the Corporate Governance advisor

March/April 2006 Volume 14, Number 2

WHISTLEBLOWERS

Key Issues in Whistleblower Case Law under Sarbanes-Oxley (So Far)

by Carrie Wofford and Thomas W. White

Corporate whistleblowers continue to attract significant attention in the media. An important part of the Sarbanes-Oxley Act of 2002 (Act) is dedicated to protecting corporate whistleblowers from retaliation. Yet, based on the case law to date, the scope of these protections remains uncertain. The case law so far is decidedly mixed on several key issues, including which employers are covered, whether the law applies extraterritorially, what constitutes whistleblowing, and what constitutes retaliation. Uncertainty also prevails with respect to allocation of burdens of proof.

This article describes the current state of the law in these important areas. Although the law continues to develop, resolution of these issues may still take some time as the cases wend their way through the administrative process and courts. Only now are the circuit courts beginning to weigh in some of these issues and there is no guarantee that splits among the circuits will not develop.

Continued on page 2

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CONTENTS

Background on the Civil Provision

Section 806 of the Act[1] and the federal Department of Labor regulations that implement it,[2] prohibits any form of discrimination or retaliation[3] against an employee of a publicly traded company who has reported or assisted in an investigation into conduct that the employee "reasonably believes" constitutes mail, wire, bank, or securities fraud; a violation of any rule or regulation of the Securities and Exchange Commission (SEC); or a violation of any federal law regarding fraud against shareholders.[4] The vast majority of cases to date have involved allegations of shareholder fraud; very few cases have involved allegations of mail, wire, bank, or securities fraud.

The Act and regulations provide employees with a civil cause of action, enforced in the first instance through administrative proceedings before the Occupational Safety and Health Administration (OSHA) and administrative law judges (ALJs) at the Department of Labor, with recourse to the federal courts.[5] The law also contains a unique "opt-out" provision enabling a complainant to withdraw her complaint and file a *de novo* lawsuit in federal district court if the Department has failed to resolve the matter within 180 days.[6] As of September 30, 2005, employees have filed 602 cases with OSHA.[7] Most of the cases have been resolved, the vast majority of them dismissed.[8] As of December 31, 2005, employees have filed 650 cases with OSHA.[9] Many of the cases have been resolved, the vast majority of them dismissed.[10] Only 16 employees have won their claims of retaliation, and another 67 have settled their cases.[11]

Which Companies Are Subject to the Law?

Subsidiaries of Publicly Traded Companies

The civil whistleblower provision of the Act applies to companies that are publicly traded in the United States.[12] The law defines covered companies as (1) companies required to register their securities with a national securities exchange or the SEC under section 12 of the Exchange Act, and (2) companies required to file reports under section 15(d) of the Exchange Act.[13]

But what about subsidiaries of publicly traded companies? Administrative Law Judges are all over the map on this question. Some ALJs (and one court) appear to find a subsidiary to be covered *per se* if the parent is publicly traded. For instance, one ALJ explained that, "A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units."[14] In another case, the ALJ summarily considered the parent company and subsidiary sufficiently connected without discussing their relationship.[15] Similarly, the only federal court to rule on the issue rejected the defendants' contention that a whistleblower at a non-publicly traded subsidiary was not a covered "employee" under the Act; the court observed that the plaintiff "is within the definition of employee because her employment could be affected by officers of" the parent company.[16]

At the opposite end of the spectrum, other ALJs have required a showing of facts sufficient to "pierce the corporate veil." For instance, one ALJ dismissed a claim because the complainant failed to name a publicly traded company and the ALJ found no indication that the parent companies were sufficiently involved in the management and employment relations of the subsidiary to justify piercing the corporate veil.[17] Another ALJ *sua sponte* found no jurisdiction because the employee had not named the parent company as a party in the complaint, and indicated that, even if it had been named, the employee had not provided evidence that the parent was publicly traded, nor that the two were sufficiently intertwined.[18] The ALJ explained, "Complainant's failure to name a publicly traded company as respondent cannot be overcome by principles of vicarious liability. [The subsidiary] and [the parent] are without question separate corporate entities."[19]

Between these two poles, a few ALJs look for whether the parent and subsidiary are "so intertwined as to represent one entity," focusing particularly on management of employees.[20] For example, one ALJ held a parent company responsible for the retaliatory action of its subsidiary where the parent company was merely a holding company with no employees, and had only one subsidiary, which was its operating arm and the parent used the two corporate logos and titles interchangeably, administered employee benefits and contracts for the subsidiary, and had common senior management, board members, and officers.[21]

