Whistleblower Newsletter Sarbanes-Oxley Act

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Chief Judge

Contents:

II. REMOVAL TO FEDERAL DISTRICT COURT

DISTRICT COURT JURISDICTION; COMPLAINT MUST FIRST BE FILED WITH THE SECRETARY OF LABOR

In ***Mann v. Gannett Co., Inc.***, No. 2:06-CV-00888 (M.D.Ga. June 8, 2007), the Plaintiff had reported to the Defendant's attorney her belief that the Defendant was defrauding customers by overcharging for advertisements. The Plaintiff later sued the Defendant under the Victim and Witness Protection Act of 1982. The court granted summary judgment for the Defendant, finding that the the VWPA does not provide for a private right of action. In the ruling, the court noted that the Plaintiff had mentioned in her brief that the whistleblowing provision of the SOX supported her case. The court observed that there may have been some confusion on the part of the Plaintiff because the whistleblower provision of the SOX is found at 18 U.S.C. § 1514A, while the VWPA is found at 18 U.S.C. § 1514. Assuming for purposes of decision that the Plaintiff meant to rely on the SOX instead of, or in addition to, the VWPA, the court still found dismissal proper because a SOX complaint must be filed with the Secretary of Labor before filing a lawsuit in federal district court.

IV. REQUEST FOR HEARING

TIMELINESS OF REQUEST FOR HEARING; RECEIPT OF OSHA DECISION LETTER BY COMPLAINANT'S COUNSEL

In ***Savastano v. WPP Group, PLC***, 2007-SOX-34 (ALJ July 18, 2007), the ALJ found that the request for an ALJ hearing was timely where it had been filed on the 30th day after the Complainant's counsel received the OSHA decision letter.

V. FILING OF COMPLAINT

TIMELINESS OF COMPLAINT; PRESENCE OF NEGATIVE WRITE-UP IN PERSONNEL FILE

In ***Pittman v. Siemens AG***, 2007-SOX-15 (ALJ July 26, 2007), the Complainant argued that a negative write-up that had been placed in his personnel file prevents his being rehired, and that every day that it remains in the file triggers a new statute

of limitations. The ALJ, assuming for purposes of argument that the write-up was an adverse employment action, found that the Complainant's almost two year later SOX filing was untimely, noting that the Complainant had not provided any evidence of any specific acts of blacklisting or refusal to rehire based on the alleged write-up.

TIMELINESS OF COMPLAINT; DATE COMPLAINANT WAS PRESENTED WITH "CAREER DECISION DATE" CHOICES RATHER THAN LATER DATE OF TERMINATION IS DATE THAT LIMITATIONS PERIOD BEGINS

In ***Rollins v. American Airlines, Inc.***, ARB No. 04 140, ALJ No. 2004 AIR 9 (ARB Apr. 3, 2007), a whistleblower complaint arising under both AIR21 and SOX, the Respondent issued to the Complainant a "Career Decision Day Advisory Letter" providing three choices: (1) commit to comply with the Respondent's rules and regulations (including satisfactory work performance and personal conduct) and accept reassignment, (2) voluntarily resign with transitional benefits and agree not to file a grievance, or (3) accept termination with grievance options. Five days later the Complainant informed the Respondent that he would not agree to any of the options, and on that same day the Complainant was provided a letter of termination. The whistleblower complaint would be timely if measured from the date of the termination letter, but untimely if measured from the date of the advisory letter. The ARB found that advisory letter provided final and unequivocal notice to the Complainant that the Respondent had decided to terminate his employment. The ARB observed that under *English v. Whitfield*, 858 F.2d 957, 962 (4th Cir. 1988), *rev'd on other grounds*, 496 U.S. 72 (1990) and *Wagerle v. The Hosp. of the Univ. of Pa.*, 1993 ERA 1, slip op. at 3 6 (Sec'y Mar. 17, 1995), the possibility that the Complainant could have avoided the effects of the advisory letter by resigning voluntarily or accepting employment in another division did not negate the effect of the advisory letter's notification of intent to terminate the Complainant's employment. Thus, the complaint was untimely.

TIMELINESS OF COMPLAINT; UNEQUIVOCAL VERBAL NOTICE OF TERMINATION

In ***Salian v. Reedhycalog UK***, 2007-SOX-20 (ALJ May 11, 2007), the ALJ granted summary decision against the Complainant where the Respondent asserted that the Complainant was informed of the decision to terminate him more than 90 days before the SOX complaint was filed, and the Complainant's only response was to contend that the limitations period did not start to run until the date that his termination became effective. The Complainant argued that the notice of termination had not been given to him in writing. The ALJ, however, found that the law does not require that a notice of termination be given in writing, and that since the Respondent had given the Complainant an unequivocal verbal notice of termination, the Complainant had adequate notice to trigger the running of the statute of limitations.

TIMELINESS OF COMPLAINT; UNEQUIVOCAL NOTICE OF TERMINATION; OBJECTIVE ASSESSMENT OF COMMUNICATION RATHER THAN COMPLAINANT'S SUBJECTIVE ASSESSMENT GOVERNS

In ***Sneed v. Radio One, Inc.***, 2007-SOX-18 (ALJ Apr. 16, 2007), the Respondent filed a motion for summary decision based on the complaint being not timely filed. The Respondent asserted that the adverse action triggering the limitations period was June 29, 2006, while the Complainant asserted that she did not receive unequivocal notice that she would be fired until June 30, 2006. If the notice was received on the earlier date, the complaint was untimely. The ALJ acknowledged that the Complainant may have been able to establish a genuine issue of fact as to whether she subjectively comprehended that the communications between her and the Respondent constituted a final, definitive and unequivocal notice of termination. However, the record contained e mails dated June 29, 2006 that the ALJ found led to no reasonable objective conclusion other than the Complainant would be terminated on June 30, 2006. Although there may have been subjective confusion on the Complainant's part because of the negotiation of the terms of a severance package and the timing of public announcements, those negotiations did not relate to whether the Complainant would continue to be employed by the Respondent after June 30, 2006. The ALJ rejected the Complainant's argument that the clock should not have started because the termination notice did not state a date certain for termination, because "such a certain date is not required, as long as notice of an unequivocal decision to terminate was communicated." Slip op. at 5.

TIMELINESS OF COMPLAINT; LIMITATIONS PERIOD BEGINS UPON NOTICE OF ADVERSE ACTION, NOT UPON LEARNING OF THE MOTIVATION FOR THE ADVERSE ACTION

In ***Coppinger Martin v. Nordstrom, Inc.***, 2007-SOX-19 (ALJ Apr. 4, 2007), the Complainant alleged that she believed that her position was being eliminated for budgetary reasons, and did not suspect that the Respondent's stated reasons for eliminating her position were untrue until she later learned from another employee that many of her job functions had been transferred to other employees. The Complainant argued that she did not have a basis for filing a SOX complaint until obtaining this information, and therefore the limitations period should run from that date rather than the date that she learned that she would be terminated or the date that she was actually terminated. The ALJ held that the ARB holding in *Halpern v. XL Capital Ltd.*, 2004-SOX-54 (ARB Aug. 31, 2005), precluded application of equitable tolling or equitable estoppel in this case. The ALJ observed that in *Halpern*, the ARB held that "'[n]either [SOX] nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint.' Y The complainant's failure to acquire evidence of the employer's motivation for terminating him 'did not affect his rights or responsibilities for initiating a complaint pursuant to the SOX.'" Slip op. at 5, quoting *Halpern* (citations omitted). The ALJ held that "Complainant was required to file her claim within 90 days of receiving "final, definitive, and unequivocal notice" of her termination,

regardless of whether she suspected that Respondent's stated reasons were pretextual, had evidence of Respondent's notice, or was aware that her termination constituted a legal wrong." *Id*.

TIMELINESS OF COMPLAINT; EQUITABLE ESTOPPEL; COMPLAINANT'S ALLEGED FEAR OF RESPONDENT'S ALLEGED CRIMINAL CONNECTIONS

In ***Farnham v. International Manufacturing Solutions***, 2006-SOX-111 (ALJ June 18, 2007), the ALJ declined to apply equitable principles to permit the Complainant to proceed with his untimely filed SOX complaint, where the Complainant's actions undermined the credibility of his assertion that he was too afraid to file the SOX complaint because of fears that the Respondent was associated with a drug cartel. The ALJ noted that during the time that the Complainant delayed sending a letter to his congressman seeking protection as a corporate whistleblower (the letter being forwarded to OSHA, which treated it as a whistleblower complaint), the Complainant continued to work for the Respondent for a period of time, he contacted the FBI with more information than would have been needed to file a complaint with OSHA, he filed a counter suit in a civil suit brought by the Respondents, and contacted current and former employees of the Respondent to discuss the Respondent's alleged fraudulent behavior. The ALJ found that the Respondent's actions did not cause the Complainant not to file his SOX complaint in a timely fashion.

