

# HELPING THOSE WHO ARE HELPING US: SARBANES-OXLEY WHISTLEBLOWER PROTECTION AND ITS INTERPLAY WITH ARBITRATION

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## I. INTRODUCTION

The accounting profession took a major blow to its credibility in 2002 when numerous scandals surfaced on the front pages of newspapers seemingly everyday.<sup>1</sup> The most notable stories told of two women who, despite the enormous pressure and harassment they knew they would face, came forward to reveal the ugly truth behind the facades of America's corporate skyscrapers.<sup>2</sup> Cynthia Cooper and Sherron Watkins, employees at WorldCom and Enron respectively, blew the whistle on major accounting frauds at these companies. Their employers' retaliation was harsh and swift, revealing the truth about how today's corporate juggernauts operate.<sup>3</sup>

In 2002, Sherron Watkins, a Vice-President at Enron, whistleblow on the illegal accounting activities taking place in a letter she personally wrote to the President of Enron, Kenneth Lay.<sup>4</sup> A short while later, news broke of another whistleblower, this time at WorldCom. Cynthia Cooper reported to the company's board of directors about illegal and fraudulent bookkeeping that covered

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<sup>1</sup> Marc I. Steinberg & Seth A. Kaufman, *Minimizing Corporate Liability Exposure When the Whistle Blows in the Post Sarbanes-Oxley Era*, 30 IOWA J. CORP. L. 445 (2005).

<sup>2</sup> In fact, at the end of 2002 these two women were named Time Magazine's "Persons of the Year." See Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002, at 30. Coleen Rowley was also named a "Person of the Year" as an FBI employee who whistleblow on the agency's handling of the Zacarias Moussaoui investigation. *Id.*

<sup>3</sup> James Kelly, *The Year of the Whistle-Blowers*, TIME, Dec. 30, 2002, at 8.

<sup>4</sup> Lacayo & Ripley, *supra* note 2; Kelly, *supra* note 3.

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up millions of dollars in losses.<sup>5</sup> These women ushered in a new era of corporate skepticism by the American public. At a time when our confidence and security had been shaken to the ground with the fall of the Twin Towers, it was almost appropriate that the supreme confidence in our economic prowess would come crumbling down as well.<sup>6</sup>

In response to the increasingly public features of corporate fraud scandals, Congress quickly took a major step towards curbing the corruption and fraudulent practices taking place in some of the largest corporations throughout the United States. In 2002 Congress passed the Sarbanes-Oxley Corporate Reform Act of 2002 (Sarbanes-Oxley Act, or the Act).<sup>7</sup> The Act is an attempt to reform the corporate and securities industries for the protection of public investors from fraudulent bookkeeping and reporting of financial information.<sup>8</sup>

There are critics of the Sarbanes-Oxley Act who claim that Congress acted too quickly in passing the legislation.<sup>9</sup> Some claim that the Act does not go far enough in curbing fraudulent practices, that the costs of compliance are exorbitant,<sup>10</sup> that the implications of the Act run counter to its intended purposes,<sup>11</sup> or that the provisions do not adequately address the essential problems regarding

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<sup>5</sup> Lacayo & Ripley, *supra* note 2; Kelly, *supra* note 3.

<sup>6</sup> Lacayo & Ripley, *supra* note 2:

Enron and WorldCom turned out to be Twin Towers of false promises. They fell. Their stockholders and employees went down with them. So did a large measure of public faith in big corporations. Each new offense seemed to make the same point: with communism vanquished, capitalism was left with no real enemies but its own worst impulses.

*Id.*

<sup>7</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 802-04 (2002).

<sup>8</sup> H.R. Res. 3763, 107th Cong. (2002) (“To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.”); 148 CONG. REC. H1540 (2002) (“This legislation focuses on several principles, all designed to protect investors and employees.”).

<sup>9</sup> See Miriam A. Cherry, *Whistling in The Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029 (2004) [hereinafter Cherry, *Whistling*]; Floyd Norris, *Will Auditing Reform Die Before It Begins?*, N.Y. TIMES, Dec. 27, 2002, at C1.

<sup>10</sup> See Joseph Nocera, *For All Its Cost, Sarbanes Law Is Working*, N.Y. TIMES, Dec. 3, 2005, at C1. Although the article supports the Act, it points out that some critics take issue with the large costs associated with compliance and in particular with section 404 of the Act.

