

UNFULFILLED EXPECTATIONS:
AN EMPIRICAL ANALYSIS OF WHY SARBANES-OXLEY
WHISTLEBLOWERS RARELY WIN

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ABSTRACT

Scholars praise the whistleblower protections of the Sarbanes-Oxley Act of 2002 as one of the most protective anti-retaliation provisions in the world. Yet, during its first three years, only 3.6% of Sarbanes-Oxley whistleblowers won relief through the initial administrative process that adjudicates such claims, and only 6.5% of whistleblowers won appeals through the process. This Article reports the results of an empirical study of all Department of Labor Sarbanes-Oxley determinations during this time, consisting of over 700 separate decisions from administrative investigations and hearings. The results of this detailed analysis demonstrate that administrative decision-makers strictly construed, and in some cases misapplied, Sarbanes-Oxley's substantive protections to the significant disadvantage of employees. These data-based findings assist in identifying the provisions and procedures of the Act that do not work as Congress intended as well as suggest potential remedies for these statutory and administrative deficiencies.

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I. INTRODUCTION

Whistleblowers played a significant role in revealing and disrupting corporate malfeasance at the beginning of the 21st Century, as scandals at corporations such as Enron and WorldCom came to public light through the efforts of whistleblowing employees.¹ Subsequently, Congress recognized the importance of whistleblowing and included strong and unprecedented anti-retaliation protection for corporate employees as part of the Sarbanes-Oxley Act of 2002, the mammoth Congressional reaction to these corporate scandals.²

Yet, in the first three years after the statute’s enactment, the Act failed to protect the vast majority of employees who filed a Sarbanes-Oxley retaliation claim. During this time, 491 employees filed Sarbanes-Oxley complaints with the Occupational Safety and Health Administration (OSHA), the agency charged with initially investigating such complaints.³ OSHA resolved 361 of these cases, and found for employees

¹ See Richard E. Moberly, *Sarbanes-Oxley’s Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1117-19, 1123-24 (2006) (describing successful whistleblowing efforts).

² See Sarbanes-Oxley Act of 2002, § 806, 18 U.S.C. § 1514A (Supp. 2004).

³ See Table 3 *infra* Part IV.A.

only 13 times, a win rate of 3.6%.⁴ On appeal from 93 OSHA decisions, Administrative Law Judges (ALJs) in the Department of Labor found in favor of 6 employees, a win rate of 6.5%.⁵

This Article presents the findings of an empirical analysis of these Sarbanes-Oxley administrative decisions to explore why the Act's protections did not produce a robust number of employee victories. The results indicate that employees rarely won claims for two primary reasons. First, OSHA and the ALJs generally decided cases as a matter of law and rigidly construed Sarbanes-Oxley's legal requirements.⁶ Second, for cases that survived this strict legal scrutiny during the initial OSHA investigation, OSHA tended to misapply Sarbanes-Oxley's burden of proof to the detriment of employees.⁷

These findings challenge the hope of scholars and whistleblower advocates that Sarbanes-Oxley's legal boundaries and burden of proof would often result in favorable outcomes for whistleblowers. For example, soon after the Act's enactment, Professor Robert Vaughn asserted that the statute "may be the most important whistleblower protection law in the world."⁸ Tom Devine, the legal director for the Government Accountability Project, a whistleblower advocacy group, described the Act as "the promised land [T]he law represents a revolution in corporate freedom of speech [that] far surpasses, indeed laps, the rights available for government workers."⁹ Taxpayers Against Fraud called the statute "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."¹⁰

The language of Sarbanes-Oxley's anti-retaliation protections justified this initial reaction. Prior to Sarbanes-Oxley, millions of workers were protected from retaliation for revealing corporate wrongdoing only sporadically, if at all.¹¹ The Act now purports to protect these workers by providing significant remedies for retaliation against corporate whistle-

⁴ See Table 1 *infra* Part IV.A.

⁵ See *id.*

⁶ See discussion *infra* Part IV.B.2.

⁷ See discussion *infra* Part IV.B.3.

⁸ Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 105 (2005); see also STEPHEN M. KOHN, ET AL., WHISTLEBLOWER LAW xii (2004) (labeling Sarbanes-Oxley's whistleblower provision "the most systematic whistleblower protection framework enacted into federal law"); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUMBIA L. REV. 319, 376 (2005) (calling the provision the "gold standard" of whistleblower protection); but see Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1034 (2004) (concluding that Sarbanes-Oxley is a "half-measure" and not the true reform that securities law needs to respond to corporate fraud).

⁹ *Blowing the Whistle on Corporate Wrongdoing: An Interview with Tom Devine*, 23 MULTINATIONAL MONITOR (2002), available at <http://multinationalmonitor.org/mm2002/02oct-nov/octno02interviewdevine.html>. Additionally, Gregory Watchman, the Executive Director of the Government Accountability Project, characterized the provisions as a "major breakthrough in establishing whistleblower rights." Gregory R. Watchman, *Sarbanes-Oxley Whistleblowers: A New Corporate Early Warning System*, at 8 (Nov. 2004), available at <http://www.whistleblower.org/doc/GAP%20Analysis%20Sarbanes%2DOxley%2Epdf>.

¹⁰ S. REP. NO. 107-146, at 10 (2002).

¹¹ See *infra* text accompanying notes 32-36; Vaughn, *supra* note 8, at 11-12.

blowers, including non-economic damages and reinstatement.¹² Moreover, the Congressionally-mandated burden of proof under Sarbanes-Oxley favors employees more than most employment protections.¹³ Indeed, a few early victories for employees sparked outrage from management attorneys, who argued that Sarbanes-Oxley's protections were too broad and overly burdensome for employers¹⁴—a sign that perhaps the Act provided real protections for whistleblowers.

Despite Sarbanes-Oxley's pro-whistleblower provisions and a few early employee victories, however, administrative decisions over the first three years of the Act's life failed to fulfill Congress' expectation that a strong anti-retaliation provision would both encourage and protect whistleblowers. This Article explains why.

Part II of the Article provides a brief summary of Sarbanes-Oxley's substantive and procedural requirements. Part III summarizes the scope and methodology of my empirical study examining why employees rarely won Sarbanes-Oxley cases. This study examined *all* Department of Labor Sarbanes-Oxley cases filed and resolved during the first three years of Sarbanes-Oxley's existence, totaling over 700 separate decisions from two levels of administrative investigations and hearings. As explained in Part III, the scope of this study differs from previous empirical studies of employment cases in two fundamental ways. First, rather than rely only on published decisions to comprise a sample of examined cases,¹⁵ this

¹² See 18 U.S.C. § 1514A(c) (Supp. 2004).

¹³ To prove a *prima facie* case of retaliation under Sarbanes-Oxley, employees must demonstrate by a preponderance of evidence that retaliation for engaging in protected activity was a "contributing" factor to their adverse employment action. See *infra* text accompanying notes 50-52. To rebut a *prima facie* case, an employer must show by clear and convincing evidence that it would have made the same employment decision in the absence of any employee protected activity. See *id.*

¹⁴ See Cathleen Flahardy, *SOX Gives DOL Power to Reinstate Whistleblowers: Employers Struggle to Defend Themselves Against Wrongful Termination Claims*, CORP. LEGAL TIMES, Aug. 2005, at 24 (stating that one ALJ employee win demonstrates "how difficult it will be for companies to prove their cases in whistleblower suits under Sarbanes-Oxley"); Mary E. Pivec, *Whistleblower Protection Pitfalls: Innocent Companies are Drained in Defending Adverse-Action Claims*, LEGAL TIMES, Apr. 18, 2005, at 28; Michael Starr & Adam J. Heft, *Whistleblower Protections and the Sarbanes-Oxley Act*, N.Y. L.J., April 4, 2005, at 12 (discussing three early ALJ decisions in favor of the employee and concluding that "[b]ased on these [early] decisions, SOX may reach a broader range of conduct and provide a more potent array of remedies than most employers had anticipated."). Two management attorney commentators concluded that one ALJ decision in favor of an employee "looms as a foreboding omnipresence to employers who were hoping for a restrictive interpretation" of Sarbanes-Oxley. See Starr & Heft, *supra*, at 12; see also John B. Chiara & Michael D. Orenstein, *Note: Whistler's Nocturne in Black and Gold-The Falling Rocket: Why the Sarbanes-Oxley Whistleblower Provision Falls Short of the Mark*, 23 HOFSTRA LAB. & EMP. L.J. 235, 267 (2005) ("Sarbanes-Oxley's whistleblowers have an easier time gaining protection than do employees under other whistleblower acts. . . . [W]hat remains to be seen is whether the employer has been placed in too vulnerable a position.").

¹⁵ See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 103-04 (1999) [hereinafter *Windfall*]; Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 244 (2001) [hereinafter *Winning*]; Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 556 (2001); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 532 (2003);

study collected all administrative decisions involving Sarbanes-Oxley's anti-retaliation provision. Data from this census of cases allows stronger inferences than data derived from a sample of published cases.¹⁶ Second, some previous employment law studies relied upon data collected by the government; while such data sets contain a large number of cases, analyses usually produce only general outcome or procedural data about each case.¹⁷ By contrast, this study involved in-depth coding of decisions to obtain detailed data that permitted nuanced analyses of the rationales provided by decision-makers in their determinations.¹⁸ The breadth of data produced by a census of cases and the depth of data resulting from the coding process permitted a truly comprehensive analysis of Sarbanes-Oxley's administrative decisions.

Part IV of the Article presents the study's results. The first section describes the low employee win rate at the two different levels of administrative review—the initial investigation conducted by OSHA and any subsequent hearing before an ALJ. The second section analyzes the rationales OSHA and the ALJs provided when finding for the employer and examines whether the employee lost because (1) the employee violated a “procedural” rule, such as the statute of limitations; (2) the employee's claim failed as a matter of law for not fitting within Sarbanes-Oxley's legal “boundaries”; or (3) the decision-maker determined that the case did not have sufficient “factual” merit, e.g., that the employee's whistleblowing *caused* any adverse employment action.

The analysis in Part IV provides two explanations for Sarbanes-Oxley's low employee win rate. First, employees frequently lost because OSHA and the ALJs determined that a large number of employees either violated a procedural rule or did not meet Sarbanes-Oxley's statutory requirements as a matter of law. Thus, OSHA and the ALJs rejected a large percentage of cases (71.0% for OSHA, 95.2% for ALJs) for failing to fit within the exact legal parameters of a Sarbanes-Oxley claim, thereby avoiding any determination of the factual merits of an employee's allegations.¹⁹ This strict legal scrutiny may have many causes; I posit that it likely resulted from the push and pull of defining a new statute's boundaries. Employees, perhaps relying on expectations generated by scholars and whistleblower advocates, brought claims that tested the boundaries of this new statute. Administrative decision-makers responded by interpreting ambiguous provisions of the statute narrowly.

Second, for the few cases that survived this strict scrutiny (meaning that a decision-maker determined that the case fell within the legal “boundaries” of a Sarbanes-Oxley claim), employees often lost because OSHA misapplied Sarbanes-Oxley's burden of proof. Despite a burden

Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 897-99 (2006).

¹⁶ See discussion *infra* Part III.

¹⁷ See, e.g., Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMP. L. STUD. 429, 429-30 (2004); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 687-701 (2005).

¹⁸ See discussion *infra* Part III.

¹⁹ See discussion *supra* Part IV.B.1.

of proof clearly favorable to employees, OSHA decided in favor of the employee in only 12.1% of the cases in which it evaluated the factual merits of an employee's allegations. By contrast, when ALJs adjudicated the facts of a whistleblower claim, employees won 55.6% of the time. I suggest that OSHA's regulations and budgetary restraints contributed to its failure to apply Sarbanes-Oxley's burden of proof appropriately.

In Part V, based on the findings of this study, I offer suggestions for statutory changes and interpretations that would better reflect Congress' goals of protecting whistleblowers and remedying retaliation. First, fully one-third of all employees who lost at the ALJ Level and 18% who lost at the OSHA Level lost because the employee failed to satisfy Sarbanes-Oxley's short 90-day statute of limitations.²⁰ Because this procedural issue has little to do with the substantive merits of the whistleblower's claim, I suggest extending this statute of limitations to a minimum of 180 days.²¹ This extension will make the Act's limitations period similar to those found in equivalent whistleblower protections statutes and also should provide a more reasonable period of time for whistleblowers to file complaints.

Second, when OSHA and the ALJs interpreted certain provisions of the Act that define the legal "boundaries" of the Act's coverage, these administrative decision-makers strictly examined two areas in particular: whether the Respondent was a "covered employer" and whether the employee engaged in "protected activity." Part V recommends statutory changes that could be implemented to address the overly-rigid administrative scrutiny in these two areas.²² For example, Sarbanes-Oxley currently applies only to employees of publicly-traded corporations. I recommend that the Act apply to employers with a specific number of employees, which would clarify the Act's applicability by importing a well-known standard from other employee protection statutes. Furthermore, I suggest amending the scope of an employee's "protected activity." The Act currently protects only employees who disclose illegalities related to six specific areas of federal law. I suggest amending the Act to protect whistleblowers who report any unlawful activity by their employer. Alternatively, I suggest that OSHA and the Office of Administrative Law Judges publicize and disseminate certain statistical and substantive information about Sarbanes-Oxley cases in order to clarify their interpretations of the Act's legal protections and to moderate any bias toward a particular party.

Third, the Act's employee-friendly burden of proof needs to be revitalized by altering OSHA's investigative procedures and providing OSHA more investigative resources.²³ As an alternative, I suggest removing OSHA from its current investigative role and replacing OSHA's process with one of three substitutes: permitting whistleblowers to file claims directly in federal court; beginning the Sarbanes-Oxley administrative process with hearings before an ALJ rather than with an OSHA

²⁰ See Table 4 *infra* Part IV.B.

²¹ See discussion *infra* Part V.A.

²² See discussion *infra* Part V.B.

²³ See discussion *infra* Part V.C.

investigation; or giving OSHA's investigative responsibilities to another agency, such as the Securities and Exchange Commission.²⁴ Any of these options could address OSHA's current misapplication of the Act's burden of proof scheme.

Ultimately, Sarbanes-Oxley failed to fulfill the great expectations generated by the Act's purportedly-strong anti-retaliation protections. Examining the reasons for this failure can provide insight to improve the Act. Specifically, the results suggest an urgent need for a legislative and administrative reevaluation of Sarbanes-Oxley's anti-retaliation provision. The under-enforcement of this provision undermines Congress' policy goal of deterring corporate fraud and leaves literally millions of private-sector employees vulnerable to retaliation. Moreover, the study's findings can provide general lessons for the drafters of future whistleblower protection efforts and should serve as a reminder of the difficulty of transferring the idealistic legislative goal of broad employee protection into realistic rights and attainable remedies.

II. SARBANES-OXLEY'S WHISTLEBLOWER PROVISIONS: A SHORT OVERVIEW

In Congressional hearings investigating the stunning collapse of Enron in 2002, whistleblower Sherron Watkins revealed crucial details regarding Enron's fraudulent activities.²⁵ In later hearings regarding WorldCom's subsequent collapse, testimony from WorldCom officers demonstrated that an internal auditor named Cynthia Cooper discovered the massive fraud orchestrated by the company's Chief Financial Officer and reported it to the board of directors.²⁶ Given the importance of such employee disclosures, Congress considered it necessary to break the "corporate code of silence" that discouraged potential whistleblowers from coming forward.²⁷ Accordingly, Sarbanes-Oxley contains several provisions aimed at encouraging employees to disclose information about corporate wrongdoing.

First, and most prominently,²⁸ Congress created an anti-retaliation provision to protect whistleblowers from adverse employment actions.²⁹

²⁴ See *id.*

²⁵ See *The Financial Collapse of Enron – Part 3: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy & Commerce*, 107th Cong. 14–66 (2002) (testimony of Sherron Watkins).

²⁶ See *Statement of John W. Sidgmore, Pres. & CEO, WorldCom, Inc. Before the Committee on Financial Services, U.S. House of Representatives*, at 2 (July 8, 2002), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/worldcom/70802jstst.pdf>.

²⁷ S. REP. NO. 107-146, at 4-5 (2002).

²⁸ With regard to whistleblower encouragement, academic and public attention has focused primarily on Sarbanes-Oxley's anti-retaliation provisions. See, e.g., KOHN, ET AL., *supra* note 8; Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act*, 76 ST. JOHN'S L. REV. 875 (2002); Cherry, *supra* note 8; Vaughn, *supra* note 8; Ashlea Ebeling, *Blowing the Sarbanes-Oxley Whistle*, FORBES.COM (June 18, 2003), available at http://www.forbes.com/2003/06/18/cx_ae_0618beltway_print.html.

²⁹ The anti-retaliation provision is Section 806 of the Corporate and Criminal Fraud Accountability Act, which was included as Title VIII of the Sarbanes-Oxley Act of 2002. See Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A (Supp. 2004).

Second, Sarbanes-Oxley also contains criminal penalties for individuals who retaliate against employees who “blow the whistle” to law enforcement authorities about violations of federal law.³⁰ Third, the Act requires that corporations create a whistleblower disclosure channel for employees to report misconduct anonymously to the corporate board of directors.³¹ This Article focuses on Sarbanes-Oxley’s anti-retaliation provision.

A. The Anti-Retaliation Protections of the Act

Congress viewed the anti-retaliation protections as particularly important because, at the time, federal and state laws failed to protect employees consistently if they reported corporate malfeasance. Rather, corporate whistleblowers were “subject to the patchwork and vagaries of current state laws, although most publicly traded companies do business nationwide.”³² Prior to Sarbanes-Oxley, protections for whistleblowers varied by the state in which the employee worked³³ and the type of retaliation which the employee endured.³⁴ Federal law protected only whistleblowers who reported certain types of violations in certain industries.³⁵ Thus, employees had difficulty predicting whether they would be protected from retaliation as a result of reporting wrongdoing. Needless to say, this difficulty discouraged employees from consistently coming forward with information.³⁶

The protections of Sarbanes-Oxley’s anti-retaliation provision purport to address some of these problems. First, to address the “patchwork of state laws,” Sarbanes-Oxley applies nationally to employees of all publicly-traded companies. The Act’s coverage extends beyond a particular industry and reaches all companies that issue publicly-traded shares.³⁷

³⁰ See *id.* § 1107, 18 U.S.C. § 1513(e) (Supp. 2004).

³¹ See *id.* § 301, 15 U.S.C. § 78j-1(m)(4)(A) (Supp. 2004); see generally Moberly, *supra* note 1 (analyzing this provision as a method of encouraging whistleblowers).

³² S. REP. NO. 107-146, at 10 (2002).

³³ States vary widely in the type of protections they provide. Some states, like Georgia, provide little protection to employee whistleblowers. See GA. CODE ANN. § 34-7-1 (2005) (at-will employment provision); *Goodroe v. Ga. Power Co.*, 251 S.E.2d 51, 52 (Ga. Ct. App. 1978) (finding that Georgia’s employment-at-will statute permitted employer to fire employee because employee was about to uncover criminal activities). Others, like New Jersey, have a broad reaching statute protecting any whistleblower who reports any violation of law. See N.J. STAT. ANN. § 34:19 (2005). As Congress noted, “a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions.” S. REP. NO. 107-146, at 10 (2002).

³⁴ Some laws protect employees only if they are discharged and do not address other forms of retaliation. See, e.g., *White v. State*, 929 P.2d 396, 407 (Wash. 1997) (limiting retaliation suit to cases in which employee was actually or constructively discharged).

³⁵ See, e.g., STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW 79-80 (2001); MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES 233-34 (1992).

³⁶ See Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 17 U. MICH. J.L. REFORM 277, 286 (1983).

³⁷ The Act applies to any “company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)).” 18

Second, to correct the lack of protection for employees who report the type of securities fraud and accounting irregularities that led to the corporate scandals, Sarbanes-Oxley specifically protects employees who engage in protected activity related to fraud. To be protected, the subject matter of the whistleblower's report must relate to violations of one of six different types of laws, many of which are related to securities or accounting fraud.³⁸ The breadth of protected activity related to that topic actually could be quite expansive.³⁹ Employees are protected if they "provide information, cause information to be provided, or otherwise assist in an investigation regarding" such violations.⁴⁰ Further, the whistleblower does not need to report an actual violation of the law; rather, the employee must "reasonably believe" that a violation occurred.⁴¹ The employee can provide information to any one of numerous recipients: a federal regulatory or law enforcement agency; any Member of any committee of Congress; or a person with "supervisory authority" over the whistleblower.⁴² The Act protects a whistleblower who files, causes to be filed, testifies, participates in, or otherwise assists in a proceeding related to violations of the same laws and regulations.⁴³

Finally, the remedies for a violation of the Act seem appropriately set to discourage retaliation. OSHA may immediately reinstate a whistleblower if an initial OSHA investigation finds reasonable cause to believe retaliation occurred.⁴⁴ In addition to the standard back-pay award, whistleblowers also receive special damages, including attorneys' fees, litigation costs, and expert witness fees.⁴⁵

B. The Procedure for Filing a Whistleblower Complaint

Congress specifically incorporated into Sarbanes-Oxley the procedural rules of the Wendell H. Ford Aviation Investment and Reform Act

U.S.C. § 1514A(a) (Supp. 2004). The Act also applies to any "officer, employee, contractor, subcontractor, or agent of such company." *See id.*

³⁸ The statute protects activity related to violations of sections 1341 (mail fraud); 1343 (wire fraud); 1344 (bank fraud); and 1348 (securities fraud) of Title 18 of the U.S. Code, or "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." *Id.* § 1514A(a)(1); *see also id.* § (a)(2).

³⁹ *See Vaughn, supra* note 8, at 22-50 (discussing broad readings of Sarbanes-Oxley's statutory language); *see also* discussion *infra* Part V.B (supporting a broad reading of this language).

⁴⁰ 18 U.S.C. § 1514A(a)(1) (Supp. 2004).

⁴¹ *See id.* This standard is more protective of employees than other courts and statutes that require a whistleblowing employee to be correct in their disclosure of illegal activity. *See, e.g., DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655 (9th Cir. 1992); *Bordell v. General Elec. Co.*, 667 N.E.2d 922 (N.Y. 1996).

⁴² 18 U.S.C. § 1514A(a)(1) (Supp. 2004).

⁴³ *Id.* § 1514A(a)(2).

⁴⁴ *See id.* § 1514A(c)(2)(A); 29 C.F.R. § 1980.105(a)(1) (2006); *see also Vaughn, supra* note 8, at 94 n.400 (noting benefits of reinstatement as a remedy).

