Corporations, Securities & Antitrust

Testing the Waters of Sarbanes-Oxley Whistleblower Claims

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It has been nearly five years since Congress, in the aftermath of several corporate scandals, including Enron and WorldCom, passed the Corporate and Criminal Fraud Accountability Act of 2002, better known as the "Sarbanes-Oxley Act" or "SOX" for short.[1] Among the many civil and criminal provisions of SOX is a whistleblower provision, Section 806(a), codified at 18 U.S.C. §1514A, that seeks to protect employees from retaliatory employment actions in certain specified circumstances.[2] Questions remain whether Section 1514A provides sufficient protection for corporate whistleblowers who attempt to fall within its coverage and whether it is fair to corporate employers charged with retaliation under the Act. This article will examine Section 1514A, the regulations relating thereto that have been promulgated by the United States Department of Labor (DOL), and the experience of litigants in Occupational Safety & Health Administration (OSHA) investigations and whistleblower actions before administrative law judges (ALJs) and the federal courts.[3]

Section 1514A

Section 1514A protects employees who provide information, cause information to be provided or assist in an investigation "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [of Title 18], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."[4] In addition, for the employee to be protected by the statute, the information pertaining to the violation must be provided to one of the following: "(a) a Federal regulatory or law enforcement agency; (b) any Member of Congress or any committee of Congress; or (c) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[5] An employee is also protected in filing, causing "to be filed, testifying, participat[ing] in or assist[ing] 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 [18 USCS §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."[6] An employer for purposes of Section 1514A is a company "with a class of securities registered under Section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company."[7] Under Section 1514A, an employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee.[8]

An employee who believes that he was subjected to retaliation, in violation of SOX, must file an administrative complaint with the Secretary of Labor within ninety days after the violation occurs.[9] If a final decision is not issued by the Secretary of Labor within 180 days of the filing of the complaint, jurisdiction may transfer to the federal district court and the complainant may then bring his claim before the federal court for a de-novo review, provided that "there is no showing that there has been delay due to the bad faith of the complainant.[10]

29 CFR Part 1980

The Secretary of Labor has issued final rules regarding the handling of discrimination complaints under Section 1514A.[11] The complainant should file a complaint with the Area Director of OSHA, in the area where the complainant lives or was employed, but a complaint may be filed with any OSHA official or employee.[12] To avoid a dismissal of the complaint, the complainant is required to make a prima facie showing that "protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."[13] Even if a prima facie case is established by the complainant, an investigation can be avoided if the employer "demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct."[14] Where the employer does not make the required showing to rebut the prima facie case, an investigation is conducted and the Assistant Secretary of Labor is required to issue written findings, within sixty days of the filing of the complaint, as to whether or not there is reasonable cause to believe that the employer has discriminated against the complainant in violation of the Act.[15] A reasonable cause finding will be accompanied by a preliminary order of "make whole" relief.[16] The parties have the right to file objections within thirty days and to request a hearing before an ALJ.[17] The regulations require the ALJ to conduct a de novo hearing, where the formal rules of evidence will not apply, and to issue a written decision containing appropriate findings, conclusions and an order pertaining to remedies.[18] The ALJ cannot make a determination that a violation has occurred unless the complainant demonstrates that the protected conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.[19]

The ALJ may not order relief where the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse personnel action in the absence of any protected behavior.[20] A party that wishes to appeal an

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ALJ decision must file a written petition for review with the Administrative Review Board ("the Board") within ten business days of the decision of the ALJ; otherwise, the ALJ's ruling becomes the final order of the Secretary.[21] The ALJ's order will also become the final order of the Secretary unless the Board, within thirty days of the filing of the request for review, issues an order notifying the parties that the Board has accepted the case for review.[22] If the Board accepts the case for review, the Board reviews the factual determinations of the ALJ under a "substantial evidence" standard of review.[23] If it concludes that a violation has occurred, the Board will issue an order directing the employer to make the complainant whole; if it concludes otherwise, an order will be issued denying the complaint.[24] A party adversely affected by an order of the Board may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred, or the circuit in which the complainant resided on the date of the violation.[25]

