CLAIMS OF CONSCIENCE UNDER SABINE PILOT AND SARBANES-OXLEY

JULIUS GLICKMAN
ASHTON BACHYNSKY
Glickman & Hughes, L.L.P.
909 Fannin Street, Suite 3800
Houston, Texas 77010
713. 658.1122
E-mail: jglickman@glickmanlawfirm.com
abachynsky@glickmanlawfirm.com

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CHAPTER 15
JULIUS GLICKMAN received his B.A. from The University of Texas (Plan II Honors) in 1962 and his L.L.B. from The University of Texas School of Law in 1966.

In 1992, Mr. Glickman was lead counsel in a case in which the jury rendered the largest verdict in the United States for one individual in a wrongful termination case – $124 million. He received a $48 million verdict for another wrongful termination case. He also obtained the largest damage award in the history of Arkansas at the time. In 1996, Mr. Glickman won a $41 million verdict for defamation and breach of contract tried in New York City.

He represented the judge in the Texaco-Pennzoil case when Texaco attempted to disqualify that judge.

Mr. Glickman also obtained a judgment on behalf of three law firms in a case with a potential recovery of up to $300 million, depending on royalties from products.

Mr. Glickman is certified by the Texas Board of Legal Specialization in Civil Litigation. He is an Advocate of the American Board of Trial Advocates and past President of the Houston Chapter. He is a past member of the Board of Directors of the State Bar of Texas, was Vice Chairman of the Texas Board of Legal Specialization and President of the Houston Chapter of Civil Trial Specialists.

Mr. Glickman is listed in The Best Lawyers in America and has been for over 10 years. In 2002, 2003, and 2004 he was listed in Inside Houston magazine’s “Top Lawyers,” H Texas Magazine’s “Top Lawyers,” and Texas Monthly’s “Texas Super Lawyers.” In 2004, Mr. Glickman was the recipient of the
prestigious Jaworski Award presented by the Houston Bar Auxiliary.

Mr. Glickman has chaired and participated in numerous committees in both state and local professional organizations and has spoken frequently to both lawyer and business groups.

When Julius Glickman was a member of the Board of Directors of the State Bar of Texas, he and the committee he chaired reorganized the Houston area grievance committee system which opened the grievance system to more lawyers and the public and, at the same time, reduced a large backlog of cases pending before the grievance committee. It is a system still in use today in Houston for processing and handling grievances against lawyers.
WRONGFUL TERMINATION FOR REFUSING TO COMMIT AN ILLEGAL ACT - THE PUBLIC POLICY TORT IN TEXAS

THE CREATION AND RATIONALE FOR THIS TORT

From 1888 until 1985, almost a hundred years, the courts of Texas allowed employees for an indefinite term to be terminated-at-will and without cause. East Line & R.R.R. Co. v. Scott, 72 Tex. 70, 10 S.W. 99, 102 (1888). The Texas Supreme Court changed that outmoded doctrine and for the first time protected an employee who refused to commit an illegal act for an employer. Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (1985) (“Sabine Pilot”). In Sabine, a deckhand saw placards posted on the boat which stated it was illegal to pump bilges into the water. When he called the coast guard, they confirmed it was illegal so the deckhand refused to pump bilges into the water. He was fired for his refusal. The Texas Supreme Court unanimously held that his firing was wrongful.

The logic is difficult to fault. Citizens and courts should discourage illegal conduct. If an employer can engage in illegal activity and force its employees to participate in a crime to keep their jobs, the public policy of preventing criminal behavior is undermined. As Justice Kilgarlin stated in his concurring opinion, “Allowing an employer to require an employee to break a law or face termination cannot help but promote a thorough disrespect for the laws and legal institutions of our society.” Sabine Pilot, 735. Nor should an employee be faced with the wrenching alternative of either committing an illegal act or being fired. One court has ruled that such a practice intolerable in a civilized community. It rewards those who engage in illegal conduct and punishes those who do not. Higginbotham v. Allwaste, Inc., S.W.2d 411, 416 (Houston [14th Dist.] 1994, writ denied). Permitting employees to recover for refusing to commit an illegal act reaffirms that a citizen’s first duty is not to the employer but to the rule of law. To hold otherwise “turns the employment relationship into a criminal conspiracy.” See WILLIAM HOLLOWAY & MICHAEL LEECH, EMPLOYMENT TERMINATION - RIGHTS AND REMEDIES, pp. 149, 150 (2nd Ed. 1993). In short, the courts of Texas no longer permit an employer to retaliate by firing an employee who refuses to participate in an illegal act.

THE ELEMENTS OF THE CAUSE OF ACTION - SUMMARY.

The elements of the cause of action for terminating an employee for refusing to commit an illegal act are set forth in Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (1985). To establish this claim, a plaintiff under Sabine Pilot must prove:

1. that the employee was terminated
2. for the sole reason
3. that the employee refused
4. to commit an unlawful act.

Sabine Pilot, 687 S.W.2d at 735.

Termination of the Employee.

One requirement under Sabine Pilot is that the employee must be terminated. Sabine Pilot, 687 S.W.2d at 735. If the employee does not voluntarily resign, but is forced to resign by the employer, this is a termination. Nguyen v. Technical and Scientific Application, Inc., 981 S.W.2d 900, 901-902 (Tex.App.– Houston [1st Dist.] 1998, no pet.). In Nguyen, an engineer was told to load software on personal computers or he would receive a pay cut. Id. at p. 901. The engineer refused on the basis that he thought it would violate federal copyright laws. Id. The engineer was then demoted, humiliated, and harassed. Id. As a result, the engineer resigned and filed suit under Sabine Pilot. Id. The employer argued that Sabine Pilot only applies to terminations, not resignations. Id. The court disagreed and stated that “we doubt the Texas Supreme Court intended to permit employers to avoid liability by coercing resignations from, rather than firing, their employees who refused to break the criminal law.” Id. at 902. Therefore, the Nguyen court held that “the Sabine Pilot exception to the employment-at-will doctrine applies to employees who are constructively discharged for the sole reason that they refuse to commit a crime.” Id.

A constructive discharge occurs when an employer forces the employee to quit by making work conditions intolerable. Nguyen, 981 S.W.2d at 901. To find a constructive discharge, a court must determine whether or not a reasonable person in the employee’s position would have felt compelled to resign. Hammond v. Katy Independent School District, et al., 821 S.W.2d 174, 177 (Tex.App. - Houston [14th Dist] 1991, no writ). In doing so, it is necessary to examine the conditions
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imposed, not the employer’s state of mind. Id. at 177. Therefore, in a constructive discharge case an employee does not need to prove that an employer subjectively intended to force the employee to resign. Id. at 177. The policy underlying this position is that the courts will not permit an employer to do an "end run" around the termination requirement by forcing the employee to quit. When that occasion arises, the doctrine of constructive discharge will constitute a termination. Hammond v. Katy Independent School District, et al., 821 S.W.2d 174 (Tex. App– Houston [14th Dist] 1991, no writ).

Elimination of a job can also constitute termination under Sabine Pilot. Higginbotham v. Allwaste, Inc., 889 S.W.2d 411, 414 (Tex.App.– Houston [14th Dist.] 1994, writ denied). In Higginbotham, the court held in a Sabine Pilot case that a "position may be 'eliminated' as a retaliatory measure. In that context, there is no difference between having the position 'eliminated' and being terminated. The effect on the employee is the same." Id.

Does a change of responsibility or the demotion of an employee amount to a termination? It could. In the Nguyen case cited above, the engineer’s demotion after refusing perform an illegal act was one the reasons that supported the court’s finding of a constructive discharge. Nguyen, 981 S.W.2d at 901-02. Therefore, while a demotion or change in responsibilities may not constitute a termination by itself, if it forces the employee to resign then it could amount to a constructive discharge. The classic example of a demotion or change in responsibilities amounting to a constructive discharge is the Wilson v. Monarch Paper Co. case. In Wilson, a long time executive and Vice-President of Monarch Paper who was a college graduate with thirty years of experience in the business was demoted to a janitorial position which required him to sweep the warehouse floors and clean up after employees in the cafeteria. 939 F.2d 1138, 1145 (5th Cir. 1991). The Wilson court found that this type of change in responsibilities and demotion was sufficient to support a finding that the executive was constructively discharged. Id. at 1148. Therefore, if an employee is demoted or his responsibilities are changed in retaliation for his refusal to commit an illegal act, then such conduct by the employer could amount to a termination under Sabine Pilot if it reasonably forces the employee to resign.