It remains to be seen how the differences in standards articulated by the ALJs will be resolved. However, to the extent that the standard is defined by reference to corporate law principles of "piercing the corporate veil," the effect may be to bar a large proportion of whistleblower claims. Corporations often operate through subsidiaries and take care to observe the cor-

porate formalities, precisely in order to insulate other entities in the corporate structure from legal claims and liabilities. As a result, persons seeking to pierce the veil typically have substantial hurdles to overcome.[22] Nevertheless, in practice, many of the ALJs who invoke the corporate veil approach appear more willing to actually pierce the veil in civil whistleblower situations than strict adherence to corporate law might permit.

Foreign Country Activities

Another current hot topic is whether whistleblowers in foreign countries are protected against retaliation under the Act. The U.S. Court of Appeals for the First Circuit recently joined two ALJs in ruling that foreign nationals working for overseas subsidiaries of US companies are not protected by the Act.[23] All three decisions turned on the judges' finding no affirmative evidence that Congress intended the civil whistleblower provision to have extraterritorial effect (relying on cases that establish a presumption against extraterritorial application of US statutes unless there is clear congressional intent to the contrary). The First Circuit noted Congress' failure to address overseas cases in its provision of enforcement powers with the Department of Labor and venue for cases that reach the federal courts.[24]

None of these decisions, however, directly addressed the fact that the Act makes no jurisdictional distinction between whistleblower claims and others that clearly do apply extraterritorially. Specifically, the express jurisdictional language of the whistleblower provision covers any company required to register its securities under section 12 of the Exchange Act or required to file reports under section 15(d) of that Act. This jurisdiction parallels that of the Sarbanes-Oxley Act generally, as defined in section 2(a)(7) of the Act. In no other context under the Act has congressional intent to apply the Act extraterritorially been questioned. To the contrary, the SEC's regulations under the Act apply generally to all foreign companies that report under the Exchange Act, including regarding their internal operations, although in some cases the SEC has exercised regulatory discretion to make accommodations to address potential conflicts with foreign laws and other concerns specific to foreign issuers.[25] None of the cases attempted to explain why the whistleblower provision should be interpreted more narrowly than the virtually identical definitions applicable to other provisions of the Act. In addition, none of the cases turned on the nationality of the whistleblowers, and this suggests the possibility that an American whistleblower working in an overseas office of an American company, or even traveling temporarily to an overseas office, might not be protected under the Act, given current case law—a result that would test the current holdings.

What Constitutes Whistleblowing?

Another important area of disagreement regards what constitutes whistleblowing. Specifically, judges differ on the appropriate standard to apply in determining if a whistleblower's allegation regards "fraud against shareholders" under the Act.

Some judges are quite lenient in granting protection to whistleblowing regarding nearly any financial wrongdoing, even if such wrongdoing does not obviously affect shareholders. For example, allegations of a scheme to induce concessions in labor negotiations by having the company absorb the costs of airline pilots' absences for union meetings—which the union should have borne directly—was deemed to affect the company's "bottom line" and, therefore, its shareholders.[26] Similarly, one ALJ granted protection to a whistleblower who had reported manipulations of financial

the Corporate Governance Advisor

The **CORPORATE GOVERNANCE ADVISOR** (ISSN 1067-6171) is published bimonthly by Aspen Publishers at 111 Eighth Avenue, New York, NY 10011. One Year subscription costs $395. POSTMASTER: Send address changes to **THE CORPORATE GOVERNANCE ADVISOR**, Aspen Publishers, 7201 McKinney Circle, Frederick, MD 21704. Send editorial correspondence to Aspen Publishers, 111 Eighth Avenue, New York, NY 10011. To subscribe, call 1-800-638-8437. For Customer service, call 1-800-234-1660.