⁴⁵ *See* 18 U.S.C. § 1514A(c)(2)(B) & (C) (Supp. 2004); *see also KOHN, supra* note 8, at 111 (noting that Sarbanes-Oxley is one of only four federal statutes that permit recovery of attorney fees as part of "special damages" that must be awarded, as opposed to as part of a fee-shifting scheme that gives courts discretion to deny the payment of reasonable attorneys' fees to an employee).

for the 21st Century,⁴⁶ also known as “AIR21,” which provides whistleblower protection for employees who report airline safety problems.⁴⁷ Consequently, Congress charged OSHA with the responsibility for investigating Sarbanes-Oxley whistleblower complaints.⁴⁸ Subsequent to the passage of Sarbanes-Oxley, OSHA issued specific regulations that detail the procedure for such whistleblower claims and that, for the most part, mirror AIR21’s procedures.⁴⁹

After an employee files a complaint with OSHA, the agency informs the named Respondents and the SEC of the allegation.⁵⁰ OSHA will dismiss the complaint without any investigation, under two conditions. First, OSHA will dismiss complaints that do not make a *prima facie* showing of retaliation that: (1) the employee engaged in protected activity; (2) the employer knew about the activity; (3) the employee suffered an unfavorable personnel action; and (4) the “circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.”⁵¹ Second, if an inference of retaliation can be drawn, then OSHA will dismiss a complaint if the employer demonstrates by clear and convincing evidence that the adverse employment action would have been taken regardless of the protected activity.⁵² The employer has twenty days from receiving notice of the complaint to provide statements or documents presenting its position.⁵³

If an employee presents a *prima facie* case and the employer fails to meet its clear and convincing burden of proof, then OSHA will conduct an investigation.⁵⁴ The regulations require OSHA to issue written findings from the investigation within 60 days of the filing of the complaint

⁴⁶ Pub. L. No. 106-181, 114 Stat. 61 (Apr. 5, 2000) (codified in scattered sections of 49 U.S.C.).

⁴⁷ See *id.*; 18 U.S.C. § 1514A(b)(2)(A) (Supp. 2004) (providing that, with few exceptions, Sarbanes-Oxley whistleblower actions “shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code”).

⁴⁸ Commentators initially questioned whether OSHA, an agency mainly responsible for workplace safety, could adequately investigate claims involving “complex matters of corporate securities laws and other financial and accountancy laws and practices.” Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 [hereinafter Procedures], 69 Fed. Reg. 52104, 52104 (Aug. 24, 2004); see also Cherry, *supra* note 8, at 1083 n.383 (questioning the choice of OSHA as Sarbanes-Oxley investigative agency). OSHA defended the choice by noting that it administers thirteen other whistleblower statutes, all of which involve protecting whistleblowers. See Procedures, *supra*, at 52104-05.

⁴⁹ See generally Procedures, *supra* note 48, at 52104-52117.

⁵⁰ See 29 C.F.R. § 1980.104 (2006). The regulations delegate the authority to investigate and issue determinations regarding Sarbanes-Oxley claims to OSHA’s Assistant Secretary. See Secretary’s Order 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002). In the following description of Sarbanes-Oxley’s procedural regulations, I use the convenient (and intuitive) term “OSHA” rather than “Assistant Secretary,” which is used by the regulations, because the Assistant Secretary is acting on behalf of the agency.

⁵¹ See 29 C.F.R. § 1980.104 (2006).

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See 29 C.F.R. § 1980.104 (2006).

regarding whether it finds reasonable cause to believe that retaliation in violation of the Act occurred.⁵⁵

If OSHA finds reasonable cause to believe that a violation occurred, then OSHA “shall” also issue a preliminary order of relief to the employee. This order “shall” include “all relief necessary to make the employee whole, including, where appropriate: reinstatement with the same seniority status that the employee would have had but for the discrimination; back pay with interest; and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney’s fees.”⁵⁶ OSHA may order reinstatement to begin immediately, even if the employer requests further review of the order.⁵⁷ Although such orders appear mandatory given the use of the term “shall,” the regulations provide that reinstatement may not be appropriate if the employer demonstrates that the employee is a “security risk.”⁵⁸ Of course, if reasonable cause is not found, then OSHA simply will notify the parties of that finding.⁵⁹

The parties have thirty days to request further review from an Administrative Law Judge; otherwise, OSHA’s initial findings and order will become the final order of the Department of Labor.⁶⁰ If a hearing is requested, then an ALJ conducts a *de novo* hearing regarding the complaint.⁶¹ ALJs have broad discretion regarding the extent of discovery permitted and the type of evidence allowed.⁶²

Appeals from an ALJ decision must be made within ten days of the decision to the Department of Labor’s Administrative Review Board (ARB).⁶³ The ARB has discretion to take the case for review; if it has not done so within thirty days of the decision, then the ALJ’s decision will become the final determination of the agency.⁶⁴ The ARB reviews the ALJ’s determination under the “substantial evidence” standard, and has 120 days from the conclusion of the ALJ hearing to issue a final decision.⁶⁵ Appeals from an ARB decision are made to a federal circuit court of appeals.⁶⁶

Finally, the Act gives whistleblowers the option of filing a claim in federal court. Sarbanes-Oxley permits employees (not employers) to remove the case to federal district court if the Department of Labor does not completely resolve a complaint within 180 days, including a decision by the ARB if appropriate.⁶⁷ This option almost certainly will be available for employees, because it is unlikely that the entire process will be com-

⁵⁵ See *id.* § 1980.105.

⁵⁶ *Id.*

⁵⁷ See *id.*

⁵⁸ *Id.*

⁵⁹ See *id.*

⁶⁰ See *id.* § 1980.106(b)(2).

⁶¹ See *id.* § 1980.107(b).

⁶² See *id.* §§ 1980.107(c); (d).

⁶³ See *id.* § 1980.110.

⁶⁴ See *id.* § 1980.110(b).

⁶⁵ See *id.* § 1980.110(b); (c).

⁶⁶ See *id.* § 1980.112(a).

⁶⁷ See 18 U.S.C. § 1514A(b)(1)(B) (Supp. 2004).

pleted in that period of time: in Fiscal Year 2005, the initial OSHA investigation itself took an average of 127 days to complete.⁶⁸

As written, Sarbanes-Oxley appears to provide strong substantive and procedural protections for whistleblowers. The Act includes favorable provisions for whistleblowers to file claims easily, to benefit from a favorable burden of proof, to obtain immediate reinstatement, and to file in federal court if desired. Why, then, did so few employees win during the first three years of the Act's existence? The purpose of the present study was to empirically analyze OSHA and ALJ decisions to discover patterns of decision-making that, at least in part, answer this question.

III. STUDY METHODOLOGY

This section summarizes the study's methodology,⁶⁹ which differs from previous empirical studies of employment law decisions in areas such as sexual harassment,⁷⁰ the Americans with Disabilities Act,⁷¹ race discrimination,⁷² general employment discrimination cases in federal court,⁷³ and California jury verdicts in employment discrimination and wrongful discharge cases⁷⁴. These studies obtained their data either by examining published judicial decisions⁷⁵ (the "Westlaw" approach) or by utilizing an outcome database managed by a federal agency⁷⁶ (the "Database" approach). Professors Kevin Clermont and Theodore Eisenberg describe these methods as the two most commonly employed of the three types of empirical legal studies currently being conducted.⁷⁷ Professors Clermont and Eisenberg, however, reserve their highest praise for the third type of empirical study they identify—a study in which researchers

⁶⁸ See E-mail from Nilgun Tolek, Director, OSHA Office of Investigative Assistance, to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (Feb. 15, 2006) (on file with author). This time period has grown significantly longer since the enactment of OSHA: in Fiscal Year 2003, the average length of a Sarbanes-Oxley investigation was 92 days. See *id.*; see also *Allen v. Stewart Enterp.*, No. 05-059 (ARB Aug. 17, 2005), at 3 n.5 (noting that employees dismissed their appeal in order to file in federal district court and stating that "[a]s is the usual case, the 180-day period for deciding the case had expired before the employees filed their petition with the Board").

⁶⁹ A more detailed description of the study's methodology can be found at the author's website: <http://law.unl.edu/inside.asp?d=faculty&id=28>.

⁷⁰ See Julianio & Schwab, *supra* note 15, at 549-50.

⁷¹ See Colker, *Windfall*, *supra* note 15, at 103-04; Colker, *Winning*, *supra* note 15, at 244.

⁷² See Parker, *supra* note 15, at 893.

⁷³ See Clermont & Schwab, *supra* note 17, at 429; Nielsen & Nelson, *supra* note 17, at 664.

⁷⁴ See Oppenheimer, *supra* note 15, at 538.

⁷⁵ See, e.g., Colker, *Windfall*, *supra* note 15, at 103-04 (utilizing Westlaw to find published opinions); Colker, *Winning*, *supra* note 15, at 244 (Westlaw); Julianio & Schwab, *supra* note 15, at 556 (utilizing Westlaw to find published opinions); Oppenheimer, *supra* note 15, at 532 (utilizing California jury verdict reporters); Parker, *supra* note 15, at 897-99 (Westlaw).

⁷⁶ See, e.g., Clermont & Schwab, *supra* note 17, at 429-30 (utilizing Administrative Office data); Nielsen & Nelson, *supra* note 17, at 687-91 (utilizing EEOC statistics); *id.* at 692-701 (utilizing Administrative Office data).

⁷⁷ See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 125-26 (2002).

gather their own dataset from original sources for subsequent statistical analysis.⁷⁸ The study presented in this Article follows this third, and less well-traveled, path described by Professors Clermont and Eisenberg. Although more labor intensive, the third path offers significant advantages over the other two methods.

Complete Census vs. Sampling. First, this study evaluates “broader” data than typically mined by the Westlaw approach. The Westlaw method can produce nuanced descriptive data if researchers follow social science methods of coding and analyzing the cases.⁷⁹ However, the data comes from a narrow pool of cases, because the cases available on a database such as Westlaw represent a non-representative fraction of the cases actually decided by agencies and courts.⁸⁰ This well-documented “tip of the iceberg” limitation produces data with limited breadth, from which researchers can only draw limited inferences to the entire population of cases filed.⁸¹

By contrast, the study described in this Article addressed these limitations by examining *all* decisions issued by OSHA and the Office of Administrative Law Judges under the Sarbanes-Oxley Act. This dataset thus represents what social scientists call a “census” or an entire population of cases—not merely a sample of cases. Analyzing a census resolves the “tip of the iceberg” problem that inherently limits the inferential strength of data obtained only from a commercial database of published decisions.⁸² Thus this Article can draw stronger inferences from the broader dataset of a census than inferences drawn from a sample.

Original Sources vs. Secondary Compilations. Second, this study evaluates “deeper” data than data available through the Database approach. The Database method typically produces data from a broad, comprehensive pool of cases, but the data itself is limited and narrow. For example, the Administrative Office of the Federal Courts maintains a database for all federal cases.⁸³ Scholars generally regard the Administrative Office

⁷⁸ See *id.* at 126.

⁷⁹ See *id.* at 125-26; Parker, *supra* note 15, at 899-900 (describing methodology in which research assistants coded opinions for 61 factors).

⁸⁰ See Clermont & Eisenberg, *supra* note 77, at 125-126 (noting that “published decisions are a skewed sample” of all judicial decisions); Colker, *Windfall*, *supra* note 15, at 103-04 (recognizing this limitation); Colker, *Winning*, *supra* note 15, at 246 (acknowledging the “selection bias” inherent in examining appellate cases by searching Westlaw); Juliano & Schwab, *supra* note 15, at 557 (acknowledging that studying only published judicial opinions “may not be a random sample of all judicial decisions”).

⁸¹ See Peter Siegelman & John J. Donohue, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC’Y REV. 1133, 1144 (1990) (warning researchers that published judicial opinions represent less than fifteen percent of employment discrimination complaints filed); see also Clermont & Eisenberg, *supra* note 77, at 125 (noting that when studying only published opinions, “it is tough to infer truths about the underlying mass of disputes or what lies below disputes”).

⁸² Given that this study examines only cases actually filed under Sarbanes-Oxley, this study gives insight into a much greater part of the “iceberg” of disputes than the Westlaw approach. However, the study does not provide insight into the entire iceberg, i.e., it does not consider disputes in which a case is settled, ignored or otherwise disposed of *before* a formal complaint is filed with OSHA.

⁸³ See Clermont & Schwab, *supra* note 17, at 430.

data as reliable and valid,⁸⁴ but recognize that it provides limited data, typically only about procedural issues and outcomes.⁸⁵ By contrast, this study evaluated the original source of administrative Sarbanes-Oxley decisions: the written decisions themselves. Moreover, this study coded information contained in these decisions using rigorously-applied social scientific methods, thus yielding more nuanced, “deeper” data beyond simply procedural or outcome information. In short, this study produced detailed and complex data, such as the types of factual allegations made by the whistleblower and the rationales used by the decision-maker—data that is not analyzed in studies utilizing the Database method because such information is simply not available for analysis in the government-compiled databases.⁸⁶ Data gathered from original sources, as employed in this study, present a more intricate and thus complete picture of a set of claims and their resolutions than data obtained through the Database method.⁸⁷

Both the Westlaw method and the Database method have strengths and weaknesses. The method used in the research reported in this Article, however, retains the advantages of each of the other two methods while minimizing their corresponding disadvantages. In short, to determine why so few employees succeeded in Sarbanes-Oxley anti-retaliation cases, this study gathered original data that were both broad—covering a census of cases—and deep—including descriptions of the important particulars of the cases.

⁸⁴ See Clermont & Eisenberg, *supra* note 77, at 127-29 (discussing the database’s strengths and weaknesses).

⁸⁵ See *id.* at 127 (noting that the forms used to compile the Administrative Office database include “data regarding the names of the parties, the subject-matter category and the jurisdictional basis of the case, the case’s origin in the district as original or removed or transferred, the amount demanded, the dates of filing and termination in the district court or the court of appeals, the procedural stage of the case at termination, the procedural method of disposition, and, if the court entered judgment or reached decision, the prevailing party and the relief granted”); *id.* at 128 (noting that the Administrative Office data “do not contain many other things one would like to know. They show *no particulars* of each lawsuit”) (emphasis added); *id.* at 129 (“More generally, the Administrative Office’s data are just a bunch of codes about a limited number of case features.”).

⁸⁶ OSHA does collect some data related to its Sarbanes-Oxley decisions; however, the data available to the public is generally limited to outcome data for each case, i.e. whether the Complainant or Respondent won, or if the case was withdrawn or settled. With regard to the ALJs, on April 28, 2005, the Office of Administrative Law Judges stopped compiling statistics for Sarbanes-Oxley cases related to the type of disposition at the ALJ Level. See E-mail from Todd Smyth, Office of Administrative Law Judges, to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (Feb. 15, 2006) (on file with author). Before that date, the OALJ collected only outcome statistics, not the more complex data obtained by this study. See *id.*

⁸⁷ Of course, all studies have limitations. One limitation of relying on written decisions is that the data are derived from what OSHA investigators and ALJs determine is important in a case. See Juliano & Schwab, *supra* note 15, at 558-59 (discussing this limitation). With this limitation in mind, strong inferences can still be drawn in this Article because my analysis focuses on the rationales provided by these decision-makers, thus minimizing the study’s limitation. Nonetheless, the limitation is important to consider when addressing a party’s factual allegations, because these allegations are described through the lens of a decision-maker justifying his or her result. See *id.* at 559 (cautioning that a researcher using data derived from judicial decisions should be “sophisticated and somewhat tentative in the conclusions” drawn from such decisions).

The Specifics. This study examined decisions from the first two levels of Sarbanes-Oxley's administrative process: (1) the initial decision by OSHA, as set forth in a decision letter sent to the parties from the Secretary of Labor (the "OSHA Level"); and (2) if the parties requested a hearing with an Administrative Law Judge, the decision published by the ALJ (the "ALJ Level"). The study included all OSHA Level decisions from the first Sarbanes-Oxley complaint on August 19, 2002 through complaints filed on July 13, 2005 ($n=470$), as well as all decisions from the ALJ Level, from the effective date of the Act through June 1, 2006 ($n=236$). This census of Sarbanes-Oxley decisions involved 491 Complainants at the OSHA Level and 237 Complainants at the ALJ Level.⁸⁸

The study was divided into two phases in which cases from each level (OSHA and ALJ) were analyzed and coded separately on Excel spreadsheets. The cases were coded for numerous variables: 134 variables for OSHA decisions and 121 variables for ALJ opinions.⁸⁹

In general, each level of cases was coded for the following categories of variables:

- *descriptive variables related to the employee*, including gender, whether the employee was represented by an attorney, and the employee's job title;
- *variables describing the allegations made by the employee* related to (1) the type of retaliation allegedly suffered by the employee; (2) the type of protected activity in which the employee alleged to have engaged; (3) the position of the person to whom the employee alleged to have provided information regarding illegal activity; and (4) the type of illegal activity the employee alleged to have reported;
- *outcome variables* identifying whether the case ended in a win for the employee, a win for the employer, a withdrawal by the employee, a settlement, or was sent to arbitration; and
- *variables related to the types of rationales and evidence utilized by the decision-maker* when deciding for either the employee or the employer.

The variables were intended to be "objective," such that, as put by the authors of a previous study in another area of employment law, "well-trained legal professionals should reach the same answers in most cases."⁹⁰

I randomly divided the OSHA and ALJ cases among the coders for coding. For OSHA cases, the selection of cases for each coder included

⁸⁸ The OSHA decisions were obtained from OSHA through a Freedom of Information Act (FOIA) request, while the ALJ decisions were obtained from the website of the Office of Administrative Law Judges. Each ALJ opinion in a Sarbanes-Oxley case is published at <http://www.oalj.dol.gov/LIBWHIST.HTM>.

⁸⁹ A well-regarded study of published sexual harassment court opinions utilized a similar methodology for coding written opinions by decision-makers, although the coding variables used in that study and this study obviously differ. See Juliano & Schwab, *supra* note 15, 555-60.

⁹⁰ See *id.* at 558. The coders for the OSHA cases were two law students who completed their first year of study at a law school in the Midwestern U.S. The coders for the ALJ cases included the two OSHA coders, a recent graduate of that same law school, and the author. I gave the student coders specific instruction on the Act's legal requirements and trained them through repeated practice coding sessions.

the same randomly-selected 52 cases (approximately 10% from each year) to check inter-coder reliability.⁹¹ The coders had 95.82% agreement for their coding of variables for these overlapping cases. The high agreement rate among coders indicates that the coded results are reliable.⁹²

For ALJ cases, the coders had 90.41% agreement for their coding of variables. After correcting for coder input errors and misunderstanding of the coding for two specific variables,⁹³ the coders had 93.97% agreement.⁹⁴ The remaining differences were interpretative, and these differences were resolved through discussion among the coders. The agreed-upon coding became the data used in the study. Again, given the high agreement rate and the discussion regarding the few differences, the coded results for the ALJ cases are also reliable.⁹⁵

Before statistical analyses, I matched OSHA decisions with any subsequent ALJ decision related to the OSHA complaint. I matched cases using employer names⁹⁶ and synchronizing key variables, such as filing dates, decision dates, and case numbers. After this process, 186 cases contained both OSHA and ALJ decisions. Forty-three cases (involving forty-four employees) contained information only from ALJ opinions, while 305 cases contained information only from OSHA decisions.⁹⁷ Thus, the data contained information for 535 employees who filed for relief under Sarbanes-Oxley. The final data spread sheet contained 223 variables across the 535 employees, ultimately yielding 119,305 cells, or data points.⁹⁸

⁹¹ The coders did not know which cases were included among these overlapping 52 cases.

⁹² See KIMBERLY A. NEUENDORF, *THE CONTENT ANALYSIS GUIDEBOOK* 143 (2002) ("It's clear from a review of the work on reliability that reliability coefficients of .90 or greater would be acceptable to all . . .").

⁹³ These coding issues are addressed more thoroughly in the detailed description of the study's methodology that can be found at the author's website: <http://law.unl.edu/inside.asp?d=faculty&id=28>.

⁹⁴ An inordinate amount of the differences between the coders occurred in the 6 cases in which the employee prevailed. Although these cases amounted to 2.54% of cases (6/236), coding differences on these cases totaled 23.55% of all the differences. Coders on these 6 cases had an agreement rate of 74.87%. The most likely explanation for such a disparity on these types of cases might be that these opinions are extraordinarily long. Except for one case in which a default judgment was entered, the opinions in the other five employee-win cases averaged 55 pages in length. The agreement rate for all cases other than the 6 employee-win cases was 95.71%.

⁹⁵ See NEUENDORF, *supra* note 92, at 143.

⁹⁶ I was unable to use the employee's name as a means of matching cases because OSHA redacted information related to the identity of the employee when OSHA responded to the FOIA request.

⁹⁷ The forty-three cases with only ALJ decisions were missing OSHA decisions for one of two reasons: either I could not reasonably link the ALJ case to an OSHA case based upon the method discussed above, or the ALJ case was related to an OSHA case filed after July 13, 2005, the date of my FOIA request, and therefore would not be included in the documents produced by OSHA. Of the 305 OSHA decisions with no corresponding ALJ opinion, 129 either settled or withdrew at the OSHA Level, and therefore would not have any ALJ case associated with it. The balance of 176 cases either did not request an ALJ hearing or the ALJ decision had not been released by June 1, 2006, the end date of the study.

⁹⁸ Copies of the code books describing the study's variables and the spreadsheets used for statistical analyses are available from the author upon request.

Researchers employ hypothesis-testing statistics with associated alpha levels to infer that sample characteristics represent the population from which the sample was drawn with a specific probability of accuracy.⁹⁹ In this study, no sampling occurred; instead I analyzed a complete census of cases for the time period described above. Thus, I did not calculate and do not report statistical findings with alpha levels. Instead, I report exact statistical characteristics for the population of cases under study.¹⁰⁰

I did not include ARB decisions in the study because only a small number of ARB opinions addressed legal or factual issues related to Sarbanes-Oxley. As of September 30, 2006, the ARB issued 39 Sarbanes-Oxley opinions involving review of 33 cases.¹⁰¹ Of those 39 opinions, only 13 addressed legal or factual issues related to Sarbanes-Oxley. The other opinions addressed ARB procedural policies, or indicated that the case was either withdrawn or settled. Of course, ARB decisions substantively affect the administrative review process, as the ARB's interpretation of the Act is binding on OSHA and the ALJs. Accordingly, I will discuss the impact of an ARB decision on a particular legal issue where appropriate.

IV. RESULTS AND DISCUSSION

This Part examines two types of results from the study. First, in order to contextualize the study's explanations for why so few employees won Sarbanes-Oxley claims, Section A provides a statistical "big picture" view of the outcomes for all Sarbanes-Oxley cases. Second, to explain the low employee win rate described in Section A, Section B examines the rationales used by OSHA and the ALJs when finding against the employee. In this section, I conclude that employees rarely won because OSHA and the ALJs determined that a large percentage of employees failed to prove a Sarbanes-Oxley claim *as a matter of law*, often by narrowly construing the Act's legal parameters. Moreover, for the cases that survived this strict legal analysis, OSHA found that a vast majority of employees failed to satisfy Sarbanes-Oxley's burden of proof.

