No. 13-2399

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANDREA GAIL JONES,
Plaintiff-Appellee,

v.

SOUTHPEAK INTERACTIVE CORPORATION OF DELAWARE,
TERRY M. PHILLIPS and MELANIE J. MROZ,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR SECRETARY OF LABOR, THOMAS E. PEREZ, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND SUPPORTING AFFIRMANCE

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

MARY J. RIESER
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

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BRIEF FOR SECRETARY OF LABOR, THOMAS E. PEREZ, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND SUPPORTING AFFIRMANCE

STATEMENT OF THE ISSUES

1. Whether the district court correctly rejected Defendants-Appellants' arguments that claims of retaliation under the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A, ("Sarbanes-Oxley" or "Section 1514A"), are governed by the two-year statute of limitations for securities fraud claims set forth in 28 U.S.C. 1658(b).

2. Whether the district court correctly held that Plaintiff-Appellee's complaint filed with the Occupational Safety and Health Administration ("OSHA") satisfied Section

1514A's administrative-exhaustion requirement with respect to her claims against the individual defendants.

3. Whether the district court correctly held that 18 U.S.C. 1514A permits an employee to recover damages for emotional distress caused by an act of retaliation.

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

Congress enacted Sarbanes-Oxley "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson v. FMR, LLC*, 134 S.Ct. 1158, 1161 (2014) (citing S. Rep. No. 107-146, pp. 2-11 (2002)). Further, to address "a significant deficiency" in the law, Congress passed 18 U.S.C. 1514A of Sarbanes-Oxley to protect whistleblowers who report corporate misconduct from retaliation by their employers. *Id.*, at 1162-63.

The Secretary of Labor ("Secretary") administers and enforces the anti-retaliation provision of Sarbanes-Oxley through administrative adjudication. *See* 18 U.S.C. 1514A(b)(2)(A), incorporating the rules and procedures in 49 U.S.C. 42121(b); 29 C.F.R. Part 1980. An employee seeking to recover for a violation of Section 1514A must file a complaint with the Secretary through OSHA. 18 U.S.C. 1514A(b)(1)(A); 29 C.F.R. 1980.103. Following an OSHA investigation, a complainant may pursue a whistleblower claim within the Department of Labor

("Department") through a *de novo* hearing before an administrative law judge ("ALJ") and an administrative appeal to the Administrative Review Board ("ARB"), which issues the final decision of the Secretary in Sarbanes-Oxley whistleblower cases. *See* 18 U.S.C. 1514A(b)(2)(B); incorporating 49 U.S.C. 42121(b); 29 C.F.R. § 1980.104-.110.

Alternatively, if the Secretary has not issued a final decision within 180 days of the filing of the complaint, and the delay is not due to bad faith on the complainant's part, a complainant may bring a de novo action in federal district court. 18 U.S.C. 1514A(b)(1)(B); *Lawson*, 134 S.Ct. at 1163. This "kick-out" provision is aimed at providing a second avenue for whistleblowers to achieve prompt resolution of their claims.

The Secretary has an interest in ensuring that courts apply the correct statute of limitations to Sarbanes-Oxley whistleblower claims so that whistleblowers are not prematurely barred from bringing a de novo action in district court.

The Secretary also has an interest in maintaining the informal requirements for filing a Sarbanes-Oxley whistleblower complaint with OSHA. Such a complaint is not a formal pleading. Rather, its purpose is to trigger an investigation into the alleged retaliation. *See, e.g., Sharkey v. J.P. Morgan Chase & Co.*, 805 F. Supp. 2d 45, 53-54 (S.D.N.Y. 2011); *Sylvester v.*

Parexel Int'l LLC, ARB Case No. 07-123, 2011 WL 2165854, at *9-10 (ARB May 25, 2011).

Finally, the Secretary has an interest in the correct construction of the remedies provision of 18 U.S.C. 1514A. In precedential decisions of the ARB, the Secretary has found that the statute authorizes emotional distress damages and that such damages can be critical to making a victim of unlawful retaliation whole. *See Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1138 (10th Cir. 2013) (agreeing with Secretary that Section 1514A authorizes emotional distress damages); *Menendez v. Halliburton*, ARB No. 09-002, -003, 2013 WL 1282255, at *11, (ARB Mar. 15, 2013) on appeal (5th Cir. No. 13060323)).

STATEMENT OF THE CASE

1. Statement of facts. Plaintiff-Appellee Andrea Jones ("Jones") was the Chief Financial Officer of Defendant-Appellant SouthPeak Interactive Corporation of Delaware ("SouthPeak"), a video games publisher. Jones was fired on August 14, 2009, after reporting inaccuracies in SouthPeak's financial statements to the Audit Committee of the company's Board of Directors, its outside counsel, and the Securities Exchange Commission ("SEC").

