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ESSAY

DOES SARBANES-OXLEY PROTECT WHISTLEBLOWERS? THE RECENT EXPERIENCE OF COMPANIES AND WHISTLEBLOWING WORKERS UNDER SOX

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ABSTRACT

The Sarbanes Oxley Act of 2002 (SOX) attempts to prevent fraud in the business activities of public companies. SOX includes regulations designed to protect whistleblowing employees that may be triggered if workers allege fraudulent activity by their employers, and, in response, their employers retaliate. This Essay discusses the strength of the whistleblowing protection provided by SOX, the conduct covered by the SOX whistleblower provisions, and specifically the application of the law by the courts.

INTRODUCTION

Congress passed the Sarbanes Oxley Act of 2002 (SOX) in the hope that SOX would interrupt, check, and prevent illegal accounting practices by public companies whose activities threatened investors.[1] In concert with the Act's goals, protection is offered to the whistleblowing employee who reports questionable practices.[2] A whistleblowing employee can

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1. *See, e.g.*, Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 108-09 (2007) ("Primarily, SOX aims to transform corporate board members into active managers rather than part-time monitors.").

2. SOX is not the only act to provide whistleblower protection. See, for example, Section 1553 of the American Recovery and Reinvestment Act of 2009, which offers protection to whistleblowers who report corruption that is associated with employers who

supply important information about a company's actions: "Fraud and accounting imbroglios come to light because of a tip (42.6%), internal auditing (24.6%), accident (18%), outside auditors' discovery (16.4%), and last of all, by virtue of an earlier-installed internal control (8.2%)."[3] The whistleblower's contribution to the process, therefore, can be vital.[4] This Essay examines the impact of whistleblower protection under SOX, focusing particularly on four federal circuit decisions that have addressed the issue.

Most of the employees who have claimed whistleblower protection have been dramatically unsuccessful.[5] First, because the language of the Act indicates that such protection does exist: "No [publicly traded company] ... may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee."[6] Second, due to the at least initial belief by lawmakers, business people, accountants, attorneys, investors, or anyone with an interest in preventing corporate fraud that not only was whistleblowing protection necessary, SOX was the vehicle to provide it.

The actual result of the Act appears to have been much different. Richard Moberly of the University of Nebraska School of Law, found that out of the 491 filings by employees in the first three years after SOX was enacted (2002-2005), 361 cases were actually resolved by the Occupational Safety and Health Administration (OSHA)—the federal agency charged with the initial investigations of SOX whistleblower complaints—and of those claims only 3.6% were successfully argued by the employee (i.e., thirteen of the 361).[7] The employees who challenged the OSHA decisions were successful 6.5% of the time when they appealed to a

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have received stimulus funds. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553, 123 Stat. 115 (2009) (enacted Feb. 17, 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf.

3. Douglas M. Branson, *Too Many Bells? Too Many Whistles? Corporate Governance in the Post-Enron, Post-WorldCom Era*, 58 S.C. L. REV. 65, 78-79 (2006); Rapp, *supra* note 1, at 109 n.107 (discussing how light is being shed by more than one method).

4. Whistleblowers were primarily responsible for revealing the fraud at Enron (Sherron Watkins) and WorldCom (Cynthia Cooper). James Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 438-39 (2004).

5. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 67 (2007).

6. 18 U.S.C. § 1514A(a) (2006).

7. Moberly, *supra* note 5, at 67.

Department of Labor Administrative Law Judge (i.e., six of the ninety-three appeals).[8] Moberly found that far from helping employees whose efforts might reveal their public companies' questionable conduct, SOX failed to protect the employees it claimed to champion.[9] Moberly cites to the Act's plain language and experts' opinions that SOX would revolutionize the approach to and protection of employees' conduct when employees choose to disclose the illegal activities of their employers.[10] Nevertheless, SOX has not protected whistleblowers. Moberly's data showing the number of unsuccessful employees was similarly found by Mary Ramirez, who reports that:

> As of May 31, 2006, the total number of SOX complaint determinations was 702; of that number, 499 complaints had been dismissed, 93 were settled, 15 more were decided on the merits, and 95 complaints were withdrawn. Thus, only [3%] of cases decided by DOL were decided on the merits; if settled cases are added to those addressed on the merits (assuming that settled cases have some merit), then less than 1 out of 5 complaints ... avoid dismissal.[11]

Examining the early articles concerning SOX whistleblower protection, there was a collective belief that the protection was assured, and that SOX could prevent an Enron-type fiasco by shielding the whistleblower.[12] The

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8. *Id.*

9. *Id.*

10. *Id.* at 68-69.