TIMELINESS OF COMPLAINT; HOSTILE WORK ENVIRONMENT; AT LEAST ONE ACT MUST HAVE OCCURRED WITHIN 90 DAY LIMITATIONS PERIOD

In ***Grove v. EMC Corp.***, 2006-SOX-99 (ALJ July 2, 20007), the Complainant argued in a pre trial conference that retaliatory conduct that occurred more than 90 days before the filing of his SOX complaint with OSHA were part of a "hostile work environment" and therefore would be actionable. The ALJ permitted the Complainant to amend his complaint accordingly, citing authority to the effect that an ALJ has some responsibility to assist a pro se litigant in clarifying pleadings. The ALJ found that allegations, such as non payment of a commission and reassignment of accounts, were discrete adverse actions that were not actionable because they occurred outside the 90 day limitations period. He found that some other actions were not the type of discrete actions that would have been individually actionable and therefore subject to the 90 day limitations period; however, the only act that occurred within the 90 day limitations period was the Complainant's termination B which was a separate and discrete adverse employment action, and therefore not part of the same unlawful employment practice as the other actions that allegedly created a hostile work environment. The ALJ, therefore, found the hostile work environment claim was time barred.

VI. PROCEDURE BEFORE ARB

BRIEFS; LEAVE TO FILE SURREPLY

In ***Beck v. Citigroup, Inc.***, ARB 06 140, ALJ No. 2006-SOX-3 (ARB May 23, 2007), the ARB stated that it is guided by the Federal Rules of Appellate Procedure, Rule 28, in determining whether to permit the filing of a surreply. The ARB stated that a surreply may be filed to address new matters raised in a reply to which a party would otherwise be unable to respond, and that case law that is substantially new and decided after the respondent had filed its brief may provide grounds for a surreply brief. In the instant case, however, the ARB did not find that grounds had been demonstrated for leave to file a surreply (disparagement of the Respondent's law firm and citation of a new (and irrelevant) ARB decision).

MOTION FOR RECONSIDERATION; AUTHORITY OF THE ARB TO RECONSIDER ITS DECISIONS UNDER THE SOX WHISTLEBLOWER PROVISION; SUCH A MOTION MUST BE FILED WITHIN A REASONABLE TIME TO BE TIMELY; SCREENING OF MOTIONS TO DETERMINE APPROPRIATENESS FOR RECONSIDERATION

In ***Henrich v. Ecolab, Inc.***, ARB No. 05 030, ALJ No. 2004-SOX-51 (ARB May 30, 2007), the ARB ruled that it has the authority to reconsider a decision issued pursuant to the whistleblower provision of the Sarbanes Oxley Act. The ARB stated that "unless some other standard applies to reconsideration of SOX decisions, or we or our predecessors have adopted a different standard for determining timeliness of reconsideration petitions, we must apply a 'reasonable time' standard when determining the timeliness of [such a] petition." USDOL/OALJ Reporter at 6. Reviewing the OALJ rules of practice and procedure, rules of procedure for federal district and circuit courts, and previous decisions of the ARB and its predecessors, the ARB found that it had not adopted a different standard, and therefore the "reasonable time" standard applied. In defining what constitutes a reasonable time, the ARB turned to a decision it had rendered in a Service Contract Act proceeding, *Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 98 164, ALJ No. 1996 DBA 33 (ARB June 8, 2001). The ARB concluded that in *Thomas & Sons*, and other decisions of the ARB and its predecessors, a three part approach had been delineated:

> In sum, the Board and its predecessors have presumed a petition timely when the petition was filed within a short time after the decision. The Board and its predecessors also have granted reconsideration where a petition, though filed after a longer period, raised Rule 60(b) type grounds or showed "good cause" for the delay. Finally, the Board and its predecessors have rejected as untimely those petitions filed more than a short time after the decision, when such petitions have neither raised Rule 60(b) type arguments nor shown good cause for delay.

USDOL/OALJ Reporter at 15. The Board then applied this test to the Complainant's motion for reconsideration. The Complainant's motion was filed on the 60th day after the ARB's decision. The ARB suggested that 14 to 30 days might be sufficiently short a time, but did not specifically so rule, holding only that 60 days was not a "short" time. The Board found that the Complainant's grounds for reconsideration presented rehearing type arguments (which do not themselves justify a delay in filing a petition for reconsideration) rather than Rule 60(b) type grounds. Finally, the Board held that the Complainant 's belief that he would not suffer penalty if he did not file within a short time, and his argument that the Respondent would not be prejudiced by a reconsideration, did not show good cause for the delay.

The ARB then stated even if the Complainant's motion had been timely, it would have been rejected as failing to demonstrate that the Board's decision should be reconsidered. The ARB observed that it is guided by federal court practice in applying standard screening hurtles in determining whether reconsideration is warranted. In the instant case, the Complainant's motion was based in part on portions of his deposition which were not in evidence. The ARB cited caselaw to the effect that "[a] party that has not presented known facts helpful to its cause when it had the opportunity cannot ordinarily avail itself of Rule 60(b) after it has received an adverse judgment." USDOL/OALJ Reporter at 20 (citations omitted). Finally, the ARB found that the Complainant's remaining arguments that it made errors in judgment in determining whether the ALJ's findings and credibility determinations were supported by substantial evidence were not supported by any demonstrations of materials errors of law, fact or process; or any changed circumstances warranting Rule 60(b) relief; or any other circumstance warranting reconsideration under ARB precedent.

ALJ'S CREDIBILITY DETERMINATIONS NOT BASED ON DEMEANOR; IN AIR21 AND SOX CASES, SUCH DETERMINATIONS ARE REVIEWED UNDER THE SUBSTANTIAL EVIDENCE STANDARD RATHER THAN DE NOVO

In ***Walker v. American Airlines, Inc.***, ARB No. 05 028, ALJ No. 2003 AIR 17 (ARB Mar. 30, 2007), the Complainant argued on appeal that the ARB should overturn the ALJ's credibility determinations. According to the Complainant, because the ALJ determination was not demeanor based it should be reviewed de novo. The ARB rejected the argument that de novo was the appropriate standard of review, noting that the caselaw cited by the Complainant was all from environmental whistleblower cases. In contrast, in AIR21 and SOX cases the ARB is required to review an ALJ's fact determinations under the substantial evidence standard. Because the ALJ's credibility determinations were not explicitly based on demeanor, the Board would not afford those determinations the "great deference" that a demeanor based determination would receive. Nonetheless, because they were factual findings, the ARB was required to uphold them if supported by substantial evidence.

VII. PROCEDURE BEFORE OALJ

CONSOLIDATION; SAME OR SUBSTANTIALLY SIMILAR EVIDENCE STANDARD OF 29 C.F.R. § 18.11

In ***Davis v. The Home Depot U.S.A., Inc.***, 2006-SOX-17 (ALJ Mar. 13, 2007), three Complainants moved under 29 C.F.R. § 18.11 for consolidation of their SOX complaints against the Respondent before an administrative law judge who had already conducted an evidentiary hearing in the first of the three cases. The Complainants contended, inter alia, that all three cases involved retaliation for protesting the same type of actions by the Respondent. One of the two new cases was already scheduled for a hearing before that same ALJ, while a third new case was scheduled to be heard by an ALJ from a different office. The Chief ALJ denied the motion to consolidate based on the very different stages of litigation for the three cases, because the complaints alleged different acts taking place in different stores in different regions of the country. The Chief ALJ found that the complaints did not involve the "same or substantially similar evidence" and that the evidence in one hearing may not be relevant or material in another.

X. COVERED RESPONDENT

COVERED EMPLOYEE; EMPLOYEE OF NON PUBLICLY TRADED SUBSIDIARY

In ***Rao v. Daimler Chrysler Corp.***, No. 2:06-CV-13723 (E.D.Mich. May 14, 2007) (case below 2006-SOX-78), the district court granted summary judgment against the Plaintiff in a SOX whistleblower suit where the Defendant was not itself a public company, but only the subsidiary of its publicly traded parent, and the publicly traded parent had not been named in the complaint. The court reviewed ALJ decisions on this issue, and while recognizing some merit to the position that the background to enactment of SOX might support the view that subsidiaries should be covered, observed that the clear statutory text of section 1514A only lists employees of public companies as protected individuals. The court stated it was not its job to rewrite the statute, especially in light of the corporate law principle that parent companies are not ipso facto liable for the actions of their subsidiaries, and that Congress had specifically overrode this principle in other portions of SOX.