Criticisms of Section 1514A

While Section 1514A created a new right for corporate whistleblowers, some commentators have criticized the law as being inadequate.[26] It has been suggested that the limited avenues for making a complaint may deter some employees from coming forward with complaints.[27] It has also been argued that the ninety day deadline for filing a complaint with OSHA is unreasonable as the time for filing runs from the day that the violation occurs, as opposed to ninety days from when the violation is discovered.[28] Another criticism of Section 1514A is that ALJs and federal district judges are likely to apply an objection standard, as opposed to the more employee-favorable subjective standard, in evaluating whether the complainant reasonably believed that certain conduct violated federal securities laws, which, according to this argument's proponents, will make it harder for complainants to prevail.[29] Other criticisms of the statute and related regulations include the argument that Congress was not serious about Section 1514A because it gave enforcement responsibility to OSHA instead of the SEC, which has the "technical expertise to truly evaluate the complainant and ascertain whether fraud and other manipulation of stock (and/or the marketplace) has taken place; [while] OSHA would not."[30] One commentator has opined that the Section 1514A regulations create a "relaxed structure in which a complaint can be filed, lacking effective means to discourage frivolous filings" and that the regulations reiterate "vague definitions of important concepts within the statute."[31] Finally, some may argue that since Section 1514A does not provide for a right-to-jury trial in cases where jurisdiction is transferred to federal court, that complainants will be at a disadvantage.[32]

OSHA Statistics

SOX retaliation complainants began filing complaints with OSHA in 2002. The number of complaints increased through Fiscal Year 2005 ("FY") to a high of 285 complaints in 2005, before dropping to 223 complaints in FY 2006.[33] From the date of enactment through December 10, 2006, a total of 881 SOX whistleblower complaints were received by OSHA; out of 881 complaints, 791 have been concluded, with 110 withdrawn, 586 dismissed, and 127 found to have merit (of which 110 have settled).[34] Based on the total number of complaint investigations completed, the reasonable-cause finding percentage for SOX whistleblower complaints is 16%.[35] However, a recent article noted that in cases that are appealed out of the OSHA investigative stage to ALJs or the Board of Review "only 5 whistleblowers have won, though that number dwindled to 4 last summer, when the agency's administrative review board overturned a case on appeal… Companies have appealed 3 of the remaining 4 to the board, whose handful of judges so far have not decided an appeal in favor of a whistleblower.[36]

Illustrative Decisions Under Section 1514A

In the federal courts, only a few SOX retaliation cases have been decided on the merits.[37] Recently, the Second Circuit, in *Alliance Berstein Inv. Research & Mgmt., Inc. v. Schaffran,*[38] found that the issue of whether a SOX retaliation claim was excluded from arbitration as "a claim alleging employment discrimination" under Rule 10201(b) of the Code of Arbitration Procedure of the National Association of Securities Dealers (NASD) was a question for the arbitration panel under the NASD Code of Arbitration Procedure.[39]

(1) Evidentiary Framework

The foundational elements for succeeding on a SOX whistleblower complaint are laid out in *Collins v. Beazer Homes, Inc.*[40] The complainant must show that: "(1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action."[41] The court stated that "proximity in time is sufficient to raise an inference of causation."[42] The court then noted that the defendant "may avoid liability if it can demonstrate by clear and convincing evidence that it 'would have taken the same unfavorable personnel action in the absence of [protected] behavior.'"[43]