11. Ramirez's data came from "an email from Nilgun Tolek, Director, Office of Investigative Assistance, Department of Labor, to Thomas Hitchcock (June 12, 2006, 3:24 p.m. CST) (on file with [Ramirez])." Mary Kreimer Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 199-200 (2007) (internal citations omitted). The data is further supported in an article by Tresa Baldas, *Whistleblowing Protection under SOX is a 'Major Disappointment' for Plaintiffs*, NAT'L L. J., Oct. 31, 2007. Baldas states that of the approximately 1000 claims filed through October 2007, seventeen were decided on the merits, but only six of these seventeen were decided in favor of the employee by an Administrative Law Judge, according to the Department of Labor. *See id.*

12. *See, e.g.*, Larry Catá Baker, *The Sarbanes-Oxley Act: Federalizing Norms for Officer, Lawyer, and Accountant Behavior*, 76 ST. JOHN'S L. REV. 897, 897 (2002); Michael Delikat, *Retaliation & Whistleblowing Claims in the Sarbanes-Oxley Era*, 712 PLI/LIT 559, 570 (2004); Stephen Fraidin & Laura Mutterperl, *Advice of Lawyers: Navigating the New Realm of Federal Regulation of Legal Ethics*, 72 U. CIN. L. REV. 609, 609 (2003); Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the "Delete Key": §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 AM. CRIM. L. REV. 67, 89-91 (2004); Brooke Iley & Mark Blondman, *An Employer's Guide to Conducting Internal Investigations*, CORP. COMPLIANCE & REG. NEWSL. (July 2006); Katrina Campbell Randolph, *Understanding How Employers Can Be Held Liable Under Criminal Law*, THE RECORDER, Mar. 22, 2007; A. Martin Wickliff, Jr. & Peter M.

reality is that SOX has not delivered on this front—not to the employees, the government, or the public.[13]

Data from Terry Dworkin at the University of Indiana, Kelley School of Business, similarly shows that whistleblowers are virtually never successful under SOX.[14] "Despite the intended promotion and use of whistleblowing to help enforce Sarbanes-Oxley and deter wrongdoing in the securities market, the statutory scheme gives the illusion of protection without truly meaningful opportunities or remedies for achieving it."[15] Dworkin's sentiment is echoed by Ramirez, who states that, "[T]his limited success for complainants suggests that many employees expecting protection by SOX are not actually enjoying such protection."[16]

Although the whistleblowers' revelations can be significant, the consequences of blowing the whistle may be deleterious to the employee beyond losing his or her current job. Even if the employee can successfully obtain SOX protection, information concerning widespread fraud may kill a firm, as was true at Enron, in which case there is neither a job to come back to nor a source of damages when the company collapses.[17]

Panken, *Retaliation and Whistleblowing Protection—A New Tune from Sarbanes-Oxley*, in ALI-ABA Course of Study Materials, 3 Employment and Labor Relations Law for the Corporate Counsel and the General Practitioner (Apr. 2003).

13. Additionally, when Congress delivered SOX to President Bush, its passage was accompanied by the President's use of a signing statement. President Bush said when he signed SOX into law,

> The legislative purpose of section 1514A ... is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority, [therefore] the executive branch shall construe section 1514A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.

Statement by President George W. Bush Upon Signing H.R. 3763, 2002 U.S.C.C.A.N. 543 (July 30, 2002). Ramirez states that, for SOX, "out of literally hundreds of reform provisions, [the President] narrowed only whistleblower protection," further muddying the waters as to the protection SOX provided, perhaps limiting it to protecting only those whistleblowers who were cooperating with Congress. Ramirez, *supra* note 11, at 183 n.9.

14. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1764 (2007).

15. *Id.* Dworkin cites to a study by Earle and Madek (as of 2006), finding that "of the 677 completed Sarbanes-Oxley complaints, 499 were dismissed and 95 were withdrawn." *Id.* at 1757, 1764-65 (citing Beverly Earle and Gerald A. Madek, *The Mirage of Whistleblowing Protection under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1 (2007)).

16. Ramirez, *supra* note 11, at 200.

17. Rapp, *supra* note 1, at 95.

Even if the firm survives, the whistleblower may be labeled as disloyal by current or future employers, making one's current job, or securing a new position, difficult.[18] As noted, the safety net offered through SOX is fundamentally of limited use to the whistleblower, who cannot count on SOX protections. Nevertheless, SOX as written and applied does grant some, albeit imperfect, assistance to the whistleblower who perseveres.

Very few cases involving SOX retaliation claims have made it to the appellate courts.[19] The circuit courts' interpretation and application of the Act help explain employees' difficulty in successfully mounting a SOX retaliation complaint; some of this difficulty lies in both the approach of the agencies charged with enforcing SOX as well as the courts' own analyses of what is a protected activity under the Act. This Essay examines four cases, focusing specifically on the courts' respective interpretations of what is a protected whistleblowing activity under SOX. The courts' general failure to classify the actions of an employee as protected conduct (for which he or she should not have been dismissed) establishes the primary obstacle to winning a whistleblower claim.