The Unlawful Act.

Sabine Pilot requires that the illegal act which the employee refuses to perform be a criminal act. Sabine Pilot, 687 S.W.2d at 735. “Before a Sabine Pilot case may go to the jury, the trial judge must determine if a statute with a criminal penalty is involved.” Hawthorne v. Star Enterprise, Inc., 2003 WL 21705370, *3 (Tex.App.–Amarillo 2003). “The employee’s termination is not actionable unless criminal sanctions can be assessed against the plaintiff.” Wortham v. Diamond Shamrock, Inc., 2001 WL 1014526, *6 (Tex.App.– El Paso 2001). “Whether a particular statute, administrative regulation, or municipal ordinance imposes such liability is a question of law for the trial court to decide.” Id. “Absent some risk of criminal liability, [a plaintiff] cannot prevail on his complaint that his discharge was unlawful under Sabine Pilot.” Id. at *7.

Civil wrongs, so far, will not suffice. Hancock v. Express One Int’l, 800 S.W.2d 634 (Tex.Civ.App.- Dallas 1990, writ denied) (refusal to violate federal regulation that only carried civil penalties did not fall within Sabine Pilot doctrine); See also, Fite v. Cherokee Water Co., 6 S.W.3d 337, 342 (Tex.App.–Texarkana 1999, no pet) (holding that Sabine Pilot was inapplicable because statute requiring private citizens to respond to peace officer’s request for assistance did not carry criminal penalties). In Hancock, the plaintiff was a member of a cockpit crew and was licensed under governmental rules and regulations governing aircraft pilots and also he was governed by applicable rules and regulations by the Federal Aviation Administration. 800 S.W.2d at 635. The plaintiff was directed to fly under conditions which would have violated flight and rest-time limitations for airplane crews and when he refused to comply, he was terminated. Id. The former employee in Hancock acknowledged that his claim was outside the scope of Sabine Pilot since only civil penalties were involved. Id. at p. 636. Since only civil and no criminal penalties were involved, the Dallas court refused to extend the public policy exception and held that there was no cause of action under Sabine Pilot. Id.

The logic of the distinction between civil or criminal wrongs is difficult to justify. The failure to abide by FAA rules and regulations can cause aircraft crashes resulting in death and permanent injury. The courts should provide every incentive and protection for those who guard the public’s safety and health by insisting that employers obey the law and who themselves refuse to break such a law. Surely the public interest is no less important where death and serious injury can occur than in the criminal area where only money may be at stake, not life or serious injury.
Examples of instances where an employee has been fired for refusing to break the law include:

- Refusing to file false and misleading reports with the Securities and Exchange Commission. *Higginbotham v. Allwaste, Inc.*, S.W.2d 411, 416 (Houston [14th Dist.] 1994, writ denied)


- Refusing to sign blank form that might be used with or relied on by a governmental agency because it could be considered aiding and abetting the falsification of the form. *Morales v. Simuflite Training International, Inc.*, 132 S.W.3d 603 (Tex.App.–Fort Worth 2004, n.p.h.)

- Refusing to conceal the commission or possible commission of a federal offense and refusing to participate in a criminal conspiracy. *Ed Rachal Foundation v. D’Unger*, 117 S.W.3d 348 (Tex.App.–Corpus Christi 2003, pet. filed)


- Refusal to falsify insurance reports - *Schmidt v. Yardney*, 492 A2d 512 (Conn. App. 1985)


**Must the act actually be illegal?**

One court has held that it is not necessary to prove that the requested act is illegal when an employee is terminated for attempting to find out if a requested act is illegal and if the employee has a good faith belief that the requested act is illegal. *Johnston v. Del Mar Distributing Co.*, 776 S.W.2d 768, 772 (Tex. App.–Corpus Christi 1989, writ denied). In *Johnston*, the court held that public policy demands that an employee be allowed to investigate into whether or not such actions are illegal so that the employee can determine which course of action to take. *Johnston*, 776 S.W.2d at 771. The court pointed out that if an employer is allowed to terminate an employee when she was trying to find out if she was about to commit an illegal act, then the public policy exception in *Sabine Pilot* would have little or no effect. The employee would be faced with the unacceptable alternative of subjecting herself to discharge if she attempts to find out if the act is illegal or perform the act without knowing it was illegal and face criminal penalties. The Court stated the public policy exception created under *Sabine Pilot* demanded that the employee be allowed to investigate into whether the actions she was about to commit are legal if she has a good faith belief that her employer has requested her to commit acts.
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Refusal to Commit an Illegal Act.

_Sabine Pilot_ requires that the employee refuse to commit an unlawful act. _Sabine Pilot_ at 735. The court in _Winters v. Houston Chronicle Publishing Co._, 795 S.W.2d 723 (Tex. 1990) reaffirmed _Sabine Pilot_, and held that the plaintiff may recover only if he was unacceptably forced to choose between risking criminal liability or being discharged. . . .” _Winters_ 795 S.W.2d at 724.

However, an employee does not have to be specifically threatened with termination if he or she refuses to perform an illegal act. _Higginbotham v. Allwaste, Inc._, 889 S.W.2d 411, 416 (Tex.App.–Houston [14th Dist.] 1994, writ denied) (reversing a summary judgment because an employee does not have to be “put to an unacceptable choice of doing an illegal act or being fired”). “Generally, one who seeks the performance of an illegal act does so with subtlety and stealth. Once the employee is asked to perform the illegal act, he is put at risk of discharge if he refuses to do it.” _Id_. Therefore, the _Allwaste_ court found that under the Texas Supreme Court’s holding in _Winters_ “merely asking an employee to perform an illegal act automatically puts him to that unacceptable choice of doing the act or risking termination.” _Id_.

Furthermore, _Sabine Pilot_ did not expressly require that the employee be ordered or requested to commit an illegal act. _Sabine Pilot_ did expressly intend to protect employees who risk criminal liability or risk losing their job. _Sabine Pilot_ at 724. If there is a question whether the employee was fired because the employee refused to commit an illegal act, that is a question for a jury to determine.1

Sole Cause

_Sabine Pilot_ requires that the refusal to commit an illegal act be the sole cause of the discharge. _Sabine Pilot_, 687 S.W.2d at 735. Even if an employee’s refusal is a reason, it is not sufficient to establish a _Sabine Pilot_ claim. _Tex. Dep’t of Human Servs. v. Hinds_, 904 S.W.2d 629, 633 (Tex.1995) (“An employer who discharges an employee both for refusing to perform an illegal act and for a legitimate reason or reasons cannot be liable for wrongful discharge.”) (emphasis in original).

One court has interpreted the sole cause requirement broadly. In _Hawthorne_, an employee was instructed to smell water samples to determine if hazardous chemicals had been removed. _Hawthorne v. Star Enterprise, Inc._, 45 S.W.3d 757, 758-59 (Tex.App.–Texarkana 2001, pet. denied). The employee refused, instructed other employees to not do it, and reported his employer to OSHA. _Id_. The employee was fired and filed suit under _Sabine Pilot_. However, during his deposition, the employee testified several times that the only reason he was fired was because he reported his employer to OSHA. _Id_. at p. 759. The employer moved for summary judgment because _Sabine Pilot_ does not provide a cause of action for private whistleblowers and the employee’s own testimony established a reason for his termination besides his refusal to perform an illegal act. _Id_. The court disagreed and said that the employee’s call to OSHA was “not a new and separate act for which he was fired; it was a continuation of his refusal to perform an illegal act.” _Id_. at 761. The court

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1 One court of appeals has interpreted the “refusal” requirement of _Sabine Pilot_ to mean that the employer must have requested or required “in some form” that the employee commit an illegal act. _Burt v. City of Burkburnett_, 800 S.W.2d 625 (Tex. App.–Ft. Worth 1990, writ denied). This holding should be viewed under the facts from which it arose. A policeman arrested a citizen and the day after the arrest, he was offered the option to resign or be fired. The policeman filed a wrongful discharge claim on the theory that he had been terminated for refusing not to arrest the citizen, and that he had a legal duty to enforce the law. The policeman’s pleading admitted that there were no written or oral instructions not to arrest the citizen. Further, there was no evidence that he had ever had any discussions with his employer concerning the matter at all. The court of appeals affirmed a summary judgment for the city.
further stated that to “hold that an employee’s attempt to stop an employer from requiring an employee to perform an illegal act by reporting the act to OSHA negates that employee’s cause of action under Sabine Pilot would be bad public policy, leaving the employee with no choice but to perform the illegal act or be fired.” Id.