The court then looked to common law agency principles to determine whether the Defendant was acting as an agent for its parent company in its actions towards the Plaintiff. The court granted summary judgment in favor of the Defendant on this issue because the Plaintiff's amended complaint only mentioned employees of the Defendant as those who were aware of the situation and his complaints, and did not assert that anyone at the parent company had such knowledge.

EXTRATERRITORIAL APPLICATION OF SOX WHISTLEBLOWER PROVISION; ARB FOLLOWS *CARNERO* RULING

In ***Ede v. The Swatch Group Ltd.***, ARB No. 05 053, ALJ Nos. 2004-SOX-68 and 69 (ARB June 27, 2007), the ARB found that substantial evidence supported the ALJ's findings that the Complainants worked solely for foreign subsidiaries of the Respondent in Switzerland, Hong Kong and Singapore; that they never worked for the Respondent within the United States; and that their SOX complaint was grounded in adverse actions that occurred outside the United States. The ARB also found no reason to depart from the First Circuit decision in *Carnero v. Boston Scientific Corp*., 433 F.3d 1, 4, 6 7 (1st Cir. 2006), *cert. denied*, __ U.S. __, 126 S.Ct. 2973 (June 26, 2006), that SOX section 806 does not protect employees who work exclusively outside the United States. The ARB therefore denied the complaint.

COVERED EMPLOYER; THE AMERICAN MEDICAL ASSOCIATION

In ***Fleszar v. American Medical Association***, 2007-SOX-30 (ALJ June 13, 2007), the ALJ dismissed the Complainant's SOX complaint because the Respondent was not subject to the provisions of § 806 of the SOX, and thus not a properly named Respondent. Specifically, the ALJ found that the "AMA is a private organization that has not registered securities under § 12 of the SEA. Similarly, § 15(d) relates solely to reports of registered issuers of securities, and the AMA is not such an issuer. Consequently, I find the AMA does not fall under either specific category of publicly traded company subject to the § 806 whistleblower provisions." Slip op. at 3 (footnotes omitted). The Complainant alleged that the Respondent had filed reports to the SEC under § 15(d). The ALJ, however, found that the pleadings showed that those reports related to defined benefits plans that did not involve the issuance of securities, and would not have been filed under § 15(d). The ALJ also rejected the Complainant's contention that the Respondent was covered under § 806 because it had contractual relationships with publicly traded companies and governmental entities, or due to real estate transactions or mutual fund activities.

COVERED EMPLOYER; NON PUBLICLY TRADED SUBSIDIARY WHICH WAS NOT THE PUBLICY TRADED PARENT COMPANY'S AGENT IN REGARD TO THE COMPLAINANT'S EMPLOYMENT

In ***Savastano v. WPP Group, PLC***, 2007-SOX-34 (ALJ July 18, 2007), the Complainant relied on the ALJ decision in *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004), to argue that she qualified for coverage under the whistleblower provision of SOX as a covered employee of a subsidiary of publicly traded parent company. The ALJ, however, found that *Morefield*'s approach to non public subsidiaries was inconsistent with the ARB's holding in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB No. 04 149, ALJ No. 2004-SOX-11 (ARB May 31, 2006), and had not been followed in later federal district court and ALJ decisions. In *Klopfenstein*, the ARB held that a non public subsidiary of a publicly held parent company could be subject to the Act's whistleblower provisions if the evidence establishes that it acted as an "agent" of its publicly held parent as determined under

principles of general common law agency. The ALJ wrote that "for an employee of a nonpublic subsidiary to be covered under Section 806, the non public subsidiary must act as an agent of its publicly held parent, and the agency must relate to employment matters. *Rao*, 2007 U.S. Dist. LEXIS 34922, at *15; *Brady v. Calyon Secs. (USA)*, 406 F. Supp. 2d 307, 318 n.6 (S.D.N.Y. 2005)." Slip op. at 7.

In the instant case, the ALJ found that the Complainant had alleged no facts that would tend to support a finding that either her non publicly traded employer or its non publicly traded holding company were acting as agents of the publicly traded parent in connection with the termination of her employment with her employer. The Complainant had not contradicted the Respondents' claims that: (1) the subsidiary acted and was run independently from the parent; (2) there was no overlap in the officers; (3) the companies had separate offices, operations and officers and were rarely, if ever, involved in one another's daily activities; (4) no officer or employee of the parent exerted any control over the terms and conditions of the Complainant's employment; and (5) no officer or employee of the parent had anything to do with the decision to hire or terminate the Complainant. The ALJ found that, while the Complainant had identified statements from the parent's annual report indicating that its non public subsidiaries may act as its agents for purposes of collecting and reporting financial data, there was no factual predicate for finding an agency relationship pertaining to employment matters. Accordingly, the ALJ granted summary decision in favor of the Respondents.

XI. COVERED EMPLOYEE

COVERED EMPLOYEE; CONTRACTOR ENGAGED AS A PROJECT MANAGER ON SOX COMPLIANCE

In ***Deremer v. Gulfmark Offshore Inc.***, 2006-SOX-2 (ALJ June 29, 2007), the Complainant was engaged by the Respondent as an independent contractor to serve as a project manager coordinating SOX compliance. The contract was for a set period. The Respondent took the position that the Complainant was not a covered employee or person under the SOX whistleblower provision. The ALJ found that the Complainant was not a covered "employee." Applying the common law master servant principles, the ALJ found that the testimony uniformly showed that the Complainant had been hired with the understanding that he would work on a contract basis on a specific task with an estimated time of completion. The nature of the assignment compelled access to the Respondent's financial records for testing and analysis; the ALJ found that his physical presence and guidance from the controller in completion of his assignment were not indicia of employment, but rather incidental to his assignment. Rather, the Complainant was paid as a contractor, and enjoyed no formalities associated with employment as an employee.

The Complainant also contended that he was an "individual applying to work for a company" B an internal audit position as evidenced by conversations with his supervisor concerning future employment. The ALJ rejected this contention, finding that the Complainant never made formal application for the position, and that his conversations with the controller and CFO did not constitute application for a position. The Complainant was aware that the controller did not have the authority to hire for the internal audit position, and that the job did not exist at the time he had the conversations with the controller and the CFO. The ALJ found that an employer does not have a duty to inform contractors of job openings.

The ALJ, however, agreed with the Complainant's contention that he was "an individual whose employment could be affected by a company or company representative" and therefore an employee as defined in 29 C.F.R. § 1980.101. The ALJ observed that the regulation was purposely broad, and that found that consistent with SOX purpose of protecting investors, found that "the term "employment' as used in 29 C.F.R. § 1980.001 [sic] includes any service or activity for which an individual was contracted to perform for compensation. Therefore, a contractor or sub contractor may be 'an individual whose employment could be affected by a company or company representative.' 29 C.F.R. § 1980.001. [sic] Under this definition, the only "employment" which the employer is capable of affecting, in its terms and conditions, is the contracted for services or assignment." Slip op. at 44.

In view of his finding that the Complainant was a covered employee within the meaning of section 1980.101, the ALJ did not reach the Complainant's argument that failure to extent coverage to him would lead to an impermissible loophole in coverage that would subvert the intent of Congress.

COVERED EMPLOYEE; AUDITOR OF WHOLLY OWNED SUBSIDIARY ESTABLISHED TO BE EMPLOYEE OF PARENT COMPANY'S INTERNAL AUDIT DEPARTMENT

In ***Robinson v. Morgan Stanley***, 2005-SOX-44 (ALJ Mar. 26, 2007), the Respondent Morgan Stanley was a publicly traded company, while the Respondent "Discover" was a wholly owned subsidiary. The ALJ found that he had jurisdiction over the Complainant's SOX whistleblower complaint because although the Complainant worked in the Discover office facilities, audited its credit card service functions, and was compensated by Discover's holding company she was principally employed as a senior auditor for Morgan Stanley's Internal Audit Department ("IAD"). The ALJ found that the IAD had a supervisory chain descending from the Audit Committee of the Morgan Stanley Board of Directors down to the Complainant's immediate supervisor, that the Complainant's work was assigned by IAD supervisors which had ultimate authority for her level of compensation, and that the termination decision underlying the SOX complaint resided with a senior executive officer of Morgan Stanley.