I. ALLEN V. ADMINISTRATIVE REVIEW BOARD

Former employees of Stewart Enterprises, Inc., (Stewart) a public company with offices throughout the United States, sued the company under the Sarbanes Oxley Act of 2002 when they were fired by the

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18. *Id.*

19. Four circuit court cases are discussed in this article: Allen v. Admin. Review Bd., 514 F.3d 468, 471 (5th Cir. 2008); Livingston v. Wyeth, 520 F.3d 344, 346 (4th Cir. 2008); Platone v. U.S. Dep't of Labor, 548 F.3d 322 (4th Cir. 2008); and Welch v. Chao, 536 F.3d 269 (4th Cir. 2008). Other cases decided by the circuit courts in this area include: Day v. Staples, Inc., 555 F.3d 42 (1st Cir. 2009) (employee's SOX whistleblower claim denied); Harp v. Charter Commc'ns, Inc., 558 F.3d 722 (7th Cir. 2009) (employee's SOX whistleblower claim denied); Halloum v. U.S. Dep't of Labor, 307 Fed.Appx. 106, 2009 WL 118960 (9th Cir. 2009) (employee's SOX whistleblower claim denied); Bregin v. Liquidebt Sys., Inc., 548 F.3d 533 (7th Cir. 2008) (employee's SOX whistleblower claim denied); Guyden v. Aetna Inc., 544 F.3d 376 (2d Cir. 2008) (compelling arbitration of employee's SOX whistleblower claim); Taylor v. Admin. Review Bd., 288 Fed.App'x. 929, 2008 WL 3375098 (5th Cir. 2008) (holding that regardless of whether the employee's activities were protected conduct under SOX whistleblower provisions, employee failed to make a claim under the Act); Washington v. Weaver, 2008 WL 4948612, slip op. (5th Cir. 2008) (employee's SOX whistleblower claim denied). *But see* Van Asdale v. Int'l Game Tech., 2009 WL 2461906 (9th Cir. 2009) (holding that employees engaged in conduct protected by SOX whistleblower provisions and remanding the case to determine if this activity contributed to their terminations).

company after raising their concerns about the company's accounting practices.[20] In accordance with SOX, the former employees' claims were ultimately heard by a Department of Labor (DOL) administrative law judge who dismissed their complaints.[21] When appealed to the department's Administrative Review Board, the complaints were dismissed again.[22] In the decisions reached by the Administrative Law Judge and the Administrative Review Board, the former employees failed to establish that they engaged in a protected activity under the Act; the company's terminations of the employees were not, therefore, a violation of SOX.[23] The Fifth Circuit affirmed these prior decisions under the following facts.[24]

The complainants, Laura Waldon, Patricia Allen, and Dana Breaux, expressed concern to Stewart when the company's computer system incorrectly calculated its customers' accounts.[25] Each of the three employees was responsible for using the accounting system and providing information that the system used.[26] The errors had been discovered by Stewart, and, while none of the complainants alleged that Stewart intentionally overcharged its customers, they did express concern that corrections to the accounting errors were "taking too long ... the delay was due to Stewart's desire to keep the problem a secret, (and the complainants) were concerned that Stewart might be overcharging customers who did not complain."[27] The three employees expressed concern that Stewart's activities posed a risk of violating Missouri and Texas law as well as federal legislation protecting stockholders.[28]

A further allegation of inappropriate company action came in connection with a directive from the Securities Exchange Commission (SEC).[29] SEC Staff Accounting Bulletin 101 "prohibits publicly-traded companies from recognizing sales revenues before they deliver merchandise to the customer."[30] The bulletin forced Stewart to change its accounting practices, and complainant Waldon, in particular, became con-

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20. *Allen*, 514 F.3d at 471, 475; Sarbanes Oxley Act of 2002 § 806, 18 U.S.C. § 1514A (2006).

21. *Allen*, 514 F.3d at 477.

22. *Id.*

23. *Id.* at 471.

24. *Id.*

25. *Id.*

26. *Id.* at 471-72.

27. *Id.* at 472.

28. *Id.*

29. *Id.* at 473.

30. *Id.*

cerned that the necessary changes at Stewart were not being made.[31] The accounting reports for recognized sales revenue were not provided to the SEC, nor did the bulletin require that the reports be supplied to the SEC.[32] Waldon, nonetheless, believed that Stewart's activities were not in compliance with the bulletin's directives.[33] Waldon told Stewart's Chief Accounting Officer about her concerns.[34] As noted, the other two complainants, Allen and Breaux, were also worried about Stewart's accounting practices, and similarly reported their concerns to Stewart through its Director of Internal Audit.[35]

As a result of their reports regarding accounting irregularities, the complainants testified that, "they began to experience stonewalling and resistance from the SSC (a division within Stewart, its Shared Service Center)," within which they worked.[36] Additionally, each experienced "exclusion from emails and meetings, lack of notification of policy and procedural changes, and delays in receiving responses from the SSC."[37] The complainants faced, therefore, "a hostile environment for engaging in a protected activity."[38]