In *Collins,* soon after the plaintiff, Collins, started working for the defendant, she began having differences with her manager, the division president, and the director of sales.[44] Collins alleged that these individuals were improperly favoring a particular advertising agency.[45] Collins complained to the vice president of sales and marketing of these problems, along with other generalized allegations of "improper conduct."[46] Collins was later terminated and filed a complaint with OSHA requesting whistleblower protection under SOX.[47] When OSHA failed to issue a final administrative decision with 180 days, Collins filed her case in federal court, and after discovery, the defendant moved for summary judgment.[48] Collins alleged that she was terminated because she reported violations of the defendant's internal accounting controls in violation of securities laws.[49] In defense, the company argued that Collins' complaints were not covered by SOX, because she never made *specific* allegations of securities or accounting fraud or violations of any specific SEC rules, but instead made vague or imprecise

complaints.[50] The district court, in denying the defendant's motion for summary judgment, found that SOX protects "all good faith and reasonable reporting of fraud" and that there was a genuine issue of material fact as to whether the complaints were protected activity under SOX.[51] Even though the district court found that "the connection of Plaintiff's complaints to the substantive law protected by Sarbanes-Oxley is less than direct," it allowed the plaintiff's complaint to proceed.[52] The district court also found that summary judgment was inappropriate because there was a factual dispute over whether the defendant would have taken the same employment action absent the protected activity.[53]

(2) Protected Activity

In *Romaneck v. Deutche Asset Management*, plaintiff Romaneck had been subpoenaed to testify before the SEC.[54] He was subsequently fired by the defendant Deutsche Asset Management and was allegedly informed that his firing was due to his intent to testify and "spill the beans on everything he knew" about clients' prohibited "market timing" transactions, and, therefore, he was "not a team player."[55] Romaneck sued for, among other thins, wrongful discharge under Section 1514A of SOX. The court in finding that summary judgment for the defendant was not appropriate on plaintiff's SOX whistleblower claim, noted that "protected activity" under SOX includes not only reporting a specific SOX violation, but also activities such as filing, testifying or otherwise participating in a proceeding if it relates to an alleged securities law violation.[56] Here, the district court found that the plaintiff's anticipated testimony before the SEC was sufficient to constitute protected activity under Section 1514A.[57]

(3) Employer Knowledge of Protected Activity

Courts have engaged in a fact-sensitive inquiry when determining whether an employer was put on notice as to alleged protected activity. Recently in *Fraser v. Fiduciary Trust Company International*,[58] the district court evaluated what constitutes notice to the defendant.

From 2000 to 2003, the plaintiff Fraser was a Vice President at Fiduciary Trust Company International, an investment management company.[59] Fiduciary was acquired by Franklin Resources Inc. in 2001, and Fraser claimed illegal conduct related to Franklin's acquisition of Fiduciary. Specifically, Fraser alleged that filings in connection with the acquisition contained "insufficient, not meaningful, materially false and misleading" statements.[60] Fraser was terminated and brought a SOX whistleblower claim, as well as, several other federal and state statutory claims and a common law claim for breach of contract.

The court addressed several issues in determining if Fraser's SOX claim could proceed to trial. First, Fraser related that he had sent e-mails to Fiduciary's Chief Investment Officer which claimed that the investment performance had suffered because they had failed to implement his recommendations for investing. The court dismissed this allegation, stating that the e-mail was more in the form of a complaint that his advice was not being followed and did not indicate anything to put Fiduciary on notice related to the fraud of the shareholders.[61] Additionally, Fraser's allegation in which he asserted that Fiduciary had discharged him after he had prepared a confidential letter alleging that a portfolio manager had not listened to investment strategy advice, was also dismissed. Here, the court concluded that the documents were "barren of any allegation of conduct that would alert Defendants that Fraser believed the company was violating any federal rule or law related to fraud on shareholders.[62]

Fraser also alleged, that he had prepared an email to distribute firmwide stating that the "company's Fixed Income Group was 'recommending a SELL on WorldCom bonds due to deteriorating industry conditions, continued pricing pressures and heightened competition,'" but was told not to send it out and that he made the Company's President aware of this incident.[63] In addition, Fraser alleged that one to two weeks prior to his termination, he confronted the Head of the Company's Fixed Income Group concerning a scheme to manipulate and falsify managed assets. Fraser alleged that this scheme resulted in Fiduciary receiving a nominal consulting fee, but that his report was "brushed off" by management. [64] The court ultimately determined that Fraser satisfied the elements for a SOX whistleblower claim on his allegations related to the WorldCom bond incident and the alleged scheme.[65] In another case, *Richards v. Lexmark International, Inc.,* the plaintiff had been employed by the defendant for just over two years, when, in late 2002, the employer began to discuss firing him.[66] Lexmark had a well-documented history of performance problems with Richards and his difficulties getting along with coworkers. The company also had well-established documentation of its likely intention to fire Richards in January 2003.