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information even though the manipulations occurred only in "internal and interim" reports that were shared only with the parent company and not with investors, lenders, or other third parties.[27] The ALJ reasoned, "By blowing the whistle, [whistleblowers] may anticipate the deception buried in a draft report or internal document, which if not corrected, could eventually taint the public disclosure."[28] In addition, a federal court allowed an employee to pursue her claim under the Act even though the employee's allegations dealt only with internal accounting controls (specifically, overpayment to an advertising agency because of a personal relationship and possible kickbacks and overpayments to sales agents) rather than acts that might constitute fraud against shareholders of the magnitude at Enron.[29]

On the other hand, a large number of ALJs have adopted a more narrow view of what constitutes "fraud against shareholders," particularly where the alleged wrongdoing did not involve "intentional deceit."[30] These judges follow SEC anti-fraud regulations and query whether the allegation includes "any means of disseminating false information into the market on which a reasonable investor would rely."[31] One ALJ, for example, denied protection for an employee whose allegations concerned accounting programs, a disagreement about building codes, and the company's inability to monitor encroachments. The ALJ found the latter two allegations not "remotely related to securities or accounting fraud"[32] and ruled that concerns about accounting errors "[do] not amount to fraud under the Act."[33] Two ALJs have tied the inquiry into intentional fraud to the question of whether the complainant's belief was objectively reasonable. One ALJ rejected a claim because the complainants did not believe the company's wrongdoing was intentional,[34] and could not reasonably believe so given the company's steps to remedy the problem.[35] Another ALJ ruled that "concern" that an accounting program "could cause accounting problems if not corrected is very different than accusing someone of fraud"[36] and that "no reasonable person" would think the employee's concerns raised an allegation of fraud.[37]

Given the wide disparity in ALJs' decisions, practitioners should closely monitor future cases regarding whether a whistleblower's allegations rise to the level of fraud against shareholders.

What Constitutes Retaliation?

A major problem for practitioners is disagreement among ALJs about the standard for analyzing whether an employer's action against the whistleblower could be deemed an "adverse personnel action" under the Act.[38] The apparent origin of the disagreement is "discord" in both administrative and federal circuit decisions over whether a "tangible job consequence" is required for "adverse action" under other whistleblower statutes; one ALJ, therefore, recommended that ALJs follow the law in the circuit in which they sit.[39] (However, most ALJs failed to identify the circuit split.)

For those circuits and ALJs choosing to employ a more expansive construction of what constitutes an adverse act, the key question is whether the company's act would be "reasonably likely to discourage" an employee from reporting wrongdoing.[40] (Note, however, that there is some difference in how this standard is applied, as some ALJs look at whether the employer's act would be likely to deter only the complainant in question from continuing to report wrongdoing,[41] while other ALJs look at whether the employer's act would be likely to deter *other* employees at the company from engaging in whistleblowing.[42]) In one of the few federal court decisions regarding the Sarbanes-Oxley Act's civil whistleblower provision, a district court within the Ninth Circuit employed that circuit's "expansive view [of] what constitutes an adverse employment action," to find that such acts as a delay in reassigning a whistleblower, leaving him in a conference room without any duties, and assigning him to a job with a reduced pay range "would appear to constitute adverse employment activity."[43]

Likewise, an ALJ applying the expansive construction of adverse action concluded that being placed on a lay-off list, even though the employee was removed before the lay-offs took place, constitutes adverse action because "an employee who is placed on a lay-off list reasonably fears that he will lose his job when that list goes into effect [and] would be deterred from blowing the whistle if he fears he will lose his job for reporting the unlawful conduct of his employer."[44] Another ALJ employing the expansive standard found that removing an employee's supervisory responsibilities and reassigning his subordinates were adverse actions, as was the employer's imposition of a performance improvement plan on the employee because the employee was able to show that the plan "set [him] up for failure by assigning him unattainable tasks. The certain failure to achieve the [plan's] goals would result in his termination, so they not only adversely affected the terms of his employment, they would deter other employees from daring to make protected disclosures."[45]

Other ALJs have required a tangible job consequence, rather than just a deterrent effect, although without reference to the circuit split on the question. In one case, an ALJ dismissed a complaint because the only claimed adverse action that would have fallen within the 90-day statute of limitations—the company's refusal to remove a negative performance evaluation from the complainant's file—was not sufficient.[46] The ALJ cited case law under other whistleblower statutes for the proposition that "[a]n adverse employment action must have some tangible job consequence. Unfavorable performance evaluations, absent tangible job consequences, do not constitute an adverse employment action."[47] Such tangible job consequences could include a lower salary or jeopardized job security that resulted from the performance evaluation.[48] Similarly, a federal court queried whether a loss of job responsibilities sufficiently constituted a "change in employment conditions."[49]

What Are the Burdens of Proof under the Act?