According to the former employees, Stewart disingenuously claimed that it fired the three employees as part of a reduction in force, but the inclusion of the three in this reduction was actually explained by their reporting of the accounting irregularities.[39] Stewart denied the allegations and insisted that it based the terminations on "job functions rather than the individuals in the jobs."[40] The former employees filed complaints through the Department of Justice alleging that Stewart retaliated against them for engaging in protected activity.[41] The administrative law judge who heard their claims dismissed them, and this result was repeated on appeal to the Administrative Review Board.[42] The Fifth Circuit then heard the case.[43]

The Fifth Circuit provided the relevant law governing Stewart's alleged misconduct, 18 U.S.C. § 1514A, which lays out the requirements

31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 472.
36. *Id.* at 474.
37. *Id.* at 473.
38. *Id.* at 473-74.
39. *Id.* at 474.
40. *Id.*
41. *Id.* at 475.
42. *Id.* at 471.
43. *Id.* at 476.

for a civil action filed to protect against retaliation in fraud cases.[44] In addition, the Fifth Circuit noted the burden of proof in SOX whistleblower cases as governed by section 1514A(b)(2)(c) of the Act:

> To prevail, an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[45]

According to the court, employees will be protected when their engagement in a protected activity contributes to an unfavorable, that is, an adverse, employment action by their employer.[46]

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44. 18 U.S.C. § 1514A (2006).

> (a) Whistleblower protection for employees of publicly traded companies.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
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> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
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> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
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> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

See Sarbanes Oxley Act § 806, 18 U.S.C. § 1514A (2006); *see also Allen*, 514 F.3d at 475.

45. *Allen*, 514 F.3d at 475-76. Under SOX, "the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b), governs SOX whistleblower actions." *Id.* at 475; *see* 49 U.S.C. § 42121(b) (2000).

46. *Allen*, 514 F.3d at 476.

The Supreme Court established the meaning of an adverse employment action in *Burlington Northern & Santa Fe Railway Co. v. White*:[47] "Burlington held that 'a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from [engaging in the protected activity].'"[48] The Administrative Review Board adopted the Supreme Court's definition of an adverse employment action in *Hirst v. Southeast Airlines, Inc.*[49] *Hirst* dealt with claims under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), which also governs SOX claims.[50] The Fifth Circuit agreed with the Administrative Review Board that the *Burlington* standard for adverse employment actions should be applied under SOX as well,[51] specifically, "that an employee's reasonable belief must be scrutinized under both a subjective and objective standard."[52]

The Fifth Circuit stated that the Administrative Review Board's decision would be affirmed "unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.'"[53] Focusing on the prior rulings in the case by an administrative law judge and the Administrative Review Board, the Fifth Circuit held, consistent with these tribunals, that the employees' actions were not protected activity as it is understood under the Act, because the activity did not "'definitively and specifically relate' to one of the six enumerated categories found in § 1514A: (1) 18 U.S.C. § 1341 (mail fraud); (2) 18 U.S.C. § 1343 (wire fraud); (3) 18 U.S.C. § 1344 (bank fraud); (4) 18 U.S.C. § 1348 (securities fraud); (5) any rule or regulation of the SEC; or (6) any provision of federal law relating to fraud against shareholders."[54]

The Fifth Circuit held that an employer violates the SOX protections by retaliating against the whistleblowing employee who tells a supervisor of his or her concerns, "which the employee reasonably believes constitute a violation of one of the six enumerated categories."[55] Consistent with the

47. Burlington & Sante Fe Ry. Co. v. White, 548 U.S. 53 (2006).

48. *Allen*, 514 F.3d at 476 n.2 (citing Burlington & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (internal quotation marks and citations omitted)).

49. *Allen*, 514 F.3d at 476 n.2.

50. *See* 49 U.S.C. § 42121(b) (2000); Hirst v. Se. Airlines, Inc., ARB Case No. 04-116, 2007 WL 352447 (ARB Jan. 31, 2007).

51. *Allen*, 514 F.3d at 476 n.2.

52. *Id.* at 477.

53. *Id.* at 476 (citing Williams v. Admin. Review Bd., 376 F.3d 471, 476 (5th Cir. 2004) (quoting Macktal v. U.S. Dep't of Labor, 171 F.3d 323, 326 (5th Cir. 1999))).

54. *Id.* at 476-77.

55. *Id.* at 477 (quoting 18 U.S.C. § 1514A(a)(1) (2006)).

Supreme Court's analysis in *Burlington* regarding what is a reasonable belief, the Fifth Circuit stated, "[t]he objective reasonableness of an employee's belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[56] The court then applied the principles it derived from the statute and prior case law to the former employees' claims.

