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The TAF Education Fund is a nonprofit charitable organization dedicated to combating fraud against the Federal Government through the promotion and use of the *qui tam* provisions of the False Claims Act (FCA). The TAF Education Fund serves to inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions.

The TAF Education Fund is based in Washington, D.C., where it maintains a comprehensive FCA library for public use and a staff of lawyers and other professionals who are available to assist anyone interested in the False Claims Act and *qui tam*.

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Legal Analysis

New Tools to Combat Whistleblower Retalitation

by R. Scott Oswald

New Tools to Combat Whistleblower Retaliation

R. Scott Oswald[1]

Recognizing the critical role that whistleblowers play in exposing financial fraud, threats to public health and safety, and fraud on the government, Congress has enacted numerous robust whistleblower protection laws and strengthened existing whistleblower protection statutes. A most recent example is the National Defense Authorization Act for Fiscal Year 2013 ("NDAA"), which amends 10 U.S.C. § 2409 and protects contractors and subcontractors of the DoD and NASA who report gross mismanagement, gross waste, or abuse of authority relating to a DoD or NASA contract or grant. *See* NDAA, Pub. L. No. 112-329 § 827 (Jan. 2, 2013). The NDAA also contains a pilot program which expands protections to contractors and subcontractors of other executive agencies. *See id.* at § 828; 41 U.S.C. § 4712

This article aims to assist counsel in identifying and evaluating whistleblower retaliation claims and formulating a strategy to maximize the whistleblower's recovery.

The article discusses the following federal whistleblower protections:

Section I — Retaliation provision of the False Claims Act ("FCA")

Section II — Retaliation provision of the American Recovery and Reinvestment Act ("ARRA")

Section III — Other protections for contractors and subcontractors under the National Defense Authorization Act of FY 2013 ("NDAA")

- A. 10 U.S.C. § 2409 protecting DoD and NASA contractors
- B. 41 U.S.C. § 4712 protecting executive agency contractors
- C. Retaliation provision of the Federal Acquisitions Streamlining Act

Section IV — Retaliation provision of the Sarbanes-Oxley Act ("SOX")

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Section VII — Whistleblower reward and retaliation provisions of the Dodd-Frank Act

Section VIII — Retaliation provision of the Patient Protection and Affordable Care Act ("PPACA")

1. The original version of this article, appearing in the October 2010 Quarterly Review, was authored by R. Scott Oswald and Jason M. Zuckerman, principals at The Employment Law Group, PC (www.employmentlawgroup.com). In July 2011, Jason was appointed as the Senior Legal Advisor to the Special Counsel at the U.S. Office of Special Counsel.

In addition, the article discusses the common law wrongful discharge tort and state whistleblower protection statutes (Section IX), and offers tips on claim selection, forum selection, maximizing damages, pleading whistleblower retaliation claims and prosecuting whistleblower claims (Section X).

I. FALSE CLAIMS ACT RETALIATION PROVISION, 31 U.S.C. § 3730(H)

The retaliation provision of the FCA provides robust protection to any employee, contractor, or agent who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h). Section 3730(h) plaintiffs must allege three things: (1) that they engaged in protected conduct, *i.e.*, acted in a lawful manner to stop a false claim; (2) that the defendants knew that the relators were engaged in this protected conduct; and (3) that the defendants were motivated, at least in part, to retaliate against the relators because of the protected conduct. *See Mann v. Heckler & Koch Defense, Inc.*, 630 F.3d 338, 343 (4th Cir. 2010). Section 3730(h) protects not only individuals who bring *qui tam* actions, but also individuals who take steps to expose fraud, including investigating a potential *qui tam* action or supplying information that could prompt an investigation. *See Neal v. Honeywell Inc.*, 33 F.3d 860, 864-65 (7th Cir. 1994); *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

Since 2009, Congress has twice strengthened the retaliation provision of the FCA. The Fraud Enforcement Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624-25 (2009), amended § 3730(h) by expanding the scope of coverage to expressly protect independent contractors, and expanded the scope of protected conduct to cover "efforts to stop 1 or more violations" of the FCA. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079B, 124 Stat. 1376 (2010) ("Dodd-Frank Act"), enacted on July 21, 2010, enhanced § 3730(h) by prohibiting associational discrimination, applying a uniform three-year statute of limitations and broadening the scope of protected conduct.

A. Scope of Coverage

Section 3730(h) protects not only employees of government contractors, but also contractors, agents, and associated others. *See* 31 U.S.C. § 3730(h). Congress has made clear that any individual in the private sector who suffers retaliation for taking any action in furtherance of a potential *qui tam* action has a remedy under § 3730(h).

B. Protected Conduct

Protected conduct under § 3730(h) includes "lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h). Protected conduct includes internal complaints about what an employee, contractor, or agent reasonably believes to be a violation of the FCA. *See, e.g., Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469, 481 (7th Cir. 2004) (holding that employee's internal complaints about alleged misappropriations of federal funds to government official can constitute protected conduct under FCA); *Neal v. Honeywell Inc.*, 33 F.3d 860, 865 (7th Cir. 1994) (court specifically rejected argument that plaintiff must raise her concerns directly to government to qualify for protection, noting that it was appropriate for plaintiff to complain through corporate channels).

A "protected activity" is defined as that activity that reasonably could lead to a viable FCA action. *See McKenzie v. Bellsouth Telecomms., Inc.*, 219 F.3d 508, 516 (6th Cir. 2000) (citation omitted). An employee's conduct is protected when it raises the distinct possibility of litigation, when it could lead to an action under the FCA, or when there is a reasonable possibility of litigation. *Mann*, 630 F.3d at 344 (citing *Eberhardt v. Integrated Design & Const., Inc.*, 167 F.3d 861, 869 (4th Cir. 1999)). A plaintiff "need not use formal words of 'illegality' or 'fraud,' but must sufficiently allege activity with a nexus to a *qui tam* action, or fraud against the United States government." *McKenzie*, 219 F.3d at 516. An employee need not have actual knowledge of the FCA for her actions to be considered "protected activity" under § 3730(h). If so, only those with sophisticated legal knowledge would be protected by the statute. *United States ex rel. Yesudian v. Howard Univ.*, 332 U.S. App. D.C. 56, 153 F.3d 731, 741 (D.C. Cir. 1998) ("…only [lawyers] would know from the outset that what they were investigating could lead to a False Claims Act prosecution.").

There is both a subjective and an objective component for assessing whether an activity is protected conduct under the FCA, *i.e.*, the relevant inquiry is whether "(1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government." *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002). Employers have tried to apply an onerous standard of objective reasonableness under which the plaintiff must demonstrate that her disclosures would have resulted in a successful *qui tam* action. *See, e.g., Dookeran v. Mercy Hosp. of Pittsburgh*, 281 F.3d 105, 109 (3d Cir. 2002) (plaintiff's disclosure about false information in application to be designated clinical study research center is not protected because application was not claim for payment). Requiring a § 3730(h) plaintiff to prove that she disclosed actual violations of the FCA, however, is contrary to the plain meaning of § 3730(h) and well-established precedent. The Supreme Court has specifically noted that "proving a violation of § 3729 is not an element of a § 3730(h) cause of action." *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409,

416 n.1 (2005) (citing *Yesudian*, 153 F.3d at 740). FCA litigation is a "distinct possibility" if plaintiff had a "good faith" belief, based on information he had "at the time of the retaliation," he could reasonably conclude that "there was a 'distinct possibility' [the plaintiff] would find evidence" showing the defendant had submitted false claims. *See Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 869 (4th Cir. 1999).

Courts tend to use a broad standard when evaluating whether a plaintiff has sufficiently pleaded the existence of a "distinct possibility." *See Layman v. MET Labs., Inc.*, No. RDB–12–2860, 2013 WL 2237689, at *7 (D. Md. May 20, 2013) (citing *Brazill v. Cal. Northstate Coll. of Pharmacy, LLC*, 904 F. Supp. 2d 1047, 1055 (E.D. Cal. 2012) (employee engaged in protected conduct when reporting to management that the potential fraud in question "could result in civil and criminal sanctions."); *United States ex rel. George v. Boston Scientific Corp.*, 864 F. Supp. 2d 597, 607 (S.D. Tex. 2012) (employee engaged in protected conduct when asking if a medical device "'could be promoted legally' for the off label use presented by the sales trainer.").

As the D.C. Circuit held in a leading case construing the scope of § 3730(h) protected conduct, Congress's "inclusion of an 'investigation for…an action filed or to be filed' within its protective cover…manifests Congress' intent to protect employees while they are collecting information about a possible fraud, *before they have put all the pieces of the puzzle together*." *Yesudian*, 153 F.3d at 740 (emphasis added). According to the U.S. District Court for the District of Maine, "[s]ince a plaintiff now engages in protected conduct whenever he engages in an effort to stop an FCA violation, the act of internal reporting itself suffices as both the effort to stop the FCA violation and the notice to the employer." *Manfield v. Alutiiq Int'l Solutions, Inc.*, 851 F. Supp. 2d 196, 204 (D. Me. 2012).

The D.C. Circuit's metaphor of "putting all the pieces of the puzzle together" should guide discovery, *i.e.*, plaintiff should take discovery not only about the pieces of the puzzle that he gathered at the time he engage in protected conduct, but also the pieces of the puzzle that plaintiff was not aware of or had not put together at the time he blew the whistle. Taking broad discovery about the plaintiff's protected conduct is important to demonstrate the objective reasonableness of plaintiff's disclosures, and also show the employer's motive to retaliate against plaintiff.

Discovery should be also be guided by the Eleventh Circuit's standard for assessing protected conduct:

> If an employee's actions, as alleged in the complaint, are sufficient to support a reasonable conclusion that *the employer could have feared being reported to the government for fraud* or sued in a qui tam action by the employee, then the complaint states a claim for retaliatory discharge under § 3730(h).

United States ex rel. Sanchez v. Lymphatx, Inc., 596 F.3d 1300, 1304 (11th Cir. 2010) (citation omitted) (emphasis added). In *Lymphatx*, the court concluded that the plaintiff has sufficiently alleged an FCA retaliation action by averring that "she complained

about the defendants' 'unlawful actions' and warn[ing] them that they were incurring 'significant criminal and civil liability,'" which if proven suffices to show that the defendants were aware of the possibility of *qui tam* litigation. *Id. Lymphatx* underscores the importance of taking broad discovery about the employer's knowledge of and reaction to plaintiff's disclosures, including an investigation of those disclosures.

As employers vigorously try to narrow the scope of protected conduct, it is important to focus on the purpose of § 3730(h). The Senate report accompanying the 1986 amendments to the FCA states that Congress added a retaliation provision to the FCA "to halt companies…from using the threat of economic retaliation to silence 'whistleblowers'" and to "assure those who may be considering exposing fraud that they are legally protected from retaliatory acts." S. Rep. No. 99-345, at 34 (1986), U.S. Code Cong. & Admin. News 1986, at 5266, 5299. In addition, the legislative history expressly states that courts should interpret "[p]rotected activity…broadly," and protected conduct "includes any 'good faith' exercise of an individual 'on behalf of himself or other of *any option offered by this Act*, including…*an action filed or to be filed under this act*.'" *Id.* at 34-35 (emphasis added).

C. Scope of Actionable Adverse Actions

Section 3730(h) of the FCA prohibits an employer from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against a whistleblower. The purpose of § 3730(h) is to prevent retaliation which would dissuade whistleblowers from coming forward. *See, e.g., McKenzie*, 123 F.3d at 943-44. Section 3730(h) plaintiffs are not limited to seeking redress for "ultimate employment decisions" affecting the terms and conditions of their employment, and need only show "that a reasonable employee would have found the challenged action materially adverse." *Vander Boegh v. EnergySolutions, Inc.*, No. 12–5643, 2013 WL 4105648), 6, __ F. App'x __ at *6 (6th Cir. Aug. 14, 2013) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006)).

Acts which constitute actionable retaliation under Title VII are generally actionable under the FCA, though on its face, the FCA covers a broader range of adverse actions. *See Moore*, 275 F.3d at 847. This includes oral or written reprimands, reassignment of duties, as well as other actions that "might well have dissuaded a reasonable person from making or supporting a claim" or otherwise engaging in protected conduct. *See Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 63. For example, courts have construed § 3730(h) to protect individuals who are constructively discharged. *See Neal v. Honeywell, Inc.*, 191 F.3d 827, 831 (7th Cir. 1999), *aff'g*, 995 F. Supp. 889 (N.D. Ill. 1998) (concluding that "a drastic diminution of duties might suffice as a 'constructive discharge.'").

D. Burden of Proof to Prevail in an FCA Retaliation Case under 3730(h)

According to statutory history, a plaintiff must show that "the retaliation was motivated at least in part by the employee's engaging in protected activity." S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300. However, in light of the Supreme Court's decision in *Nassar*[2], 3730(h) plaintiffs should be prepared to prove that their protected conduct was the "but-for" cause of their employer's decision to take an adverse employment action. *See United States ex rel. Schweizer v. Oce N. Am.*, No. 06–648, 2013 WL 3776260, 11, __ F. Supp. 2d __ (D.D.C. July 19, 2013 ("[W]here Congress has given plaintiffs the right to sue employers for adverse actions taken against them by their employers 'because of' X, plaintiffs may succeed only by showing that X was a 'but-for' cause of the adverse action, not merely one of several 'motivating factors.'").

E. Individual Liability

There is a split among district courts regarding individual liability for violations of 3730(h). The split stems from the 2009 FERA amendments, which changed 3730(h) from:

> [a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment *by his or her employer* because of lawful acts done in furtherance of…

to:

> [a]ny employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts…

31 U.S.C. § 3730(h) (emphasis added).

In *Laborde v. Rivera-Dueño*, 719 F. Supp. 2d 198, 205 (D. Puerto Rico 2010), Senior District Judge Pieras, Jr., denied an individual defendant's motion to dismiss due to "the absence of specific First Circuit guidance holding that individual liability does not exist in FCA retaliation claims, and in light of the fact that the persuasive authority on the issue relies upon an outdated version of the statute." *Laborde*, 719 F. Supp. 2d at 205.