In December 2002, Richards was assigned to assess the company's inflated levels of inventory displayed through record keeping over the previous two years.[67] He provided a preliminary analysis on January 3, 2003, asserting that the company's accounting and bookkeeping methods would potentially lead to erroneous inventory-management reporting. Richards was terminated the next day, at which time he filed a complaint with OSHA alleging that he was fired over the concerns he raised regarding Lexmark's accounting practices.[68]

Lexmark argued that ample documentation proved that it would have fired Richards despite the report he filed. However, construing the evidence in Richard's favor, the ALJ held that the proximity in time between his protected activity and his discharge was more than sufficient to raise an inference of causation, and that Lexmark failed to show by clear and convincing evidence that it would have fired him even in the absence of this conduct.

In June 2006, the case was again reviewed by the ALJ. The main issue addressed was whether Richards reasonably believed that what he was reporting was a violation, such as providing false information to investors which they may rely upon. The ALJ noted that the burden lay with Richards to establish both a subjective and objective element, that he must have actually believed there was a violation, and that that belief must have been reasonable, taking into consideration his training and experience.[69]

Richards' main concern was that upper management

was receiving data that was misleading, and that management decisions based upon that information could mislead the public.[70] The ALJ concluded, however, that Richards did not go so far as to say that the data included intentional misrepresentations or fraud or that that information was disseminated to investors and shareholders.[71] In determining that Richards failed to establish reasonable belief that actual violations and intentional misrepresentations had occurred, the ALJ further noted that Richards did not mention any SEC rules or regulations, or fraudulent activity relating to criminal or civil statutes that were violated.[72]

The ALJ went on to state that no facts were demonstrated that would allow a reasonable person with Richard's training and experience to determine that there was a potential violation of SEC rules or securities fraud.[73] Therefore, Richards could not have reasonably believed that there was a violation, nor did he successfully communicate concerns about a violation.[74]

(4) Unfavorable Personnel Action

When making a determination whether an employment action is adverse for purposes of SOX, courts and ALJs sometimes look to cases decided under Title VII of the Civil Rights Act of 1964 ("Title VII") for guidance.[75] For example, in *Halloum v. Intel Corporation*, the ALJ concluded that a modified, personal corrective action plan which the company forced on the employee was indeed an adverse employment action.[76] The reasoning was that, while the original plan was acceptable, the modified plan included unattainable tasks and set him up for failure, thereby unfavorably affecting his employment.[77] In another case, *Bozeman v. Per-Se Technologies, Inc.,* Bozeman claimed that Per-Se Technologies retaliated against him for complaining to the SEC about "financial irregularities within the company."[78] Per-Se did not dispute that this conduct was a protected activity for purposes of Section 1514A.

Upon filing a claim with the SEC, Bozeman took a medical leave of absence under the Family Medical Leave Act ("FMLA") from March 2003 until his resignation in July 2003.[79] The cause of his leave was stated as severe hypertension, anxiety, and depression, which he attributed to his work environment and remained on physician recommended leave. Throughout the duration of his leave, Bozeman remained in contact with his employer and expressed his desire and intention to return to work.[80] On the day he was scheduled to return, Bozeman notified Per-Se of his resignation.

Bozeman subsequently filed an action against Per-Se and former supervisors alleging violations of Title VII, Section 1514A and as well as several common law claims. Bozeman's complaint alleged that defendants, including individual managers, violated his civil rights by retaliating against him because of his participation in investigations of alleged discrimination committed by defendants, the intentional infliction of emotional distress upon him and by negligently supervising, retaining, and hiring employees.