Turning first to complainant Waldon, the Fifth Circuit described Waldon as a CPA, whose beliefs must be examined through the lens of similar expert accounting professionals.[57] Waldon's complaints regarding the Staff Accounting Bulletin concerned financial statements that would not be submitted to the SEC; Waldon knew this and must have known it as an accounting expert, according to the court.[58] When she raised concerns about Stewart's compliance with the Bulletin, her "general inquiries" regarding compliance failed to constitute protected activity, primarily because the report would never reach the SEC.[59]

Second, all of the employees voiced concerns about Stewart's accounting practices, although the court thought that none could point to one of the six enumerated categories announced in the statute.[60] The former employees argued that they possessed the reasonable belief, "that Stewart's conduct violated some unidentified federal law relating to fraud against shareholders."[61] The employees' reasonable beliefs related, therefore, to the sixth category, that is, any provision of federal law relating to fraud against shareholders.[62] The Fifth Circuit reasoned that the statute's plain language requires a finding that the company intended to commit a fraud against its shareholders in order for the employer's conduct to constitute a whistleblowing violation of SOX as retaliatory.[63] The Fifth Circuit stated, "[T]he employee must reasonably believe that his or her

56. *Id.* The court also noted that a mistaken belief may still constitute protected activity, as long as it is reasonable. *Id.* at 478 (referencing Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1376 (N.D. Ga. 2004) and Halloum v. Intel Corp., ARB Case No. 04-068, 2006 WL 3246900, at *5 (Dep't of Labor Jan. 31, 2006)).

57. *Allen*, 514 F.3d at 478-79.

58. *Id.* at 479.

59. *Id.* The reports would not be sent to the SEC, therefore the Fifth Circuit would not classify Waldon's actions as falling into the fifth class of enumerated categories ("any rule or regulation of the SEC"). 18 U.S.C. § 1514A(a)(1) (2006).

60. *Allen*, 514 F.3d at 479.

61. *Id.*

62. *Id.*

63. *Id.* at 479-80.

employer acted with a mental state embracing intent to deceive, manipulate, or defraud its shareholders."[64]

Regardless of whether Stewart's inattention to accounting irregularities as raised by the employees might constitute negligence by Stewart, the complainants could not reasonably have believed that Stewart's actions were fraudulent, such fraudulent actions requiring scienter, not a merely negligent act.[65] The Fifth Circuit stated that the former employees did not allege that Stewart intentionally manipulated its accounting data, and each acknowledged that Stewart was attempting to rectify its accounting discrepancies;[66] a reasonable person could not have concluded that Stewart's actions were fraudulent, and neither could the complainants.[67] The former employees' actions were, therefore, unprotected activity.[68]

In its defense, Stewart argued "it 'would have taken the same unfavorable personnel action in the absence of that [protected] behavior,'"[69] such a contributing factor being necessary to establish protection under the Act for an adverse employment action precipitated by a protected activity.[70] As noted by the Fifth Circuit, "[a] contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'"[71] Since the actions of the employees were not protected activity, however, it was unnecessary for the employer to show necessity for the terminations independent of the employees reporting behavior; the Fifth Circuit affirmed the decision by the Administrative Review Board and dismissed the complaints.[72]

II. LIVINGSTON V. WYETH INCORPORATED

Mark Livingston worked for Wyeth, Inc. (Wyeth), a public pharmaceutical company, as Associate Director of Training and Continuous Improvement.[73] Wyeth fired Livingston for "abusive and insubordinate

64. *Id.* at 480.
65. *Id.* at 480-81.
66. *Id.* at 481.
67. *Id.*
68. *Id.* at 482.
69. *Id.* at 476 (quoting 49 U.S.C. § 42121(b)(2)(B)(iv) (2006)).
70. *Id.*
71. *Id.* n.3 (citing Klopfenstein v. PCC Flow Techs. Holdings, Inc., ARB Case No. 04-149, 2006 WL 3246904, at *13 (ARB May 31, 2006) (quoting Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993))).
72. *Id.* at 482-83.
73. Livingston v. Wyeth, Inc., 520 F.3d 344, 346 (4th Cir. 2008).

conduct" in 2002.[74] Livingston contended that his termination resulted from his statements both to Wyeth's Office of Compliance and in a memorandum in which Livingston reported that Wyeth could not meet training requirements specified by Food and Drug Administration (FDA) regulations.[75] Wyeth required training for its employees as necessary for compliance with prior violations of FDA rules.[76] Livingston became concerned that Wyeth could not fulfill its obligations to train according to the FDA requirements, and he reported his worries to Wyeth.[77]

