UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

KATHY J. SYLVESTER and,	:	
THERESA NEUSCHAFER	:	**ARB Case No. 07-123**
Complainants,	:	
v.	:	**ALJ Case Nos. 2007-SOX-039**
	:	**2007-SOX-042**
PAREXEL INTERNATIONAL LLC	:	
	:	
Respondent.	:	

AMICUS BRIEF
OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

INTERESTS OF AMICUS CURIAE 1

INTRODUCTION 2

I. Protected Disclosures Under Sarbanes-Oxley Must Definitively And Specifically Relate To Fraud On Shareholders 4

A. Employee Communications Must "Definitively and Specifically" Relate To The Substantive Laws Enumerated In Sarbanes-Oxley 5

B. Employee Communications Must Relate To Shareholder Fraud 10

II. A SOX Complaint Is Subject To Pre-Hearing Dismissal By An Administrative Law Judge Pursuant To The Pleading Requirements Of The Federal Rules Of Civil Procedure 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Allen v. Admin. Review Bd.,
514 F.3d 468 (5th Cir. 2008) 6

Ashcroft v. Iqbal,
129 S.Ct. 1937 (2009) 17, 19

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 17, 19

Bishop v. PCS Administration (USA), Inc.,
No. 05-C-5683, 2006 WL 1460032 (N.D. Ill. May 23, 2006) 13

Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.,
331 U.S. 519 (1947) 12

Corley v. United States,
129 S. Ct. 1558n.5 (2009) 12

Day v. Staples, Inc.,
555 F.3d 42 (1st Cir. 2009) 6

Engquist v. Oregon Dept. of Agr.,
553 U.S. 591 (2008) 15, 16

FCC v. Fox Television Stations, Inc.,
129 S.Ct. 1800 (2009) 10

Good Samaritan Hosp. v. Shalala,
508 U.S. 402 (1993) 10

INS v. Nat'l Ctr. for Immigrants' Rights, Inc.,
502 U.S. 183 (1991) 13

Kester v. Carolina Power & Light Co.,
ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003) 7

Livingston v. Wyeth Inc.,
No. 1:03CV00919, 2006 WL 2129794 (M.D.N.C. July 28, 2006) 11

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,
463 U. S. 29 (1983) 10

National Ass'n of Home Builders v. Defenders of Wildlife,
551 U.S. 644 (2007) 18

Neuer v. Bessellieu,
No. 07-036 (ARB Aug. 31, 2009) 8, 10, 11, 18

Platone v. FLYi, Inc.,
ARB Case No. 04-154, 2006 WL 3246910 (ARB Sept. 29, 2006), *aff'd, Platone v. U.S. Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008) 5, 10

Portes v. Wyeth Pharms, Inc.,
No. 06-Civ.-2689 (WHP), 2007 WL 2363356 (S.D.N.Y. Aug. 20, 2007) 11

Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union (Pace),
No. 04-111 (ARB Aug. 31, 2007) 18

Russello v. United States,
464 U.S. 16 (1983) 7

Sylvester v. Parexel Int'l LLC,
ALJ Nos. 2007-SOX-39 & 2007-SOX-42 (Aug. 31, 2007) 2, 3, 16

Tuttle v. Johnson Controls, Battery Division,
2004-SOX-0076 (ALJ Jan. 3, 2005) 8

United States v. Hayes,
129 S.Ct. 1079 (2009) 13

United States v. Nat'l Bank v. Independent Ins. Agents of Am., Inc.,
508 U.S. 439 (1993) 12

Van Asdale v. Int'l Game Tech.,
577 F.3d 989 (9th Cir. 2009) 6

Vodopia v. Koninklijke Philips Elecs., N.V.,
No. 09-4747-cv, 2010 WL 4186469 (2d Cir. Oct. 25, 2010) 6

Welch v. Chao,
536 F.3d 269 (4th Cir. 2008) 5, 6, 7, 8

Statutes

15 U.S.C. § 2651 8

15 U.S.C. § 615 8

15 U.S.C. § 622 8

18 U.S.C. § 1513 ..... 7, 15

18 U.S.C. § 1514A 1, 3, 4, 13

20 U.S.C. § 3608 8
29 U.S.C. § 1132 9
29 U.S.C. § 158 9
29 U.S.C. § 1854 9
29 U.S.C. § 206 9
29 U.S.C. § 215 9
29 U.S.C. § 2615 9
29 U.S.C. § 301 9
29 U.S.C. § 623 9
30 U.S.C. § 815 9
31 U.S.C. § 3730 9
42 U.S.C. § 12203 9
42 U.S.C. § 1997d 9
42 U.S.C. § 2003a 9
42 U.S.C. § 300j-9 9
42 U.S.C. § 5851 9
42 U.S.C. § 7622 9
42 U.S.C. § 9610 9
45 U.S.C. § 441 9
46 U.S.C. § 1506 9
46 U.S.C. § 2144 9
46 U.S.C. § 688 9
49 U.S.C. § 1801 9
49 U.S.C. § 31105 9
49 U.S.C. § 42121 9