XII. ARBITRATION AGREEMENTS; SEVERANCE AGREEMENTS

MOTION TO COMPEL ARBITRATION; PARTICIPATION IN DOL SOX PROCEEDINGS IS NOT A WAIVER OF THE RIGHT TO COMPEL

In ***Green v. Service Corp. Int'l***, No. 4:06-CV-00833 (S.D.Tx. June 30, 2006) (case below 2006-SOX-35), the Plaintiff had removed his SOX whistleblower complaint to federal district court. The Respondent then moved to compel arbitration. Noting that U.S. Supreme Court has held that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, the court rejected the Plaintiff's claim that the Defendant had waived its right to compel arbitration when it defended itself in the administrative proceedings before DOL. The court did not find any Fifth Circuit case law on point, but found authoritative the decision of the First Circuit in *Brennan v. King*, 139 F.3d 258, 264 (1st Cir. 1998), which held that, in determining whether such a waiver occurred, reference is made to judicial rather than administrative proceedings. The court also rejected the Plaintiff's claim that the arbitration agreement was not enforceable because it did not identify the Defendant as the party which could enforce the agreement. Finally, the court denied the Plaintiff's request that his case be dismissed rather than stayed. In ***Green v. Service Corp. Int'l***, No. 4:06-CV-00833 (S.D.Tx. Aug. 17, 2006), the court denied reconsideration. The court recognized that the DOL proceedings resembled the judicial process quite closely, but nonetheless found no authority that states that invoking a process that resemble a judicial process operates as a waiver of the right to compel arbitration. The Plaintiff appealed to the Fifth Circuit, which found that under 16(b) of the FAA, 9 U.S.C. § 16(b), it had no jurisdiction, the case being still pending before the district court. ***Green v. Service Corp. Int'l***, No. 06 20732 (5th Cir. May 30, 2007).

ARBITRATION; CLAUSE IN ARBITRATION CONTRACT COVERING "ANY CLAIMS INVOLVING RIGHT PROTECTED BY ANY FEDERAL STATUTE" CAPTURES SOX WHISTLEBLOWER CLAIM, EVEN THOUGH CONTRACT PRECEDED ENACTMENT OF SOX

In ***Kimpson v. Fannie Mae Corp.***, No. 1:06-CV-00018 (D.D.C. Mar. 31, 2007), the Plaintiff did not deny the existence of a valid agreement to arbitrate employment disputes with the Defendant, but argued that he did not consent to arbitrate SOX claims because SOX was not listed among the statutes stated to be covered by the dispute resolution policy. The Defendant responded that the comprehensive language of the policy applied to the Plaintiff's SOX claims. The court agreed with the Defendant. Even though SOX had not yet been passed when the arbitration contract was entered into, the court found that language in the agreement regarding the inclusion of "any claims involving rights protected by any federal Y statute" captured the Plaintiff's SOX claim. Pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, the court stayed the district court suit pending the conclusion of arbitration.

XIII.C. ADVERSE EMPLOYMENT ACTION

HOSTILE WORK ENVIRONMENT; ROUTINE WORKPLACE IRRITATIONS AND INCONVENIENCES

In ***Grove v. EMC Corp.***, 2006-SOX-99 (ALJ July 2, 20007), the ALJ found that the Complainant failed to establish the existence of a hostile work environment where, after being reinstated, the Complainant had problems with his company e mail and Virtual Private Network. The Complainant did not report the problems to IT personnel because he "was not interested in tracking down technical support to figure out something that was terminated purposely by my management." Slip op. at 20 (quoting transcript). Neither did the Complainant inquire with his managers about the problems. The ALJ found that a reasonable person would have contacted technical support before assuming that the problems related to a sinister conspiracy. The ALJ found that the remainder of the acts related to routine workplace irritations and inconveniences typically experienced by new employees, without altering working conditions or detrimentally affecting a reasonable person (delay in getting a laptop and business cards; loss or mishandling of personnel documents).

EMPLOYEE; ADVERSE ACTION; FILING OF ANTI-SLAPP SUIT

In ***Pittman v. Siemens AG***, 2007-SOX-15 (ALJ July 26, 2007), the Complainant alleged that the Respondents engaged in adverse action when they filed an anti-SLAPP claim against the Complainant relating to a defamation suit in state court. The Complainant alleged that this suit was in retaliation for his filing of the SOX claim with OSHA. The ALJ, however, found that the Complainant had not been an employee of the Respondent for more than one and a half years prior to the filing of the anti-SLAPP motion. Since he was not an employee at time, and the anti-SLAPP suit was not blacklisting or interference with employment, the ALJ found that it was not adverse action under the whistleblower provision of the SOX.

EMPLOYEE; ADVERSE ACTION; SLANDEROUS RUMORS AGAINST FORMER EMPLOYEE

In ***Pittman v. Siemens AG***, 2007-SOX-15 (ALJ July 26, 2007), the Complainant contended that a former co-worker had informed him that officers of the Respondent were spreading slanderous rumors about him. The ALJ noted that, except for blacklisting or interference with subsequent employment, the SOX only protects an employee from retaliation for his protected activity while the complainant is an employee of the respondent. Since the alleged slanders occured two years after the Complainant's employment with the Respondent had been terminated, he was not an employee at the time of the alleged adverse action and the claim was not covered under SOX.

XIII.D. CAUSATION

CONTRIBUTING FACTOR; FIRING FOR INSUBORDINATION FOR REFUSING TO COOPERATE IN INVESTIGATION

In ***Grove v. EMC Corp.***, 2006-SOX-99 (ALJ July 2, 20007), the ALJ found that the Complainant did not meet his burden of proving by a preponderance of the evidence that protected activity was a contributing factor in his termination. The ALJ acknowledged that the SOX contributing factor standard is a relatively low hurdle, but found that the evidence clearly showed that rather than contributing to his termination, protected activity if anything insulated the Complainant from adverse actions for a period of time and effectively delayed the termination decision which was not based on conduct protected under SOX. The decision to terminate the Complainant was initiated when the Complainant failed to appear at a mandatory training session by a manager who at that time did not know about the Complainant's protected activity. Rather, when other managers learned of the protected activity, the Complainant was immediately reinstated. The ALJ found that at this point, the Complainant "had blown the whistle, and [the Respondent] was ready to listen. However, over the next several weeks, [the Complainant] swallowed the whistle and decided not to cooperate with [the Respondent] in investigating his concerns...." Slip op. at 27. The Complainant argued that he was entitled to something like asylum after "entering protected activity." The ALJ rejected this contention, finding that the legislative history of SOX "expresses an implicit expectation that when an employee makes a protected disclosure of fraudulent activity to an employer, the employee would not unreasonably refuse to cooperate in the employer's lawful investigation into the disclosure." Slip op. at 27. It was when the Complainant refused to cooperate in the investigation and stopped working that he was discharged for insubordination. The ALJ found that the Complainant had offered no evidence that he had a valid reason to be wary of the Respondent's general counsel, who tried repeatedly with no success to meet with the Complainant to discuss the allegations.

20 MONTH GAP BETWEEN PROTECTED ACTIVITY AND ADVERSE ACTION FOUND TO ESTABLISH THAT PROTECTED ACTIVITY WAS NOT A CONTRIBUTING FACTOR IN THE PLAINTIFF'S TERMINATION

In ***Johnson v. Stein Mart, Inc.***, No. 3:06-CV-00341 (M.D.Fla. June 20, 2007) (case below 2006-SOX-52), the district court found that B not only did a 20 month gap between the protected activity and the adverse action fail to indicate a temporal link sufficient to establish causation B but in fact showed that the protected activity was not a contributing factor in the Plaintiff's termination.

TEMPORAL PROXIMITY MAY ESTABLISH CAUSATION, BUT IS NOT ITSELF SUFFICIENT TO ESTABLISH RETALIATORY INTENT

In ***Taylor v. Wells Fargo Bank, NA***, ARB No. 05 062, ALJ No. 2004-SOX-43 (ARB June 28, 2007), the ARB wrote: "Temporal proximity does not establish retaliatory intent, but may establish the causal connection component of the prima facie case. The ultimate burden of persuasion that the respondent intentionally discriminated because of complainant's protected activity remains at all times with the complainant." USDOL/OALJ Reporter at n.12 (citation omitted).

CAUSATION; EVIDENCE OF PERFORMANCE DEFICIENCIES BOTH PRIOR TO AND AFTER PROTECTED ACTIVITY; SUPERVISOR WHO INITIATED EMPLOYMENT ACTIONS AGAINST THE COMPLAINANT DID NOT KNOW ANY DETAILS ABOUT THE PROTECTED ACTIVITY

In ***Robinson v. Morgan Stanley***, 2005-SOX-44 (ALJ Mar. 26, 2007), the Complainant was a senior internal auditor who engaged in protected activity when she submitted a memorandum to senior executives setting out her concern that banking regulations were being violated in regard to the prompt charge off of credit card bankruptcies. The ALJ, however, found that the Complainant failed to prove that this protected activity contributed to her discharge. Although temporal proximity provided some circumstantial evidence of a causal link between the protected activity and the discharge, the record demonstrated that the Complainant had well documented, pre existing performance issues in the areas of professional communications, timely work product, and acceptance of feedback, all of which were unrelated to any protected activity. Moreover, the same performance deficiencies persisted after the protected activity. The direct supervisor who initiated the Complainant's post protected activity job actions was only aware that the Complainant had submitted a memorandum that generated an investigation. This supervisor did not know the nature or extent of the memorandum and related investigation, did not discuss the memorandum with the Complainant, and no one from the investigation or HR contacted the supervisor about the memorandum. The ALJ found, therefore, that the protected activity would not have been a basis for this supervisor's decision to terminate the Complainant's employment. The ALJ found based on credible testimony that the supervisor initiated the post protected activity job actions on her own. The executive who approved the supervisor's termination decision was aware of the Complainant's protected activity, the expense of the consequent investigation, and the fact that it produced no significant findings. Nonetheless, the ALJ found credible this executive's testimony that his decision to accept the termination decision (which was initiated by the supervisor and not the executive) was based solely on the documented performance issues and not protected activity.

EMPLOYER'S KNOWLEDGE; DISCLOSURE TO PERSON WITH AUTHORITY TO INVESTIVATE, DISCOVER OR TERMINATE MISCONDUCT; ALJ FINDS THAT SOX REQUIRES AN EXPRESS, NOT MERELY A CONSTRUCTIVE, COMMUNICATION

In ***Frederickson v. The Home Depot, U.S.A., Inc.***, 2007-SOX-13 (ALJ July 10, 2007), the Complainant, a department supervisor, had used some hooks in his department, and was told by a supervisor for a different department (who had no supervisory authority over the Complainant) that nothing was to be marked in the store computer as for store use, but rather entered as damaged goods. When the Complainant protested, the other supervisor told him that these were the orders of the store manager. Another employee was present. After the incident, the Complainant mentioned it to several other non supervisory employees. He did not discuss it with his direct supervisor or the store manager. Several days later, he entered some other items into the store computer under the "store use" category. The Complainant knew that the store manager watched the books closely and concluded that the manager would become aware that he had contravened his instructions as relayed by the other supervisor. The Respondent filed a motion for summary decision arguing that none of the persons that the Complainant complained to had the authority to act on the complaints. The Complainant responded that this was an issue of fact, which could not be determined based upon the Respondent's assertions and self serving affidavits.

The ALJ noted that the SOX:

> . . . anticipates and encourages employees to report fraudulent conduct, to outside agencies, Congress, and **company personnel in a supervisory capacity over the employee or "such other person working for the employer who has the authority to investigate, discover, or terminate misconduct."** 18 U.S.C. § 1514A (a)(1)(c). Communication of an employee to their supervisor would be a natural course of reporting, following established lines of authority. Likewise, reporting wrongful conduct to another employee vested with the power to take remedial steps would be a logical course to effect change. However, communication of wrongful conduct to parties lacking supervisory authority over the whistleblower, or "authority to investigate, discover, or terminate misconduct," does not constituted [sic] protected activity, as it does not serve the underlying purpose of the Act.

Slip op. at 10 (emphasis as in original). The ALJ found that the Complainant's communications with the other supervisor and non supervisory employees could not constitute protected activity because none had supervisory authority over the Complainant or the authority to investigate, discover or terminate misconduct. The ALJ found that the Complainant's assumption that the store manager would discover his computer entries would, at best, constitute a constructive communication of the

issue of proper input of items for store use. The ALJ found that the SOX encourages employees to come forward with information of wrongdoing, but does not indicate an intent to protect constructive communications. Thus,

> . . . the Act seeks to protect employees from retaliation for their purposeful protected communications. There is nothing in the Act to indicate that it intended to protect any constructive communication, as such does not require purposeful effort by the employee and thus would not subject him to retaliation for such effort. Therefore, for a communication to be protected, it arguably must be an express, not constructive, communication.

Slip op. at 11.

EMPLOYER'S KNOWLEDGE; DISCLOSURE TO PERSON WITH AUTHORITY TO INVESTIVATE, DISCOVER OR TERMINATE MISCONDUCT; OUTSIDE LAW FIRM ENGAGED BY AUDIT COMMITTEE; EXTERNAL AUDITORS

In ***Deremer v. Gulfmark Offshore Inc.***, 2006-SOX-2 (ALJ June 29, 2007), the ALJ found that disclosures made to a law firm hired by the audit committee to investigate allegations made by the Complainant were disclosures to "such other person working for the employer who has the authority to investigate, discover or terminate misconduct." *See* 18 U.S.C. § 1514(A)(1)(c). The ALJ, applying a broad interpretation to comport with the intent of SOX, also found that disclosures made to an external auditor fit within the "complaint to a proper person" element of a SOX whistleblower complaint.

EMPLOYER'S KNOWLEDGE; CONSTRUCTIVE KNOWLEDGE

In ***Deremer v. Gulfmark Offshore Inc.***, 2006-SOX-2 (ALJ June 29, 2007), the ALJ, although denying the claim because he found that the Complainant had not engaged in protected activity, noted that:

> A complainant is not required to prove "direct personal knowledge" on the part of the employer's final decision maker that he engaged in protected activity. The law will not permit an employer to insulate itself from liability by creating "layers of bureaucratic ignorance" between a whistleblower's direct line of management and the final decision maker. Frazier v. Merit Systems Protection Board, 672 F.2d 150, 166 (D.C. Cir. 1982). Therefore, constructive knowledge of the protected activity can be attributed to the final decision maker. Id.; see also Larry v. Detroit Edison Co., Case No. 1986 ERA 32 @ 6 (ALJ October 17, 1986); Platone, supra.

Slip op. at 61 62.

XIII.E. PROTECTED ACTIVITY

PROTECTED ACTIVITY; COMPLAINT ABOUT CHANGE OF REVENUE FORECASTING FORMULA DURING CORPORATE ACQUISITION; ACTUAL VIOLATION NEED NOT BE PROVED, BUT ONLY REASONABLE BELIEF BY EMPLOYEE IN COMPLAINANT'S POSITION

In ***Grove v. EMC Corp.***, 2006-SOX-99 (ALJ July 2, 20007), the Complainant complained to management that a new formula which increased revenue projections tenfold during a time when the company was being acquired by another company could defraud investors. The ALJ found that, although the record did not establish that the company reckless or fraudulently inflated its revenue forecasts for the purpose of drawing a higher purchase offer from the acquiring company, the Complainant was not required to prove an actual violation of securities law. Because the Complainant was a salesman with no specialized training or expertise in the area of corporate acquisitions, and there was no evidence that the Complainant did not actually believe that the revised revenue forecast overstated expected income, the ALJ found it not unreasonable for a person in the Complainant's position to believe that the new formula presented investors with a materially misleading picture of the company's financial condition. The ALJ found, therefore, that the Complainant engaged in protected activity.

PROTECTED ACTIVITY; EMPLOYEE'S CONTACT WITH THE SEC IN CONNECTION WITH A REASONABLE BELIEF OF A VIOLATION OF SECURITIES LAW FOUND TO BE PROTECTED EVEN IF THE SEC DID NOT INSTITUTE A FORMAL PROCEEDING

In ***Grove v. EMC Corp.***, 2006-SOX-99 (ALJ July 2, 20007), the Complainant, a salesman, testified that he called an SEC attorney to get information after he read about the "arrest" by the SEC of a person who had dealings with his employer relating to his accounts. The Complainant reported to the SEC attorney his concerns about anomalous activity and GAAP violations, and inquired whether other arrangements were legal. The Complainant, however, specifically refused to provide any evidence, opting instead to pursue his concerns internally with the Respondent. The ALJ wrote: "On these facts, one might conclude that Grove's contact with the SEC is not protected because he never initiated or participated in any proceeding before that agency. In my view, however, this would require a narrow and overly technical reading of the Act that would run counter to the legislative history which reflects that 'the law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market'" Slip op. at 23 24 (citation omitted). The ALJ noted that the ARB had recognized that whistleblower laws should be interpreted liberally, and had suggested in a ERA case that an employee's contact with a government agency for the purpose of obtaining a legal opinion related to the employee's raising of protected concerns is protected activity. Accordingly, the ALJ held that "when an employee contacts the SEC in connection with a reasonable belief of a securities law

violation within the scope of Sarbanes Oxley ... that action is protected even if no formal SEC proceeding is ever initiated."

PROTECTED ACTIVITY; REASONABLENESS OF PLAINTIFF'S BELIEF IN ACCOUNTING VIOLATION; DEFENDANT'S INTERNAL INVESTIGATION AS A RESULT

In ***Johnson v. Stein Mart, Inc.***, No. 3:06-CV-00341 (M.D.Fla. June 20, 2007) (case below 2006-SOX-52), the Plaintiff had been hired as a Buyer at the Defendant's corporate headquarters, and was later promoted to be a Planner, in which capacity she complained to management about (1) the collection of markdown allowances from vendors, (2) the changing of season codes on older inventory, and (3) the accounting for the value of inventory. The Defendant argued that the Plaintiff failed to establish a prima facie case on the element of protected activity because she did not have a reasonable belief that these practices were illegal because she had no accounting background and had no knowledge of the Defendant's accounting practices. The Defendant argued that its vendor markdown allowances and season code changes were in line with general industry practices. The district court rejected this argument because the Defendant had treated the Plaintiff's complaints reasonable enough to have warranted an internal investigation.

PROTECTED ACTIVITY; REPORTS OF MAIL OR WIRE FRAUD NEED NOT BE LINKED TO FRAUD AGAINST SHAREHOLDERS TO BE PROTECTED UNDER THE SOX

In ***Reyna v. Conagra Foods, Inc.***, No. 3:04-CV-00039 (M.D.Ga. June 11, 2007), the Plaintiffs (who were employees in the Defendant's HR Department) contended that the Defendant violated the whistleblower provision of the Sarbanes Oxley Act when they were terminated for reporting two incidents of fraud: (1) a fraudulent insurance scheme in which a supervisor falsely requested that individuals he identified as his wife and son (who were in fact his sister and nephew) be added to his company provided health insurance as dependents, and (2) an instance in which a HR supervisor and a benefits coordinator provided a fake social security card for an employee in order to satisfy the I 9 requirements of the immigration law. The Plaintiffs contended that these fraudulent activities necessarily involved the use of mail or the internet, and thus the reporting of the activities was protected under the SOX. The Defendant filed a motion for summary judgment arguing that the reporting was not protected activity because the reports of mail fraud and wire fraud did not relate to "fraud against shareholders." Employing principles of statutory interpretation, the court denied summary judgment, holding:

> The statute 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. The Court rejects Defendants' interpretation that the last phrase of the provision, "relating to fraud against shareholders," modifies each of the preceding phrases in the provision. Defendants seek to redraft the

> statute to read that the employee is protected only if he reasonably believes that the conduct constitutes a "violation of section 1341 [mail fraud] 'relating to fraud against shareholders,' section 1343 [wire fraud] 'relating to fraud against shareholders,'" etc.

Slip op. at 39.

PROTECTED ACTIVITY; REASONABLE BELIEF TEST

In ***Welch v. Cardinal Bankshares Corp.***, ARB No. 05 064, ALJ No. 2003-SOX-15 (ARB May 31, 2007), the Complainant B who was the Respondent's CFO expressed concerns that the Respondent had overstated income in a quarterly SEC report because it had improperly treated $195,000 in loan recoveries as income when they should have been allocated to the "loan reserve" account. The Complainant argued that error improperly inflated the Respondent's income by 13.7%, and therefore could have materially misled investors. The ARB reversed the ALJ's finding that this was protected activity. The ARB wrote:

> The "reasonable belief" standard requires Welch to prove both that he actually believed that the SEC report overstated income and that a person with his expertise and knowledge would have reasonably believed that as well. Furthermore, "[b]ecause the analysis for determining whether an employee reasonably believes a practice is unlawful is an objective one, the issue may be resolved as a matter of law."

USDOL/OALJ Reporter at 10 (footnotes omitted). The ARB found that an experienced CPA/CFO like the Complainant could not have reasonably believed that the quarterly SEC report presented a misleading picture of the Respondent's financial condition because whether reported as income or as a credit to expenses, the fact remained that the Respondent had $195,000 that it previously did not have.

PROTECTED ACTIVITY; VIOLATION OF GAAP AND FFIEC ACCOUNTING STANDARDS IS NOT IPSO FACTO A VIOLATION OF FEDERAL SECURITIES LAW

In ***Welch v. Cardinal Bankshares Corp.***, ARB No. 05 064, ALJ No. 2003-SOX-15 (ARB May 31, 2007), the Complainant B who was the Respondent's CFO expressed concerns that when the Respondent misclassified loan recoveries as income rather than crediting the loan loss account, it violated GAAP accounting standards and accounting rules that the Federal Financial Institutions Examination Council (FFIEC) developed for banks. The Complainant essentially argued that violation of those accounting standards constituted a violation the clear mandate of Sarbanes Oxley, and therefore such errors were ipso facto violations of federal securities laws. The ARB found that this argument amounted to wholesale re writing of SOX's section 1514A, and it would not accept such a contention in the absence of citation of legal authority.

PROTECTED ACTIVITY; CFO'S COMPLAINT OF INSUFFICIENT ACCESS TO AN OUTSIDE AUDITOR

In ***Welch v. Cardinal Bankshares Corp.***, ARB No. 05 064, ALJ No. 2003-SOX-15 (ARB May 31, 2007), the Complainant B who was the Respondent's CFO B complained that he had been denied sufficient access to an outside auditor, who instead chose to communicate with the company's CEO. The ARB found that such complaints were not protected activity under SOX. The ARB wrote: "But Welch did not prove by a preponderance of evidence how his unhappiness about access to [the outside auditor] constituted a reasonable belief that Cardinal was violating or might violate the enumerated fraud statutes, any SEC rule or regulation, or any federal law relating to fraud against shareholders. To be protected, an employee's SOX complaint must definitively and specifically relate to the listed categories of fraud or securities violation." USDOL/OALJ Reporter at 13 (footnote omitted).

PROTECTED ACTIVITY; REJECTION OF CFO'S ADVICE ON ACCOUNTING MATTERS IS NOT INHERENTLY A VIOLATION OF FEDERAL SECURITIES LAW

In ***Welch v. Cardinal Bankshares Corp.***, ARB No. 05 064, ALJ No. 2003-SOX-15 (ARB May 31, 2007), the Complainant B who was the Respondent's CFO B complained that the Respondent had deficient internal accounting controls because persons without accounting expertise had unrestricted access to the general ledger. The Complainant argued that when he briefed Respondent's staff about the problem, and they disregarded his advice, such disregard became fraud because failure to follow the CFO's advice was reflective of an intent to leave things in a deceptive state. The ARB rejected this argument, finding that the Complainant had failed to cite any legal authority to support "the proposition that rejecting the CFO's advice on accounting matters violates or could reasonably be regarded as violating the federal securities laws." USDOL/OALJ Reporter at 14.

PROTECTED ACTIVITY; PLEADING OF ACTUAL FRAUD AGAINST SHAREHOLDERS IS NOT REQUIRED, BUT RATHER ONLY A REASONABLE BELIEF OF VIOLATION OF A LAW RELATING TO FRAUD AGAINST SHAREHOLDERS

In ***Smith v. Corning, Inc.***, No. 06-CV-6516 (W.D.N.Y. July 12, 2007), the court denied the Defendants' motion to dismiss the Plaintiff's SOX suit under FRCP 12(b)(6). The motion was based on a contention that the Plaintiff did not engage in protected activity when he raised concerns that PeopleSoft 8.8, an enterprise resource planning software application, was being implemented in a way that was not correctly reporting financial data with resultant impact on the integrity of quarterly reports.

The court rejected the Defendants' contention that the complaint was deficient because the Plaintiff had not alleged an actual fraud against shareholders. The court found that § 1514A only requires a plaintiff to have reasonably believed that the

problem constituted a violation of a provision of Federal law relating to fraud against shareholders. The court found that the Plaintiff's complaint met this standard insofar as it alleged that the Plaintiff reasonably believed that the company was violating 15 U.S.C. § 78m(b)(2)(B)(ii), and that he believed that § 78m(b)(2)(B)(ii) was related to fraud against shareholders. In other words, the Plaintiff alleged that the company was implementing a financial reporting system that was not GAAP compliant in violation of § 78m(b)(2)(B)(ii), and that the company was refusing to correct problems with the program, which would have resulted in the issuance of incorrectly quarterly reports which could have misled investors. Moreover, the court indicated that the submission of quarterly reports that were not prepared in accordance with GAAP would also violate a SEC rule, namely 17 C.F.R. § 210.4 01(a)(1), citing *Richards v. Lexmark Int'l, Inc.*, 2004-SOX-49 (ALJ June 20, 2006).