A. The Big Picture: Outcomes from the Administrative Process

The win rates for employees and employers in cases that fully completed each stage of administrative review were remarkably one-sided. As Table 1 indicates, employees won 3.6% of the cases completed at the OSHA Level, and 6.5% of the cases completed at the ALJ Level.

⁹⁹ See BERNARD E. WHITNEY, JR., PRINCIPLES OF RESEARCH IN BEHAVIORAL SCIENCE 429 (2d ed. 2001).

¹⁰⁰ Cf. NEUENDORF, *supra* note 92, at 168 (arguing that content analysis to answer research questions regarding common occurrences or themes "would probably best be addressed with simple frequencies of occurrence and no test of statistical significance").

¹⁰¹ ARB cases can be found at <http://www.oalj.dol.gov/PUBLIC/ARB/REFERENCES/CASELISTS/ARBINDEX.HTM>, where they are listed by date.

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Table 1 – Win Rates For Cases that Completed Each Level of Administrative Review

	OSHA Level	ALJ Level
Employee Win Rate	3.6% (13) ^a	6.5% (6)
Employer Win Rate	96.4% (348)	93.5% (87)

NOTE: Table 1 reports the percentage of cases won by each party when OSHA or an ALJ made a determination for either the Complainant-employee or the Respondent-employer.

^aAll numbers in parentheses reflect the number of cases in each category.

Moreover, the win rate for employees at the OSHA Level appears to be *decreasing* over time. The win rates set forth in Table 1 do not include any OSHA cases filed after July 13, 2005, the end date of the OSHA part of the study. Yet, according to preliminary statistics released by OSHA for decisions through September 30, 2006, employees won 3.1% of the cases decided at the OSHA Level since Sarbanes-Oxley’s enactment.¹⁰² No employee won in any of the 159 cases OSHA resolved in Fiscal Year 2006, after the end of the study.¹⁰³

Sarbanes-Oxley’s low employee win rate, while surprising, appears even more disproportionate when compared to win rates for employees asserting claims under statutes other than Sarbanes-Oxley. Table 2, below, summarizes win rates for employees and plaintiffs raising claims in a variety of administrative and judicial fora.

As with the Sarbanes-Oxley win rates discussed thus far, the win rates set forth in Table 2 are for cases that completed the administrative or judicial process with a decision rendered for one of the parties; therefore, cases that settled or were voluntarily withdrawn are not included.¹⁰⁴

¹⁰² See E-mail from Nilgun Tolek, Director, OSHA Office of Investigative Assistance, to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (Oct. 3, 2006) (on file with author).

¹⁰³ See *id.*

¹⁰⁴ I do not report the results of a test for statistical significance comparing the descriptive statistics displayed in Table 2. Such a test would be inappropriate because the descriptive statistics displayed in Table 2 are based on data gathered from diverse populations using different sampling techniques at divergent points in time. However, if win rates were approximately equal across employment cases and venues from Fiscal Years 2003 to 2005, we would expect to see win rates that differed in only minor ways, regardless of the sampling techniques. Thus, while the win rates in Table 2 may not be statistically comparable, they provide interesting points of conceptual comparison and a contextual perspective for the Sarbanes-Oxley win rate discussed in this Article.

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Table 2 - Comparison of Win Rates For Various Types of Claims Resolved by Administrative Agencies and Federal Courts

		Employee/Plaintiff Win Rate	Employer Win Rate
OSHA Whistle- blower Cases ^b	Energy Reorganization Act	2.9% (4) ^a	97.1% (136)
	Sarbanes-Oxley (OSHA Level)	3.6% (13)	96.4% (348)
	AIR21	9.8% (19)	90.2% (175)
EEOC Cases ^c	Age Discrimination	5.2% (1,655)	94.8% (30,405)
	Race-Based Charges	6.0% (3,772)	94.0% (59,280)
	Pregnancy Discrimination	7.2% (615)	92.8% (7,922)
	Disability Charges	9.1% (2,972)	90.9% (29,837)
	Religious Discrimination	10.6% (578)	89.4% (4,858)
	Sex-Based Charges	10.6% (5,343)	89.4% (44,840)
	Equal Pay Act Charges	13.7% (271)	86.3% (1,707)
	Sexual Harassment Cases	14.1% (3,255)	85.9% (19,775)
Federal Court Cases ^d	Employment Cases	13.0%	87.0%
	All Non-Jobs Cases	52.9%	47.1%
	Torts and Contracts Cases	62.4%	37.6%

^aAll numbers in parentheses reflect the number of cases in each category.

^bThe Sarbanes-Oxley results are derived from the study's results.¹⁰⁵ OSHA provided the other statistics to the author for Fiscal Years 2003-2005.¹⁰⁶

^c The EEOC statistics were compiled from statistics published on the EEOC's website for Fiscal Years 2003-2005.¹⁰⁷

^d The federal court statistics are from data collected by the federal government for cases filed in federal court from 1979-2000.¹⁰⁸

¹⁰⁵ See *supra* Table 1.

¹⁰⁶ See E-mail from Nilgun Tolek, Director, OSHA Office of Investigative Assistance, to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (Oct. 5, 2006) (on file with author).

¹⁰⁷ See <http://www.eeoc.gov/stats/enforcement.html>. The statistics include decisions in which the EEOC made a "reasonable cause" determination and cases in which the EEOC issued a "no reasonable cause" determination, which together appear to include all of the cases that resulted in a final administrative decision by the EEOC. In other words, these numbers do not include cases that were settled or withdrawn, or cases in which the complainant requested a "right-to-sue" letter after 180 days and thus never received an actual finding from the EEOC (labeled "administrative closures" on the website). See *id.*

With the exception of whistleblowers under the Energy Reorganization Act, Sarbanes-Oxley whistleblowers succeeded at a lower rate than a broad range of employees and other plaintiffs, regardless of whether an employee brought a different statutory claim under OSHA's jurisdiction, in a process administered by an agency other than OSHA, or as a plaintiff in federal court. For example, even though Congress based Sarbanes-Oxley's protections upon the provisions of AIR21, airline industry whistleblowers succeeded at more than twice the rate of Sarbanes-Oxley whistleblowers (9.8%).

This low employee win rate should give pause. Almost without exception, both critics and supporters of employee-rights acknowledge the employee-friendly nature of Sarbanes-Oxley, with burdens of proof clearly intended to enhance a whistleblower's chance of winning.¹⁰⁹ Despite these provisions, however, the Act fails to produce corresponding employee victories.

It should be noted that the Sarbanes-Oxley win rates set forth in Table 1 do not include all of the possible outcomes of a Sarbanes-Oxley complaint filed with OSHA: Table 1 addresses only cases in which an administrative decision was made. Sarbanes-Oxley complaints also could settle, be withdrawn,¹¹⁰ or be sent to arbitration. Table 3 sets forth the percentage of cases resolved with each of these possible outcomes at both the OSHA and the ALJ levels of review.

¹⁰⁸ Professors Clermont & Schwab reported this data. See Clermont & Schwab, *supra* note 17, at 429-31, 457 (2004). "Employment" cases included actions filed under Title VII, the ADA, the ADEA, the FMLA, and employment-related claims filed under 42 U.S.C. § 1981 or § 1983. See *id.* at 431. Plaintiff win rates for "torts and contracts" cases were compiled from "13 sizable torts and contracts categories." See *id.* at 458. The "nonjobs" cases are all federal cases *other* than the "employment" cases. See *id.*

¹⁰⁹ See *supra* text accompanying notes 50-52; see also Philip M. Berkowitz, *Whistleblower Regulations*, 27 NAT'L L.J., Sept. 20, 2004, at 1 (noting "the extraordinary risk [to business] that this statute imposes"); Cathleen Flahardy, *SOX Gives DOL Power to Reinstate Whistleblowers: Employers Struggle to Defend Themselves Against Wrongful Termination Claims*, CORP. LEGAL TIMES, Aug. 2005, at 24 (quoting management attorneys who recognize that the "burden of proof for an employee to establish a violation is very low"); Gerald L. Maatman, Jr., *Whistle-Blower Retaliation Liability Cascading*, NAT'L UNDERWRITER 23, 24 (Aug. 14, 2006).

¹¹⁰ See *id.* § 1980.114(a). Of all ALJ cases in which the employee withdrew ($n=92$), almost half (45, or 48.9%) declared that they were filing in federal court, while another 5 (5.4%) stated that they intended to file a claim in state court. The data did not provide a rationale for the withdrawal for a fairly large number of these ALJ cases: 30, or 32.6%. At the OSHA Level, a large percentage of cases, 72.2%, did not provide a reason for the employee's withdrawal. A complete table setting forth the rationales provided by employees who withdrew complaints can be found on the author's website: <http://law.unl.edu/inside.asp?d=faculty&id=28>. [NOTE TO LAW REVIEW EDITORS: I AM WILLING TO INCLUDE THIS AND OTHER TABLES IN AN APPENDIX IF YOU THINK IT IS APPROPRIATE.]

UNFULFILLED EXPECTATIONS

Table 3 - Outcomes of OSHA and ALJ Review

Outcome	OSHA Level	ALJ Level
Employer Win	70.9% (348) ^a	37.8% (87)
Employee Win	2.6% (13)	2.6% (6)
Employee Withdrawal	14.7% (72)	40.0% (92)
Settlement	11.6% (57)	18.3% (42)
Arbitration ¹¹¹	0.2% (1)	0.2% (3)
Total	100.0% (491)	100.0% (230)

^aAll numbers in parentheses reflect the number of cases in each category.

As Table 3 demonstrates, almost three-fourths of cases at the OSHA Level (73.5%) received a determination either for the employee or the employer. ALJs, however, resolved dramatically fewer of the cases filed (40.4%) because more employees settled or withdrew their claims. While the study focused on the cases that fully completed each stage of the administrative process, the settlements and withdrawals certainly impacted the types of cases left to be resolved by administrative decision-makers.

The extent of this impact is difficult to determine. Settlement of a case may provide some indication that the case had at least minimal merit and therefore arguably could be counted as an employee success. Indeed, settlements may have removed the strongest employee cases from the pool of cases, causing the employee win rate in resolved cases to appear lower than the number of “meritorious” claims actually filed.¹¹² On the other hand, given the higher settlement rate at the ALJ Level than at the

¹¹¹ These cases either were ordered to arbitration or the parties agreed that arbitration was the more appropriate forum, both because of arbitration agreements in employment contracts. As demonstrated by Table 3, arbitration issues had little impact because a case was sent to arbitration only four times, once at the OSHA Level of review and three times by an ALJ. This seemingly low number could be the result of an early federal court decision that required a Sarbanes-Oxley plaintiff to arbitrate a Sarbanes-Oxley claim, which could have influenced employees with arbitration agreements to not even attempt to file their claims administratively. *See* *Boss v. Salomon Smith Barney, Inc.*, 263 F. Supp.2d 684, 685 (S.D.N.Y. 2003).

¹¹² In fact, OSHA computes its percentage of “merit” resolutions by combining settlements with employee wins. *See* E-mail from Nilgun Tolek, Director, OSHA Office of Investigative Assistance, to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (Oct. 3, 2006) (on file with author).

OSHA Level, a settlement may simply reflect an employer's increased willingness to enter "nuisance-value" settlements rather than pay the high litigation costs of an ALJ hearing.¹¹³ Or employers may have settled a case involving allegations of corporate fraud to avoid bad publicity, even if the allegations were without merit.¹¹⁴

The settlement rate for Sarbanes-Oxley cases appears similar to the settlement rate for claims before the Equal Employment Opportunity Commission (EEOC), the other primary administrative forum for employment claims. EEOC claims settled at approximately the same rate—14.7% from Fiscal Years 2003 to 2005—as Sarbanes-Oxley OSHA cases.¹¹⁵ Both these settlement rates pale in comparison to the settlement rate for cases once they reach the court system. For example, scholars estimate that more than 60% of cases filed in federal court settled.¹¹⁶ As indicated by Table 3, Sarbanes-Oxley cases settled at a much lower rate: 11.6% at the OSHA Level and 18.36% at the ALJ Level. This lower rate may indicate that parties were less willing to settle in the early years of Sarbanes-Oxley, perhaps because the parties lacked certainty regarding the possible breadth of OSHA's and the ALJs' interpretations of the scope of the Act. On the other hand, given the similar settlement rate for EEOC claims, Sarbanes-Oxley's settlement rate may reflect less willingness to settle in an administrative forum rather than in a court case.

The ambiguity of the settlement data in the study conceals the full meaning of a Sarbanes-Oxley settlement as it relates to the employee win rate.¹¹⁷ Do settlements provide employees relief comparable to wins? It is difficult to say whether a settlement should be counted as an employee "win," given that both sides inevitably compromise their claims when

¹¹³ The study's results support this inference because 16.9% of employer wins at the OSHA level settle *after* they win, which is higher than the settlement rate before the OSHA decision in the employer's favor. Another explanation for this settlement rate, however, is that employees may be more willing to settle after losing at the OSHA Level.

¹¹⁴ There is some anecdotal evidence of this phenomenon in the Sarbanes-Oxley context. See Judy Greenwald, *Whistleblower Retaliation Claims Challenging Employers*, 39 BUS. INS. 4 (Sept. 26, 2005) ("Some observers say fear of being associated with a Sarbanes-Oxley whistleblower suit is leading some employers to settle even when they feel the claim has no merit. 'They fear the potential bad publicity,' said James S. Urban, an attorney with Jones Day in Pittsburgh."); see also Michael R. Triplett, *Uncertainty About Parameters of SOX Claims Creates Challenges for Lawyers on Both Sides*, 4 WORKPLACE LAW REPORT 482, 482 (April 14, 2006), available at <http://pubs.bna.com/ip/bna/whl.nsf/eh/a0b2q6p0v8> (reporting that a management attorney claims employers have a clear incentive to settle Sarbanes-Oxley cases before entering the administrative review process because of the types of complaints Sarbanes-Oxley whistleblowers lodge and the high-level position often held by whistleblowers).

¹¹⁵ I calculated this settlement rate from statistics published on the EEOC website by combining the number of settlements and withdrawals with benefits ($n=36,781$) by the total number of resolutions during Fiscal Years 2003 to 2005 ($n=250,366$). See <http://www.eeoc.gov/stats/all.html>.

¹¹⁶ See Clermont & Eisenberg, *supra* note 77, at 136 (noting that 66.7% of all federal civil cases terminated during fiscal year 2000 settled); Parker, *supra* note 15, at 912 (finding a settlement rate of 67% in study of race and national origin discrimination cases in two federal district courts in 2002).

¹¹⁷ Cf. Colker, *Winning*, *supra* note 15, at 256 ("It is hard to categorize settlements as pro-plaintiff or pro-defendant since plaintiffs typically settle for less than they seek in litigation."); Parker, *supra* note 15, at 910 ("[A] settlement can't be defined as either a win or a loss.").

they settle.¹¹⁸ Unfortunately, OSHA refuses to release data that could provide insight into this issue: the amount paid in settlement costs.¹¹⁹

Similarly, employee withdrawals have uncertain meaning in this context. One assumption may be that employees with strong cases withdrew from the administrative process to file in federal court, with the hope of obtaining a large damage award from a jury. Yet, the study's results demonstrate that 41% of the cases that employers won at the OSHA Level were withdrawn by employees before an ALJ decision could be reached.¹²⁰ Moreover, a substantial number of cases that withdrew likely had little or no merit: either employees withdrew without asserting any reason for their withdrawal (72.2% at the OSHA Level and 32.6% at the ALJ Level), or because the employee admitted that a *prima facie* case of retaliation could not be proven (2.8% and 6.5%), or because of some other reason, such as admitting that they had misunderstood the purpose of the Sarbanes-Oxley Act or determined that further litigation expenses were not warranted (5.6% and 6.5%). Thus, a reasonable conclusion may be that employees with *weaker* cases withdrew. These withdrawals could have depleted the pool of strong employer cases, resulting in a *higher* employee win rate than if these claims had been resolved administratively.

Ultimately, the data presently available regarding Sarbanes-Oxley settlements and withdrawals do not provide definitive answers regarding the objective merit of either the overall pool of cases or the cases that receive administrative decisions.¹²¹ Thus, we do not know, and cannot determine, whether employees filed "good" or "bad" Sarbanes-Oxley cases.¹²²

¹¹⁸ See Parker, *supra* note 15, at 909.

¹¹⁹ Through the Freedom of Information Act, I requested settlement information from OSHA and the Office of Administrative Law Judges, both of which are required to approve Sarbanes-Oxley settlement agreements. See 29 C.F.R. § 1980.111(d) (2006). OSHA denied this request and my request to the OALJ is still pending. OSHA denied my request because many parties who enter settlement agreements request that OSHA consider the settlement amount as "confidential business information" under Exemption 4 to the Freedom of Information Act. See 5 U.S.C. § 552(b)(4). Although I have disputed the appropriateness of this designation and appealed OSHA's decision, my appeal has not been resolved.

¹²⁰ A complete table setting forth the outcome at the ALJ Level of cases in which the employer won at the OSHA Level can be found on the author's website: <http://law.unl.edu/inside.asp?d=faculty&id=28>.

¹²¹ If settlements and withdrawals are included in calculations regarding employee success rate, the numbers change dramatically. Employee wins and settlements combined are 14.2% of all OSHA cases filed, and 20.9% of all ALJ filings. See *supra* Table 3. If withdrawals and arbitrations are excluded because they did not complete the process, the employee wins and settlements combined are 16.7% of the remaining OSHA cases filed, and 34.8% of the remaining ALJ cases. See *id.*

¹²² See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588-89 (1998) (explaining that inferences from win rates to generalizations about the types of cases being filed can be dangerous). Similarly, little can be inferred from the results of this study regarding the overall affect of Sarbanes-Oxley in the workplace, such as whether more or less whistleblowing or more or less retaliation occurs, as these concerns lie beyond the scope of the present study. This study does not examine the overall pool of *potential* Sarbanes-Oxley cases, only the *actual* pool of such cases filed with OSHA.

However, the employee win rate presented in Table 1 is meaningful if combined with an analysis of the types of decisions made by OSHA and the ALJs when resolving Sarbanes-Oxley claims. The manner in which OSHA and the ALJs reached their decisions provide some explanation for this unexpectedly-low employee win rate. Thus, the balance of this Part empirically examines *how* OSHA and the ALJs resolved so many cases in favor of employers and against employees.

B. Explaining the Low Win Rate: The Importance of Procedural, Boundary, and Factual Hurdles

A Sarbanes-Oxley whistleblower must overcome a series of hurdles in order to prevail in either an OSHA investigation or an ALJ hearing. Failing to surmount any of these hurdles will result in an employer victory.

First, *procedural* hurdles require that the employee take action in a timely manner: the retaliation must have occurred after the effective date of the Act,¹²³ the complaint must be filed within 90 days of the retaliation,¹²⁴ and any appeal must be filed within 30 days of an OSHA decision.¹²⁵ When OSHA or an ALJ makes a decision in favor of an employer because the employee failed to overcome one of these hurdles, the study identified that decision as using a “procedural rationale.”

Second, an employee must demonstrate that the claim is within the *boundaries* of Sarbanes-Oxley: the whistleblower must be a covered employee,¹²⁶ work for a covered employer,¹²⁷ engage in a covered (i.e., “protected”) activity,¹²⁸ and suffer a covered adverse employment ac-

See id. (“[T]he case-selection effect theory holds that win rates reveal something about the set of adjudged cases, and not much about the underlying mass of disputes and cases.”).

¹²³ *See* McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 2003-SOX 23 (Dep’t of Labor Jan. 16, 2004); Kunkler v. Global Futures & Forex, Ltd., 2003-SOX-6 (Dep’t of Labor Apr. 24, 2003); Gilmore v. Parametric Tech. Corp., 2003-SOX-1 (Dep’t of Labor Feb. 6, 2003). Even if the *protected activity* occurred before the effective date of Sarbanes-Oxley, a whistleblower claim could be based on *retaliation* that occurred after the effective date. *See, e.g.,* Getman v. Southwest Secs., Inc., 2003-SOX-8 (Dep’t of Labor Feb. 2, 2004).

¹²⁴ *See* 18 U.S.C. § 1514A(b)(2)(D) (Supp. 2004).

¹²⁵ *See* 29 C.F.R. § 1980.105(c) (2006).

¹²⁶ ALJs consistently have not permitted workers in a foreign country to assert claims under Sarbanes-Oxley. *See, e.g.,* Concone v. Capital One Financial Corp., 2005-SOX-6 (Dep’t of Labor Dec. 3, 2004); Ede v. Swatch Group, 2004-SOX-68 (Dep’t of Labor Jan. 14, 2005).

¹²⁷ *See* 18 U.S.C. § 1514A(a) (Supp. 2004) (prohibiting retaliation by any “company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781), or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))”).

¹²⁸ Not only must the employee complain about an illegal activity covered by Sarbanes-Oxley, but also the employee must reasonably believe that the activity is covered by Sarbanes-Oxley and the employer must know about the employee’s complaint. *See id.* Although there is some dispute, one scholar has argued convincingly that the “reasonable belief” issue presents a legal question to be resolved by a judge. *See* Jarod S. Gonzalez, *SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act, Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 76 (2006).

tion.¹²⁹ If an employer won because an employee's claim fell outside of these boundaries, then OSHA or the ALJ used a "boundary rationale."

Third, a decision-maker will evaluate the factual merits of the case, but only after the employee satisfied all the procedural rules and demonstrated that the complaint is within the boundaries of Sarbanes-Oxley. At that point, an employee must overcome *factual* hurdles by convincing the decision-maker that the whistleblower's protected activity was a contributing factor in the adverse employment action (i.e., causation) and by withstanding the employer's attempt to demonstrate by "clear and convincing" evidence that it would have made the same employment decision absent any protected activity.¹³⁰ As with the other two hurdles, if an employer won because an employee failed to show causation or because the employer satisfied its clear and convincing burden of proof, then the case can be thought of as being decided by a "factual rationale."

The low win rate for employees (and corresponding high win rate for employers) can be explained, at least in part, by examining the effect of these hurdles on an employee's case.

1. *The Size of the Hurdle Depended on the Level of Review*

The three categories of rationales set forth above contain eleven different grounds on which a decision against an employee may rest; one or more was cited in almost every case an employer won.¹³¹ Table 4 presents the percentage of employer wins in which OSHA or an ALJ utilized each of these rationales.

¹²⁹ Sarbanes-Oxley states it is unlawful for a covered employer to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because the employee engaged in protected activity. 18 U.S.C. § 1514A(a) (Supp. 2004).

¹³⁰ See discussion *supra* Part II.A (discussing Sarbanes-Oxley's burdens of proof); cf. Gonzalez, *supra* note 128, at 75 (arguing that, in cases removed to federal court, a "SOX jury's main role as the fact finder is to resolve the issue of causation").