The U.S. District Court for the Western District of Virginia issued a similar holding in *Huang v. Rector & Visitors of Univ. of Va.*, 896 F. Supp. 2d 524 (W.D. Va. 2012).[3] Huang, an assistant professor, brought an action against the University of Virginia, a department chairman, and his former supervisor, alleging *inter alia*, unlawful

2. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013). ("[T]he Court now concludes as follows: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.").

3. Author R. Scott Oswald and Adam Augustine Carter of The Employment Law Group, PC, represented Mr. Huang.

retaliation under section 3730(h). The court denied summary judgment and allowed Mr. Huang to pursue his relation claims against his supervisors in their individual capacities, explaining:

> Prior to the 2009 amendment, plaintiffs could only file FCA retaliation claims against their employers. In the instant matter, that would have meant Dr. Huang's individual-capacity claim against Defendants, and probably his official-capacity claim as well, would fail as a matter of law. However, by eliminating the reference to "employers" as defendants in § 3730(h)(1), the 2009 amendment effectively left the universe of defendants undefined and wide-open. Notably, the 2009 amendment applies to conduct on or after the date of enactment, which was May 20, 2009.
>
> ****
>
> In the absence of specific guidance from the United States Court of Appeals for the Fourth Circuit dictating that there can be no individual liability in FCA retaliation claims after the 2009 amendment, and because Defendants do not assert in their motion that Dr. Huang's FCA claims against them are legally impermissible, I will not dismiss those claims out of hand.

Id. at n.16.

In contrast, the courts in *Russo v. Broncor, Inc. et al*., No. 13-cv-348-JPG-DGW (S.D. Ill. July 24, 2013) and *Aryai v. Forfeiture Support Assocs., LLC*, 10 Civ. 8952 (LAP), 2012 U.S. Dist. LEXIS 125227 (S.D.N.Y. Aug. 27, 2012) found that Congress did not intend 3730(h) to create liability for individual supervisors.

F. Statute of Limitations and Forum

Prior to the passage of the Dodd-Frank Act, the statute of limitations for an FCA retaliation claim was the analogous state statute of limitations for wrongful discharge actions, which can range from as little as three months to three years. *See Graham County Soil*, 545 U.S. at 418. Under the Dodd-Frank Act, the statute of limitations for FCA retaliation claims is now three years from the date on which the retaliation occurred. Dodd-Frank Act § 1079B(c)(2); 31 U.S.C. § 3730(h)(3). FCA retaliation claims can be brought directly in federal court; there is no administrative exhaustion requirement. *See* 31 U.S.C. § 3730(h)(2).

G. Remedies

A prevailing whistleblower is entitled to "all relief necessary to make that employee, contractor, or agent whole," which includes reinstatement, *double* back pay, interest on the back pay, special damages, and attorney's fees and costs. *See* 31 U.S.C. § 3730(h)(2) (emphasis added). Where reinstatement is not feasible, front pay is available. *See Wilkins v. St. Louis Housing Authority*, 314 F.3d 927, 934 (8th Cir. 2002). The term "special damages" has been construed to include damages for emotional distress and other non-economic harm resulting from retaliation. *See Neal*, 191 F.3d at 832 (awarding damages for emotional distress where manager threatened to physically injure whistleblower).

H. State False Claims Acts

Twenty-nine (29) states and the District of Columbia have enacted false claims act statutes containing a *qui tam* provision, twenty-seven (27) of which contain an anti-retaliation provision. There is little case law interpreting state FCA retaliation provisions; therefore, judicial interpretations of § 3730(h) will likely shape construction of the retaliation provision of state false claims act statutes.

II. THE AMERICAN RECOVERY AND REINVESTMENT ACT, PUB. L. NO. 111-5, § 1553, 123 STAT. 115, 297-302 (2009)

The American Recovery and Reinvestment Act of 2009 ("ARRA"), also known as the "Economic Stimulus Bill," authorized nearly $800 billion in federal spending to stimulate the economy and create jobs. To safeguard these funds, ARRA includes robust whistleblower protections to ensure that employees of private contractors and state and local governments can disclose gross mismanagement, waste, fraud, and abuse of stimulus funds without fear of reprisal. ARRA, Pub. L. No. 111-5, § 1553(a), 123 Stat. 115, 297-302 (2009). In particular, § 1553 of ARRA prohibits any private employer or state or local government that receives stimulus funds from retaliating against an employee who discloses information that the employee reasonably believes constitutes evidence of an improper use of stimulus funds, including gross mismanagement of an agency contract or grant. *Id.* There is no statute of limitations governing this whistleblower provision, which means that an employee may bring a whistleblower retaliation claim against her employer several years after the employer received the stimulus funds. *See* § 1553.

A. Scope of Coverage

Section 1553 applies to "any non-federal employer receiving covered funds," including private contractors, state and local governments and other non-federal employers that receive a contract, grant or other payment appropriated or made available by covered

funds. *See* § 1553(a). It covers not only employees of companies that have obtained contracts for stimulus projects, but also to employees of companies that receive any payment made available by stimulus funds.

B. Protected Conduct

Under ARRA, protected conduct includes a disclosure to a person with supervisory authority over the employee, a state or federal regulatory or law enforcement agency, a member of Congress, a court or grand jury, the head of a federal agency, or an inspector general about information that the employee reasonably believes evidences:

- Gross mismanagement of an agency contract or grant relating to stimulus funds;
- A gross waste of stimulus funds;
- A substantial and specific danger to public health or safety related to the implementation or use of stimulus funds;
- An abuse of authority related to the implementation or use of stimulus funds; or
- A violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.

Id. Section 1553 expressly protects "duty speech" whistleblowing, *i.e.*, disclosures made in the ordinary course of performing one's job duties can constitute protected conduct.

C. Burden of Proof

To prevail on a § 1553 whistleblower claim, an employee need only demonstrate that the protected conduct was a contributing factor in the employer's decision to take an adverse action. *Gerhard v. D Const., Inc.*, No. 11 C 0631, 2012 WL 893673, at *3 (N.D. Ill. Mar. 14, 2012). Under this standard, employees need not prove that their whistleblower complaint was the sole factor or the determinative factor leading to the adverse action. Additionally, § 1553 specifically clarifies that an employee can satisfy the "contributing factor" standard through the use of "circumstantial evidence," *i.e.*, by showing temporal proximity or by demonstrating that the decision-maker knew of the protected disclosure. Once the employee demonstrates by a preponderance of the evidence that her protected conduct was a contributing factor in the retaliatory action, the employer can avoid liability only by proving by clear and convincing evidence that it would have taken the same adverse action in the absence of the employee's protected conduct.

D. Administrative Exhaustion Requirement and Right to Jury Trial

Actions brought under the whistleblower provisions of § 1553 must be filed initially with the appropriate inspector general. Unless the inspector general determines that the action is frivolous, does not relate to covered funds, or has been resolved in another federal or state administrative proceeding, the inspector general must conduct an investigation and make a determination on the merits of the whistleblower retaliation claim no later than 180 days after receipt of the complaint. Within thirty (30) days of receiving an inspector general's investigative findings, the head of the agency must determine whether there has been a violation, in which event the agency head can award a complainant reinstatement, back pay, compensatory damages, and attorney fees. Where an agency has denied relief in whole or in part or has failed to issue a decision within 210 days of the filing of a § 1553 complaint, the plaintiff can remove the action to federal court and is entitled to trial by jury. Pre-dispute arbitration agreements do not apply to § 1553 claims.

E. Remedies

Under § 1553, a prevailing employee is entitled to "make whole" relief, which includes reinstatement, back pay, compensatory damages, and attorney's fees and litigation costs. Where an agency files an action in federal court to enforce an order of relief for a prevailing employee, the court may award exemplary damages.

III. ADDITIONAL CONTRACTOR EMPLOYEE PROTECTIONS

There are three lesser known anti-retaliation provisions that prohibit retaliation against employees of government contactors yet provide robust remedies, including reinstatement. *See* 10 U.S.C. § 2409; 41 U.S.C. § 4705; 41 U.S.C. § 265. These statutes require agency inspectors general to investigate claims of retaliation. Provisions protecting employees of contractors and subcontractors authorize a private right of action in federal court and expressly provide for trial by jury.

A. Protections for DoD and NASA Contractors and Subcontractors, 10 U.S.C. § 2409

1. Scope of Coverage

Revised in 2013 by section 827 of the National Defense Authorization Act for Fiscal Year 2013 ("NDAA"), Pub. L. No. 112-329 (Jan. 2, 2013), section 2409 is expanded to include subcontractors of the Department of Defense ("DoD"), the Army, the Navy, the Air Force, the Coast Guard and the National Aeronautics and Space Administration ("NASA"). *See* 10 U.S.C. § 2409; NDAA § 827; *see also* 10 U.S.C. § 2303(a).

Implementing regulations can be found at 78 Fed. Reg. 189, from pages 59851 to 54, *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23768.htm. Cost aspects are addressed at 78 Fed. Reg. 189, from pages 60173 to 74, *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23702.htm.

2. Protected Conduct

Section 2409 protects contractors and subcontractors who disclose information that they reasonably believe evidences:

- a gross mismanagement of a DoD or NASA contract or grant;
- a gross waste of DoD or NASA funds;
- an abuse of authority relating to a DoD or NASA contract or grant;
- a violation of law, rule or regulation related to a DoD or NASA contract or grant; or
- a substantial and specific danger to public health or safety;[4]

10 U.S.C. § 2409(a)(1)

There is no materiality requirement for reporting violations of a violation of law rule or regulation. *See Drake v. Agency for Int'l Dev.*, 543 F.3d 1377 (Fed. Cir. 2008).[5]

In order to be protected, the disclosure must be made to:

a. a Member of Congress;
b. an Inspector General;
c. the Government Accountability Office;
d. a DoD or NASA employee, as applicable, responsible for contract oversight or management.
e. an authorized official of the Department of Justice or other law enforcement agency;
f. a court or grand jury; or
g. a management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct

10 U.S.C. § 2409(a)(2). Filing a complaint with any judicial or administrative body is per se protected activity. *See* 10 U.S.C. § 2409(a)(3)(A).

3. Procedure and Remedies

A § 2409 Action must be filed with the DoD or NASA Inspector General ("IG") within three years after the date on which the alleged reprisal took place.

A complaint filed with the IG must contain:

- the name of the contractor;
- contract number if known, or a description reasonably sufficient to identify the contract(s) involved;

4. The "substantial and specific danger to public health or safety" does not need to be related to a DoD or NASA contract or grant. *See* 10 U.S.C. § 2409(a)(1)(C).

5. Author R. Scott Oswald and Nicholas Woodfield of The Employment Law Group, PC, represented Mr. Drake.

- the violation of law, rule, or regulation giving rise to the disclosure;
- the nature of the disclosure giving rise to the retaliatory act, including to whom the information was disclosed; and
- the specific nature and date of the reprisal.

DFARS § 203.904(c).

Unless the IG determines that the complaint is frivolous, fails to allege a violation, or has been previously addressed in another federal or state judicial or administrative proceeding initiated by the complainant, the IG must conduct an investigation and make a determination on the merits no later than 180 days after receipt of the complaint. The IG may request, and the complainant may grant, an extension of up to 180 additional days. Within thirty (30) days of receiving an inspector general's investigative findings, the head of the agency must determine whether there has been a violation, in which event the agency head can award a complainant reinstatement, back pay, employment benefits, exemplary damages, and attorney fees and expenses.

If the agency denies relief or fails to issue a decision within 210 days of the filing of the complaint or thirty (30) days after the expiration of any extension, the complainant can bring a de novo action in federal court and seek a jury trial. A complainant must file in federal court within two years of exhausting his administrative remedies.

Plaintiffs under 10 U.S.C. § 2409 need only show that their protected activity was a "contributing factor" in the employer's decision to take an adverse action. *See* 10 U.S.C. § 2409(c)(6); 5 U.S.C. § 1221(e). The more onerous "but-for" standard applicable to FCA retaliation claims does not apply.[6]

Under the revised NDAA protections, employer "forced arbitration" clauses are invalid, and it is no longer an affirmative defense to claim that the DoD ordered the employee's termination. *See* 10 U.S.C. § 2409(c)(7), (a)(3)(B) (Retaliation "is prohibited even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.").

B. Pilot Program Expanding Contractor and Subcontractor Protections, 41 U.S.C. § 4712

Section 828 of the NDAA creates a four year pilot program that dramatically expands whistleblower protections for federal contractors and subcontractors. Section 828 provides protections virtually identical to section 827 for all contractors and subcontractors other than those working for the DoD, NASA, Coast Guard, or elements of the intelligence community. *See* 41 U.S.C. § 4712.

Sections 828 and 827 now provide protections for nearly all *qui tam* relators whose disclosures relate to federal contracts, and plaintiff's counsel should consider 10 U.S.C. § 2409 and 41 U.S.C.§ 4712 as possible alternatives to FCA retaliation claims under 31 U.S.C. § 3730(h).

6. *See generally supra* section I(D) discussing the impact of the Supreme Court's decision in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) on FCA retaliation claims.

Section 828 protections only apply to contracts awarded or significantly modified to include coverage after July 1, 2013. *See* 41 U.S.C. § 4712. Interim rules can be found at 78 Fed. Reg. 189, from pages 60169 to 74, *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23703.htm and http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23702.htm.

C. Federal Acquisitions Streamlining Act, 41 U.S.C. § 265

Section 828 of the NDAA suspends whistleblower provisions of the Federal Acquisitions Streamlining Act while the pilot program contained at 41 U.S.C. § 4712 is in effect.

The Federal Acquisitions Streamlining Act, 41 U.S.C. § 265, protects employees of contractors of agencies other than the DoD who suffer reprisal for "disclosing to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract)." 41 U.S.C. § 265(a). Unlike 10 U.S.C. § 2409, however, there is no private right of action under 41 U.S.C. § 265. If an Inspector General does not recommend that the agency grant relief (reinstatement, back pay and attorney fees), the contractor cannot further prosecute the action.