<sup>11</sup> Larry E. Ribstein, *Market vs. Regulatory Responses To Corporate Fraud: A Critique of The Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1 (2002).

fraud in the corporate and securities industries.<sup>12</sup> Now that some time has passed, the full implication of the Act's policies can be better appreciated and its effects analyzed.

The Sarbanes-Oxley Act contains many controversial provisions.<sup>13</sup> This Note, however, will focus on the whistleblower provision, contained in section 806 of the Act.<sup>14</sup> In particular, the recent decision in *Boss v. Salomon Smith Barney, Inc.* and its implications for employers and employees will be analyzed in relation to the alternative dispute resolution (ADR) technique of mandatory arbitration.<sup>15</sup> For years, employers have used mandatory arbitration provisions in employee handbooks,<sup>16</sup> collective bargaining agreements,<sup>17</sup> registration agreements,<sup>18</sup> and other employment agreements<sup>19</sup> to force employees into arbitrating employment related disputes. This issue became extremely critical when the Southern District of New York decided *Boss* in 2003. The goal of section 806 is to expand protections for whistleblower,<sup>20</sup> and, as part of that scheme, Congress provided for access to the federal courts to those employees claiming retaliation under the provision.<sup>21</sup> In light of this, it may seem perplexing to some, particularly those critical of arbitration, that the Southern District of New York precluded

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<sup>12</sup> See Cherry, *Whistling*, *supra* note 9; Ribstein, *supra* note 11; *but see* Nocera, *supra* note 10; Byron Acohido, Greenspan Marvels At How Effective Sarbanes-Oxley Has Been So Far, USA TODAY, May 16, 2005, at 3B.

<sup>13</sup> *Boss*, 263 F. Supp. 2d 682 (S.D.N.Y. 2003). These implications include greater executive liability. 15 U.S.C. § 7241 (2002); Nocera, *supra* note 10 ("It forces chief executives and chief financial officers to vouch, in writing, for their companies' financial statements."). Section 404, Management Assessment of Internal Controls, has also been fertile ground for debate and criticism. 15 U.S.C. § 7262 (2002); Nocera, *supra* note 10; see also *Tosha Huffman, Note, Section 404 of the Sarbanes-Oxley Act: Where The Knee Jerk Bruises Shareholders and Lifts The External Auditor*, 43 BRANDEIS L.J. 239 (2004) (arguing for the repeal of section 404).

<sup>14</sup> 18 U.S.C. § 1514A (2002).

<sup>15</sup> While this case was pending, Benjamin N. Cardozo Law School held a symposium discussing this issue and this case among other topics involving the Sarbanes-Oxley Act. One of the panelists, Rob Whitman, Esq., was employed by the law firm handling the case for Salomon Smith Barney. To read his discussion on the issue see Symposium, *Arbitrating Corporate Malfeasance*, 4 CARDOZO ONLINE J. CONFLICT RESOL. 1 (2003).

<sup>16</sup> See, e.g., *Boss*, *supra* note 13, at 685.

<sup>17</sup> See, e.g., *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 42-43 (1974).

<sup>18</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (New York Stock Exchange Registration); *Boss*, *supra* note 13, at 685 (National Association of Securities Dealers U-4 Registration).

<sup>19</sup> See, e.g., *Oldroyd v. Elmira Savings Bank*, 134 F.3d 72, 76 (2d Cir. 1998); *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105 (2001).

<sup>20</sup> 148 CONG. REC. H1540 (2002).

<sup>21</sup> 18 U.S.C. § 1514A(b)(1)(B) (2002).

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traditional adjudication of the retaliation claim in favor of a mandatory arbitration resolution.

The usual questions were asked as to whether mandatory arbitration could fulfill the purposes of section 806. Did arbitration favor the employer, thus destroying the greater protections of the provision? Did the employee have a greater chance of success in front of a judge or jury?<sup>22</sup> This Note will attempt to answer these questions and shed light on where future section 806 retaliation claims will end up.

The position of this Note is that the benefits of arbitration outweigh the drawbacks and, therefore, *Boss*, which held that section 806 does not preempt arbitration agreements, was correctly decided. While traditional court room adjudication certainly has its benefits, benefits which this Note does not dispute, the flexibility and savings of arbitration to the employee overshadow the benefits of traditional adjudication. Further, the lower courts' decisions regarding jurisdictional language relating to judicial litigation of claims under other statutes is demonstrative of the prevelant position that this language does not indicate congressional intent to provide only a judicial forum for resolutions of disputes to the exclusion of all others.

Section I provides a detailed examination of section 806 in order to provide a backdrop for further analysis. This provision contains many new features that we have not previously seen in whistleblower statutes, which make them relevant to the exploration of section 806's purposes and its compatibility with mandatory arbitration. Section II examines court-based retaliation claims, specifically *Boss v. Salomon Smith Barney, Inc.*<sup>23</sup> and the Supreme Court progeny of cases which provide the historical perspective upon which *Boss* was decided.<sup>24</sup> Section III details the current relationship and status of mandatory arbitration versus traditional adjudication, while section IV argues the premise that arbitration works for the employee in retaliation claims and squares with the purposes of the whistleblower provision of the Sarbanes-Oxley Act. In this section, the lower courts' decisions regarding similar statutes will also be discussed.

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<sup>22</sup> Morgan Lewis Client Alert, [http://www.morganlewis.com/pdfs/3038A864-053F-4B1A-8C125F998BA93FEF\\_Publication.pdf#search='sarbanesoxley%20and%20arbitration](http://www.morganlewis.com/pdfs/3038A864-053F-4B1A-8C125F998BA93FEF_Publication.pdf#search='sarbanesoxley%20and%20arbitration) (last visited Apr. 6, 2007) [hereinafter Morgan Lewis].

<sup>23</sup> *Boss*, *supra* note 13.

<sup>24</sup> See *Alexander*, *supra* note 17; *Gilmer*, *supra* note 18; *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105 (2001).

II. *SARBANES-OXLEY WHISTLEBLOWER PROTECTION*

## A. Overview

Whistleblowers are protected under the provisions of section 806<sup>25</sup> of the Sarbanes-Oxley Act of 2002.<sup>26</sup> This section<sup>27</sup> protects employees of public companies from retaliatory action for blowing the whistle on illegal activities by their employers.<sup>28</sup> The importance of section 806 flows from its ability to create an environment in which employees feel comfortable reporting illegal activity without fear of retaliation from their employers.<sup>29</sup>

The civil action procedures set forth in the statute create a platform for employees to fight back and seek redress if they are retaliated against for reporting illegal activities by their employers.<sup>30</sup> Given the clearly stated consequences for employers who retaliate and the enforcement scheme and remedies available, the apprehension employees may feel in coming forward is significantly decreased.<sup>31</sup> This whistleblower provision provides even greater protections to whistleblowers and disincentives to retaliate than did earlier federal and state provisions because now violators

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<sup>25</sup> Section 806 is titled "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud."; Section 1107 adds a criminal penalty for retaliating against a whistleblowing employee. 18 U.S.C. § 1513(e) (2002).

<sup>26</sup> 15 U.S.C.S. § 7201 (2002) (hereinafter "Sarbanes-Oxley Act"); 18 U.S.C. § 1514A (2002) (Whistleblower protection statute).

<sup>27</sup> 18 U.S.C. § 1514A ("enacted as part of the Corporate and Criminal Fraud Accountability Act of 2002, and incorporated as Title VIII of the Sarbanes-Oxley Act of 2002."); *Carnero v. Boston Scientific Corp.*, 2004 U.S. Dist. LEXIS 17205, 1-2 (Mass. 2004).

<sup>28</sup> GUY LANDER, *WHAT IS SARBANES-OXLEY?* 97 (McGraw-Hill 2004) ("[The Sarbanes-Oxley Act] creates a civil action for employees of public companies who have been subject to retaliation by their employers for disclosing illegal activities by their employers.").

<sup>29</sup> Ribstein, *supra* note 11 ("Establishment of control systems within the firm and protecting whistleblowers helps ensure the flow of information within the company." He later argues that this might work counter to the intended purposes by inhibiting people from coming forward if they believe at all that they were complicit); see Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 325 (2005) This article talks about various self-regulation devices a firm can employ in the post Sarbanes-Oxley environment. One possible device for self-regulation is the use of internal employee whistleblowers. The article points out that the use of certain self-regulation processes can be used as a "conduit for what [employees] know . . . ."

<sup>30</sup> Steinberg & Kaufman, *supra* note 1, at 446-447.

<sup>31</sup> *Id.*

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may be sanctioned criminally<sup>32</sup> in addition to the civil penalties<sup>33</sup> provided for in the statute.<sup>34</sup>

## B. Companies Covered by Section 806

Any company required to register securities listed on a national exchange according to the provisions of section 12 of the Securities and Exchange Act of 1934<sup>35</sup> is covered by the provisions of the whistleblower protection section of the Sarbanes-Oxley Act.<sup>36</sup> Furthermore, any company who files reports with the Securities and Exchange Commission (SEC) according to the terms of section 15(d) of the Securities and Exchange Act of 1934<sup>37</sup> is also covered by section 806.<sup>38</sup> Essentially, the whistleblower protections cover employees of all “public compan[ies]”<sup>39</sup> as long as they are registered in one way or another with the SEC and/or a stock exchange. In conjunction, both of the provisions mentioned above require that all public companies refrain from retaliation against whistleblowers.

Furthermore, under certain circumstances, these provisions may cover some private companies as well.<sup>40</sup> The prohibition on covered entities, both public and private, on retaliation against whistleblowers extends to certain personnel employed by those entities.<sup>41</sup> The statute permits a whistleblower to bring a civil action against a company for retaliation if the retaliatory acts claimed were committed by “an officer, employee, contractor, subcontractor, or agent of such company. . . .”<sup>42</sup> Not only does this expand the group of persons and entities that an employee is protected against,

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<sup>32</sup> 18 U.S.C. § 1513(e) (2002).

<sup>33</sup> 18 U.S.C.S. § 1514A(c) (2002).

<sup>34</sup> See Steinberg & Kaufman, *supra* note 1, at 446-447.

<sup>35</sup> 15 U.S.C.S. § 78l (2004); See § 78l(a) for the registration requirements. The types of securities required to be registered and the exemptions from this section are determined by the terms of section (g) of § 78l.

<sup>36</sup> 18 U.S.C.S. § 1514A(a) (“No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934. . .”).

<sup>37</sup> 15 U.S.C.S. § 78o(d) (2002).

<sup>38</sup> 18 U.S.C.S. § 1514A(a) (“. . . or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934. . .”).

<sup>39</sup> LANDER, *supra* note 28.

<sup>40</sup> Steinberg & Kaufman, *supra* note 1, at 448.

<sup>41</sup> 18 U.S.C.S. § 1514A(a) (“No 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 . . .”).

<sup>42</sup> *Id.*

but it further implies that private entities may be subject to the terms and conditions of the Act as well.<sup>43</sup> The Act does not specify that it applies *only* to public companies,<sup>44</sup> nor is the Act limited to “contractors, subcontractors or agents of such company”<sup>45</sup> that are only public companies themselves.<sup>46</sup>

### C. Actions Prohibited and Activities Protected

Section 806 clearly sets forth both the actions prohibited by covered entities and those activities of employees protected by the statute.<sup>47</sup> Specifically, companies covered under section 806 cannot “discharge, demote, harass, suspend, threaten, or in any other manner discriminate against any employee in the terms and conditions of employment because of any lawful act done by the employee”<sup>48</sup> in connection with the employee reporting<sup>49</sup> illegal activity by their employer. The breadth of the terms used along with the specificity of the statute demonstrate Congress’ clear attempt to eliminate the fraudulent activities that had taken place and are continuing to take place in companies throughout the country.<sup>50</sup> The terms of the statute leave little room for ethical maneuvering by entities and represent a major advance in the eradication of corporate accounting scandals through greater protections for employees who come forward.<sup>51</sup>

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<sup>43</sup> Steinberg & Kaufman, *supra* note 1, at 448.

<sup>44</sup> Section 806(a) states “[n]o company” and at no time specifies that the covered entities must only be public entities. 18 U.S.C. § 1514A.

<sup>45</sup> 18 U.S.C.S. § 1514A(a).

<sup>46</sup> The fact that no written distinction is made between public and private in the Act itself, entities, either in reference to the companies covered or those employed by the company, may suggest that, under certain circumstances, private companies are in fact covered by the provision of the Sarbanes-Oxley Act as well.

<sup>47</sup> “No company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee . . .” 18 U.S.C.S. §1514A(a); *see* § 1514A(a)(1)-(2) for specific types of lawful acts covered by the Act.

<sup>48</sup> 18 U.S.C.S. § 1514A(a).

<sup>49</sup> 18 U.S.C.S. § 1514A(a)(1)-(2) (defining what reported actions are considered “protected” under the whistleblowing provision of the Sarbanes-Oxley Act).

<sup>50</sup> 18 U.S.C. § 1514A.

<sup>51</sup> Steinberg & Kaufman, *supra* note 1, at 446-447:

In its scope of coverage, SOX provides greater consistency and protection for whistleblowers than state laws. This legislation also promotes a more hospitable environment for whistleblowers in the corporate and securities context through a decreased threat of employer retaliation. This consequence is due to the fact that SOX covers employees who report covered corporate fraud that may violate several fed-

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In order to promote the uncovering of illegal activities by corporate entities, the statute is built on the premise that employees are in the best position to reveal corporate fraud.<sup>52</sup> To achieve the goals of the Sarbanes-Oxley Act, Congress provided for the protection of employees who lawfully reveal fraudulent activities.<sup>53</sup> However, an employee is not protected simply because it was the employee's intention to report an irregularity.<sup>54</sup> Any action taken by an employee must be a "lawful" action in order to be protected under the statute.<sup>55</sup> A "lawful" act is considered to be any of the enumerated outcomes in section 806 as a result of, following, or in connection with the reported activity by the employee.<sup>56</sup> A lawful act according to the statute consists of providing information in any

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eral statutes while other federal whistleblower provisions provide more limited protection. Furthermore, SOX holds employers, employees, and other specified persons both civilly and criminally liable for retaliating against whistleblowers.

*Id.*

<sup>52</sup> See generally Estlund, *supra* note 29, at 325.

<sup>53</sup> H.R. Res. 3763, 107th Cong. (2002) ("To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes."); Cherry, *Whistling*, *supra* note 9, at 1056 ("One of the major purposes of Sarbanes-Oxley is to promote the flow of accurate information to investors so that they can make informed decisions about how to allocate their resources. The whistleblowing provisions advance this purpose in that, if effective, they will reduce the amount of fraudulent financial information.").

<sup>54</sup> 18 U.S.C.S. § 1514A(a); See Steinberg & Kaufman, *supra* note 1, at 451-453.

<sup>55</sup> 18 U.S.C.S. § 1514A(a) (No company can retaliate against an employee "because of any lawful act done by the employee . . ."); *SARBANES-OXLEY ACT OF 2002: LAW AND EXPLANATION* 84 (James Hamilton & Ted Trautmann eds., CCH Incorporated 2002) ("The statute specifically protects employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud.").

<sup>56</sup> 18 U.S.C. § 1514A(a)(1)-(2) (2002):

- (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [*18 USCS § 1341, 1343, 1344, or 1348*], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
  - (A) a Federal regulatory or law enforcement agency;
  - (B) any Member of Congress or any committee of Congress; or
  - (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
- (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348 [*18 USCS § 1341, 1343, 1344, or 1348*], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

*Id.*

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manner to: “(1) a federal law enforcement or regulatory agency; (2) a committee or member of Congress; or (3) a person with supervisory authority over a subject employee or such other person retained by the employer who is authorized to ‘investigate, discover, or terminate [for] misconduct’.”<sup>57</sup> Furthermore, a lawful act consists of filing, causing to be filed, or participating in a proceeding related to alleged violations of section 806.<sup>58</sup>

In order to be protected, the employee must “reasonably believe”<sup>59</sup> the activity is a violation of the statute, but there is no requirement that the activity actually be determined illegal after an investigation or trial.<sup>60</sup> If the employee “reasonably believes” there has been a violation of “18 USCS § 1341,<sup>61</sup> 1343,<sup>62</sup> 1344,<sup>63</sup> or 1348,<sup>64</sup> any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against

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<sup>57</sup> Steinberg & Kaufman, *supra* note 1, at 451; See 18 U.S.C. § 1514A(a)(1); see Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52104 (proposed Aug. 4, 2004) (to be codified at 29 C.F.R. pt. 1980) [hereinafter Procedures for the Handling of Discrimination Complaints].

Complaints to an individual member of Congress are protected, even if such member is not conducting an ongoing Committee investigation within the jurisdiction of a particular Congressional committee, provided that the complaint relates to conduct that the employee reasonably believes to be a violation of one of the enumerated laws or regulations.

*Id.*

<sup>58</sup> See 18 U.S.C. § 1514A(a)(2) (raising an issue regarding what constitutes a proceeding under the statute); Steinberg & Kaufman, *supra* note 1, at 451 (arguing that the unrestricted use of the term “proceeding” indicates that the statute should include many forms of proceedings in addition to judicial proceedings such as administrative actions, private direct actions and shareholder derivative suits).

<sup>59</sup> 18 U.S.C.S. § 1514A(a)(1) (“which the employee reasonably believes constitutes a violation of . . .”).

[R]easonable belief should be construed as an objective standard. The statute’s legislative history supports the position that Congress intended to establish a ‘normal reasonable person standard used and interpreted in a wide variety of legal contexts.’ . . . [C]ourts should apply an objective standard because of the statute’s clear language and legislative history [and] other federal whistleblower protection provisions similarly employ an objective standard.

*Id.*

<sup>60</sup> Steinberg & Kaufman, *supra* note 1, at 452 (“[A] whistleblower does not have to be correct in his or her belief. Even when the employee is mistaken. . . and a violation of a covered statute or SEC rule did not in fact occur, the employee. . . may invoke [Sarbanes-Oxley’s] whistleblower protection provision, provided the belief was reasonable.”).

<sup>61</sup> 18 U.S.C.S. § 1341 (2002) (prohibiting “[f]rauds and swindles” through the mails and other carriers).

<sup>62</sup> 18 U.S.C.S. § 1343 (2002) (prohibiting “[f]raud by wire, radio, or television.”).

<sup>63</sup> 18 U.S.C.S. § 1344 (1990) (prohibiting “[b]ank fraud.”).

<sup>64</sup> 18 U.S.C.S. § 1348 (2002) (prohibiting “[s]ecurities fraud.”).

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shareholders”<sup>65</sup> and properly whistleblows on that activity, then the employer may not retaliate against the employee. However, this is subject to the employer having had knowledge that the employee reported the activity before the claimed retaliatory action was taken.<sup>66</sup> Without knowledge on the part of the employer, a *prima facie* case of retaliation cannot be established by the employee given that the employer may easily demonstrate that the action taken was due to other factors and circumstances.<sup>67</sup>

An employee is not automatically protected when he reports prohibited activity, but rather is only protected when the specific guidelines under the statute have been followed.<sup>68</sup> For the employee, this means not only that he must take time to deliberately follow these guidelines, but also that the employee must make sure the result of reporting that activity falls under at least one of the listed outcomes in section 806(a)( 1) & (2).

#### D. Procedures for Whistleblowers Claiming Retaliation

Procedurally, the whistleblower protection statute of the Sarbanes-Oxley Act is very explicit and clearly details the steps that need to be taken when claiming retaliation.<sup>69</sup> Courts have been receptive to the fact that Congress clearly intended the procedures to be followed without deviation in order to file a complaint of retaliation and later an action in federal court.<sup>70</sup> The procedures

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<sup>65</sup> 18 U.S.C.S. § 1514A(a)( 1)-( 2) (2002).

<sup>66</sup> Stephen M. Honig & Bronwyn L. Roberts, *The Morning After: Employment Law and Sarbanes-Oxley*, 47 B.B.J. 10 (2003) (noting the provision “that the offending person had knowledge of such action . . . .” (citing 29 C.F.R. pt. 1980 (2003)).

<sup>67</sup> Procedures for the Handling of Discrimination Complaints, 69 Fed. Reg. 52104, 52106 (proposed Aug. 4, 2004) (to be codified at 29 C.F.R. pt. 1980) (“[A]n investigation of the complaint will not be conducted if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant’s protected behavior or conduct, notwithstanding the *prima facie* showing of the complainant.”); see 29 C.F.R. § 1980.104(c) & (d) (2004); see also Steinberg & Kaufman, *supra* note 1, at 454.

<sup>68</sup> The statute specifically lists the types of retaliation an employee is protected against in addition to exactly what forms of whistleblowing are protected. The activity reported must lead to, in addition to other outcomes, the providing of information to any of the persons or agencies listed in subsections (a)( 1)( A) through (a)( 1)( B), to the instituting of an action against the employer (subsection (a)( 1)), or to the employee’s participation in an action against the employer (subsection (a)( 2)). 18 U.S.C. § 1514A (2002).

<sup>69</sup> 15 U.S.C.S. § 7201 (2002).