Recent Cases

The following are a few notable recent Sabine Pilot decisions:

In Morales v. Simuflite Training International, Inc., 132 S.W.3d 603 (Tex.App.–Fort Worth 2004, n.p.h.), Morales was a flight instructor for Simuflite which is an aviation training facility regulated by the Federal Aviation Administration. Morales’ certifications expired which meant he was no longer qualified to act as an instructor for specific training. Despite this, Morales’ supervisor asked Morales to handle certain training courses and the supervisor signed the training forms even though he was not present. The FAA began an investigation into those training courses and Morales’ supervisor asked him to sign a blank flight form which could have been falsified to cure the FAA training violation being investigated. Morales refused, was fired, and filed suit under Sabine Pilot. Simuflite argued that even if the blank form would have been falsified after Morales signed it, Morales would not be criminally liable because he was not the one falsifying the document. Id. at 608. The court disagreed and held that Morales could have been charged with aiding and abetting the falsification of a government document and reversed the trial court’s summary judgment for the employer. Id. at 608-09.

In Ed Rachal Foundation v. D’Unger, 117 S.W.3d 348 (Tex.App.–Corpus Christi 2003, pet. filed), D’Unger was a vice-president of the Foundation which owned extensive land along the Texas-Mexico border. D’Unger learned about several circumstances where undocumented immigrants from Mexico who had entered the Foundation’s property were either mistreated or disappeared after being chased and apprehended by the Foundation’s employees. D’Unger took his concerns to the Foundation’s Board and to numerous governmental agencies. D’Unger was instructed by his supervisor to leave these matters alone and to “drop it.” Id. at p. 360. D’Unger refused to keep quiet and conceal the information and he was fired. The court found that the jury could have found that D’Unger refused to participate in a conspiracy to cover up criminal and illegal conduct involving Mexican Nationals on the Foundation’s property which could have made D’Unger criminally liable under a criminal conspiracy or misprison of felony under federal law. Id. at p. 361, 364-5. Therefore, the court found that there was legally and factually sufficient evidence to support the jury’s verdict on D’Unger’s Sabine Pilot claim.

In Laredo Medical Group Corp. v. Mireles, 2004 WL 2346252 (Tex.App. –San Antonio Oct. 20, 2004), a former employee filed a Sabine Pilot claim claiming that she was fired for refusing to conceal illegal activity in internal accounting reports and in refusing to commit perjury in a lawsuit brought by a former employee. A broad form question was submitted to jury asking if the employee was terminated for refusing to perform an illegal act which contained a laundry list of violations related to the employee’s allegations. The jury answered “yes” and awarded $1.5 million. The employer appealed claiming there was insufficient evidence of the employee being requested to perform any illegal acts relating to internal accounting reports. The court agreed, but found there was sufficient evidence to support her claim that she refused to commit perjury. However, the court also held that because there was insufficient evidence regarding her refusal to conceal illegal accounting practices, it was harmful error to submit the broad form question to the jury which included the accounting practices as illegal acts. Id. at *9. Therefore, even though there was sufficient evidence that she refused to commit perjury which would support the jury’s finding, the court reversed the trial court’s judgment finding that the jury “almost certainly relied on one or more of the accounting subparts of the jury question which should not have submitted.” Id.

Special Examples--Attorneys Refusing to Perform An Illegal Act

In Willy v. Coastal States Management Co., the First Court of Appeals in Houston held that an in-house attorney is precluded from maintaining a Sabine Pilot claim if it would require the disclosure of client confidential information. 939 S.W.2d 193, 200 (Tex.App. – Houston [1st Dist.] 1996, writ denied). The in-house attorney in Willy claimed that he had been terminated solely because he refused to falsify environmental reports and participate in criminal concealment of violations of state and federal environmental laws. The employer argued that Willy’s claim was barred because he could not prove it without breaching his ethical obligations of maintaining a client’s confidences. The Willy court
agreed with the employer and rendered judgment against Willy because he could not prove his claim without revealing client confidences.\(^2\)

The plaintiff in *Willy* even took his claims to the U.S. Department of Labor on the basis that he was terminated in violation of the whistleblower provisions of certain federal environmental statutes. However, the Administrative Review Board held similarly to the Texas Court of Appeals in that the Board found that Willy was not allowed to use confidential information to prove his claims. *In the Matter of: Willy v. The Coastal Corp.*, 2004 WL 38741 (DOL Adm.Rev.Bd. Feb. 27, 2004).

Therefore, the Board found that Willy had no evidence to support his claims and dismissed his complaint. *Id.*

The disciplinary rule which governs preservation of client’s confidences and secrets that was in effect at the time Willy brought his suit provided in part that:

> “(A) “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

> (B) Except when permitted under DR 4–101(C), a lawyer shall not knowingly:

> (1) Reveal a confidence or secret of his client.

The Court noted that DR 4–101(C)(3) permits disclosure of confidential information to prevent a client from committing a crime. The Court said, however, Willy’s intention was to use client confidences to prove he was wrongfully terminated, not to prevent Coastal from committing a crime in the future.

One provision that was argued by Willy was the provision of (C)(4) stating that a lawyer may reveal a confidence or secret of his client “necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

Willy, at 200. The Court said the rule does not provide that an attorney could reveal client confidences and secrets when necessary to prove a claim against the client.

In a footnote, the *Willy* court pointed out that the current rules changed on January 1, 1990 to provide that a lawyer may reveal confidential information “to the extent necessary to force a claim or establish a defense on behalf of a lawyer in a controversy between the lawyer and a client.” *Tex. Disciplinary R. Prof. Conduct 1.05(c)(5) The Court by way of *dicta* said that “the comments to Rule 1.05 suggest that this provision applies in situations in which a lawyer is attempting to collect a fee.” *Willy*, f. 6. The rule applying to controversies “between the lawyer and the

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2 On appeal, the Texas Supreme Court originally granted petition for review, but later withdrew the order granting review because the key issue of whether the *Sabine Pilot* exception applies to in-house counsel had not been fully briefed by the parties. *See Willy v. Coastal States Management Co., Inc.*, 977 S.W.2d 566 (Tex.1998). Justice Owen joined by Justice Hecht, filed a concurring opinion that admitted that the “question of critical importance to the approximately 5,000 lawyers of this state who are in-house attorneys and their employer-clients is whether this Court should recognize any common law cause of action for wrongful discharge of an in-house attorney based on the limited exception to the employment-at-will doctrine that we recognized in *Sabine Pilot Service, Inc. v. Hauck.*” *Id.* The opinion acknowledged that there is a split of authority among the States on whether in-house counsel can bring such a claim, but found that because the legal issue of whether *Sabine Pilot* should even apply to in-house counsel was not fully briefed, the Court had to deny the application for writ of error. *Id.*
client” leaves room for interpretations depending on the circumstances. Read broadly, the rule would contemplate a circumstance where an attorney may reveal confidential information in a dispute with a client.