IV. THE SARBANES-OXLEY ACT, 18 U.S.C. § 1514(A)

In the wake of several corporate fraud scandals in the early 2000s, including the collapse of Enron, Congress enacted the Sarbanes-Oxley Act of 2002 ("SOX"), also known as the Corporate and Criminal Fraud Accountability Act.[7] Section 806 provides a robust private right of action for retaliation, including preliminary reinstatement for employees who prevail at the investigative stage of the action. Recently, OSHA has issued some very favorable orders for SOX complainants, including a Sept. 30, 2013, order awarding the former CFO of Clean Diesel Technologies, Inc., over $1.9 million, and a $346,000 award for a former T-Mobile employee.

In order to establish a prima facie case, a claimant must prove: (1) he or she engaged in SOX protected activity, (2) the respondent took unfavorable employment actions against complainant, and (3) the protected activity was a contributing factor to the adverse action. A complainant engages in protected activity if he discloses information to a supervisor that the complainant reasonably believes evidences a violation of the laws enumerated in SOX 806. *Zinn v. American Commercial Lines, Inc.*, ARB Case No. 10-029, ALJ Case No. 2009-SOX-025 (March 28, 2012) (citations omitted). A reasonable belief includes subjective and objective elements. *Id.*

7. Pub. L. No. 107-204, 116 Stat. 745 (2002).

A. Scope of Coverage

Section 806 of SOX applies to any "officer, employee, contractor, subcontractor or agency" of a company that has securities registered under § 12 of the Securities Exchange Act or is required to file reports under section 15(d) of the same Act. *See* 18 U.S.C. § 1514(A). SOX also applies to employees of "any subsidiary whose financial information is included in the consolidated financial statements of such company" and employees of nationally recognized statistical rating organizations. *See* Dodd-Frank §§ 922, 929A.[8]

B. Protected Conduct

SOX protects an employee who provides information, causes information to be provided, or otherwise assists in an investigation regarding any conduct the employee reasonably believes constitutes mail, wire, bank, or securities fraud, or a violation of any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of Federal law relating to fraud against shareholders. Internal reporting is protected, including a disclosure to a supervisor. *See* 18 U.S.C. § 1514(A). Indeed, merely requesting that a company investigate potential shareholder fraud constitutes protected conduct. *See Van Asdale v. Int'l Game Tech*, 577 F.3d 989, 997 (9th Cir. 2009).

Protected conduct is not limited to disclosures about shareholder fraud, and, instead, includes disclosures of a violation of *any* SEC rule or regulation. *See* 18 U.S.C. § 1514(A). For example, a disclosure about deficient internal accounting controls9 or non-compliance with Generally Accepted Accounting Principles is protected. *See Smith v. Corning Inc.*, 496 F. Supp. 2d 244 (W.D.N.Y. 2007); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008).

The Department of Labor's Administrative Review Board ("ARB") in *Sylvester v. Parexel Int'l LLC*, noted that various types of fraud or a violation of an SEC rule or regulation may lead to fraud on shareholders, even if they do not immediately harm a company's investors. The ARB also held that a SOX complainant need not allege all of the elements of a claim of securities fraud, or conduct approximating such a claim, in order to demonstrate that he or she engaged in protected whistleblowing activity. *Sylvester*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 042, 2011 WL 2165854 (ARB May 25, 2011); *see also Wiest v. Lynch*, 710 F.3d 121, 134 (3d Cir. 2013) (discussing *Sylvester* and acknowledging that it is owed *Chevron* deference).

In *Vannoy v. Celanese Corp*, an employee made a disclosure to the IRS Whistleblower Rewards Program and complained to company officials that the company "misstated their financial records and underestimated their required tax burden potentially in millions of dollars." The court held that "while Vannoy may not have asserted a

8. Prior to the enactment of the Dodd-Frank Act, Administrative Law Judges ("ALJs") and federal courts were inconsistent in the application of SOX to privately held subsidiaries of publicly traded companies. *See Johnson v. Siemens Blg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Apr. 15, 2010) (ARB solicited amicus briefs discussing proper scope of SOX and various tests used to determine whether SOX should apply to subsidiaries).

9. *See Klopfenstein v. PPC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ 2004-SOX-11 (ARB May 31, 2006).

claim of shareholder fraud specifically, under SOX he need not do so to sustain his claim of a SOX violation." *Vannoy*, ARB Case No. 09-118 at *11 (Sept. 28, 2011).

C. Reasonable Belief Requirement

A SOX retaliation plaintiff need not demonstrate that she disclosed an actual violation of securities law, only that she reasonably believed that her employer was defrauding shareholders or violating an SEC rule. *See Van Asdale*, 577 F.3d at 992. Indeed, a reasonable but mistaken belief is protected under SOX. *See Kalkunte v. DVI Fin. Servs.*, ARB Nos. 05-139, 05-140 at 11, ALJ No. 2004-SOX-56 at 11 (ARB Feb. 27, 2009); *see also Halloum v. Intel Corp.*, 2003-SOX-7 at 10 (ALJ Mar. 4, 2004), *aff'd* (ARB Jan. 31, 2006) ("belief that an activity was illegal may be reasonable even when subsequent investigation proves a complainant was entirely wrong…"); *Wiest v. Lynch*, 710 F.3d 121, 132 (3d Cir. 2013) ("an employee must establish not only a subjective, good faith belief that his or her employer violated a provision listed in SOX, but also that his or her belief was objectively reasonable") (citation omitted); *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1132 (10th Cir. 2013).

An employee's reasonable belief must be scrutinized under both a subjective and objective standard. *See Welch*, 536 F.3d at 275. The objective reasonableness of a complainant'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." In *Allen*, the court held that a certified public accountant ("CPA") did not engage in protected conduct when she complained about her employer overstating gross profits in violation of SEC Staff Accounting Bulletin 101 ("SAB-101"). *See Allen v. Admin. Review Bd.*, 514 F.3d 468 (5th Cir. 2008). The *Allen* Court held that this disclosure was not protected because the whistleblower identified improper accounting practices in accounting reports that had not yet been filed with the SEC and a CPA should know that SAB-101 applies to only financial reports that have been filed with the SEC. *Allen*, 514 F.3d, 478. The implication of this flawed decision is that a whistleblower should allow the violation to occur before reporting it, thereby ensuring that the whistleblower is disclosing an actual violation. Adopting this rule would defeat the intent of SOX, which is to prevent the underlying crime from occurring. *See Getman v. Southwest Secs., Inc.*, 2003-SOX-8 at 13 n.8 (ALJ Feb. 2, 2004), *reversed on other grounds*, ARB No. 04-059 (ARB July 29, 2005). Judge Levin pointed out in *Morefield v. Exelon Servs., Inc.*, 2004-SOX-2 at 5 (ALJ Jan. 28, 2004):

> The value of the whistleblower resides in his or her insider status… [T]heir reasonable concerns may, for example, address the inadequacy of internal controls promulgated in compliance with Sarbanes-Oxley mandates or SEC rules that impact on procedures throughout the organization, or the application of accounting principles, or the exposure of incipient problems which, if left unattended, could mature into violations of rules or regulations of the type an audit committee would hope to forestall.

A more recent ARB decision acknowledges that an employee's good faith reasonable, but mistaken disclosures can still be protected. *See Menendez v. Halliburton*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005 (Sept. 13, 2011).

Requiring a SOX complainant to demonstrate that she disclosed an actual violation is contrary to Congressional intent in that the legislative history of § 806 specifically states that the reasonableness test "is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), available at 2002 WL 32054527 (citing *Passaic Valley Sewerage Commissioners v. DOL*, 992 F.2d 474, 478 (3d Cir. 1993) (setting forth broad definition of "good faith" protected disclosures under analogous whistleblower protection statutes)). Since a SOX plaintiff need not prove that they disclosed an actual violation or fraud, SOX retaliation claims are not subject to the heightened pleading requirements of Fed. R. Civ. P 9(b).

In sum, limiting protected conduct to disclosures of actual violations of SEC rules is contrary to the plain meaning and intent of SOX. A SOX plaintiff, however, must prepare at the outset of the case to meet a high standard of objective reasonableness. For example, the complaint should plead how the plaintiff's disclosures implicate violations of specific SEC rules or fraud statutes. Since a plaintiff does not need to prove the underlying violation, they do not need to meet the heightened pleading requirements necessary for a shareholder fraud case.

D. Scope of Actionable Adverse Actions

Under § 806, the scope of actionable adverse actions is broad and includes discharging, demoting, suspending, threatening, harassing or discriminating against an employee who engages in protected conduct. *See* 18 U.S.C. § 1514A(a). The Supreme Court's *Burlington Northern*[10] standard is "a particularly helpful interpretive tool, but the plain language of Section 806's adverse action provision controls." *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005, at *15 (ARB Sept. 13, 2011). According to the ARB, "By explicitly proscribing non-tangible activity, this language bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse actions against SOX whistleblowers." *Id*. In *Menendez*, the ARB found that releasing a whistleblower's identity to coworkers constituted an actionable adverse action. The ARB explained that "Section 806's express statutory language is more expansive than either of the Title VII provisions addressed in *Burlington*, and consequently demands a correspondingly broader interpretation." *Id*

E. Burden of Proof

A SOX complainant need not prove that her protected conduct was the motivating or determining factor in the employer's adverse action but instead need only prove

10. *See supra* section I(C) (discussing *Burlington Northern* standard).

that the protected conduct was a "contributing factor." The ARB defines a contributing factor as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). This standard is "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action." *Id.* Once an employee satisfies this minimal causation standard by a preponderance of the evidence, an employer can avoid liability only where it proves by "clear and convincing evidence" that it would have taken the same action absent the employee's protected conduct. *See Kalkunte*, ARB Nos. 05-139, 05-140 at 13; *Menendez*, ARB Case Nos. 09-002, 09-003, ALJ Case No. 2007-SOX-05, at *11 (ARB Sept. 13, 2011).

F. Statute of Limitations and Forum

A SOX whistleblower must file a complaint with the Department of Labor ("DOL") within 180 days of the date that she becomes aware of the violation. *See* § 1514A(b)(2)(D) (as amended by the Dodd-Frank Act § 922(c)(1)(A)(i)-(ii)). A SOX plaintiff must exhaust administrative remedies prior to litigating, *i.e.*, a SOX plaintiff must file her complaint with DOL's Occupational Safety and Health Administration ("OSHA"). Plaintiffs must ensure that they include all possible respondents in their administrative filing. *See Genberg v. Porter*, No. 11-cv-2434 (D.Colo. Mar. 25, 2013) (dismissing counts against defendants not named as respondents in the plaintiff's OSHA complaint). If, while the claim is before OSHA, new adverse actions take place, an employee must amend her complaint to include the subsequent adverse employment actions. *See, e.g., Willis v. Vie Fin. Grp., Inc.*, No. 04-435, 2004 WL 1774575 (E.D. Pa. 2004) (dismissing complaint for termination in violation of SOX because it was never presented to DOL). After OSHA performs an investigation, either party can request a hearing before a DOL ALJ and can appeal an ALJ decision to the DOL's Administrative Review Board. If DOL has not issued a final decision within 180 days of the filing of the complaint, the employee may remove the complaint to federal court for de novo review and seek a jury trial. *See* § 1514A(b)(1)(B)-(E) (as amended by the Dodd-Frank Act § 922(c)(1); *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 245 (4th Cir. 2009).

G. Remedies

A prevailing employee under the SOX retaliation provision is entitled to "all relief necessary to make the employee whole," including reinstatement, back pay, attorney's fees, and costs. 18 U.S.C. § 1514A(c). An employee can also obtain special damages under SOX, which includes damages for impairment of reputation, personal humiliation, mental anguish and suffering, and other non-economic harm resulting from retaliation. *See Kalkunte,* ARB Nos. 05-139, 05-140 (clarifying that "special damages" under

SOX includes compensatory damages; upholding ALJ's award of damages for pain, suffering, mental anguish, humiliation, and effect on complainant's credit). If OSHA finds for the employee and the employer appeals, OSHA's preliminary award of relief is stayed, except for any order for reinstatement.

V. THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT, 15 U.S.C. § 2087

In response to startling instances of consumers being exposed to dangerous products, such as children exposed to toys with lead paint, Congress enacted an overhaul of consumer protections in the Consumer Product Safety Improvement Act ("CPSIA"), 15 U.S.C. § 2087. The CPSIA includes a robust whistleblower anti-retaliation provision that prohibits manufacturers, private labelers, distributors, and retailers from retaliation against an employee because the employee blew the whistle about a perceived violation of the CPSIA. Similar to a SOX complainant, a CPSIA whistleblower retaliation plaintiff must prove that: (1) she engaged in protected conduct; (2) the employer knew that she engaged in protected conduct; (2) the employer took adverse action against her; and (4) the protected conduct contributed to the employer's decision to take an adverse action. § 2087(b).

The whistleblower provision of the CPSIA protects an employee whose employer discharges or discriminates against her because the employee: (1) provides information relating to a violation of the CPSIA or any act enforced by the Consumer Product Safety Commission ("Commission") to their employer, the federal government, or state attorneys general; (2) testifies or assists in a proceeding concerning a violation of the CPSIA or any act enforced by the Commission; or (3) refuses to participate in an activity, policy, practice, or assigned task that the employee reasonably believes violates the CPSIA or any act enforced by the Commission. § 2087(a)(1)-(4). Specific examples of protected conduct include:

1. Reporting violations of the standard for the flammability of children's sleepwear;

2. Disclosing information about the use of consumer patching compounds containing free-form asbestos;

3. Reporting an employer's violation of a safety standard for creating architectural glazing materials;

4. Reporting choking incidents involving marbles, small balls, latex balloons and other small parts;

5. Reporting the export of banned or misbranded products;

6. Disclosing information about an employer's import or distribution of new all-terrain vehicles in violation of the CPSIA; and

7. Providing information about an employer who manufactures a toy that contains an unsafe amount of lead.

The ARB has been liberal when identifying products covered by the CPSIA, and counsel should not limit its analysis to the plain language of the CPSIA. For example, in *Saporito v. Publix Super Markets, Inc.*, the ARB held that an employee's complaints about the suspected contamination of milk bottles was protected even though the CPSIA expressly excludes "food" from the definition of "consumer product." *Saporito*, ARB No. 10-073, ALJ No. 2010-CPS-1, at *4-5 (ARB Mar. 28, 2012) ("the Commission also enforces the Federal Hazardous Substances Act (FHSA), and the Poison Prevention Packaging Act (PPPA). Under the PPPA, the Commission regulates packaging of 'household substance[s]' which can include 'food' as defined under the [Federal Food, Drug, and Cosmetics Act]."") (citations omitted).