While Wyeth met its requirements, and Livingston confirmed this result,[78] Livingston was told by Wyeth's Human Resource office to "stop making non-constructive comments, such as saying that the use of 'approved and verified training practices is defrauding the FDA,' and that he '[r]efrain from making negative and insulting comments regarding the practices of other departments.'"[79] Wyeth told Livingston that if Livingston would not sign a document that affirmed that he would desist from making his statements, such a signature being required by Wyeth within thirty days, Livingston would be terminated.[80] Livingston refused to sign, and Wyeth fired him.[81]

Information about the circumstances of Livingston's termination also revealed that Livingston had a troubled history with Wyeth, including being "formally warned for the use of 'foul and abusive language and unprofessional behavior' toward subordinates."[82] Livingston's employment relationship with Wyeth finally ended after a confrontation at a company holiday party.[83]

When terminated, Livingston filed a complaint through the Department of Labor (DOL) claiming that Wyeth violated the whistleblower protection provisions of SOX.[84] Wyeth's claim was heard by the federal district court when the DOL failed to reach a final decision within the

74. *Id.*

75. *Id.* at 350. FDA regulations specified that, "'[e]ach person engaged in the manufacture ... of a drug product shall have education, training, and experience' sufficient to perform the functions assigned to them." *Id.* at 347 (citing 21 C.F.R. § 211.25 (1995)).

76. *Id.* at 347.

77. *Id.* at 347-48.

78. *Id.* at 348-49.

79. *Id.* at 349 (some internal quotation marks omitted).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

statutory time requirements. The district court dismissed the case in favor of Wyeth.[85] Livingston appealed.[86]

The Fourth Circuit analyzed Livingston's statements to Wyeth and its personnel regarding Livingston's belief that Wyeth might fail to fulfill its training obligations as prescribed by the FDA.[87] Livingston characterized his statements as protected activity and the reason for his termination by Wyeth when the company sought to shut Livingston's protests down.[88] The Fourth Circuit concluded, however, that Livingston's statements were not protected activity.[89]

According to the Fourth Circuit, Livingston could establish a claim only if he proved the following elements:

> (1) [H]e provided information or a complaint to a Wyeth supervisor or to one authorized to investigate and correct misconduct; (2) the information or complaint regarded conduct that he reasonably believed constituted a violation of an enumerated statute or any regulation promulgated by the Securities and Exchange Commission relating to fraud; (3) his employer discharged him or took other unfavorable personnel action against him; and (4) his providing the information or making the complaint was a contributing factor to his discharge or other adverse employment action taken by Wyeth.[90]

As was true in *Allen*, the Fourth Circuit referred to the complainant's subjective and objective reasonable belief that the employer's actions violated the law: "Livingston must show not only that he believed that the conduct constituted a violation, but also that a reasonable person in his position would have believed that the conduct constituted a violation."[91] The Fifth Circuit advised that the belief must encompass a current or past violation, not the possibility that a company might commit a violation.[92]

In Livingston's case, Livingston failed to show that he either believed that that the company was violating or did violate the law, or that the

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85. *Id.* (citing Livingston v. Wyeth, No. 1:03CV00919, 2006 WL 2129794, at *15 (M.D.N.C. July 28, 2006)).

86. *Id.* at 350.

87. *Id.* at 350-51.

88. *Id.* at 350.

89. *Id.* at 353.

90. *Id.* at 351-52.

91. *Id.* at 352. The Fourth Circuit references both a subjective and objective belief, which were also contemplated by the *Allen* court in the Fifth Circuit. Allen v. Admin. Review Bd., 514 F.3d 468, 477 (5th Cir. 2008). *See generally* Courtney J. Anderson DaCosta, *Stitching Together the Patchwork:* Burlington Northern's *Lessons for State Whistleblower Law*, 96 GEO. L.J. 951 (2008).

92. *Livingston*, 520 F.3d at 352 (citing Jordan v. Alternative Res. Corp., 458 F.3d 332, 340-41 (4th Cir. 2006)).

company's potential noncompliance with the FDA regulations posed a simultaneous violation of the Securities and Exchange Act, or one of the enumerated sections specified under SOX.[93] At no time did Livingston articulate concerns for which an SEC violation might be raised.[94] A reasonable employee could not have concluded that Wyeth's actions violated securities law, and neither could Livingston, according to the Fourth Circuit.[95] Livingston did not allege that Wyeth concealed or manipulated training data,[96] that Wyeth was not complying with FDA directives,[97] that shareholders were being misled regarding the training,[98] or that SEC regulations were violated.[99] The Fourth Circuit stated:

> In sum, not one link in Livingston's imaginary chain of horribles was real or was in the process of becoming real. The only *fact* about which Livingston ever complained was the fact that the training system for good manufacturing practices was off schedule ... Livingston has failed to produce evidence that he provided information or made a complaint to Wyeth about conduct which a reasonable employee in his position could have believed at the time constituted a violation of the securities laws.[100]

Regarding Wyeth's FDA compliance efforts, the Fourth Circuit noted that § 10(b) of the Securities Exchange Act and Rule 10b-5 required that false statements to the SEC must be material misstatements: "'[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'"[101] Because the FDA never took, nor threatened to take, actions against Wyeth regarding its training compliance, Wyeth's financial health was never in jeopardy.[102]

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93. 18 U.S.C. § 1514A(a)(1) (2006) ("[T]o provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], *or* 1348 *[securities fraud], any rule or regulation of the Securities and Exchange Commission*, or any provision of Federal law relating to fraud against shareholders ...." (emphasis added)); *Livingston*, 520 F.3d at 353.