5 U.S.C. § 2303 8

Other Authorities

148 Cong. Rec. S7418, S7420, Legislative History of Title VIII of HR 2673 11

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173 (2010) 9, 15

S. Rep. No. 107-146, as reprinted in 2002 WL 863249 at *9 (May 6, 2002) 12

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802-804 (2002) 12

Rules

29 C.F.R. § 18.1 18

29 C.F.R. § 18.40 18

29 C.F.R. § 1980.103 ..... 5, 17

29 C.F.R. § 1980.104 ..... 5, 18

29 C.F.R. Part 18 4

29 C.F.R. Part 1980 17

Fed. R. Civ. P. 12(b) 18

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief in support of respondent, PAREXEL International LLC, with PAREXEL's consent in accordance with the Administrative Review Board's Notice of Oral Argument and Invitation to File Briefs dated November 12, 2010. This brief urges the Board to affirm the Final Decision and Order of the Administrative Law Judge.

INTERESTS OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members are employers subject to the "whistleblower" provision of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley," "SOX," or "the Act"), 18 U.S.C. § 1514A. For almost a century, the Chamber has played a key role in advocating on behalf of its membership. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases raising issues of vital concern to the nation's business community, including cases construing Sarbanes-Oxley.

The Chamber's members have a strong interest in the fair and efficient enforcement of the Sarbanes-Oxley whistleblower provision to accomplish its essential goals and in the speedy dismissal of claims not within the scope of protected activity under the Act. Meritless claims and expanding litigation costs have a direct impact on the viability, growth, and survival of businesses nationwide. In light of the large number of Sarbanes-Oxley whistleblower complaints, it is especially important that the Board confirm (1) that Sarbanes-Oxley whistleblower protection extends only to employee communications aimed at preventing or exposing shareholder fraud, and (2) that the pleading standards of the Federal Rules of Civil Procedure apply to administrative whistleblower complaints filed with the Department of Labor.

Absent clear guidance, the purposes of the Sarbanes-Oxley whistleblower provision may be thwarted, and the provision may be misused to second guess an employer's sound business reasons for terminating or otherwise disciplining an employee in circumstances unrelated to the activity protected under the Act.

INTRODUCTION

In the wake of several corporate scandals that dramatically reduced the share prices of affected companies and eroded public confidence in the nation's securities markets, Congress passed the Sarbanes-Oxley Act of 2002 to restore investor confidence and deter securities fraud. Congress accomplished this objective, in part, by creating whistleblower protection for employees of publicly-traded companies who provide information about fraud against shareholders. The non-retaliation provision prohibits an employer from discharging or otherwise discriminating against any employee with respect to the terms and conditions of employment because the employee provided information to the employer or the federal government relating to alleged mail fraud, wire fraud, bank fraud, securities fraud, SEC rule violations, or violations of any other provision of Federal law relating to fraud against shareholders.

In this case, complainants Kathy Sylvester and Theresa Neuschafer allege that they were retaliated against for reporting that coworkers were falsely recording and reporting data from clinical drug trials in violation of regulations of the United States Food and Drug Administration ("FDA"). Sylvester alleges that she reported violations of the FDA regulations "in two different ways on two different occasions"; "Neuschafer alleges only that she reported to Sylvester that her coworkers were reporting such false clinical data." *Sylvester v. Parexel Int'l LLC*, ALJ Nos. 2007-SOX-39 & 2007-SOX-42, Decision and Order Dismissing Complaints at 9 (Aug. 31, 2007) (hereinafter "Slip Op."). After the complainants were allegedly retaliated against for those disclosures, they filed administrative complaints with the U.S. Department of Labor

Occupational Safety and Health Administration under the employee protection provisions of Sarbanes-Oxley.

The Administrative Law Judge correctly determined that the complainants' disclosures to the respondent were outside the scope of protected reporting under Sarbanes-Oxley. More specifically, the ALJ properly stated that "'[f]raud' is an integral element of a cause of action under [Section 1514A] and incorporates a requisite accusation of intentional deceit that under SOX would pertain to a matter that is material to or that would impact shareholders or investors." Slip Op. at 9. "The alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests and meet the standards for materiality under the securities laws such that a reasonable shareholder would consider it important in deciding how to vote." *Id.* (internal quotation marks omitted). The ALJ correctly concluded that references to FDA requirements "do not involve, inherently or otherwise, reference to shareholder fraud or violations of federal criminal statutes related to shareholder fraud or SEC statutory or regulatory requirements." *Id.* Applying well-established standards governing motions to dismiss, the ALJ granted the respondent's motions to dismiss the complaints. *Id.* at 2-3, 12.