As one justice acknowledged in Willy v. Coastal States Management Co., 977 S.W.2d 566 (Tex. 1998), there is a split of authority among the states on whether in-house counsel can bring such a claim. For example, over a decade ago the Illinois Supreme Court held that in-house counsel cannot bring a claim for retaliatory discharge. Balla v. Gambro, 145 Ill. 2d 492, 164 Ill. Dec. 892, 896, 584 N.E.2d 104, 108 (1991). In that case, the defendant fired an in-house attorney who informed them that he would do whatever was necessary to stop its sale of defective dialyzers. Id. at 895, 584 N.E.2d at 107. The court found that while the plaintiff’s discharge was indeed in contravention of public policy, the public policy at issue—protecting the lives of citizens—was adequately protected by the state’s rules of professional conduct, which required the plaintiff to report his employer’s intention to sell the defective equipment. Id. at 896-97, 584 N.E.2d at 108-09. The court further noted that extending the tort of retaliatory discharge to in-house counsel would have an undesirable effect on the relationship between employers and their in-house counsel. Id. at 897, 584 N.E.2d at 109."

The Illinois Supreme Court’s opinion followed an Illinois intermediate appellate court opinion which refused to recognize a cause of action for retaliatory discharge because of the confidential and fiduciary nature of the attorney-client relationship. Herbster v. North Am. Co., 150 Ill.App.3d 21, 103 Ill.Dec. 322, 323, 501 N.E.2d 343, 344 (1986). In Herbster, the plaintiff claimed he was fired as in-house counsel after he refused to destroy discoverable information. Id. at 326-27, 501 N.E.2d at 347-48. The court recognized that the plaintiff was an employee of the defendant corporation, but could not "separate [his] role as employee from his profession." Id. at 325, 501 N.E.2d at 346. The court also noted that the client has the unfettered right to terminate the attorney-client relationship and to substitute other counsel. Id. at 326, 501 N.E.2d at 347.

The Houston Court of Appeals also discussed Judge Hittner’s ruling in Willy v. Coastal Corp., 647 F.Supp. 116, 118-19 (S.D.Tex.1986), rev’d on other grounds, 855 F.2d 1160 (5th Cir.1988) where suit had initially been filed. That court refused to extend the Sabine Pilot exception to the employment-at-will doctrine to apply to wrongful termination claims by in-house counsel. Id. at 118. The court noted that if an attorney believed his client was intent upon pursuing an illegal act, the attorney’s remedy was to voluntarily withdraw from employment. Id. When an attorney chose not to do so, the client could terminate the attorney, who would then be required to withdraw from representation. Id. The court noted that the disciplinary rules did not distinguish between retained counsel or in-house counsel. Id.

These holdings clearly appear to be in the minority. Most federal and state courts recognize the right of an in-house attorney to bring a wrongful discharge claim against their employer—even with some restrictions. For example, Massachusetts and California have both held that under certain circumstances, an in-house lawyer may bring a claim for retaliatory discharge against an employer. See GTE Prod. Corp. v. Stewart, 421 Mass. 22, 653 N.E.2d 161 (1995); General Dynamics Corp. v. Superior Court, 7 Cal. 4th 1164, 32 Cal.Rptr.2d 1, 876 P.2d 487 (1994).

In Stewart, the plaintiff asserted that he had been wrongfully discharged in retaliation for, among other things, his insistence that GTE comply with federal laws regarding the disposal of hazardous waste. 653 N.E.2d at 163. The court held, first, that the plaintiff’s status as in-house counsel for GTE did not preclude him from maintaining his suit. Id. at 166. The court went on to hold: [A] claim for wrongful discharge brought by in-house counsel will be recognized only in narrow and carefully delineated circumstances. To the extent that in-house counsel’s claim depends on an assertion that compliance with the demands of the employer would have required the attorney to violate duties imposed by a statute or the disciplinary rules governing the practice of law in the Commonwealth, that claim will only be recognized if it depends on (1) explicit and unequivocal statutory or ethical norms (2) which embody policies of importance to the public at large in the circumstances of the particular case, and (3) the claim can be proved without any violation of the attorney’s obligation to respect client confidences and secrets. Id. at 166-67. In General Dynamics, the court held that there was nothing inherent in the nature of an attorney’s role as in-house counsel that precludes a claim for retaliatory discharge; the court further held, however, that a claim could be maintained only if it could be established without breaching the attorney-client privilege or unduly damaging the values lying at the heart of the professional relationship, 32 Cal. Rptr. 2d at 4, 876 P.2d at 490.

Several other cases have allowed in-house counsel to maintain a cause of action for wrongful discharge. In Mourad v. Automobile Club Ins. Ass’n, 186 Mich.App. 715, 465 N.W.2d 395 (1991), the plaintiff was demoted after he refused to comply with alleged unethical and
illegal orders by the corporation. Id. The court held that the plaintiff could assert a cause of action for wrongful termination because the corporation’s statements of company policy could have given rise to a "just-cause" contract. Id. 465 N.W.2d at 399-400. Therefore, the plaintiff in Mourad relied on a contractual cause of action rather than a common-law tort action for wrongful discharge. See also, Golightly-Howell v. Oil, Chemical & Atomic Workers Int'l Union, 806 F.Supp. 921, 924 (D.Colo.1992) (in-house attorney whose employment is subject to "just-cause" contract is not precluded from suing for wrongful termination if attorney-client relationship not implicated). In Parker v. M & T Chemicals, Inc., 236 N.J.Super. 451, 566 A.2d 215, 217 (App.Div.1989), the plaintiff alleged that he was constructively discharged from his position as in-house counsel after he questioned the propriety of appropriating a competitor's trade secrets. Id. He filed suit pursuant to a state "whistleblower" statute. The corporation contended that the whistle-blower statute unconstitutionally impinged on the supreme court's power to regulate the conduct of attorneys. Id. 566 A.2d at 219. The court saw no constitutional incompatibility and refused to "read in-house attorneys out of the [statute's] protection." Id. at 221.

Other courts have allowed in-house attorneys to bring wrongful discharge claims in order to preserve rights guaranteed by federal law. For example, several courts have relied on the supremacy of federal law in holding that federal anti-discrimination laws take precedence over state at-will discharge principles in suits involving in-house attorneys. Jones v. Flagship Int'l, 793 F.2d 714, 726 (5th Cir.1986), cert. denied, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987); Stinneford v. Spiegel Inc., 845 F.Supp. 1243, 1245-46 (N.D.Ill.1994); Rand v. CF Industries, Inc., 797 F.Supp. 643, 645 (N.D.Ill.1992). The Fifth Circuit explained that "if a law assumes his position as [in-house attorney, plaintiff] neither abandoned her right to be free from discriminatory practices nor excluded herself from the protections of [Title VII]." Jones, 793 F.2d at 726.

Other courts have recognized that in-house attorneys can bring wrongful discharge claims to enforce rights guaranteed by federal law regardless of state laws requiring confidentiality. For example, in Doe v. A Corporation, the Fifth Circuit observed that "[a] lawyer ... does not forfeit his rights simply because to prove them he must utilize confidential information. Nor does the client gain the right to cheat the lawyer by imparting confidences to him." 709 F.2d 1043, 1050 (5th Cir. 1983); cf. Oregon State Bar Legal Ethics Comm., Formal Op.1994-136 (stating that attorney may disclose confidences to establish a wrongful termination claim where attorney was terminated after refusing to make false representations on a patent application).

Methods Of Protecting Confidentiality In Wrongful Discharge Cases Involving In-House Counsel.

Because an in-house attorney will likely be required to maintain client confidentiality in order to maintain a wrongful discharge claim, a lawyer representing the in-house lawyer should take steps from the inception of the relationship to ensure that confidentiality is preserved. One possibility is the use of anonymous pleadings. See, e.g., Doe v. A Corporation, 709 F.2d 1043 (5th Cir. 1983). The Fifth Circuit has noted that there are a variety of means to protect client confidentiality while maintaining a discharge claim:

Even when revealing confidences falls within an exception to the ethical rules, there are appropriate means for revealing confidences that limit the dissemination of information disclosed. They include requesting in camera review, requesting that the court seal the record in any proceeding, and obtaining permission to prosecute the action without revealing the true name of either party. See, e.g., Doe v. A Corp., 709 F.2d 1043, 1045 n. 1 (5th Cir.1983); United States v. Scott, 909 F.2d 488, 494 n. 10 (11th Cir.1990) (noting different protective measures attorneys may take to protect client confidences when they suspect a client of intending to commit perjury). Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 375 n.12. (5th Civ. 1999).