94. *Livingston*, 520 F.3d at 356.

95. *Id.*

96. *Id.* at 353.

97. *Id.* at 354.

98. *Id.* at 353-54.

99. *Id.*

100. *Id.* at 355-56.

101. *Id.* at 355 (quoting Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)).

102. *Id.*

The Fourth Circuit then affirmed the district court's dismissal of Livingston's suit.[103]

III. WELCH V. CHAO

In *Welch v. Chao*,[104] the Fourth Circuit affirmed the previous decision reached by the Administrative Review Board (ARB), holding that David Welch, a former employee of Cardinal Bankshares Corporation (Cardinal), failed to establish whistleblower protection under SOX.[105] Welch, a CPA and Cardinal's prior CFO, had alleged that several of Cardinal's accounting practices did not conform with generally accepted accounting principles (GAAP), that Cardinal failed to correct the accounting problems Welch identified, and that Cardinal did not reveal corrected financial reports to the SEC when the reports were revised.[106] Welch furthermore claimed that Ronald Leon Moore, CEO of Cardinal, excluded Welch from communications between Cardinal and Larrowe & Co., Cardinal's independent auditor, which compromised Welch's ability both to perform as CFO and to accurately examine Cardinal's financial reports.[107]

Welch explained all of his concerns to Moore and to others associated with Cardinal, and he refused to certify certain financial records sent to the SEC due to the problems he identified.[108] Welch's claims were then investigated by Cardinal through its Board of Directors.[109] Welch subsequenttly informed "senior personnel" at Cardinal "that three Cardinal employees were 'parties to fraudulent acts,' outlined his belief that Cardinal's accounting practices violated the Sarbanes-Oxley Act, and proposed that he leave Cardinal quietly upon receipt of a generous severance package."[110]

Welch was suspended by the Board and ultimately fired after the Board heard negative reports about Welch's conduct from the legal counsel representing Cardinal's audit committee and from Cardinal's outside auditor.[111] The Board agreed with the conclusions of the attorney and the auditor that "Welch's concerns ... lacked merit [and that] Welch

103. *Id.* at 356.
104. Welch v. Chao, 536 F.3d 269 (4th Cir. 2008).
105. *Id.* at 272.
106. *Id.*
107. *Id.* at 272-73.
108. *Id.* at 273.
109. *Id.* at 274.
110. *Id.* The last accusation here, concerning the suggestion of a severance payment, may have made it easier for the court to rule in favor of Cardinal and against Welch.
111. *Id.*

had seriously breached his fiduciary duty to Cardinal by refusing to meet with [the legal counsel or independent auditor] to discuss his charges ...."[112]

Welch filed charges in response to his termination, alleging that the firm wrongfully discharged him in violation of the SOX protections for whistleblowing employees.[113] The ARB found on review that Welch had neither engaged in conduct protected by the Act nor had Welch made a valid case under the whistleblower protections of the statute.[114]

In the Fourth Circuit's appeal, the court repeated the protections available to workers under SOX and reviewed the SOX provisions under 18 U.S.C. § 1514A.[115] Before presenting its substantive analysis of Welch's appeal, the Fourth Circuit first considered whether Welch's conduct constituted protected activity under SOX.[116] The court stated that, according to SOX, a protected employee must demonstrate "that he had both 'a subjective belief and an objectively reasonable belief' that the conduct he complained of constituted a violation of relevant law."[117] The court held that Welch could not demonstrate an objective belief that Cardinal's conduct was improper.[118] The Fourth Circuit also held that Welch could not conform to SOX's requirement that his "communications to his employer 'definitely and specifically relate' to one of the listed laws [under SOX] for these communications to constitute protected activity."[119]

The Fourth Circuit at least partially agreed with the ARB's rationale for deciding that Welch's communications were not protected conduct; namely, Welch could not show, "how he could have had an objectively reasonable belief that these actions violated any of the laws listed [under 18 U.S.C. § 1514A]."[120] More specifically, the court explained that

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112. *Id.*

113. *Id.*

114. *Id.* at 275.

115. *Id.* The court also stated in its decision that, "we may only disturb the ARB's decision if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ....'" *Id.* at 275-76 (citing 5 U.S.C. § 706(2)(A) (2006)). The court did not find a reason to disturb the decision and proceeded to affirm the ARB's ruling. *Id.* at 279.

116. *Id.* at 276.