¹³¹ A twelfth, "other" category can also be found in the cases. Of the 324 employer-win OSHA cases in which a rationale was discernable, 15 included a rationale other than one of the 11 set out in Table 4. Nine of these 15 simply stated that employee's *prima facie* case was not satisfied, but did not specify which elements were not met. Of the 83 such cases at the ALJ Level, 5 included this "other" rationale.

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Table 4 – Rationales Used When an Employer Wins

Type of Rationale	Rationale Used	OSHA Level	ALJ Level
Procedural	Sarbanes-Oxley Not Retroactive	2.8% (9) ^a	3.6% (3)
	Statute of Limitations	18.8% (61)	33.8% (28)
	Appeal Time Exceeded	n/a	4.8% (4)
Boundary	Not a Covered Employee	7.1% (23)	4.8% (4)
	Not a Covered Employer	15.4% (50)	28.9% (24)
	No Protected Activity	18.2% (59)	24.1% (20)
	No Adverse Action	11.1% (36)	9.6% (8)
	No Reasonable Belief	5.6% (18)	14.5% (12)
	No Employer Knowledge	5.9% (19)	2.4% (2)
Factual	No Causation	35.5% (115)	21.7% (18)
	Employer Satisfies “Clear and Convincing” Standard on Rebuttal	11.7% (38)	14.5% (12)

NOTE: The percentages do not total 100% because OSHA and the ALJs often provided one or more rationale when deciding a case. The percentages used in Table 4 are based on the number of cases in which coders could identify a specific rationale divided by the number of cases in which coders could identify any rationale. Of the 348 cases in favor of the employer at the OSHA Level, a rationale (other than the “other” category) was discernable in 324. Accordingly, 324 is used as the denominator for Table 4’s percentages. Of the 87 employer-win cases at the ALJ Level, 83 had discernable rationales (other than the “other” category) and therefore this number is used as the denominator.

^aAll numbers in parentheses reflect the number of cases in each category.

A pattern develops when these rationales are ordered by categories. The data displayed in Table 5 demonstrate that OSHA and the ALJs decided cases in favor of employers by utilizing somewhat different rationales.

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Table 5 – Rationale Used in Cases Decided in Favor of Employer

	OSHA Level	ALJ Level	Difference
Procedural Rationale	21.0% of cases (68) ^a	39.8% (33)	1.89 times more likely at ALJ Level
Boundary Rationale	54.3% (176)	67.5% (56)	1.24 times more likely at ALJ Level
Factual Rationale	44.8% (145)	24.1% (20)	1.86 times more likely at OSHA Level

NOTE: In Table 5, the percentages do not total 100% because OSHA and the ALJs often provided more than one type of rationale when deciding a case. As with Table 4, the percentages used in Table 5 are based on the number of cases in which coders identified a specific rationale divided by the number of cases in which coders identified any rationale: 324 OSHA cases and 83 ALJ cases.

^aAll numbers in parentheses reflect the number of cases in each category.

At both levels of review, OSHA and the ALJs resolved a substantial number of cases in favor of the employer *as a matter of law*, by using either a procedural or a boundary rationale. Although ALJs used both rationales more frequently than OSHA, decision-makers at both levels of review relied heavily on a legal analysis of a Sarbanes-Oxley claim prior to resolving any factual disputes.

At the OSHA Level, however, factual rationales played an important role as well. OSHA used one of the two factual rationales as part of the case’s determination in almost half of the cases – 44.8%. Indeed, OSHA used a factual rationale—that the employee failed to demonstrate causation—more frequently than any other single rationale. Over 35% of the cases decided in favor of the employer utilized this specific rationale, either alone or in combination with other rationales.¹³²

By contrast, ALJs tended to resolve cases with one of the procedural or boundary rationales by determining that Sarbanes-Oxley did not cover the employee’s allegations. In all cases decided in favor of the employer, ALJs relied solely on factual issues only 4.8% (4 out of 83) of the time. In other cases in which an ALJ utilized a factual rationale, it was in conjunction with one of the other two types of rationales.¹³³ Thus, even when ALJs addressed the substantive facts of a case, they typically did so only *when also* deciding the case as a matter of law with a procedural or boundary rationale. ALJs, explicitly or implicitly, utilized the lawyerly “even if...” argument to address factual issues only as a backstop to other arguments.¹³⁴ By comparison, OSHA relied solely on factual issues 29.0%

¹³² See *supra* Table 4.

¹³³ Of the 20 cases in which ALJs used a factual rationale, only 4 were decided solely based on that type of rationale (20%). In the other 16 cases, a factual rationale was used in conjunction with one or both of the other two types of rationales (80%). By contrast, of the 145 cases decided by OSHA using a factual rationale, OSHA cited only the factual rationale in 94 (64.8%) of these decisions. OSHA utilized the factual rationale in conjunction with the one or both of the other rationales in 51 cases (35.2%).

¹³⁴ See *id.*

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of the time¹³⁵—meaning that OSHA was approximately six times more likely than an ALJ to cite factual issues as determinative.

This difference in emphasis impacted the outcomes of cases as they progressed through the administrative process. The data in Table 6 reveal that ALJs typically upheld OSHA decisions when those decisions were based upon procedural or boundary grounds. However, for the cases that OSHA decided based on factual rationales, ALJs scrutinized those cases *again* for legal deficiencies, particularly boundary issues. Given that the ALJ review is *de novo*, one expects a review of the same issues examined at the OSHA Level. Nonetheless, ALJs appear more likely to decide cases on procedural or boundary grounds, even if OSHA already utilized a factual rationale.

Table 6 - Rationales Used for Employer-Wins at Each Level

	ALJ Procedural	ALJ Boundary	ALJ Factual	Total
OSHA Procedural	64.0% (16) ^a	28.0% (7)	8.0% (2)	100.0% (25)
OSHA Boundary	20.0% (9)	62.2% (28)	17.8% (8)	100.0% (45)
OSHA Factual	10.0% (3)	46.7% (14)	43.3% (13)	100.0% (30)

NOTE: The numbers in Table 6 do not equal the total number of employer-win cases at the ALJ Level because more than one rationale could be coded for each case. The numbers in bold represent consistent decision-making across both levels.

^aAll numbers in parentheses reflect the number of cases in each category.

This pattern of decision-making effectively prevented employees from obtaining an ALJ hearing on their complaints’ factual merits. ALJs held factual hearings in only 28.0% of the cases in which an ALJ rendered a decision.¹³⁶ Moreover, having a hearing before an ALJ did not guarantee that the ALJ evaluated the factual merits of a case. In over half (58.6%) of the 29 cases in which an ALJ held a factual hearing, the ALJ decided the case on boundary grounds.¹³⁷

In sum, Sarbanes-Oxley cases endured two rigorous filtering systems as they advanced through the administrative process. First, both OSHA and the ALJs rejected cases based on procedural and boundary rationales. Second, even if a case survived OSHA’s rigorous legal evaluation, OSHA also rejected a large percentage of cases because the employee failed to satisfy Sarbanes-Oxley’s burden of proof or because the employer satisfied its clear and convincing burden. Interestingly, ALJs typically upheld

¹³⁵ Of the 324 cases that were decided for the employer at the OSHA Level and from which a rationale could be discerned, OSHA utilized only a factual rationale in 94 cases.

¹³⁶ ALJs held hearings in 26 out of the 93 cases in which ALJs rendered a decision.

¹³⁷ When ALJs held a hearing, ALJs resolved the case using a procedural rationale 6.9% of the time ($n=2$); a boundary rationale 58.6% of the time ($n=17$); and a factual rationale 58.6% of the time ($n=17$). These totals do not equal 100.0% because ALJs often used more than one rationale.

these OSHA determinations for the employer, but in so doing ALJs utilized legal rather than factual rationales. ALJs relied only rarely on a factual determination alone to resolve a Sarbanes-Oxley claim.

2. *Specific Legal Hurdles Loomed Large*

OSHA and the ALJs focused on three “legal” rationales when deciding in favor of the employer: one procedural rationale and two related to Sarbanes-Oxley’s boundaries. As detailed below, the administrative focus on these three issues often led to narrow interpretations of Sarbanes-Oxley’s legal parameters that negatively impacted employees’ claims.

a. Statute of Limitations

Both OSHA and the ALJs focused intently on whether the employee filed a Sarbanes-Oxley claim within the Act’s 90-day statute of limitations. In approximately one-third (33.8%) of the ALJ cases decided in favor of the employer, ALJs found that the employee failed to file a claim within the 90-day statute of limitations.¹³⁸ OSHA utilized this rationale in 18.8% of cases it decided in favor of the employer.¹³⁹ Despite this seeming difference between OSHA and the ALJs, both levels of review often found violations of the statute of limitations in the same cases, indicating a similar focus by both sets of decision-makers. OSHA used this rationale in 72.2% of the ALJ cases that also found a statute of limitations violation.¹⁴⁰

In many cases, administrative decision-makers have little or no discretion regarding enforcement of the statute of limitations: the Act is clear regarding the 90-day limitations period. Moreover, the Department of Labor’s regulations clarify that the 90-day filing window begins when an employee has knowledge of an adverse employment action, not when the action actually occurred.¹⁴¹ Accordingly, these clear rules required that OSHA and ALJs reject complaints because employees failed to file within 90 days of the notice of an adverse action, even if the adverse action actually occurred within 90 days of the filing of the complaint.¹⁴²

¹³⁸ See *supra* Table 4.

¹³⁹ See *id.*

¹⁴⁰ The study obtained data on the OSHA result in 18 of the 28 ALJ statute of limitations cases, and OSHA also concluded that the statute of limitations was not met in 13 of those 18 cases (72.2%), indicating that OSHA also seems to focus on the statute of limitations issue. (The other ten cases were cases in which an ALJ opinion was available, but no OSHA opinion was included in the production of cases from OSHA in response to my FOIA request.) Thus, it may be that statute of limitations cases are appealed to ALJs at a higher rate, which would account for the higher use of the statute of limitations rationale at the ALJ Level.

¹⁴¹ See Procedures, *supra* note 48, at 52106.

¹⁴² See, e.g., Lawrence v. AT&T Labs, 2004-SOX-65, at 5 (Dep’t of Labor Sept. 9, 2004); Halpern v. XL Capital, Ltd., 2004-SOX-54 (Dep’t of Labor June 7, 2004); Letter from Marthe B. Kent, Regional Administrator, OSHA (Oct. 2, 2003) (on file with author); Letter from Adam M. Finkel, Regional Administrator, OSHA, to Michelle R. Kestler (Feb. 3, 2003) (on file with author).

However, OSHA and the ALJs also strictly enforced the statute of limitations in cases in which discretion could be utilized to excuse an employee's late filing. For example, OSHA and ALJs consistently rebuffed employees' claims that the statute of limitations should be tolled or not enforced for equitable reasons. Equitable tolling of the statute of limitations typically is permitted when an employee is unable, despite due diligence, to gain information necessary to file a timely complaint.¹⁴³ Similarly, equitable estoppel prevents enforcement of the statute of limitations because the employer stopped the employee from filing a timely complaint.¹⁴⁴ Neither equitable argument has had much success in Sarbanes-Oxley cases.¹⁴⁵ For example, in one ALJ case the parties agreed that while they explored settlement options, the employee would not file a Sarbanes-Oxley claim and the employer would not assert a statute of limitations defense.¹⁴⁶ As a result, the employee ultimately filed a complaint outside of the limitations period.¹⁴⁷ The ALJ rejected the application of equitable tolling or estoppel principles, and dismissed the case for failure to file within the limitations period, despite the agreement of the parties to the contrary.¹⁴⁸

Administrative decision-makers equitably tolled the statute of limitations in only one case. In a case brought against Southwest Securities very early in the life of the Act, both OSHA and an ALJ permitted a *pro se* employee to pursue a claim even though she missed the deadline by two days.¹⁴⁹ The employee had attempted to file her complaint with various governmental agencies other than OSHA prior to the expiration of the statute of limitations, but did not file with OSHA until after the limitations period had run.¹⁵⁰ Under these unique circumstances, both OSHA and the ALJ determined that her efforts to file her claim in the wrong forum equitably tolled the limitations period.¹⁵¹ This case stands out for another reason besides the application of the equitable tolling doctrine: the employee ultimately won her claim, making her one of only thirteen employees at the OSHA Level and one of only six employees at the ALJ

¹⁴³ See *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000).

¹⁴⁴ See *id.* at 1176.

¹⁴⁵ See, e.g., *Levi v. Anheuser-Busch Cos., Inc.*, 2006-SOX-37, at 22-23 (Dep't of Labor May 3, 2006); *Guy v. SBC Global Servs.*, 2005-SOX-113, at 3-4 (Dep't of Labor Dec. 14, 2005); Letter from Marthe B. Kent, Regional Administrator, OSHA (Apr. 7, 2005) (on file with author); Letter from Marthe B. Kent, Regional Administrator, OSHA (Dec. 7, 2004) (on file with author).

¹⁴⁶ See *Szymonik v. Tymetrix, Inc.*, 2006-SOX-50, at 2 (Dep't of Labor Mar. 8, 2006).

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* at 5. Although ARB decisions are not included in this study, it should be noted that the ARB follows a similarly rigid line. Prior to October 1, 2006, employees requested equitable tolling either of the statute of limitations or of an appeals filing deadline in six Sarbanes-Oxley cases before the ARB. The Board refused such requests in every case. The Board also denied an employer's request for equitable tolling of the deadline for filing a cross-appeal in the one case involving such a request from the employer. See *Henrich v. EcoLab, Inc.*, No. 05-036, at 1 (ARB Mar. 31, 2005).

¹⁴⁹ See *Getman v. Southwest Sec., Inc.*, 2003-SOX-8, at n.2 (Feb. 2, 2004); Letter from Patricia K. Clark, Regional Administrator, OSHA, at 2 (Feb. 12, 2003) (on file with author).

¹⁵⁰ See *Getman*, 2003-SOX-8, at n.2.

¹⁵¹ See *id.*

Level to emerge victorious.¹⁵² It is intriguing to consider how many other claims might have been valid but for the mistake of filing after the limitations deadline.

b. Covered Employers

ALJs, and to a lesser extent OSHA, also focused on whether the Respondent was a “covered employer” under Sarbanes-Oxley. ALJs decided 28.9% of their cases in favor of Respondent because the Act failed to cover the employer.¹⁵³ By comparison, OSHA decided 15.4% of its cases with this rationale.¹⁵⁴ When an ALJ found that the Respondent was not a “covered employer,” the corresponding opinion from OSHA used this rationale less than half of the time (42.1%).¹⁵⁵ ALJs, then, found that the employer was not the type of company covered by Sarbanes-Oxley at a much higher rate than OSHA and often in cases in which OSHA did not focus on that issue.

The difference between OSHA and the ALJs when evaluating the “covered employer” issue seems to result from ambiguity in the Act’s statutory language. The Act provides that:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781), 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 [retaliate] against an employee for engaging in lawful protected conduct.¹⁵⁶

The Act clearly covers employees of publicly-traded companies, i.e., companies that have a class of securities registered under § 12 or that are required to file reports under § 15.¹⁵⁷ Determining whether a company is publicly-traded or privately-held is relatively straight-forward: either a respondent meets one of these two definitions or it does not.¹⁵⁸ Accordingly, it seems logical that OSHA and the ALJs would make this finding at relatively equivalent rates, which they did. OSHA found a company

¹⁵² See *id.* at 26. The ARB later overturned her victory for an unrelated reason. See *Getman v. Southwest Securities*, No. 04-059 (ARB July 29, 2005).

¹⁵³ See *supra* Table 4.

¹⁵⁴ See *id.*

¹⁵⁵ Twenty-four ALJ cases used this rationale. See *supra* Table 4. The study included OSHA data for 19 of those 24 cases. In those 19 cases, OSHA also utilized the “not a covered employer” rationale in 8 cases (42.1%).

¹⁵⁶ 18 U.S.C. § 1514A(a) (Supp. 2004) (emphasis added).

¹⁵⁷ See *id.*

¹⁵⁸ *Id.* Perhaps not surprisingly, disputes on the borderline of this issue have arisen. See *Flake v. New World Pasta Co.*, No. 03-126, at 2 (ARB Feb. 25, 2004) (finding that respondent was not covered under the Act because its registration statement was automatically suspended when its shares were held by less than 300 people); *Stalcup v. Sonoma College*, 2005-SOX-114 (Dep’t of Labor Feb. 7, 2006) (finding that respondent which filed registration statement that had not yet become effective was not covered by the Act); *Roulett v. Am. Capital Access*, 2004-SOX-9, at 7-8 (Dep’t of Labor Dec. 22, 2004) (finding that company which withdrew request for registration was not covered).

was “privately held” in 64.0% of the cases in which OSHA cited the “covered employer” rationale, while ALJs made this finding in 58.3% of the relevant cases.¹⁵⁹

However, the statutory language does not clearly set forth whether the Act applies to privately-held subsidiaries of publicly-traded companies. The ALJs focused on this ambiguity much more intensely than OSHA. In 41.7% of ALJ cases using the “not a covered employer” rationale, ALJs found that an employer was not covered by the Act because it was a subsidiary of a publicly-traded company or a foreign company. By contrast, OSHA made this same determination at about one-fourth the rate, 10.9%. Thus, the difference in usage of the “covered employer” rationale between OSHA and the ALJs seems best explained by the difference in how these administrative decision-makers evaluated private subsidiaries of public companies.

The subsidiary issue arises in Sarbanes-Oxley cases because the Act prohibits discrimination by “any officer, employee, contractor, subcontractor, or agent” of publicly-traded companies.¹⁶⁰ Early conflicting ALJ interpretations of this phrase as it relates to whether Sarbanes-Oxley covers privately-held subsidiaries of publicly-traded corporations may have caused differing levels of enforcement by ALJs and OSHA. Soon after the Act’s enactment, an ALJ interpreted this phrase broadly to mean that employees of privately-held subsidiaries were protected by the Act, particularly if the employee named the publicly-traded parent as a respondent.¹⁶¹ Other ALJs permitted employees of privately-held subsidiaries to bring Sarbanes-Oxley claims because the employee specifically alleged that the publicly-held parent company was involved in the retaliation¹⁶² or that the subsidiary was a “mere instrumentality” of the private corporation.¹⁶³ All of these findings occurred before September 2004.

These early and relatively broad interpretations of the Act’s “covered employer” provision may have influenced OSHA’s reluctance to rely on this rationale in finding for the employer. However, beginning in late-2004 and early-2005, ALJ opinions consistently demonstrated a stricter reading of this provision. Some ALJs held that employees of privately-held subsidiaries could not bring a Sarbanes-Oxley claim at all.¹⁶⁴ Others rejected claims because the employee did not specifically name the publicly-traded parent as a respondent, and ALJs refused to allow the employee to amend the complaint.¹⁶⁵ Many ALJs required that an em-

¹⁵⁹ A complete table setting forth the types of companies OSHA and the ALJs found were not “covered employers” can be found on the author’s website: <http://law.unl.edu/inside.asp?d=faculty&id=28>.

¹⁶⁰ 18 U.S.C. § 1514A(a) (Supp. 2004).

¹⁶¹ See *Morefield v. Exelon Servs., Inc.*, 2004-SOX-2, at 2-3 (Dep’t of Labor Jan. 28, 2004).

¹⁶² *Gonzalez v. Colonial Bank*, No. 2004-SOX-39, at 3 (Dep’t of Labor Aug. 20, 2004).

¹⁶³ *Platone v. Atlantic Coast Airlines*, No. 2003-SOX-27, at 19 (Dep’t of Labor Apr. 30, 2004).

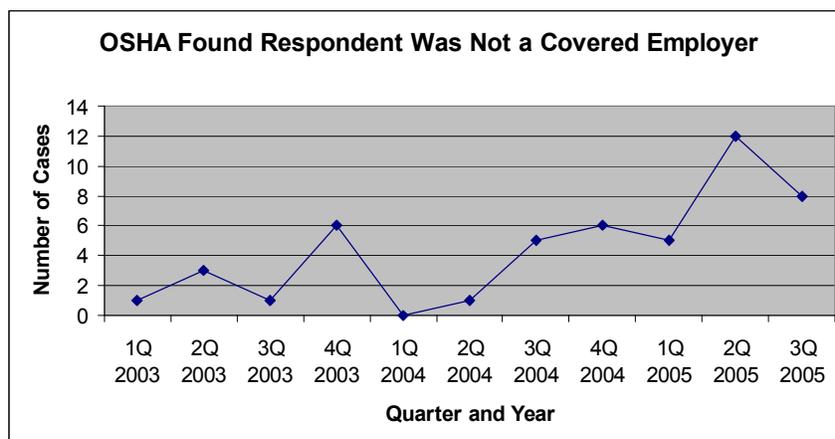
¹⁶⁴ See *Grant v. Dominion East Ohio Gas*, 2004-SOX-63, at 33 (Dep’t of Labor Mar. 10, 2005).

¹⁶⁵ See *Bothwell v. Am. Income Life*, No. 2005-SOX-57, at 7 (Dep’t of Labor Sept. 19, 2005); see also *Powers v. Pinnacle Airlines, Inc.* 2003-SOX-12 (Dep’t of Labor March 5,

ployee either pierce the corporate veil between the subsidiary and the parent¹⁶⁶ or demonstrate that the publicly-trade parent company participated in the adverse employment action.¹⁶⁷

The ALJs' attention to the "covered employer" issue and subsequent narrowing of the scope of this statutory provision seems to have affected OSHA. Although the cumulative results from the study indicate a difference between OSHA and the ALJs in the use of the "not a covered employer" rationale compared to other rationales,¹⁶⁸ any distinction between ALJs and OSHA regarding enforcement of this covered employer requirement occurred primarily in the first few years after the statute's enactment.

Chart 1 - OSHA Decisions Finding that Respondent Was Not a Covered Employer



OSHA may have responded to the more recent and numerous ALJ decisions narrowing the scope of this boundary issue. As indicated in Chart 1, in the first two years of Sarbanes-Oxley decisions, OSHA found that the Respondent was not a "covered employer" in a total of 23 cases.¹⁶⁹ In the first three quarters of 2005 alone, however, OSHA made

2003). In the *Klopfenstein* decision mentioned in the previous footnote, the ARB found that publicly-traded parent companies did *not* need to be named as a respondent in order for an employee of a privately-held subsidiary to bring a Sarbanes-Oxley claim. See *Klopfenstein*, No. 04-149, at 2.

¹⁶⁶ See *Bothwell*, 2005-SOX-57, at 6-9; *Dawkins v. Shell Chemical, LP*, 2005-SOX-41, at 4 (Dep't of Labor May 16, 2005); *Hughart v. Raymond James & Assoc., Inc.*, 2004-SOX-9, at 44 (Dep't of Labor Dec. 17, 2004); cf. *Powers v. Pinnacle Airlines, Inc.*, 2003-SOX-12 (Dep't of Labor March 5, 2003) (earlier case).