The notion that an in-house attorney should limit his disclosure of client confidences in litigation against his employer is foreshadowed in Rule 1.05 which contains a proviso that confidential information may only be revealed by an attorney in a dispute with a client "to the extent reasonably necessary."

Government Employees

Government employees cannot assert claims under Sabine Pilot. Salazar v. Lopez, 88 S.W.3d 351 (Tex.App.—San Antonio 2002, no pet.). In Salazar, a
deputy sheriff sued the Jim Wells County claiming he was terminated from employment for refusing to commit perjury while testifying. *Id.* The *Salazar* court acknowledged that several courts have recognized that the *Sabine Pilot* exception does not waive sovereign immunity. *Id.* at 353. The court found that while Salazar made an “interesting argument” that immunity should not apply under these circumstances, “the waiver of governmental immunity is a matter addressed to the Legislature, not the courts.” *Id.* Therefore, the court upheld the trial court’s dismissal of Salazar’s claim for lack of jurisdiction. *Id.*; See also, *Carroll v. Black*, 938 S.W.2d 134 (Tex.App.–Waco 1996, pet. denied) (holding that sovereign immunity barred public employee’s *Sabine Pilot* claim against state university officials).
The Sarbanes-Oxley Act of 2002 was enacted in response to the wave of countless scandals in corporate America. This outline only covers the provisions of Sarbanes-Oxley that provide protections for employees who report securities fraud; the whistleblowers. This outline will cover the general elements to establish a claim under the whistleblower protections of Sarbanes-Oxley as well as the procedural aspects of filing a whistleblower claim under Sarbanes-Oxley.

THE STATUTE

Section 806 of the Sarbanes-Oxley Act is the section which provides civil protections to employee whistleblowers. Section 806 provides as follows:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78f), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee --

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by --

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discovery, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. (18 U.S.C. § 1514A).

EFFECTIVE DATE OF STATUTE

Section 806's effective date is July 30, 2002. Section 806 does not apply retroactively. In McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 2003-SOX-23 (ALJ Jan. 16, 2004), the ALJ agreed with other decisions where it was determined that the whistleblower provision of the Sarbanes-Oxley Act could not be afforded retroactive application.

However, it is the date of the retaliatory action that is important, not the date that the whistleblower engages in the protected activity. See Lerbs v. Buca Di Beppo, Inc., 2004-SOX-8 (ALJ June 15, 2004) (holding that it is the date of the alleged retaliatory action rather than the date of the protected activity that determines whether the Act applies).

APPLICABILITY

Section 806 applies to publicly traded companies that are required to register their securities under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)). In Flake v. New World Pasta Co., ARB No. 03-126, ALJ No. 2003-SOX-18 (ARB Feb. 25, 2004), the Department of Labor’s Administrative Law Board determined that a company with less than 300 shareholders is not subject to section 806 since the reporting requirements are automatically suspended when a company’s securities are held at the beginning of the fiscal year by fewer than 300 persons.

The whistleblower provisions not only apply to publicly traded companies, but they may also apply to

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3 I wish to thank Ashton Bachynsky who prepared almost this entire article on Sarbanes-Oxley.
non-publicly traded subsidiaries of publicly trade companies. See Morefield v. Exelon Services, Inc., 2004-SOX-2 (ALJ Jan. 28, 2004) (holding that “it seems clear that Congress intended the term ‘employees of publicly traded companies’ in Section 806 to include the employees of the subsidiaries of publicly traded companies”). However, the Morefield opinion suggests that the publicly traded parent should be named in the complaint filed with OSHA. Id; See also, Klopfenstein v. PPC Flow Technologies Holdings, Inc., 2004-SOX 11 (ALJ July 6, 2004) (“Despite the apparent legislative intent to attach liability to publicly traded companies who surround themselves by other entities under their control, it does not seem the Act provides a cause of action directly against such subsidiary alone.”)

A more recent decision agrees with the Morefield decision. In Gonzalez v. Colonial Bank, 2004-SOX-39 (ALJ Aug. 20, 2004), the ALJ found that since the parent company had been named as a respondent, and Congress intended to provide whistleblower protection to employees of subsidiaries of publicly traded companies, the Complainant had set forth a cause of action sufficient to withstand a motion for summary decision.

However, in an earlier decision, the ALJ in Powers v. Pinnacle Airlines, Inc., 2003-AIR-12 (ALJ Mar. 5, 2003) dismissed a complaint that did not name publicly traded parent company and refused to allow the complainant to add the parent company to the complaint because it was untimely. The Powers decision noted that even if the parent company was part of the complaint it “ignores the general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries. In other words, the mere fact of a parent-subsidiary relationship between two corporations does not make one company liable for the torts of its affiliate.” United States v. Bestfoods, et al., 524 U.S. 51, 61 (1998) The Powers opinion even went one step further and held that the complainant of a subsidiary must pierce the corporate veil in order to establish a whistleblower claim. Id.

Section 806 also applies to “ . . . any officer, employee, contractor, subcontractor, or agent of such company” who retaliates against a whistleblower. See 18 U.S.C. §1514A.

On August 24, 2004, OSHA published some clarification regarding contractor and subcontractors and stated that "a respondent may be liable for its contractor's or subcontractor’s adverse action against an employee in situations where the respondent acted as an employer with regard to the employee of the contractor or subcontractor by exercising control of the work product or by establishing, modifying, or interfering with the terms, conditions, or privileges of employment. . . . Conversely, a respondent will not be liable for the adverse action taken against an employee of its contractor or subcontractor where the respondent did not act as an employer with regard to the employee.” 69 Fed. Reg. 52104, 52107 (August 24, 2004).

WHO IS PROTECTED

Employees of publicly traded companies are protected. As discussed in more detail above, employees of subsidiaries of publicly traded companies are protected if the parent company is included in the complaint. Collins v. Beazer Homes USA, Inc., 334 F.Supp.2d 1365 (N.D.Ga. Sept. 2, 2004) (Where the officers of a publicly traded parent company have the authority to affect the employment of employees of a subsidiary, an employee of the subsidiary is a "covered employee" within the meaning of the whistleblower provision); See also, Platone v. Atlantic Coast Airlines, 2003-SOX-27 (ALJ Apr. 30, 2004) (finding that employee of non-publicly traded subsidiary was a covered employee under the whistleblower provision of the Sarbanes-Oxley Act where the publicly-traded parent holding company controlled the subsidiary to such a degree as to make it a mere instrumentality of the parent company).

However, it appears that employees that work outside the United States are not covered. In Carnero v. Boston Scientific Corp., 2004-WL-1922132 (D. Mass., Aug. 27, 2004), the court agreed with OSHA’s preliminary determination that the whistleblower provision of the Sarbanes-Oxley Act does not cover employees working outside the U.S. In so holding, the Carnero court stated that absent contrary intent “Congressional legislation is meant to apply within the United States” and the court found “nothing in Section 1514A(a) remotely suggests that Congress intended it to apply outside the United States.” However, the plaintiff in Carnero was a foreign national working for the defendant's Argentinean and Brazilian subsidiaries so it is not clear if the same rule would apply to U.S. citizens working abroad; See also, Concone v. Capitol One, 2005-SOX-00006 (ALJ Dec.3, 2004) (finding that foreign national was not a covered employee under the Act because he was employed by the company outside the United States).
PROTECTED ACTIVITY

Sarbanes-Oxley protects employees who provide information which the employee "reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." *Collins v. Beazer Homes USA, Inc.,* 334 F.Supp.2d 1365 (N.D.Ga. Sept. 2, 2004) (citing 18 U.S.C. § 1514A(a)(1)). Therefore, a plaintiff is not required to show an actual violation of the law, but only that she "reasonably believed" that there was a violation of one of the enumerated laws or regulations. *Id.* The legislative history of Sarbanes-Oxley states that the reasonableness test "is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts." *Id.* (citing 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). "The threshold 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." *Id.*