The burden of proof, scope of actionable adverse actions, and procedural rules are similar to those in SOX. *See* § 2087(b)(2)(B)(i)-(iii). The major difference is that an employee bringing a claim under the CPSIA must wait 210 days for DOL to issue a final decision before removing the complaint to federal court for a jury trial. *See* § 2087(b)(4)(A). SOX plaintiffs need only wait 180 days to receive a final decision from DOL before removal.

VI. WHISTLEBLOWER PROTECTION FOR EMPLOYEES IN THE FINANCIAL SERVICES INDUSTRY

The Dodd-Frank Act creates a robust retaliation action for employees in the financial services industry.[11] *See* Dodd-Frank Act § 1057, codified at 12 U.S.C. § 5567. The scope of coverage is quite broad in that Section 1057 applies to organizations that extend credit or service or broker loans; provide real estate settlement services or perform property appraisals; provide financial advisory services to consumers relating to proprietary financial products, including credit counseling; or collect, analyze, maintain, or provide consumer report information or other account information in connection with any decision regarding the offering or provision of a consumer financial product or service.

Protected conduct includes providing to the Consumer Financial Protection Bureau ("CFPB") or any other government or law enforcement agency information that the employee reasonably believes relates to any violation of the consumer financial protection provision of the Dodd-Frank Act (Title X), or any rule, order, standard, or prohibition prescribed or enforced by the CFPB. Employees are also protected if they initiate or cause to be initiated any proceeding under federal consumer financial law or if they object to or refuse to participate in any activity, practice, or assigned task that the employee reasonably believes to be a violation of any law, rule, standard, or prohibition subject to the jurisdiction of the CFPB.

11. Employees of credit union and depository institutions may also have claims under the whistleblower provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and Federal Credit Union Act. *See* 12 U.S.C. § 1831j (2001); 12 U.S.C. § 1790b(a)(1) (2001).

12 U.S.C. § 5481(12) identifies the laws enforced by the CFPB:

(A) the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.);

(B) the Consumer Leasing Act of 1976 (15 U.S.C. 1667 et seq.);

(C) the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), except with respect to section 920 of that Act;

(D) the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.);

(E) the Fair Credit Billing Act (15 U.S.C. 1666 et seq.);

(F) the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), except with respect to sections 615(e) and 628 of that Act (15 U.S.C. 1681m(e), 1681w);

(G) the Home Owners Protection Act of 1998 (12 U.S.C. 4901 et seq.);

(H) the Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.);

(I) subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (12 U.S.C. 1831t(c)-(f))3;

(J) sections 502 through 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6802-6809) except for section 505 as it applies to section 501(b);

(K) the Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.);

(L) the Home Ownership and Equity Protection Act of 1994 (15 U.S.C. 1601 note);

(M) the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.);

(N) the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.);

(O) the Truth in Lending Act (15 U.S.C. 1601 et seq.);

(P) the Truth in Savings Act (12 U.S.C. 4301 et seq.);

(Q) section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111-8); and

(R) the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701).

The procedures, remedies, and burden of proof are identical to the CPSIA, *i.e.*, the complaint must be filed initially with OSHA. However, if the DOL does not issue a final order within 210 days (or within 90 days of receiving a written determination) the case may be removed to federal court and either party may request a jury trial. *See* Dodd-Frank Act § 1057(c)(1)(A) to (c)(5)(D); 15 U.S.C. § 2087(b)(1) to (c). A complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was a contributing factor in the employer's decision to take an adverse employment action. Remedies include reinstatement, back pay, compensatory damages, and attorney's fees and litigation costs, including expert witness fees.

VII. REWARDS AND PROTECTIONS FOR SECURITIES AND EXCHANGE COMMISSION AND COMMODITY FUTURES TRADING COMMISSION WHISTLEBLOWERS

Under the Dodd-Frank Act, an individual who provides original information to the SEC or the Commodity Futures Trading Commission ("CFTC") that results in monetary sanctions exceeding $1 million shall be paid an award of ten (10) to thirty (30) percent of the amount recouped. *See* 78 U.S.C. § 78u-6 (applying to CFTC whistleblowers) and 7 U.S.C. § 26 (applying to SEC whistleblowers). The amount of the reward is at the discretion of the respective commission. Factors to be considered in calculating the amount of the award include the significance of the information provided by the whistleblower, the degree of assistance provided by the whistleblower, the interest of the respective commission in deterring violations by making awards to whistleblowers, and other factors that each commission may establish by rule or regulation. *Id*.

Each provision contains various restrictions. For example, under the SEC program, an award shall not be paid to a whistleblower who has been convicted of a criminal violation related to the judicial or administrative action for which the whistleblower provided information; who gains the information by auditing financial statements as required under the securities laws; who fails to submit information to the SEC as required by an SEC rule; or who is an employee of the Department of Justice ("DOJ") or an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board or a law enforcement organization. 78 U.S.C. § 78u-6(c)(2). Similar restrictions for the CFTC program are provided under 26 U.S.C. § 26(c)(2).

The SEC and CFTC whistleblower rewards programs do not contain *qui tam* provisions, *i.e.*, the whistleblower cannot pursue an action if the SEC or CFTC decline to act on the whistleblower's disclosure. SEC and CFTC whistleblower tips are submitted via form TCR (Tip, Complaint, or Referral), and may be completed online. The SEC form is available at https://denebleo.sec.gov/TCRExternal/index.xhtml, and the CFTC form is available at http://www.cftc.gov/ConsumerProtection/FileaTiporComplaint/index.htm.

A. SEC Whistleblower Protection Provision

Dodd-Frank section 922(a), codified at 15 U.S.C. § 78u-6(h), protects employees who have suffered retaliation "because of any lawful act done by the whistleblower — '(i) in providing information to the Commission in accordance with [the whistleblower reward subsection]; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act,'" the Securities Exchange Act of 1934, and "'any other law, rule, or regulation subject to the jurisdiction of the [SEC].'"

The action may be brought directly in federal court and remedies include reinstatement, double back pay with interest, as well as litigation costs, expert witness fees, and reasonable attorney's fees. The claim must be brought within three years from the date when the facts material to the right of action are known or reasonably should have been known to the whistleblower, but no more than six years after the violation occurred. *Id*.

A § 78u-6(h) plaintiff must show:

> (1) he or she was retaliated against for reporting a violation of the securities laws;
>
> (2) the plaintiff reported that information to the SEC or to another entity (perhaps even internally) as appropriate;
>
> (3) the disclosure was made pursuant to a law, rule, or regulation subject to the SEC's jurisdiction; and
>
> (4) the disclosure was "required or protected" by that law, rule, or regulation within the SEC's jurisdiction.

Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); *Genberg v. Porter*, 935 F. Spp. 2d 1094, 1105 (D. Colo. 2013).

There is a circuit split regarding what constitutes protected activity under 15 U.S.C. § 78u-6(h), and just who is a "whistleblower." The split stems from two seemingly conflicting provisions. Under § 78u-6(a)(6), "The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." The anti-retaliation provision contained in at § 78u-6(h)(1)(A) defines protected conduct as lawful actions taken by a whistleblower:

> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or re-

> lated to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

As described by the U.S. District Court for the Middle District of Tennessee, part (iii) appears to create a "catch-all" provision, not dependent on § 78u-6(a)(6)'s definition, which requires a disclosure to the SEC. *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 (M.D. Tenn. 2012).

In *Kramer v. Trans-Lux Corp*, the U.S. District Court for the District of Connecticut ruled that the definition of "whistleblower" under § 78u-6(h) encompasses individuals who make disclosures required or protected under the Sarbanes-Oxley Act or the Securities Exchange Act of 1934, even if the individual did not actually disclose information to the SEC. *Kramer*, No. 3:11cv1424, 2012 WL 4444820, at *3–5 (D. Conn. Sept. 25, 2012).[12] Trans-Lux argued in its motion to dismiss that Kramer did not report Trans-Lux's violations in the manner that the SEC requires, and therefore did not meet the definition of a "whistleblower." Kramer argued that individuals who make disclosures that are required or protected under the Sarbanes-Oxley Act or the Securities Exchange Act of 1934 meet this definition regardless of the manner in which they make their disclosure.

The court agreed with Kramer's argument, citing to a final rule promulgated by the SEC on Aug. 12, 2011. The court explained:

> Trans-Lux's interpretation would dramatically narrow the available protections available to potential whistleblowers. In order to have provided information in the manner provided by the SEC, an individual would have either had to submit the information online, through the Commission's website, or by mailing or faxing a Form TCR (Tip, Complaint or Referral). Mailing a regular letter is insufficient.… Such a reading seems inconsistent with the goal of the Dodd-Frank Act, which was to "improve the accountability and transparency of the financial system," and create "new incentives and protections for whistleblowers."

Id. at *4.

In contrast to *Kramer* and other lower court decisions (and SEC regulations), the U.S. Court of Appeals for the Fifth Circuit in *Asadi v. G.E. Energy(USA), LLC*, takes the opposite stance. After examining the language of § 78u-6(h) and the SEC's implementing regulations, Circuit Judge Jennifer Walker Elrod opined, "we conclude that

12. Author R. Scott Oswald, along with Nicholas Woodfield of The Employment Law Group, PC, represented Mr. Kramer.

the whistleblower-protection provision unambiguously requires individuals to provide information relating to a violation of the securities laws to the SEC to qualify for protection from retaliation under § 78u–6(h)." *Asadi*, 720 F.3d 620, 629 (5th Cir. 2013).

In October 2013, the U.S. District Court for the Southern District of New York rejected the reasoning in *Asadi*, finding instead that statutory ambiguity made "appropriate to consider the SEC's interpretation of the statute," which states that protections exist for "individuals who report to persons or other governmental authorities other than the [SEC]." *Thomson Reuters LLC*, No. 13 Civ. 2219, 2013 WL 5780775, slip copy at *5 (S.D.N.Y. Oct. 25, 2013).

B. CFTC Whistleblower Protection Provision

Section 748 of the Dodd-Frank Act contains a whistleblower protection provision that is substantially similar to § 922(a). *Compare* 7 U.S.C. § 26(h) *with* 15 U.S.C. § 78u-6(h). Protected conduct includes providing information to the CFTC in accordance with the whistleblower incentive program or assisting "in any investigation or judicial or administrative action of the [CFTC] based upon or related to such information." *Id*. The statute of limitations is two years from the date of the violation. *Id*.

VIII. PROTECTION FOR HEALTH CARE WHISTLEBLOWERS

The Patient Protection and Affordable Care Act of 2009 ("PPACA") which became law on March 23, 2010, amended the definition of an "original source" under the FCA and created new protections for employees who blow the whistle about violations of Title I of the PPACA.[13] *See* PPACA §§ 1558, 10104(j)(2). Section 1558, codified at 29 U.S.C. § 218c, amends the Fair Labor Standards Act ("FLSA") and provides that an employee engages in protected conduct when he provides or is about to provide to an employer, the Federal Government, or a state attorney general, information that the employee reasonably believes to be a violation of Title I of the PPACA. Section 1558 also protects employees who participate in an investigation, or object to or refuse to participate in any activity that the employee reasonably believes to constitute a violation of Title I.[14] Title I covers a broad range of rules governing health insurance including policy and financial reporting requirements and prohibitions against discrimination. Title I also mandates that hospitals establish and publish a list of standard charges, and prescribes rules for insurers to submit reinsurance claims to the Secretary under a program for early retirees. *See* PPACA §§ 1001, 1102(c).

Section 1558 incorporates the procedures, burden-shifting framework, remedies, and statute of limitation set forth in the CPSIA, 15 U.S.C. 2087(b).[15] *See* PPACA § 1558; 29 U.S.C. § 218c.

13. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

14. Section 1558, 29 U.S.C. 218c, makes repeated reference to "this title." The phrase "this title," means Title I of the PPACA, not Title 29 of the United States Code. *See Rosenfield v. GlobalTranz Enters., Inc.*, No. CV 11–02327, 2012 WL 2572984 (D. Ariz. July 2, 2012).

15. *See supra* Section V - Consumer Product Safety Improvement Act, 15 U.S.C. § 2087.

IX. COMMON LAW WRONGFUL DISCHARGE

In addition to the relief available under Federal whistleblower laws, employees may have a common law claim for wrongful discharge in violation of public policy. This can be the best remedy for whistleblowers because employees can seek punitive damages in wrongful discharge cases.[16]

Approximately forty-six (46) states and the District of Columbia have adopted a public policy exception to the employment at will rule. The elements for establishing a whistleblowing-based wrongful discharge claim, however, vary considerably from state to state. For example, some state courts have held that a statutory expression of public policy is required. *See, e.g.*, *Gantt v. Sentry Ins.*, 824 P.2d 680, 688 (Cal. 1992); *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 1059 (Ind. Ct. App. 1980). Other state courts, however, have held that administrative regulations, federal statutes, and case law can also define the public policy at issue. *See, e.g.*, *Lewis v. Nationwide Mut. Ins. Co.*, No. 3:02CV512 (RNC) 2003 WL 1746050 (D. Conn. 2003) (denying motion to dismiss claim by in-house insurance defense counsel who alleged that he had been discharged in violation of public policy expressed by Connecticut Rules of Professional Conduct relating to duty of loyalty owed to insureds); *see also Hubbard v. Spokane County*, 50 P.3d 602, 606 (Wash. 2002) (en banc) (Washington Supreme Court recognized county zoning code and state statute as source of public policy to support claim by county planning director who alleged that he had been discharged for questioning legality of issuing hotel building permit).

States also differ on the types of legal violations that can support a wrongful discharge claim. In Virginia, for example, only state statutes constitute public policy. An employee discharged in retaliation for reporting wrongdoing that violates federal law cannot make a wrongful discharge claim in Virginia. Other states, such as Maryland, take a broader approach and protect employees who report a violation of any state or federal statute. While courts do not uniformly interpret the types of protected activity that give rise to a tort claim for wrongful discharge, most courts have recognized a claim for the following types of protected activity: (1) refusing to engage in illegal activity, (2) performing a duty required by law, or (3) exercising a statutory right.