The court first ruled that Bozeman could not maintain a SOX claim in court against individual managers because he did not name them as respondents when he filed his initial SOX complaint with the DOL.[81] Next, the court rejected Bozeman's alleged "constructive discharge" based on Bozeman's resignation.[82] Here, Bozeman failed to establish the requisite hostility directed at him to support a constructive discharge and was unable to establish an adverse employment action. Bozeman's resignation did not qualify as an adverse action under SOX because his working conditions were not so intolerable that a reasonable person would conclude that he had no other option than to quit. Bozeman contended that he felt he had been "met with hostility" at a meeting in which his managers discussed his returning to work.[83] The court stated, Plaintiff's subjective feeling of hostility . . . is not an adverse employment action."[84]

(5) Causal Connection between Protected Activity and Adverse Action

One of the most difficult elements of proof for plaintiffs in Section 1514A cases is connecting the alleged protected activity to the unfavorable job action. In *Sussberg v. K-Mart Holding Corporation*, the plaintiff, a buyer for K-Mart retail stores, claimed his employment was terminated by K-Mart in violation of Section 1514A.[85] Sussberg claimed retaliation for informing his superiors that his direct supervisor may have been accepting bribes and kickbacks from clothing vendors.

The district court granted K-mart's motion for summary judgment, concluding that Sussberg failed to establish a causal connection between any protected activity and his termination. K-Mart argued that the time lapse between Sussberg's alleged protected activities and his termination was more than five months and that his original allegations went back twenty months prior to his termination. The district court agreed with K-Mart's argument, noting that "while the passage of time is not a conclusive factor, at some point Sussberg's involvement . . . can no longer shield him from being discharged, particularly where there are intervening events."[86]

(6) Exhaustion of Administrative Remedies

In addition to meeting the requisite standard for a prima facie case, established in *Collins*, complainants are required to first exhaust all administrative remedies. For example in *Willis v. Vie Financial Group*, *Inc.*, an employee filed an administrative complaint with OSHA over his employer's threats to terminate him and strip him of his job responsibilities.[87] However, he did not include the allegation that he was terminated from his position in retaliation after he advised his employer that it had failed to comply with NASD requirements. The district court held that it could not consider a retaliatory discharge claim because it was not raised in the administrative complaint. Therefore, since the plaintiff failed to exhaust all administrative remedies, the court dismissed his retaliatory discharge claim. Nonetheless, the plaintiff was permitted to proceed on his retaliation claim over diminished responsibilities, since it amounted to an adverse change in working conditions.

(7) Preliminary Orders of Reinstatement

In *Bechtel v. Competitive Technologies, Inc.*, the Second Circuit reversed the district court's injunction order enforcing the preliminary order of reinstatement issued by OSHA.[88] The court of appeals held that the district court lacked the power to

enforce OSHA's preliminary order under the plan language of Section 1514A. The court of appeals added that the language of the SOX whistleblower provision only provides federal jurisdiction to actions brought by the DOL and private parties when a final order has been issued or when no final order is issued within 180 days after the filing of the complaint. The court found the statutory grant of federal jurisdiction did not extend to preliminary orders and concluded that the district court lacked jurisdiction to issue an injunction enforcing OSHA's preliminary order of reinstatement.

(8) Extraterritorial Application of Section 1514A

In *Carnero v. Boston Scientific Corp.,* the First Circuit held that the whistleblower protections of Sarbanes-Oxley do not extend to foreign citizens working outside the United States for foreign subsidiaries of companies covered by SOX, since there is a general presumption against applying statutes extraterritorially, and since Congress did not indicate that it intended Section 1514A to be applied extraterritorially.[89]

(9) Definition of Employer

In *Brady v. Calyon Securities (USA)*, the district court dismissed the SOX whistleblower claim of the plaintiff on the grounds that he was an employee of a non-publicly traded company.[90] The court rejected the plaintiff's argument that because his employer acted as an agent for certain publicly-traded companies related to investment banking activities, that he was protected by Section 1514A.[91]

(10) Preemption

A district court recently rejected a defendant's argument that a retaliation claim brought under the laws of Puerto Rico was preempted by Section 1514A of SOX. In *Melendez v. Kmart Corporation*,[92] the court, in reviewing the statutory language under Section 1514A(d), found no congressional intent to preempt other federal or state laws.[93]