Yet another area of disagreement relates to the appropriate burdens of proof that each side must show under the Act.

Employee's Burdens

In the initial phase of a case, OSHA staff investigators at the Department of Labor will dismiss a complaint prior to a full investigation unless the employee can make a *prima facie* showing raising the inference that her protected behavior was a "contributing factor" in her employer's unfavorable personnel action against her.[50] The Department of Labor's regulations implementing the Act's civil whistleblower provision enumerate four elements of a *prima facie* case: the employee engaged in protected activity; the named person knew or suspected, actually or constructively, that the employee engaged in protected activity; the employee suffered an adverse personnel action;[51] and the circumstances were sufficient to raise the inference that the protected activity was a "contributing factor" in the unfavorable action.[52]

A case moving from the first to second stage of an OSHA staff investigation a formal hearing before an ALJ, the employee's burden of proof increases. She must prove by a preponderance of the evidence that she engaged in protected activity, that the respondent knew that she did so, that she suffered an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action.[53] The elements are the same as for a *prima facie* case, except that the fourth prong requires the employee to prove that her protected activity "was a contributing factor" rather than merely raise an inference that it was.[54]

There are, however, discrepancies among ALJs in defining the employee's burden of proof at the hearing stage. A number of ALJs incorrectly look at the hearing stage for whether the employee successfully made out a *prima facie* case, with its requirement that an employee merely raise an inference of discrimination, rather than whether the employee has, by a preponderance of the evidence,[55] proved causation.[56] Other ALJs correctly apply the burden in the formal hearing—as compared to that in the initial stage of investigation.[57]

Employer's Burden

Disagreement exists, as well, regarding the employer's burden of proof. At both the initial investigation and formal hearing stages, an employer can defeat a claim of whistleblower retaliation only if it "demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct."[58] In other words, the employer must demonstrate by "clear and convincing evidence" that its sole reason for the adverse employment action was non-retaliatory.[59] "Although 'clear and convincing' has not been defined with precision, courts have held that, as an evidentiary standard, it requires a burden higher than 'preponderance of the evidence' but lower than 'beyond a reasonable doubt.'"[60]

This burden on the employer is a higher burden of proof than employers face under most other whistleblower protection statutes, although it also exists in statutes protecting whistleblowers in the airline,[61] energy,[62] and pipeline industries.[63] It also is different from that found in Title VII employment discrimination cases, in which the burden of persuasion remains at all times with the complainant, who must prove by a preponderance of the evidence that the respondent's proffered reasons, were not the true reasons and constitute a pretext. Under the Sarbanes-Oxley Act, the burden of proof shifts to the respondent to prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior.[64] This is another area of inconsistency among the ALJs. Some ALJs incorrectly apply the Title

VII burdens of persuasion,[65] probably because most other whistleblower statutes that they adjudicate follow the Title VII model and do not impose the "clear and convincing" burden on employers.

Conclusion

These areas of disagreement among ALJs and courts are significant because they implicate the central elements of what is protected under the Sarbanes-Oxley whistleblower provision. Companies need to consult counsel familiar with the case law to help navigate these uncertainties.

Notes

1. *See* 18 U.S.C. § 1514A.

2. *See* Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 29 C.F.R. Part 1980 (2004).

3. The statute defines retaliation as "discharge, demote, suspend, threaten, harass, or in any other manner discriminate…." 18 U.S.C. 1514A(a).

4. *See* 18 U.S.C. § 1514A(a)(1). The Act also contains a criminal whistleblower provision forbidding intentional retaliation against any person who provides law enforcement officers with truthful information about a federal crime. *See* 18 U.S.C. § 1513(e).

5. *See* 18 U.S.C. § 1514A(b).

6. *See* 18 U.S.C. § 1514A(b)(1)(B).

7. *See* e-mail from Albert Belsky, U.S. Department of Labor, Occupational Safety & Health Administration, to Carrie Wofford, Wilmer Cutler Pickering Hale and Dorr LLP (Oct. 3, 2005, 11:13 a.m.) (on file with author). For more recent data, please contact media officers at OSHA.

8. *See* e-mail from Belsky to Wofford, *supra* note 26 (Oct.3, 2005) (noting that 503 cases have been completed).