When looking at the employee’s belief it “must be scrutinized under both subjective and objective standards, i.e. he must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable.” *Lerbs v. Buca Di Beppo, Inc.,* 2004-SOX-8 (ALJ June 15, 2004). The reasonableness of the employee’s belief is determined on the basis of the knowledge available to a reasonable person in the circumstances with the employee’s training and experience. *Id.*

A reasonable belief is sufficient even if it turns out to be legal. *See Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004). In *Intel,* the Complainant told the SEC that he had been instructed to delay the payment of invoices to subsequent quarters to increase cash on Intel's balance sheet. Because of intense news coverage at the time of Enron's creative accounting, he believed that the instructions amounted to a fraud on Intel's investors. Subsequently, an internal investigation required by the SEC, and accepted by that agency after review, exonerated Intel. Nonetheless, the Administrative Law Judge found that the Complainant believed that he had been asked to delay invoices. Citing case law from other whistleblower cases adjudicated by DOL, the ALJ observed that "[a] belief that an activity was illegal may be reasonable even when subsequent investigation proves a complainant was entirely wrong. The accuracy or falsity of the allegations is immaterial; the plain language of the regulations only requires an objectively reasonable belief that shareholders were being defrauded to trigger the Act's protections." *Id.* *See also, Welch v. Cardinal Bankshares Corp.,* 2003-SOX-15 (ALJ Jan. 28, 2004) (ALJ holding that the "Complainant is not required to show the reported conduct actually constituted a violation of the law, but only that he reasonably believed Respondent violated one of the enumerated laws and regulations. . . . The standard for determining whether Complainant’s belief is reasonable involves an objective assessment.")

The complaint does not have to specifically mention securities fraud, but does have to state the employee’s particular concerns. In *Collins v. Beazer Homes USA, Inc.,* 334 F.Supp.2d 1365 (N.D.Ga. Sept. 2, 2004), the employee never specifically alleged securities or accounting fraud. *Id.* at p. 1376. However, the employee alleged that she reported accounting conduct that could be construed as knowingly circumventing or knowingly failing to implement a system of internal accounting controls which would be in violation of Section 13 of the Securities Exchange Act of 1934. *Id.* at p. 1377 (citing Section 13 of the Securities Exchange Act, 15 U.S.C. §78m(b)(3)(B)(5)). While the court found it a close one, the court denied the defendant’s motion for summary judgment on the ground that the employee did not engage in a protected activity;

While an employee does not have to specifically mention securities or accounting fraud, the complaint must be specific enough and not a mere inquiry by the employee. *See Lerbs v. Buca Di Beppo, Inc.,* 2004-SOX-8 (ALJ June 15, 2004). In *Lerbs,* the ALJ held that in order for a whistleblower to be protected the reported information “must have a certain degree of specificity.” Thus, “general inquiries do not constitute protected activities.” *Id.* “Instead, in order to be protected, a whistleblower must state particular concerns which, at the very least, reasonably identify a respondent’s conduct that the complainant believes to be illegal.” *Id.*

Fraud is a key component under Sarbanes-Oxley. “The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. *Tuttle v. Johnson Controls*, 2004-SOX-0076 (ALJ Jan. 3, 2005) (citing S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002)) (explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company.") The
provision is designed to protect employees involved in detecting and stopping actions which they reasonably believe are fraudulent.” Id. In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." Id. (citing Ames Department Stores Inc., Stock Litigation, 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations)). “While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit.” Id.

One employer argued that an employee did not have a Sarbanes whistleblower claim because the employee did not “provide information” to the regional CEO because the CEO already knew about the conduct that was a possible violation of banking laws and a fraud against shareholders. See Gonzalez v. Colonial Bank, 2004-SOX-39 (ALJ Aug. 20, 2004). The ALJ disagreed and held that the employee was still protected by the Act even though the CEO already knew about it.

One case found that an employee’s complaint about racial discrimination does not fall under Sarbanes-Oxley. Harvey v. The Home Depot, Inc., 2004-SOX-20 (ALJ May 28, 2004). In Harvey, the employee raised concerns about systematic and individual racial discrimination and was terminated. The employee filed a claim under Sarbanes-Oxley with an implicit argument that a company who commits racial discrimination is acting contrary to the best interests of its shareholders. The court also considered that a company’s representations that it is non-discriminatory may amount to a violation of disclosure requirements and “thus involve a federal law related to fraud against shareholders.” Despite this, the ALJ found that while the argument has “understandable appeal”, a Sarbanes whistleblower protected activity must involve an alleged violation of federal law directly related to fraud against shareholders and the federal law against race discrimination was “not enacted to preclude fraud against shareholders.” Id.

Complaints about internal company policies are not protected. In Reddy v. Medquist, Inc., 2004-SOX-35 (ALJ June 10, 2004), the employee raised complaints about an internal company policy and its alleged deleterious impact on the rate of pay for medical transcriptionists. The ALJ granted Respondent’s motion to dismiss for failure to state a claim upon which relief can be granted because the Complainant failed to show that she was engaged in protected activity. The ALJ found that "the evidence demonstrates the complaints concerned internal company policy as opposed to actual violations of federal law.” Id.

ADVERSE EMPLOYMENT ACTION

Section 806 prohibits an employer from retaliating “by intimidating, threatening, restraining, or in any other manner discriminating against an employee in the terms and conditions of employment.” 29 C.F.R. §1980.102(b). “An employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures. A complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities.” Halloum v. Intel Corp., 2003-SOX-7 (ALJ Mar. 4, 2004).


A negative performance evaluation by itself is not sufficient to establish an adverse employment action. However, if “it resulted in a lower salary, directly jeopardized his job security, or caused any tangible job detriment”, then it could be considered an adverse employment action. Dolan v. EMC Corp., 2004-SOX-1 (ALJ Mar. 24, 2004).

BURDEN OF PROOF AND CAUSATION

“The evidentiary framework for a claim under Sarbanes-Oxley is specifically set forth in the statute.” Collins v. Beazer Homes USA, Inc., 334 F.Supp.2d 1365, 1375 (N.D.Ga. Sept. 2, 2004) (citing § 1514A(b)(2)(C)). “An action brought under Sarbanes-Oxley shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.” Id. “Under the statutory framework, a plaintiff in federal court must show by a preponderance of the evidence that the plaintiff’s protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. 49 U.S.C. § 42121(b)(2)(B)(iii). That is, the plaintiff must show by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action.” Id.

“Proximity in time is sufficient to raise an inference of causation.” Id. at 1375-76. The defendant employer may avoid liability if it can demonstrate by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of [protected] behavior.” Id. (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).
In Halloum v. Intel Corp., 2003-SOX-7 (ALJ Mar. 4, 2004), the ALJ stated the following about contributory factor and causation:

“As the final element, Complainant must prove that his disclosures to the SEC and to Intel's CEO contributed to the decision to modify his CAP. 29 C.F.R. § 1980.109(a). In the context of similar whistle blower cases, a contributing factor includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (citations omitted) (defining "contributing factor" in the Whistleblower Protection Act for federal employees). A whistle blower need not prove his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in an adverse personnel action.

An unfavorable personnel action taken shortly after a protected disclosure may lead the fact finder to infer that the disclosure contributed to the employer's action. 29 C.F.R. § 1980.104(b)(2). Judges have drawn inferences of causation when the adverse action happened as few as two days later, Lederhaus v. Donald Paschen & Midwest Inspection Serv., Ltd., 1991-ERA-13 (Sec'y Oct. 26, 1992), to as much as about one year later. Thomas v. Ariz. Pub. Serv. Co., 1989-ERA-19 (Sec'y Sept. 17, 1993). The causal connection may be severed by the passage of a significant amount of time, or by some legitimate intervening event. Tracanna v. Arctic Slope Inspection Serv., 1997-WPC-1 (ARB July 31, 2001) (slip op. at 7-8)."

