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WHISTLE WITH A PURPOSE: EXTENDING COVERAGE UNDER SOX TO EMPLOYEES DISCHARGING THEIR DUTIES

The relative ease with which corporate fraud went unnoticed during the Enron scandal created tension between Congress and the public. In hindsight, the public questioned the difference whistleblowers could have made if they were adequately protected. Since 2002, the Sarbanes-Oxley Act (“SOX”) has provided anti-retaliation protection to employees of publicly traded companies. However, the language used in the whistleblower statute raises the question: Does SOX extend coverage to employees discharging their duties? The district courts have thus far correctly interpreted SOX as extending coverage to employees discharging their duties. Although this issue has only manifested itself in the district courts, it is crucial that Congress remain vigilant—foreseeing the consequences that would arise if courts start to deny whistleblower protection to those best suited to blow the corporate whistle.

INTRODUCTION

There are three underlying rationales for protecting whistleblowers. First, by protecting employees who report employer wrongdoing, whistleblower protection promotes employers’ compliance with the law. Second, by providing whistleblower protection, the government and the taxing public can expend fewer resources on fixing the problems that unreported wrongdoings of government and corporate fraud cause. Third,

1. Peter D. Banick, Note, The “In-House” Whistleblower: Walking the Line Between “Good Cop, Bad Cop,” 37 WM. MITCHELL L. REV. 1868, 1873 (2011) (defining whistleblowers as “employees who, in good faith and with a reasonable belief that their assertions are accurate, report, disclose, or otherwise make known . . . any violation of law by their employers . . . for the purpose of exposing such wrongdoing”).
2. Id. at 1874–75. This protection provides safeguards for those employees who stand in a “unique position” to discover and report their employer’s noncompliance or wrongdoing. Id. at 1875; Susan J. Spicer, Turning Environmental Litigation on Its E.A.R.: The Effects of Recent State Initiatives Encouraging Environmental Audits, 8 VILL. ENVT. L.J. 1, 65 (1997) (addressing compliance as one of the goals of whistleblower protection); Julie Jones, Note, Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-At-Will Doctrine, 34 TEX. TECH L. REV. 1133, 1147 (2003) (stating that “[w]histleblowers play an important role in law enforcement by acting as a means to police employers’ business practices”).
3. See Banick, supra note 1, at 1875–76; see also Gerard Sinzdak, An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements, 96 CALIF. L. REV. 1633, 1636 (2008) (discussing the reduction in enforcement costs to the public due to
whistleblower protection is necessary not only to deter employers from committing wrongful acts, but also to encourage employees to report these wrongful acts.\textsuperscript{4} By providing whistleblower protection, employees can freely report their employer’s misdeeds without fear of retaliation.\textsuperscript{5}

The policy rationales noted above also apply to the whistleblower provision of the Sarbanes Oxley Act of 2002 (“SOX”).\textsuperscript{6} Section 806 of SOX provides whistleblower protection to an employee of a publicly traded company who reports information regarding violations relating to mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the Securities and Exchange Commission (“SEC”), or any provision of federal law relating to fraud against shareholders.\textsuperscript{7} Congress implemented the whistleblower provisions of SOX “to help rectify a culture, supported by law that discourage[s] employees from reporting fraudulent behavior.”\textsuperscript{8}

Although some scholars “praise the whistleblower protections of the Sarbanes-Oxley Act of 2002 as one of the most protective anti-retaliation provisions in the world,” many whistleblowers have failed to seek protection under SOX.\textsuperscript{9} One reason for this is that, unlike other general whistleblower statutes, SOX is tailored to protect only six particular types of violations.\textsuperscript{10} Furthermore, the tersely worded and unclear statutory

\begin{enumerate}
\item See John A. Gray, \textit{Is Whistleblowing Protection Available Under Title IX?: An Hermeneutical Divide and the Role of Courts}, 12 WM. & MARY J. WOMEN & L. 671, 673 (2006) (stating that it is unjust to penalize employees who make reports in good faith); see also Nancy M. Modesitt, \textit{The Garcetti Virus}, 80 U. CIN. L. REV. 137, 155–56 (2011) (stating that employees should not be forced to “choose between losing their jobs and exercising” their right to “protect public money, promote safety, . . . [and] encourage compliance with the law”).
\item See Banick, \textit{ supra} note 1, at 1876.
\item Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 440 (S.D.N.Y. 2013) (quoting S. REP. NO. 107-146, at 4–5 (2002)) (internal quotation marks omitted) (alteration in original); see also S. REP. NO. 107-146, at 5 (2002) (finding that the corporate code of silence creates “a climate where ongoing wrongdoing can occur with virtual impunity”).
\item Richard E. Moberly, \textit{Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win}, 49 WM. & MARY L. REV. 65, 65 (2007); see also Norman D. Bishara et al., \textit{The Mouth of Truth}, 10 N.Y.U. J.L. & BUS. 37, 47–49 (2013) (footnotes omitted) (“While hailed as an improvement in the evolution of whistleblower laws, in the decades after SOX’s passage as a response to corporate scandals, SOX was criticized for not providing enough protection for whistleblowers, for its lack of extraterritorial reach, for being obstructive, and for not playing a role in exposing the high-profile frauds that precipitated the financial crisis and recession of 2008.”).
language of SOX has led to differing interpretations regarding the scope of protection provided to employees. This has led scholars to question whether whistleblower protection extends to employees of private contractors and to employees discharging their duties.

This Note addresses whether SOX covers employees discharging their duties. Employees are discharging their duties when they act in accordance with their job responsibilities and obligations. For example, an accountant is discharging his duties when he spots an accounting irregularity and reports the irregularity to his supervisor. These types of employees are crucial to spotting corporate fraud because of their roles and positions within the company. Without whistleblowing by these employees, the public and the government are susceptible to another Enron-like debacle. SOX fails to define the term “employee,” which has led to debates about how restrictively the term “employee” should be applied. Clearly delineating the type of employee covered under SOX is paramount because employees discharging their duties will not rely on SOX if they are not assuaged of their fears of employer retaliation.

To fully grasp the importance of extending protection under SOX to employees discharging their duties, this Note details the chronological history of whistleblower protection (i) prior to SOX, (ii) under SOX, and (iii) under the Dodd-Frank Act (“Dodd-Frank”) and Lawson v. FMR LLC. Specifically, Part I briefly addresses how Garcetti v. Ceballos and the regulations, without reference to possible federal law violations, the employee will not be protected by SOX.” Id.

14. The private contractor issue is discussed in Lawson v. FMR LLC. See infra Part III.D.
15. See infra notes 207–11 and accompanying text.
16. To perceive the impact that whistleblowers can have on preventing corporate fraud, it is important to understand the main catastrophe that gave rise to SOX: Enron. Further, it is crucial to understand that history can repeat itself. See S. REP. NO. 107-146, at 11 (2002) (alluding to the real possibility that other public companies are engaging in corporate fraud, yet “simply eluding discovery”).
17. See infra notes 183–86 and accompanying text.
18. See MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, WORK LAW: CASES AND MATERIALS 505 (3d ed. 2015) (stating that the majority believed that professional obligations by accountants and lawyers to blow the whistle without any protection would be insufficient incentives to do so).
19. Whistleblower protection has evolved from protection under the First Amendment and the common law to specific legislative enactment of state and federal whistleblower statutes. CRAIN, KIM & SELMI, supra note 18, at 493; see also infra Part I.
Whistleblower Protection Act ("WPA")\textsuperscript{21} have declined protection to employees discharging their duties.\textsuperscript{22} Part II then introduces the events leading up to SOX, analyzes the congressional intent behind the enactment of SOX, and discusses why the statute has been ineffective thus far. Part III then summarizes how Dodd-Frank amended SOX and discusses \textit{Lawson v. FMR LLC},\textsuperscript{23} a recent Supreme Court case, as an example of how courts have struggled with interpreting the coverage SOX provides to different kinds of employees.\textsuperscript{24} Part IV addresses the emerging split at the district court level regarding whether employees discharging their duties are protected under SOX. Part V analyzes the WPA and considers how SOX should be read in light of how the WPA has dealt with employees discharging their duties. Finally, Part VI proposes that the recent SDNY decision in \textit{Yang v. Navigators Group, Inc.},\textsuperscript{25} which extended coverage to employees discharging their duties, is the best interpretation of SOX that furthers the purpose Congress had in mind when it enacted SOX in 2002.

\section*{I. Whistleblower Protection Prior to SOX}

\subsection*{A. Protected Speech Under the First Amendment and Common Law}

Before statutory protections existed for whistleblowers, employees had to rely on either the First Amendment or the common law for protection.\textsuperscript{26} Under the First Amendment, public employees could allege that their speech was protected because they were speaking as citizens on matters of public concern.\textsuperscript{27} Under the common law, at-will employees alleged that they were wrongfully discharged in violation of a known and accepted public policy.\textsuperscript{28}

\begin{thebibliography}{9}
\bibitem{22} For the purposes of this Note, the language "employees discharging their duties" is synonymous with "arising out of one's job duties."
\bibitem{23} 134 S. Ct. 1158 (2014).
\bibitem{24} The analysis in \textit{Lawson} is used as an argument for extending coverage under SOX to employees discharging their duties. \textit{See infra} Part VI.
\bibitem{25} Yang v. Navigators Grp., Inc., 18 F. Supp. 3d 519 (S.D.N.Y 2014); \textit{see also} infra notes 155–56 and accompanying text.
\bibitem{26} \textit{See generally} CRAIN, KM & SELMI, supra note 18, at 460 (noting how different types of employees sought protection).
\bibitem{27} \textit{Id.} at 460.
\bibitem{28} \textit{See, e.g.,} Petermann v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396, 344 P.2d 25, 27 (Cal. Ct. App. 1959). For example, Petermann was discharged for refusing to testify falsely before a state legislative committee. In recognizing the interests of the state, the court reasoned that "[i]t would be obnoxious . . . to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury." \textit{Id.; see also...}
However, both the First Amendment and the common law are limited in providing whistleblower protection. In fact, constitutional protection under the First Amendment only applies to public government employees, and it is limited to speech that (1) does not arise out of one’s job duties, 29 (2) is truly a matter of public concern, 30 and (3) outweighs the government employer’s interest “in promoting the efficiency of the public services it performs through its employees.” 31 Similarly, the public policy exception does not apply in every state, and even where the exception does exist, it must be tied to a public policy that society is willing to recognize. 32 Although some whistleblower protection existed under the First Amendment and the common law, Congress enacted more concrete statutory protection for whistleblowers under the WPA and SOX. 33

B. Whistleblower Protection Act of 1989

The WPA 34 was enacted in 1989 to protect “employees who disclose Government illegality, waste, and corruption.” 35 The statute applies to

any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences—(A) a violation of any law, rule, or regulation; or (B) gross mismanagement, a gross waste

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29. See generally Garcetti v. Ceballos, 547 U.S. 410 (2006) (stating that speech made pursuant to one’s job duties is not protected under the First Amendment).

30. See generally Connick v. Myers, 461 U.S. 138 (1983) (creating a threshold question to exclude an employee’s speech that is purely proprietary in nature).

31. CRAIN, KIM & SELMI, supra note 18, at 461; see also generally Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (laying out the basic framework for balancing the interest between the citizen employee and the government employer).

32. See generally Muhl, supra note 28, at 6 (noting how different states define public policy and listing the seven states that have outright rejected the public policy exception). Compare Strozinsky v. Sch. Dist. of Brown Deer, 614 N.W.2d 443, 445 (Wis. 2000) (quoting Winkelman v. Beloit Memorial Hospital, 483 N.W.2d 211 (Wis. 1992)) (considering the “‘spirit as well as the letter’” of the law in determining public policy), with Gantt v. Sentry Ins., 824 P.2d 680, 687–88 (Cal. 1992) (allowing for a wrongful-discharge tort when the public policy is “carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions”).

33. See Jones, supra note 2, at 1163 (noting that the passage of SOX is evidence of Congress and the public taking whistleblowing more seriously).


35. Id. (noting in the “Findings and Purpose” Section how this served the public interest and created “a more effective civil service”).
of funds, an abuse of authority, or a substantial and specific danger to public health or safety.\footnote{36} Despite seemingly clear statutory language\footnote{37} and legislative history,\footnote{38} the Federal Circuit interpreted the WPA to exclude employees discharging their duties in Willis v. Department of Agriculture\footnote{39} and Huffman v. Office of Personnel Management.\footnote{40} C. Willis v. Department of Agriculture (1998)

In 1998, a plaintiff-employee sought protection under the WPA after reporting that some of the conservation farms he worked for were out of compliance with the Department of Agriculture’s approved conservation plans.\footnote{41} In denying coverage to the plaintiff-employee, the US Court of Appeals for the Federal Circuit (“Federal Circuit”) stated that the goal of the WPA is to “protect government employees who risk their own personal job security for the advancement of the public good by disclosing abuses by government personnel.”\footnote{42} Plaintiff-employee’s job responsibility was to report when farms were out of compliance. This responsibility did not put him at “personal risk for the benefit of the public good.”\footnote{43} Due to these reasons, plaintiff-employee’s claim was dismissed for failing to allege any protected disclosure that satisfied the WPA’s jurisdictional prerequisites.\footnote{44}

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\item[37] See Modesitt, supra note 4, at 149 (stating that “the plain language is unambiguous and . . . supports the interpretation that a disclosure made in the course of one’s normal job duties is protected”).
\item[38] See Modesitt, supra note 4, at 149 (arguing that the legislative history is also clear because Congress amended the language from “a disclosure” to “any disclosure” when it amended the Civil Service Act of 1978).
\item[39] 141 F.3d 1139 (Fed. Cir. 1998).
\item[40] 263 F.3d 1341 (Fed. Cir. 2001); see also infra notes 41–50 and accompanying text.
\item[41] Willis, 141 F.3d at 1139.
\item[42] Id. at 1444 (finding that extending coverage to an employee in this situation would broaden protection to nearly every report dealing with a possible breach of a law or regulation).
\item[43] Id.; see also Langer v. Dep’t of the Treasury, 265 F.3d 1259, 1267 (Fed. Cir. 2001); Herman v. Dep’t of Justice, 193 F.3d 1375, 1381 (Fed. Cir. 1999) (“[T]he WPA was enacted to protect employees who report genuine violations of law, not to encourage employees to report minor or inadvertent miscues occurring in the conscientious carrying out of a federal official or employee’s assigned duties.”).
\item[44] Willis, 141 F.3d at 1145.
\end{footnotes}
D. Huffman v. Office of Personnel Management (2001)

In line with Willis, the Federal Circuit in Huffman v. Office of Personnel Management found that a plaintiff-employee’s complaints to a supervisor about the supervisor’s conduct did not constitute a disclosure under the WPA. The court came to this conclusion because the WPA defines disclosure as “reveal[ing] something . . . hidden and not known.” Therefore, a plaintiff-employee must go “above and beyond the call of duty and report infractions of law that are hidden.” This means that a plaintiff-employee with investigatory responsibilities must report wrongdoing outside of normal channels to constitute a disclosure that reveals something unknown to the general public. In the end, the Federal Circuit affirmed the lower court’s finding that plaintiff-employee’s complaint to his supervisors did not constitute a protected disclosure.


Although this idea of excluding employees based on their job duties stems from common law interpretations of the WPA, it has spread, with the help of Garcetti, to other statutes as well.

In 2006, the Supreme Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” In this case, Richard Ceballos, a district attorney, claimed that he was “subjected to a series of retaliatory employment actions” after he notified his supervisors of the misrepresented facts in a search warrant affidavit.

45. 263 F.3d 1341.
46. Id. at 1344.
47. Id. at 1350 (finding it “quite significant that Congress in the WPA did not use a word with a broader connotation such as ‘report’ or ‘state’”); see also 5 U.S.C. § 2302(b)(8) (2014) (giving further guidance by stating that disclosures within normal channels and reports of publicly known information do not constitute protected disclosures under the WPA).
48. Huffman, 263 F.3d at 1353.
49. Id. at 1354. The underlying premise is that the report is something society has to know and that the need to know is so great that an employee is willing to risk her job for the betterment of society. The court gives an example of a “law enforcement officer who is responsible for investigating crime by government employees who, feeling that the normal chain of command is unresponsive, reports wrongdoing outside of normal channels.” Id.
50. Id. at 1355.
51. See Modesitt, supra note 4, at 195 (calling it the “Garcetti Virus” and “analyzing the degree to which the job duties exclusion has infected [other] statutes”).
53. Id. at 415.
the government employer, Justice Kennedy stated, “Ceballos did not act as a citizen when he went about conducting his daily professional activities” and “did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case.” Instead, by discharging his duties, he “acted as a government employee” and therefore his speech was not protected under the First Amendment.

Despite the fact that “Garcetti involved a constitutional, [rather than] a statutory, claim, the decision has given new life to the doctrine” of excluding employees discharging their duties. The impact Garcetti has is evident in the common law interpreting the WPA, and this can be a useful starting point in analyzing the protection afforded under SOX to employees discharging their duties.

II. WHISTLEBLOWER PROTECTION UNDER SOX

A. The Rise and Fall of Enron

In 1985, two gas companies merged to form Enron, a Houston-based energy-trading corporation. Within a short span of fifteen years, Enron grew to become America’s seventh largest company. Enron’s success, however, was based on a series of scams and fraudulent accounting practices that misstated its income. In October 2001, investigations revealed that Enron had created partnerships with off-the-book entities that...
hid massive amounts of debt from the public.\textsuperscript{61} At its peak, Enron stock sold for over $90 per share, but by the time the Enron scandal was revealed, the stock dropped to $0.26 as investors and creditors retreated.\textsuperscript{62}

Soon thereafter, Enron filed for Chapter 11 bankruptcy, which resulted in the loss of jobs, pensions, and billions of dollars in stock value.\textsuperscript{63} Further investigation revealed that “company officials willfully ignored internal warnings about the accounting irregularities even as they pocketed millions of dollar in stock-market gains.”\textsuperscript{64} In addition, Arthur Andersen, Enron’s auditing company, was found guilty of both perpetrating corporate fraud and destroying evidence.\textsuperscript{65} This led to thousands of angry investors, employees, and pension holders wondering why no one within either Enron or Arthur Andersen reported any of the extensive accounting improprieties.\textsuperscript{66} To make matters worse, between 2001 and 2002, WorldCom, a major telecommunications company, was also caught engaging in corporate malfeasance.\textsuperscript{67}

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\item Larry E. Ribstein, Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002, 28 J. CORP. L. 1, 4 (2002) (“Enron gave the impression of ever-increasing earnings and stable finances through extensive derivatives trading and profitable transactions with special purpose entities (SPEs), which also yielded substantial gains for Enron insiders.”); S. REP. No. 107-146, at 2–3 (2002) (“The partnerships—with names like Jedi, Chewco, Rawhide, Ponderosa and Sundance—were used essentially to cook the books and trick both the public and federal regulators about how well Enron was doing financially.”).
\item Enron Files for Bankruptcy, supra note 58; Enron Scandal at-a-Glance, supra note 60.
\item Enron Files for Bankruptcy, supra note 58 (finding that the collapse of Enron led to the loss of 5600 jobs and the liquidation of almost $2.1 billion in pension plans); The Fall of Enron, supra note 60.
\item The Fall of Enron, supra note 60; see also Robert H. Tillman & Michael L. Indergaard, Pump and Dump, WASH. POST (Feb. 22, 2006, 1:00 PM), http://www.washingtonpost.com/wp-dyn/content/discussion/2006/02/21/D2006022100575.html, archived at perma.cc/P9LZ-UYNW (noting that Enron officials used a “pump and dump” scheme which “artificially inflated stocks and securities in order to [allow Enron officials] to sell their shares at higher prices, leaving any fall-out and responsibility on naive investors”).
\item See The Fall of Enron, supra note 60 (“Arthur Andersen . . . at best neglected to recognize the company’s problems. At worst . . . the auditor was complicit in perpetrating one of the biggest frauds in corporate history.”); Ribstein, supra note 61, at 11 (arguing that the problem involves a combination “of excessive ties between auditing firms and the companies they are supposed to be scrutinizing, [and] inadequate review of the accounting firm’s work by corporate audit committees”); see also Enron Files for Bankruptcy, supra note 58 (finding that Arthur Andersen’s auditors were guilty of deliberately destroying documents incriminating to Enron); S. REP. No. 107-146, at 4 (2002) (stating that employees were instructed to “work overtime if necessary to accomplish the destruction”).
\item See The Fall of Andersen, Chi. TRIB. (Sept. 1, 2002), http://www.chicagotribune.com/news/chi-0209010315sep01-story.html?page=1 (stating that the 90-year-old auditing firm “shunted aside accountants who failed to adapt to the firm’s new direction” by forcing out “roughly one of every 10 auditing partners and . . . watchdogs” as the firm “embarked on a path that valued hefty fees ahead of bluntly honest bookkeeping”); Enron Scandal at-a-Glance, supra note 60 (noting that the Enron scandal prompted “the accounting industry to take a hard look at itself”).
\item Simon Romero & Riva D. Atlas, WorldCom’s Collapse: The Overview; WorldCom Files for Bankruptcy; Largest U.S. Case, N.Y. TIMES (July 22, 2002), http://www.nytimes.com/2002/07/22/......
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“In order to keep [financial] reports in line with Wall Street’s expectations,” WorldCom filed reports claiming billions in false profits.68 In the end, the company filed for bankruptcy and dismissed more than 20,000 employees.69

B. The Purpose Behind Enacting the Sarbanes-Oxley Act of 2002

As a result of Enron’s massive corporate scandal, the Sarbanes-Oxley Act of 2002,70 also known as the Public Company Accounting Reform and Investor Protection Act, was promulgated.71 By enacting SOX, Congress intended to prevent corporate fraud and create stability in the financial markets.72 In order to accomplish this goal, SOX seeks to limit information asymmetry.73 By making financial statements of public companies more transparent, SOX hoped to make the information that investors receive more accurate and representative of the financial health and status of a company.74


69. Id.; see also Theodore F. di Stefano, WorldCom’s Failure: Why Did It Happen?, E-COMMERCE TIMES (Aug. 19, 2005, 7:00 AM), http://www.ecommercetimes.com/story/45542.html, archived at http://perma.cc/PN7N-AK5Q (internal quotation marks omitted) (noting that “a lack of effective checks and balances on the power of senior management” along with a lack of transparency gave rise to WorldCom’s massive corporate fraud).


71. By a vote of 99-0 in the Senate and 423-3 in the House or Representatives, SOX was passed and sent to President George W. Bush, who signed the statute into law on July 30, 2002. JAMES S. TURLEY & STEVE HOWE, ERNEST & YOUNG LLP, THE SARBANES-OXLEY ACT AT 10: ENHANCING THE RELIABILITY OF FINANCIAL REPORTING AND AUDIT QUALITY (2012), archived at http://perma.cc/R7Q3-6B9Q.

72. Lawson v. FMR LLC, 134 S. Ct. 1158, 1161 (2014) (stating that the Sarbanes-Oxley Act was passed to “safeguard investors in public companies and restore trust in the financial markets”).

73. Clayton Brite, Is Sarbanes-Oxley a Failing Law?, U. CHI. UNDERGRAD. L. REV., June 30, 2013, at 1–3, archived at http://perma.cc/W5NC-3DWC (defining information asymmetry as “a situation in which one party in a transaction has more or superior information compared to another”).

74. Id. at 3; see also S. REP. NO. 107-146, at 11 (2002) (stating that the “majority of Americans depend on capital markets to invest in the future needs of their families” and that greater accountability and transparency would help the financial markets to function properly).
Congress included four titles within SOX that helped create this transparency. Title I of SOX established the Public Company Accounting Oversight Board ("PCAOB"). The PCAOB effectively ended "over 100 years of self-regulation" and self-auditing by providing audit services for public companies. Title II established auditor independence by creating ways to limit conflicts of interest. Title III enhanced transparency and accountability by holding management executives fully responsible for the accuracy and completeness of their companies' financial statements. Finally, Title IV required internal controls for assessing internal disclosures by employees of the public company. These four titles work together to ensure that the public is not misled as to the financial status of any publicly traded company.

Another major component of SOX, Section 806, provides protection to non-governmental whistleblowers. Prior to the enactment of SOX, whistleblowers of publicly traded companies did not receive any statutory protection. As an example, Sherron Watkins, former Vice-President of Enron, received no protection under Texas law when Enron retaliated against her for warning the Chairman of accounting improprieties within

75. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 101–409, 116 Stat. 745, 750–791 (2002). For brevity, this Note only mentions the first four of the eleven titles. The main focus is on Title VIII and the whistleblower provisions of SOX.
77. See TURLEY & HOWE, supra note 71, at 1–3.
78. Sarbanes-Oxley Act of 2002 §§ 201–209. For example, Title II prohibits audit firms from providing certain non-audit services to clients and requires audit partners to rotate every five years instead of every seven. Id. § 203.
79. Id. §§ 301–308; see also TURLEY & HOWE, supra note 71, at 6.
81. By calling for greater accountability, SOX seeks to quell public mistrust in the financial markets post-Enron.
82. S. REP. NO. 107-146, at 19 (2002) ("[C]urrent law protects many government employees . . . [but] there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors. With one in every two Americans investing in public companies, this distinction fails to serve the public good."); see also CRAIN, KIM & SELMI, supra note 18, at 498 (raising "questions about how such extensive accounting irregularities and outright fraud could go on undetected for years" and wondering if whistleblowers "could have stopped or exposed these fraudulent practices"); Banick, supra note 1, at 1877 (noting that the Whistleblower Protection Act of 1989 only provided protection to federal employees).
83. See generally Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (holding that the at-will rule only applied when an employee refused to perform an illegal act that carried criminal penalties).
the company.\textsuperscript{84} Furthermore, it was found that many of Enron’s employees and executives “did not feel secure enough in their jobs to question irregularities.”\textsuperscript{85} As a result, Congress added protection for whistleblowers to encourage employees to disclose, in good faith, securities law violations by their employers, without fear of retaliation.\textsuperscript{86}

\textbf{C. Effectiveness of SOX}

The debate over the effectiveness of SOX continues to this day.\textsuperscript{87} Proponents of SOX, such as President George W. Bush, describe the statute as a huge improvement for whistleblower protection,\textsuperscript{88} and “among the most far reaching reforms of American business practices since the time of Franklin Delano Roosevelt.”\textsuperscript{89} At the time of SOX’s enactment, “the public applauded Congress for their fast action.”\textsuperscript{90} In hindsight, however, this swift reaction by both houses of Congress has been described as “a knee-jerk reaction . . . that was perhaps not fully thought through.”\textsuperscript{91}


85. \textit{As Enron Purged Its Ranks, Dissent Was Swept Away}, N.Y. TIMES (Feb. 4, 2002), http://www.nytimes.com/2002/02/04/business/04EXOD.html?pagewanted=all, archived at http://perma.cc/RZ3D-LN52; see also S. REP. No. 107-146, at 5 (2002) (finding that Enron’s employees who attempted to blow the whistle “were discouraged at nearly every turn”); Carozza, supra note 67 (explaining how Cynthia Cooper faced “a multitude of challenges,” ranging from hostility, chastisement, and even to assurances that WorldCom’s allowances were proper).

86. Sarbanes-Oxley Act of 2002 § 1514A; see also Moberly, supra note 9, at 74–75 (finding that Congress placed an emphasis on breaking the “corporate code of silence” that discouraged whistleblowing in the workplace).

87. \textit{See Brite, supra note 73, at 1 (arguing that SOX has been effective, while others argue that it has “stymied companies, slowed economic growth, and inhibited the United States’ emergence from this current recession”).}


90. \textit{See Brite, supra note 73, at 2.}

91. \textit{Id. at 1 (quoting Vanessa Walters, Doing More Harm Than Good, FIN. TIMES (2006))} (internal quotation marks omitted).
Either way, most employees face a steep “uphill battle” in finding protection under SOX.²² Within the first three years after it was passed, SOX had a success rate of 3.6%.²³ The success rate can be attributed to procedural hurdles such as: (1) requiring employees to exhaust all administrative remedies with the Occupational Safety and Health Administration (“OSHA”),²⁴ (2) requiring employees to file a claim within ninety days of retaliation; and (3) requiring appeals to be made within thirty days of an OSHA decision.²⁵ Furthermore, OSHA strictly enforces the statute of limitations²⁶ on SOX cases, and equitable arguments explaining the reason for late filings have generated little success.²⁷

If an employee somehow manages to pass all the procedural hurdles, she is still left with proving the substance of the claim.²⁸ In order to successfully state a claim under § 1514A,²⁹ a plaintiff must allege that: “(1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.”³⁰ With so many restrictions, SOX has one of the lowest employee-win ratios when compared to other whistleblower statutes.³¹

²² Moberly, supra note 9, at 131 (footnote omitted) (“An employee who files a Sarbanes-Oxley claim faces a steeper uphill battle than most employees asserting claims against an employer under comparable employee statutes. Simply put, this study’s results suggest that Sarbanes-Oxley does not protect employee whistleblowers to the extent Congress envisioned when it passed the Act.”).

²³ An employee is successful when she brings a timely claim, meets all the procedural requirements, and wins on her whistleblower claim under SOX. See Moberly, supra note 9, at 67 (finding that “491 employees filed Sarbanes-Oxley complaints with the Occupational Safety and Health Administration” and that “OSHA resolved 361 of these cases and found for employees only 13 times, a win rate of 3.6%”).


²⁵ See Moberly, supra note 9, at 100–03 (showing that 21% of cases failed under a procedural rationale).


²⁷ See Moberly, supra note 9, at 107–08 (requiring that a report correspond to one of the four securities frauds listed in the statute).

²⁸ See Moberly, supra note 9, at 76.

²⁹ Sarbanes-Oxley Act of 2002 § 1514A.

³⁰ Harp v. Charter Comme’ns, Inc., 558 F.3d 722, 723 (7th Cir. 2009).

³¹ See Moberly, supra note 9, at 93 tbl. 2.
III. WHISTLEBLOWER PROTECTION UNDER DODD-FRANK & LAWSON V. FMR LLC

A. Financial Crisis of 2008

SOX has also been criticized for failing to both provide enough protection to whistleblowers and prevent the financial crisis of 2008.\(^{102}\) In September of 2008, Lehman Brothers filed for one of the largest US corporate bankruptcies in history.\(^{103}\) With Lehman Brothers bankrupt, panic ensued, and public distrust of the financial institution led to a freeze on lending and spending.\(^{104}\) To prevent Merrill Lynch from following a similar fate, Bank of America bought Merrill Lynch for $50 billion.\(^{105}\) As conditions deteriorated, “[m]ajor banks, insurers, government-sponsored enterprises, and investment banks either failed or required hundreds of billions in federal support to continue functioning.”\(^{106}\) In response, the government used taxpayer dollars to bail out banks and the economy was left in the worst recession it had seen in eighty years.\(^{107}\) This collapse left our financial system in disarray and millions of Americans unemployed.\(^{108}\)

B. Significant Changes to SOX

After SOX failed to prevent the financial crisis of 2008,\(^{109}\) Congress drafted the Dodd-Frank Wall Street Reform and Consumer Protection Act

\(^{102}\) See Bishara et al., \textit{supra} note 9, at 39 (footnotes omitted) (criticizing SOX for “its lack of extraterritorial reach, for being obtrusive, and for not playing a role in exposing the high-profile frauds that precipitated the financial crisis and recession of 2008”).


\(^{105}\) Quinn, \textit{supra} note 103.


\(^{107}\) See id. at 159; \textit{Crash Course: The Origins of the Financial Crisis, supra} note 104.


\(^{109}\) Carozza, \textit{supra} note 67 (noting parallels between the events leading to the financial crisis of 2008 and Enron and WorldCom). Both involved “excessive risk-taking, massive market bubbles, and
of 2010 ("Dodd-Frank"), which was signed into law on July 21, 2010, by President Obama. At its root, the financial crisis of 2008 can be attributed to a lack of oversight and regulation of banks and mortgage companies. Therefore, the purpose of enacting Dodd-Frank, similar to the purpose of enacting SOX, was to "promote the financial stability of the United States by improving accountability and transparency in the financial system." Dodd-Frank instituted "sweeping financial reform in the United States" and made significant changes to SOX. For example, Dodd-Frank expanded the limited coverage of whistleblower protection under SOX to a public company’s subsidiaries or affiliates. In addition, Dodd-Frank made the aforementioned procedural hurdles less challenging by giving whistleblowers 180 days to file a claim. Dodd-Frank also added a right to a jury trial and made arbitration agreements unenforceable. These amendments specifically targeted and enhanced SOX’s whistleblower provisions—clearly illustrating Congress’s intent in making whistleblower protection more effective.

See supra notes 94–97 and accompanying text.

See infra Part VI.
C. Dodd-Frank’s Own Set of Problems

Despite these amendments, Dodd-Frank is still criticized for over-incentivizing whistleblowing\(^\text{119}\) and inadvertently minimizing the need for internal reporting.\(^\text{120}\) Each concern is briefly explained below.

First, Dodd-Frank is criticized for encouraging whistleblowing. One of the biggest amendments to SOX is the addition of bounty provisions.\(^\text{121}\) These bounty provisions incentivize employees with knowledge of corporate wrongdoing to report to the SEC in return for monetary rewards.\(^\text{122}\) This emphasis on incentives has raised concerns of frivolous claims and of employees reporting violations of corporate fraud out of pure greed.\(^\text{123}\)

Furthermore, by encouraging whistleblowers to report fraud to the SEC, Dodd-Frank inadvertently “decreases the effectiveness of compliance programs by reducing the number of employees willing to utilize internal reporting mechanisms.”\(^\text{124}\) In doing so, Dodd-Frank creates friction between corporations and the federal government as both entities compete for employee disclosures.\(^\text{125}\) In summary, through the use of bounty provisions, Dodd-Frank arguably undermines one of the many goals of SOX: to encourage employees to report violations of fraud internally within public companies.\(^\text{126}\)

\(^\text{119}\). See infra note 122 and accompanying text.
\(^\text{120}\). See infra note 124 and accompanying text.
\(^\text{121}\). See Hartmann, supra note 94, at 1285 (quoting Geoffrey Christopher Rapp, Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers, 87 B.U. L. Rev. 91, 113–14 (2007)) (internal quotation marks omitted) (noting that SOX did not provide any true incentive to blow the whistle and therefore only “sealed cracks in the doctrine” rather than offering “radical reform”).
\(^\text{122}\). CRAIN, KIM & SELMI, supra note 18, at 521–22.
\(^\text{123}\). See Hartmann, supra note 94, at 1313 (concerned with “creating a facet of society driven by green and the potential for quick wealth”). Compare Hartmann, supra note 94, at 1306 (discussing the possibility of frivolous claims), with Bishara et al., supra note 9, at 62 (noting that in 2012, the Commission had received 3001 whistleblower tips from all fifty states and that the program had proven to be valuable).
\(^\text{124}\). See Quigley, supra note 80, at 269.
\(^\text{125}\). Id. at 271 (discussing the tug-of-war notion between companies and the government).
\(^\text{126}\). See id. at 257. Contra Hartmann, supra note 94, at 1296 (noting that “the Dodd-Frank Act does not completely usurp Sarbanes-Oxley’s administrative process; rather, it creates an entirely new and separate enforcement mechanism for retaliation claims that parallels the existing regime under Sarbanes-Oxley”).
D. Lawson v. FMR LLC (2014)

While Congress tried to improve the whistleblower protections provided in SOX through further legislation, the Supreme Court also tried to do so by providing lower courts with further guidance on the proper interpretation of SOX in *Lawson v. FMR LLC*.127

In 2014, Lawson, an employee of a private company that contracted with FMR, sought protection under SOX after being retaliated against for raising concerns regarding the overstated expenses associated with operating mutual funds.128 *Lawson* is a great example of how the statutory language of SOX can give rise to different interpretations of who is protected under the law.129 In that case, the main issue was whether § 1514A applies to employees of privately held contractors and subcontractors who perform work for a public company.130

Justice Ginsburg, who delivered the opinion of the Court, stated that Congress, in structuring SOX, “recognized that outside professionals—accountants, law firms, contractors, agents, and the like—were complicit in, if not integral to, the shareholder fraud and subsequent cover-up [of Enron].”131 She further stated that “outside professionals bear significant responsibility for reporting fraud by the public companies with whom they contract, and that fear of retaliation was the primary deterrent to such reporting by the employees of Enron’s contractors.”132 Outside professionals, in this sense, act as “gatekeepers” and are vital to spotting corporate fraud.133 By examining the congressional intent behind SOX, the

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128. Id.
129. See Spinner v. David Landau & Assocs., LLC, ARB Nos. 10-111, 10-115, ALJ No. 2010-SOX-029, 2012 WL 1999677, at *8 (Dep’t of Labor May 31, 2012) (noting how “the statute’s lack of definition of ‘employee’ leaves the text open to competing problematic interpretations”); see also McCarthy, supra note 12, at 159 (noting that Congress, in its debate, did not examine this specific question, and that this lack of clarity is “likely a result of the haste with which SOX was passed”).
131. Id. at 1169; Spinner, 2012 WL 1999677, at *12–13; see also S. REP. NO. 107-146, at 4 (2002); CRAIN, KIM & SELMI, supra note 18, at 509 (stating that the majority believed that professional obligations by accountants and lawyers to blow the whistle without any protection would be insufficient incentives to blow the whistle).
132. *Lawson*, 134 S. Ct. at 1170. In addressing the dissent’s concern, Ginsburg found supporters of the dissenting view had failed to identify a single case “in which the employee of a private contractor ha[d] asserted a § 1514A claim based on allegations unrelated to shareholder fraud.” Id. at 1172. Furthermore, she noted that if the Court were somehow wrong in regards to interpreting the intent of Congress, then Congress could easily fix the problem by amending the statute. Id. at 1173.
Court held that SOX worked to dismantle any incentive to remain silent in the corporate setting.\textsuperscript{134}

Although \textit{Lawson} extends coverage to private contractors of public companies and Dodd-Frank expands the remedies available under SOX, neither addresses whether an employee discharging her duties is covered under SOX.\textsuperscript{135} However, both \textit{Lawson} and Dodd-Frank support the argument that SOX be read broadly, in light of its purpose, to extend coverage to employees discharging their duties.\textsuperscript{136}

\textbf{IV. EMERGING SPLIT AT THE DISTRICT COURT LEVEL}

In the past few years, three district court cases\textsuperscript{137} and one Administrative Review Board ("ARB")\textsuperscript{138} decision have briefly addressed the issue of whether SOX covers employees discharging their duties. All four cases, discussed below, dispense with this issue rather quickly and instead turn their attention to the actual elements of the claim.\textsuperscript{139}

\textbf{A. No Protection to Employees Discharging Their Duties}

In \textit{Riddle v. First Tennessee Bank}, plaintiff-employee Riddle was terminated for what he believed constituted protected activity under Section 806 of SOX.\textsuperscript{140} Plaintiff alleged that he should be protected


\textsuperscript{135} Although Congress has been silent on whether SOX extends coverage to employees discharging their duties, one cannot automatically interpret congressional intent from congressional silence. Also, the impact of discharging one's duties on protection available for the employee from employer retaliation has been previously addressed under both \textit{Garrett} and the WPA. \textit{See supra} Part I.

\textsuperscript{136} \textit{See infra} Part VI.


\textsuperscript{139} \textit{See Vodopia v. Koninklijke Philips Elecs., N.V.}, 398 F. App’x 659, 662 (2d. Cir. 2010) (holding that plaintiff must demonstrate, by a preponderance of the evidence, four elements: "(1) that he engaged in protected activity, (2) the employer knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action").

\textsuperscript{140} \textit{Riddle}, 2011 WL 4348298, at *1–2.
because he reported what he believed to be a violation of the Bank Bribery Act.\textsuperscript{141} Furthermore, he alleged that he continued to protest against his employer’s refusal to report the purported violation and carried out further investigations of his own.\textsuperscript{142} The court held that plaintiff’s actions did not constitute protected activity because he failed to “step outside his role” as an investigator.\textsuperscript{143} In this case, the court found that although plaintiff “threaten[ed] to step outside his role . . . he never d[id]. He merely report[ed] the alleged violation to three individuals within the company . . . while in his role as an investigator.”\textsuperscript{144}

After addressing this first issue, the court focused its analysis primarily on whether plaintiff reasonably believed that the violation he reported constituted protected activity under SOX.\textsuperscript{145} In order to constitute protected activity, “a plaintiff must prove that the cited conduct ‘definitively and specifically’ relates to one of the classes of laws listed in [SOX].”\textsuperscript{146} Plaintiff, though alleging a violation of the Bank Bribery Act, failed to show that a reasonable person in his position would have found the purported violations to constitute shareholder fraud.\textsuperscript{147}

\subsection*{B. Protection to Employees Discharging Their Duties}

Unlike \textit{Riddle v. First Tennessee Bank}, which did not provide protection for an employee discharging his duty, the ARB in \textit{Robinson v. Stanley} concluded that “[SOX] does not indicate that an employee’s report or complaint about a potential violation must involve actions outside the complainant’s assigned duties.”\textsuperscript{148} The provisions of SOX merely state that no employer “may discharge, demote, suspend, threaten, harass, or in

\begin{itemize}
\item[\textsuperscript{141}] \textit{Id.} at *7 (noting, however, that the defendant alleged it fired plaintiff “for a string of performance failures and lack of judgment he routinely exhibited in conducting his investigations and his dealing with other employees”).
\item[\textsuperscript{142}] \textit{Id.} at *3–4.
\item[\textsuperscript{143}] \textit{Id.} at *7.
\item[\textsuperscript{144}] \textit{Id.} at *8.
\item[\textsuperscript{145}] \textit{Id.}
\item[\textsuperscript{146}] \textit{Id.} at *6 (quoting \textit{Welch v. Chao}, 536 F.3d 269, 276–77 (4th Cir. 2008)) (holding that reasonable belief is enough to constitute protected activity as long as the reasonable belief is based specifically on one of the six categories of law that SOX provides protection for).
\item[\textsuperscript{147}] \textit{Id.} at *9. Even if plaintiff Riddle had proven that his actions constituted protected activity, the court noted that defendant’s motion for summary judgment would still be granted because the defendant showed “by clear and convincing evidence it would have terminated Plaintiff regardless of his alleged protected activity.” \textit{Id.}
\end{itemize}
any other manner discriminate against an employee\textsuperscript{149} in the terms and conditions of employment.\textsuperscript{150} The plain text of the statute does not distinguish types of employees covered under SOX. The ARB, therefore, saw no need to distinguish the plaintiff as a certain type of employee and instead turned its attention to determining whether Robinson had “directly implicate[d] the categories of fraud or securities violations listed in the statute,” and then focused on the causation element.\textsuperscript{151} The ARB held that Robinson failed to prove that “her protected activity was a contributing factor in the decision to discharge her” and dismissed her complaint.\textsuperscript{152} In the following four years, two district courts deferred to the ARB’s holding in Robinson.

In 2012, the US District Court for the District of Connecticut extended coverage to an employee discharging his duty in Barker v. UBS AG, LLC.\textsuperscript{153} The court found the defendant’s reliance on Riddle unavailing and instead held that construing whistleblower protection broadly was reasonable in light of the purposes underlying SOX.\textsuperscript{154}

In 2014, the US District Court for the Southern District of New York, in Yang v. Navigators Group, Inc., held that SOX provided protection for plaintiff-employee Yang when she reported what she reasonably believed to be a securities law violation.\textsuperscript{155} Although the defendant argued that plaintiff Yang’s reports were “part and parcel of her job,” the court rejected this argument and instead focused on plaintiff Yang’s reasonable belief that a violation under SOX had occurred—based on her training and experience rather than her job duties.\textsuperscript{156}

The holdings in the latter three cases are premised on the idea that SOX was enacted to encourage the reporting of specific types of corporate fraud, regardless of an employee’s professional duty. These three cases demonstrate that not only is inquiring into an employee’s job duties


\textsuperscript{150} Sarbanes-Oxley Act of 2002 § 1514A.

\textsuperscript{151} Robinson, 2010 WL 348303, at *1 (noting that in order for plaintiff to be successful in claiming whistleblower protection under SOX, a plaintiff must show that her actions constituted protected activity and that her actions were a contributing factor in the employer’s retaliation).

\textsuperscript{152} Id.


\textsuperscript{154} Id. at 297; see also, e.g., Mahony v. KeySpan Corp., No. 04 CV 554 SJ, 2007 WL 805813, at *5 (E.D.N.Y Mar. 12, 2007) (“Given that SOX is a statute designed to promote corporate ethics by protecting whistleblowers from retaliation, it is reasonable to construe the statute broadly.”).


\textsuperscript{156} Id. at 530.
inconsequential, but also distracting—diverting the analysis away from the main purpose behind enacting SOX.

V. ANALYSIS

There is a social stigma associated with whistleblowing. Many perceive whistleblowers as reporting wrongdoing to benefit themselves or to harm others. This mentality can prevent the general public, including the legislature, from realizing society’s interest in promoting disclosures of wrongdoing within an organization. In their article, *The Mouth of Truth*, Norman D. Bishara, Elletta Sangrey Callahan, and Terry Morehead Dworkin point out that promoting whistleblowing has been ineffective due to “statutory characteristics, judicial interpretations, and the complex nature of the interaction among whistleblower claims.”

Each of the authors’ reasons why whistleblowing regulations have been ineffective are demonstrated in this Note. For instance, the ineffectiveness of whistleblowing is exemplified in SOX where the statutory language is unavailing, where there is a split in interpreting the coverage afforded by SOX to different types of employees among the courts, and where the purpose of enacting SOX is overshadowed by the unnecessary focus placed on an employee’s job responsibilities. In addition, judicial interpretation of employees discharging their duties under the WPA is “incompatible [overall] with the policies behind whistleblower protection statutes” and incompatible with SOX. In order to avoid these types of problems and to promote effective whistleblowing, it is paramount to observe the factors that motivate individuals to report violations.

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158. *See generally* Hartmann, *supra* note 94; Bishara et al., *supra* note 9, at 95 (associating derogatory terms such as “tattletales” or “snitches” with whistleblowers).

159. *See Bishara et al., supra note 9*, at 39 (stating that whistleblowing is as an “important source of information vital to honest government, the enforcement of laws, and the protection of the public health and safety”).

160. *See Bishara et al., supra note 9*, at 56.

161. *See infra* note 187 and accompanying text.

162. *See supra* Part IV.

163. *See supra* Part IV.B.


165. *See Bishara et al., supra note 9*, at 60 (footnote omitted) (“Three key factors motivating whistleblowers are: confidence that the report would effectively address the misconduct at issue; belief that the organization supported whistleblowing, in general; and the seriousness of the misfeasance. Whistleblowers are also motivated by the desire to put ‘their’ organization back on the right track.”).
Congress’s purpose in enacting the statute, and other federal whistleblower statutes to help guide in the interpretation of the law.  

To illustrate, in Lawson, the Supreme Court looked to the text and structure of the Aviation Investment and Reform Act (“Air 21”), a parallel statute, to better understand how to interpret SOX. This Subpart follows a similar approach by looking at the WPA, its case law, and Congress’s response in 2014.

To review, the statutory language of the WPA protects any disclosure of information by an employee. However, under Willis and Huffman, the Federal Circuit held that the WPA does not extend coverage to employees merely carrying out their job responsibilities. In 2012, Congress amended the WPA and strengthened whistleblower protection to federal whistleblowers. Most notably, Congress added subsection (f), which does not exclude an employee from whistleblower protection simply because the report occurs during the normal course of her duties.

Prior to this amendment, most courts followed Garcetti, which scrutinized an employee’s job duties as an initial threshold requirement. The Garcetti threshold, as noted by Julian W. Kleinbrodt, shifted the focus “from the content of the speech to the role of the speaker” and assumed that the government employer’s interest in workplace efficiency always outweighed an employee’s speech made pursuant to his job

166. See supra notes 70–74 and accompanying text.
167. See Bishara et al., supra note 9, at 83 (arguing that improving the harmony between whistleblowing laws has the potential to increase their effectiveness).
168. Lawson v. FMR LLC, 134 S. Ct. 1158, 1164 (2014). This tactic is necessary because Congress, when enacting SOX, “track[ed] . . . as closely as possible” the protections afforded by Air 21’s whistleblower protection provision. Id. at 1175 (quoting S. REP. NO. 107-146, at 30 (2002) (“Because we had already extended whistleblower protections to non civil service employees, we thought it best to track those protections as closely as possible.”)). Compare 18 U.S.C. § 1514A(a) (2002) (“No [public] company . . . or any officer, employee, contractor, subcontractor, or agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment . . . .”), with 49 U.S.C. § 42121(a) (2002) (“No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment . . . .”).
169. See supra note 36 and accompanying text.
170. See supra Part I.C–D.
171. Jason Zuckerman, Congress Strengthens Whistleblower Protections for Federal Employees, LEL FLASH (Section on Labor & Emp’t, Am. Bar Ass’n, Chicago, IL), Nov./Dec. 2012 (noting that “President Obama signed into law the Whistleblower Protection Enhancement Act of 2012,” which amended and strengthened the whistleblower protection provided by the WPA).
172. 5 U.S.C. § 2302(h)(2) (2014) (stating that protection is not excluded simply because an employee’s disclosure is made during the normal course of her duties).
173. See supra note 29 and accompanying text.
duties. 172 It is not surprising, then, that Garcetti, Willis, and Huffman did not extend protection to employees merely discharging their duties, as all three cases focused on protecting the employer, who wears two hats—“employer and sovereign.”176

However, by amending the WPA, Congress made “crystal clear its intent that any whistleblower who reports misconduct via one of the enumerated channels be protected under federal whistleblower statutes.”177 This not only overruled the need to address whether a report concerning a potential violation arose out of an employee’s job responsibilities, but shifted the focus correctly back to the content of an employee’s speech.178 Therefore, one argument for extending coverage to employees discharging their duties is that even its predecessor, the WPA, moved away from the Garcetti threshold and dispensed with this issue.

Even if one does not find the first argument persuasive, courts should still hold that SOX extends coverage to employees discharging their duties because the ways in which SOX is distinguishable from general whistleblower statutes179 only augments the need for broader whistleblower protection.180 SOX is notably different because the concerns of an employer playing a dual role are not present as SOX protects employees of publicly traded companies.181 In addition, the purpose of SOX is hindered if courts interpreting SOX adopt the Garcetti approach to employees discharging their duties. The rest of this Note highlights these differences and states five arguments in favor of following the holding in Yang and extending coverage to employees discharging their duties.182

VI. PROPOSAL

Congress has the prerogative to fashion statutes as it sees fit.183 Section 1514A begins by stating that SOX provides “[w]histleblower protection

175. Id.
176. Id. at 112.
178. See supra note 174 and accompanying text.
179. See generally CRAIN, KIM & SELMI, supra note 18, at 498–501 (noting that SOX and Dodd-Frank are specific corporate whistleblower statutes that are unlike other general whistleblower statutes as they protect only certain types of employees for reporting certain types of information); see also Bishara et al., supra note 9, at 44 (discussing adjunct versus core statutes).
180. See, e.g., supra note 154 and accompanying text.
181. Sarbanes-Oxley Act of 2002 § 1514A.
182. All five of the arguments below derive from observing the history of whistleblower protection. Particularly, analyzing the WPA, Dodd-Frank, and Lawson in light of the purposes of enacting SOX supports extending coverage to employees discharging their duties.
for employees of publicly traded companies.\textsuperscript{184} It continues to state that no employer “may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.”\textsuperscript{185} This is the full extent of the language used to clarify the type of employee protected under SOX.\textsuperscript{186} The statutory language of SOX alone is unavailing and does not help in defining the term “employee.”\textsuperscript{187} This vagueness has led to different interpretations of the same language by courts.\textsuperscript{188} However, these different interpretations do not automatically render SOX ambiguous.\textsuperscript{189} On the contrary, a careful examination of the policy reasons and objectives behind enacting SOX\textsuperscript{190} supports five arguments for following the holding in \textit{Yang} and extending coverage to employees discharging their duties.\textsuperscript{191}

First of all, SOX should extend coverage to employees discharging their duties because its predecessor, the WPA, moved away from distinguishing employees on this very basis when Congress amended subsection (f) of the WPA.\textsuperscript{192} The WPA is a great starting point because it is also a federal whistleblower statute that has struggled with this issue and can shed some light on how courts have dealt with and interpreted its whistleblower protection provisions.\textsuperscript{193}

the importance of giving deference to Congress’s intent).
\textsuperscript{184} Sarbanes-Oxley Act of 2002 § 1514A.
\textsuperscript{186} Spinner v. David Landau & Associates, LLC, ARB Nos. 10-111, 10-115, ALJ No. 2010-SOX-029, 2012 WL 1999677, at *15 (Dep’t of Labor May 31, 2012) (stating that “Congress could easily have limited [coverage] simply by statutorily defining the term ‘employee,’” but for some reason did not limit or restrict the term “employee”).
\textsuperscript{188} The Supreme Court has not addressed whether SOX extends coverage to employees discharging their duties. District court holdings are only persuasive and not mandatory. See, e.g., Englehart v. Career Educ. Corp., No. 8:14-cv-444-T-33EAJ, 2014 U.S. Dist. LEXIS 64994, at *10, *20 (M.D. Fla. May 12, 2014) (noting that the Fifth Circuit declined to follow the conclusion of several district courts).
\textsuperscript{189} Id. at *20.
\textsuperscript{190} See S. REP. No. 107-146, at 1 (2002) (Section I). The Senate Report is arguably one of the clearest expressions of Congress’s intent while drafting SOX.
\textsuperscript{191} Crandon v. United States, 494 U.S. 152, 158 (1990) (finding it proper to fully understand the meaning of the statute by looking “not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy”); see also Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1352 (Fed. Cir. 2001) (holding that it was appropriate to “interpret the statute in light of its central purpose”).
\textsuperscript{193} Huffman, 263 F.3d at 1351–52. Even though there seems to be a consistent notion of not
In both *Willis* and *Huffman*, the Federal Circuit declined to extend whistleblower protection to employees discharging their duties. One reason for this was a strong notion that an employee had a fiduciary obligation to his employer and that extending coverage to employees merely carrying out this obligation would interfere with “subjecting employees to normal, non-retaliatory discipline.” This notion was also embodied in *Garcetti*, which stated that an employer’s interest always outweighs the employee’s interest when the employee speaks pursuant to his or her job duties. By amending the WPA, however, Congress made its intent clear. Instead of focusing on the chance that employees would take advantage of whistleblower protection, Congress focused on the purpose of enacting the WPA, which was to protect federal whistleblowers from employer retaliation. Similarly, SOX should also move away from *Garcetti* and extend coverage to employees that are discharging their duties to fully enact the purpose Congress had in mind when drafting SOX—to prevent future corporate fraud by making public companies more transparent through the utilization of whistleblowers.

Second, SOX is different from the WPA in a way that strengthens the argument for extending protection to employees discharging their duties. The WPA’s main goal is to “encourage reporting of a ‘genuine violation of law’ rather than ‘minor or inadvertent miscues occurring in the conscientious carrying out of a federal official or employee’s assigned duties.’” In contrast, SOX, though narrow in scope, is “intentionally
written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market.\r

The fundamental difference between the WPA and SOX lies in the consequences that stem from whistleblowing.\r

Stated differently, the magnitude of an unreported violation under SOX is greater than that of the WPA. As seen in Willis,\r

the impact of reporting violations of conservation plans for sixteen farms did not lead to the collapse of the Department of Agriculture. In contrast, the impact a whistleblower can have by reporting securities fraud violations is drastic. This is not to say that reports of violations under the WPA are less important than SOX. Instead, violations under SOX are more time sensitive and require immediate attention and public exposure.\r

If one of Enron’s employees had come forward with the extensive accounting improprieties to the public, the outcome could have potentially saved billions of dollars and prevented the collapse of Enron.\r

The harmful and devastating impact that could occur from an unreported securities violation further supports a more liberal interpretation of the coverage extended to employees discharging their duties. The focus, therefore, needs to remain “on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law.”\r

Third, extending protection to employees discharging their duties is the most logical way to safeguard investors and the public from future

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protected under the WPA, but that reports of wrongdoing within the normal course of one’s duties are not protected).\r

201. 149 Cong. Rec. S1725-01, S1725, 2003 WL 193278 (Jan. 29, 2003); see also Mahony v. KeySpan Corp., No. 04 CV 554 SJ, 2007 WL 805813, at *1, *5 (E.D.N.Y. Mar. 12, 2007) (holding it reasonable to construe SOX broadly); Enron Whistleblower Tells of ‘Crooked Company,’ supra note 84 (quoting former Enron managing director Vince Kaminski who “felt the company was threatened and . . . had a duty to speak up”).\r

202. Because SOX deals directly with publicly traded companies, the effect that a whistleblower can have on the financial markets is immeasurable. See S. Rep. No. 107-146, at 4 (2002) (pointing out that Enron was one example of numerous other cases where corporate fraud left the public in disarray).\r

203. Willis v. Dep’t of Agric., 141 F.3d 1139, 1139 (Fed. Cir. 1998).\r

204 Violations under SOX go more to timing and society’s imminent need to know about corporate fraud. See S. Rep. No. 107-146, at 3 (2002) (“Enron’s sudden collapse left thousands of investors holding virtually worthless stock . . . ”).\r

205. See S. Rep. No. 107-146, at 4 (2002). There is an undeniable need to protect those that report corporate fraud because of the particular vulnerability that corporate fraud places on the public. Firefighters and teachers, for example, have no way of being aware of the fraud occurring in these companies, and in turn have no means of protecting themselves from losing significant investments without the help of whistleblowers. See id.; see also supra note 84 and accompanying text.\r

harm. In a committee hearing, experts warned Congress “that there are more ‘Enrons’ lurking out there, simply eluding discovery.” If Enron could hide massive amounts of debt from the public for four years, it is absurd to think that Enron’s employees, who are not hired as accountants or auditors, would be able to notice accounting irregularities that are so intricately designed and hidden. It is therefore essential to rely on whistleblowers from within the company who are hired as experts in accounting and auditing because they are in the best position to spot corporate fraud. If, however, employees discharging their duties are not protected, securities violations are likely to go unreported and undetected.

By declining to provide protection to employees discharging their duties, the statute is effectively rendered useless. SOX is already tailored narrowly and has failed to protect many whistleblowers due to its procedural and substantive hurdles. Further limiting the coverage provided to whistleblowers under SOX only undermines Congress’s

207. See S. Rep. No. 107-146, at 2-3 (2002) (stating that the public was not savvy to the inner workings of Enron as Enron and its auditors spun “an intricate spider’s web of deceit” that “successfully deceived the investing public and reaped millions for some select few insiders”).

208. Id. at 11.

209. Id. at 3.

210. Even when Enron’s former head of risk and research, Vince Kaminski, reported his concerns to upper management, he was not taken seriously. See Enron Whistleblower Tells of ‘Crooked Company,’ supra note 84 (describing how the defense attorney of Kenneth Lay, Enron’s CEO, questioned Kaminski’s competence on cross-examination and got him to acknowledge that he is not an accountant or an accounting expert).

211. See S. Rep. No. 107-146, at 10 (2002) (realizing that whistleblowers “are the only firsthand witnesses to the fraud” in complex fraud prosecutions).

212. Id. at 2. In its Senate Report, Congress stated that “[t]he alleged activity Enron used to mislead investors was not the work of novices.” Id. Therefore, it is crucial to rely on expert accountants and auditors that are hired from within the company to spot and report corporate fraud. See Bishara et al., supra note 9, at 37 (noting that the intent of whistleblowing is not to focus on whether an employee learned of fraud during the course of his duties, but rather the intent lies in exposing, curtailing, and deterring misconduct through self-reporting and self-monitoring).

213. See Bishara et al., supra note 9, at 60 (noting that employees were motivated to blow the whistle if they were confident that the report would be addressed and that the organization would support and protect the employees who reported such violations); see also S. Rep. No. 107-146, at 11 (2002) (noting that “one in two Americans . . . depend on the transparency and integrity of our public markets”).

214. See Bishara et al., supra note 9, at 48–49 (stating that SOX was criticized for not providing enough protection for whistleblowers); see also Banick, supra note 1, at 1899 (arguing that it is “improbable that . . . an employee would encounter wrongdoing ‘outside the scope’ of his or her job as the duties explicitly entail monitoring and reporting such wrongdoing—which leaves the argument that any wrongdoing discovered is always within the scope of his or her duties”).

215. See Bishara et al., supra note 9, at 48–49; Moberly, supra note 9, at 100–03.
In fact, a major component of SOX focuses on internal reporting, which cannot be enforced if employees can only seek protection by stepping outside their role and reporting to external sources.

Fourth, coverage should extend to employees discharging their duties because Dodd-Frank supports such a reading. As a matter of fact, most of the amendments to Dodd-Frank evince Congress’s intent to broaden whistleblower protection under SOX. For example, Congress expanded protection by explicitly including a public company’s subsidiaries and affiliates. Congress also addressed the procedural hurdles in SOX by doubling the amount of time whistleblowers had to bring a claim. Furthermore, Dodd-Frank prevents employers from upholding pre-dispute arbitration agreements and grants whistleblowers a right to trial by jury. The overall intent of Congress is to broaden whistleblower protection, which, in this case, is best furthered by following the holding in Yang and extending protection to employees discharging their duties.

Last but not least, SOX should extend coverage to employees discharging their duties because Lawson extended coverage to private contractors of the public company. One reason why the Supreme Court extended coverage to private contractors is that securities violations occurred despite oversight from third-party advisory firms. By extending coverage, the Court’s goal was to ensure protection of private contractors that blew the whistle. If auditors and lawyers further removed from the company are protected under SOX, it only makes sense to protect auditors and lawyers of the public company. The Supreme Court realized that extending protection to private contractors was the best means for carrying out the intent Congress had when it enacted SOX. In a similar manner, in order to prevent future corporate scandals, it is in the courts’

218. See Kleinbrodt, supra note 174, at 126 (“One of Garcetti’s major deficiencies is that it incentivizes employees to publicly voice their concerns before they utilize internal channels of communication.”); see also Garcetti v. Ceballos, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting) (stating similar reasoning).
219. See supra note 114 and accompanying text.
220. See supra note 116 and accompanying text.
221. See supra note 117 and accompanying text.
223. See McCarthy, supra note 12, at 144 (“One troubling aspect of these scandals was that they occurred despite oversight from the corporations themselves and from outside advisers such as law firms, accounting firms, and other contractors.”).
best interest to uphold the line of reasoning in Yang and extend coverage to public employees that are discharging their duties.

CONCLUSION

There are many reasons why SOX can be criticized as a failing law. However, it is important to keep in mind that SOX was the first whistleblower statute that provided protection to employees of public companies. Although this does not excuse the haste with which the bill was drafted, nor its consequent deficiencies, it does show that SOX was a direct response to a scandal that devastated the financial markets. Congress, when drafting the bill, had a single purpose: to protect investors against corporate fraud through increased transparency, accountability, and whistleblower protection. With this purpose in mind, every court should follow the Yang decision and extend protection under SOX to employees discharging their duties. History, both before and after SOX, validates this argument and compels the courts to shift their focus when interpreting the scope of SOX. There have been debates over who is covered under SOX and whether employees discharging their duties should be protected. Instead of asking who is covered under SOX, the analysis should focus on what is covered under SOX and why. By focusing on the latter two questions, the need to ask who is covered is eliminated, and the focus properly shifts back to preventing corporate fraud through the integral role of whistleblowers in publicly traded companies.

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224. See generally Brite, supra note 73.
226. Enron Files for Bankruptcy, supra note 58 (describing the consequences of Enron’s failure).
227. Lawson, 134 S. Ct. at 1158 (describing SOX’s purpose as: “safeguard[ing] investors in public companies and restor[ing] trust in the financial markets”).

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