9. *See* e-mail from Albert Belsky, U.S. Department of Labor, Occupational Safety & Health Administration, to Carrie Wofford, Wilmer Cutler Pickering Hale and Dorr LLP (Jan. 19, 2006, 12:30 p.m.) (on file with author). For more recent data, please contact media officers at OSHA.

10. *See id.* (noting that 561 cases have been completed).

11. *See id.*

12. *See* S. Rep. No. 107-146, at 13, 18 (2002); Minkina v. Affiliated Physician's Group, Dep't of Labor ALJ No. 2005-SOX-19, slip op. at 5 (ALJ Feb. 22, 2005).

13. *See* 18 U.S.C. § 1514A.

14. Morefield v. Exelon Servs., Inc., Dep't of Labor ALJ No. 2004-SOX-2, slip op. at 3 (ALJ Jan. 28, 2004).

15. *See* Stojicevic v. Arizona-Am. Water Co., Dep't of Labor ALJ No. 2004-SOX-73, slip op. at 1 (ALJ Mar. 24, 2005) (citing *Morefield*).

16. *See* Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1368 n.1, 1374 n.7 (N.D. Ga. 2004).

17. *See* Dawkins v. Shell Chem., LP, Dep't of Labor ALJ No. 2005-SOX-41, slip op. at 4 (ALJ May 16, 2005).

18. *See* Grant v. Dominion East Ohio Gas, Dep't of Labor ALJ No. 2004-SOX-63, slip op. at 33 (ALJ Mar. 10, 2005).

19. *Id.*, slip op. at 34.

20. *See* Hughart v. Raymond James & Assocs., Inc., Dep't of Labor ALJ No. 2004-SOX-9, slip op. at 44-45 (ALJ Dec. 17, 2004).

21. *See* Platone v. Atl. Coast Airlines, Dep't of Labor ALJ No. 2003-SOX-27, slip op. at 18-20 (ALJ Apr. 30, 2004).

22. As a leading commentary on Delaware corporate law has explained:

Although the separate corporate entity will be ignored when the controlling stockholder treats the corporation as if it were a facet of his own personality or when the corporate formalities have been sufficiently disregarded by the corporate principals, mere control of a corporation—even total ownership—is not in itself a sufficient basis for ignoring the separate entity. In addition, common management between affiliated corporations is not a basis for disregarding the corporate entity absent some showing that fraud is involved or that the subsidiary is the alter ego of the parent. More often than not, the Delaware courts have upheld the legal significance of the corporate form in a corporate-subsidiary context, despite the fact of substantial overlap in the management and control of the two entities.

Edward P. Welch & Andrew J. Turezyn, Folk on the Delaware General Corporation Law: Fundamentals, § 329.3, at 814-15 (2005 ed.) (footnotes omitted).

23. *See* Carnero v. Boston Scientific Corp., Nos. 04-1801, 04-2291, slip op. at 39 (1st Cir. Jan. 5, 2006), *aff'g* No. Civ.A.04-10031-RWZ, 2004 WL 1922132 (D.Mass. Aug. 27, 2004) (dismissing the claim of an Argentine citizen who worked for the Argentine and Brazilian subsidiaries of a US company); Concone v. Capitol One Financial Corp., Dep't of Labor ALJ No. 2005-SOX-6 (ALJ Dec. 3, 2004) (denying coverage to an Italian employee of a U.S. company whose employment occurred exclusively in Italy and the U.K.); Ede v. Swatch Group, Dep't of Labor ALJ Nos. 2004-SOX-68, 2004-SOX-69 (ALJ Jan. 14, 2005) (denying coverage to two foreign employees of a Swiss company; note that the ALJ could have denied coverage on jurisdictional grounds as the Swiss company was neither publicly traded in the U.S. nor subject to SEC reporting requirements, a fact the ALJ did not mention).

24. *See Carnero*, slip op. at 31-37.

25. *See, e.g.*, Rule 10A-3(b)(1)(iv)(D)-(E), 17 C.F.R. § 240.10A-3(b)(1)(iv)(D) (exemptions from independence requirements for audit committee members of foreign private issuers); Securities Exchange Commission, Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports of Non-Accelerated Filers and Foreign Private Issuers, Release No. 33-8545 (March 2, 2005), 70 Fed. Reg. 11528 (March 8, 2005), found at *http://www.sec.gov/*

rules/final/33-8545.htm (extending date for foreign private issuers to comply with internal control reporting requirements under section 404 of the Sarbanes-Oxley Act).