**DAMAGES**

The text of the Sarbanes-Oxley Act provides for the following remedies:

1. In general.− An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.
2. Compensatory damages. Relief for any action under paragraph (1) shall include --
   
   (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
   
   (B) the amount of back pay, with interest; and
   
   (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

18 U.S.C. § 1514A(c)

Reputation damages can be recovered. See Hanna v. WCI Communities, Inc., 2004 WL 2931132 (S.D.Fla. Dec. 2, 2004) (holding that “a successful Sarbanes-Oxley Act plaintiff cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff’s future earning capacity”). In so holding, the Hanna court compared Sarbanes-Oxley to the remedies provided for in Title VII claims. Id. It would appear that a successful plaintiff should be able to recover damages for mental anguish as well as future pay. With regard to professional conduct under Texas law, see our discussion under Sabine Pilot, beginning at p. 5.

Despite a plaintiff’s ability to obtain punitive damages under Title VII, the Hanna court did dismiss plaintiff’s claim for punitive damages. Id. However, the plaintiff’s response to defendant’s motion to dismiss conceded that punitive damages are unavailable under Sarbanes-Oxley.

**AFTER-ACQUIRED EVIDENCE DOCTRINE**

One court has stated that the after-acquired evidence doctrine can be applied in these cases to limit an employee’s remedy. In Halloum v. Intel Corp., 2003-SOX-7 (ALJ Mar. 4, 2004), the ALJ stated "[a]n employer's after-acquired evidence of wrongdoing that could have resulted in discharge does not bar an employee from prevailing in a retaliation case. McKennon v. Nashville Publishing Co., 513 U.S. 352, 358 (1995). The relocation misrepresentation would have limited the remedy had Complainant prevailed. Id.; see also O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 760 (9th Cir. 1996)."
PROCEEDURAL ASPECTS OF WHISTLEBLOWER CLAIMS UNDER SARBANES-OXLEY

Administrative Pre-requisite


The date of the violation occurs "when the discriminatory decision has been both made and communicated to the complainant." Flood v. Cedant Corp., 2004-SOX-16 (ALJ Feb. 23, 2004) (citing 29 C.F.R. § 1980.103(d)) (holding that limitations began to run when employee was notified he would be terminated if he did not find alternative employment by a certain date, not when termination actually occurred); See also, Lawrence v. AT&T Labs, 2004-SOX-65 (ALJ Sept. 9, 2004) (“The statute of limitations begins to run when the employee is made aware of the employer’s decision to terminate him or her even when there is a possibility that the termination could be avoided”).

The complaint must specify each violation or retaliatory act for which the employee complains or it will be barred. For example, in Willis v. Vie Financial Group, Inc., 2004 WL 1774575 (E.D. Pa. Aug. 6, 2004), the employee originally filed a complaint about a threatened termination and a stripping of job responsibilities. After the complaint was filed, the employee was terminated but never amended his administrative complaint to include the termination. The Willis court held because the employee did not exhaust his administrative remedies with respect to his termination complaint, the employee could not pursue that claim before a federal district court. Id.

Procedural Aspects

“The Regulations governing OSHA’s handling of discrimination complaints under Sarbanes-Oxley provide for an investigation, a hearing before an administrative law judge, a review by an administrative review board, and an appeal to the Circuit Court of Appeals.” Id. (citing 29 C.F.R. § 1980). “The administrative scheme underlying the Sarbanes-Oxley Act has been described as "judicial in nature" and designed to resolve the controversy on its merits.” Id. (citing Willis v. Vie Fin. Group. No. 04-435, 2004 WL 1774575, at *5 (E.D.Pa. Aug. 6, 2004) (holding that plaintiff’s failure to raise a claim in his administrative complaint with OSHA precluded him from pursuing it in district court).

Within 60 days of filing the administrative complaint, OSHA then issues written findings as to whether or not there is reasonable cause to believe that the employer has discriminated against the employee in violation of the act. Hanna v. WCI Communities, Inc. 2004 WL 2931133(S.D. Fla. Nov. 18, 2004) (citing 29 C.F.R. § 1980.105(A)). Any party who desires a review, including judicial review, of the findings and preliminary order . . . must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order. Id. (citing 29 C.F.R. § 1980.106(a)). “If no timely objection is filed with respect to either the findings or the preliminary order, the findings or the preliminary order, as the case may be, shall become the final decision of the secretary, not subject to judicial review.” 29 C.F.R. § 1980.106(b)(2).

Once a timely objection is filed, the case will be assigned to an administrative law judge who will notify the parties of the day, time and place of hearing. 29 C.F.R. § 1980.107(b). During the hearing before the administrative law judge, the formal rules of evidence do not apply, but the administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious. 29 C.F.R § 1980.107(d). The administrative law judge will then make a decision based upon the evidence presented and will issue an opinion that contains appropriate findings, conclusions, and an order pertaining to the remedies granted to the plaintiff which will provide all relief necessary to make the employee whole. 29 C.F.R. § 1980.109(a) & (b).

If any party desires to seek review, including judicial review, on the decision of the administrative law judge, they must file a written petition for review with Administrative Review Board. 29 C.F.R. § 1980.110(a). The petition for review must specifically identify the findings, conclusions, or orders to which exception is taken. The petition must be filed within ten (10) business days of the date of the decision of the administrative law judge. Id. The decision of the administrative law judge will become a final order unless the Administrative Review Board notifies the parties within 30 days of filing the petition that the case has been accepted for review. 29 C.F.R. § 1980.110(b). The final decision of the Administrative Review Board will be issued within 120 days of the conclusion of the hearing before the
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administrative law judge. 29 C.F.R. § 1980.110(c). A final administrative decision must be issued within 180 days of the filing of the complaint or the employee may bring an action at law or in equity for de novo review in federal court. 18 U.S.C. § 1514A(b)(1)(B).

“Under the Sarbanes-Oxley Act’s regulations, there are only two scenarios under which OSHA’s "preliminary findings" may eventually become final decisions.” Hanna v. WCI Communities, Inc., 2004 WL 2931133 (S.D.Fla. Nov. 18, 2004). The first scenario is when there is no appeal of the preliminary order. Id.; See also, 29 C.F.R. § 1980.106(b)(2) ("if no timely objection is filed with respect to ... the preliminary order, the ... preliminary order, ... shall become the final decision of the Secretary, not subject to judicial review"). The second scenario is when OSHA’s preliminary findings are appealed to the Administrative Law Judge and then appealed to the Administrative Review Board. Id.; See also, 29 C.F.R. § 1980.106 & § 1980.110(a). However, under both scenarios, the decision must become final before 180 days or the plaintiff may seek de novo review in federal court.

Once a decision by OSHA becomes final, any person affected by the decision may file a petition for review of the decision in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. 29 C.F.R. §1980.112(a).

Federal Court Jurisdiction

“A federal court lacks jurisdiction over a suit brought under §806 of the Sarbanes-Oxley Act if (1) the plaintiff failed to file a complaint with OSHA within ninety days of the alleged violation; (2) OSHA issued a final decision within 180 days of the complaint; (3) the plaintiff filed in district court less than 180 days after filing a complaint with OSHA; or (4) there was a showing that OSHA failed to issue a final decision within 180 days due to the plaintiff's bad faith.” Murray v. TXU Corp., 279 F.Supp.2d 799, 802 (N.D.Tex.2003).

“If a final administrative decision is not issued within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, an employee may bring an action at law or in equity for de novo review in federal court.” Collins v. Beazer Homes USA, Inc., 334 F.Supp.2d 1365 (N.D.Ga. Sept. 2, 2004) (citing 18 U.S.C. § 1514A(b)(1)(B)). In Collins, the employee filed suit in federal court after OSHA did not issue its final decision within 180 days. The OSHA file suggested that the delay in issuing findings may have been attributable in some part to Plaintiff’s failure to cooperate with OSHA investigators and misrepresentations to OSHA regarding representation by legal counsel. Id. at *6, fn. 8. It also appeared that the delay was caused in part by settlement discussions. Id. Despite this, the Collins court found that it was unclear to the Court to what extent “OSHA’s failure to issue findings within 180 days was due to the acts and/or omissions of Plaintiff, or whether these actions would be considered bad faith such that federal court jurisdiction would be improper.” Id. Therefore, the court found that this evidence was insufficient to defeat the court’s jurisdiction on the grounds that the delay was caused by plaintiff’s bad faith.