¹⁶⁷ See *Bothwell*, 2005-SOX-57, at 9; see also *Hughart*, 2004-SOX-9, at 44 (liability extended to parent only in area where "parent has exerted its influence or control"). In May 2006, the ARB adopted similarly-restrictive interpretations of the Act by permitting a claim against a privately-held subsidiary, but only because the employee specifically demonstrated that the subsidiary acted as an agent of the publicly-traded parent company when the subsidiary fired the employee. See *Klopfenstein v. PCC Flow Technologies Holdings, Inc. & Allen Parrott*, No. 04-149, at 15 (ARB May 31, 2006). The ARB found significant the fact that the subsidiary and the parent had overlapping officers and that the person who made the decision to fire the whistleblower served as an officer of both the subsidiary employer and the parent company. See *id.*

¹⁶⁸ See *supra* text accompanying notes 153-55; see also *supra* Table 4.

¹⁶⁹ A complete table setting forth the use of the "not a covered employer" over time can be found on the author's website: <http://law.unl.edu/inside.asp?d=faculty&id=28>.

this finding 25 times. This upward trend in OSHA's use of the "not a covered employer" rationale may reflect the attention OSHA pays to ALJ opinions regarding the definitional boundaries of the Act. As of the end of the time period covered by the study, it seems fair to conclude that *both* OSHA and the ALJs focused intensively on whether the named employer was "covered" by Sarbanes-Oxley's statutory definition. Moreover, ALJs and the ARB have significantly narrowed the applicability of Sarbanes-Oxley's protections by strictly defining which companies are "covered" by the Act.

c. Protected Activity

OSHA and the ALJs focused on a third legal question: whether the employee engaged in "protected activity" covered by Sarbanes-Oxley. The Act protects only whistleblowers who disclose violations of one or more of six specific types of laws, rules, or regulations. Specifically, in order to be protected, an employee must disclose any conduct that the employee reasonably believes constitutes a violation of:

1. 18 U.S.C. § 1341 (mail fraud);
2. 18 U.S.C. § 1343 (wire fraud);
3. 18 U.S.C. § 1344 (banking fraud);
4. 18 U.S.C. § 1348 (securities fraud);
5. Any rule or regulation of the Securities and Exchange Commission; or
6. Any provision of Federal law relating to fraud against shareholders.¹⁷⁰

In 24.1% of the cases ALJs found in favor of the employer, ALJs determined that the employee did not engage in protected activity because the whistleblower's disclosure did not relate to one of these statutorily-defined illegal activities.¹⁷¹ OSHA relied on this rationale in 18.2% of the cases in which the employer prevailed.¹⁷²

Employees alleged certain protected activities far more frequently than others. As Table 7 indicates, employees alleged that they blew the whistle on general "fraud" or fraud related generally to "accounting" at a much higher rate than more specific types of fraud mentioned by the Act, including mail and wire fraud, banking fraud, and securities fraud.¹⁷³ Moreover, an extremely high number of employees did not assert that they disclosed illegal activity related to any of the categories set forth by Sarbanes-Oxley: 48% of OSHA Complainants and 52.7% of ALJ Com-

¹⁷⁰ See 18 U.S.C. § 1514A(a) (Supp. 2004).

¹⁷¹ See *supra* Table 4.

¹⁷² See *id.*

¹⁷³ These more specific types of fraud were only coded in the study if the decision mentioned these very specific words or statutory provisions as part of the allegations. In contrast, coders employed general "fraud" as a catch-all category in which fraud was mentioned in the decision, but not related to a specific statutory provision. Similarly, "accounting fraud" was coded if an allegation related to accounting, but not to a more specific category.

plainants alleged protected activity in the “other” category, at least as these allegations were described by administrative decision-makers in their written opinions.¹⁷⁴

These data are particularly relevant when examined next to data of cases in which the decision-maker found for the employer precisely because the employee did not engage in a protected activity. In these “no protected activity” cases, certain types of illegal activity were alleged more frequently than in the overall pool of cases. Table 7 compares the data regarding “protected activity” allegations from the overall pool of cases with cases in which the decision-maker found for the employer specifically because “no protected activity” occurred. As indicated in Table 7, when OSHA or an ALJ utilized the “no protected activity” rationale, the employee alleged blowing the whistle on illegal activity falling within the “other” category and the “fraud” category more frequently than in the overall pool of cases.

Employees alleged protected activity in the “other” category in 78.9% and 75% of the cases at the OSHA and ALJ Levels, respectively, in which decision-makers utilized the “no protected activity” rationale. In the overall pool of cases, 48.1% of the OSHA Complainants and 52.7% of the ALJ Complainants alleged the “other” category. A similar, yet smaller, jump can be seen when comparing the general “fraud” category in the same way. A higher percentage of cases utilized this rationale among the “no protected activity” cases than among the overall population of cases: 31.6% versus 24.2% at the OSHA Level and 45.0% versus 28.0% at the ALJ Level. Thus, when OSHA and ALJs decided for an employer because the employee did not allege the proper “protected activity,” these decision-makers often utilized this rationale in cases in which the employee alleged generalized protected activity, such as disclosing “fraud” or some “other” misconduct. Employees who alleged specific types of misconduct, such as “mail fraud” or “federal law relating to shareholder fraud,” rarely lost cases because the decision-maker found “no protected activity.”

The increase in the two general categories for the “no protected activity” rationale could reflect OSHA’s and ALJs’ reluctance to broadly define the categories of whistleblower disclosures that will be protected by Sarbanes-Oxley. These two categories of “fraud” and “other” misconduct could be characterized as the most amorphous and least bound by the specific statutory language of the Act. In other words, those employees who framed their whistleblower disclosures to fall neatly within the Act’s specific statutory provisions, such as mail or wire fraud, bank fraud, or securities fraud, fared better than employees who alleged protected activity less grounded in statutory language.

¹⁷⁴ These decisions may not necessarily reflect the language used by an employee to describe the employee’s protected activity. The results do reflect how OSHA and the ALJs thought about the employee’s allegations regarding protected activity.

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Table 7 - Type of Protected Activity Alleged When the “No Protected Activity” Rationale is Used Compared to the Overall Pool of Cases

Protected Activity (Type of Illegal Activity Disclosed by Whistleblower)	All OSHA Cases	“NPA” Rationale Used - OSHA	All ALJ Cases	“NPA” Rationale Used - ALJ
Banking Fraud (§ 1344)	1.4% (6) ^a	3.5% (2)	2.7% (5)	0.0% (0)
Securities Fraud (§ 1348)	3.6% (15)	1.8% (1)	4.8% (9)	0.0% (0)
Mail / Wire Fraud (§§ 1341 / 1343)	4.8% (20)	3.5% (2)	7% (13)	0.0% (0)
Violation of SEC Rules and Regs	8.6% (36)	3.5% (2)	11.3% (21)	15% (3)
Federal Law Relating to Shareholder Fraud	15.3% (64)	8.8% (5)	19.9% (37)	15% (3)
Fraud	24.2% (101)	31.6% (18)	28.0% (52)	45% (9)
Accounting Fraud	29.4% (123)	14.0% (8)	31.7% (59)	40.0% (8)
Other	48.1% (201)	78.9% (45)	52.7% (98)	75% (15)

NOTE: The percentages in Table 7 reflect the percentage of cases in which coders could identify the type of illegal activity allegedly disclosed. At the OSHA Level, the type of disclosure made could be discerned in 418 cases. At the ALJ Level, it could be ascertained in 186 cases. For the “no protected activity” columns, the percentages are from the 57 OSHA cases and the 20 ALJ cases in which “no protected activity” was the rationale used by OSHA and the ALJ, respectively, and the type of illegal activity allegedly disclosed could be discerned. The percentages do not equal 100% because more than one protected activity could be alleged.

^aAll numbers in parentheses reflect the number of cases in each category.

Examining specific ALJ cases qualitatively demonstrates that many ALJs interpreted the Act’s “protected activity” requirement narrowly. ALJs required that employees draw a direct line between their whistleblower disclosures of misconduct and the misconduct’s relationship to shareholder fraud.¹⁷⁵ For example, in *Grant v. Dominion East Ohio Gas*, an

¹⁷⁵ See, e.g., *Grant v. Dominion East Ohio Gas*, 2004-SOX-63, at 40 (Dep’t of Labor Mar. 10, 2005); *Harvey v. Safeway, Inc.*, 2004-SOX-21, at 32 (Dep’t of Labor Feb. 11, 2005) (finding that disclosures about underpayment of wages “did not have the necessary magnitude to raise a concern about fraud against the shareholders”); *Hopkins v. ATK Tactical Sys.*, 2004-SOX-19, at 5 (Dep’t of Labor May 27, 2004) (dismissing claim based on retaliation for disclosing an employer’s “release of sludge water into the ground water

ALJ found that an employee properly reported accounting irregularities and errors, but found that the employee did not engage in “protected activity” because the employee was unable to directly tie these irregularities to active fraud on the shareholders.¹⁷⁶ Similarly, the employees in *Allen v. Stewart Enterprises, Inc.*, reported to their supervisors several instances of faulty interest calculations, inconsistent and untimely refunds, and improper accounting involving cost recognition.¹⁷⁷ The ALJ refused to find a “protected activity” because the employees could not demonstrate that these errors and omissions in financial accounting and reporting were related to a broader scheme of intentional corporate fraud.¹⁷⁸

ALJs also demanded that employee whistleblowers specifically inform the recipient of a whistleblower disclosure that the illegal activity being reported violates one of Sarbanes-Oxley’s identified federal laws.¹⁷⁹ Rather than merely reporting activity that an employee reasonably views as illegal under this interpretation, the employee must have enough legal knowledge to tie that activity to a specific illegality identified by the Act.¹⁸⁰

Yet, despite this narrow interpretation by some ALJs, others took a relatively broad view of the Act’s “protected activity” requirement in specific cases. One early ALJ decision held that whistleblower disclosures about fraud that amounted to only .0001% of the parent company’s revenues could be protected.¹⁸¹ As noted by the ALJ, Sarbanes-Oxley

places no minimum dollar value on the protected activity it covers. Whether or not “materiality” is a required element of a criminal fraud conviction as Respondents contend, we need to be mindful that Sarbanes-Oxley is largely a prophylactic, not a punitive measure. The mere existence of alleged manipulation, if contrary to a regulatory standard, might not be criminal in nature, but it very well might reveal flaws in the

system” because disclosure neither alleged fraud nor “involve[d] transactions relating to securities”).

¹⁷⁶ See *Grant*, 2004-SOX-63, at 40-44 (emphasizing that the “limited scope and application of the Sarbanes-Oxley Act does not cover the complaints and allegations lodged by Complainant”).

¹⁷⁷ See *Allen v. Stewart Enterprises*, 2004-SOX-60, at 83-84 (Dep’t of Labor Feb. 15, 2005).

¹⁷⁸ See *id.* at 85-90.

¹⁷⁹ See *Grant*, 2004-SOX-63, at 39 (“[S]imply raising questions or lodging complaints without any reference to or suspicion about fraud against shareholders is not protected activity.”). This requirement seems to contradict other ALJ decisions which held that a whistleblower was not required to specifically identify a particular code section that had been violated. See *Hendrix v. Am. Airlines*, 2004-SOX-23, at 23-24 (Dep’t of Labor Dec. 9, 2004); *Gonzalez v. The Colonial Bank*, 2004-SOX-39, at 5 (Dep’t of Labor Aug. 20, 2004) (finding “support for the finding” that whistleblower had a reasonable belief that activity disclosed involved “misconduct, regardless of whether he could specify specific banking, securities, shareholder, or mail fraud violations.”).

¹⁸⁰ See *Grant*, 2004-SOX-63, at 39; *cf. Allen, et al.*, 2004-SOX-60, at 86 (denying protection for whistleblower who reported a potential violation of state law, because such an illegality is not specifically listed by Sarbanes-Oxley).

¹⁸¹ See *Morefield v. Exelon Servs., Inc.*, 2004-SOX-2, at 5 (Dep’t of Labor Jan. 28, 2004).

internal controls that could implicate whistleblower coverage for seemingly paltry sums.¹⁸²

Furthermore, an ALJ held that the Act protected disclosures related to improper reimbursements to company employees, with no discussion of whether these reimbursements were “material” and thus required disclosure under the securities laws.¹⁸³ Another ALJ found that “protected activity” included a whistleblower’s report of an employee’s improper use of company materials and time to create sculptures for retiring co-workers.¹⁸⁴ This report was protected because the sculptor “undoubtedly uses the mail or wires as part of his sculpture business,” and such fraudulent use would violate the mail and wire fraud statutes.¹⁸⁵

Commentators point to these examples and counter-examples as indications that ALJs are working through the Act’s ambiguities, with decisions in favor of both employees and employers.¹⁸⁶ However, the study’s results indicate that the various interpretations of the “protected activity” requirement are not as evenly balanced as these examples and counter-examples might indicate. In fact, the study indicates that OSHA and the ALJs frequently denied whistleblower claims because the employee purportedly failed to engage in “protected activity.”¹⁸⁷ Fully 24.1% of ALJ cases and 18.2% of OSHA cases in which the employer won were resolved because the employee did not demonstrate the correct “protected activity.”¹⁸⁸ The study also found that in addition to these cases, the ALJ determined that the employee could not reasonably believe that the activity disclosed violated a law set forth in Sarbanes-Oxley in 14.5% of the decisions in which employers won.¹⁸⁹

3. *A Surprisingly Unfavorable Burden of Proof*

As discussed above, ALJs relied exclusively or primarily on legal rationales in 95.2% of the cases won by employers, meaning that ALJs resolved only 4.8% of the cases by using solely a factual rationale.¹⁹⁰ By contrast, OSHA reached the factual issues in 29.0% of the cases decided for employers.¹⁹¹ The results of the study call into question whether OSHA appropriately applied Sarbanes-Oxley’s employee-friendly burden of proof in these cases.

¹⁸² *Id.*

¹⁸³ See *Platone v. Atl. Coast Airlines*, 2003-SOX-27, at 22 (Dep’t of Labor Apr. 30, 2004).

¹⁸⁴ See *Hendrix v. Am. Airlines*, 2004-SOX-23, at 22-23 (ALJ Dec. 9, 2004).

¹⁸⁵ *See id.*

¹⁸⁶ See, e.g., Eugene Scalia, *The Developing Law under the Sarbanes-Oxley “Whistleblower” Protection Provision*, Practising Law Institute, Litigation and Administrative Practice Course Handbook Series, PLI Order No. 8327 (Jan. 2006), available on Westlaw at 735 PLI/Lit 291; Triplett, *supra* note 114, at 482.

¹⁸⁷ See discussion *supra* Part IV.B.2.

¹⁸⁸ See *supra* Table 4.

¹⁸⁹ *See id.* The “reasonable belief” rationale was used less frequently at the OSHA Level. OSHA used this rationale in 5.6% of the cases that employers won. *See id.*

¹⁹⁰ See *supra* text accompanying note 133.

¹⁹¹ *See id.*

Sarbanes-Oxley's burden-of-proof is employee-friendly for two reasons. First, the Act adopted the "contributing-factor" test for causation.¹⁹² To be a contributing factor, the protected activity must simply be one factor, "alone or in connection with other factors," which "tends to affect in any way the outcome of the decision."¹⁹³ Sarbanes-Oxley whistleblowers can satisfy this burden of proof more easily than employees under many other whistleblower provisions. The "contributing factor" causation test demands less evidence than the "causal" language required for Title VII retaliation cases¹⁹⁴ and perhaps even less than the "motivating factor" language utilized in Title VII "mixed-motive" cases.¹⁹⁵ As stated by the ARB in a Sarbanes-Oxley case, this "test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action."¹⁹⁶ In implementing the Sarbanes-Oxley regulations, the Department of Labor also recognized the "contributing factor" test as less onerous for the employee to satisfy than other causation tests.¹⁹⁷

Second, after establishing causation and the other prerequisites of the *prima facie* case, the employee should *win* unless the employer demonstrates that it would have made the same decision absent any protected activity. Significantly, the employer's burden must be satisfied under the "clear and convincing" standard,¹⁹⁸ which requires a higher level of proof than the typical "preponderance of the evidence" standard utilized by other anti-retaliation statutes.¹⁹⁹ The U.S. Supreme Court described the

¹⁹² See 18 U.S.C. § 1514A(b)(2)(C) (Supp. 2004) (adopting the burden of proof standard from AIR21, 49 U.S.C. § 42121); 49 U.S.C. § 42121(b)(2)(B)(i) (2000); 29 C.F.R. § 1980.104 (2006).

¹⁹³ See *Klopfenstein v. PCC Flow Tech Holdings*, No. 04-149, at 18 (ARB May 31, 2006) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)) (internal quotation marks omitted).

¹⁹⁴ See, e.g., *Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir. 2005) ("The proper standard of proof on the causation element of a Title VII retaliation claim is that the adverse employment action taken against the plaintiff would not have occurred 'but for' her protected conduct.").

¹⁹⁵ In its explanation of this provision, OSHA noted that

[t]he "contributing factor" language used in this section is identical to that used in the employee protection provisions of the ERA and AIR21, under which there is sufficient case law interpreting the phrase. For example, in *Kester v. Carolina Power & Light Co.*, No. 02-007, 2003 WL 22312696, * 8 (Adm. Rev. Bd. Sept. 30, 2003), the ARB noted: "[P]rior to the 1992 amendments, the ERA complainant was required to prove that protected activity was a 'motivating factor' in the employer's decision. Congress adopted the less onerous 'contributing factor' standard 'in order to facilitate relief for employees who have been retaliated against for exercising their [whistleblower rights].' 138 Cong. Rec. No. 142 (Oct. 5, 1992)."

Procedures, *supra* note 48, at 52107.

¹⁹⁶ See *Marano*, 2 F.3d at 1140, cited in *Klopfenstein*, No. 04-149, at 18.

¹⁹⁷ See Procedures, *supra* note 48, at 52107.

¹⁹⁸ See *Halloum v. Intel Corp.*, 2003-SOX-7, at 16 (Dep't of Labor Mar. 4, 2004); *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15, at 44 (Dep't of Labor Aug. 1, 2003); see also *Vaughn*, *supra* note 8, at 77.

¹⁹⁹ See *Halloum*, 2003-SOX-7, at 16; *Welch*, 2003-SOX-15, at 44; see also *Vaughn*, *supra* note 8, at 77.

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level of proof needed to satisfy this standard as “highly probable”²⁰⁰—a rigorous standard for employers to satisfy.²⁰¹

Thus, in a Sarbanes-Oxley case, after an employee presents a *prima facie* case (using the forgiving “contributing factor” standard) the burden of *proof* shifts to the employer, which must then satisfy a significantly higher burden than normal.²⁰²

Despite Sarbanes-Oxley’s favorable burden of proof, employees at the OSHA Level rarely won when factual issues were evaluated. One hundred seven cases at the OSHA Level presented solely a factual question regarding *why* the employee suffered an adverse action.²⁰³ In these cases, the employee engaged in protected activity and suffered an adverse employment action. According to OSHA, the employee overcame all the procedural and boundary hurdles.²⁰⁴ The only question to be answered was whether the employer retaliated against the employee for engaging in a protected activity. As shown in Table 8, employees prevailed in only 12.1% of these 107 OSHA cases.

Table 8 - Win Rates For Cases with Only Factual Disputes

Outcome	OSHA Level	ALJ Level
Employee win	12.1% (13) ^a	55.6% (5)
Employer win	87.9% (94)	44.4% (4)
Total	100.0% (107)	100.0% (9)

NOTE: Employer wins were included when “causation” or the employer’s “rebuttal” were the only rationales provided by the decision-maker.

^aAll numbers in parentheses reflect the number of cases in each category.

By contrast, at the ALJ Level, only a small number of cases—10.2%, or 9 out of 88—presented a factual issue regarding causation or the employer’s rebuttal burden.²⁰⁵ As discussed above, procedural or boundary

²⁰⁰ Colorado v. New Mexico, 467 U.S. 310, 316 (1984); see also KOHN, *supra* note 8, at 62.

²⁰¹ See Stone & Webster Eng’g Corp. v. Herman, 115 F.3d 1568, 1572 (11th Cir. 1997) (recognizing under the same statutory framework found in the Energy Reorganization Act, 42 U.S.C. § 5851, that “[f]or employers, this is a tough standard”).

²⁰² See Klopfenstein, No. 04-149, at 19-21.

²⁰³ This number was derived by examining cases in which OSHA decided in favor of the employer based solely on a factual rationale (*n*=94) and cases in which the employee prevailed (*n*=13). The employee wins were included because these cases, by definition, reached the factual merits of the complaint.

²⁰⁴ In other words, OSHA did not utilize a procedural or boundary rationale in its determination.

²⁰⁵ See *id.* The total of nine ALJ cases was calculated by combining five employee wins on the merits with 4 employer wins in which an ALJ utilized a factual rationale. Although 6 employees won at the ALJ Level, one employee won by default because the employer did not appear at the hearing. Thus, the ALJ did not address the factual issues in the case.

rationales resolved the remaining ALJ employer-win cases.²⁰⁶ Of these nine cases involving only factual disputes, ALJs decided over half (5, or 55.6%) in favor of the employee.²⁰⁷

Comparing the 12.1% win rate at the OSHA Level for “factual” cases with other win rates emphasizes its aberrational nature.²⁰⁸ The strongest comparison may be with similar cases at the ALJ Level, in which 55.6% of employees win when only factual issues are evaluated. However, given the small raw number of ALJ decisions, consider other comparisons. For example, under other employment statutes, win rates for cases that survive summary judgment and have a trial are analogous to win rates for cases with only factual disputes set forth in Table 8. A study of whistleblower wrongful discharge cases in California in 1998 and 1999 found that employees won 63% of the time at trial²⁰⁹—over five times the rate of employee wins at the OSHA Level under Sarbanes-Oxley. Another study found that, in 2001, 39.5% of employment discrimination plaintiffs won trials in federal court.²¹⁰ When compared with these win rates, the 12.1% win rate for factual cases at the OSHA Level seems extraordinarily low.

One explanation for this 12.1% win rate may be that OSHA inappropriately utilized Sarbanes-Oxley’s employee-friendly burden of proof. For example, the employee’s initial burden to prove that the employee’s protected activity was a “contributing factor” in the retaliation should be a relatively low burden for an employee to overcome. Yet, as shown in Table 9, in approximately two-thirds of the 107 “factual rationale” cases (65.4%), OSHA determined that the employee did not meet this relatively low burden. Thus, because OSHA determined that the employee failed to present a *prima facie* case of retaliation in these cases, OSHA never shifted the burden from the employee to force “clear and convincing” proof from the employer.²¹¹ By contrast, at the ALJ Level, the opposite result occurred. ALJs found that employees satisfied the “contributing factor” causation test and shifted the burden to employer in 66.7% of the “factual rationale” cases at the ALJ Level.²¹²

²⁰⁶ See *supra* text accompanying note 133.