The Board should affirm that decision for the reasons stated below.

SUMMARY OF ARGUMENT

First, Sarbanes-Oxley whistleblower protection extends only to employee communications aimed at preventing shareholder fraud. Under well-establish Board precedent, a claimant must establish that her communication definitively and specifically relates to a violation of the laws listed in 18 U.S.C. § 1514A. That requirement serves the purposes of Sarbanes-Oxley and is supported by the statutory text. The Board should not upset this settled law, which has been adopted by many federal courts and implemented by the Administrative Law Judges.

Second, a complaint is subject to pre-hearing dismissal by an Administrative Law Judge pursuant to the pleading requirements of the Federal Rules of Civil Procedure. The Rules of Practice and Procedure for Administrative Hearings before Administrative Law Judges contained in 29 C.F.R. Part 18 direct an ALJ to the Federal Rules of Civil Procedure when the Rules of Practice and Procedure are silent. Because the Rules of Practice and Procedure do not specifically address motions to dismiss, such motions are reviewed in administrative hearings under Federal Rule of Civil Procedure 12(b).[1]

ARGUMENT

I. Protected Disclosures Under Sarbanes-Oxley Must Definitively And Specifically Relate To Fraud On Shareholders

Section 806 of Sarbanes-Oxley, codified at 18 U.S.C. § 1514A(a)(1), creates a civil cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Specifically, it prohibits employers from discriminating against an employee in the terms or conditions of employment because of the employee's

> lawful act . . . 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 [concerning mail, wire, bank, and securities fraud], any rule or regulation of the

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[1] This *amicus curiae* brief addresses issues 1 ("Whether the pleading requirements of the Federal Rules of Civil Procedure, particularly Rules 8(a), 9(b), 12(b) and 15(a), and interpretive case law apply to administrative whistleblower complaints filed with the Department of Labor pursuant to Section 806 of SOX, 18 U.S.C.A. § 1514A?"); 4(a) ("Whether the claimant must establish that the protected activity definitively and specifically relates to a violation of one or more of the laws listed in Section 806 of SOX?"); and 4(c) ("Whether the claimant must establish that the asserted violation of the laws listed in Section 806 of SOX involves or relates to fraud against shareholders?") in the Board's November 12, 2010 Notice. These issues are of paramount importance to the Chamber's members, and the Chamber believes it can assist the Board by highlighting the impact its decision on those issues will have beyond the immediate concerns of the parties to the case. The Chamber supports respondent's position as to the remaining issues.

> Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to . . . a person with supervisory authority over the employee . . . .

In order to make a *prima facie* showing under Section 1514A, "an employee's complaint must allege that: (1) the employee engaged in protected conduct; (2) the employer knew, actually or constructively, of the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the circumstances raise an inference that the protected activity was a contributing factor in the personnel action." *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008) (citing 29 C.F.R. § 1980.104(b)(1)).

A. Employee Communications Must "Definitively and Specifically" Relate To The Substantive Laws Enumerated In Sarbanes-Oxley

Well-settled Board precedent makes clear that the Sarbanes-Oxley whistleblower provision is not implicated every time an employee questions a corporate business practice. Vague, non-specific questions or concerns, or allegations of wrongdoing not anchored in the statutes and rules specifically identified in Sarbanes-Oxley, do not serve the laudatory purposes of the Act, do not put the employer on notice of protected activity, and, therefore, do not give rise to the Act's protections. Consistent with its interpretation of other, parallel whistleblower statutes over which it has jurisdiction, the Board, in its seminal decision in *Platone v. FLYi, Inc.*, interpreted Sarbanes-Oxley to require that an employee's communications "definitively and specifically" relate to one of the violations enumerated in Section 1514A(a)(1). *Platone v. FLYi, Inc.*, ARB Case No. 04-154, 2006 WL 3246910, at *7-8 (ARB Sept. 29, 2006), *aff'd*, *Platone v. U.S. Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008) (affirming dismissal because the complainant did not sufficiently articulate a theory of fraud); *see also* 29 C.F.R. § 1980.103(b) (stating that Sarbanes-Oxley complaint "should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations").