A. Refusing to Engage in Illegal Activity

The tort for wrongful discharge protects employees from being terminated because they refuse to engage in illegal activity. For example, courts will likely recognize a

16. Three recent verdicts reveal that punitive damages can be a significant component of damages in a common law wrongful discharge action. In *Carpenter v. Sandia Nat'l Laboratories*, a jury awarded Mr. Carpenter approximately $4.4 million in a common law wrongful termination action, which consisted of $36,000 for lost wages, benefits, and other costs, $350,000 for emotional distress, and $4 million in punitive damages. *See Carpenter v. Sandia Natl. Laboratories*, #D-202-CV-200506347, Bernalillo Co. NM Dist. Court (verdict Feb. 13, 2007). Mr. Carpenter alleged that he was terminated in retaliation for cooperating with federal authorities that were investigating Chinese cyber intelligence efforts. In *Feliciano v. Parexel International,* No. 04-CV-3798 (E.D. Pa. verdict Sept. 15, 2008), a jury awarded $1.8 million in punitive damages for wrongful termination, plus nearly $100,000 in compensatory damages, plus attorneys' fees. Mr. Feliciano alleged that he was terminated in retaliation for complaining to his supervisors that a company marketing database contained email addresses and other information that was illegally obtained.

wrongful discharge claim where an employee is terminated for refusing to participate in an employer's irregular accounting practices, including the recording of an asset purchased by one entity and placing it on the books of another entity. *See Rocky Mountain Hosp. & Medi. Serv. v. Mariani*, 916 P.2d 519, 527 (Colo. 1996) (recognizing wrongful discharge claim where company recorded assets purchased by one entity under books of another entity). Cases construing this form of protected conduct include:

- Recognizing a wrongful discharge claim where an employee was terminated for refusing to participate in employer–directed activities that he claimed violated both state and federal criminal statutes. *See, e.g., Isbell v. Stewart & Stevenson, Ltd.*, 9 F. Supp. 2d 731, 732 (S.D. Tex. 1998).

- Recognizing a wrongful discharge claim where an employee was discharged for refusing to violate federal and state tax laws regarding deductions for employees' wages and bonuses. *See, e.g., Strozinsky v. Sch. Dist. of Brown Deer*, 614 N.W.2d 443, 459 (Wis. 2000).

- Recognizing a wrongful discharge claim where an employee refused to commit perjury on behalf of his supervisor. *See, e.g., Ne. Health Mgmt., Inc. v. Cotton*, 56 S.W.3d 440, 447 (Ky. Ct. App. 2001).

B. Fulfilling a Statutory Obligation

An at-will employee who is terminated for fulfilling a statutory obligation or reporting suspected criminal behavior to law enforcement is protected under public policy. Under this form of protected conduct, the employee must demonstrate that she had a legal obligation or duty to report the employer's unlawful conduct. Thus, an employee terminated for blowing the whistle on her co-worker who distributed prescription medication to patients without authorization from a physician, but who had no statutory duty to report the misconduct, will likely have her claim dismissed. *See Austin v. HealthTrust, Inc.*, 967 S.W. 2d 400 (Tex. 1998) (declining to extend public policy tort doctrine to protect private whistleblower who reported another nurse for working while under the influence and distributing prescription medication to patients without authorization from a physician because the employee was under no duty to oppose such illegal conduct).

C. Exercising a Statutory Right or Privilege

Terminating an employee for exercising her statutory rights can give rise to a wrongful discharge claim. *Uylaki v. Town of Griffith*, 878 N.E. 2d 412, 414 (Ind. Ct. App. 2007) (holding that employee who has been fired for exercising statutory right or refusing to violate law has claim for wrongful discharge). In *Jackson v. Morris Commc'ns Corp.*, for example, a Nebraska court recognized a cause of action for wrongful discharge where a co-circulation manager for the York News-Times alleged that "she was discharged in

retaliation for filing a [workers' compensation] claim." *Jackson*, 657 N.W.2d 634, 641 (Neb. 2003). In reaching its decision, the court reasoned that the "failure to recognize the cause of action for retaliatory discharge for filing a workmen's compensation claim would only undermine [the] Act and the strong public policy behind its enactment." *Id.* at 641 (citing *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984)). A California court reiterated this principle in *Grant-Burton v. Covenant Care, Inc.*, when it recognized a wrongful discharge claim for an employee who was terminated for participating in a group discussion with other employees about the fairness of the employer's bonus system, a statutory right available to employees under section 232 the California Labor Code. *See Grant-Burton*, 99 Cal. App. 4th 1361, 1371 (2002). Covenant Care argued that section 232 was not triggered because the marketing directors did not disclose the amount of their bonuses. The court, however, rejected Covenant's argument, stating that the amount of wages can be disclosed without mentioning dollars and cents and concluded that the company wrongfully discharged the marketing director for exercising her statutory right to discuss compensation with her co-workers. Other examples of rights that have been recognized as the basis of a violation include:

- Terminating a barmaid for exercising her right to participate in benefits of the Unemployment Compensation Fund. *See, e.g., Smith v. Troy Moose Lodge No. 1044*, 645 N.E. 2d 1352, 1353 (Ohio 1994).
- Terminating an employee because he protested his employer's unauthorized use of his name in its lobbying efforts. *See, e.g., Chavez v. Manville Prods. Corp.*, 777 P. 2d 371, 376 (N.M. 1989).
- Discharging an employee for refusing to submit to a drug test in violation of Cal. Const. Art. 1, § 1. *See, e.g., Semore v. Pool*, 217 Cal. App. 3d 1087, 1098 (1990).

In sum, "[an] employee must be able to exercise his [statutory] right in an unfettered fashion without being subject to reprisal." *Jackson*, 657 N.W.2d at 639.

D. Potential Sources of Public Policy

Sources of public policy for a common law wrongful discharge claim may include clear and particularized pronouncements of public policy in the United States Constitution, the State Constitution, and federal and state statutes and regulations. *See, e.g., Island v. Buena Vista Resort*, 103 S.W.3d 671,679 (Ark. 2003) (sexual harassment statute established public policy against sexual harassment); *Ballinger v. Delaware River Port Auth.*, 800 A.2d 97, 108 (N.J. 2002) (sources of public policy include legislation, administrative rules, regulations or decisions, and judicial decisions, as well as professional codes of ethics under certain circumstances); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 575 S.E.2d 618, 622 (W. Va. 2002) (Code of State Regulations sets forth specific statement of substantial public policy, ensuring that hospital unit is properly staffed to accommodate regulation's directive, that patients are protected from inade-

quate staffing practices, and that medical care is provided to hospital patients); *Wholey v. Sears Roebuck*, 803 A.2d 482, 490 (Md. 2002) (constitutional provisions and principles provide clear public policy mandates under which a termination may be grounds for wrongful discharge claim); *Mitchem v. Counts*, 523 S.E.2d 246, 250 (Va. 2000) (common law cause of action for wrongful termination could be based on public policies expressed in statutes prohibiting fornication and lewd and lascivious behavior); *Faulkner v. United Tech. Corp.*, 693 A.2d 293, 295 (Conn. 1997) (wrongful discharge claim may be predicated solely on violation of federal as opposed to state statute); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1033 (Ariz. 1985) (public policy can be found in expressions of state's founders and state's constitution and statutes that embody the public conscience of people within that state). Specific examples of federal statutes that may serve as sources of public policy include:

- 18 U.S.C. § 1001, which prohibits knowing and willful falsification, concealment or covering up of "a material fact, or mak[ing] any false, fictitious, or fraudulent statement or entry ... ;"
- 18 U.S.C. § 1002, which prohibits knowingly defrauding the government;
- 18 U.S.C. § 1031, which criminalizes the knowing execution of a scheme or artifice to defraud the federal government;
- 18 U.S.C. § 208, which prohibits employees from participating in government contracts in which they hold a financial interest;
- 41 U.S.C. §§ 51-54, which makes it a criminal offense for any subcontractor to knowingly influence the award of a subcontract;
- 18 U.S.C. § 1516, which prohibits an intentional effort to influence, obstruct or impede a federal auditor;
- 18 U.S.C. §§ 1341 and 1343, which prohibit mail fraud and wire fraud, *i.e.*, using wire communications, the U.S. Postal Service or other interstate delivery services to accomplish an illegal act; and
- 18 U.S.C. § 287, which criminalizes the knowing submission of any false claim to the government.

The FCA itself can be a source of public policy in a wrongful discharge action. For example, in *McNerney v. Lockheed Martin Operations Support, Inc.*, a district judge denied a motion to dismiss a Missouri common law wrongful discharge action in which the plaintiff alleged she was terminated for disclosing to her supervisor a billing scheme in which her employer was spreading the cost of certain projects to other unrelated projects, thereby causing certain projects to be falsely over billed. *McNerney*, No. 10–0704–CV–W–DGK, 2010 WL 4312976, at *2 (W.D. Mo. Oct. 22, 2010);

McNerney v. Lockheed Martin Operations Support, Inc., No. 10–0704–CV–W–DGK, 2012 WL 2131826 (W.D. Mo. June 12, 2012) (granting summary judgment for the employer, but further acknowledging the FCA as a source of public policy).

E. Pleading Requirements and Burden of Proof

While there is no heightened pleading requirement for a wrongful discharge claim, it is critical to plead with specificity the public policy that the employer violated by discharging the plaintiff. *See, e.g., Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 808 (Va. 1996) (no cause of action was stated where employee failed to specify statutory basis for claim that he was wrongfully discharged for refusing to perform auto repairs using method that he believed unsafe). Moreover, an employee should ensure that the specified public policy applies not only to him but also to the particular employer. *See, e.g., Edmondson v. Shearer Lumber Prod.*, 75 P.3d 733 (Idaho 2003) (employee cannot base wrongful discharge claim against private sector employer on exercise of constitutional right of free speech, because this right is protected only against government action).

To establish a *prima facie* case in most jurisdictions, an employee must establish the following:

1. That plaintiff was an at-will employee terminated by the defendant;

2. That the termination of the plaintiff's employment violates a specific public policy; and

3. That there is a causal nexus between the public policy violation and the employer's decision to terminate the plaintiff.

In attempting to establish that the employee's termination violates public policy, the employee's counsel should always try to emphasize the public and social importance of the rights or interests that the employee is attempting to defend. Courts are more apt to recognize a wrongful discharge claim of an employee discharged for supplying law enforcement with information about a co-worker's involvement in a crime than for an employee discharged for asserting his right to take a rest break. *Compare Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 846 (Ill. 1981) (employee stated cause of action for retaliatory discharge where employee alleged that he was discharged for supplying law enforcement agency with information that fellow employee might be involved in violation of criminal code) *and Miller v. SEVAMP, Inc.*, 362 S.E.2d 915 (Va. 1987) (court characterized employee-shareholder's statutory right to vote free from employer's coercion, right conferred by policy benefiting public rather than merely benefiting shareholder's private interest) *with Crawford Rehab. Servs, Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997) (plaintiff's right to take rest breaks clearly did not implicate substantial public policy); *and City of Virginia Beach v. Harris*, 523 S.E.2d 239 (Va. 2000) (police officer terminated for obtaining warrants against his supervisor did not have

claim against city for wrongful discharge in violation of public policy based on statute describing powers and duties of police officer; statute did not state any public policy and was not designed to protect any public rights pertaining to property, personal freedoms, health, safety, or welfare).

Additionally, in some states an employee must identify a public policy that is expressed in a source acceptable and actionable within the state governing the action. For example, as discussed above, some states require that the public policy be expressed in a state statute, rather than a federal source. *See, e.g., Clinton v. State ex rel. Logan County Election Bd.*, 29 P.3d 543 (Okla. 2001) (plaintiff must identify Oklahoma public policy goal that is clear and compelling and is articulated in existing Oklahoma constitutional, statutory, or jurisprudential law); *Torrez v. City of Scottsdale*, No. CV 96-07667, 13 IER 316 (Ariz. Super. Ct. 1997) (holding that neither federal statutes nor municipal ordinances are cognizable sources of public policy). Once the public policy has been established, the employee must demonstrate that her conduct furthered that particular public policy. This may require a showing that the employee took affirmative steps that required the employer to conform to the stated public policy.

There are challenges, however, in proving the causal relationship between the employee's conduct and the stated public policy violation. Some issues that arise in the context of wrongful discharge litigation include: (1) whether an employee must prove that the employer's conduct actually violated public policy or whether it is sufficient that the employee had a good faith belief that the employer's conduct violated public policy; and (2) whether the employee must demonstrate that she disclosed information about the employer's violations of public policy to regulatory or prosecutorial agencies or if it is sufficient to make complaints internally. While most courts have held that employees need not voice their concerns about their employer's public policy violations externally, and that a reasonable belief that the employer's conduct violated public policy is sufficient to make a claim for wrongful discharge, employees should try to identify evidence that would show a colorable case of illegality, *i.e.*, information about a regulatory action taken against the employer for malfeasance can provide a basis for the employee's belief that the employer was engaging in conduct that violated public policy.

F. Remedies

A prevailing plaintiff can recover backpay, front pay, damages for emotional distress, and punitive damages. In certain jurisdictions, punitive damages can be awarded only upon a showing of malice, which can be inferred from circumstantial evidence. *See Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144, 1151 (Md. Ct. Spec. App. 1990). Other jurisdictions have awarded punitive damages where an employer formally requires an employee's adherence to the law but simultaneously requests that the employee engage in unlawful conduct. *See Smith v. Brown-Forman Distillers Corp.*, 196 Cal. App. 3d 503 (1987) (awarding punitive damages where liquor distiller consciously disregarded rights of employees by requiring that they engage in illegal activities).

