistleblower in internal compliance systems.

The following criteria that may decrease an award will also be considered:

- Culpability of the whistleblower;
- Unreasonable reporting delay by the whistleblower; and
- Interference with internal compliance and reporting systems by the whistleblower. *Id.* at 123.

No single criterion is determinative or mandatory.

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Whistleblowers can appeal the denial of an award directly to a United States Circuit Court of Appeals, but cannot appeal the size of an award that is within the statutory range. *See* 15 U.S.C. § 78u–6(f).

E. Implications Of The Final Rules On Internal Reporting Procedures

1. Internal Reporting Is Not Required

Internal reporting procedures have been an important part of corporate compliance programs at virtually all regulated companies for many years, and took on an even more prominent role after the enactment of Sarbanes Oxley. With the advent of Dodd-Frank – and its enhanced penalties and larger bounties – the need for strong internal reporting and investigatory systems has become even more acute. Indeed, most companies have enhanced these processes in the past year in the hope that they will learn of a problem before a whistleblower reports it to the authorities. The final Dodd-Frank regulations, however, seem to send a mixed message to companies and whistleblowers regarding internal reporting programs. Although the Final Rules do not require an employee to report an alleged securities violation to the employer first, they do contain some provisions that the SEC states will "expand upon the incentives for whistleblowers to report internally."

The decision not to require employees to report alleged violations internally prior to complaining to the SEC was the subject of much criticism by business and securities groups. The Association of Corporate Counsel harshly criticized this "no internal exhaustion" rule, stating that "[t]he SEC's bounty rule is a Pandora's box that, when opened, is likely to create new and even unanticipated harms once the floodgates are open, and we question whether the SEC even has the capacity to handle a torrent of new reports," adding that "the final SEC rules undermine internal compliance program[s] by preventing companies from addressing festering allegations of misconduct." Press Release, Association of Corporate Counsel Frustrated by Today's SEC Ruling on Whistleblowing Bounty Provisions of Dodd-Frank Law (May 25, 2011), http://www.acc.com.

The SEC explains its rationale for not mandating internal reporting is to induce prompt reporting of possible securities violations and enhance its enforcement capabilities:

> [T]he broad objective of the whistleblower program is to enhance the Commission's law enforcement operations by increasing the financial incentives for reporting and lowering the costs and barriers to potential whistleblowers, so that they are more inclined to provide the Commission with timely, useful information that the Commission might not otherwise have received.

Final Rules at 105.

Noting that internal reporting will not always advance its goals, the SEC states that "providing information to persons conducting an internal investigation, or simply being contacted by them, may not, without more, achieve the statutory purpose of getting high-quality, original information about securities violations directly into the hands of Commission staff." *Id.*

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at 34. In this regard, the SEC also points out that not all internal reporting systems are created equal, stating "while many employers have compliance processes that are well-documented, thorough, and robust, and offer whistleblowers appropriate assurances of confidentiality, others do not." *Id.* at 91. It is concerned that a company notified of a violation prior to an SEC investigation might destroy documents or attempt to tamper with witnesses. *Id.* at 104. Thus, the SEC concludes, there are cases where internal disclosures "could be inconsistent with effective investigation or the protection of whistleblowers." *Id.*

The SEC also emphasizes its belief that mandatory internal reporting might discourage some potential whistleblowers from reporting at all. The SEC explained that it believes that there are a significant number of whistleblowers who would respond to the financial incentive offered by the whistleblower program by reporting only to the Commission, but who would not come forward either to the Commission or to the entity if the financial incentive were coupled with a mandatory internal reporting requirement. *Id.* at 103.

In addition, the SEC believes that, because of the greater potential for financial reward, the cases most likely to go to the SEC without internal reporting are those "involving clear fraud or other instances of serious securities law violations by senior management." *Id.* at 232, n. 456. The SEC's view is that the benefit to the public of bringing such cases directly to it is so great that it justifies bypassing the internal compliance system.

According to The Chief Officer of the Office of the Whistleblower, Sean McKessy, employers' fears that employees would skip over internal reporting, in hopes of gathering a bounty, have not come to fruition. McKessy reported that the overwhelming number of persons who made complaints to his office had previously reported their complaints to the employer.

2. Although Not Required, The Final Rules Encourage And Reward Internal Reporting

Although the Final Rules do not make internal reporting mandatory, the SEC also plainly states, in several places throughout the regulations, its interest in promoting strong internal compliance and reporting systems rather than undermining them. The SEC believes that, even without requiring whistleblowers to report internally first, most are likely to do so anyway. The SEC cites sources as varied as the National Whistleblower Center and the New England Journal of Medicine for the proposition that the vast majority of whistleblowers first present their problems to management before consulting counsel or communicating with a government agency. *Id.* at 230, n. 452. The SEC supports this limited empirical data by pointing out that whistleblowers are frequently motivated by non-monetary incentives, including "cleansing the conscience," punishing wrong-doers, simply doing the right thing for the sake of a general increase in social welfare, or self-preservation. Whistleblowers are frequently motivated by concern about their continued employment or personality conflicts with superiors or other employees. They blow the whistle as a weapon in the workplace battle and only later recognize the possibility of financial gain. Another obvious reason for employees to continue to raise their complaints internally is because Dodd-Frank whistleblower retaliation protection only attaches if the employer knows that the employee has engaged in protected activity. Internal reporting aids in that respect. *Id.* at 90-91.

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More significantly, the SEC has included provisions in the Final Rules that it believes create "strong incentives for employees to continue to use their employer's internal compliance systems." Noting that "the federal securities laws [are] promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct by company officers or employees," the SEC emphasizes its goal is "to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials first while still preserving their rights under the Commission's whistleblower program."

The Final Rules encourage internal reporting in the following ways:

- Probably the most favorable provision is Rule 21F-6 which provides for "credit in the calculation of award amounts to whistleblowers who utilize established internal procedures" to report misconduct. *Id.* at 92, n.197. That provision also makes it clear that an award may be decreased if a whistleblower is found to have intentionally interfered with internal compliance or reporting systems. *Id.* at 125.