26. *See* Platone, slip op. at 22-23.

27. *See* Morefield, slip op. at 1; *see also* Hughart, slip op. at 47 (protecting allegations of a breach of a company's duty to protect clients' property from being escheated to the state; improperly withholding foreign taxes and failing to recover those funds; and permitting improper over-the-counter trades that were producing losses for clients); Mann v. United Space Alliance, LLC., Dep't of Labor ALJ No. 2004-SOX-15, slip op. at 7 (ALJ Feb. 18, 2005) (denying summary judgment because allegations of a fraud against a government agency by favoring vendors in violation of federal acquisition regulations could reach shareholders).

28. *See* Morefield, slip op. at 5.

29. *See* Collins, 334 F. Supp. 2d at 1377.

30. *See* Hopkins v. ATK Tactical Systems, Dep't of Labor ALJ No. 2004-SOX-19, slip op. at 5 (ALJ May 27, 2004); Allen v. Stewart Enters., Inc., Dep't of Labor ALJ Nos. 2004-SOX-60, 2004-SOX-61, 2004-SOX-62, slip op. at 82, 84-85, 89 (ALJ Feb. 15, 2005); *Grant*, slip op. at 39-42; *Stojicevic*, slip op. at 7; *Minkina*, slip op. at 6-7 (ALJ Feb. 22, 2005); Tuttle v. Johnson Controls, Battery Division, Dep't of Labor ALJ No. 2004-SOX-76, slip op. at 4 (ALJ Jan. 3, 2005) (Price, J.); Marshall v. Northrop Gruman [sic] *Synoptics*, Dep't of Labor ALJ No. 2005-SOX-8 (June 22, 2005) (Price, J.). Note that two cases (*Tuttle* and *Marshall*) were decided by the same ALJ.

31. *See Hopkins*, slip op. at 5 (*citing Ames Dep't Stores Inc., Stock Litigation*, 991 F.2d 953, 967 (2d Cir. 1993); *Marshall*, slip op. at 4 (same) (Price, J.); *Tuttle*, slip op. at 3 (Price, J.).

32. *See* Grant, slip op. at 43.

33. Grant, slip op. at 40.

34. *See* Allen, slip op. at 85, 89.

35. *See* Allen, slip op. at 86, 91.

36. Grant, slip op. at 39 n.36.

37. *See* Grant, slip op. at 43; *see id.*, slip op. at 40-41,42.

38. *See* 29 C.F.R. § 1980.104(b)(2); *Allen*, slip op. at 94 (reporting that some decisions under the Act have required a "tangible job consequence," while other decisions look for whether the employer's act is "likely to deter employees from making protected disclosures") (internal citations omitted).

39. *See* Hendrix v. American Airlines, Inc., Dep't of Labor ALJ No. 2004-SOX-23, slip op. at 12 (ALJ Dec. 9, 2004) (observing that some ALJs have followed the Seventh and Eleventh Circuits in requiring a showing of tangible job consequence, based on Title VII law, while other ALJs have followed the Ninth Circuit to "define 'adverse action' more liberally"); *id.*, slip op. at 13 ("Some of the discord in these administrative decisions may be attributed to disagreement among the circuits" on Title VII).

40. *See, e.g.*, McClendon v. Hewlett-Packard Co., No. CV-05-087-S-BLW, 2005 WL 1421395, at *3 (D. Idaho, June 9, 2005); *Allen*, slip op. at 83.

41. *See, e.g.*, Hendrix, slip op. at 14.

42. *See, e.g.*, Halloum v. Intel Corp., Dep't of Labor ALJ No. 2003-SOX-7, slip op. at 12 (ALJ Mar. 4, 2004); *Allen*, slip op. at 95.

43. McClendon, 2005 WL 1421395, at *4.

44. Hendrix, slip op. at 15.

45. *See* Halloum, slip op. at 12 aff'd Dep't of Labor ARB No. 04-068 (ARB Jan. 31, 2006).

46. *See* Dolan v. EMC Corp., Dep't of Labor ALJ No. 2004-SOX-1, slip op. at 3 (ALJ Mar. 24, 2004).