G. An Alternative Statutory Remedy May Bar a Common Law Wrongful Discharge Action

In many states, where the source of public policy is expressed in a statute with its own remedy to vindicate the public policy objectives, the employee can pursue a retaliation action only through the statute. For example, in *Scott v. Topeka Performing Arts Ctr., Inc.*, the court granted the employer's motion to dismiss, concluding that the employee's state-law claim for retaliatory discharge was precluded by the alternative statutory remedies available under the Fair Labor Standards Act ("FLSA"). *Scott v. Topeka Performing Arts Ctr., Inc.*, 69 F. Supp. 2d 1325, 1330 (D. Kan. 1999). In *Scott*, the employee alleged that she was wrongfully discharged for asserting her rights under the FLSA. In her complaint, the employee argued that it was unclear whether relief on her FLSA retaliation claim would include all the remedies available under her state-law claim and that the remedies under the FLSA were not adequate. The court rejected this argument, barring the employee from pursuing a wrongful discharge claim against her employer. Similarly in *Korslund v. DynCorp Tri-Cities Serv., Inc.*, a group of employees was precluded from pursuing wrongful discharge claims where the employees alleged that their employer retaliated against them for reporting safety violations, mismanagement, and fraud at a nuclear facility. *Korslund*, 125 P.3d 119 (Wash. 2005) (en banc). According to the Washington court, the administrative process for whistleblower complaints in the federal Energy Reorganization Act ("ERA") adequately protected the public policy of protecting against waste and fraud in the nuclear industry. Thus, when attempting to bring a retaliation claim under the wrongful discharge tort, an employee should not rely on a statute with its own whistleblowing remedy as the source of public policy. The employee should, if possible, identify and cite another statue that lacks its own remedy.

H. Failure to Exhaust Internal Remedies May Lead to Early Dismissal

An employee's claim for wrongful discharge can be dismissed at the early stages of litigation if the state or jurisdiction where the tort is being adjudicated requires that the employee exhaust internal remedies prior to reporting the employer's alleged malfeasance to outside authorities and the employee fails to comply with the company's remedial corporate procedures and policies. For example, a California court affirmed summary judgment, dismissing an employee's wrongful discharge claim where the employee failed to exhaust a university's internal grievance procedures. *See Palmer v. Regents of the Univ. of Ca.*, 132 Cal. Rptr. 567, 571 (2003). According to the court, when a private association or public entity establishes an internal grievance mechanism, an employee must exhaust those internal remedies before pursuing a civil action for wrongful termination. *See id.*

I. State Statutory Whistleblower Protections

Nearly all states and the District of Columbia have adopted statutory whistleblower protections, some of which protect only public sector employees.[17] The scope of protected conduct varies widely. Some state whistleblower statutes protect only disclosures concerning violation of law, while some also protect disclosures concerning violations of rules and regulations. Unlike nearly all of the federal whistleblower protection statutes, many state whistleblower protection laws do not protect internal disclosures. And some afford protection to a whistleblower only where the whistleblower disclosed the matter internally prior to reporting it to the Government.

The strongest state whistleblower protection statute for employees in the private sector is New Jersey's Conscientious Employee Protection Act ("CEPA"), N.J.S.A. § 34:19-5, which protects both private and public sector employees who disclose or threaten to disclose internally or to a public body an activity, policy, or practice that the employee reasonably believes is in violation of a law, rule, or regulation. Remedies for a prevailing CEPA plaintiff include economic damages, emotional distress damages, attorney's fees and punitive damages.

The District of Columbia also provides robust protections under its Contractors and Instrumentality Whistleblower Protection Act of 1998, D.C. Code §§ 2-223.01 to .07, which protects internal and external disclosures regarding:

> (A) Gross mismanagement in connection with the administration of a public program or the execution of a public contract;
>
> (B) Gross misuse or waste of public resources or funds;
>
> (C) Abuse of authority in connection with the administration of a public program or the execution of a public contract;
>
> (D) A violation of a federal, state, or local law, rule, or regulation, or of a term of a contract between the District government and a District government contractor which is not of a merely technical or minimal nature; or
>
> (E) A substantial and specific danger to the public health and safety.

D.C. Code § 2-223.01(7).

In sum, counsel should assess whether a whistleblower who has suffered retaliation has a remedy under state law, including a retaliation action under a state FCA, an action under a state whistleblower protection statute, and a common law wrongful discharge action. Trying the case in state court may offer the opportunity to recover higher damages and minimizes the risk of dismissal on a motion summary judgment.

17. Public Employees for Environmental Responsibility has compiled a detailed survey of state whistleblower protection statutes, which is posted at http://www.peer.org/assets/docs/wbp2/overview.pdf.

X. GENERAL TIPS FOR LITIGATING WHISTLEBLOWER RETALIATION CLAIMS

The proliferation and strengthening of whistleblower retaliation statutes and the expansion of the common law wrongful discharge tort have dramatically altered the options for whistleblowers who have suffered retaliation. Whereas just a few years ago a whistleblower may have had just one remedy, if any, whistleblowers now may have several available to them. Therefore, it is critical during the intake process to thoroughly analyze those options. The remainder of the article provides general tips for maximizing damages, claim selection, forum selection, pleading whistleblower retaliation claims, and litigating whistleblower retaliation claims.

A. Claim Selection

1. Maximizing Damages

In choosing claims, consider options to maximize damages. For example, including a claim with a fee-shifting provision is critical. The statutory whistleblower retaliation claims discussed in this article all authorize attorney fees and costs for a prevailing plaintiff. Additionally, statutory whistleblower retaliation claims generally do not authorize punitive damages. Consider bringing a common law claim under state law for wrongful discharge in violation of public policy or other tort claims that offer the opportunity to obtain punitive damages. Potential common law claims include defamation, promissory estoppel, breach of the covenant of good faith and fair dealing, intentional interference with contract, and breach of contract. Where an employer's conduct is outrageous, a jury may be motivated to award significant punitive damages.

Another advantage of adding a statutory whistleblower retaliation claim is the opportunity to obtain reinstatement. Most of the DOL whistleblower retaliation statutes authorize preliminary reinstatement, *i.e.*, if OSHA finds for the complainant at the investigative stage (before the parties have litigated the case), the employer must reinstate the employee immediately. Preliminary reinstatement gives a complainant significant leverage in litigation (the whistleblower is back at the worksite while prosecuting his claim) and can lead to a favorable settlement.

Under the leadership of former US Labor Secretary Elaine Chao, OSHA was criticized for failing to enforce whistleblower protection statutes and for finding in favor of employers in most whistleblower retaliation investigations. Plaintiff's counsel typically viewed the OSHA investigative stage as a waste of time for the whistleblower because OSHA merely adopted the employer's justification for the adverse action. The current leadership of OSHA has undertaken concrete steps to invigorate OSHA's Whistleblower Protection Program, and OSHA has issued numerous favorable orders in whistleblower retaliation cases. The improvements are due in part to OSHA's updated Whistleblower Investigations Manual, which took effect on Sept. 20, 2011.[18]

18. The OSHA Whistleblower Investigations Manual is available online at https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf.

Accordingly, plaintiff's counsel should not assume that it is best to forego pursuing a whistleblower retaliation claim with an administrative exhaustion requirement. To the contrary, pursuing a strong whistleblower retaliation claim before OSHA can provide an opportunity to obtain preliminary reinstatement. The OSHA investigative process also enables plaintiff to discover the employer's defenses and possibly obtain critical admissions prior to prosecuting related claims. Furthermore, since many of the whistleblower retaliation claims that must be initially filed with DOL contain a removal provision, the whistleblower can initially pursue the claim before DOL and later remove it to federal court.

2. Choosing a Remedy with a Favorable Causation Standard

As discussed *supra*, the whistleblower retaliation statutes enacted in the past decade all employ a very favorable causation standard for plaintiffs. To prevail, the plaintiff must demonstrate merely that protected conduct was a "contributing factor" in the employer's decision to take an adverse action. The ARB defines a contributing factor as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). Close temporal proximity alone can support an inference of causation under the "contributing factor" standard. *See, e.g., Kalkunte*, 2004-SOX-56, *supra*. Some state common law wrongful discharge actions, however, require a plaintiff to meet a "sole cause" standard, a far more onerous causation standard. Accordingly, in selecting claims, it is important to consider adding a claim that employs the favorable "contributing factor" standard.

3. Naming Individual Defendants

An important consideration in choosing among retaliation claims is whether the claim authorizes individual liability. The retaliation provision of SOX expressly authorizes claims against individuals, and at least some jurisdictions have held the FERA amendments to § 3730(h) authorize claims against individuals. *See Laborde v. Rivera-Dueño*, 719 F. Supp. 2d 198, 205 (D. Puerto Rico 2010); *Huang v. Rector & Visitors of Univ. of Va.*, 896 F. Supp. 2d 524 (W.D. Va. 2012) (post-FERA, liability is not limited to employers). Additionally, several jurisdictions allow for individual supervisor liability in common law wrongful discharged claims. *See, e.g., VanBuren v. Grubb*, 733 S.E.2d 919, 923 (Va. 2012); *Myers v. Alutiiq Int'l Solutions, LLC*, 811 F.Supp.2d 261, 269 (D.D.C. 2011); *Harless v. First Nat'l Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692, 698, 699 (1982).

Asserting a claim against an individual can be especially important where the corporation might not have sufficient assets to pay a judgment and the individual responsible for the retaliation is covered under a Director & Officers insurance policy. Before naming an individual as a defendant, consider the potential impact on diversity jurisdiction and consider whether naming an individual defendant will make them

personally invested in the case and pose an obstacle to settlement. An individual defendant might be strongly disinclined to settle and instead prefer to litigate the claim.

B. Forum Selection

As a general rule, state courts are the preferred forum to try whistleblower retaliation claims because jury verdicts tends to be higher and summary judgment is less of an obstacle when litigating in state court. While jurors can readily relate to being the subject of an abusive working environment, it is important to carefully evaluate whether the plaintiff will be likeable to a jury in the forum in which the claim would be brought.

Where the plaintiff is not likely to be viewed favorably by a jury but the facts are strong, litigating before a DOL ALJ might be a better option than a jury trial because DOL ALJs are less inclined to make emotional decisions in reaction to the employer's efforts to undermine the plaintiff's motive for engaging in protected activities or the employer's efforts to portray the plaintiff as a disgruntled former employee and instead focus on the evidence.

Counsel should also consider the varying standards for actionable adverse actions and causation. For example, SOX section 806's scope of actionable adverse actions is considered broader than the *Burlington Northern* standard applied by courts when interpreting 31 U.S.C. § 3730(h). Additionally, SOX and the new provisions of the NDAA use a "contributing factor" standard instead of 3730(h)'s more rigorous "but-for" requirement.

Litigating a retaliation claim before a DOL ALJ can also be advantageous because ALJs typically permit the plaintiff to take broad discovery,[19] which could produce evidence useful in a *qui tam* action.[20] In addition, DOL ALJs usually address discovery disputes promptly, and will permit nearly all relevant evidence to come in at the hearing. Formal rules of evidence generally do not apply in whistleblower retaliation cases tried before DOL ALJs. Lastly, plaintiff can reach a hearing on the merits before an ALJ far more expeditiously than in federal court while avoiding baseless counterclaims.

Several of the recently enacted federal whistleblower protection statutes contain a removal provision under which the plaintiff may elect to bring the retaliation claim *de novo* in federal court once the claim has been pending before DOL for a certain period of time—180 days for a SOX claim, for example. That option provides the complainant an opportunity to initially litigate the claim at DOL and then remove it to federal court and add other deferral claims and pendent state claims. Employers have tried to argue that although these statutes provide for *de novo* review in federal court, the decisions of the presiding ALJ, such as an order granting a motion to dismiss or a motion for summary decision, should be accorded preclusive effect when the claim is removed to federal court. The Fourth Circuit, however, has flatly rejected this argument, hold-

19. *See, e.g., Leznik v. Nektar Therapuetics, Inc.*, 2006-SOX-93 (ALJ Feb. 9, 2007) (Order Granting Motion to Compel) ("Unless it is clear that the information sought can have no possible bearing on a party's claims or defenses, requests for discovery should be permitted.").

20. While FERA amendments to the public disclosure bar contained at 31 U.S.C. § 3730(e) restrict its application to actions in which the government is a party, the government may still call for a reduction in the relator's reward under § 3730(d)(1).

ing that a SOX whistleblower may seek *de novo* review in federal court so long as the complaint has been pending for 180 days and DOL has not issued a final decision. *See Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 245 (4th Cir. 2009) (deferring to administrative agency, "even if more efficient, is in direct conflict with the unambiguous language of [SOX]").

In devising a strategy to litigate whistleblower retaliation claims, avoiding arbitration is an important factor to consider. Whistleblower retaliation claims brought under the American Recovery and Reinvestment Act, Sarbanes-Oxley Act, Patient Protection and Affordable Care Act, and Dodd-Frank Act are exempt from mandatory arbitration. Accordingly, when choosing among multiple claims, it is preferable to bring a claim that will not be subject to arbitration. Even if a whistleblower retaliation claim is subject to arbitration, the plaintiff may initially pursue the claim before DOL or an Agency IG if the claim has an administrative exhaustion provision. The DOL or an Agency IG could award relief to the whistleblower before the claim is submitted to arbitration, and OSHA's orders of preliminary reinstatement are effective immediately.

C. Claim Preemption

Federal whistleblower protection statutes do not preempt state remedies, including a common law claim of wrongful discharge in violation of public policy. In the leading case addressing this issue, the United States Supreme Court held that a whistleblower retaliation action under the Energy Reorganization Act did not preempt a common law emotional distress claim arising from the plaintiff's termination. *English v. General Electric Co.*, 496 U.S. 72 (1990). The Court found "no basis for [the] contention that all state-law claims arising from conduct covered by the [statute] are necessarily [preempted]." 496 U.S. at 83. Accordingly, a whistleblower can pursue remedies under both federal and state law. Bringing a state tort action offers a plaintiff the opportunity to obtain punitive damages in a jury trial. Where a federal whistleblower protection statute has an administrative exhaustion requirement, the whistleblower may be able to initially litigate the claim before DOL or an IG and subsequently remove the claim to federal court and add pendent state claims.

D. Claim Preclusion

While the Fourth Circuit's recent *Stone* decision clarifies that a SOX retaliation plaintiff is entitled to a *de novo* hearing in federal court after litigating the case before a DOL ALJ (so long as DOL has not yet issued a final order), formulating a strategy to maximize a whistleblower's recovery requires careful analysis of claim preclusion. Courts seek to avoid "claim splitting" and are reluctant to give a plaintiff more than one bite at the apple.