- The rules further incentivize internal reporting by making a whistleblower eligible for an award based on "information that the whistleblower reports through the company's internal reporting system." *Id.* at 42. The award is available whether the company first reports the information to the SEC, or someone else (another employee) first reports to the SEC. In this way, the SEC explains, it is not rewarding the first employee to report a violation and penalizing the person who uses an internal reporting system to advise the company of a potential violation. In such a circumstance, "the whistleblower who had first reported internally will be considered the first whistleblower." *Id.* at 90.

- The SEC states that in "appropriate cases" – and being careful to protect the identity of the whistleblower – it may contact a company, describe the allegations and "give the company an opportunity to investigate the matter and report back." *Id.* at 92. Thus, it explains, "we do not expect our receipt of whistleblower complaints to minimize the importance of effective company processes for addressing allegations of wrongful conduct." *Id.* In addition, a company will be rewarded for self-reporting a violation even after an SEC investigation has begun. *Id.* at 77.

3. Internal Reporting Alone May Constitute Protected Conduct, If The Report Was Communicated To The SEC By Others, Or The Internal Report Falls Within The "Catch-all" Provision

In *Egan v. TradingScreen, Inc.*, No. 10 CIV. 8202 LBS, 2011 WL 1672066 (S.D.N.Y. May 4, 2011), the court addressed whether the plaintiff must personally transmit his complaint to the SEC for it to be protected under Dodd-Frank. Egan was the company's head of sales for the Americas. In early 2009, he allegedly learned that the CEO was diverting corporate assets to another company that he solely owned. In January 2010, believing that the CEO's behavior was jeopardizing the company's business, Plaintiff reported it to the President of the company, who

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then contacted the Board of Directors (Board). The Board hired an outside law firm to conduct an investigation, in which Plaintiff participated. The investigation confirmed Plaintiff's allegations. Shortly thereafter, the CEO terminated Egan's employment.

The court considered whether Dodd-Frank's anti-retaliation provisions require a plaintiff *personally* to report information to the SEC. Though Egan never personally and directly reported any information to the SEC, he claimed he was protected since he initiated the inquiry and disclosed information in interviews with the law firm conducting the investigation. Egan claimed he was "acting jointly" with the law firm because he expected the law firm to report the information to the SEC. The court agreed with Egan, noting that "[t]he plain text of the statute merely requires that the person seeking to invoke the private right of action have acted with others in such reporting, not that he or she led the effort to do so." It thus found Egan's cooperation with the law firm's investigation sufficient to allow him to invoke Dodd-Frank's protections – provided he demonstrate that the law firm did in fact provide the information to the SEC. Thus, the court refused to dismiss Egan's case. Instead, it gave him permission to file an amended complaint pursuant to its opinion.

Egan then filed an amended complaint, but still did not specifically allege in his pleading that the law firm actually did provide the information to the SEC. Accordingly, at that point, Egan's lawsuit was dismissed for failure to state a claim under Dodd-Frank. *See Egan v. TradingScreen, Inc*., No. 10 CIV. 8202 LBS, 2011 WL 4344067 (S.D.N.Y. Sep 12, 2011).

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

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

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

The *Asadi* plaintiff argued that even if the Act's anti-retaliation protection did not apply extraterritorially, he was eligible for protection, apparently based in large part on an e-mail from GE Energy which terminated his employment "as an at-will employee, as allowed under U.S. law" and stated that "[a]s a U.S. based employee you will be terminated in the U.S." *Id*. at * 5 & n.46. In contrast to its extended discussion of extraterritorial application, the court dismissed this factual argument in a single paragraph, noting that the plaintiff admitted that "the majority of events giving rise to the suit occurred in a foreign country," the e-mail was sent to plaintiff in

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Jordan, related to his employment in Jordan, and noted that a letter would be sent to his home in Jordan." *Id*. at *5.

The district court's decision in *Asadi* was affirmed on different grounds in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013).

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

G. The SEC's Attack On Confidentiality Agreements It Perceives As Inconsistent With Dodd-Frank

On April 1, 2015, the SEC took action against — including a $130,000.00 fine — a company over concerns that the company was preventing its employees from potentially blowing the whistle on illegal activity. The action is significant because the SEC was targeting typical language in a confidentiality agreement and there were no allegations that the company, KBR, Inc., was violating any substantive securities law.

The Dodd-Frank Act amended the Securities Exchange Act to provide for whistleblower incentives and protections in order to encourage individuals to report possible violations of securities laws, but the new law goes further than merely encouraging reporting. Under SEC Rule 21F-17, companies may not take action to impede individuals from communicating with SEC staff about possible law violations, "including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications."

Like many large companies, KBR has a compliance program to process complaints from employees concerning potentially unethical or illegal conduct. KBR has its own investigators who review these complaints and interview witnesses, including the individual who made the allegations. For many years KBR used a form confidentiality agreement in connection with its internal investigations. KBR's investigators asked witnesses to sign the statement at the beginning of an interview. The form provided as follows: "I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment."

The SEC asserted that this language violated Dodd-Frank and Rule 21F-17. Despite finding that (1) no employee was actually prevented form reporting potential law violations to the SEC, and (2) KBR had not tried to enforce the confidentiality agreement, the SEC nonetheless found that the offending language "undermines the purpose of Section 21F," which is to encourage individuals to report to the SEC.

Without admitting wrongdoing, KBR agreed to (1) contact employees who had previously signed the agreement and advise them that they do not need permission from KBR's

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legal department to report potential illegal activity to the government, (2) refrain from further violations, and (3) pay a $130,000 civil monetary penalty.

The SEC's order in this case is a warning to other companies that may have similar, otherwise typical confidentiality provisions which are intended to protect privileged communications, and not intended or used to prevent employees from reporting potential law violations to the SEC. Moreover, the fact that the SEC's action involved a company not even accused of actually preventing such reporting, or violating any substantive securities law, may signal that the SEC intends to be aggressive in searching out similar provisions in confidentiality agreements used by other companies for similar enforcement actions. Accordingly, employers should review their confidentiality agreements to ensure they do not run afoul of SEC Rule 21F-17 as interpreted by the SEC in this case.