Numerous federal courts have agreed with the ARB's well-reasoned interpretation of the law. *See, e.g., Vodopia v. Koninklijke Philips Elecs., N.V.*, No. 09-4747-cv, 2010 WL 4186469 at *3 (2d Cir. Oct. 25, 2010) ("[T]o qualify as protected activity, the employee's communications must definitively and specifically relate to one of the listed categories of fraud or securities violations in 18 U.S.C. § 1514A(a)(1)") (internal quotation marks and alterations omitted); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996-97 (9th Cir. 2009) (deferring to the ARB's "reasonable interpretation" that "an employee's communications must 'definitively and specifically' relate to one of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1)") (internal quotation marks and alterations omitted); *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) ("The employee must show that his communications to the employer specifically related to one of the laws listed in § 1514A."); *Welch*, 536 F.3d at 275 ("[A]n employee must show that his communications to his employer definitively and specifically related to one of the laws listed in § 1514A.") (internal quotation marks and alteration omitted); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008) ("We agree with the ARB's legal conclusion that an employee's complaint must definitively and specifically relate to one of the six enumerated categories found in § 1514A.").

The language of Section 1514A makes plain that Sarbanes-Oxley "does not provide protection for any type of information provided by an employee" but provides protection only for information relating to the enumerated statutes. *Day*, 555 F.3d at 54. Comparison of Section 1514A to other statutory provisions confirms that Congress intentionally limited the categories of activities deserving protection under Section 1514A to the listed violations. In addition to the civil cause of action provided in Section 1514A, Sarbanes-Oxley contains a criminal provision

protecting whistleblowers. Section 1513 of Title 18 of the United States Code—entitled "Retaliating against a witness, victim, or an informant"—provides:

> 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 or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

Protected activity for the purposes of Section 1513 (the criminal provision) extends to "any truthful information relating to the commission or possible commission of *any* Federal offense." (emphasis added). Section 1514A (the civil provision), in contrast, is limited to a carefully crafted list of statutes. It is clear that Congress knew how to draft more expansive language when it intended to do so. Congress's choice to enumerate particular statutes in Section 1514A must be given effect. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The requirement that the employee's communications to her employer "definitively and specifically" relate to one of the laws enumerated in Section 1514A(a)(1) makes perfect sense. That requirement "ensures that an employee's communications to his employer are factually specific." *Welch*, 536 F.3d at 276. Corporate insiders are the first line of defense in combating securities fraud. In order for the employee to sound the early warning system and for an employer to take appropriate corrective action, the employee must report what happened, why, and who was involved. *See Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, Slip Op. at 9, (ARB Sept. 30, 2003) (stating that employees at nuclear facilities are the first line of defense in reporting safety violations). General inquiries or vague complaints do not constitute protected activity because they fail to alert the employer of the conduct that the

complainant believes to be illegal. *See Welch*, 536 F.3d at 276-77. By requiring specific communications, employees are encouraged to provide the information needed to root out and remedy fraudulent conduct.

The requirement serves another important function in the administrative process: It disposes of complaints that do not concern the substantive areas afforded protection by the statute. *See, e.g., Neuer v. Bessellieu*, No. 07-036, at 5 (ARB Aug. 31, 2009) (dismissing complaint for failure to allege disclosure of any securities fraud, intentional deceit, or fraud against shareholders or investors); *Tuttle v. Johnson Controls, Battery Division*, 2004-SOX-0076, at 4 (ALJ Jan. 3, 2005) (same).

The sheer number of complaints makes it difficult for the Department to timely resolve claims. In this case, for instance, Sylvester and Neuschafer filed their complaints with OSHA in September and October 2006, respectively; the ALJ issued his decision in August 2007. Three years later, this appeal is still pending before the Board. Removing complaints that do not definitively and specifically relate to the subject matter of the statute ensures that meritorious claimants blowing the whistle on shareholder fraud will not have to wait in line behind individuals claiming employer retaliation for activity not in any material way related to shareholder fraud.

Nothing in the Act suggests that Congress intended Sarbanes-Oxley to provide general whistleblower protection. To the contrary, Congress has created whistleblower provisions designed to protect employees providing other specified types of information.[2] Interpreting the

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[2] *See, e.g.*, 5 U.S.C. § 2303 (Civil Service Reform Act); 15 U.S.C. § 615(a) (Clayton Act); 15 U.S.C. § 622 (Toxic Substances Control Act); 15 U.S.C. § 2651 (Asbestos Hazard Emergency Response Act of 1986); 20 U.S.C. § 3608 (Asbestos School Hazard Detection &

[Footnote continued on next page]

non-retaliation provision to cover employee reports about how a public company conducts its affairs, spends it money, pays its bills, or complies with regulatory requirements, regardless of whether that practice relates to shareholder fraud, would render the civil remedies in many other federal whistleblower protection provisions superfluous. Nothing in the text of the statute or the legislative history provides reason to think that Congress intended the Sarbanes-Oxley non-retaliation provision to displace other civil remedies (or, as discussed below, to intrude broadly upon at-will employment).