47. *See id.*

48. *See id.*

49. *See* Willis v. Vie Fin. Group, Inc., No. Civ.A. 04-435, 2004 WL 1774575, at *6 (E.D. Pa. Aug. 6, 2004) (denying motion to dismiss complaint of threatened termination and loss of job responsibilities)

50. *See* 29 C.F.R. § 1980.104(b). This has been called a "gatekeeper test." *See Collins*, 334 F. Supp. 2d at 1375 n.12.

51. *See* 29 C.F.R. § 1980.104(b)(2). This is shorthand typically used in employment discrimination law. The Act specifically prohibits "discharge, demot[ion], suspen[sion], threat[s], harass[ment], or in any other manner discrimin[ation] against an employee in the terms and conditions of employment." 18 U.S.C. § 1514A(a).

52. *See* 29 C.F.R. § 1980.104(b)(1).

53. *See* 29 C.F.R. § 1980.109(a).

54. *Compare* 29 C.F.R. § 1980.104(b)(2) *with* 29 C.F.R. § 1980.109(a); *see also* 18 U.S.C. § 1514A(b)(2)(C) (establishing that burdens of proof are to be governed by the "AIR21" whistleblower statute, 49 U.S.C. § 42121(b)).

55. The Secretary of Labor has, in the context of other whistleblower statutes, interpreted "demonstrated" to mean "proved by a preponderance of the evidence," and federal courts have given this interpretation deference. *See Collins*, 334 F. Supp. 2d at 1375 n.11 (discussing evolution of the burdens of persuasion and citing Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1572 (11th Cir. 1997)).

56. *See, e.g.*, Trodden v. Overnite Transp. Co., Dep't of Labor ALJ No. 2004-SOX-64, slip op. at 5 (ALJ Mar. 29, 2005); Heaney v. GBS Props. LLC, Dep't of Labor ALJ No. 2004-SOX-72, slip op. at 5 (ALJ Dec. 2, 2004); *Allen*, slip op. at 81. The source of this confusion stems "from the use of the term '*prima facie*'…because [that] phrase 'invoke[s] the sprawling body of general employment discrimination law.'" However, the Sarbanes-Oxley Act "supplie[s] its own free-standing evidentiary framework" which requires "an analysis different from that of the general body of employment discrimination law." *Collins*, 334 F. Supp. 2d at 1375 n.11 (internal citations omitted).

57. *See, e.g.*, Harvey v. Home Depot, Inc., Dep't of Labor ALJ No. 2004-SOX-77, slip op. at at 5 n.4 (ALJ Nov. 24, 2004); *Halloum*, slip op. at 10; *Grant*, slip op. at 35; *Getman*, Dep't of Labor ALJ No. 2003-SOX-8, slip op. at 10 (ALJ Feb. 2, 2004) (citing Trimmer v. Dep't of Labor, 174 F.3d 1098, 1101 (10th Cir. 1999)), *rev'd on other grounds*, Dep't of Labor ARB No. 04-059 (ARB July 29, 2005).

58. 29 C.F.R. § 1980.104(c) (standard of proof to defeat a *prima facie* case during the OSHA staff investigation); *see also* 29

C.F.R. 1980.109(a) (standards of proof in the formal hearing before the ALJ).

59. *See, e.g.*, Getman, slip op. at 10 (ALJ Feb. 2, 2004), *rev'd on other grounds*, Dep't of Labor ARB No. 04-059 (ARB July 29, 2005).

60. *See* Getman, slip op. at 10 (ALJ Feb. 2, 2004); *see also* Jayaraj v. Pro-Pharmaceuticals, Inc., Dep't of Labor ALJ No. 2003-SOX-32, slip op. at 16 (ALJ Feb. 11, 2005).

61. *See* 49 U.S.C. 42121(b)(2)(B)(ii); *id.* at 42121(b)(2)(B)(iv).

62. *See* 42 U.S.C. 5851(b)(3)(B); *id.* at 5851(b)(3)(D).

63. *See* 49 U.S.C. 60129(b)(2)(B)(ii); *id.* at 60129(b)(2)(B)(iv).

64. *See* Kalkunte v. DVI Fin. Servs., Inc., Dep't of Labor ALJ No. 2004-SOX-56, slip op. at 38 (ALJ July 18, 2005) (contrasting burdens of proof under Title VII and the Sarbanes Oxley Act) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

65. *See, e.g.*, Halloum, slip op. at 10 (citing Clement v. Milwaukee Transport. Servs., 2001-STA-6, slip op. at 5 (ARB Aug. 29, 2003) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993)).