H. Other Anti-Retaliation Laws Created Or Strengthened By Dodd-Frank

Dodd-Frank amended SOX's anti-retaliation provision. Those amendments are discussed in section XVII.C of this paper. Immediately below is a summary of other anti-retaliation laws, aside from SOX, that Dodd-Frank created or strengthened.

1. Private Cause Of Action For Retaliation Under Dodd-Frank Section 1057, Relating To The Consumer Financial Protection Act of 2010, For Financial Services Employees

Dodd-Frank Section 1057 creates a robust private right of action for employees in the financial services industry who suffer retaliation for disclosing information about fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or service. The scope of coverage is quite broad in that Section 1057 applies to organizations that extend credit or service or broker loans; provide real estate settlement services or perform property appraisals; provide financial advisory services to consumers relating to proprietary financial products, including credit counseling; or collect, analyze, maintain, or provide consumer report information or other account information in connection with any decision regarding the offering or provision of a consumer financial product or service.

Section 1057 prohibits retaliation against an employee who has engaged in any of the following protected acts:

- Provided, caused to be provided, or is about to provide or cause to be provided, to an employer, the newly created Bureau of Consumer Financial Protection (Bureau), or any other government authority or law enforcement agency, information that the employee reasonably believes relates to any violation of any provision of Title X of the bill, which establishes new consumer financial protections, or any rule, order, standard or prohibition prescribed or enforced by the Bureau;

- Testified or will testify in a proceeding resulting from the administration or enforcement of any provision of Title X;

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- Filed, instituted, or caused to be filed or instituted any proceeding under any federal consumer financial law; or

- Objected to, or refused to participate in any activity, practice, or assigned task that the employee reasonably believes to be a violation of any law, rule, standard, or prohibition subject to the jurisdiction of, or enforceable, by the Bureau.

Remedies include reinstatement, backpay, compensatory damages, and attorney's fees and litigation costs, including expert witness fees. Where reinstatement is unavailable or impractical, front pay may be awarded.

Section 1057 employs a burden-shifting framework that is favorable to employees. A complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable action. A contributing factor is any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision. Once a complainant meets his or her burden by a preponderance of the evidence, the employer can avoid liability only if it proves by clear and convincing evidence that it would have taken the same action in the absence of the employee's protected conduct.

The statute of limitations for a Section 1057 claim is 180 days and the claim must be filed initially with OSHA, which will investigate the complaint and can order preliminary reinstatement. Once OSHA issues its findings, either party can request a hearing before a DOL administrative law judge. If the DOL has not issued a final order within 210 days of the filing of the complaint, the complainant has the option to remove the claim to federal court and either party can request a trial by jury. Section 1057 claims are exempt from mandatory arbitration agreements.

2. Amendment Of The Commodity Exchange Act

Section 748 amends the Commodity Exchange Act to create a whistleblower incentive program and whistleblower protection provision that are substantially similar to the SEC reward program and anti-retaliation provision contained in section 922.

Under section 748, the amount of a reward is determined by the Commodity Futures Trading Commission ("CFTC") and unlike section 922, a whistleblower may appeal any determination regarding an award, not just rewards outside of the 10 to 30 percent range. Protected conduct under Section 748 includes providing information to the CFTC in accordance with the whistleblower incentive provision and "assisting in any investigation or judicial or administrative action of the [CFTC] based upon or related to such information."

On August 4, 2011, the CFTC approved its Final Rule implementing the whistleblower and bounty hunter provisions applicable to the Commodity Exchange Act under Section 748 of the 2010 Dodd-Frank Act. The Final Rule establishes a "Commodity Whistleblower Incentives and Protection" program nearly identical to the whistleblower incentive and protection program created under Section 922 of the Dodd-Frank Act, which provides financial incentives for employees to report violations of federal securities laws.

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3. Amendment Of The False Claims Act

The False Claims Act ("FCA") is a whistleblower law that allows a private individual with knowledge of past or present fraud committed on the federal government to sue on the government's behalf and recover a portion of any damages award. *See* 31 U.S.C. §§ 3729-3733. Dodd-Frank broadens the FCA to cover conduct by persons "associated" with a whistleblower in furtherance of an FCA whistleblower action. Dodd-Frank Act §1079B(c). Dodd-Frank also now clarifies that the statute of limitations for an FCA retaliation claim is three years. 31 U.S.C. § 3730(h)(3). The statute states, "[a] civil action under [the FCA's anti-retaliation provisions] may not be brought more than 3 years after the date when the retaliation occurred." 31 U.S.C. § 3730(h)(3).

Note, however, that the bar against arbitration found in Dodd-Frank, and the amended SOX, does not apply to claims under the FCA. *See James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020, 1028-29 (S.D. Tex. 2012) (FCA does not prohibit arbitration and nothing in Dodd-Frank changed that); *Ruhe v. Masimo Corp.*, No. SACV 11–00734–CJC(JCGx), 2011 WL 4442790, at *4 (C.D. Cal. Sept. 16, 2011) (explaining that Dodd–Frank's anti-arbitration amendments extend only to the two statutes it specifically amended in this regard, SOX and the Commodity Exchange Act).

In 2009, Congress had strengthened the FCA's anti-retaliation provision by providing for individual liability and broadening the scope of coverage to include contractors and agents. *See* Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624-625.

XVI. SARBANES-OXLEY UPDATE

A. ***Parexel* And Its Prodigy**

1. The Pre-*Parexel* Landscape

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

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or

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> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a).