CONCLUSION

Section 1514A has provided corporate whistleblowers with important new protections. The evidence to date shows that complaints filed with OSHA have increased in the four and one-half years since enactment and that merit-finding rates are relatively high. However, plaintiffs whose complaints are appealed out of the OSHA investigative process have not fared as well before ALJs and the federal district courts. Plaintiffs appear to have the most difficulty proving protected activity and a nexus between the protected activity and the adverse employment action. The recent cases demonstrate that courts are reluctant to stray from the specific statutory language set out in Section 1514A and appear to be relying on case law from other DOL-enforced whistleblower statutes to interpret Section 1514A. While reasonable minds may differ on the question of whether Section 1514A needs to be re-examined, it will remain one of the many potential tools for plaintiffs in employment cases challenging a termination or other adverse job action.

Endnotes

1 Pub. L. No. 107-204, 16 Stat. 745 (codified as amended in scattered sections of Title Eighteen of the United States Code). *See generally*, Chiara, John B. and Orenstein, Michael D., "Whistleblower's Nocturne in Black and Gold-The Falling Rocket: Why the Sarbanes-Oxley Whistleblower Provision Falls Short of the Mark", 23 Hofstra Lab. & Emp. L.J. 235, 237-38 (Fall 2005)(hereinafter cited as "Chiara & Orenstein, at p. ___").

2 18 U.S.C. §1514A, (a).

3 Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act of 2002 (Final Rule), 29 CFR Part 1980 (hereinafter "29 CFR §___").

4 18 U.S.C. §1514A(a)(1).

5 18 U.S.C. §1514A(a)(1)(A)-(C).

6 18 U.S.C. §1514A(a)(2).

7 18 U.S.C. §1514A(a).

8 *Id*. The types of employment actions that potentially trigger liability under SOX may be expanded by The United States Supreme Court's recent decision in *Burlington Northern & Santa Fe Railroad Company v. White*, __U.S._ __, 126 S. Ct. 2405, 2409 (2006) ("We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

9 18 U.S.C. §1514A(b)(1). SOX "is one of 14 whistleblower laws passed since 1974 enforced by the DOL [covering] employees connected to specific topics such as: nuclear materials, airline, trucking, shipping safety, air wand water pollution, [and] abuse of migrant workers." Day, K., *White-Stop Campaigns: Some Firms Are Trying to Limit Protection of Workers Who Expose Wrongdoing*, Washington Post (April 23, 2006). The 14 statutes enforced by OSHA and the regulations governing their administration are listed on OSHA's website. *See* http://www.osha.gov/dep/oia/whistleblower/index.html. Many states, such as New Jersey, have enacted whistleblower statutes that have been liberally construed by their respective state courts. *See, e.g.,* Mehlman v. Mobile Oil Corp., 153 N.J. 163, 707 A. 2d 1000 (1998). In some states, a common law retaliatory discharge cause of action co-exists with a statutory whistleblower action. *See, e.g.,* Guy v. Mutual of Omaha Ins. Co., 79 S.W. 3d 528 (Tenn. 2002).

10 18 U.S.C. §1514A(b)(1). 29 CFR §1980. 114(a). The complainant is also required to file with the ALJ or the Board of Review a notice of intention to file a complaint in federal court fifteen days prior to filing the federal court complaint. *Id*. at §1980. 114(b).

11 *See generally* 29 CFR Part 1980.

12 *Id*. at §1980. 103(c).

13 *Id*. at §1980.104(b). The prima facie requirements are: "(i) The employee engaged in a protected activity or conduct; (ii)The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity; (iii)The employee suffered an unfavorable personnel action; and (iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." Id. The rules provide that "[n]ormally the [prima facie] burden is satisfied, for example, if the complaint shows that the adverse action took place shortly after the protect activity, giving rise to the inference that it was a factor in the adverse action." *Id*. at §1980.104(b)(2). However, courts have held that "mere allegations of whistleblowing without a connection to securities fraud will result in a dismissal of a civil claim." Fatino, J., *The Sarbanes-Oxley Act of 2002 and the New Prohibition on Employer Retaliation Against Whistleblowers: For Whom The Bell Tolls or Tooting One's Own Horn?* 51 S.D.L. Rev. 450, 454 n. 20 (2006) ("Fatino, J.")(citing Rogus v. Bayer Corp. No. 3:02cv1778 (MRK), 2004 U.S. Dist. LEXIS 17026, at *18n. 6 (D. Conn. 2004)).