²⁰⁷ See Table 8. The ALJ results also confirm the impact ALJs’ focus on legal rationales has on an employee’s chance of success. If employees survived ALJs’ legal analysis of procedural and boundary issues, employees seemed to benefit from Sarbanes-Oxley’s favorable burden of proof.

²⁰⁸ Although the win rates in Table 8 seem to approach, and even surpass, the win rates under other statutes set forth in Table 2, *supra*, the employee win rates set forth in Table 8 occur in cases with only factual disputes, i.e., all of the legal hurdles have been overcome. The win rates in Table 2 are overall win rates for cases in which a decision was rendered at any stage in the administrative or judicial process.

²⁰⁹ See Oppenheimer, *supra* note 15, at 538.

²¹⁰ See Clermont & Schwab, *supra* note 17, at 441.

²¹¹ Six of these 70 cases won by the employer alternatively held that the employer satisfied its “clear and convincing” evidence burden, utilizing an “even if” argument.

²¹² See Table 9.

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Table 9 - Determination of Causation Issue

Outcome	OSHA Level	ALJ Level
<u>For Employee</u> – Employee demonstrated causation	34.6% (37) ^a	66.7% (6)
<u>For Employer</u> – Employee failed to demonstrate causation	65.4% (70)	33.3% (3)
Total	100.0% (107)	100.0% (9)

NOTE: Table 9 shows the result when “causation” is resolved under the “contributing factor” test. Cases resolved “for the employer” utilized the causation rationale. Cases resolved for the employee on this issue included cases in which the employee won and cases in which the employer won solely because the employer satisfied its rebuttal burden of proof.

^aAll numbers in parentheses reflect the number of cases in each category.

Furthermore, even when OSHA shifted the burden to the employer and the issue was whether the employer met the “clear and convincing” standard, OSHA found in favor of the employer in a surprising number of cases. As set forth in Table 10, employees won only thirteen of the thirty-seven cases (35.1%) in which the employer had a “clear and convincing” burden of proof. Importantly, these employee wins occurred in Sarbanes-Oxley cases in which all Sarbanes-Oxley’s legal requirements were met and the *employer*—not the employee—had the burden of proof under a “clear and convincing” standard. This difference in burdens should and can matter: by comparison, when the dispositive issue at the ALJ Level was whether the “clear and convincing” burden was met, employees won 83.3% of the time.²¹³

The results at the OSHA Level contradict expectations, for these were cases in which the employee supposedly met all of the “legal” hurdles required by Sarbanes-Oxley. The employee engaged in protected activity and suffered an adverse employment action. The only question was whether a causal link existed between these events. Given the low burden for employees to prove this point and the high burden for employers, in essence, to disprove a negative (that it would have made the same decision regardless of the protected activity) on rebuttal, it seems reasonable to expect that more than 12.1% of employees would win these “factual” cases.

²¹³ *See id.* It should be noted that the number of cases is *very* small: only six cases reached this stage, five of which were won by employees. This disparity between OSHA and the ALJs seems to support the conclusion that OSHA may examine the factual issues more readily than the ALJs, but when ALJs do examine them, the results seem more favorable to employees than at the OSHA Level.

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Table 10 - Determination of Employer's Rebuttal Burden of Proof

Outcome	OSHA Level	ALJ Level
<u>For Employee</u> - Employer failed to satisfy burden of proof by clear and convincing evidence	35.1% (13)	83.3% (5)
<u>For Employer</u> - Employer satisfied burden of proof	64.9% (24)	16.7% (1)
Total	100.0% (37)	100.0% (6)

^aAll numbers in parentheses reflect the number of cases in each category.

A possible explanation for these findings is that OSHA did not have the resources to investigate Sarbanes-Oxley cases in the time frame the agency's regulations required for it to complete an investigation.²¹⁴ Although Sarbanes-Oxley whistleblower cases currently consist of approximately 13% of the whistleblower cases administered by OSHA,²¹⁵ OSHA did not receive any additional funding to increase its investigative staff by hiring investigators with experience in securities laws as opposed to worker health and safety.²¹⁶ This lack of resources may have caused investigators to take shortcuts, thereby limiting the depth and scope of inquiry into an employee's claims. Indeed, some employees and their attorneys assert that OSHA investigators did not interview employee-complainants and failed to provide employees with a chance to fully argue their case.²¹⁷

In addition to OSHA's lack of resources, OSHA's investigative manual does not adequately explain Sarbanes-Oxley's unique burden of proof structure. The sections of the manual that explain general investigative procedures give examples from the less employee-friendly burden of proof found in the Occupational Safety and Health Act.²¹⁸ This general

²¹⁴ As noted above, *see supra* text accompanying note 68, the average time between the filing of a Sarbanes-Oxley complaint with OSHA and the issuance of a report by the OSHA investigator was 127 days for Fiscal Year 2005. *See* E-mail from Nilgun Tolek, Director, OSHA Office of Investigative Assistance, to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (Feb. 15, 2006) (on file with author). OSHA's regulations require an investigation to be completed within 60 days. *See* 29 C.F.R. § 1980.105 (2006).

²¹⁵ Discussion with Nilgun Tolek, Director, OSHA Office of Investigative Assistance (Jan. 29, 2007).

²¹⁶ *See id.*; *see also* Deborah Solomon, *For Financial Whistle-Blowers, New Shield Is an Imperfect One*, WALL ST. J., May 19, 2005, at A1, A14 (reporting that OSHA investigators acknowledge that OSHA is "struggling with the new mandate" from Sarbanes-Oxley).

²¹⁷ *See* Solomon, *supra* note 216, at A14.

²¹⁸ *See* OSHA, WHISTLEBLOWER INVESTIGATIVE MANUAL 3-2; 3-3 (Aug. 22, 2003), available at <http://www.osha.gov/dep/oia/whistleblower/index.html> (last visited Jan. 31, 2007).

section explains that a “nexus” must be found between a whistleblower’s protected activity and the adverse employment action, and the section describes the employer’s rebuttal as requiring proof by a preponderance of the evidence.²¹⁹ Although the specific chapter on Sarbanes-Oxley uses the proper “contributing factor” and “clear and convincing” standards, this section does not elaborate on the differences between this language and the language of the Occupational Safety and Health Act.²²⁰ OSHA’s investigative manual could easily mislead OSHA’s investigators as to the true nature of Sarbanes-Oxley’s unique burden of proof structure.

Moreover, employers have several procedural advantages that may explain OSHA’s willingness to accept an employer’s explanation for an adverse employment action. OSHA does not have subpoena power and therefore cannot force employers to provide documents or witnesses to testify.²²¹ OSHA regulations allow employers to meet with investigators and dispute OSHA’s conclusions, but employees do not have these same rights.²²² Prior to April 2006, employees did not necessarily receive the employer’s response to the complaint, even though employers received a copy of the employee’s complaint.²²³ Employers also can specifically request that OSHA withhold confidential information from employees during and after the investigation.²²⁴

The way in which OSHA resolves cases involving factual disputes may reflect these investigative issues. When deciding against employees so frequently in these “factual rationale” cases, OSHA closely evaluates the employee’s own behavior, which the employer likely emphasized during the investigation. Two evidentiary determinations seem to have particularly influenced OSHA investigators. First, in over one-half of the cases citing a factual rationale in favor of the employer (51.1%), OSHA found that the employee engaged in improper behavior, such as insubordination or illegal activity.²²⁵ Second, in 43.6% of these “factual rationale” cases, OSHA found that the employee suffered an adverse employment

²¹⁹ See *id.*

²²⁰ See *id.* at 14-2.

²²¹ See Solomon, *supra* note 216, at A1. By contrast, Congress provided OSHA with subpoena power to fulfill OSHA’s obligations under the Occupational Safety and Health Act. See 29 U.S.C. § 657(b).

²²² See 29 C.F.R. § 1980.104(e) (2006); Solomon, *supra* note 216, at A14.

²²³ On April 11, 2006, OSHA revised its investigative procedures. OSHA now states that “[d]uring an investigation, disclosure must be made to the complainant of at least the substance of the respondent’s response. Other evidence submitted by the respondent (or the substance of it) may also be disclosed, so that the complainant can fully respond to the respondent’s position and the investigation can proceed to a final resolution. The form and timing of the disclosure are at OSHA’s discretion.” OSHA, REVISED INTERIM GUIDELINES ON CHANGES IN PROCEDURES FOR HANDLING PRIVACY ACT FILES AND FREEDOM OF INFORMATION ACT REQUESTS § II.A.2 (Apr. 11, 2006), available at http://www.osha.gov/dep/oia/whistleblower/Revised_interim_guidelines.html (last visited Jan. 30, 2007).

²²⁴ See 29 C.F.R. §§ 1980.104(c); (d) (2006); Solomon, *supra* note 216, at A14.

²²⁵ A complete table of important evidentiary factors cited by OSHA or ALJs to support a decision for an employer can be found on the author’s website: <http://law.unl.edu/inside.asp?d=faculty&id=28>.

action because of poor performance rather than as a result of retaliation.²²⁶

The importance of these two types of factual findings—bad employee behavior and poor performance—are not surprising. It is well-documented that a typical reaction of employers to retaliation suits by whistleblowers is to attack the whistleblower's behavior.²²⁷ In fact, by definition, a whistleblower in a retaliation lawsuit suffered some sort of adverse employment action that the employer must justify.

But, OSHA rarely cited other possible evidentiary facts in support of its decision, or at least OSHA failed to discuss additional facts in its decision-letters. For example, in these factual rationale cases, OSHA's decision-letters rarely discussed witness credibility (2.1%), the timing of the adverse action in relation to the protected activity (4.3%), or whether the employer followed its normal procedures in disciplining the employee (4.3%).²²⁸ Furthermore, OSHA decisions only occasionally discussed whether the employee claimed to treat the whistleblowers similarly to the rest of its employees (14.9%) or whether the employee's discharge occurred as part of a reduction-in-force (10.6%).²²⁹ OSHA's heavy reliance on the employee's behavior in justifying its decision, while underutilizing other potential evidence related to an employer's actions and policies, seems to support the conclusion that OSHA did not fully investigate and evaluate both sides of a dispute. OSHA seemed merely to accept the employer's position, perhaps because the employee was not as involved in the investigation.

By comparison, employees may have won factual cases at the ALJ Level more frequently than at the OSHA Level because ALJs have the luxury of hearing full testimony from both sides, complete with demeanor evidence of witnesses and cross-examination. For example, the credibility of a witness played an important role at the ALJ Level while this factor was almost irrelevant at the OSHA Level: in 75% of the "factual rationale" cases won by the employer at the ALJ Level, ALJs relied on the credibility of the witnesses to make a decision, as compared to 2.1% at the OSHA Level.²³⁰ Similarly, in all five employee wins resulting from an ALJ hearing, the ALJ cited "witness credibility" as a factor in deciding in favor of the employee. Only 41.7% of the OSHA employee wins recognized this factor as important in OSHA's decision.²³¹

²²⁶ See *id.*

²²⁷ See, e.g., Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355, 364 (1991).

²²⁸ A complete table of important evidentiary factors cited by OSHA or ALJs to support a decision for an employer can be found on the author's website: <http://law.unl.edu/inside.asp?d=faculty&id=28>.

²²⁹ See *id.*

²³⁰ See *id.* It is important to remember that the raw numbers of factual rationale cases at the ALJ Level are quite small.

²³¹ A complete table of important evidentiary factors cited by OSHA or ALJs to support a decision for an employee can be found on the author's website: <http://law.unl.edu/inside.asp?d=faculty&id=28>.

4. Conclusion – Narrow Boundaries and a High Burden

The results of the present study indicate that OSHA and the ALJs failed to fulfill employees' expectations of broad protections in the initial years after the Act's enactment. Employers consistently won Sarbanes-Oxley cases because OSHA and the ALJs found that employees failed to present claims within the legal parameters of the Act.

Part of the explanation for this low win rate could be that employees filed frivolous or borderline claims that clearly did not fall within the Act's boundaries.²³² This explanation suggests that the employee win rate should increase as employees and their attorneys learn from these outcomes and file fewer cases requiring a broad reading of the Act. The use of procedural and boundary rationales should decrease and factual rationales (and employee wins) should increase as attorneys and employees determine where administrative decision-makers draw the parameters of the Act.

However, the study's results contradict these predictions. During the course of the study, procedural and boundary rationales did not decrease over time. In fact, as seen in Chart 2 below, the trend at the OSHA Level was to resolve increasingly *more* cases over time by using boundary rationales, perhaps following the lead of the ALJs. With regard to the ALJs, Chart 3 demonstrates that there was no discernable decline in the use of either procedural and boundary rationales over time.

Moreover, recent statistics provided by OSHA demonstrate that no employee won any of the 159 cases that OSHA resolved during Fiscal Year 2006, which ended on September 30, 2006.²³³ This lack of employee victories four years after the Act's enactment suggest explanations other than a stubborn insistence of employees and their attorneys to file non-meritorious claims. Indeed, the study demonstrates that OSHA and the ALJs particularly focused on two new legal boundaries to whistleblower law implemented by Sarbanes-Oxley: a new definition of a "covered employer" and a new type of "protected activity". Qualitative evidence from ALJ decisions regarding these topics demonstrate that ALJs often interpreted these new boundaries narrowly. All of these results suggest that, even if employees filed some cases requiring a broad reading of the Act, OSHA and the ALJs also contributed to the low employee win rate by strictly construing the legal boundaries of Sarbanes-Oxley. Such discrepancies between a whistleblower's expectations regarding the Act's

²³² Indeed, to explain the low employee win rate, OSHA posited the theory that early Sarbanes-Oxley employees pushed the outer boundaries of the Act. See Discussion with Nilgun Tolek, Director, OSHA Office of Investigative Assistance (Oct. 3, 2006); E-mail from Nilgun Tolek, Director, OSHA Office of Investigative Assistance to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (July 11, 2005) (on file with author); cf. Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 567 (2001) (asserting that claims on the "outer perimeter" of the Americans with Disabilities Act may "represent a natural evolution of a new and innovative statute that left much room for interpretation"); Colker, *Winning*, *supra* note 15, at 258-265 (exploring this thesis with data from ADA appellate cases).

²³³ See E-mail from Nilgun Tolek, Director, OSHA Office of Investigative Assistance, to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (Oct. 3, 2006) (on file with author).

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applicability and how the Act actually was applied likely caused a substantially lower win rate than might otherwise be expected.²³⁴

Chart 2 - Rationales Used By OSHA Over Time

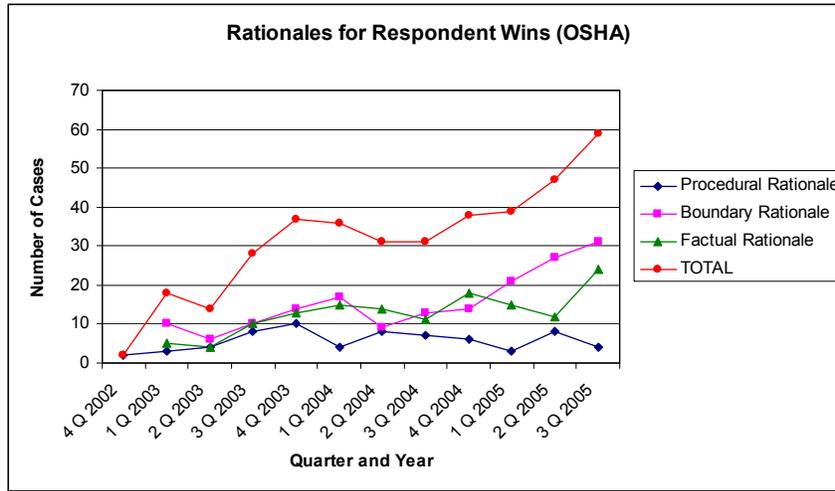
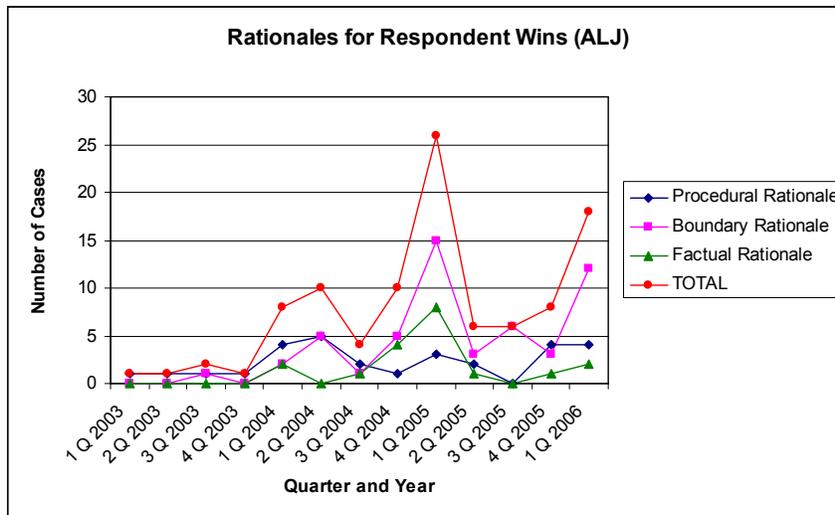


Chart 3 - Rationales Used by ALJs Over Time



Moreover, even for cases that *did* fall within the strict boundaries of Sarbanes-Oxley, OSHA failed to fulfill employees’ expectations for protection based upon the Act’s employee-friendly burden of proof. Employers won almost 90% of these “factual” cases in front of OSHA, indicating that OSHA failed to properly apply the Act’s burden-shifting requirements.²³⁵ OSHA seemed more willing than the ALJs to delve into messy factual issues, but when OSHA did evaluate the factual merits of a case, employees rarely won.

²³⁴ See Clermont & Eisenberg, *supra* note 122, at 590 (“[A]nother type of powerful explanation of aberrant win rates is the parties’ mutual misperceptions about the prevailing standard of decision.”).

²³⁵ See *supra* text accompanying notes 211-14.

V. RECOMMENDATIONS

An employee who files a Sarbanes-Oxley claim faces a steeper up-hill battle than most employees asserting claims against an employer under comparable employee statutes.²³⁶ Simply put, Sarbanes-Oxley does not protect employee whistleblowers to the extent Congress envisioned when it passed the Act. This Part presents three suggestions to remedy this under-enforcement of a statute Congress intended to provide broad remedial relief and encouragement to whistleblowers.

First, Congress should increase the Act's statute of limitations from 90 to at least 180 days. Second, Congress should address OSHA's and the ALJs' emphasis on "boundary" issues either by broadening the Act's boundaries to include more types of claims or by clarifying that it intended the Act to have the narrow application currently being imposed by these administrative decision-makers. Third, Congress should attend to OSHA's inappropriate application of Sarbanes-Oxley's employee-friendly burden of proof either by giving OSHA more resources to investigate Sarbanes-Oxley complaints thoroughly or by eliminating OSHA's role as principal investigator of these claims.

A. Amending the Statute of Limitations Procedural Hurdle

The study's results indicate that OSHA and ALJs denied large numbers of whistleblowers Sarbanes-Oxley protection because of the restrictive 90-day statute of limitations. In almost half of the ALJ statute of limitations cases (46.4%, or 13 out of 28 cases), employees filed Sarbanes-Oxley claims between 90 and 180 days after an adverse action.²³⁷ This large number of cases highlights a significant procedural obstacle for employees.

A longer filing period would enable OSHA or an ALJ to hear the merits of these claims. Moreover, most employees who filed Sarbanes-Oxley claims alleged that they lost their jobs.²³⁸ Additional time to file claims would provide whistleblowers the ability to first take care of other, more pressing responsibilities, such as finding another job and dealing with the upheaval of losing a primary source of income. Furthermore, more than 90 days should be provided for a whistleblower to locate a competent attorney and for the attorney to investigate a claim thoroughly before filing with the Department of Labor.

A longer limitations period also would ameliorate the drastic consequences resulting from any confusion regarding the beginning of limitations period. Such confusion may result from the well-enforced

²³⁶ See discussion *supra* Part IV.A (comparing win rates with other employment statutes); see also *supra* Table 2.

²³⁷ See, e.g., *Stone v. Duke Energy Corp.*, 2006-SOX-48, at 3 (Dep't of Labor Apr. 7, 2006) (filed 92 days after adverse action); *Stevenson v. Vertex Pharm., Inc.*, 2006-SOX-56, at 2 (Dep't of Labor May 8, 2006 (95 days)). OSHA decisions either did not contain this data or, if a decision did indicate the number of days between the retaliation and the filing, OSHA redacted that data under an exception to the Freedom of Information Act.

²³⁸ The study found that 81.8% (378/462) of Complainants whose allegation regarding retaliation was discernable alleged that they were fired from their jobs as retaliation.

rule that the statute of limitations begins running when the employee has notice of an adverse action, rather than when the action occurs²³⁹ — a rule that can lead to disputes regarding when such notice was received and whether the notice was clear. Disputes about notice seem more likely when the limitations period is shorter, because the few days or weeks between notice and an actual adverse employment action become crucial with a shorter statute of limitations.

Lengthening the statute of limitations should not negatively impact the ability of an employer to defend itself. Many employment statutes have limitations periods of 180 days or more, and employers have not had difficulty marshalling evidence to defend themselves.²⁴⁰ In fact, various federal statutes require most employers to keep certain records on employees for one year or more, resulting in the typical practice of maintaining an employee's file for at least this period of time.²⁴¹

No compelling rationale for a 90-day limitations period appears in the literature on labor relations, employee rights, or whistleblowing. In fact, the original version of the Sarbanes-Oxley contained a 180-day statute of limitations.²⁴² When the Senate Judiciary Committee considered the original bill, Senators Grassley and Leahy offered an amendment, apparently to mollify a group of Republican senators.²⁴³ The amendment weakened a number of key whistleblower provisions, including reducing the statute of limitations to 90 days.²⁴⁴

While a statute of limitations is obviously necessary, the short duration of Sarbanes-Oxley's current limitations period is unrelated to the Act's goals of deterring corporate fraud and remedying retaliation against whistleblowers. Significant numbers of whistleblowers have been prevented from asserting potentially valid claims because this procedural requirement is too restrictive. Given the complex nature of these cases,

²³⁹ See *supra* text accompanying note 142.

²⁴⁰ See Title VII of the Civil Rights Act of 1964 § 706(e)(1), 42 U.S.C. § 2000e-5(e)(1) (300 days if charge is first instituted with state or local agency; otherwise 180 days); Americans With Disabilities Act §107(a), 42 U.S.C. § 12117(a) (incorporating Title VII's statute of limitations); Age Discrimination in Employment Act § 7(d), 29 U.S.C. § 626(d) (either 180 or 300 days if state law provides relief for age discrimination); Fair Labor Standards Act (two or three years, depending on employer intent); Surface Transportation Assistance Act, 49 U.S.C. § 31105(b) (180 days); Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129(b)(1) (180 days). The Government Accountability Project suggests that a "realistic" statute of limitations is an essential provision for an anti-retaliation statute to provide true protection for whistleblowers. See *Testimony of Tom Devine, Legal Director, Government Accountability Project, for the Working Group on Probity and Public Ethics, Organization of American States* (Mar. 31, 2000), available at http://www.oas.org/juridico/English/tom_devine.htm. Specifically, the GAP suggests that a "one year statute of limitations is consistent with common law rights and has proved functional." See *id.*

²⁴¹ See 29 C.F.R. § 1602.14 (2006) (EEOC regulation requiring employers to maintain certain employment records for at least one year); 29 C.F.R. § 516.5 (2006) (Department of Labor regulations requiring employers to maintain payroll and other wage records for three years).