29 C.F.R. § 1980.104(b)(1) sets out the *prima facie* elements of a SOX whistleblower claim:

> (i) the employee engaged in a protected activity or conduct; (ii) the [employer] knew or suspected, actually or constructively, that the employee engaged in the protected activity; (iii) the employee suffered an unfavorable personnel action; and (iv) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

Id.; *see also Harp v. Charter Comm., Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) (same); *Gale v. U.S. Dept. of Labor*, 384 Fed. Appx. 926, 929 (11th Cir. 2010) (same); *Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (same); *Mozingo v. South Financial Group, Inc.*, 520 F. Supp. 2d 733, 740 (D.S.C. 2007) (same).

Under SOX, a plaintiff's activity is "protected" only if the employee "provide[s] information ... regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1); *see also Perez v. Progenics Pharmaceuticals, Inc.*, 965 F. Supp. 2d 353 (S.D.N.Y. 2013). "To demonstrate that a plaintiff engaged in a protected activity, a plaintiff must show that he 'had both a subjective belief and an objectively reasonable belief that the conduct he complained of constituted a violation of relevant law.'" *Welch*, 536 F.3d at 275; *see also Fraser v. Fiduciary Trust Co. Int'l*, 396 Fed. Appx. 734, 735 (2d Cir. 2010) (affirming district court's grant of summary judgment where "record evidence would not permit a factfinder to conclude that [plaintiff] held both a subjective and objectively reasonable belief that [plaintiff] was reporting conduct covered by [Sarbanes–Oxley]"). In assessing the reasonableness of a plaintiff's belief regarding the illegality of the particular conduct at issue, courts look to the basis of the knowledge available to a reasonable person in the circumstances with the employee's training and experience. *See Pardy v. Gray*, No. 07–CV–6324, 2008 WL 2756331, at *5 (S.D.N.Y. July 15, 2008) ("It is sufficient for a plaintiff to show that she reasonably believed, based on the knowledge available to her, considering her training and the circumstances, that her employer was violating the applicable federal law."); *see also Harp v. Charter Comm., Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) ("Objective reasonableness is evaluated based on the knowledge available to a reasonable

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person in the same factual circumstances with the same training and experience as the aggrieved employee." (internal quotation marks omitted)).

SOX does not follow the familiar Title VII *McDonnell Douglas* burden-shifting framework. Rather, in a SOX retaliation case:

> [A]n employee bears the initial burden of making a *prima facie* showing of retaliatory discrimination; the burden then shifts to the employer to rebut the employee's *prima facie* case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity.

Welch v. Chao, 536 F.3d 269, 275 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009) ; *see also* 18 U.S.C. § 1514A(b) ("An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code."); 49 U.S.C. § 42121(b)(ii) ("[N]o investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."); *see also Livingston v. Wyeth, Inc*., 520 F.3d 344, 352–53 (4th Cir. 2008) (setting out SOX affirmative defense standard).

"The words 'a contributing factor' mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Pardy v. Gray*, No. 07 Civ. 6324(LAP), 2008 WL 2756331, at *5 (S.D.N.Y. July 15, 2008) (Preska, J.) (citing *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)); *Allen v. Administrative Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008) (stating in a SOX case that "[a] contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."). The Tenth Circuit referred to the "contributing factor" standard as being "broad and forgiving." *Lockheed Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121 (10th Cir. 2013). In *Lockheed*, the court stated that the "contributing factor" standard was intended to overrule existing case law that required whistleblowers to prove that their protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in an unfavorable personnel action in order to prevail. *Id*. at 1136.

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

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factor between the claimant's complaint and constructive discharge, despite passage of twenty months between the date the plaintiff filed her ethics complaint and the date she resigned); *Barker*, 888 F. Supp. 2d at 300-01 (sufficient causal connection existed despite five month gap between reporting and termination, where in between plaintiff was overlooked for assignments and given unfavorable reviews).

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

Until *Parexel* was decided, the vast majority of SOX claimants – more than 95% – lost their cases, often because the Administrative Law Judge ("ALJ"), Administrative Review Board ("ARB"), or federal district or appellate court concluded that they had not engaged in protected activity under the law. The decisions commonly reached that conclusion by finding that the alleged fraud that the claimant complained of was not material, that the complaint did not specifically and definitively relate to one of the six categories listed in SOX Section 806 or fraud on shareholders, or that the complaint was about supposed fraud that may occur in the future, but had not yet occurred. *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65 (2007).

2. *Parexel*

In *Sylvester v. Parexel Int'l LLC*, No. 07-123, 2011 WL 2165854 (ARB May 25, 2011), the ARB dramatically shifted the standards for "protected activity" under Section 806 of SOX in favor of claimants. In this case, the complainants reported to company managers that their co-workers failed to properly record test times for clinical drug trials that the company performed on behalf of drug manufacturers; that management responded that it "was no big deal"; and that they then were subjected to various forms of retaliation. The ALJ dismissed the complaint, finding that Complainants failed to establish they engaged in SOX-protected whistleblower activity. However, the ARB reversed, making the following significant holdings:

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- The federal pleading standards do not apply to SOX whistleblower claims initiated with OSHA.

- An employee's complaint need not "definitively and specifically" relate to the categories listed in Section 806, and need not relate to fraud on shareholders.

- The "reasonable belief" standard does not require that the complainant actually communicate the reasonableness of his or her belief to management or other authorities.

- Section 806 protects complaints about a violation of law that has not yet occurred, provided that the employee reasonably believes, based on facts known to him or her, that the violation is about to be committed.

- A complainant need not establish the elements of fraud, including materiality.

These holdings contradicted many prior rulings from ALJs, federal courts, and the ARB itself.