117. *Id.* at 275 (citing to Livingston v. Wyeth, Inc. 520 F.3d 344, 352 (4th Cir. 2008)).

118. *Id.* at 276 n.3.

119. *Id.* at 276. The listed, unlawful acts under SOX include mail fraud, wire fraud, bank fraud, securities fraud, the violation of any SEC rule or regulation, or federal laws addressing fraud against shareholders of a public company. 18 U.S.C. §§ 1341, 1343, 1344, 1348 (2000 & Supp. 2009).

120. *Welch*, 536 F.3d at 278.

Cardinal did not violate federal securities law through its conduct.[121] Although Welch made new allegations in this regard on appeal to the Fourth Circuit, the court stated that these new arguments would not be heard because the arguments were never raised prior to the ARB review.[122] The Fourth Circuit then affirmed the ARB's ruling.[123]

IV. PLATONE V. U.S. DEPARTMENT OF LABOR

In *Platone*,[124] an employee, Stacy Platone, who originally worked for Airline Pilots Association (ALPA), was hired by Atlantic Coast Airlines (ACA) as a manager of labor relations.[125] She began to notice discrepancies in the airline flight loss procedures, whereby pilots were reimbursed for scheduled days lost when they had to attend union meetings.[126] The procedures called for pilots to be reimbursed only for days on which they were scheduled to fly.[127] Some pilots, however, were scheduling flights on days for which they were not originally scheduled to fly—thereby getting paid for days they would normally be off anyway.[128] Plaintiff brought this issue to the attention of her supervisors and was told ACA would be reimbursed by the ALPA.[129] She was not satisfied with the ACA's response and brought the issue up with ACA's Director of Employment Services.[130] There was no indication that fraud was specifically discussed at these meetings.[131] Platone was fired shortly thereafter, allegedly over her relationship with a pilot who had been a member of the ACA management team.[132]

Platone filed a whistleblower action under SOX with OSHA.[133] The administrative law judge found that there was a fraudulent scheme to compensate the pilots with the hope of getting concessions from the union, and these actions would of necessity involve using mail and wire

121. *Id.* at 278-79.
122. *Id.* at 279.
123. *Id.*
124. Platone v. U.S. Dep't of Labor, 548 F.3d 322 (4th Cir. 2008), *cert. denied*, 130 S. Ct. 622 (2009).
125. *Id.* at 323.
126. *Id.* at 324.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

services.[134] The judge found that her complaints were a contributing factor in her dismissal, were impossible to separate from any legitimate reasons for her firing, and that her actions were protected activities within the meaning of SOX.[135]

The union filed an appeal with the Labor Department's Administrative Review Board (ARB).[136] The ARB found that the meetings and emails were not sufficient communication to specifically indicate possible fraud against shareholders, and that the real victim was the ALPA, not shareholders.[137] Thus, the plaintiff failed to "provide ACA with specific information relating to protected activity under § 1514A(a)(1) ...."[138]

Platone appealed the ARB decision.[139] The Fourth Circuit stated that their review was *de novo*, and the court said it was limited to determining if the ARB's findings were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[140] If the findings were supported by substantial evidence, the decision must be upheld.[141]

The court then agreed with the ARB that the evidence failed to show that the plaintiff made any allegation of possible fraud against the shareholders.[142] The Fourth Circuit also agreed with the ARB that Platone's actions amounted to no more than informing management of an internal billing issue, and SOX did "not afford her whistle-blower protection."[143] Thus, this case further illustrates the limits on protection afforded the whistleblowing employee under SOX when the employee cannot establish that he or she engaged in an activity sheltered by SOX.

CONCLUSION

The protection provided to whistleblowers in SOX might be important in some instances, but, this protection is restrictive in application as demonstrated by the courts' interpretation of protected conduct in recent

134. *Id.*
135. *Id.* at 324-25
136. *Id.* at 325.
137. *Id.*
138. *Id.* The review board appears to be continuing its position taken in earlier decisions. *See supra* note 19.
139. *Platone*, 548 F.3d at 322.
140. *Id.* at 326. The court also stated that they must give a degree of deference to the ALJ's factual findings. *Id.*
141. *Id.* ("Substantial evidence is that which is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'").
142. *Id.*
143. *Id.* at 327.

cases. There are numerous hurdles placed in the way of a plaintiff before any protection is available to the whistleblower. SOX notes, and the courts have repeated that, first, a violation of a specific act must be communicated by the whistleblower to the proper authorities. Second, this act must be shown to be detrimental to shareholders. Third, the actions of the whistleblower must be protected activities under SOX. Fourth, the whistleblower's action must have led to his or her being discharged or otherwise treated in a detrimental fashion. Each element is critical and may be difficult to establish, as illustrated in this Essay by the courts' treatment of protected activities. Only then will the whistleblower's conduct result in protection by any tribunal that hears the issue.