For example, in *Tice v. Bristol-Myers Squibb*, the Third Circuit affirmed summary judgment for the employer, holding that a DOL ALJ's determination that the em-

ployer had a legitimate reason for terminating SOX plaintiff Carol Tice's employment should be accorded preclusive effect in related employment actions. *Tice*, 325 F. App'x 114 (3d Cir. 2009). Tice had initially filed a SOX retaliation claim with OSHA, alleging that her employment was terminated because she opposed management's direction to employees to falsify sales call reports in violation of SOX. A SOX ALJ dismissed Tice's claim, concluding that the employer demonstrated that it would have terminated Tice absent her disclosure because Tice falsified sales call reports. Tice did not appeal the ALJ's order and subsequently brought an action in federal court alleging age discrimination and gender discrimination. The summary judgment dismissal of Tice's discrimination claims likely could have been avoided if Tice had appealed the DOL ALJ's order.

Similarly, in *Thanedar v. Time Warner, Inc.*, the Fifth Circuit held that an unsuccessful Title VII discrimination claim can preclude a SOX claim arising from the same adverse action. *Thanedar*, 352 F App'x 891 (5th Cir. 2009). Five months after Thanedar's Title VII and 42 U.S.C. § 1981 claims were dismissed, Thanedar removed a SOX complaint pending before OSHA to federal district court. Time Warner moved for judgment as a matter of law on the basis that Thanedar's SOX and state law claims are barred by the doctrine of *res judicata*, because the claims should have been asserted in his prior Title VII lawsuit. Thanedar appealed to the Fifth Circuit, which found that "all three of Thanedar's claims arise from the same core set of facts and therefore the preclusive effect of the Title VII judgment "extends to all rights the original plaintiff had 'with respect to all or any part of the transaction, or series of connected transactions out of which the [original] action arose.'" *Id*.

In general, the findings of an agency investigation do not have preclusive effect on related claims. *See, e.g., Hanna v. WCI Cmtys., Inc.*, 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. Nov. 18, 2004) (holding that OSHA's preliminary findings in a SOX do not have preclusive effect). But the California Supreme Court did issue a surprising holding in *Murray v. Alaska Airlines, Inc.*, when it ruled that OSHA's findings in an AIR21 retaliation action barred a plaintiff from pursuing related claims under state law because he had the option of a formal adjudicatory hearing at DOL to determine the contested issues and failed to request a hearing before DOL, thereby rendering OSHA's notice of determination a final order. *Murray*, 237 P.3d 565 (CA 2010). It does not appear that any other courts have followed the *Murray* decision with regard to DOL-administered whistleblower claims, but it underscores the importance of timely appealing agency decisions before they become final orders.

Resolving a whistleblower retaliation action will not preclude the whistleblower from bringing a *qui tam* action. *See U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 852 (7th Cir. 2009). But if the government is aware of the facts underlying a *qui tam* action before the action is filed, a general release signed by the relator may, in certain jurisdictions, waive the whistleblower's relator share. *U.S. ex rel. Radcliffe, et al. v. Purdue Pharma L.P.*, 600 F.2d 319 (4th Cir. 2010), *cert. denied*, 10-254, 2010 WL 3302027 (U.S. Oct. 12, 2010) ("When the government is unaware of potential FCA claims the public interest favoring the use of *qui tam* suits to supplement federal

enforcement weighs against enforcing prefiling releases. But when the government is aware of the claims, prior to suit having been filed, public policies supporting the private settlement of suits heavily favor enforcement of a pre-filing release."); *c.f. United States ex rel. Green v. Northrop* 59 F.3d 953, 963-967 (9th Cir. 1995) (a general release entered into without the knowledge or consent of the United States, could not be enforced to bar a later *qui tam* claim where the government did not know have knowledge of the fraud prior to the filing of the *qui tam* action).

E. Preserving Ability to Recover Relator Share

Where a client is both eligible for a whistleblower reward under the False Claims Act and also has a strong retaliation claim, counsel should carefully analyze whether prosecuting the retaliation claim could limit the client's ability to obtain a whistleblower reward. A *qui tam* relator can prosecute a retaliation claim without violating the seal, but this requires planning, including a strategy for responding to questions during the plaintiff's deposition about the plaintiff's disclosures to the government. The following are some issues counsel should consider in prosecuting a retaliation claim while a *qui tam* action is under seal:

- Before filing a retaliation claim on behalf of a whistleblower who may have a *qui tam* action, the whistleblower should disclose the fraud to the Government to ensure that the whistleblower will qualify as an original source.
- Consider filing the retaliation claims with the *qui tam* action under seal.
- Be prepared to justify the plaintiff's damages with specificity to avoid the appearance that the employer is settling more than just an employment claim. As most whistleblower retaliation claims authorize both compensatory damages and front pay in lieu of reinstatement, potential damages can be very substantial, especially where the employer's retaliation damages the whistleblower's career. A vocational rehabilitation expert can evaluate the extent to which the whistleblower's career prospects have been diminished and the time it will take for the whistleblower to regain a comparable employer. Relying on the opinion of the vocational rehabilitation expert, an economist can estimate front pay.

F. Pleading Whistleblower Retaliation Claims

While Rule 9(b) does not apply to 3730(h) or any other retaliation cause of action, counsel for whistleblowers are well-advised in the wake of *Iqbal*[21] and *Twombly*[22] to plead whistleblower retaliation complaints in detail. In a 3730(h) action, plaintiff should plead how plaintiff's disclosures or plaintiff's investigation reasonably could lead to a viable FCA action. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261,

21. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

22. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

1269 (9th Cir. 1996). In a SOX retaliation action, plaintiff should plead how plaintiff's disclosure "definitively and specifically" relates to the SOX subject matter (such as shareholder fraud or a violation of an SEC rule).[23] Pleading protected conduct in detail will also be useful in discovery disputes in that plaintiff will be able to point to specific allegations in the complaint as a basis to take broad discovery on plaintiff's disclosures.

Additionally, plaintiff should plead adverse actions in detail, as context matters, *i.e.*, "the significance of any given act of retaliation will often depend upon the particular circumstances." *Burlington N.*, 548 U.S. at 57. For example, changing an employee's work hours may be materially adverse where the change in hours would effectively force the employee to resign. In a SOX retaliation case, the ALJ found that the plaintiff suffered an adverse action when he was given one day to either resign or accept a transfer to a different department that would significantly decrease his workload. *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29 (ALJ Oct. 5, 2006).

Plaintiff should also plead retaliatory actions (any act that would dissuade a reasonable employee from whistleblowing) that occurred outside of the statute of limitations. While such adverse actions are not actionable, they can constitute important circumstantial evidence of retaliation, and including them in the complaint is important to ensure that they are discoverable. Finally, it is critical to exhaust administrative remedies where plaintiff is subjected to additional adverse actions after filing a complaint. When exhausting administrative remedies is a prerequisite to filing a lawsuit, plaintiff should plead that she has done so.

G. Prosecuting Whistleblower Retaliation Claims

Although whistleblower retaliation statutes generally do not require that plaintiff disclose an actual violation of law,[24] some courts are erroneously applying a heightened standard of objective reasonableness that comes close to requiring plaintiff to prove that she disclosed an actual violation of law, *e.g.*, requiring a § 3730(h) plaintiff to demonstrate that her disclosures would have resulted in a successful *qui tam* action. Therefore, to survive summary judgment, it is critical to develop evidence proving the objective reasonableness of plaintiff's disclosures.

Whistleblower retaliation plaintiffs are entitled to take broad discovery about their protected disclosures, but of course should expect defendants vigorously to resist disclosing documents and information about the plaintiff's disclosures. Counsel should promptly move to compel such evidence, and there are several strong legal arguments to support a motion to compel. As discussed *supra*, plaintiff will have to prove the objective reasonableness of her disclosures, and therefore should take broad

23. While *Sylvester v. Parexel Inc., LLC*, ARB Case No. 07-123, ALJ Nos. 2007-SOX-39, 42, 2011 WL 2165854 (ARB May 25, 2011), replaced the "definitively and specifically" with "reasonable belief," some circuits have been slow to adopt the more liberal standard. *See Riddle v. First Tenn. Bank, Nat'l Ass'n*, 497 F. App'x 588, 595 (6th Cir. 2012) ("In order to receive the whistle-blower protections of SOX,'an employee's complaint must definitively and specifically relate to one of the six enumerated categories found in 18 U.S.C. § 1514A.'") (quotation and citation omitted).

24. *See, e.g.*, *Graham County*, *supra* (proving a violation of the FCA is not element of a § 3730(h) cause of action).

discovery about her disclosures. In addition, courts have held that information about the plaintiff's disclosures is relevant to the employer's motive for retaliating against plaintiff. *See, e.g., Dilback v. Gen. Elec. Co.*, No. 4:00-CV-222, 2008 WL 4372901, at *4 (W.D. Ky. Sept. 22, 2008) ("If Plaintiff can show that the documents he was attempting to retrieve reveal the existence of false claims on the part of the Defendant, then such evidence may be probative of the Defendant's motivation.").

Plaintiff should also vigorously pursue discovery about investigations of her disclosures. For example, in a SOX case, the employer refused to produce in discovery the report of an internal investigation related to plaintiff's disclosures which the employer had submitted to the SEC prior the plaintiff filing suit. Plaintiff moved to compel, and the ALJ ordered production of the report, concluding that the employer's disclosure of the report to the SEC waived attorney-client privilege and work product protection, despite the presence of a confidentiality agreement with the SEC. *See Fernandez v. Navistar Int'l Corp.*, 2009-SOX-43 (ALJ Oct. 16, 2009). It is also important not to accept broad assertions of privilege at face value and instead require employers to produce privilege logs. A privilege log may reveal that the employer retained outside counsel to investigate plaintiff's disclosures, which may be critical evidence to prove that the employer had knowledge of the whistleblower's protected conduct. For example, it is not credible for an employer to claim at trial that it was never aware that plaintiff was disclosing violations of securities laws where the employer promptly retained a securities lawyer to investigate the whistleblower's disclosures.

Third-party discovery can also be very useful to obtaining the evidence necessary to prove the objective reasonableness of plaintiff's disclosures. For example, a SOX retaliation plaintiff alleging that she disclosed inadequate internal accounting controls should consider deposing the company's independent auditors to discover the extent to which the internal control deficiencies she disclosed adversely impacted the accuracy of the company's financial reporting. Retaliation plaintiffs should also consider obtaining information through the Freedom of Information Act that may corroborate the objective reasonableness of their disclosures.

In addition to taking broad discovery on the objective reasonableness of plaintiff's disclosures, plaintiff's counsel should focus discovery on eliciting evidence of causation, including the following types of direct and circumstantial evidence:

- Direct evidence of retaliatory motive, *i.e.*, "statements or acts that point toward a discriminatory motive for the adverse employment action." William Dorsey, *An Overview of Whistleblower Protection Claims at the United States Department of Labor*, 26 J. Nat'l Ass'n Admin. L. Judiciary 43, 66 (Spring 2006) (citing *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004)). As the Eighth Circuit has pointed out, direct evidence is not the converse of circumstantial evidence, but instead "is evidence 'showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated' the adverse employment action." *Griffith*, 387 F.3d at 736. "'[D]irect' refers to the causal strength of the proof, not whether it is 'circumstantial' evidence." *Id.*

- Deviation from company policy or practice, such as failing to apply a progressive discipline policy to the whistleblower. During the employer's Rule 30(b)(6) deposition or the deposition of a Human Resources official, plaintiff should explore relevant company policies in detail to lay a foundation for proving that the employer deviated from its policies. For example, a whistleblower who is terminated for committing a minor violation of policy, such as sending a personal email using a work computer, should establish that the company has a progressive disciplinary policy and that the employer typically metes out an oral warning or no disciplinary action to an employee who sends a personal email from work. Similarly, explore whether the company investigated plaintiff's disclosures in accordance with its policies or protocols concerning investigation of employee concerns. A sham or biased investigation is strong evidence of retaliation. Failure to investigate can also be circumstantial evidence of retaliation. In *Howard v. Urban Inv. Trust, Inc.*, No. 03cv7668, 2010 WL 832294 at *4 (N.D. Ill. Mar. 8, 2010), the court held that the employer's failure to investigate or stop the harassment of the whistleblower constitutes discrimination in the terms and conditions of employment.

- Animus or anger towards the employee for engaging in a protected activity. *See Pillow* v. *Bechtel Constructions, Inc.,* Case No. 1987-ERA-00035 (Sec'y July 19, 1993).

- Singling out the whistleblower for extraordinary or unusually harsh disciplinary action. *See Overall* v. *TVA,* ARB Nos. 98-111 and 128, ALJ No. 1997-ERA-000S3, slip op. at 16-17 (Apr. 30, 2001), *aff'd TVA* v. *DOL*, 59 F. App'x 732 (6th Cir. 2003). Obtain all relevant policies and procedures, including the employer's progressive discipline policy, and determine whether the employer failed to follow its procedures. Where your client was subject to an adverse action for violating a particular policy or work rule, ascertain whether the employer meted out similar discipline against other employees who violated the same policy or work rule.

- Proof that employees who are situated similarly to the plaintiff, but who did not engage in protected conduct, received better treatment. Dorsey, *supra*, at 71.

- Temporal proximity between the employee's protected conduct and the decision to take an actionable adverse employment action. *See Stone & Webster Eng'g Corp.* v. *Herman,* 115 F.3d 1568, 1573 (11th Cir 1997).

- The cost of taking corrective action necessary to address the whistleblower's disclosures and the decision-maker's incentive to suppress or conceal the whistleblower's concerns.

- Evidence that the employer conducted a biased or inadequate investigation of the whistleblower's disclosures, including evidence that the person accused of misconduct controlled or heavily influenced the investigation.