3. Post-*Parexel* ARB Decisions – An Avalanche Of Favorable Decisions For SOX Complainants

Parexel was decided on May 25, 2011. Since May 25, 2011, the ARB has continued to follow *Parexel* in numerous cases, to the great benefit of SOX claimants. *See, e.g., Gunther v. Deltek, Inc.*, No. 14-2415, 2016 WL 2946570 (4th Cir., May 20, 2016 (affirming ARB's decision in favor of SOX claimant and its award of $300,342.00 in front pay); *Barrett v. E-Smart Technologies, Inc.*, Nos. 11-088 12-013, 2013 WL 1856718 (ARB Apr. 25, 2013) (affirming ALJ's liability finding and damages award of more than $1.2 million against employer under *Parexel* standard); *Zinn v. American Commercial Lines, Inc.*, No. 10-029, 2012 WL 1102507, at *4-5 (ARB Mar. 28, 2012) (relying on *Parexel* to conclude that the ALJ "legally erred in analyzing the evidence of Zinn's objective reasonableness of a violation of pertinent law, thus warranting a remand . . . [partially because] an allegation of shareholder fraud is not a necessary component of protected activity under Section 806 of the SOX"); *Prioleau v. Sikorsky Aircraft Corp.*, No. 10-060, 2011 WL 6122422, at *5-7 (ARB Nov. 9, 2011) (reversing ALJ's decision against complainant based largely on *Parexel*); *Menendez v. Halliburton, Inc.*, No. 09-002, 2011 WL 4439090, at *8 (ARB Sept. 13, 2011) (relying on *Parexel* in affirming ALJ's conclusion that the complainant engaged in SOX-protected activity); *Funke v. Federal Express Corp.*, No. 09-004, 2011 WL 3307574, at *7 (ARB July 8, 2011) (reversing ALJ's decision against complainant based in part on *Parexel*); *Inman v. Fannie Mae*, No. 08-060, 2011 WL 2614298, at *6-7 (ARB June 28, 2011) (reversing ALJ's decision against complainant based on *Parexel* and stating that "an allegation of fraud is not a necessary component of protected activity under Section 806."); *Mara v. Sempra Energy Trading, LLC*, No. 10-151, 2011 WL 2614345, at *6-7 (June 28, 2011) (reversing ALJ's decision against complainant based on *Parexel*).

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4. Post-*Parexel* Federal Court Decisions That Discuss *Parexel*

a. *Gladitsch v. Neo@Ogilvy*, No. 11 Civ. 919 DAB, 2012 WL 1003513 (S.D.N.Y. Mar. 21, 2012)

In *Gladitsch v. Neo@Ogilvy*, the district court cited *Parexel* with approval for the proposition (that some courts have rejected) that protected activity under SOX Section 806, 18 U.S.C. § 1514A(a)(1), is not limited to reporting fraud against shareholders, but rather prohibits an employer from retaliating against an employee who complains about any of the six enumerated categories of misconduct under that section, whether or not they involve reporting fraud against shareholders. *Id*. at *7.

Other courts taking this same position include *Lockheed Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121 (10th Cir. 2013) (complaints regarding mail and wire fraud were protected, even though they did not related to shareholder fraud); *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 518 (S.D.N.Y. 2008) (employee's reporting of employer's fraudulent scheme to evade social security taxes deemed protected activity, regardless of relation to shareholder fraud), and *Reyna v. ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1381 (M.D. Ga. 2007) (finding that § 1514A "clearly protects an employee against retaliation based upon that employee's reporting of mail fraud or wire fraud regardless of whether that fraud involves a shareholder of the company").

Courts taking a contrary position (all pre-*Parexel*) include *Bishop v. PCS Admin., (USA), Inc*., No. 05 Civ. 5683, 2006 WL 1460032 at *9 (N.D. Ill. May 23, 2006) (finding that the phrase "relating to fraud against shareholders" must be read as modifying all violations enumerated under section § 1514A) (citations omitted), and *Livingston v. Wyeth, Inc*., 2006 WL 2129794 *10 (M.D.N.C. July 28, 2006) ("To be protected under Sarbanes-Oxley, an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud."), *aff'd*, 520 F.3d 344 (4th Cir. 2008). The Fifth Circuit U.S. Court of Appeals expressly declined to rule on this issue in *Allen v. Administrative Review Bd*., 514 F.3d 468, 480 n. 8 (5th Cir. 2008) ("Because the issue is not before us, we express no opinion on whether the first five enumerated categories of protected activity found in § 1514A require some form of scienter related to fraud against shareholders.") (citations omitted).

Post-*Parexel*, however, the court in *Gauthier v. Shaw Group, Inc.*, No. 3:12–cv–00274–GCM, 2012 WL 6043012, at *5 (W.D.N.C. Dec. 4, 2012), continued to follow *Wyeth*, and dismissed the plaintiff's SOX claim, because even if the plaintiff raised concerns of fraud, the concerns did not concern fraud against shareholders. As the court concluded, "[a]ny fraudulent modification of the safety-related report would not provide a basis for suit under Section 1415A because it in no way reflects attempts to defraud shareholders." *Id*. The court did not discuss or mention *Parexel*.

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

In this case, the plaintiff filed a complaint alleging retaliation under Section 806 after having reported concerns about certain corporate expenditures. The district court granted the

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defendants' motion to dismiss. The district court held that the plaintiff failed to adequately allege that he engaged in protected activity, and emphasized that Section 806 only protects employees who provide information regarding conduct they "reasonably believe" violates one of the laws enumerated in Section 806, and that the complaint must "definitively and specifically" relate to such laws. Following the dismissal of the complaint, the plaintiffs moved for reconsideration, relying on the ARB's decision in *Parexel* rejecting the "definitively and specifically" standard. The court district court denied the motion for numerous reasons, including its belief that an ARB decision is not binding authority on a United States district court. *Id*. at 126. Wiest filed an appeal.

In a 2-1 decision issued on March 19, 2013, the Third Circuit U.S. Court of Appeals reversed the district court. The Third Circuit held that the ARB's rejection of the "definitive and specific" standard [in *Parexel*] is entitled to *Chevron* deference." *Id*. at 131 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984) ("If ... the court determines Congress has not directly addressed the precise question at issue ... the question for the court is whether the agency's answer is based on a permissible construction of the statute.")). Moreover, it concluded that, based on *Parexel*: (1) the District Court erred by requiring that an employee's communication reveal the elements of securities fraud, including intentional misrepresentation and materiality; and (2) the District Court erred in holding that to constitute protected activity, the information contained within an employee's communication must implicate "a reasonable belief of an *existing* violation." *Id*. at 132-33. After applying what the Third Circuit considered to be the correct legal standard, it found that the plaintiff had alleged sufficient facts to make out a SOX retaliation claim, and remanded the case to district court for further proceedings. *Id*. at 135-38. One justice dissented, arguing that *Parexel* was wrongly decided by the ARB, and was not entitled to deference. That justice's position is in line with pre-*Parexel* cases from other circuit courts that adopted the "definitive and specific" standard, such as *Day v. Staples*, 555 F.3d 42 (1st Cir. 2009) and *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009).