Before an employee may bring an action in federal district court, the employee “must file with the administrative law judge or the Administrative Law Board, depending on where the proceeding is pending, a notice of his or her intention to file such a complaint.” 29 C.F.R. §1980.114(b).

Jury Trial

Once a plaintiff gets to federal court, he/she should be able to obtain a trial by jury. However, one court has called this into question. See Hanna v. WCI Communities, Inc. 2004 WL 2931132 (S.D.Fla. Dec. 2, 2004). The Hanna court did not decide if a jury trial is available, but said the following:

“Unlike Title VII, the Sarbanes-Oxley Act is silent as to whether a plaintiff may demand a jury trial. (Compare 42 U.S.C. § 1981a with 18 U.S.C. § 1514A). Again, both parties concede that this is also an issue of first impression. Rather than address the issue at this time, the court will deny the defendants’ motion to strike a jury trial in this case without prejudice to bring this motion again if all of the parties’ case-dispositive motions have been denied prior to trial. At that time, the court might have the benefit of guidance from other courts that have considered the availability of jury trials under the Sarbanes-Oxley Act.”

Id.
ATTORNEY STANDARDS UNDER SARBANES-OXLEY

There are special requirements for attorneys under the Sarbanes-Oxley Act. 15 U.S.C. §7245 provides as follows:

Rules of professional responsibility for attorneys. Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

The Commission issued its rules on August 5, 2003 which are published in 17 C.F.R. Part 205.

Attorneys that are subject to these rules include attorneys that are “appearing and practicing” before the SEC. The regulations define that as follows:

Appearing and practicing before the Commission: (1) Means:

(i) Transacting any business with the Commission, including communications in any form;

(ii) Representing a publicly traded company in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or

(iv) Advising a publicly traded company as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission’s rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission.

17 C.F.R. §205.2(a).

The S.E.C.

This is a broad definition of “appearing and practicing” before covers any attorney who has contact with the S.E.C. or assists in the preparation of any documents which the attorney knows will be filed with the S.E.C., or supervises an attorney who appears or practices before the S.E.C. See Section 205.2, 205.4, of S.E.C. Release No. 33-8186.

If an attorney subject to these rules becomes aware of evidence of a “material violation”, he/she must report it to the Chief Legal Counsel, the Chief Executive Officer, or a person in some equivalent position. 17 C.F.R. §205.3(b). A “material violation” is defined as “a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.” 17 C.F.R. §205.3(i).

If the attorney does not reasonably believe that he has received an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(1) The audit committee of the issuer's board of directors;
(2) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, “interested persons” as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer's board of directors has no audit committee); or

(3) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, “interested persons” as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19))).

17 C.F.R. 205.3(b)(3).

Under the current rules and regulations, attorneys are not required to make a “noisy withdrawal” if their concerns are not reasonably addressed by the board of directors. Under proposed SEC rules, the noisy withdrawal would require attorneys whose complaints have not be properly addressed to withdraw from representation and give written notice to the SEC of the withdrawal with a statement that the withdrawal is based on professional considerations.

**Attorney-Client Privilege Issues under Sarbanes-Oxley**

Although a “noisy withdrawal” is not required, Sarbanes-Oxley does allow an attorney to disclose confidential client information and “blow the whistle” on its corporate client under a number of circumstances. The regulations provide as follows:

Issuer confidences. (1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury; suborning perjury; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

17 C.F.R. 205.3(d).

On August 12, 2003, one week after the SEC adopted its regulations, the ABA adopted the SEC standards affecting the legal profession. In particular, the ABA amended Rule 1.6 to include two new exceptions to the rule of confidentiality. Those new rules are:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

*ABA Model Rules of Professional Conduct*, 1.06(b)(2) & (3) (2004).
However, these rules conflict with some states’ rules of professional conduct. In particular, the Washington and California state bar associations have expressed opposition to the SEC’s less stringent rules on confidentiality and have taken the position that an attorney in their states will violate state ethical rules if such confidential information is disclosed. See Interim Formal Ethics Opinion Re: The Effect of the SEC’s Sarbanes-Oxley Regulations on Washington Attorneys’ Obligations Under the RPC’s (As approved and adopted by the WSBA Board of Governors on July 26, 2003) and Letter from the Corporations Committee of the Business Law Section of the State Bar of California to Giovanni P. Prezioso, U.S. Securities and Exchange Commission (Aug. 13, 2003).

The General Counsel for the SEC responded to the Washington state bar association in pertinent part as follows:

“In opining that the Washington RPC 1.6 bars attorney disclosures permitted by Section 205.3(d)(2) of the Commission’s rules, however, the Proposed Interim Formal Opinion is inconsistent with prevailing Supreme Court precedent. The Court has consistently upheld the authority of federal agencies to implement rules of conduct that diverge from and supersede state laws that address the same conduct. See, e.g., Sperry v. State of Florida, 373 U.S. 379 (1963) (Florida could not enjoin non-lawyer registered to practice before the Patent and Trademark Office from prosecuting patent applications in Florida, even though non-lawyer’s actions constituted unauthorized practice of law under Florida bar rules). In particular, where, as here, a conflict arises because a state rule prohibits an attorney from exercising the discretion provided by a federal regulation, the federal regulation will take priority. See Fidelity Fed Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 155 (1982) (holding that a conflict between an agency’s regulations and state law "does not evaporate because the [agency’s] regulation simply permits, but does not compel," what state law prohibits; state law is preempted because its prohibition removes the "flexibility" provided by the agency’s regulation). Thus, Section 205.3(d)(2) of the Commission’s rules will take precedence over any conflicting provision of RPC 1.6.

Federal law will also determine whether, under Section 205.6(c) of the Commission's rules, an attorney has complied in "good faith" with the Commission's rules. Section 205.6(c) shields an attorney from discipline and liability under inconsistent state-law conduct rules if the attorney complies in "good faith" with the Commission's conduct rules. Because the issue whether an attorney has acted in "good faith" under Section 205.6(c) requires an interpretation of a Commission rule, states must defer to the Commission's construction. See Barnard v. Walton, 535 U.S. 212, 122 S. Ct. 1265, 1269 (2002) (agency's interpretation of regulation must be sustained if based on a permissible construction). The purposes of the Commission's "good faith" provision would be frustrated by a state-based definition of "good faith" that is inconsistent with the Commission's interpretation. Thus, a conflicting state definition of "good faith" would be preempted. See United States v. Locke, 529 U.S. 108, 110 (2000) ("a federal agency acting within the scope of its delegated authority may pre-empt state regulation"); City of New York v. FCC, 486 U.S. 57, 64 (1989) (federal agency regulations preempt any state law that frustrates the purposes of those regulations).

See General Counsel, Giovanni P. Prezioso, U.S. Securities and Exchange Commission, Public Statement by SEC Official: Letter Regarding Washington State Bar Association’s Bar Opinion on the Effect of the SEC’s Attorney Conduct Rules (July 23, 2003). Therefore, this is an undecided, key issue where the SEC claims that the regulations on attorney’s conduct preempts any conflicting state bar ethical rules.

**Criminal Liability under Sarbanes**

In addition to the civil remedies mentioned above, Sarbanes-Oxley criminalizes retaliation against employee whistleblowers. § 1107 of Sarbanes covers more than just whistleblower related to securities fraud and applies to both public and privately-held companies. The amendment states:

"Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any
truthful information relating to the commission
of any federal offense shall be fined under this
title or imprisoned for not more than ten years
or both.” See 18 U.S.C. §1513(E)

This provision applies to reports of wrongdoing involving
any federal law, not just shareholder fraud. Complaints
alleging other violations of federal law (equal employment
opportunity, wage/hour, safety and health administration)
involve potential criminal violations.