²⁴² See S. REP. NO. 107-146, at 22, 26 (2002); S. 2010, § 7(a).

²⁴³ See S. REP. NO. 107-146, at 22, 26 (2002); S. 2010, § 7(a) (indicating the group of senators to include Senators Hatch, Thurmond, Grassley, Kyl, DeWine, Sessions, Brownback, and McConnell).

²⁴⁴ See CONG. REC. S1789-90 (Mar. 12, 2002).

and the reluctance of OSHA, ALJs and the ARB to consider equitable relief from the requirements of the statute of limitations, Congress should amend Sarbanes-Oxley to provide for a limitations period of a minimum of 180 days.

B. Broadening and Clarifying the Act's Boundaries

The study's results also indicate that the administrative review process focused intensely on the legal boundaries of a Sarbanes-Oxley claim.²⁴⁵ Administrative decision-makers concentrated on two "boundary" issues: the "covered company" and the "protected activity" requirements for a *prima facie* case. These decision-makers interpreted each of these provisions in ways that overly restricted whistleblower claims.

Rigid and narrow interpretations of the Act seem inappropriate given the Act's remedial goals and the necessity of employee whistleblowers to reveal corporate fraud.²⁴⁶ A "model" whistleblower statute—one that maximizes encouragement and protection of whistleblowers—should protect a broad range of whistleblowers and disclosures.²⁴⁷ The current interpretations of the Act do not attain these goals, because they narrow the scope of protected disclosures and, by strictly construing the type of employee covered by the Act, seem to focus inordinately on the whistleblower rather than the disclosure being made.²⁴⁸ Accordingly, Congress could amend the Act to address these strict constructions of the Act's language by broadening the types of companies subject to the Act and the type of employee activities protected by the Act. This broader language, set forth in more detail below, would clarify the Act's goals of encouraging whistleblowers to report a variety of wrongdoing and protecting them after they do.

On the other hand, extending protections as I suggest may arguably broaden the scope of the anti-retaliation provision beyond Sarbanes-Oxley's general focus on fraud at publicly-traded companies. To the extent Congress desires to maintain a narrower focus on a single issue, i.e., fraud, at only certain companies, i.e., those that are publicly-traded, I also make alternative suggestions to clarify the Act's narrow boundaries by requiring more disclosure from OSHA and the ALJs regarding the limited protections of the Act. By clarifying the Act's boundaries in this manner, Congress could help temper employees' expectations about the seemingly broad coverage of the Act.

²⁴⁵ See *supra* Table 5.

²⁴⁶ See Moberly, *supra* note 1, at 1116-17 (discussing the importance of employees as corporate monitors).

²⁴⁷ See Robert G. Vaughn, et al., *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 GEO. WASH. INT'L L. REV. 857, 865 (2003) (discussing various provisions of a "model" whistleblower statute).

²⁴⁸ See *id.* at 864 (asserting that a model whistleblower statute should focus on the disclosure made by the whistleblower, not the whistleblower).

1. Broadening the Definition of a “Covered Employer”

ALJs and the ARB strictly construed the definition of “covered employer.” First, as discussed above,²⁴⁹ ALJs and the ARB imposed onerous requirements for employees to bring Sarbanes-Oxley claims against privately-held subsidiaries of publicly-traded companies. For example, under these decisions, employees must pierce the corporate veil in order to bring a claim against a privately-held subsidiary. Yet, this requirement ignores the law’s treatment of subsidiaries as “agents” of publicly-traded companies for accounting and financial reporting purposes.²⁵⁰ Subsidiaries “are an integral part of the publicly traded company, inseparable from it for purposes of evaluating the integrity of its financial information, and they must be treated as such.”²⁵¹ A parent company’s internal corporate controls must include providing a subsidiary’s material financial information to the parent company’s officers, who are required to certify the parent’s annual or quarterly reports.²⁵² For Sarbanes-Oxley purposes, at least, a “publicly traded corporation is . . . the sum of its constituent units,” including any privately-held subsidiaries.²⁵³ Thus, concluded one ALJ, “the scope of Sarbanes-Oxley whistleblower protection tracks the flow of financial and accounting information throughout the corporate structure and remains as permeable to the internal ‘corporate veils’ as the financial information itself.”²⁵⁴ By contrast, other ALJ decisions and the ARB’s recent opinion requiring the piercing of the corporate veil seem misguided in light of this persuasive reasoning equating whistleblower protection with other corporate reporting reforms enacted by Sarbanes-Oxley.

Second, ALJs uniformly held that privately-held companies that serve as contractors of publicly-traded companies are not “covered entities” under Sarbanes-Oxley, and therefore cannot be liable under the

²⁴⁹ See discussion *supra* Part IV.B.2.

²⁵⁰ *Morefield v. Exelon Servs., Inc.*, 2004-SOX-2, at 3 (Dep’t of Labor Jan. 28, 2004).

²⁵¹ *Id.*

²⁵² See *id.* (citing to Sarbanes-Oxley Act of 2002, § 302(a)(4)(B)).

²⁵³ *Id.* at 4. As put by one ALJ in a Sarbanes-Oxley whistleblower case:

The publicly traded entity is not a free-floating apex. When its value and performance is based, in part, on the value and performance of component entities within its organization, the statute ensures that those entities are subject to internal controls applicable throughout the corporate structure, that they are subject to the oversight responsibility of the audit committee, and that the officers who sign the financials are aware of material information relating to the subsidiaries. A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries. In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization.

Id.

²⁵⁴ *Id.* at 4.

Act.²⁵⁵ The ALJs interpreted the Act's language to mean that an "officer, employee, contractor, subcontractor, or agent" of a publicly-traded company may not retaliate against an employee of *the public company*.²⁵⁶ According to the ALJs, the Act's anti-retaliation protections do not extend to employees of contractors, subcontractors, and agents unless the contractor, subcontractor, or agent is *itself* a public company.²⁵⁷ Based on such a limited interpretation of the Act's language, ALJs dismissed a number of cases without addressing the factual merits of whether an employee was retaliated against for engaging in protected activity.²⁵⁸

ALJs' unwillingness to apply the Act directly to employees of "contractors, subcontractors, and agents," also appears unnecessary and contrary to Congressional intent. As Professor Robert Vaughn has argued, the Act's use of the term "employee" not only could mean an employee of a public company, but also could include coverage for employees of a contractor, subcontractor, or agent of a public company.²⁵⁹ Professor Vaughn noted that when Congress wants to limit the coverage of a whistleblower statute to certain employees it does so very clearly.²⁶⁰ For example, the AIR21 statute (on which much of Sarbanes-Oxley's procedural requirements are based) specifically refers to discrimination against "airline employees," while Sarbanes-Oxley does not contain such an express limitation.²⁶¹

A prominent whistleblower advocate made a similar argument for a broad reading of "covered employer" to include non-publicly traded corporations that have a contractual or agency relationship with publicly-traded corporations. Stephen Kohn of the National Whistleblower Center asserted that this interpretation "is consistent with the case law developed under other whistleblower laws."²⁶² Specifically, under the Energy Reorganization Act, ALJs found suppliers and vendors of formally covered companies to be covered employers.²⁶³

The Act's statutory language, then, permits a broader interpretation of a "covered employer" than ALJs and OSHA currently utilize. A broader interpretation also furthers Sarbanes-Oxley's policy goals. Professor Vaughn astutely noted that an employee of a contractor can be "well-placed to discover fraud and abuse by the [public] company" and public companies should not be able to pressure contractors, subcontractors, and agents to retaliate against this employee."²⁶⁴ Although Sarbanes-Oxley's administrative decision-makers have not interpreted

²⁵⁵ See *Goodman v. Decisive Analytics Corp.*, 2006-SOX-11, at 9 (Dep't of Labor Jan. 10, 2006); *Minkina v. Affiliated Physician's Group*, 2005-SOX-19, at 6 (Dep't of Labor Feb. 22, 2005); *Roulett v. American Capital Access*, 2004-SOX-78, at 9 (Dep't of Labor Dec. 22, 2004).

²⁵⁶ See cases cited in footnote 255 *supra*.

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ Vaughn, *supra* note 8, at 9.

²⁶⁰ See *id.*

²⁶¹ See *id.*

²⁶² KOHN, *supra* note 8, at 70.

²⁶³ *Id.* (citing *In re Five Star Products, Inc.*, CLI-93-23, M&O of NRC Commission, 38 NRC 169 (Oct. 21, 1993)).

²⁶⁴ Vaughn, *supra* note 8, at 10.

the Act in this manner, a reasonable interpretation of Sarbanes-Oxley's language is that Congress wanted to protect employees of these contractors, subcontractors, and agents, given the role of several such employees in "enabling or condoning corruption and fraud."²⁶⁵ Moreover, the results from fraud at privately-held companies can be as devastating to the companies' employees, owners, and suppliers as fraud at a publicly-traded corporation.

At a minimum, drawing technical distinctions between publicly-traded and privately-held companies in both the subsidiary and the contractor scenarios creates employee confusion regarding whether a potential whistleblower will be protected from retaliation. This confusion can only lead to inconsistent enforcement of the Act and therefore less whistleblower disclosure. At its most dangerous, such distinctions provide a free pass for privately-held corporations to retaliate against any employee who reports internal misconduct. If Sarbanes-Oxley aims to reduce corporate fraud, then protecting only employees of publicly-traded corporations undermines that goal.

Thus, Congress could reconsider whether the protections received by an employee should hinge on the vagaries of the corporate decision to publicly-trade its shares. A more commonly-utilized distinction in employment law is for statutes to cover employers with a definable number of employees, such as Title VII's fifteen-employee minimum.²⁶⁶ Indeed, Sarbanes-Oxley could achieve similar coverage with less ambiguous language by relying on the number of employees as a proxy for publicly-traded companies. In order to avoid overly burdening employers, Congress could set the number of employees required for coverage at the same minimum set by the Family and Medical Leave Act, which provides the largest minimum of any federal employment statute: the FMLA covers employers with 50 or more employees within a 75 mile radius of a work site.²⁶⁷ This requirement will be both over- and under-inclusive, in that it will exclude small publicly-traded companies and include large privately-held companies. However, it would provide more certainty regarding coverage because employees may better understand this criteria commonly utilized by other employee-protection statutes.

Moreover, the harm from corporate fraud results more from the size of the company than from whether the company is publicly-traded or privately-held. Large corporations can be the economic centers of a community, regardless of their corporate form, and corporate fraud harms these communities—not just corporate shareholders.²⁶⁸ Publicly-traded companies have attempted to avoid the regulations of Sarbanes-

²⁶⁵ *Id.*

²⁶⁶ See Title VII of the Civil rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (15 employees); see also Americans With Disabilities Act § 101, 42 U.S.C. § 12111(5)(A) (15 employees); Age Discrimination in Employment Act § 11(b), 29 U.S.C. § 630(b) (20 employees). It should be noted that several whistleblower protections do not require a minimum number of employees. Instead, these statutory anti-retaliation provisions protect employees from retaliation by any "person," including employers of any size. See, e.g., Occupational Safety and Health Act § 11(c), 29 U.S.C. § 660(c).

²⁶⁷ See 29 U.S.C. § 2611(2) (defining eligible employees); *id.* § 2611(d) (defining covered employers).

²⁶⁸ See Moberly, *supra* note 1, at 1164-65.

Oxley by becoming privately-held,²⁶⁹ yet the public costs of fraud at private companies remains significant, including the costs of lost jobs and unemployed workers on a community. Furthermore, privately-held companies have fewer internal controls than publicly-traded companies, which may make them more susceptible to fraud. Thus, encouraging whistleblowers by protecting them in privately-held corporations reduces the chance of fraud in the very places it is most likely to occur.

In short, covering employers with a certain number of employees would make Sarbanes-Oxley's whistleblower protection less dependent on the corporate form taken by an employer and would clarify the application of the Act. At the same time, the Act would cover the country's largest companies, where the overarching problem of corporate fraud has the greatest impact.

2. Broadening the Scope of "Protected Activity"

The Act's coverage of "protected activities" also could be broadly construed. The statutes that the Act identifies as proper subjects for whistleblower disclosures cover a particularly broad swath of activities. The criminal code provisions identified by Sarbanes-Oxley as topics for protected whistleblower disclosures "include some of the broadest and most widely used provisions of the federal criminal law."²⁷⁰ The protection of disclosure related to conduct that violates "any rule or regulation of the Securities and Exchange Commission' . . . may permit the coverage of some disclosures not clearly encompassed by a purely economic definition of materiality under the securities laws."²⁷¹ Furthermore, by protecting "any" law "relating to" fraud against shareholders, the Act protects disclosures about not only securities laws, but also "any other federal law that relates to the ability of shareholders to protect themselves against fraud, such as the Foreign Corrupt Practices Act."²⁷² In other words, as Professor Vaughn argues, whistleblower disclosures about matters "well beyond accounting fraud" should be protected,²⁷³ including

disclosures of misconduct as diverse as health and safety violations, the suppression of information regarding product risks, environmental misconduct, consumer fraud, false claims against the government, disregard of statutes requiring the disclosure of information to federal regulatory agencies, violations of federal anti-discrimination laws, violations of statutes and rules protective of labor, conspiracies to break the antitrust laws, [and] bribery of public officials, including foreign officials, and human rights abuses.²⁷⁴

²⁶⁹ See Deborah Solomon, *At What Price?*, WALL ST. J., Oct. 17, 2005, at R3.

²⁷⁰ See Vaughn, *supra* note 8, at 22 (citing sections 1341, 1343, 1344 and 1348 of Title 18 of the United States Code).

²⁷¹ See *id.* (quoting 18 U.S.C. § 1514A(a)(1) (Supp. 2004)).

²⁷² See *id.* at 23.

²⁷³ See *id.* at 46.

²⁷⁴ See *id.* at 22-23.

Recent ARB decisions, however, rejected a broad interpretation and reinforced the ALJs' narrow interpretations of "protected activity," thus likely making the road steeper for future whistleblowers. First, the ARB required a whistleblower's disclosure to "definitely and specifically" relate to the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1).²⁷⁵ In *Platone v. FLYi, Inc.*, the ARB interpreted the Act to mean that whistleblower disclosures regarding mail or wire fraud were insufficient, by themselves, to constitute "protected activity"; rather, the ARB read into the Act a requirement that the fraudulent conduct reported *also* had to specifically "be of a type that would be adverse to investors' interests."²⁷⁶ This additional requirement does not appear in the Act's statutory language, which seems to protect the disclosure of *any* mail or wire fraud, not just fraud related to shareholders.

Second, in a different case, the ARB specifically found that 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" to satisfy the "protected activity" requirement.²⁷⁷ The ARB also seemed to require, at the time a whistleblower makes a disclosure, that the whistleblower specifically identify the statute violated by the activities the whistleblower reports and connect the statute to Sarbanes-Oxley's provisions.²⁷⁸ Yet, even though some rank-and-file employees, such as bookkeepers or office managers, are in position to identify and report financial wrongdoing, the assumption that these same employees would have such specific and detailed legal knowledge is unwarranted.

Third, the ARB limited the Act's "protected activity" requirement by examining Sarbanes-Oxley's mandate that the employee whistleblower "reasonably believe" that the corporate activity disclosed violated one of the named statutes. In *Allen v. Stewart Enterprises*, the ARB indicated that a "reasonable belief" that a statute has been violated means a high certainty that the law has been broken.²⁷⁹ In that case, the employee alleged that she examined "internal consolidated financial statements" and that these statements indicated that the company violated an SEC rule.²⁸⁰ The ARB, however, found that her disclosure of this potential SEC rule violation was not protected because these internal reports did not have to be filed with the SEC, and therefore could not have violated the rule.²⁸¹ Accordingly, the ARB found that the employee could not have "reasonably believed" that a violation of the rule occurred.²⁸²

²⁷⁵ See *Platone v. FLYi, Inc.*, No. 04-154, at 17 (ARB Sept. 29, 2006).

²⁷⁶ See *id.* at 15.

²⁷⁷ *Harvey v. Home Depot*, No. 04-114, at 15 (ARB June 2, 2006); see also *Platone*, No. 04-154, at 22 (finding that a reasonable shareholder would not find the potential loss of \$1,500.00 to be "material," and therefore finding that a whistleblower who reported such a loss would not be protected under the Act).

²⁷⁸ See *Allen v. Stewart Enterp.*, No. 06-081, at 12 (ARB July 27, 2006); *Reddy v. Medquist*, No. 04-123, at 8-9 (ARB Sept. 30, 2005).

²⁷⁹ See *Allen*, No. 06-081, at 14.

²⁸⁰ See *id.*

²⁸¹ See *id.*

²⁸² See *id.*

Fourth, in *Getman v. Southwest Securities*, the ARB determined that refusing to engage in illegal activity is not protected activity under the Act.²⁸³ In July 2005, the ARB reversed an ALJ decision in favor of an employee who alleged that she refused to engage in illegal activity—in that case changing a stock rating.²⁸⁴ The ARB found that merely refusing to break the law, rather than affirmatively reporting violations of the law to a person with supervisory authority, cannot be deemed true whistleblowing protected by the Act.²⁸⁵ Although the ARB acknowledged that “there may be times where only refusal is sufficient to provide information,” and thus would be protected activity, the facts in the case before it did not satisfy that requirement.²⁸⁶ Accordingly, employees who refuse to engage in illegal activity must also demonstrate that their refusal communicates to a person with supervisory authority that the employer’s conduct violates the law.²⁸⁷

This decision undermines a long tradition of interpreting both statutory whistleblower protections and the common law of wrongful discharge to protect an employee who refuses to engage in illegal activity.²⁸⁸ The impact of this decision on employees may be substantial. In the study, a substantial number of successful employees alleged that Sarbanes-Oxley protected their refusal to engage in illegal activity. Among *all* employees, only 8.7% (40/462) made this claim.²⁸⁹ However, considerably more of the *successful* employees made this claim in addition to claiming that they actually provided information about illegal activity to another person: 60% at the ALJ Level, and 30.8% at the OSHA Level.²⁹⁰ The ARB’s decision in *Getman* dismantles this avenue of protected whistleblowing.

These problems are more inscrutable than the “covered entity” problem because of the type of anti-retaliation protection provided by Sarbanes-Oxley. The Act follows the general federal model of using statutory whistleblower protections to protect only certain disclosures related to the substantive aims of a particular statute. Sarbanes-Oxley specifically aims at disclosures related to corporate fraud. Other examples of such limited federal protection include the Energy Reorganization Act, aimed at disclosures related to nuclear safety,²⁹¹ the Occupational

²⁸³ See No. 04-059 (ARB July 29, 2005).

²⁸⁴ See *id.* at 9-10.

²⁸⁵ See *id.*

²⁸⁶ See *id.* at 10.

²⁸⁷ See *id.*

²⁸⁸ See, e.g., *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 255 (1987) (interpreting the Surface Transportation Assistance Act to protect an employee who refused to operate a motor vehicle that did not comply with safety regulations); *Petermann v. Intern’l Brotherhood of Teamsters Local 396*, 344 P.2d 25 (Cal. 1959) (refusing to commit perjury); *Harless v. First Nat’l Bank*, 246 S.E.2d 270 (W.Va. 1978) (refusing to violate a consumer credit code); *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 610 P.2d 1330 (1980) (refusing to participate in illegal price fixing scheme).

²⁸⁹ Forty out of 462 complainants whose allegations were discernable claimed to have refused to engage in illegal activity (8.7%). Three out of five successful ALJ complainants (60.0%) and four out of 13 successful OSHA complainants (30.8%) made this claim.

²⁹⁰ See *id.*

²⁹¹ See 42 U.S.C. § 5851.

Safety and Health Act, aimed at disclosures related to workplace safety and health,²⁹² and AIR21, geared towards protecting whistleblowers who report problems with airline safety.²⁹³

By tying the protection an employee receives to whether the employee disclosed information about a “protected” topic, Sarbanes-Oxley puts enormous consequences on the ability of an employee to frame a whistleblower disclosure in the terms presented by the Act. It also presents an easy target for employers or administrative decision-makers to limit the Act’s coverage by forcing employees to make an unreasonably specific whistleblowing disclosure or to hold an unrealistic understanding of the law.

Thus, this federal model always depends upon difficult line-drawing as long as the aim of whistleblower protection is to encourage only whistleblower disclosures regarding specific topics, such as fraud or workplace safety. In the case of Sarbanes-Oxley, this problem may be more pronounced because of the broad applicability of the statute across industries as compared to other whistleblower provisions that are aimed at specific industries.²⁹⁴ Additionally, the Act’s goal of preventing “shareholder fraud” appears more ambiguous and open-ended than other topics, such as workplace health and safety.²⁹⁵ Furthermore, Sarbanes-Oxley’s broad language implies that Congress prefers protection for disclosure of a broader range of misconduct.

Accordingly, “protected activity” could be redefined specifically to include the reporting of misconduct that goes beyond reporting only corporate fraud. California’s and New Jersey’s whistleblower protection statutes, for example, protect corporate whistleblowers who report *any* illegal activity, such as a violation of a statute, rule, or regulation.²⁹⁶ At the federal level, the National Whistleblower Center proposed legislation that would broadly protect corporate whistleblowers in the same manner.²⁹⁷ Internationally, model whistleblower statutes developed by whistleblower scholars in conjunction with the Office of Legal Cooperation of the Organization of American States contain similarly protective provisions,²⁹⁸ as do statutes applicable to private sector employees in Great Britain,²⁹⁹ Canada,³⁰⁰ and South Africa.³⁰¹ Given the difficulty employees have had penetrating the boundaries of Sarbanes-Oxley’s limited “protected activity” requirement, these explicitly-broad protections warrant further consideration by Congress. An expansion and

²⁹² See 29 U.S.C. § 660(c).

²⁹³ See 42 U.S.C. § 42121.

²⁹⁴ See, e.g., The Energy Reorganization Act, 42 U.S.C. § 5851 (aimed at the nuclear power industry); AIR21, 42 U.S.C. § 42121 (aimed at airline industry).

²⁹⁵ Cf. Occupational Safety and Health Act § 2(b), 29 U.S.C. § 651(b).

²⁹⁶ See CAL. LAB. CODE § 1102.5; N.J. STAT. ANN. § 34:19-3.