It is worth noting that, after remand, Tyco prevailed in this case. The district court granted summary judgment for Tyco, concluding that there was insufficient evidence for a jury to find that Wiest's protected activity was a contributing factor in Tyco's preliminary or final decision to terminate Wiest's employment. Wiest appealed, and the Third Circuit affirmed the district court's decision. *See Wiest v. Tyco Electronics Corp.*, 812 F.3d 319 (3rd Cir. 2016). As it turned out, Wiest had been investigated for sexual harassment and inappropriate sexual relationships, and the HR director who was in charge of the investigation and made recommendations on how to discipline Wiest was not even aware that he had made any SOX-protected complaints.

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

In this case, the Tenth Circuit held that the claimant had engaged in protected activity under SOX when she made a complaint relating to mail fraud and wire fraud, even though the alleged fraud was not related to fraud on shareholders. *Id*. 1131. In doing so, it relied upon *Parexel*'s same conclusion, and gave the *Parexel* decision *Chevron* deference, stating that

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"[b]ecause the Board's interpretation of Section 806 is based on a permissible construction of the statute, we hold an employee complaint need not specifically relate to shareholder fraud to be actionable under the Act." *Id*. at 1131-32.

d. *Stewart v. Doral Financial Corp.*, 997 F. Supp. 2d 129 (D. Puerto Rico 2014)

In this case, the district court held that the ARB's decision in *Parexel* is entitled to *Chevron* deference, and denied the employer's motion to dismiss. In doing so the district court relied on both the *Wiest* and *Lockheed* decisions from 2013 that both also gave *Parexel* Chevron deference.

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

In *Nielsen*, the Second Circuit declined to decide whether *Parexel* deserved *Chevron* deference, but did conclude that it was at least entitled to, "respect according to its persuasiveness" pursuant to *Skidmore v. Swift & Co*., 323 U.S. 134, 65 S. Ct. 161 (1944). Based on that deference, the Second Circuit agreed that "in accord with the ARB's interpretation in *Sylvester*, that the "definitively and specifically" requirement is not in keeping with the language of the statute." *Id*. at 221. Rather, the Second Circuit held that Section 806 "extends whistleblower protection to information provided by an employee regarding any conduct which the employee *reasonably believes* constitutes a violation of the enumerated federal provisions." *Id*. (emphasis added and internal quotation marks omitted).

f. *Taylor v. Fannie Mae*, 65 F. Supp. 3d 121 (D.D.C. 2014)

The court held that "the ARB's interpretation of "reasonable belief" [in *Parexel*] is reasonable in light of this ambiguity and is entitled to *Chevron* deference, and therefore rejected the "definitively and specifically" standard.

g. *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797 (6th Cir. 2015)

In this case, the Sixth Circuit U.S. Court of Appeals followed the Second Circuit, and held that *Parexel* deserved respect according to its persuasiveness pursuant to *Skidmore v. Swift & Co*., 323 U.S. 134, 65 S. Ct. 161 (1944). Based on that deference, the Sixth Circuit agreed that with the ARB's interpretation in *Parexel*, that the "definitively and specifically" requirement was not the law and affirmed a jury verdict for the plaintiff in a SOX retaliation case.

h. *Beacon v. Oracle*, __ F.3d __, 2016 WL 3144730 (8th Cir. June 6, 2016)

In this case, the Eighth Circuit joined the Second, Third, and Sixth Circuits and deferred to the ARB, and gave *Parexel* deference. Accordingly, the court rejected the "definitively and specifically" standard. Nevertheless, the court upheld summary judgment for the employer, even

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under *Parexel's* less demanding "reasonable belief" standard, primarily because the plaintiff could not have reasonably believed that a discrepancy of $10 million is too small to create a fraud on shareholders where, as here, the employer annually generates billions of dollars.

B. Other Recent Significant SOX Decisions

1. The Fifth And Fourth Circuits Hold That SOX Retaliation Claims Brought In Federal District Court Have An Administrative Exhaustion Requirement With OSHA

In *Wallace v. Tesoro Corp.*, 796 F.3d 468 (5th Cir. 2015), the Fifth Circuit Court of Appeals held that SOX retaliation claims brought in federal court must first be exhausted with OSHA. The Fifth Circuit held that similar to the rule in Title VII cases *vis a vis* the EEOC, a SOX retaliation plaintiff may only pursue in court a complaint that was within the "sweep of the OSHA investigation that can reasonably be expected to ensue from the administrative complaint [to OSHA]." *Id*. at *5. Applying this standard, the plaintiff had failed to exhaust the part of his SOX retaliation claim that related to alleged wire fraud, and thus the district court did not err in dismissing that aspect of his claim. *Id*. at *6. In its holding, the Fifth Circuit joined the Fourth Circuit, the only other circuit to address this issue. *See Jones v. Southpeak Interactive Corp. of Del*., 777 F.3d 658, 669 (4th Cir. 2015) (holding in a SOX retaliation case that "litigation may encompass claims 'reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint.'") (quoting *Evans v. Techs. Applic. & Serv. Co*., 80 F.3d 954, 963 (4th Cir. 1996)).

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

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

> The determination whether a complainant has met his or her initial burden of proving that protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on the evidence submitted by the complainant, in disregard of any evidence submitted by the respondent in support of its affirmative defense that it would have taken the same personnel action for legitimate, non-retaliatory reasons only. Should the complainant meet his or her evidentiary burden of proving "contributing factor" causation, the respondent's affirmative defense evidence is then to be taken into consideration, subject to the higher "clear and convincing" evidence burden of proof standard, in determining

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> whether or not the respondent is liable for violation of SOX's whistleblower protection provisions.