14 29 CFR §1980.104(c). The employer has 20 days from receipt of notice of the complaint to provide a position statement and supporting evidence or request a meeting with the Assistant Secretary to present its position. *Id*.

15 *Id*. at 1980.105(a).

16 *Id*. at §1980.105(a)(1).

17 *Id*. at §§1980.105(b)(c). The preliminary order is stayed, with the exception of the portion, if any, requiring preliminary reinstatement, upon the filing of timely objections. Id. at §1980.106(b)(1). If no timely objections are filed, the findings and/or preliminary order become the final decision of the Secretary, not subject to judicial review. Id. at §1980,106(b)(2). Judicial enforcement is authorized where a party fails to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement. Id. at §1980.113.

18 *Id*. at §§1980.107 & 1980.109. The ALJ is required to award a make whole remedy, including "reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees." Id. at §1980. 109(b).

19 *Id*. at §1980.109(a).

20 *Id*.

21 *Id*. at §1980.110(a).

22 *Id*. at §1980.110(b).

23 *Id*. The Board is required under the regulations to issue a final decision within 120 days of the conclusion of the hearing. *Id.* at 1980.110(c).

24 *Id*. at §§1980.110(d)(e).

25 *Id*. at §1980.112(a).

26 *Chiara & Orenstein*, at 251-54; *Whistle-Stop Campaigns*, at 1-3, Cf. Lundgren, A., *Sarbanes-Oxley, Then Disney; The Post-Scandal Corporate-Governance Plot Thickens,* 8 Del. L. Rev. 195, 199-204 (2006).

27 *Chiara & Orenstein,* at 251-52.

28 *Id*. at 253. For example, in *Harvey v. Home Depot, Inc.*, DOL-ALJ, No. 2004-SOX-00020 (May 28, 2004) the ALJ dismissed the employee's retaliation complaint finding that the complaint was not timely filed within the 90 day window. *See also* McClendon v. Hewlett-Packard Company, 2005 U.S. Dist. LEXIS 29449, at *6-13 (D. Idaho 2005).

29 *Chiara & Orenstein*, at 253-54. A subjective standard focuses on what the plaintiff actually believed at the time the complaint was made while an objective standard is more restrictive, focusing on what a reasonable person would have believed under the same or similar circumstances.

30 Fatino, J. *supra* at 461.

31 *Id*.

32 *Moy, L. & Neilan, L. Whistleblower Claims Under The Sarbanes-Oxley Act of 2002,* 1556 PLI/Corp 451, 472 (Sept-Dec. 2006), "In the absence of an explicit legislative grant, courts have held this to mean that the right [to a jury trial] simply does not exist." *Id*. [citing *Fraser v. Fiduciary Trust Co.*, 417 F. Supp. 2d. 310 (S.D.N.Y. 2006) [remaining citations omitted].

33 Telephone interview with OSHA *Official Nilgun Tolek, conducted by Lauren Donald* (December 18, 2006) (hereinafter, "OSHA Stats"). The regulations provide for "investigative settlements" and "adjudicatory settlements" that can be enforced by a federal district court. 29 CFR §§1980.111(d)(1)&(2) and §1980.113.

34 OSHA Stats.

35 *Id*. By comparison, from FY 1992 to FY 2005, the reasonable cause finding percentage for all charges filed with the Equal Employment Opportunity Commission ("EEOC") ranged from a high of 9.9% in FY 2001 to a low of 2.2% in FY 1996. *See* EEOC All Statutes FY 1992- FY 2005, http://eeoc.gov/stats/all.html.