- Shifting or contradictory explanations for the adverse employment action. *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, at 9, ALJ No. 2004-AIR-11 (ARB May 26, 2010) (footnotes omitted). Focus on the evolution of an employer's justification for an adverse action from the inception of the litigation through discovery. For example, an employer's justification at an unemployment compensation hearing or in a position statement submitted to an agency soon after the complaint is filed may differ significantly from the reasons asserted at the deposition of a witness well prepared by counsel.

- Evidence of after-the-fact explanations for the adverse employment action. In *Clemmons*, the ARB pointed out that "the credibility of an employer's after-the-fact reasons for firing an employee is diminished if these reasons were not given at the time of the initial discharge decision." *Id.* at 9-10 (footnotes omitted).

- Corporate culture and evidence of a pattern or practice of retaliating against whistleblowers.

In addition to eliciting evidence of causation, plaintiff should seek evidence in discovery that would justify an award of punitive damages, including reckless indifference to the federally protected rights of the aggrieved individual or malice, which can be inferred from outrageous conduct. The employer's reaction to the whistleblowing may provide evidence of malice, such as an employer conducting a sham investigation of plaintiff's disclosures or an employer leveling false accusations of misconduct against the whistleblower and not providing the whistleblower an opportunity to respond to such accusations. Additional conduct warranting punitive damages includes efforts by the employer to injure the employee post-termination, including negative references to prospective employers or disparagement of the plaintiff.

H. Playing Defense

While whistleblower retaliation plaintiffs often have significant leverage in litigation, including the prospect of far-reaching discovery about the unlawful conduct that the whistleblower disclosed, a straightforward retaliation case can turn into years of expensive and hard-fought litigation. Upper management's animosity toward the whistleblower, an inclination to avoid the appearance of conceding that the whistleblower's disclosures were legitimate, and other factors sometimes cause employers to commit an irrational level of resources towards defending a whistleblower retaliation claim, including legal costs that are several times the value of the claim. During the intake stage and throughout the litigation, it is critical to anticipate scorched earth tactics and to develop a strategy to avoid permitting such tactics to derail the litigation. The following are some tips for playing defense:

- Advise clients early on to avoid posting anything about their claims on social media and from commenting about their claims in emails or text messages. Indeed,

a retaliation plaintiff should strongly consider curtailing the use of social media while the litigation is pending.

- With some exceptions, such as cooperation with the DOJ or other law enforcement, it is best for a retaliation plaintiff to obtain documents to support a retaliation claim through the discovery process or from public records.[25] To avoid defending a strong retaliation case on the merits, defense counsel might use a plaintiff's retention of company documents as a basis to derail the litigation. For example, the employer may file and aggressively prosecute retaliatory counterclaims with no value except to force a settlement or intimidate the plaintiff. The employer may also move for sanctions.

- Where the defendant files retaliatory counterclaims, amend the complaint to bring a separate cause of action. *See, e.g., Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008) ("filing a lawsuit alleging fraud with a retaliatory motive and without a reasonable basis in fact or law" constitutes an adverse employment action).

- Do not let the case focus on plaintiff's motive. Indeed, the ARB has repeatedly held that plaintiff's motive for blowing the whistle is irrelevant.[26]

- React promptly and pro-actively to defense tactics designed to harass plaintiff. For example, where defendant insists on subjecting the plaintiff to a gratuitous defense medical examination (defense counsel will refer to it as an "independent medical examination") in a case where plaintiff is alleging only garden variety emotional distress damages, consider moving for a protective order before the defendant moves to compel the examination.[27] Similarly, consider moving for a protective order where the defense counsel takes extensive discovery from plaintiff's current or prior employers as a means to harm plaintiff's reputation.

- Plaintiff should be cautious in discussing the litigation with current employees, as the employer might use current employees to conduct informal discovery.

- During the intake process, counsel should investigate potential pitfalls, such as untrue statements on a job application or resume (harmful to plaintiff's credibility and a possible ground for an after-acquired evidence defense), or plaintiff's nega-

25. The Sixth Circuit has articulated a six-factor test to determine whether employee's delivery of confidential documents to his counsel in support of a discrimination claim was protected conduct. *See Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 725-26 (6th Cir. 2008); *see also Kempcke v. Monsanto Co.*, 132 F.3d 442, 446–47 (8th Cir. 1998) (reversing district court's grant of summary judgment for employer because reasonable jury could find that employee who obtained and disseminated confidential information engaged in protected activity under Title VII); *but see* ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011) (holding that an employee engaged in SOX protected conduct when he sent an email with co-workers' social security numbers to a personal email address and provided proprietary information to the IRS.).

26. *See Carter v. Electrical Dist. No. 2*, Case No. 1992-TSC-00011, slip op. at 11 (Sec'y July 26, 1995); *Oliver v. Hydro-Vac Services, Inc.*, Case No. 1991-SWD-00001, slip op. at 8 (Sec'y Nov. 1, 1995).

27. *See, e.g., Flanagan v. Keller Prods., Inc.*, No. CIV. 00–542–M, 2001 WL 1669379 (D.N.H. Dec. 18, 2001) (plaintiff did not place her mental condition in controversy where plaintiff renounced any claim for damages for unusually severe emotional distress).

tive postings about the employer on blogs, social media, or listservs.

- Ensure that plaintiff preserves all evidence relevant to the claim. The idea of a "litigation hold" and the consequences of failing to preserve electronic evidence are foreign to most plaintiffs pursuing retaliation claims. Therefore, counsel should explain in detail the steps necessary to preserve evidence. Aggressive defense counsel will question plaintiff at a deposition in detail to establish that plaintiff did not take adequate measures to preserve evidence and then bring a spoliation motion in an effort to obtain dismissal or an adverse inference.

- Plaintiff should maintain a detailed log of job search efforts in order to prove mitigation of damages.

- Limit aggressive employer discovery concerning the after-acquired evidence defense, which is often used as a means to harass the plaintiff and put the plaintiff on trial. The after-acquired evidence defense gives employers a strong incentive to undertake extensive discovery into a discrimination plaintiff's character, conduct, background, and job performance to find some misconduct that would potentially warrant cutting off certain damages at the time the employer learned of new information. Indeed, as suggested by Professor Hart, a frivolous assertion of the after-acquired evidence defense to dissuade a plaintiff from pursuing her case may give rise to an independent retaliation claim.[28]

XI. CONCLUSION

The whistleblower protection statutes enacted by Congress in recent years have created a patchwork of many potential claims for whistleblowers who have suffered retaliation, with significant differences in the scope of protected conduct, burden of proof, remedies, and procedural requirements. The author hopes that this article is helpful to practitioners in identifying potential whistleblower retaliation claims and formulating a strategy to maximize a whistleblower's recovery. The following table summarizes the primary features of the whistleblower protection statutes discussed in this article:

28. Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of "After- Acquired Evidence,"* 40 Ariz. St. L.J. 401 (2008).

Statute	Protected Conduct	SOL	Administrative Exhaustion	Remedies	Jury Trial
American Recovery and Reinvestment Act, Pub. L. No. 111-5, § 1553, 123 Stat. 115, 297-302 (2009).	Disclosures about: • gross mismanagement of an agency contract or grant relating to stimulus funds; • gross waste of stimulus funds; • a substantial and specific danger to public health or safety related to the implementation or use of stimulus funds; • an abuse of authority related to the implementation or use of stimulus funds; or • a violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.	None, but 4 year catchall SOL may apply	Yes, employee must file with Inspector General. If no decision within 210 days of filing the complaint, employee may file a complaint in federal district court.	• Reinstatement • Double back pay • Interest on back pay • Special damages • Attorney's fees and costs	Yes
Consumer Product Safety Improvement Act, 15 U.S.C. § 2087.	(1) providing information relating to a violation of the Consumer Product Safety Improvement Act or any act enforced by the Commission to the employer, the Federal Government, or the State Attorney general; (2) testifying or assisting in a proceeding concerning a violation of the CPSC Reform Act or any act enforced by the Commission; or (3) refusing to participate in an activity, policy, practice, or assigned task that the employee reasonably believes violates the CPSC Reform Act or any act enforced by the Commission.	180 days	Yes, employee must file with DOL's OSHA. If no decision within 210 days of filing complaint, may file a complaint in federal district court.	• Reinstatement • Back pay • Special damages • Attorney's fees and costs	Yes

Statute	Protected Conduct	SOL	Administrative Exhaustion	Remedies	Jury Trial
Department of Defense Authorization Act, 10 U.S.C. § 2409.	Disclosure about: • gross mismanagement of DoD or NASA contract or grant; • gross waste of DoD or NASA funds; violation of law related to a DoD or NASA contract or grant; or • a substantial and specific danger to public health or safety.	3 years	Yes, employee must file with Inspector General. If no decision within 210 days of filing the complaint, employee may file a complaint in federal district court.	• Reinstatement • Back pay • Restoration of employment benefits • Exemplary damages • Attorney's fees and costs	Yes
Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information, 41 U.S.C. § 4712.	Disclosure about: • gross mismanagement of a federal grant; • a gross waste of federal funds; • a violation of law, rule, or regulation related to a federal contract (including the competition for or negotiation of a contract) or grant; or • a substantial and specific danger to public health or safety. Excludes the intelligence community.	3 years	Yes, employee must file with Inspector General. If no decision within 210 days of filing the complaint, employee may file a complaint in federal district court.	• Reinstatement • Back pay • Restoration of employment benefits • Exemplary damages • Attorney's fees and costs	Yes
Federal Acquisitions Streamlining Act, 41 U.S.C. § 265. Temporarily suspended for the duration of the pilot program found at 42 U.S.C. § 4712.	Disclosures about a substantial violation of law related to a contract.	None	No private right of action. Employee receives only an investigation by the Inspector General.	• Reinstatement • Back pay • Attorney's fees and costs	No
False Claims Act, 31 U.S.C. § 3730(h).	• Lawful acts done in furtherance of a qui tam action or to stop a violation of the FCA. • Being associated with someone who engaged in protected conduct.	3 years	No, employee can bring claim in any federal district court.	• Reinstatement • Double back pay • Interest on back pay • Special damages • Attorney's fees and costs	Yes

Statute	Protected Conduct	SOL	Administrative Exhaustion	Remedies	Jury Trial
Sarbanes-Oxley Act, 18 U.S.C. § 1514(A).	Disclosures about alleged violations of the federal mail, wire, radio, TV, bank, securities fraud statutes or any rule or regulation of the SEC.	180 days	Yes, employee must file with DOL's OSHA. If no decision within 180 days of filing complaint, may file a complaint in federal district court.	• Reinstatement • Back pay with interest • Special damages • Attorney's fees and costs	Yes
Wrongful Discharge	Varies by state. Examples include: (1) exercising a statutory right, (2) refusing to engage in illegal activity, or (3) performing a duty required by law.	State statute of limitations for tort actions.	No, employee can file in federal or state court.	• Back pay • Front pay • Special damages • Punitive damages • Lacks statutory fee-shifting	Yes
Patient Protection and Affordable Care Act § 1558; 29 U.S.C. § 218c.	• Disclosures about suspected violations of Title I of the Act to the employer, federal government, or state attorney general. • Participating in investigations. • Testifying about violations. • Objecting or refusing to participate in an activity reasonably believed to violate Title I.	180 days	Yes, employee must file with DOL's OSHA. If no decision within 210 days of filing complaint, may file a complaint in federal district court.	• Reinstatement • Back pay • Special damages • Attorney's fees and costs	Yes
Dodd-Frank Wall Street Reform and Consumer Protection Act § 748; 7 U.S.C. § 26(h).	• Disclosing information to the CFTC in accordance with the whistleblower incentive program. • Assisting in any investigation or action of the CFTC based upon or related to disclosed information.	2 years	No, employee can bring claim in any federal district court.	• Reinstatement • Back pay with interest • Special damages • Attorney's fees and costs	Likely yes[29]

29. While § 748 of the Dodd-Frank Act does not explicitly grant the right to a jury trial, the ARB's decision in *Kalkunte*—affirming the ALJ's award of damages for "pain, suffering, mental anguish, the effect on her credit [due to losing her job], and the humiliation she suffered"—shows that special damages can include compensatory damages. *Kalkunte v. DVI Fin. Servs.*, ARB Nos. 05-139, 05-140 at 11, ALJ No. 2004-SOX-56 at 11 (ARB Feb. 27, 2009). If compensatory damages are sought, it is likely the plaintiff would be entitled to a jury trial.

Statute	Protected Conduct	SOL	Administrative Exhaustion	Remedies	Jury Trial
Dodd-Frank Wall Street Reform and Consumer Protection Act § 922; 15 U.S.C. § 78u-6(h).	• Disclosing information to the SEC in accordance with the whistleblower incentive program • Initiating, testifying in, or assisting in any investigation or action based on or related to previously disclosed information • Making disclosures that are required or protected under SOX. • Making disclosures that are protected or required under any law, rule, or regulation subject to the jurisdiction of the SEC.[30]	3 years from the date when the facts material to the right of action are known or reasonably should have been known by the employee; no more than 6 years from the date of the violation.	No, employee can bring claim in any federal district court.	• Reinstatement • Double back pay with interest • Attorney's fees and costs	No
Dodd-Frank Wall Street Reform and Consumer Protection Act § 1057; 12 U.S.C. § 5567.	(1) providing information relating to a violation of the Consumer Finance Protection Act or any law enforced by the Consumer Financial Protection Bureau ("CFPB") to the employer, CFPB, or any state, federal, or local government or law enforcement agency; (2) testifying or assisting in a proceeding concerning a violation of the CFPA or any rule, order, standard, or prohibition prescribed by the CFPB; (3) filing, instituting, or causing to be filed any proceeding under any Federal consumer finance law; or (4) refusing to participate in an activity, policy, practice, or assigned task that the employee reasonably (or other such person) reasonably believes violates any law, rule, order, standard, or prohibition subject to the jurisdiction of, or enforceable by, the CFPB.[31]	180 days	Yes, employee must file with DOL's OSHA. If no decision within 210 days of filing complaint, may file a complaint in federal district court.	• Reinstatement • Back pay with interest • Special damages • Attorney's fees and costs	Yes

30. *See supra* Section VII(A) discussing the circuit split regarding the definition of "whistleblower" and what constitute protected activity.

31. *See supra* section VI listing the laws enforced by the CFPB; 12 U.S.C. § 5481(12).