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

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

A potential problem with applying the ARB's holding is that evidence in many cases is not easily compartmentalized. Often evidence that establishes a legitimate reason for terminating an employee (the defense's burden) will deprive the complainant of the quantum of proof necessary to demonstrate that the activity protected by SOX was a contributing factor in the adverse employment action (the complainant's burden).

In the case of *Powers v. Union Pacific RR Co.*, No. 13-034, 2015 WL 1959425 (ARB Mar. 20, 2015), the ARB, sitting *en banc*, reaffirmed its holdings in *Fordham* in a 3-2 decision, stating:

> The holding in *Fordham*, in which the ARB distinguished the evidence relevant to the determination of whether a complainant meets his/her burden of proving contributing factor causation from an employer's affirmative defense evidence is consistent with both the OALJ Rules requiring deference to rules "of special application as provided by statute, executive order, or regulation" (29 C.F.R. § 18.1(a)), and the relevance of admissible evidence as prescribed statute or "other rules or regulations prescribed ... pursuant to statutory authority" (29 C.F.R. § 18.402).

Id. at *17.

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

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

After a hearing, the ALJ ruled in favor of the employer, but in 2012 the ARB vacated the order. *See Zinn v. American Commercial Lines, Inc.*, No. 10-029, 2012 WL 1102507, at *4-5 (ARB Mar. 28, 2012). The ARB ruled that an employee does not have to prove that the employer's reasons for taking adverse action are false and a pretext for retaliation, as she would ordinarily have to do under federal employment discrimination statutes. Instead, the ARB held that once the employee makes a bare showing that she engaged in protected activity and suffered adverse action related to that activity, the employer must show by "clear and convincing evidence" that it would have made the same decision absent the protected activity. The ARB explained that an ALJ must weigh the evidence as a whole in assessing whether an employer met the "clear and convincing" standard. The case was sent back to the ALJ who, after submission of additional briefing and evidence, again found for the employer.

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

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

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

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

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Until the *Lawson* case, no court had addressed the meaning of the term "an employee." In *Lawson*, the plaintiffs worked for private companies that provided services for Fidelity mutual funds. The plaintiffs' actual employers were privately held companies, but served as contractors to the publicly held mutual funds, which have no employees of their own.

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

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

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

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

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

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

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

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

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

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

Lawson has its limits, however, as demonstrated by the post-*Lawson* case of *Gibney v. Evolution Marketing Research, LLC*, 25 F. Supp. 3d 741, 748 (E.D. Pa. 2014). In *Gibney*, the district court distinguished *Lawson* and concluded that the plaintiff's claims fell outside the scope of SOX, although the court said this was "a close question."

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

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

More recently, another court explained:

> Analyzing the facts of *Lawson*, *Gibney*, and the Enron scandal, the Court concludes that there are two main limitations on the scope of § 1514A. First, the whistleblowing must relate to the contractor's provision of services to the public company. *See Lawson*, 134 S.Ct. at 1173. Thus, § 1514A only covers contractors insofar as they are firsthand witnesses to corporate fraud at a public company—for example, the lawyers and accountants in the Enron scandal who facilitated and contributed to the fraud. It does not cover contractor employees who experience retaliation that is unrelated to the provision of services to a public company. The second limitation is that § 1514A is concerned with public company fraud, whether committed by the public company itself or through its contractors. *Gibney*, 25 F. Supp.3d at 747; *see also Lawson*, 134 S.Ct. at 1173 ("[T]he contractor ... fulfilling its role as a contractor for the public company, not the contractor in some other capacity." (emphasis added)). A private company's

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> fraudulent practices do not become subject to § 1514A merely because that company incidentally has a contract with a public company. *See Fleszar v. U.S. Dep't of Labor*, 598 F.3d 912, 915 (7th Cir. 2010) ("Nothing in § 1514A implies that, if [a privately held company] buys a box of rubber bands from Wal–Mart, a company with traded securities, the [privately held company] becomes covered by § 1514A."). The effect of these limitations is to restrict § 1514A to situations where a contractor employee is functionally acting as an employee of a public company, and in that capacity, is a witness to fraud by the public company.

Anthony v. Northwestern Mut. Life Ins. Co., 130 F. Supp. 3d 644, 652 (N.D.N.Y. 2015).

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

The ARB ruled in a 3-2 *en banc* decision that Section 806 of SOX has no extraterritorial application. *Villanueva v. Core Labs., NV*, No. 09-108, 2011 WL 7021145 (ARB Dec. 22, 2011), *aff'd, Villanueva v. U.S. Dept. of Labor*, 743 F.3d 103 (5th Cir. 2014).

Villanueva, a Colombian national, was the CEO of Saybolt de Colombia Limitada ("Saybolt"), an indirect subsidiary of Core Laboratories ("Core"), a Dutch company whose securities are registered under the Securities Exchange Act and traded on the New York Stock Exchange. Core had an office in Houston, and Complainant alleged that Core controlled Saybolt's business. Villanueva further alleged that he complained of a tax evasion scheme that violated Columbian law to Core executives located in Houston, and that they retaliated against him by, among other things, terminating his employment.

Villanueva filed a claim under Section 806 of SOX, which OSHA and an ALJ dismissed. The ARB affirmed the dismissal, principally relying on *Morrison v. National Australian Bank, Ltd*., 130 S. Ct. 2869, 2877 (2010), to evaluate whether Section 806 has an extraterritorial reach and to examine whether the fraudulent activity Villanueva reported would trigger an extraterritorial application of Section 806. The ARB was persuaded that Section 806 does not apply extraterritorially, noting that Section 806(a)(1) refers only to domestic securities laws, criminal laws and financial regulations, and is silent to its extraterritorial application. Likewise, the ARB found that Section 806 did not cover Villanueva's claim because of the foreign nature of the alleged fraud. More specifically, the ARB ruled that dismissal was warranted because Villanueva did not show that Core's U.S. accounting policy was fraudulent, identify any domestic financial statement that was fraudulent or otherwise point to a violation of U.S. law. But, in a footnote, the ARB stated that, in addition to considering where the fraud occurred (which was the driving factor in this case) the following should be considered: the location of the job and the employer; the location of the retaliatory act; and the nationality of the laws allegedly violated that the complainant was retaliated against for reporting.