2. OSHA complaint and investigation. On October 5, 2009, Jones filed a timely complaint with OSHA alleging that her

discharge violated 18 U.S.C. 1514A. The complaint identified SouthPeak and three of the company's officers, including Terry Phillips, Chairman of the Board, and Melanie Mroz, President, Chief Executive Officer, and Director, as the parties that had violated the statute. OSHA sent notice of the complaint to SouthPeak, but did not separately notify the individual officers or investigate the claims against them. On July 23, 2010, Jones notified OSHA of her intent to proceed to federal district court pursuant to 18 U.S.C. 1514A(b)(1)(B) after the Secretary did not issue a final decision within 180 days of the date Jones filed her complaint.

3. District court proceedings. On June 18, 2012, nearly two years later, Jones filed her action in the United States District Court for the Eastern District of Virginia.[1] On August 13, 2012, Mroz and Phillips filed motions to dismiss alleging that Jones had not exhausted her administrative remedies on her Sarbanes-Oxley retaliation claim as to them. Subsequently, the defendants filed motions to dismiss the Sarbanes-Oxley

[1] The regulations in effect when Jones filed her complaint allowed an employee to terminate the administrative process after 180 days by submitting a notice of intent to file suit. 29 C.F.R. 1980.114(b) (2010). The Department has amended the relevant regulations to provide that the administrative process terminates only after the employee actually files a complaint in district court, thereby eliminating any gap between the administrative and court proceedings. *See* 29 C.F.R. 1980.114(b).

retaliation claim as untimely. On March 19, 2013, the district court denied defendants' motion to dismiss the complaint as untimely, holding that suits under 18 U.S.C. 1514A are governed by the four-year statute of limitations in 28 U.S.C. 1658(a), and not the two-year limitations period in 28 U.S.C. 1658(b). *Jones v. SouthPeak Interactive Corp.*, --- F. Supp. 2d ---, No. 3:12CV443, 2013 WL 1155566 (E.D. Va. Mar. 19, 2013). The district court concluded that 28 U.S.C. 1658(b)(1) cannot be applied to actions brought under 18 U.S.C. 1514A because "the violation" that starts the running of 28 U.S.C. 1658(b)(1)'s two-year clock must be the violation referenced earlier in that provision -- that is, the violation of "a regulatory requirement concerning the securities laws." *Id.* at 15-16. A claim under 18 U.S.C. 1514A, however, does not accrue when the underlying fraud occurs, but only when the employee suffers an act of retaliation. *Id.* at 15. The court noted that the retaliatory action may not occur until more than two years after the underlying fraud, and rejected as absurd an interpretation that could allow the statute of limitations to expire "before the whistleblower cause of action accrued." *Id.*

The district court also denied the individual defendants' motion to dismiss Jones's claims against them for failure to exhaust administrative remedies. The court held that Jones's administrative complaint clearly presented OSHA with a claim

that Phillips and Mroz had violated 18 U.S.C. 1514A, and reasoned that Jones should not be penalized for OSHA's failure to notify the individual defendants or to investigate the claims against them. *Id.* at 10. At trial, the district court instructed the jury that it could award damages for emotional distress in addition to back pay. The jury returned a verdict for Jones and she was awarded $470,000 in back pay from SouthPeak, $123,000 in additional compensatory damages from the company, and $50,000 in compensatory damages from each of the individual defendants.[2]

SUMMARY OF ARGUMENT

First, the district court correctly rejected Defendants-Appellants' argument that the two-year statute of limitations in 28 U.S.C. 1658(b) bars Jones's retaliation claim. There is no indication that Congress intended the limitations period under 28 U.S.C. 1658(b) to apply to retaliation claims under 18 U.S.C. 1514A. A retaliation claim under 18 U.S.C. 1514A is not "a private right of action that involves a claim of [securities] fraud" within the meaning of 28 U.S.C. 1658(b). In this regard claims under Section 1514A are like retaliation claims under the False Claims Act ("FCA"), which the courts have recognized are

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[2] These amounts reflect a remittitur. *See Jones v. SouthPeak Interactive Corp.*, --- F. Supp. 2d ---, 2013 WL 5837756, *16 (Oct. 29, 2013).

employment law claims involving retaliation, not fraud claims. Additionally, 18 U.S.C. 1514A protects employees who report misconduct other than securities fraud, making it all the more clear that Sarbanes-Oxley retaliation claims do not fall within the scope of claims covered by 28 U.S.C. 1658(b).

Second, Jones's OSHA complaint satisfied the administrative-exhaustion requirement for her claims against Phillips and Mroz. The applicable regulations provide that "[n]o particular form of complaint is required." 29 C.F.R. 1980.103(b) (2010).[3] Jones's complaint to OSHA specifically listed SouthPeak, Phillips and Mroz as "person(s) who are alleged to have violated the Act (who the complaint is being filed against)." As the district court explained, "[i]t could not have been clearer that Jones intended to name Phillips [and] Mroz." *Jones*, 2013 WL 1155566, at *4.