36 Whistle-Stop Campaigns, at 1.

37 *Chiara & Orenstein*, at 254.

38 445 F.3d 121, 127 (2d Cir. 2006). *See also* Boss v. Solomon Smith Barney, 263 F. Supp. 2d 684 (S.D.N.Y. 2003) (court enforced agreement to arbitrate involving SOX retaliation claim). Accord Guyden v. Aetna Inc., 2006 U.S. Dist. LEXIS 73353 (D. Conn. 2006). The Second Circuit's decision in Alliance suggests that SOX retaliation claims will be subject to private agreements to arbitrate similar to employment discrimination claims under the Federal Arbitration Act. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001).

39 445 F. 3d at 127.

40 334 F. Supp. 2d 1365, 1375 (N.D. Ga. 2004). In noting that there was little case law on Sarbanes-Oxley, the district court looked to other whistleblower provisions enforced by the DOL. Id. at 1374. The district court noted that "[t]he Sarbanes-Oxley Regulations specifically indicate that consideration was given to the regulations implementing the whistleblower provisions of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century ("AIR 21"), 29 C.F.R. § 1979; the Surface Transportation Assistance Act ("STAA"), 29 C.F.R. § 1978; and the Energy Reorganization Act ("ERA"), 29 C.F.R. 24. See. 29 C.F.R. § 1980 at 2. Moreover, the legal burdens of proof in, Sarbanes-Oxley are taken from AIR 21, 49 U.S.C. § 42121. See also 42 U.S.C. §5851(b)(3) (legal burdens of proof for whistleblowing under ERA)."

41 334 F. Supp. 2d at 1375.

42 *Id*.

43 *Id*. at 1376 [quoting 49 U.S.C. §421219(b)(2)(B)(iv].

44 334 F. Supp 2d at 1368.

45 *Id*.

46 *Id*. at 1369.

47 *Id*. at 1370.

48 *Id*. at 1370-71.

49 *Id*. at 1372.

50 *Id*. at 1376.

51 *Id*. at 1376-77.

52 *Id*. at 1377.

53 *Id*. at 1381.

54 2006 U.S. Dist. LEXIS 59397 (N.D. Cal. August 17, 2006).

55 *Id*. at *18.

56 *Id*. at *18-19.

57 *Id*.

58 417 F. Supp. 2d 310 (S.D.N.Y 2006).

59 *Id*. at 315.

60 *Id*.

61 *Id*. at 322.

62 *Id*.

63 *Id*. at 333.

64 *Id*. at 317.

65 *Id*. at 324.

66 2004-SOX-49 (ALJ Oct. 1, 2004).

67 *Id*. at 14.

68 *Id*. at 18.

69 2004-SOX-49 (ALJ June 20, 2006) at 32.

70 *Id*. at 33.

71 *Id*.

72 *Id*. at 34.

73 *Id*. at 16-18.

74 *Id*. at 33-34.

75 42 U.S.C.§2000e et seq.

76 2003-SOX-7 (ALJ Mar. 4, 2004).

77 *Id*. at 7-9.

78 456 F. Supp. 2d 1282 (N.D. Ga. 2006).

79 *Id*. at 1342, 1361.

80 *Id*. at 1309.

81 *Id*. at 1357.

82 *Id*. at 1356-57.

83 *Id*. at 1360.

84 *Id*.

85 2006 U.S. Dist. LEXIS 86110 (E.D. Mich. 2006).

86 *Id*. at *25-26.

87 2004 U.S. Dist. LEXIS 15753 (E.D. Pa. 2004).

88 448 F.3d 469 (2d Cir. 2006). See also Welch v. Cardinal Bankshares Corp., 454 F. Supp. 2d 552 (W.D. Va. 2006) (District Court concluded that it did not have jurisdiction to enforce a preliminary order of reinstatement under Section 1514A.).

89 433 F.3d 1, 7-9 (1st Cir. 2006).

90 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005).

91 *Id*.

92 2006 U.S. Dist. LEXIS 15694 (D. PR 2006).

93 Section 1514A(d) provides in pertinent part that, "nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement."