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Private Sector Whistleblowers: Are There Sufficient Legal Protections?

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Madame Chairwoman and members of the Sub-Committee, I am pleased and honored to be here today to testify about the legal protections that are offered to private sector whistleblowers.

By way of introduction, I am a Partner in the Labor and Employment Section of the law firm Proskauer Rose LLP. Although I practice out of my firm's New York City office, I have handled employment matters in federal and state courts and administrative agencies around the country. My fifteen year legal career has been almost exclusively devoted to the representation of employers in employment matters, whether engaged in counseling for the purpose of avoiding employee disputes or litigating those disputes as they arise. Throughout, I have advised and represented clients in connection with litigating or avoiding retaliation and whistleblower claims. In recent years, my practice, at least in the for-profit sector, has focused on the representation of financial services firms.

The issue before you today is whether there are sufficient legal protections for private sector whistleblowers, balanced, against, of course, the need for employers to run their businesses in a competitive and potentially profitable manner. I am going to focus my prepared remarks on the anti-retaliation provisions contained in the Sarbanes-Oxley Act of 2002.

Before discussing the Sarbanes-Oxley anti-retaliation provision as such, it is important to place that provision in context. Congress enacted Sarbanes-Oxley against the backdrop of the Enron debacle, a disaster born out of, among other things, fraudulent financial reporting which grossly overstated earnings and understated obligations. Given the breadth with which Enron stock had been held by pension and 401k funds as well as individual investors, Enron's fall was felt widely throughout the economy.

Unlike Title VII of the 1964 Civil Rights Act, the Fair Labor Standards Act or Occupational Safety and Health Act, Sarbanes-Oxley is not a statute intended in the first instance to govern employee/employer relations. As the preamble to Sarbanes-Oxley states, it is an Act "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." To that end, Sarbanes-Oxley contained eleven titles, ranging from Title I, which established the Public Company Accounting Oversight Board to Title IV, which requires enhanced financial disclosures to enhancing various relevant criminal provisions in Titles IX and XI. As part of Sarbanes-Oxley's overall effort to protect investors in public companies from fraud, Congress enacted Section 806 of the Act, titled, "Protection for employees of publicly traded companies who provide evidence of fraud". This anti-retaliation provision must not be mistaken for, or compared against, some sort of generalized whistleblower protection act. Indeed, the approach adopted in Sarbanes-Oxley is consistent with the federal government's oft-used approach of enacting targeted anti-retaliation protections that fit within the specific aims of the substantive legislation.

The Sarbanes-Oxley Anti-Retaliation Provisions Are Favorable To Employees

The anti-retaliation provisions contained in Sarbanes Oxley are unquestionably very favorable to employees. First and foremost, the burden of proof for a Sarbanes-Oxley whistleblower claim is extremely favorable to the claimant. To establish a prima facie case of retaliation, the employee need only establish that: (i) he "engaged in a protected activity or conduct"; (ii) the respondent "knew or suspected, actually or constructively, that the employee engaged in protected activity"; (iii) he "suffered an unfavorable personnel action"; and (iv) the circumstances were sufficient to give rise to the inference that the protected activity was a *contributing factor* in the unfavorable action."[1] According to at least one district court, "The words 'a contributing factor' mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[2] By contrast, in other employment litigation contexts, a plaintiff-employee must establish that the impermissible consideration was a "determining" or a "significant" factor in the employer's decision, a unquestionably higher burden of proof.[3]

According to the regulations promulgated under Sarbanes-Oxley, once an employee proves a prima facie case of retaliation, an employer can avoid liability only if it "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."[4] By contrast, in a mixed

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1 29 C.F.R. §§ 1980.104 (b)(1), 1980.109(a) (emphasis added).

2 *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1379 (N.D. Ga 2004).

3 *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)(to succeed on an age discrimination claim, a plaintiff must show that age was a determinative factor in adverse action); *Woodson v. Scott Paper Co.*, 109 F.3d 913 (3d Cir. 1997) (jury must be instructed that improper motive must have had a determinative effect on the decision to fire in order for plaintiff to prevail on Title VII retaliation claim).

4 29 C.F.R. §§ 1980.104 (b)(2) (emphasis added); 1980.109(a); *Platone v. Atl. Coast Airlines Holdings, Inc.*, 2003-SOX-27 (ALJ Apr. 30, 2004), at 28, *rev'd on other grounds*, *Platone v. FLYi, Inc.*, Case No. 04-154 (ARB Sept. 29, 2006).

motive retaliation case under Title VII, an employer need only prove by a preponderance of the evidence that it would have taken the same action in the absence of the employee's protected conduct.[5]

To engage in activity protected by the statute, a Sarbanes-Oxley complainant need only "reasonably believe" that his report describes a violation of the laws, rules and regulations set forth in the statute.[6] By contrast, certain whistleblower statutes require an "actual violation" of the statute, rule or regulation at issue.[7]

In addition, as a practical matter, employees (unlike employers) have a choice of forum for their Sarbanes-Oxley retaliation claims – they may choose whether to pursue a Sarbanes-Oxley whistleblower claim before OSHA or in federal court. A Sarbanes-Oxley complainant may:

> if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bring[ ] an action at law or equity for de novo review in the appropriate district court of the United States . . . [8]

Given the time frames allotted for the various proceedings before OSHA, it would not be surprising to learn that many, if not most, claimants will have this option. OSHA has sixty (60) days from filing to issue a reasonable cause determination; the parties then have thirty (30) days to request review by an Administrative Law Judge; appeals from an ALJ's decision must be made to the Department of Labor's Administrative Review Board ("ARB") within ten (10) days,

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5 *See, e.g., Kubicko v. Ogden Logistics Services*, 181 F.3d 544 (4th Cir. 1999) (if employer establishes by a preponderance of the evidence that it would have taken the same act adverse act in the absence of protected activity, Title VII retaliation claim fails).

6 18 U.S.C. § 1514A(a)(1).

7 *See, e.g., Pail v. Precise Imps. Corp.*, 681 N.Y.S.2d 498, 500 (1st Dep't 1998) (applying New York State's private employer whistle-blower statute).

8 18 U.S.C. § 1514A(b)(1)(B).

and the ARB has 120 days to issue a final decision (which itself may be appealed to a Federal circuit court of appeals).[9] As Professor Moberly has noted, the option to seek de novo review in federal court "almost certainly will be available for employees, because it is unlikely that the entire process will be completed in that period of time."[10]

OSHA Performs Thorough Investigations

Apart from the statute itself, based upon my law firm's experience with OSHA investigations of Sarbanes-Oxley retaliation claims, we believe that OSHA has generally conducted thorough investigations, and has certainly done so when compared to investigations conducted by other federal, state and local agencies with whom we routinely interact.[11] Transferring jurisdiction over Sarbanes-Oxley retaliation claims from OSHA to another agency at this point would waste the experience and knowledge that OSHA has accumulated in handling these matters. And doing away with the requirement that Sarbanes-Oxley complainants first file with OSHA before going to federal court would leave to the already-overburdened federal courts the task of weeding out, in the first instance, the many Sarbanes-Oxley retaliation claims that are procedurally flawed.

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9 29 C.F.R. §§ 1980.105(a),(c); 1980.109(c), 1980.110(c).

10 Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. (forthcoming Fall 2007) (manuscript at 12, on file with SSRN: http://ssrn.com/abstract=977802).

11 Any suggestion that more thorough investigations by OSHA would necessarily favor complainants is nothing but pure speculation. Indeed, one could hypothesize various sets of facts in which a more thorough investigation would favor the employer. For example, while the timing of an adverse action as related to a complainant's protected activity might, on the surface, suggest a connection between the two, a more in-depth analysis might reveal that the employer had planned the adverse action prior to learning of the protected activity, thus undermining any inference of retaliation.

Sarbanes-Oxley's Salutary Effects On The Workplace

Apart from victories obtained by Sarbanes-Oxley plaintiffs, whether through OSHA or in federal court, Sarbanes-Oxley has had a salutary effect on the workplace. Section 301 of Sarbanes-Oxley mandates that public company audit committees:

> establish procedures for – (A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.[12]

In other words, Sarbanes-Oxley mandated the creation of an avenue by which employees can raise certain issues without having to go through the company's executives. Moreover, apart from Sarbanes-Oxley's specific requirements in this regard, companies have adopted proactive policies requiring the investigation and resolution of complaints made pursuant to corporate codes of ethics. While it would be impossible to quantify, Sarbanes-Oxley has undoubtedly promoted a culture more open to and welcoming of internal complaints by employees.

Whistleblower Statutes Must Reflect A Balance Between Employee Protections and Costs

While the enactment of Sarbanes-Oxley has undoubtedly positively impacted investors in and employees of public companies alike, as with any statute regulating the workplace, Sarbanes-Oxley has also had costs. It is beyond dispute that for every meritorious case filed under any employment statute, there are far more cases that are not.[13] The costs incurred by employers to defend such actions are staggering; the defense of a meritless case can range from five to seven figures. Moreover, there are certain employees who will abuse statutes such as Sarbanes-Oxley, viewing a complaint protected thereunder as providing guaranteed immunity from management or scrutiny. And because of the very favorable burdens of proof to employees

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[12] 15 U.S.C. § 78j (m)(4).

[13] *See, e.g.,* Moberly, *Unfulfilled Expectations* (manuscript at 20).

under Sarbanes-Oxley, employers must be extraordinarily careful in managing employees who have engaged in protected activity, even those whose complaints are specious or in bad faith. Therefore, before considering any proposals to make Sarbanes Oxley even more favorable to employees, the attendant costs to employers must be considered.

A Brief Comment On Professor Moberly's Forthcoming Article

In a forthcoming article entitled "An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win" Professor Moberly asserts that Sarbanes-Oxley has "failed to protect the vast majority of employees who filed a Sarbanes-Oxley retaliation claim" because, in his view, they do not win often enough.[14] He comes to this conclusion by comparing Sarbanes-Oxley "win" rates (before OSHA only, not in federal court) with the "win" rates of claimants under other employment statutes.[15] The unstated premise necessary to this argument is that employers are, in fact, retaliating against employees in violation of Sarbanes-Oxley at the same (or greater) rate that employers violate other employment statutes. But Professor Moberly offers no support for any such hypothesis. (He, in fact, expressly disavows possessing any evidence to support such a claim).[16]

In addition, much of Professor Moberly's criticism of the claimant "win" rate with OSHA reflects a disdain for the statute's limited coverage in terms of employer types and protected activity. But that limited scope flows naturally from the statute's original purposes, discussed above. Indeed, by Professor Moberly's own analysis, if the employee losses accounted for by

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[14] Moberly, *Unfulfilled Expectations* (manuscript at 2).

[15] Some of the comparisons offered by Professor Moberly are highly suspect. For example, comparing the rate at which the United States Equal Employment Opportunity commission finds "reasonable cause" to the rate at which OSHA finds "reasonable cause" is like comparing apples to oranges. A "reasonable cause" finding by OSHA, if not appealed, is a final determination on the merits. A "reasonable cause" finding by the EEOC has no such effect.

[16] Moberly, *Unfulfilled Expectations* (manuscript at 24) ("Thus, we do not know, and cannot determine, whether employees filed "good" or "bad" Sarbanes-Oxley cases."); (*see also* manuscript 24 n. 128).

such issues are excluded, employees win at much higher rates (10.6 percent before OSHA and 55.6 percent before ALJ's).[17]

Professor Moberly is also highly critical of the statute's 90 day statute of limitations, and claims that it is contrary to Sarbanes-Oxley's purpose.[18] In fact, a short limitations period is entirely consistent with the Act's purpose of protecting investors in public companies. If a company is engaged in securities fraud, and it is retaliating against putative whistleblowers who are trying to bring that conduct to light, it is indeed in the interests of investors that the fraud and retaliation be brought to light in an expeditious manner. Moreover, of the fourteen anti-retaliation statutes administered by OSHA, seven have a thirty (30) day limitations period, one has a sixty (60) day limitations period, three (including Sarbanes-Oxley) have ninety (90) day limitations periods; only three have periods greater than ninety (90) days.[19] Thus, it can hardly be said that the Sarbanes-Oxley limitations period is "restrictive" (as asserted by Professor Moberly), relative to other similar statutes.

Conclusion

The anti-retaliation provisions of Sarbanes-Oxley were enacted against a particular backdrop with a specific purpose, to protect investors in public companies. The statute, in its

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17 Moberly, *Unfulfilled Expectations* (manuscript at 41)

18 *Id.* at 49-51.

19 The statutes other than Sarbanes-Oxley are the Occupational Safety and Health Act of 1970 § 11(c), 29 U.S.C. § 660 (30 days); the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (180 days); the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2651 (90 days); the International Safe Container Act of 1977, 46 U.S.C. app. § 1506 (60 days); the Safe Drinking Water Act of 1974, 42 U.S.C. § 300j-9(i) (30 days); the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1367 (30 days); the Toxic Substances Control Act of 1976, 15 U.S.C. § 2622 (30 days); the Solid Waste Disposal Act of 1976, 42 U.S.C. § 7001 (30 days); the Clean Air Act of 1977, 42 U.S.C. § 7622 (30 days); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9610 (30 days); the Energy Reorganization Act, 42 U.S.C. § 5851 (180 days); the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 (90 days); and the Pipeline Safety Improvement of 2002 § 6, 49 U.S.C. § 60129 (180 days).

current form, is very favorable to employees who present valid claims. Based on the experience of Proskauer Rose, OSHA has done a relatively thorough job in investigating and handling these claims. And American corporations are taking actions internally to protect whistleblowers from retaliation. Notwithstanding these positives, significant costs are undoubtedly associated with Sarbanes-Oxley. Under these circumstances, there is no basis for Congress to amend the anti-retaliation provisions of Sarbanes-Oxley or otherwise alter its enforcement mechanisms.