The court also rejected the Defendants' contention that the Plaintiff's complaints were not protected in that they involved an internal accounting dispute, and only pertained to a potential for fraud occurring in the future. The court distinguished cases cited by the Defendants because in those cases the plaintiffs had not alleged violation of any law covered by § 1514A, whereas in the instant case, the Plaintiff had alleged that the Defendants repeatedly refused to address a problem that was resulting in incorrect financial information being reported to the company's general ledger B a sufficient allegation to survive a Rule 12(b)(6) motion.

Finally, the court rejected the Defendants' contention that the Plaintiff's complaint was deficient because he only complained about the PeopleSoft application, and therefore could not allege a basis for reasonably believing that the company's entire system of accounting controls was so inadequate as to violate § 78m(b)(2), which speaks to *systems* rather than portions of accounting systems. The court found that based on facts alleged in the complaint and at this stage in the litigation, it could not say as a matter of law that it was unreasonable for the Plaintiff to believe that the company was violating § 78m(b)(2)(B)(ii) when it refused to address problems with PeopleSoft.

PROTECTED ACTIVITY; ELEMENTS SUBJECTIVE AND OBJECTIVE REASONABLE BELIEF; INTENT TO DEFRAUD; MATERIALITY OF INFORMATION DISSEMINATED TO INVESTORS; INTERNAL CONTROLS

In ***Deremer v. Gulfmark Offshore Inc.***, 2006-SOX-2 (ALJ June 29, 2007), the ALJ reviewed the still evolving law on what constitutes protected activity under SOX. The ALJ started by observing that the law includes a "reasonable belief" test, which must be scrutinized under both subjective and objective standards: the complainant must have actually believed that the employer was in violation of the relevant law or regulations, and that belief must be reasonable. Reasonable belief is determined based on the knowledge available to a reasonable person in the circumstances with the employee's training and experience. The ALJ then observed that fraud is an integral element under the SOX whistleblower provision, which in the securities area, may include dissemination of false information in to the market on which a reasonable investor may rely. The intent to deceive is implicit. The ALJ noted a split

in authority over whether SOX whistleblower protection is limited to fraud "against shareholders," and after reviewing the nature of that split, found that his conclusion was consistent with that of the ARB B that an allegation of "shareholder fraud" is an essential element of a cause of action under SOX. The ALJ concluded, therefore, that materiality was required for alleged conduct to rise to the level of shareholder fraud. In summation, the ALJ wrote:

> Therefore, under subjective and objective standards, Complainant must actually and reasonably believe, based on the knowledge available to a reasonable person, that Respondent intentionally acted fraudulently, and that such conduct was sufficiently material so as to constitute fraud against the shareholders. In cases where allegations of shareholder fraud are based on potential or actual dissemination of fraudulent information, there must exist a "substantial likelihood" that the disclosure of the omitted or misstated information would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.

Slip op. at 50. Finally, the ALJ addressed specifically the issue of internal controls, writing,

> In securities fraud cases, it has been observed that inadequacy of internal accounting controls "are probative of scienter [defendant's intent to deceive, manipulate, or defraud] . . . and can add to the strength of a case based on other allegations." Crowell v. Ionics, Inc., 343 F.Supp.2d 1, 12, 20 (D. Mass. 2004). Therefore, a significant deficiency in internal controls, at least when combined with other significant issues, would constitute a circumstance likely to be "viewed by the reasonable investor as having significantly altered the >total mix' of information made available." As a company's management is under a statutory duty to disclose significant deficiencies in internal control, a willful attempt to conceal such deficiencies or subvert the published attestation of auditors concerning internal controls, would constitute "shareholder fraud" for purposes of protected activity under the Act.

Slip op. at 51. In the instant case, the ALJ considered whether any of the internal control deficiencies complained of by the Complainant constituted protected activity, either singularly or collectively, and found that they did not. The ALJ found that the only potential financial impact of the alleged fraudulent activity was an additional expense of $200,000 (also observing that varying computations in the record showed a lower amount). The ALJ found this amount arguably not material when compared with the Respondent's overall revenue and losses. The only evidence introduced to suggest that this amount would be material to shareholders was the Complainant's subjective opinion. External auditors chose not to adjust the expense by the final determined amount of $60,000 because they considered it not to be material. An audit committee engaged a law firm to investigate allegations raised by

the auditor; this investigation included some of the Complainant's contentions. The ALJ found that this action indicated that auditor and audit committee considered issues raised by the audit to be significant, but did not lead to the conclusion that the concerns acted upon were those raised by the Complainant.

[Editor's note: *See also* ***Frederickson v. The Home Depot, U.S.A., Inc.***, 2007-SOX-13 (ALJ July 10, 2007) for a similar summary of the element of protected activity in a SOX whistleblower case.].

PROTECTED ACTIVITY; ALLEGED FRAUDULENT POLICY OF SINGLE STORE FOUND NOT TO HAVE BEEN OF SUFFICIENT MAGNITUDE TO MATTER TO A REASONABLE INVESTOR

In ***Frederickson v. The Home Depot, U.S.A., Inc.***, 2007-SOX-13 (ALJ July 10, 2007), the ALJ found that the Complainant failed to establish a prima facie case of a SOX whistleblower complaint where he did not, under the facts presented, show that he had a reasonable belief of actionable fraudulent activity. Specifically, the Complainant maintained that he had a reasonable belief of fraud relating to the recording of items as damaged rather than for "store use," whereby refunds for such merchandise were wrongfully extracted from vendors (the Complainant had used some hooks in his department, and was instructed to record them in the store computer as damaged). The ALJ found, however, that the Complainant had no reasonable basis to believe that this policy extended beyond the store at which he worked, and that such an alleged fraudulent policy, isolated to a single store, even if true, would not have been of sufficient magnitude to believe that a reasonable investor would rely on such information.

PROTECTED ACTIVITY; AUDITOR WHO IS MERELY PERFORMING ASSIGNED DUTIES VERSUS AUDITOR WHO GOES BEYOND ASSIGNED DUTIES TO REPORT REASONABLY PERCEIVED PROBLEMS TO UPPER MANAGEMENT

In ***Robinson v. Morgan Stanley***, 2005-SOX-44 (ALJ Mar. 26, 2007), the Complainant was a senior internal auditor for Morgan Stanley/Discover. Frustrated based on her perception that her concerns about identifiable deficiencies in the company's financial operations were not reaching higher levels of management, the Complainant submitted a detailed memorandum to senior executives at Discover setting out numerous failures in audit controls and examples of management fraud. Based on the circumstances and nature of the memorandum, the Complainant contended that the report was a protected activity under SOX, despite her employment status as an internal auditor.

The ALJ detailed the holding of the ARB in *Platone v. FLYi, Inc.*, ARB No. 04 154 (Sept. 29, 2006), and the Sixth Circuit in *Sasse v. USDOL*¸ No. 04 3245 (6th Cir. May 31, 2005) (cases below ARB No. 02 077 and ALJ No. 1998 CAA 7), and summarized the components that the Complainant would need to establish in order to prove that she engaged in protected activity under SOX:

> First, the report or action must relate to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders. Second, the complainant's belief about the purported violation must be subjectively and objectively reasonable. Third, the complainant must communicate her concern to either her employer, the federal government, or a member of Congress. Fourth, the report or complaint must involve actions outside the complainant's assigned duties.

Slip op. at 115 116. In regard to the element of relatedness/reasonableness, the ALJ found that most of the items in the Complainant's memorandum failed to fit within the laws enumerated in SOX or other law related to fraud against shareholders. The ALJ found that a few items may have implicated allegations of fraud, but that the Complainant had not presented sufficient evidence to allow the ALJ to identify a specific federal law that may have been violated. The ALJ found that items related to several hundred dollars of unreported misuse of company cell phones and calling cards did not rise to the level of materiality in regard to fraud against shareholders. The ALJ did, however, find that one item in the memorandum B that audit management dropped her finding that Discover was not complying with banking regulations in regards to the prompt charge off of credit card bankruptcies and failed to take corrective action B fit the definition of protected activity under SOX (even though a resultant internal investigation led to no significant findings of impropriety). The ALJ then turned to the question of whether the Complainant's action in sending the memorandum to upper management was exempt from SOX protection based on the Complainant's role as an auditor. The ALJ found that the Complainant's discovery of the bankruptcy reporting problem and presentation of her findings to audit management was not a SOX protected activity because she was merely discharging her auditor duties (*i.e.*, under *Sasse*, she bore no employment risk in reporting the deficiency as an auditor). However, the ALJ found that the Complainant engaged in protected activity when she went beyond her assigned duties as an auditor by presenting the bankruptcy issue in a memorandum to the Discover President and CFO based on her belief that the issue was not getting to a sufficiently high level of management for necessary corrective action. The ALJ ultimately found, however, that the Complainant failed to prove that this protected activity contributed to her discharge.