²⁹⁷ See National Whistleblower Protection Act Proposal, at http://www.whistleblowers.org/html/model_whistleblower_law.html; see also Cherry, *supra* note 8, at 1085, 1121 (recommending the proposal from the National Whistleblower Center).

²⁹⁸ See Vaughn, et al., *supra* note 247, at 859, 865-66.

²⁹⁹ See *id.* at 891-92 (discussing the Public Interest Disclosure Act of 1998).

³⁰⁰ See *id.* at 882 (discussing the New Brunswick Employment Standards Act).

³⁰¹ See *id.* at 893-94 (discussing the South African Public Disclosures Act).

simplification of the “protected activity” requirement should reduce the tendency among administrative decision-makers to strictly construe whether a whistleblower deserves protection based upon the type of disclosure made. The focus of the administrative decision-maker could shift from the disclosures of the whistleblower to the retaliatory actions of the employer.³⁰²

3. Clarifying the Act’s Boundaries

Suggestions to broaden whistleblower protections such as I propose inevitably lead to counter-arguments that these protections extend Sarbanes-Oxley beyond its original focus on corporate fraud and that any restriction on an employer’s ability to fire an employee will result in higher employer costs.³⁰³ In turn, these higher employer costs could force lower employee wages or higher unemployment. Neither outcome would help employees as a group.³⁰⁴

Recognizing these criticisms, I also suggest a less drastic alternative than broadening the scope of the Act. At a minimum, the Act’s boundaries should be clarified by providing employees ready information on protections and consequences *prior to* blowing the whistle. The low employee success rate revealed in this study suggests that whistleblowers and their attorneys need more information about their chance of success in the administrative process. Statistical data would provide whistleblowers better information with which to weigh the costs and benefits of blowing the whistle in the first place.

Currently, OSHA and the Office of Administrative Law Judges (OALJ) maintain and publish information related to Sarbanes-Oxley complaints under surprisingly different standards and policies. OSHA maintains statistics about the outcomes of Sarbanes-Oxley complaints and is willing to release them, but only in response to a specific request.³⁰⁵ By contrast, the OALJ stopped keeping and releasing statistics regarding the outcomes of Sarbanes-Oxley cases in April 2005.³⁰⁶ However, the OALJ publishes all ALJ decisions on its website and provides a helpful digest of decisions organized by topic.³⁰⁷ OSHA, on the other hand, requires a FOIA request to release individual decision-letters and does not publish

³⁰² See *id.* at 864 (asserting that a model whistleblower statute should focus on the disclosure made by the whistleblower, not the whistleblower).

³⁰³ See generally Steven L. Willborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101 (1988).

³⁰⁴ See *id.*

³⁰⁵ See E-mail from Nilgun Tolek, Director, OSHA Office of Investigative Assistance, to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (Oct. 5, 2006) (on file with author).

³⁰⁶ See E-mail from Todd Smyth, Office of Administrative Law Judges, to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (Feb. 15, 2006) (on file with author).

³⁰⁷ See OFFICE OF ADMINISTRATIVE LAW JUDGES, SARBANES-OXLEY ACT (SOX) WHISTLEBLOWER DIGEST, at http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/SOX.HTM (last visited Feb. 1, 2007).

any summary or digest of its decisions. Neither OSHA nor the OALJ has agreed to release information regarding settlements.³⁰⁸

For broadest exposure, all information regarding both overall statistics and individualized decisions from OSHA and the ALJs should be published. Such information could appear on the internet sites for OSHA and the OALJ. These websites could include running totals of the amounts awarded to employees and amounts received by employers through settlements, in addition to basic information such as the win rate for employees.

If OSHA and the ALJs made these statistics readily available for Sarbanes-Oxley cases, then the statistics may dispel popular (and possible administrative) opinion that the Act is overly protective of employees. To the extent that administrative decision-makers view Sarbanes-Oxley cases with skepticism because of the Act's potentially dramatic applicability to millions of employees, these decision-makers may have a tendency to read the Act narrowly in order to avoid a "flood" of litigants. Statistical information about the overwhelming advantage employers have in the Sarbanes-Oxley claims process may have a substantive impact on decision-makers, who may reevaluate such inclinations. Additionally, this public exposure may also expose and discipline any decision-maker bias toward a particular party.

With regard to substantive, as opposed to statistical, information, OSHA could follow the OALJ's lead and post its decision-letters online for public inspection. OSHA also could update and publish any guidance it gives to its field investigators regarding OSHA's approach to the unique Sarbanes-Oxley issues addressed in this Article, such as OSHA's interpretation of the "covered employer" and "protected activity" requirements. Such information would allow for further public discourse and transparency regarding OSHA's interpretations of these debatable issues.

This information also may convince employees with marginal claims *not* to assert them. Weak claims may have led to stronger-than-necessary language in decisions construing the Act narrowly.³⁰⁹ This narrowing language is problematic because of its applicability to later cases in which a broader interpretation might have been appropriate. A stronger overall pool of employee-complainants may help convince decision-makers that a slightly broader view of the Act is appropriate to satisfy Sarbanes-Oxley's remedial aims with only a minimal risk of opening the floodgates for frivolous claims.

These suggestions would impose little administrative cost on the government, given that these agencies already maintain much of the information. Indeed, the EEOC, the other major federal administrative agency that processes and adjudicates employee claims, provides such

³⁰⁸ See Letter from Richard E. Fairfax, Director of the Directorate of Enforcement Programs, OSHA, to Richard Moberly, Asst. Prof. of Law, Univ. of Neb. College of Law (Nov. 6, 2006) (on file with author).

³⁰⁹ Cf. Selmi, *supra* note 232, at 567-68 (discussing this problem in the context of the ADA).

statistics on its website, demarcated by year and statute.³¹⁰ Unlike OSHA, the EEOC also publishes a detailed Compliance Manual and updated Enforcement Guidances describing the standards used by the EEOC when evaluating various legal issues.³¹¹

In sum, the study indicates that many employee losses resulted from the focus of administrative decision-makers on issues that define the legal boundaries of the Act. To the extent one believes that Sarbanes-Oxley should apply broadly to encourage substantial numbers of corporate employee whistleblowers to report a wide range of misconduct, one response to the study's results might be for Congress to re-define Sarbanes-Oxley's boundaries to more clearly include cases that the administrative process currently excludes.

Of course, another view might be that Congress meant Sarbanes-Oxley to address only the problem of corporate fraud in public companies, and the study's results demonstrate that administrative decision-makers appropriately enforced the narrow legal parameters of the Act. A less drastic response than Congressional amendment of the Act might be more appropriate in this instance, such as providing more information publicly about the outcomes of Sarbanes-Oxley cases in order to provide employees realistic information about their protection, or lack thereof, before they decide to blow the whistle on corporate wrongdoing.

C. Enforcing the Burden of Proof

Unlike the unclear scope of Sarbanes-Oxley's legal boundaries, Sarbanes-Oxley mandates an unambiguously employee-friendly burden of proof for claims that fall within the Act's protections. As discussed above, employees have a low burden because the employee must only prove causation under a "contributing factor" test.³¹² Conversely, Sarbanes-Oxley places a high burden on employers, who must prove their rebuttal under a "clear and convincing" standard.³¹³ Thus, a reasonable expectation when the case focuses on a factual dispute would be that, absent significant case-selection effects, Sarbanes-Oxley should produce a higher-than-average win rate for employees. Indeed, ALJ decisions met this expectation as employees won 66.7% of the time when "causation" was the issue, and 88.3% of the time when the employer was required to satisfy the "clear and convincing" burden of proof.³¹⁴

But, despite having every advantage regarding the burden of proof for causation, employees still lost at an extremely high rate at the OSHA Level, *even when the only issue was causation*. OSHA found that an employee satisfied the "contributing factor" standard only 34.6% of the

³¹⁰ See EEOC, ENFORCEMENT STATISTICS AND LITIGATION, at <http://www.eeoc.gov/stats/enforcement.html> (last visited Feb. 1, 2007)

³¹¹ See EEOC, COMPLIANCE MANUAL, at <http://www.eeoc.gov/policy/compliance.html> (last visited on Jan. 30, 2007); EEOC, ENFORCEMENT GUIDANCES, at <http://www.eeoc.gov/policy/guidance.html> (last visited on Jan. 30, 2007).

³¹² See discussion *supra* Part IV.B.3.

³¹³ See *id.*

³¹⁴ See *supra* Tables 9, 10.

time.³¹⁵ When the employee met this level of proof, placing a “clear and convincing” burden of proof on the employer still resulted in a relatively low employee win rate of 35.1%.³¹⁶ Overall in these “factual” cases, employees won only 12.1% of the time at the OSHA Level, compared to 55.6% of the time at the ALJ Level.³¹⁷

This problem presents no easy solution. The statutory language already sets forth the favorable burden of proof for employees unambiguously, so further legislative change to the burden of proof seems unhelpful. OSHA itself appears unable or unwilling to implement Sarbanes-Oxley’s employee-friendly burdens.

To the extent OSHA is willing but unable to perform this task, Congress should provide OSHA with more resources to investigate and to adjudicate Sarbanes-Oxley claims adequately. A fuller investigation and more information from employees may increase the likelihood of employee success at the OSHA Level. To provide a fuller investigation—one that is more “hearing-like”—Congress should provide OSHA subpoena power in its Sarbanes-Oxley investigations, similar to the authority OSHA employs to enforce the Occupational Safety and Health Act.³¹⁸ Additionally, OSHA should amend its regulations to provide itself more authority for information gathering.³¹⁹ Altering OSHA’s policies and regulations to ensure more employee participation in the process may present OSHA with more complete information about the factual circumstances of a case.³²⁰

For example, the Whistleblower Protection Act (WPA), which protects federal government employees who report waste, mismanagement, or wrongdoing, takes a different approach than the current OSHA regulations. When the Office of Special Counsel investigates a whistleblower’s complaint against a federal agency, the WPA permits the whistleblower to comment upon the agency’s answer to the whistleblower’s complaint after it is submitted to the Special Counsel.³²¹ This statutorily-mandated back-and-forth exchange provides the Special Counsel with a more complete picture of the factual background to the case. Similarly, a broader picture may give OSHA’s investigators the proper context with which to

³¹⁵ See *supra* Table 9.

³¹⁶ See *supra* Table 10.

³¹⁷ See *supra* Table 8.

³¹⁸ See 29 U.S.C. § 657(b) (granting OSHA subpoena power when OSHA investigates possible safety and health problems).

³¹⁹ As part of this overhaul, OSHA also should highlight Sarbanes-Oxley’s unique burden of proof structure in its investigative manual and better differentiate Sarbanes-Oxley from other whistleblower statutes OSHA administers.

³²⁰ See Vaughn, et al., *supra* note 247, at 864 (asserting that a model whistleblower law should include provisions enabling whistleblowers to be “involved in the administrative process regarding evaluation of their allegations and regarding petitions for protection or redress,” including being given opportunities “to respond or to provide additional information”). A similar suggestion has been made recently by Professor Valerie J. Watnick. See Valerie J. Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique*, at 60 (2006), available at <http://law.bepress.com/expresso/eps/1822> (unpublished manuscript).

³²¹ See 5 U.S.C. § 1213(e)(1)(1994).

apply the appropriate employee-friendly burden of proof.³²² In fact, in April 2006, OSHA amended its procedures to require that the employee receive “at least the substance” of the employer’s response to a Sarbanes-Oxley complaint.³²³ Additionally, other evidence from the employer, or at least the “substance” of such evidence, “may” also be disclosed to the employee.³²⁴ While these changes are a substantial improvement, OSHA still fails to require that the employee receive the employer’s *actual* response and other evidence presented by the employer, and also fails to unambiguously permit the employee to comment upon and respond to the employer’s submissions. Without such full disclosure and opportunity to participate, the employee will have a difficult time fully presenting a case of retaliation and responding to the employer’s version of the events.

To the extent OSHA’s failure is one of will, merely increasing OSHA’s authority and resources may not be sufficiently drastic to respond to the agency’s failure to enforce Sarbanes-Oxley adequately. Rather, it may be necessary to remove OSHA entirely from this role. In fact, from the Act’s inception, OSHA seemed like an unlikely choice to investigate corporate whistleblower claims.³²⁵ Although the agency administers thirteen other whistleblower provisions, the type of corporate fraud at issue in Sarbanes-Oxley cases seems far removed from the worker safety and health issues addressed by many of the other statutes under OSHA’s purview.³²⁶ At least three other options may serve the Act’s, and whistleblowers’, interests better than keeping investigative responsibility with OSHA.

Two of these three options entail providing more formalized hearing procedures to whistleblowers in the first instance, without requiring employees to jump through the hoops of an administrative investigation. First, Congress could eliminate the statutory 180-day waiting period before a whistleblower can file a claim in federal court. Indeed, an early draft of Sarbanes-Oxley’s whistleblower protections did not contain this waiting period and permitted Sarbanes-Oxley whistleblowers to file directly in federal court.³²⁷ At least one other anti-retaliation provision

³²² Cf. Vaughn, et al., *supra* note 247, at 864 (noting that involvement of whistleblowers in the administrative process “not only reassures whistleblowers but also increases the efficiency of the administrative process”).

³²³ See OSHA, REVISED INTERIM GUIDELINES ON CHANGES IN PROCEDURES FOR HANDLING PRIVACY ACT FILES AND FREEDOM OF INFORMATION ACT REQUESTS § II.A.2 (Apr. 11, 2006), at http://www.osha.gov/dep/oia/whistleblower/Revised_interim_guidelines.html.

³²⁴ See *id.*

³²⁵ See Cherry, *supra* note 8, at 1083 n.383; Larry Ribstein, *Sarbanes-Oxley After Three Years*, 2005 NEW ZEALAND L. REV. 365, 371 (noting that “Congress delegated enforcement [of Sarbanes-Oxley] to safety and health regulators unsophisticated in financial fraud rather than to securities regulators”); Solomon, *supra* note 216, at A1.

³²⁶ See, e.g., Occupational Safety and Health Act, 29 U.S.C. § 660(c); Surface Transportation Assistance Act, 49 U.S.C. § 2305; see also Solomon, *supra* note 216, at A1 (noting that OSHA had to hand out books on securities laws to investigators).

³²⁷ See S. REP. NO. 107-146, at 22, 26 (2002). The waiting period was added as part of a compromise with the same group of Republican senators that reduced the statute of limitations from 180 days to 90 days. See S. 2010, § 7(a), CONG. REC. S1789-90 (Mar. 12, 2002).

that protects “financial” whistleblowers—specifically, employees of depository institutions and federal banks who report illegal conduct—permits direct filing of anti-retaliation claims in federal court.³²⁸ Federal courts may be more willing and able to apply Sarbanes-Oxley’s shifting burdens of proof correctly.³²⁹ If so, then removing the 180-day waiting period would enable whistleblowers to avoid OSHA’s procedural unfairness and choose the federal forum immediately.

Second, if direct filing in federal courts overly burdens an already-crowded federal docket, then employees could be permitted to bypass the OSHA investigation and obtain an ALJ hearing directly. ALJs currently review Sarbanes-Oxley cases *de novo* after an OSHA investigation and without deference to OSHA’s determinations.³³⁰ To the extent OSHA currently filters cases with little or no merit, ALJs could perform this same function with Orders to Show Cause, Motions to Dismiss and Motions for Summary Judgment. Indeed, the study demonstrates that ALJs regularly decided cases based on pre-hearing legal arguments regarding the applicability of Sarbanes-Oxley to an employee’s claims.³³¹ The advantage of sending cases directly to the Office of Administrative Law Judges would be that, when the facts are in dispute, ALJs have demonstrated the ability and willingness to apply the burdens of proof in the employee-friendly manner in which Congress intended.³³²

Finally, to the extent an initial administrative investigation has value, shifting initial investigative responsibility to a different administrative agency represents a third option. One possible alternative investigatory body is the SEC. A whistleblower investigation by the SEC, with its ongoing concern for corporate fraud, may better deter corporate fraud than the threat of any other agency investigation. Through Sarbanes-Oxley investigations, the SEC may learn information that could lead to charges of securities fraud against companies or individual officers, which would have much greater deterrence value than the typical whistleblower investigation of an employee complaint. In fact, any violation of Sarbanes-Oxley, presumably including the Act’s whistleblower provision, already should be considered a violation of the Securities Exchange Act of 1934, with penalties of up to \$1,000,000 in fines and ten years in prison.³³³

³²⁸ See Financial Institutions Reform, Recover, and Enforcement Act of 1989, 12 U.S.C. § 1831j (2001).

³²⁹ To determine the accuracy of this speculation, I currently am collecting and analyzing Sarbanes-Oxley cases filed in federal courts.

³³⁰ See 18 C.F.R. § 1980.107(b) (2006).

³³¹ The study found that ALJs decided 67 of 93 cases (72.0%) without a factual hearing, based primarily on motion practice. A complete table setting forth the results regarding the resolution of ALJ cases by hearing or motion can be found on the author’s website: <http://law.unl.edu/inside.asp?d=faculty&id=28>.

³³² It must be remembered, however, that only 9 cases made it to the “causation” stage of an ALJ’s decision-making process. Thus, if this suggestion were adopted, then it would be important to address the ALJ’s fixation on the Act’s procedural and legal boundaries, as discussed in the prior two sub-Parts. See discussion *supra* Parts V.A. & V.B.

³³³ See Sarbanes-Oxley Act of 2002, § 3(d) (stating that “a violation by any person of th[e Sarbanes-Oxley] Act . . . shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 . . . and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act”); Securities Exchange Act of 1934, 15 U.S.C. § 78ff.

Although not currently enforced in this manner, placing the SEC in charge of whistleblower investigations might encourage the agency to request that the Department of Justice utilize this additional enforcement mechanism to deter retaliation against whistleblowers. In short, the SEC seems like a natural choice to investigate claims related to shareholder fraud.

However, this suggestion presents the risk that the SEC may be just as unsympathetic to whistleblowers as OSHA. Since the Act's enactment, the SEC has shown little or no interest in whistleblower claims. Even though the SEC receives summaries of whistleblower allegations filed with OSHA,³³⁴ the SEC has not publicly recommended that the Department of Justice investigate any person accused of retaliating against a whistleblower. In 2004, two U.S. Senators formally requested that the SEC explain whether the SEC intended to use its authority to file civil enforcement actions for violations of Sarbanes-Oxley in order to enforce Sarbanes-Oxley's anti-retaliation provisions.³³⁵ The Chairman of the SEC responded that the SEC puts its resources towards "substantive" violations of securities laws and therefore would leave Sarbanes-Oxley anti-retaliation enforcement to the Department of Labor.³³⁶ Yet, despite this apparent reluctance to become involved with whistleblowers, a formal Congressional mandate for the SEC to enforce Sarbanes-Oxley's whistleblower provisions may motivate the agency, particularly if whistleblower investigations unveil "substantive" violations of other securities laws.

Any of these options could provide better protection for employees than maintaining the status quo, which likely fails to adequately deter retaliation against whistleblowers.

VI. CONCLUSION

This study suggests that Sarbanes-Oxley fails to protect employee whistleblowers as Congress originally intended. The unfulfilled expectations of employees regarding the Act's potential protections have led to a surprisingly low win rate in claims adjudicated administratively under the Act. In particular, two discrepancies between employee expectation and administrative implementation contributed to the low win rate for employees throughout Sarbanes-Oxley's administrative process.

First, OSHA and the ALJs typically found for the employer because the employee failed to satisfy the Act's legal hurdles. During the initial years of the Act's implementation, employees may have brought claims that pushed the boundaries of the Act. Administrative decision-makers responded by narrowly interpreting the Act's provisions, particularly with regard to the procedural bar of the statute of limitations and the boundary requirements of a *prima facie* case, including the "covered

³³⁴ See 29 C.F.R. § 1980.104(a) (2006).

³³⁵ See Letter from Senators Patrick Leahy and Charles E. Grassley to William H. Donaldson, Chairman, Securities & Exchange Commission, at 1 (Nov. 9, 2004), available at www.whistleblowers.org/Donaldson_Letter_November_9_2004.pdf.

³³⁶ See Letter from William H. Donaldson, Chairman, Securities & Exchange Commission, to Senators Patrick Leahy and Charles E. Grassley, at 3 (Dec. 21, 2004) (on file with author).

employer” and “protected activity” elements. Because most Sarbanes-Oxley cases were resolved through the resolution of legal issues, the factual merits of a whistleblower’s allegation were rarely adjudicated.

Second, in the instances when these factual allegations were addressed, OSHA tended to apply the Act’s employee-friendly burden of proof inappropriately. In these cases, OSHA consistently found for the employer, even when the only issue was whether the employer satisfied a “clear and convincing” burden of proof.

To address these issues, Congress could make several changes to the Sarbanes-Oxley Act. To redress the unfair burdens the Act’s short statute of limitations imposes on employees, Congress could lengthen the limitations period from 90 to at least 180 days, which would comport with statute of limitations found in other employment statutes.

Additionally, to curb the rigid application of the Act’s “boundaries,” Congress could consider extending the Act’s coverage to protect more types of whistleblowers. This statutory amendment could address areas on which OSHA and the ALJs appear to focus: the “covered employer” requirement and the “protected activity” requirement. Clarifying and increasing the scope of the Act’s coverage would protect employees who report wrongdoing, but work for the wrong “type” of company or report the wrong “type” of misconduct. Alternatively, Congress could require that OSHA and the ALJs publicize and report the types of findings they make in order to better inform the public of the limitations of their decision-making.

Finally, to address OSHA’s apparent misapplication of the Act’s burden of proof, Congress and OSHA could provide employees more influence and participation in the investigative process, enabling OSHA to consider both sides of the dispute more fully. To supplement this suggestion, Congress should provide OSHA more resources to enable the agency to comprehensively and competently administer the increased load of Sarbanes-Oxley cases. Alternatively, Congress could consider removing OSHA as the primary investigator of Sarbanes-Oxley complaints. Other options are available: Sarbanes-Oxley whistleblowers could file directly in federal court or with an ALJ; or, another agency such as the SEC might be able to apply the statute more appropriately.

The recent corporate scandals powerfully reinforced the notion that employees are uniquely positioned to identify and to report corporate misconduct.³³⁷ Employees’ internal placement in the corporate structure often provides them with better information about wrongdoing than external corporate monitors, such as the government or outside attorneys and accountants.³³⁸ This monitoring can only be effective, however, if the law protects whistleblowers from retaliation. Employees will report wrongdoing less frequently unless they are given credible assurances that they are safe from retaliation. Unfortunately, during the first years of its existence, Sarbanes-Oxley has not sufficiently protected whistleblowers and thus cannot provide such assurances. As a result, Sarbanes-Oxley requires further Congressional and administrative scrutiny in order to

³³⁷ See Moberly, *supra* note 1, at 1116-25.

³³⁸ See *id.* at 1116-17.

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fulfill Congress' and employees' expectation that whistleblowers will be protected from retaliation for blowing the whistle on corporate malfeasance.