In February 2014, the Fifth Circuit affirmed the ARB's decision. *See Villanueva v. U.S. Dept. of Labor*, 743 F.3d 103 (5th Cir. 2014). The Fifth Circuit affirmed on different grounds. The Fifth Circuit held that, irrespective of whether Section 806 of SOX has extraterritorial

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application, the plaintiff's complaint must involve an alleged violation of U.S. law to be protected under Section 806. In this case, the Court found that the plaintiff's complaint only alleged violations of Columbian law, and so the complaints were not protected from retaliation under Section 806.

C. Damages Under SOX

1. Until Recently, Courts Had Generally Held That SOX Does Not Provide For Mental Anguish Damages, But Now The Trend Is Clearly To The Contrary

An employee prevailing on a claim brought under Section 1514A shall be entitled to "all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). Compensatory damages under Section 1514A include "(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) the amount of back pay, with interest; and (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." § 1514A(c)(2).

Until 2013, Courts generally held that Section 1514A does not provide for any type of non-pecuniary damages, including mental anguish and punitive damages. *See Murray v. TXU Corp*., No. Civ.A.3:03–CV–0888–P, 2005 WL 1356444, at **3–4 (N.D. Tex. June 7, 2005) (noting the original draft of the remedies provision of section 1514A provided explicitly for punitive damages, but subsequent drafts removed the language, providing force that such terms no longer applied); *see also Walton v. Nova Info. Sys*., 514 F. Supp. 2d 1031, 1035 (E.D. Tenn. 2007) ("Notably, the provision of [Section 1514A] makes no mention of any type of damages considered non-pecuniary, damages such as injury to reputation, mental and physical distress or punitive damages."). In *Hemphill v. Celanese Corp*., No. Civ.A.3:08CV2131-B, 2009 WL 2949759, at *5 (N.D. Tex. Sept. 14, 2009), the district court dismissed the SOX plaintiff's claims for "mental anguish damages, future earnings and benefits, and exemplary and punitive damages," holding that they were not available under SOX as a matter of law.

Courts had also generally held that non-pecuniary damages for reputational injuries are not available, as they would be akin to damages for emotional distress, and allowance for such damages would expand the scope of remedies articulated in and intended by SOX. *See Jones v. Home Federal Bank*, No. CV09-336-CWD, 2010 WL 255856 at *6 (D. Idaho Jan. 14, 2010); *Hanna v. WCI Communities, Inc*., 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004). However, those same courts held that reputational injury damages may be available where they are specifically for reputational injuries that caused a decrease in the plaintiff's future earning capacity, as granting such relief could be consistent with SOX's goal of making the plaintiff whole. *See Jones*, 2010 WL 255856 at *6; *Hanna*, 348 F. Supp. 2d at 1334.

In 2013, in the case of *Lockheed Martin Corp. v. Administrative Review Bd., U.S. Dept. of Labor*, 717 F.3d 1121, 1138-39 (10th Cir. 2013), the Tenth Circuit bucked this approach, and indicated that such damages may be available based on the logic that SOX's language indicated that the specific types of relief mentioned in the statute were "not meant as an exhaustive list of all the relief available to a successful claimant."

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Then, in November 2014, in the case of *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 266-67 (5th Cir. 2014), the Fifth Circuit engaged in an extended analysis, and concluded the SOX did provide for emotional distress damages, and upheld a $30,000.00 emotional harm award. And, in January 2015, the Fourth Circuit agreed, and upheld a $100,000.00 award for emotional harm to prevailing SOX plaintiff. *See Jones v. Southpeak Interactive Corp. of Delaware*, 777 F.3d 658, 672-73 (4th Cir. 2015).

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

The ARB takes the position that compensatory damages for mental distress are available under SOX. In *Kalkunte v. DVI Financial Services, Inc.*, Nos. 05-139, 05-140, 2009 WL 564738, at *13 (ARB Feb. 27, 2009), the ARB affirmed the ALJ's award of $22,000 to a prevailing claimant in a SOX case for "pain, suffering, mental anguish, the effect on her credit [because of her loss of employment] and the humiliation that she suffered." Following *Kalkunte*, Administrative Law Judges have also granted prevailing SOX claimants damages for mental anguish and emotional distress. For example, in *Brown v. Lockheed Martin Corp*., 2008-SOX-00049, 2010 WL 2054426, at *59 (ALJ Jan. 15, 2010), *aff'd*, No. 10-050, 2011 WL 729644 (ARB Feb. 28, 2011) the ALJ awarded, and the ARB affirmed, $75,000.00 in damages to a prevailing SOX claimant for "emotional pain and suffering, mental anguish, embarrassment, and humiliation." As mentioned, in the appeal to the Tenth Circuit, the court declined to rule on whether such damages were available under SOX, but seemed to believe that they were. *See Lockheed Martin Corp. v. Administrative Review Bd., U.S. Dept. of Labor*, 717 F.3d 1121, 1138-39 (10th Cir. 2013) (noting that SOX's "shall include" language indicated that the specific types of relief mentioned in the statute "was not meant as an exhaustive list of all the relief available to a successful claimant.").

XVII. CONCLUSION

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

Now, a new wave of laws – Dodd-Frank and the amended SOX whistleblowing provisions – are in effect, and the ARB and courts are frequently issuing divergent and seemingly contradictory rulings regarding those laws.

Rest assured that all anti-retaliation and whistleblower laws – the old, the new, and those yet to come – will continue to keep generations of employment lawyers busy for many years to come. As employment lawyers ply their trade, and blaze new trails, we hope this paper and presentation are helpful to them, and to you.

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