In fact, Congress chose not to expand the scope of protected activities when it recently expanded the coverage of the Sarbanes-Oxley whistleblower protections in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank") in certain respects. Pub. L. 111-203, H.R. 4173 (2010). Dodd Frank increases whistleblower protections by, among other things, expressly including within the coverage of Sarbanes-Oxley the employees of subsidiaries of publicly traded companies where the subsidiaries are included in the publicly-traded parent corporation's consolidated financial statements and by extending the statute of limitations from

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[Footnote continued from previous page]
Control Act); 29 U.S.C. § 158(a)(4) (National Labor Relations Act); 29 U.S.C. § 206(d) (Equal Pay Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 29 U.S.C. § 301 (Labor Management Relations Act); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act); 29 U.S.C. § 1132(a) (Employee Retirement Income Security Act); 29 U.S.C. § 1854 (Migrant and Seasonal Agricultural Workers Protection Act); 29 U.S.C. § 2615 (Family Medical Leave Act); 30 U.S.C. § 815(c) (Federal Coal Mine Health and Safety Act); 31 U.S.C. § 3730(h) (False Claims Act); 42 U.S.C. § 300j-9 (Safe Drinking Water Act); 42 U.S.C. § 1997d (Civil Rights of Institutionalized Persons Act); 42 U.S.C. § 2003a (Civil Rights Act of 1964); 42 U.S.C. § 5851 (Atomic Energy and Energy Reorganization Act); 42 U.S.C. § 7622 (Clean Air Act); 42 U.S.C. § 9610 (Comprehensive Environmental Response, Compensation, and Liability Act); 42 U.S.C. § 12203(a) (Americans with Disabilities Act); 45 U.S.C. § 441 (Federal Railway Safety Act); 46 U.S.C. § 688 (Jones Act); 46 U.S.C. § 1506 (Safe Containers for International Cargo Act); 46 U.S.C. § 2144 (Coast Guard whistleblower protection); 49 U.S.C. § 1801 (Hazardous Materials Transportation Act); 49 U.S.C. § 31105 (Commercial Motor Vehicles Program); 49 U.S.C. § 42121(b) (Wendell H. Ford Aviation Investment Reform Act).

90 to 180 days. *Id.* at § 922(c). Congress clearly knew how to amend and expand the Act's protections when it wanted to, but it chose not to overrule the ARB's, ALJ's, and Courts' interpretation of the statute by enlarging the categories of information protected under Section 1514A.

The Board should not now expand the statute in a way that Congress did not see fit. Doing so would upset settled, well-considered, and well-supported law, which is true to the statutory text, serves the purposes of Sarbanes-Oxley, and has been adopted by many federal courts (and implemented by the Administrative Law Judges). Because there is no reasoned basis for departing from this well-supported doctrine, any change in the agency's position would not command deference within the courts. *See, e.g., FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (2009); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U. S. 29, 46-57 (1983).

B. Employee Communications Must Relate To Shareholder Fraud

In addition, to constitute protected activity, an employee's disclosures must definitively and specifically relate not only to the enumerated statutes generally, but also to *shareholder fraud* specifically. As this Board has held, "SOX-protected activity must involve an alleged violation of a federal law directly related to fraud or securities violations." *Neuer*, No. 07-036, at 5. Although the federal wire and mail fraud statutes "are not by their terms limited to fraudulent activity that directly affects investors' interests . . . when allegations of mail or wire fraud arise under the employee protection provision of the Sarbanes-Oxley Act, the alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests." *Platone*, 2006 WL 3246910 at *8. Accordingly, "[p]roviding information to management about questionable personnel actions, racially discriminatory practices, executive decisions, or corporate expenditures with which the employee disagrees, or even possible violations of other laws

standing alone, is not protected conduct under the SOX." *Neuer*, No. 07-036, at 4-5 (internal quotation marks and alterations omitted). Rather, an "employee must ordinarily complain about a material misstatement of fact or omission concerning a corporation's financial condition on which an investor would reasonably rely." *Id.* at 5. "A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough." *Id.* ; *see also Portes v. Wyeth Pharms, Inc.*, No. 06-Civ.-2689 (WHP), 2007 WL 2363356 at *4 (S.D.N.Y. Aug. 20, 2007) ("Where a communication is barren of any allegation of conduct that would alert a defendant that the plaintiff believed the company was violating any federal rule or law related to fraud against shareholders, the reporting is not protected by SOX.") (internal quotation marks and alterations omitted); *Livingston v. Wyeth Inc.*, No. 1:03-CV-00919, 2006 WL 2129794 at *9-*10 (M.D.N.C. July 28, 2006) ("To be protected under [SOX], an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud.").

The legislative history, statutory text, and practical considerations support the Board's interpretation of the Act. It is clear from the legislative history and circumstances surrounding the enactment of Sarbanes-Oxley that Congress sought specially to protect investors. Congress enacted Sarbanes-Oxley to "prevent recurrences of the Enron debacle and similar threats to the nation's financial markets." 148 Cong. Rec. S7418, S7420, Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002 (July 26, 2002). Congress recognized that:

> [C]orporate employees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide.... U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies.

Id. Congress therefore included the whistleblower provision codified in Section 1514A to provide federal protection for "employees of publicly traded companies *who blow the whistle on*

fraud and protect investors." S. Rep. No. 107-146, *as reprinted in* 2002 WL 863249 at *9 (May 6, 2002) (emphasis added).

The plain language of the Act as a whole confirms that the primary purpose of Sarbanes-Oxley is addressing fraud on corporate shareholders. *See Corley v. United States*, 129 S. Ct. 1558, 1566 n.5 (2009) (stating that it is a "cardinal rule" of statutory construction that "a statute is to be read as a whole"); *United States v. Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Statutory construction is a holistic endeavor, and at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.") (internal alterations omitted). The preamble to the Act states that its purpose is to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Pub. L. No. 107-204, 116 Stat. 745 (2002).

The title and caption of the whistleblower provision also emphasize that the protection is afforded only to employees disclosing fraud on investors in publicly-traded companies. *See Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 529 (1947) (stating that titles of statutory sections are tools "available for the resolution of a doubt" to be used "when they shed light on some ambiguous word or phrase."). In the enrolled bill that was signed into law as the Sarbanes-Oxley Act of 2002, the section colloquially-known as the "whistleblower" provision is titled: "Protection For Employees Of Publicly Traded Companies *Who Provide Evidence Of Fraud*." Pub. L. No. 107-204, § 806, 116 Stat. 745, 802-804 (2002) (emphasis added). Section 1514A is captioned "Civil action to protect against retaliation *in fraud cases*." (emphasis added). Congress's use of language in the statutory title that directly reflects the problem it sought to address—defrauding investors in public companies—demonstrates that the references to fraud in Section 1514A should be read as reference to fraud on shareholders. *See*

INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 185, 189 (1991) (ruling that "[t]he text's generic reference to 'employment' should be read as a reference to the 'unauthorized employment' identified in the paragraph's title.").

The text of Section 1514A is similarly tailored to eliminating fraud against shareholders. That provision provides protection for an employee who reports information that the employee "reasonably believes constitutes a violation of sections 1341 [the mail fraud statute], 1343 [the wire fraud statute], 1344 [the bank fraud statute], or 1348 [the securities fraud statute], 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(a)(1) (emphasis added). Although under the grammatical rule of the last antecedent the limiting clause ("relating to fraud against shareholders") ordinarily is read as modifying only the noun or phrase that it immediately follows ("any provision of Federal law"), the rule "is not an absolute and can assuredly be overcome by other indicia of meaning." *United States v. Hayes*, 129 S.Ct. 1079, 1086 (2009).

Here, the limiting phrase "relating to fraud against shareholders" is properly read as modifying all of the enumerated forms of fraud and securities violations in Section 1514(A). *See Bishop v. PCS Administration (USA), Inc.*, No. 05-C-5683, 2006 WL 1460032 at *9 (N.D. Ill. May 23, 2006) (stating that "relating to fraud against shareholders" must be read as modifying each item in the series). All of the antecedent statutes appear in the same sentence as the modifying phrase—uninterrupted by line breaks, semicolons, or other statutory subsections. *Cf. Hayes*, 129 S.Ct. at 1086-87 (declining to follow the rule of the last antecedent even though the antecedent was separated from the limiting phrase by two line breaks, a separate statutory clause, and a semicolon). Congress's use of commas to separate the enumerated statutes does not indicate that the limiting clause was intended to apply solely to the phrase that it immediately

follows. It was a reasonable drafting decision to use commas to separate a laundry list of offenses without intending the punctuation to confine the reach of the limiting phrase to the last item on the list. Properly read in light of the purpose of the statute, the limiting phrase—"relating to fraud against shareholders"—modifies *all* the statutes listed in Section 1514A. Thus, to prove an employee engaged in protected activity, the employee must establish that the asserted violation of the law listed in Section 1514A relates to fraud against shareholders.

The statutory scheme further supports that reading of Section 1514A. The whistleblower protection provision advances the purpose of the Act: eliminating fraud against shareholders. Congress prohibited retaliation against individuals who further that remedial goal by disclosing conduct that is material to shareholders' investment decisions. Expanding the scope of the retaliation provision to generalized complaints will not advance the purposes of Sarbanes-Oxley. If the employee's communication does not disclose conduct that might harm investors, the employee is not helping to eliminate fraud against shareholders. An expansive reading of the non-retaliation provision would therefore enlarge the statute beyond the boundaries delineated by Congress, covering employees who are not performing the whistleblowing function contemplated by Congress, and expending scarce adjudicatory and enforcement resources on matters unrelated to the purpose of the statute.

Practical considerations also support limiting protected activity to communications material to shareholders. Extending the SOX non-retaliation provision to cover allegations that do not implicate the securities fraud concerns of Sarbanes-Oxley would sweep into the non-retaliation provision a broad array of workplace disputes. To illustrate, an employee could bootstrap any allegation of wrongdoing by corporate employees (for example, theft of office supplies, misuse of company property, or inappropriate behavior by corporate executives) into a

Sarbanes-Oxley whistleblower claim merely by framing such complaints in terms of mail or wire fraud. Publicly-held companies and their subsidiaries would be unable to take any adverse action against any employee who challenged a corporate practice without fear of litigation under Sarbanes-Oxley. OSHA, the Office of Administrative Law Judges, the Board, and the federal courts would be inundated with whistleblower claims that have little, if any, discernable connection to shareholder fraud, making it increasingly difficult to provide timely relief to meritorious claimants. The costs of interpreting the non-retaliation provision in Sarbanes-Oxley to be a catch-all wrongful-termination provision require that any judgment about expanding the statute in this manner be made by Congress.

As noted above, enlarging the scope of the non-retaliation provision would render many other federal whistleblower protection provisions superfluous. *See supra* note 2. Indeed, in the Dodd Frank Act, Congress created a new whistleblower protection for employees who provide certain information, provide certain forms of assistance, or make disclosures that are required or protected under the Sarbanes-Oxley Act, the Securities Exchange Act of 1934, 18 U.S.C. § 1513(e), and any other law, rule, or regulation subject to the SEC's jurisdiction. Dodd Frank § 922(h). If Sarbanes-Oxley already covered disclosures unrelated to fraud against shareholders, this new protection would not have been necessary. The correct conclusion, therefore, is that the Board's prior interpretation of Sarbanes-Oxley correctly limited its application to whistleblowing related to shareholder fraud.

In addition, expanding the scope of SOX protected activity would impermissibly alter the nature of at-will employment beyond the intent of Congress. The basic principle of at-will employment is that an employee may be terminated for a "'good reason, bad reason, or no reason at all.'" *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 606 (2008). Ordinary dismissals,

accordingly, are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. *Id.* at 606. Congress and the States have made exceptions to at-will employment with various specific statutes protecting employees from discharge for impermissible reasons. *See id.* at 606-07 (discussing at-will employment of public sector employees). Such statutory exceptions should be narrowly construed so as not lead to undue judicial interference in employment practices and invalidate at-will employment. "[E]mployment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Id.* at 604. The employment-at-will doctrine would be subverted if any employee subject to a personnel action who had reported some form of wrongdoing could conjure up a claim of retaliation to second guess an employer's reasons for terminating or otherwise disciplining the employee. *See id.* at 608.

Finally, the ALJ correctly recognized that concerns with the reporting of clinical data do not justify relief under Sarbanes-Oxley. *See* Slip Op. at 11. The FDA, the administrative agency with primary regulatory authority over clinical drug trials, has promulgated requirements governing the conduct and data produced from a clinical drug trial. *See* Federal Food and Drug Administration, Running Clinical Trials, http://www.fda.gov/ScienceResearch/SpecialTopics/RunningClinicalTrials/default.htm (last visited Dec. 22, 2010). As the ALJ noted, inaccurate reporting of data collected in clinical drug trials could constitute a violation of the FDA's regulations or, perhaps, a violation of federal statutes. *See* Slip Op. at 10 n.5. If alerted to fraudulent clinical practices, the FDA can investigate, require corrective action, or impose administrative or criminal penalties. But the complainants' reports failed to establish a sufficient connection to shareholders' interests and fraud against shareholders to support a Sarbanes-Oxley

whistleblower claim. The decision of the ALJ granting the respondent's motions to dismiss the complaints therefore should be affirmed.

II. A SOX Complaint Is Subject To Pre-Hearing Dismissal By An Administrative Law Judge Pursuant To The Pleading Requirements Of The Federal Rules Of Civil Procedure

Motions to dismiss perform a critical gate-keeping role in federal and state courts by halting litigation where a plaintiff lacks plausible, specific factual allegations that, if proven, would give rise to a cause of action. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007). The U.S. Supreme Court has clarified that, "[t]o survive a motion to dismiss [for failure to state a claim], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949 (internal quotation marks omitted). "A claim has facial plausibility," the Court explained, "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Such motions are similarly beneficial in the administrative adjudication process. Removing frivolous claims from the system permits potentially meritorious claims to proceed more rapidly. The Department of Labor's time and resources may be devoted to more deserving claims. Moreover, the agency's judgments about the statute will engender more deference if whistleblower proceedings are conducted pursuant to established, fair, court-like procedures. Furthermore, employers have a strong interest in not having to bear the burden of full discovery and hearings relating to groundless complaints. Thus, the interests of the parties, the public, and the government are best served by permitting pre-hearing dismissal of groundless complaints.

The regulations implementing Sarbanes-Oxley, contained in 29 C.F.R. Part 1980, contemplate pre-hearing dismissal of a non-meritorious complaint. As an initial matter, the implementing regulations specifically provide that a complaint "should include a full statement

of the acts and omissions, with pertinent dates, which are believed to constitute the violations." 29 C.F.R. § 1980.103(b). OSHA may dismiss a complaint "unless the complainant has made a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint." 29 C.F.R. § 1980.104(b).

Similarly, an ALJ, like OSHA, may dismiss a complaint before proceeding to a full adjudicative hearing. The complaint—either in the form filed with OSHA or as amended upon commencement of proceedings before the ALJ—is properly subject to pre-hearing dismissal by an ALJ on a motion for summary decision pursuant to 29 C.F.R. § 18.40 or on a motion to dismiss.

The Rules of Practice and Procedure for Administrative Hearings before Administrative Law Judges contained in 29 C.F.R. Part 18 contain no specific provision for evaluating a motion to dismiss. The Rules of Practice and Procedure instruct that, in situations not addressed in the Rules, any statute, executive order, or regulation, the Rules of Civil Procedure for the District Courts of the United States "shall be applied." 29 C.F.R. § 18.1; s*ee Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007) (noting that Congress's use of word "shall" connotes mandatory obligations).

Because the Rules of Practice and Procedure for Administrative Hearings do not specifically address a motion to dismiss, motions to dismiss are reviewed in administrative hearings under Federal Rule of Civil Procedure 12(b). *See, e.g., Neuer v. Bessellieu*, No. 07-036, at 4 (ARB Aug. 31, 2009) ("The rules governing hearings in whistleblower cases contain no specific provisions for dismissing complaints for failure to state a claim upon which relief may be granted. It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims."); *Powers v. Paper,*

Allied-Industrial, Chemical & Energy Workers Int'l Union (Pace), No. 04-111, at 8-9 & n.16 (ARB Aug. 31, 2007) (same) (citing cases). Federal Rule of Civil Procedure 12(b) authorizes, among others, both types of motions to dismiss made in this case: a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

Reviewing motions to dismiss in administrative hearings on the same terms as Federal Rule of Civil Procedure 12(b) will inure to the benefit of the government and the litigants. As previously discussed, employees blowing the whistle on shareholder fraud will obtain faster relief if non-meritorious claims are culled from the system.

Moreover, agency judgments resulting from court-like procedures will carry more weight with courts. On review in the United States Courts of Appeals, a record and decision produced according to the adjudicative process familiar to judges will be of most assistance to them as they review the agency's action. In this way, allowing for the dismissal of groundless complaints under the pleading standards of the Federal Rules of Civil Procedure will give added force to the agency's substantive judgments about the statute.

Finally, notions of fundamental fairness also militate in favor of allowing a respondent to file a pre-hearing motion to dismiss based on the pleading requirements of the Federal Rules of Civil Procedure and interpretive case law. The respondent has a substantial interest in having groundless complaints dismissed at the earliest possible stage of litigation. *See Iqbal*, 129 S.Ct. at 1953-54; *Twombly*, 550 U.S. at 558-59. The employers' interest in avoiding the burdens of litigation requires a meaningful opportunity to seek pre-hearing dismissal of an inadequate pleading. The opportunity to resolve a complaint administratively is of little value if an employer cannot avoid the time and expense of needlessly defending itself at an administrative

hearing from "a claim just shy of a plausible entitlement to relief." *Twombly*, 550 U.S. at 559. It is no answer to say that a claim can be dismissed after a hearing or once it reaches federal court. *See id.* at 559. It would be waste of resources for the parties and the Department if a full hearing on the merits were held for claims that could have been resolved on the papers. Accordingly, upon request for a hearing, the respondent must be given a full and fair opportunity to defend its interests before the ALJ, including by filing a motion to dismiss a meritless complaint.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States of America respectfully requests that the Board affirm the decision of the Administrative Law Judge.

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