PROTECTED ACTIVITY; EMPLOYER'S KNOWLEDGE; REPORTING WITHIN JOB DUTIES; WHETHER COMPLAINANT MUST EXPRESSLY IDENTIFY THE COMPLAINED OF ACTIONS AS ILLEGAL

In ***Deremer v. Gulfmark Offshore Inc.***, 2006-SOX-2 (ALJ June 29, 2007), the Respondent contended that the Complainant's SOX whistleblower complaint was barred because his allegations fell within his job responsibilities and because he failed to communicate to the Respondent that he believed the conduct to be illegal. In support of the first contention, the Respondent cited several decisions in which it was found that finding irregularities as part of one's job duties cannot constitute protected activity B that the employer must be put on notice that the reporting is

being done to expose illegal acts rather than merely warning of the consequences of its conduct. The ALJ distinguished the decisions as arising under other laws with different contexts, and returned to the purposes of SOX in interpreting the respondent's knowledge element of protected activity. The ALJ concluded that restricting protected activity to exclude job duties would be contrary to Congressional intent. The ALJ pointed out that the legislative history of SOX explicitly discusses the case of Sherron Watkins, whose job responsibilities at Enron arguably included reporting accounting fraud. The ALJ also pointed out that, to be actionable, a SOX whistleblower complaint requires the respondent's knowledge of protected activity, and an adverse job action to which protected activity is a contributing factor B as the actor, the respondent is necessarily aware of an adverse action and its motivation for such action.

In regard to the Respondent's second contention that a complainant must expressly state that he considers the conduct to be illegal, the ALJ found that an examination must be made of the context in which and to whom the statements were made. In the instant case, the statements were made to the controller, auditors, and an investigating law firm, all of whom should logically have recognized fraudulent behavior if the Complainant described it to them, and that publishing of fraudulent statements with the SEC was illegal. Thus, the ALJ found that the Complainant was not required to specifically state to the Respondent that the activity of which he complained was illegal.

XIII.H. CLEAR AND CONVINCING EVIDENCE

DISCHARGE REGARDLESS OF PROTECTED ACTIVITY; SUMMARY DECISION WHERE COMPLAINANT ADMITTED INCIDENT LEADING TO DISCHARGE TOOK PLACE, AND DID NOT PRESENT ANY EVIDENCE TO RAISE DISPUTED MATERIAL FACTS ABOUT THE JOB ACTION

In ***Frederickson v. The Home Depot, U.S.A., Inc.***, 2007-SOX-13 (ALJ July 10, 2007), the ALJ granted summary decision based on the Respondent's contention that the Complainant was discharged for an incident in which he struck a vendor's representative in the groin, and that the Complainant would have been discharged regardless of his alleged protected activity. The ALJ observed that the Complainant did not dispute that he was involved in the incident, although the circumstances and gravity of the conduct was disputed, and that the vendor's representative refused to speak with him after the incident. The Respondent presented evidence that other employees had been discharged for conduct reasons, and had a written policy. The Complainant presented no evidence to establish disputed material facts related to the job action or disparity in its application. Moreover, the Complainant presented no evidence to support a finding that the managers involved in the discharge had knowledge of the protected activity.

XV. FRIVOLOUS COMPLAINT; SANCTIONS

ATTORNEY FEES FOR FRIVOLOUS OR BAD FAITH CLAIM

In ***Pittman v. Siemens AG***, 2007-SOX-15 (ALJ July 26, 2007), the Respondent requested that it be awarded $1,000 in attorney fees under 29 C.F.R. § 1980.109(b). The ALJ agreed that the complaint was unmeritorious, but found that it was not completely frivolous and that the pro se Complainant demonstrated a deep belief in his claims. The ALJ therefore denied the request.

XVII. DISMISSALS AND WITHDRAWALS

VOLUNTARY DISMISSAL WITHOUT PREJUDICE; AUTHORITY OF COURT TO IMPOSE CONDITIONS

In ***Jones v. Smartvideo Technologies, Inc.***, 1:06-CV-02760 (N.D.Ga. June 4, 2007), the Plaintiff filed a motion for voluntary dismissal without prejudice of his SOX whistleblower case. The Defendants opposed the motion, arguing that they would be prejudiced by a dismissal without prejudice. The court found no evidence of bad faith by the Plaintiff or his counsel, that the Plaintiff had not failed to properly prosecute his case, that discovery was not yet complete and no dispositive motions had been filed, and that the Defendants had not substantially prepared for trial. The court also found that mere delay was not sufficient reason to deny dismissal without prejudice. The court, however, found that the Defendant had been prejudiced in having to prepare for the Plaintiff's deposition. Accordingly, the court granted dismissal without prejudice, but ordered that if the action was refiled (and was not barred by the applicable statute of limitations or other legal prohibitions), the Plaintiff must certify to the court that he had paid the Defendant's costs and fees incurred to prepare for the deposition (in an amount approved by the court). The court gave the Plaintiff 10 days to choose to withdraw the withdrawal and to proceed with the case if he was unwilling to accept the conditions on withdrawal.

WITHDRAWAL OF APPEAL RESULTS IN ALJ'S DECISION BECOMING THE FINAL DECISION OF THE SECRETARY OF LABOR

In *Hagman v. Washington Mutual Bank, Inc.*, 2005-SOX-73 (ALJ Dec. 19, 2006), the ALJ issued a recommended decision awarding front pay and reduced attorney fees. The Respondent filed a petition seeking review by the ARB. After the ARB issued a Notice of Appeal and Briefing Schedule, the parties were granted an extension of time for mediation. Subsequently, the Respondent requested that its petition for review be withdrawn and its appeal dismissed. In ***Hagman v. Washington Mutual Bank, Inc.***, ARB No. 07 039, ALJ No. 2005-SOX-73 (ARB May 23, 2007), the ARB

granted the request and dismissed the appeal, noting that the effect would be that the ALJ's decision becomes the final decision of the Secretary of Labor pursuant to 29 C.F.R. ' 1980.109(c).

VOLUNTARY DISMISSAL OF APPEAL; COMPLAINANT MUST SPECIFY WHETHER DISMISSAL IS SOUGHT (1) BECAUSE OF WITHDRAWAL OF OBJECTIONS TO THE ALJ'S ORDER, (2) BECAUSE OF A SETTLEMENT, OR (3) BECAUSE OF REMOVAL OF THE CASE TO FEDERAL DISTRICT COURT

In ***Vodicka v. Dobi Medical International, Inc.***, ARB No. 06 037, ALJ No. 2005-SOX-111 (ARB May 30, 2007), a Sarbanes Oxley Act whistleblower claim, the ALJ had granted summary judgment for the Respondent, and the Complainant petitioned for review by the ARB. The ARB granted the petition. Later, the ARB received a letter from the Complainant requesting dismissal of the whistleblower claim with prejudice. The ARB issued an Order requiring the Complainant to specify which of three options he wished to proceeding, noting:

> The SOX implementing regulations provide three options for terminating a case pending at the Board prior to final adjudication. First, a party may withdraw his or her objections to the findings or order on appeal by filing a written withdrawal with the Board. In that case the findings or order becomes the final order of the Secretary. Second, the parties may enter into an adjudicatory settlement. If the parties enter into a settlement, the regulations require the parties to file a copy of the settlement with the Board for its review. Third, if the Board has not issued a final decision within 180 days of the filing of the complaint, the complainant may bring an action at law or equity for de novo review in the appropriate United States district court.

USDOL/OALJ Reporter at 2 (footnotes omitted). The Complainant's counsel responded that the Complainant was withdrawing his objections to the ALJ's recommended decision and order. The ARB then approved the motion to withdraw, dismissed the appeal, and noted that the ALJ's decision had become the DOL's final order in the case.

DISMISSAL FOR CAUSE; FAILURE TO TIMELY RESPOND TO RESPONDENT'S MOTION FOR SUMMARY DECISION

In ***Rowland v. National Association of Securities Dealers***, 2007-SOX-6 (ALJ July 2, 2007), the ALJ dismissed the Complainant's SOX complaint for failure to timely respond to the Respondent's motion for summary decision, and for failure to respond to the ALJ's order to show cause why the complaint should not be dismissed for her failure to comply with the ALJ's orders and timely file a response to the Respondent's motions.