Finally, the text of 18 U.S.C. 1514A(c) authorizes the award of damages for emotional distress. It states that a prevailing employee "shall be entitled to all relief necessary to make the employee whole" and expressly provides that the remedies include "special damages." 18 U.S.C. 1514A(c). Although damages for emotional distress are not among the specific categories of relief listed in Section 1514A(c)(2), the

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[3] The amended regulations currently in effect preserve this language, and also expressly authorize the filing of oral complaints. 29 C.F.R. 1980.103(b).

statute indicates that the list is not exclusive. Further, the only appellate decision to address the issue indicated that emotional distress damages are available. *See Lockheed Martin Corp.,* 717 F.3d at 1138. Other courts of appeals have come to the same conclusion in interpreting the materially identical language in the FCA's anti-retaliation provision, 31 U.S.C. 3730(h). *See Hammond v. Northland Counseling Center, Inc.,* 218 F.3d 886, 893 (8th Cir. 2000); *Neal v. Honeywell, Inc.*, 191 F.3d 827 (7th Cir. 1999). Moreover, the ARB has issued a precedential decision holding that emotional distress damages are available under Sarbanes-Oxley, which is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Menendez,* 2013 WL 1282255, at *11; *see also Welch v. Chao*, 536 F.3d 269, 276 & n.2 (4th Cir. 2008) (deferring to the ARB's interpretation of Section 1514A).

ARGUMENT

I. The district court correctly refused to apply 28 U.S.C. 1658(b)'s two-year statute of limitations.

A. Claims under 18 U.S.C. 1514A are not private rights of action involving securities fraud.

The district court correctly rejected Defendants-Appellants' arguments that Jones's Sarbanes-Oxley retaliation claim was untimely under 28 U.S.C. 1658(b)'s two year statute of limitations. That statute of limitations is plainly

inapplicable to this case which involves claims of retaliation for reporting securities law violations, and not a private right of action involving a claim of securities fraud within the meaning of that section.

Section 1658(b) provides a two-year statute of limitations and a five-year statute of repose for a "private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities and Exchange Act of 1934 (15 U.S.C. 78c(a)(47))."

Section 1658(b) was enacted to extend the statute of limitations for private securities-fraud claims beyond the one-year period adopted by the Supreme Court prior to 2002. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 646-648 (2010) (explaining pre-2002 case law and passage of Section 1658(b)); *see* S. Rep. 107-146 (2002), 2002 WL 863249, at * 8-10 May 6, 2002) (noting Congress' concern with preventing "innocent, defrauded investors attempting to recoup their losses [from] facing unfair timing limitations"). Numerous courts have recognized that section 1658(b)'s statute of limitations is limited to securities fraud and similar securities law claims, and does not apply to claims that do not sound in fraud. *See, e.g., In re: Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 197

(3d Cir. 2007) (agreeing with numerous district courts that section 1658(b) does not apply to claims under section 14(a) of the Securities Exchange Act ("SEA") because those claims do not require a showing of fraudulent intent); *DeKalb Cnty. Pension Fund v. Transocean, Ltd.,* 10 Civ. 07498, 2014 WL 941699, at *3-4 (S.D.N.Y. Mar. 11, 2014) (same); *In re: Alstom Securities Litigation,* 406 F. Supp. 2d 402, 412-13 (S.D.N.Y. 2005) (holding the same with regard to claims under SEA sections 11 and 12(a)(2)).

A Sarbanes-Oxley whistleblower claim is a claim alleging retaliation, not "a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws" within the meaning of 28 U.S.C. 1658(b). *See Hemphill v. Celanese Corp.,* CIV.A.3:08CV2131-B, 2009 WL 2949759, at *4 (N.D. Tex. Sept. 14, 2009) (holding that the allegations in a Sarbanes-Oxley whistleblower action involve wrongful termination and discrimination, not fraud, and thus the heightened pleading requirements of Fed. R. Civ. P. 9(b) do not apply). In this regard, Sarbanes-Oxley whistleblower claims are analogous to retaliation claims under the FCA, 31 U.S.C. 3730(h), which courts of appeals, in the context of deciding whether the heightened pleading standards in Fed. R. Civ. P. 9(b) apply, have held are not fraud claims. *See United States*

ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 238 n.23 (1st Cir. 2004) ("A retaliation claim under 31 U.S.C. 3730(h) does not require a showing of fraud and therefore need not meet the heightened pleading requirements of Rule 9(b)."), *abrogated on other grounds by Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662 (2008); *see also United States ex rel. Sanchez v. Lymphatx, Inc.,* 596 F.3d 1300, 1304 (11th Cir. 2010); *United States ex rel. Elms v. Accenture LLP*, 341 F. App'x 869, 873 (4th Cir. 2009) (unpublished); *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). In a Sarbanes-Oxley retaliation case, the whistleblowing may, but need not necessarily, relate to conduct that the employee reasonably believes is intended to defraud shareholders. However, the claim that forms the basis for the employee's private right of action is a claim of retaliation, which does not require a showing of shareholder fraud.

To make out a claim of retaliation under Sarbanes-Oxley, a complainant must prove that she engaged in an activity protected by the statute by participating in a proceeding or reporting conduct that the employee reasonably believed violates any of the six categories of law listed in 18 U.S.C. 1514A. These categories include mail fraud, wire fraud, and bank fraud, in addition to securities fraud, violations of SEC rules, and violations of any provision of federal law relating to fraud

against shareholders. 18 U.S.C. 1514A(a)(1). She must further show that her employer knew of the protected activity, that she suffered an adverse action, and that her protected activity was a contributing factor in the adverse action. *Feldman v. Law Enforcement Assocs. Corp.*, No. 13-1849, __ F.3d __, 2014 WL 1876546, at *3 (4th Cir. May 12, 2014). She need not, however, prove that any fraud actually occurred. *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008) (noting that Section 1514A does not require the complainant to show an actual violation of a listed law).

Contrary to Defendants-Appellants' arguments (Br. at 13-14), to make out a claim of retaliation under Sarbanes-Oxley, an employee need not show that she reasonably believed her employer acted with intent to defraud shareholders. The employee need only report conduct that the employee reasonably believes violates any of the six categories of law listed in 18 U.S.C. 1514A – at least three of which (mail fraud, wire fraud, and bank fraud) do not necessarily relate to fraud against shareholders. *Lockheed Martin Corp.,* 717 F.3d at 1129-1133 (adopting ARB's reasoning in *Sylvester,* 2011 WL 2165854, that protected conduct can involve a reasonable belief of a violation of any of the six categories of law listed in SOX and need not necessarily relate to shareholder fraud); *see also Villanueva v. United States Dep't of Labor*, 743 F.3d 103, 109-10 (5th Cir.

2014) ("Section 806 prohibits a covered entity from retaliating against an employee who "*reports information* to a supervisor" regarding his or her reasonable belief of a violation of, for instance, the U.S. mail- or wire-fraud statute"); *Wiest v. Lynch*, 710 F.3d 121, 133 (3d Cir. 2013) ("[T]here is nothing in the statutory text that suggests that a complainant's communications must assert the elements of fraud in order to express a reasonable belief that his or her employer is violating a provision listed in Section 806").[4]

Because claims under 18 U.S.C. 1514A of Sarbanes-Oxley are retaliation claims and not "claims involving fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws," the court should affirm the district court's ruling rejecting the two-year statute of limitations in 28 U.S.C. 1658(b).

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[4] That Jones's protected activity in this case happened to involve allegations of shareholder fraud does not change the fact that 18 U.S.C. 1514A whistleblower claims are not fraud claims covered by 28 U.S.C. 1658(b). *See In re: Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 197 (3d Cir. 2007) (that SEA section 14 claim happened to involve fraud did not mean that 1658(b)'s statute of limitations applied); In re: *Alstom Sec. Litig.*, 406 F. Supp. 2d 402, 417-18 (S.D.N.Y. 2005) (same for claims under SEA sections 11 and 12(a)(2) that happened to involve fraud). Indeed, holding otherwise would lead to the absurd result that Sarbanes-Oxley retaliation claims would be subject to a different limitations period depending on which type of violation the whistleblower had reported.

B. The district court's application of the four-year statute of limitations in 28 U.S.C. 1658(a) should be affirmed.

The district court found Jones's complaint timely under the general four-year statute of limitations in 28 U.S.C. 1658(a). After the district court issued its decision, the district court of Kansas held that 28 U.S.C. 1658 does not apply to Sarbanes-Oxley whistleblower claims at all. *Jordan v. Sprint Nextel Corp.,* No. 12-2573, 2014 WL 941824, at *7-*8 (D. Kan. Mar. 11, 2014). The *Jordan* decision does not lead to absurd results because the employee's ability to seek relief in district court terminates once the Secretary issues a final decision, thus the employer under *Jordan* is ensured that there will be repose. However, on balance, the Secretary believes the district court below was correct to apply the four-year statute of limitations in 28 U.S.C. 1658(a) to this case, in which there was a substantial gap between the close of the administrative proceeding and the filing of the district court complaint.

District court actions under Section 1514A(b)(1)(B) fit easily into the plain language of 28 U.S.C. 1658(a) because Section 1514A does not provide an explicit statute of limitations for the civil action filed in federal court.[5] Additionally, applying the four-year catch-all statute of

[5] Because Jones's claim was timely filed under Section 1658(a), the Court need not address Jones's arguments that the statute of limitations was tolled during the administrative process.

limitations to these claims is generally more consistent with the approach courts have taken under other employment laws providing for administrative exhaustion that are silent with regard to a filing limitation in federal court. *See, e.g., Baldwin v. City of Greensboro*, 714 F.3d 828, 833-34 (4th Cir. 2013) (applying 28 U.S.C. 1658(a) to USERRA, 38 U.S.C. 4323, which did not have express statute of limitations); *Kannikal v. Holder*, Civil Action No. 3:12-220, 2014 WL 917342, at * 3 (W.D. Pa. Mar. 10, 2014) (applying 28 U.S.C. 2401(a)'s six-year catch-all statute of limitations for claims against the U.S. to federal-employee Title VII claim where employee has not received agency decision); *Howard v. Blank*, 891 F. Supp. 2d 95, 98-101 (D.D.C. 2012)(same).

The Secretary also notes that although *Jordan* relied in large part on this Court's decision in *Stone v. Instrumentation Laboratory Company,* 591 F.3d 239 (4th Cir. 2009), *Stone* does not constrain this Court from deciding that 28 U.S.C. 1658(a) provides the statute of limitations in this case. In *Stone*, this Court was faced simply with the question whether section 1514A(b)(1)(B)'s reference to de novo hearings meant that an ALJ's decision under Sarbanes-Oxley does not preclude the complainant from re-litigating the case before a district court de novo. The Court was not asked to determine whether a separate limitations period (other than the 90-day

administrative filing period, and 180-day waiting period) applied to de novo actions in district court under Sarbanes-Oxley. Thus, this court is free to affirm the lower court's ruling that 28 U.S.C. 1658(a) applies to this case.

II. Jones exhausted her administrative remedies with respect to her claims of retaliation against Phillips and Mroz in her complaint to OSHA.

The district court correctly denied Phillips's and Mroz's motion to dismiss Jones's complaint against them based on failure to exhaust her administrative remedies.[6]

Sarbanes-Oxley requires that a complainant exhaust her administrative remedies as to each defendant by filing a complaint with OSHA before she may file a complaint in district court. *See, e.g., Smith v. Psychiatric Solutions, Inc.*, No. 3:08cv3/MCR/EMT, 2009 WL 903624 (N.D. Fla. Mar. 31, 2009). However, there are no formal pleading requirements for an OSHA complaint. *Sylvester*, 2011 WL 2165854, at *9-10. The complaint may be made orally or in writing and OSHA will consider the complaint to include the complainant's initial

[6] Defendants-Appellants moved for dismissal under Fed. R. Civ. P. 12(b)(1) based on lack of subject matter jurisdiction. This Court recently had the opportunity to decide whether Section 1514A's exhaustion requirement is jurisdictional, but declined to do so. *Feldman v. Law Enforcement Assocs. Corp.*, No. 13-1849, __ F.3d __, 2014 WL 1876546, at *4 & *4 n.7 (4th Cir. May 12, 2014) (noting that no other federal circuit courts have reached the issue). The Court should do the same here because Defendants-Appellants clearly raised exhaustion, so nothing turns on whether the requirement is jurisdictional.

filing with the agency supplemented by interviews of the complainant. *See* 29 C.F.R. 1980.103(b) and 1980.104(e), *Sylvester*, 2011 WL 2165854, at *9-10.[7] The purpose of the exhaustion requirement is to put OSHA on notice of the claims to investigate. *See, e.g, Hanna v. WCI Communities, Inc.*, No. 04-80595-CIV, 2004 WL 6072492, at *3 (S.D. Fla. Nov. 29, 2004).[8] In the preamble to the 2004 final regulations implementing the Sarbanes-Oxley whistleblower provision, the Department stated that it intentionally did not require a detailed complaint because the administrative complaint's purpose is to trigger an

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[7] When Jones filed her complaint, the Department's regulations stated that a complaint "must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations." 29 C.F.R. 1980.103 (2004). However, in practice, the pre-2011 regulations did not apply a higher pleading standard than the current regulations because the Department regarded an oral complaint that OSHA reduced to writing as meeting the "in writing" standard in the regulations. *See Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002*, as amended, 76 Fed. Reg. 68084, 68086 (Nov. 3, 2011).

[8] Defendants-Appellants are incorrect that, unlike under Title VII, the complainant is solely responsible for the content of a whistleblower complaint under Sarbanes-Oxley. (Br. at 22). Because no specific form of complaint is required and the complaint may be supplemented by interviews, the OSHA investigator may take an active role in interpreting the charge of retaliation. For example, OSHA, not the complainant, is responsible for identifying the statute(s) under which the complaint is filed. *See Whistleblower Investigations Manual* at p. 2-2 (Sept. 20, 2011), *http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=5061*

investigation, and even highly educated complainants may not have the legal expertise to plead the elements of a prima facie case. *Procedures for the Handling of Discrimination Complaints*, 69 Fed. Reg. 52104, 52106 (Aug. 24, 2004)).

Jones's informal complaint to OSHA was sufficient to put OSHA on notice of the potential claims against the individual defendants. The district court correctly held that Jones properly exhausted her administrative remedies against the individual defendants because her informal letter to OSHA made clear that she intended to hold the individuals responsible for retaliating against her for reporting securities law violations. 2013 WL 1155566, at *3. As the district court noted, "Jones, in her filing with OSHA, specifically identified the individual defendants as: persons 'who the complaint is being filed against.' It could not have been clearer that Jones intended to name Phillips . . . and Mroz, in her administrative complaint." 2013 WL 1155566, at *4. Under these standards, Jones's complaint to OSHA should have triggered the agency to inquire into the individual defendants' involvement in the matter and whether Jones intended to hold them personally liable. Thus, her complaint was sufficient to exhaust her administrative remedies.

Indeed, as the district court recognized, the specificity with which Jones stated that she sought to hold Phillips and

Mroz liable contrasts with the cases on which Defendants-Appellants rely. (Br. at 22-23), 2013 WL 1155566, at *4. In those cases, the district courts held that the complainants did not exhaust their administrative remedies with respect to individual defendants merely by mentioning them as actors in the body of the complaint. *Compare Bozeman v. Per–Se Technologies, Inc.*, 456 F. Supp. 2d 1282, 1357-58 (N.D. Ga. 2006) (mentioning an individual in the body of the complaint was insufficient for administrative exhaustion) and *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332 (S.D. Fla. 2004) (same) *with Morrison v. MacDermid, Inc.,* C.A. No. 07–cv–01535–WYD–MJW, 2008 WL 4293655, at *3 (D. Colo. Sept. 16, 2008) (finding exhaustion where pro se complainant's letter complaint to OSHA discussed the involvement of individual who was major actor in termination with sufficient specificity to put OSHA on notice of the need to investigate the individual's involvement). By contrast, Jones's complaint clearly stated that Phillips and Mroz were the individuals "who the complaint is being filed against."

Furthermore, contrary to Defendants-Appellants' arguments (Br. 23-25), OSHA's failure to provide Phillips and Mroz with notice of the complaint or to investigate the claims against them does not mean that those claims were not exhausted. The statute does not condition the employee's right to file an action in district court on OSHA's compliance with the

requirements that it notify the respondents and investigate the complaint. To the contrary, it provides that an employee may sue whenever the Secretary "has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant." 18 U.S.C. 1514A(b)(1)(B).

The absence of an OSHA investigation into Jones's claims against Phillips and Mroz is irrelevant to whether Jones properly named them in her complaint to OSHA, thus exhausting her administrative remedies. 2013 WL 1155566, at *4 n. 2; *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 705, 711 (E.D. Va. 2007) (assuming plaintiff exhausted administrative remedies and noting that the absence of an OSHA investigation does not mean that plaintiff did not do his part to exhaust). To find that a complainant did not exhaust her administrative remedies because OSHA did not investigate all parties properly named in her complaint would frustrate the purpose of the relaxed pleading standards for OSHA complaints under 18 U.S.C. 1514A. Moreover, as the district court explained, there is no apparent reason why Congress would have intended to penalize the employee for the agency's oversight.

III. **Sarbanes-Oxley provides for an award of emotional distress damages.**

The district court correctly held that Section 1514A provides for an award of emotional distress damages. Sarbanes-Oxley's remedies provision, 18 U.S.C. 1514A(c), broadly states:

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

18 U.S.C. 1514A(c). The language of the statute expressly provides that a prevailing employee "shall be entitled to all relief necessary to make the employee whole." 18 U.S.C. 1514A(c)(1). As the only court of appeals to consider the question has concluded, this language permits an award of damages for emotional distress. *Lockheed Martin Corp.*, 717 F.3d at 1138 (upholding an award of "noneconomic compensatory damages" for "emotional pain and suffering, mental anguish, and humiliation"); see also *Hanna,* 348 F. Supp. 2d at 1334 (upholding award for reputational injury).

Further, the statute specifically references compensatory damages, which "*shall include*" reinstatement with the same seniority status, 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 fees." (emphases added). The phrases "shall include" and "including" make clear that the relief specifically enumerated in Section 1514A was not meant as an exhaustive list of all relief available to a successful complainant. *See Lockheed Martin Corp.*, 717 F.3d at 1138; *Project Vote/Voting for Am. v. Long*, 682 F.3d 331, 337 (4th Cir. 2013) ("Courts have repeatedly indicated that 'shall include' is not equivalent to 'limited to.'") (citations omitted).

In addition, reading the statute as including emotional distress damages and other similar relief is necessary to give meaning to section 1514A's prohibition on retaliation. In addition to prohibiting termination and other "tangible employment actions," the plain language of the statute also prohibits retaliation such as threats or harassment, which may not result in lost pay or other pecuniary losses. *See* 18 U.S.C. 1514A. For victims of these types of retaliation, non-pecuniary compensatory relief, such as emotional distress damages, may be the only remedy that would make the complainant whole. Thus, the district court was correct to hold that emotional distress

damages are available under Sarbanes-Oxley based both on the text of the statute and on the Secretary's interpretation of Sarbanes-Oxley.

A. Sarbanes-Oxley's remedies provision is materially identical to the remedies provision in the FCA, which permits emotional distress damages.

Two federal appellate courts have held that an almost identical provision for relief under the whistleblower provision of the FCA, 31 U.S.C. 3730(h), includes damages for emotional distress caused by an employer's retaliatory conduct. Like section 1514A(c), the FCA provides that a prevailing retaliation plaintiff "shall be entitled to all relief necessary to make that [plaintiff] whole" and that the relief "shall include" reinstatement, back pay, and "any special damages sustained as a result of the discrimination."[9]

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[9] The full text of the FCA provides:

> (1) In general.-- Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is . . . discriminated against in the terms and conditions of employment because of [protected activity].
>
> (2) Relief. -- Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district

Both courts of appeals that have considered the question in the FCA context have held that this language authorizes an award of damages for emotional distress, explaining that "[p]roviding compensation for such harms comports with the statute's requirement that a whistleblowing employee 'be entitled to all relief necessary to make the employee whole.'" *Hammond v. Northland Counseling Ctr., Inc.,* 218 F. 3d at 893; see *Neal v. Honeywell, Inc.*, 191 F.3d 827, 832 (7th Cir. 1999).

In *Hammond*, the Eighth Circuit reasoned that damages for emotional distress fall within the statutory authorization for "special damages." 218 F.3d at 893. "*Special*, as contradistinguished from *general* damage, is that which is the natural, but not the necessary, consequence of the act complained of." *Neal*, 191 F.3d at 832 (citation omitted). Whether a particular kind of injury gives rise to "special" damages thus depends on the tort committed. The usual consequences of a wrong are "general" damages, and unusual consequences are "special." *Id.* (citing *LINC Finance Corp. v. Onwuteaka,* 129 F.3d 917, 922 (7th Cir. 1997)).

However, as the Seventh Circuit explained, "it is unnecessary to classify emotional distress" damages as either

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court of the United States for the relief provided in this subsection.

31 U.S.C. 3730(h).

"special" or "general" in order to hold that they are available under the FCA -- and, by extension, section 1514A. *Id.* In directing that the employee receive "all relief necessary to make the employee whole" and providing for "[c]ompensatory damages" including, but not limited to, special damages, "the statute allows both general and special damages." *Id.*

At least one district court has concluded that emotional distress damages are available under 18 U.S.C. 1514A based on the analogy to the FCA. *See Rutherford v. Jones Lang LaSalle Am., Inc.*, C.A. No. 12-14422, 2013 WL 4431269, at *4-5 (E.D. Mich. Jan. 29, 2013) (concluding that "the language of SOX's remedy provision, analogous whistleblower statutes and decisions of the ARB support the recovery of damages under SOX for emotional distress, mental anguish, humiliation and injury to reputation."). These cases agree that the inclusion of such special damages as attorney fees, expert witness fees, and litigation costs in the language of the statute does not limit the types of damages a complainant may receive, but merely provides illustrative examples. *See Neal*, 191 F.3d at 832 ("Costs and reasonable attorneys' fees' are a component of 'special damages.'"); *Mahony v. Keyspan Corp.*, No. 04 CV 554 SJ, 2007 WL 805813, at *8 (E.D.N.Y. Mar. 12, 2007) (unpublished) (concluding that 18 U.S.C. 1514A(c)(2)(C) "comprises an

illustrative list of the types of special damages that may be recovered rather than an exhaustive list”).

B. The district court cases on which Defendants-Appellants rely look to the wrong statutory analogues.

Defendants-Appellants rely on district court cases that examined Sarbanes-Oxley’s remedies provision primarily in the context of deciding whether the statute authorized jury trials. (Br. at 26-27). Those cases concluded that 18 U.S.C. 1514A provides for only equitable relief and does not include legal remedies, such as emotional distress damages. *See, e.g., Schmidt v. Levi Strauss & Co.*, 621 F. Supp. 2d 796, 805 (N.D. Cal. 2008); *Walton v. NOVA Information Sys.*, 514 F. Supp. 2d 1031, 1035 (E.D. Tenn. 2007); *Murray v. TXU*, C.A. No. 3:03-cv-0888-P, 2005 WL 1356444, at *2, *3 (N.D. Texas 2005).

The cases that Defendants-Appellants cite failed to recognize that Sarbanes-Oxley has always explicitly provided for both legal and equitable relief. 18 U.S.C. 1514A(b)(1)(B)(2003) (stating that a complainant, after exhausting administrative remedies, may bring an action “at law or equity” in the district court, if the Secretary has not issued a final decision).[10]

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[10] In 2010, Congress amended Sarbanes-Oxley to expressly provide for the right to a jury trial in cases filed in district court. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. IX, subtit. B § 922(c)(1)(B), 124 Stat. 1376, 1842 (2010). By doing so, the 2010 amendments clarified that limiting the remedies available under Sarbanes-

These cases also relied on a misplaced analogy to the pre-1991 text of Title VII, which limited remedies under Title VII to equitable remedies and read "[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate," 42 U.S.C. 2000e-5(g) (1990). The cases on which Defendants-Appellants rely did not consider the more closely analogous statutory language in the FCA discussed above, nor did they consider the Secretary's longstanding view, discussed below, that emotional distress damages are available under Sarbanes-Oxley and the analogous whistleblower statutes that the Secretary administers.

C. To the extent Section 1514A is ambiguous, the Court should defer to the Secretary's reasonable interpretation of the statute.

To the extent that there is any ambiguity regarding whether emotional distress damages are available, the court should defer to the Secretary's long held view that they are. The Secretary, through the ARB, recently issued a precedential decision in *Menendez v. Halliburton*, ARB No. 09-002, -003, 2013 WL 1282255, at *11, restating the Secretary's view that non-pecuniary

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Oxley solely to equitable relief is not consistent with 18 U.S.C. 1514A.

compensatory damages are authorized under 18 U.S.C. 1514A and affirming the ALJ's award of $30,000 for emotional distress and reputational harm. The ARB observed that it has previously "countenanced damage awards for emotional distress and reputational injury under the SOX whistleblower statute." *Menendez*, 2013 WL 1282255, at *11 (citing *Kalkunte v. DVI Fin. Servs., Inc.,* ARB No. 05-139, 2009 WL 564738, at *13 (ARB Feb. 27, 2009)) (affirming the ALJ's award of $22,000 in damages for mental anguish and humiliation suffered by the complainant as a consequence of retaliation); *see also Brown v. Lockheed Martin Corp.*, 2011 WL 729644, ARB No. 10-050 (ARB Feb. 28, 2011) (affirming without comment the ALJ's award of $75,000.00 in compensatory damages for emotional pain and suffering), *aff'd, sub nom. Lockheed Martin Corp. v. Admin. Rev. Bd.,* 717 F.3d 1121 (10th Cir. 2013).

The ARB's reasonable interpretation of Sarbanes-Oxley is entitled to *Chevron* deference. *See Wiest,* 710 F.3d at 131 (granting *Chevron* deference to ARB's views on Sarbanes-Oxley protected activity); *Lockheed Martin Corp.*, 717 F.3d at 1131 (same); *Welch*, 536 F.3d at 276 n.2 (granting *Chevron* deference to ARB's interpretations of Sarbanes-Oxley).

For many years, the ARB has consistently upheld numerous non-pecuniary compensatory damages awards to prevailing employees under analogous whistleblower statutes, such as the

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121, the Energy Reorganization Act ("ERA"), 42 U.S.C. 5851, and the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. 31105(b)(3)(A)(iii). The Sarbanes-Oxley whistleblower provision shares similar statutory language, legislative intent, and broad remedial purpose with the other whistleblower statutes enforced by the Secretary.

These statutes, including Sarbanes-Oxley, all specifically reference compensatory damages and should be interpreted consistently. *See e.g. Evans v. Miami Valley Hosp. & CJ Sys. Aviation Grp., Inc.,* ARB No. 07-118, -121, 2009 WL 1898238, at *12 (ARB June 30, 2009) (AIR 21) (affirming award for emotional harm and reputational injury and stating that "[c]ompensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress."); *Rooks v. Planet Airways, Inc.,* ARB No. 04-092, slip op. at 10 (ARB June 29, 2006) (AIR 21) (same); *Pierce v. U.S. Enrichment Corp.*, ARB No. 06-055, -058, -119, slip op. at 18 (ARB Aug. 29, 2008) (stating that "[a]n employer who violates the ERA may be held liable to the employee for compensatory damages for mental or emotional distress," but concluding that complainant had not provided sufficient evidence to support his damages claim); *Ferguson v. New Prime, Inc.,* 2011 WL 4343278, at

*6, ARB No. 10-075 (ARB Aug. 31, 2011) (affirming a $50,000 compensatory damages award for emotional distress under the STAA); *In re: Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, 2009 WL 4324727, at *8, (ARB Nov. 30, 2009) (affirming compensatory damages award for emotional distress) (STAA).

The federal appellate courts have affirmed the ARB's decisions upholding awards of non-pecuniary compensatory damages under the whistleblower laws it administers, including Sarbanes-Oxley. *See e.g., Lockheed Martin Corp.*, 717 F.3d at 1138 (noting "18 U.S.C. § 1514A(c)(2), however, provides that relief 'shall *include*' the relief specifically enumerated in that subsection, indicating it was not meant as an exhaustive list of all of the relief available to a successful claimant.") (emphasis in original); *Vieques Air Link, Inc. v. United States Dep't of Labor,* 437 F.3d 102, 110 (1st Cir. 2006) (affirming ARB decision upholding compensatory damages award of $50,000 for mental anguish under AIR 21); *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, slip op. at 33 (ARB Feb. 9, 2001), *aff'd sub. nom. Georgia Power Co. v. U.S. Dep't of Labor,* No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (upholding award of $250,000 in compensatory damages for emotional distress and reputational injury) (ERA).

In sum, there is ample support for the district court's adoption of the Secretary's and the Tenth Circuit's reasonable

interpretation of 18 U.S.C. 1514A as including compensatory damages for emotional distress. This Court should affirm the district court's award of emotional distress damages under Sarbanes-Oxley.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the decision of the district court.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

s/Mary J. Rieser
MARY J. RIESER
Attorney

U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

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MARY J. RIESER
Attorney
U.S. Department of Labor

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s/Mary J. Rieser
MARY J. RIESER
Attorney
U.S. Department of Labor

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I hereby certify that on this 27th day of June, 2014, I caused the Brief for the Secretary of Labor as Amicus Curiae to be electronically filed via the Court's CM/ECF system. I certify that I served this brief electronically on the following counsel of record through the Court's electronic filing system:

James B. Thorsen
Marchant, Thorsen, Honey,
Baldwin & Meyer, LLP

Kevin D. Holden, Esq.
Jackson Lewis P.C.

s/Mary J. Rieser
MARY J. RIESER
Attorney