<sup>70</sup> See *Willis v. VIE Financial Group, Inc.*, 2004 U.S. Dist. LEXIS 15753 (E.D. Pa. 2004) (barring plaintiff’s claims for failure to exhaust administrative remedies. Specifically, the Court

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are outlined in subsection (b) of section 806 for the filing of claims against employers by employees claiming retaliation from a protected activity.<sup>71</sup>

Although an employee's initial reaction to retaliatory moves by an employer is to initiate an action in federal court, an employee must first file a claim with the Secretary of Labor.<sup>72</sup> The Secretary authorized the Occupational Safety and Health Administration (OSHA)<sup>73</sup> to investigate and hold hearings on retaliatory claims by whistleblowers under the Sarbanes-Oxley Act.<sup>74</sup> Therefore, an employee must file a complaint with the Secretary and, procedurally from this point on, OSHA handles all matters related to the investigation and the final administrative determination of the issue.<sup>75</sup>

An employee must also follow the procedures promulgated by OSHA for pursuing a claim of retaliation.<sup>76</sup> The 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."<sup>77</sup> Further, the complaint should be filed with the OSHA Area Director who governs the geographical area of employment or residence of the complainant.<sup>78</sup> The most important provision states that the complaint must be filed within ninety days of the date of retaliation in response to a whistleblower claim<sup>79</sup>

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identified numerous procedural provisions of the Section 806 and would not allow the claim to proceed given the failure to follow the procedures correctly.); *see also* *Hanna v. WCI Communities, Inc.*, 2004 U.S. Dist. LEXIS 25652 (S.D. Fla. 2004) (dismissing complaint against another defendant due to the plaintiff's failure to name the defendant in the administrative complaint. Therefore, the statute of limitations on filing a complaint with OSHA ran and prohibited the plaintiff from bringing suit given that the administrative remedies were not exhausted.).

<sup>71</sup> 18 U.S.C.S. § 1514A(b) (2002).

<sup>72</sup> *Id.* § 1514A(b)(1) ("A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by –(A) filing a complaint with the Secretary of Labor . . .").

<sup>73</sup> Secretary's Order 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002); 29 C.F.R. § 1980.103(e) (2004).

<sup>74</sup> *Willis*, 2004 U.S. Dist. LEXIS, at \*7.

<sup>75</sup> 29 C.F.R. § 1980.109 (2004).

<sup>76</sup> 29 C.F.R. § 1980.100 (2004). For an overview of the entire procedural process under the OSHA regulations for filing of a complaint under section 806 of the Sarbanes-Oxley Act, see *Procedures for the Handling of Discrimination Complaints*, 68 Fed. Reg. 31860, 31860-31862 (proposed May 28, 2003) (to be codified at 29 C.F.R. pt. 1980).

<sup>77</sup> 29 C.F.R. § 1980.103(b).

<sup>78</sup> *Id.* § 1980.103(c).

<sup>79</sup> *Id.* § 1980.103(d); *see* *Procedures for the Handling of Discrimination Complaints*, 68 Fed. Reg. at 31861 ("this is considered to be when the discriminatory decision has been both made and communicated to the complainant.") (citing *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980)).

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and, within subsection (c),<sup>80</sup> the regulation provides an example regarding when the time begins to run on the statute, most likely to decrease any ambiguity.<sup>81</sup> In a further attempt to decrease ambiguity and streamline the process of filing, the regulation specifically states “[t]he date of the postmark, facsimile transmittal, or e-mail communication is [to] be considered. . .the date of filing.”<sup>82</sup>

In addition to procedural requirements, there is a significant substantive requirement that a *prima facie* showing of retaliation be contained in the complaint or the claim will be immediately dismissed by OSHA.<sup>83</sup> In order for OSHA to further investigate a complaint, the complaint must make “a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.”<sup>84</sup> Therefore, the burden is placed initially on the employee to set forth facts which merit further investigation. The burden may be satisfied in a number of ways so long as the employee demonstrates that some inference can be made as to retaliatory action.<sup>85</sup> If a *prima facie* showing is not made out by the complainant, OSHA will decline to initiate an investigation.<sup>86</sup>

However, the regulation gives the employer an opportunity to rebut any *prima facie* showing of retaliation even if an inference of

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<sup>80</sup> 29 C.F.R. § 1980.103(c).

<sup>81</sup> *Id.* § 1980.103(d)

Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee’s behalf, a complaint alleging such discrimination.

*Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 29 C.F.R. § 1980.104 (2004).

<sup>84</sup> *Id.* § 1980.104(b); *Id.* § 1980.104(b)( 1):

The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a *prima facie* showing as follows:

(i) The employee engaged in a protected activity or conduct;  
(ii) The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;  
(iii) The employee suffered an unfavorable personnel action; and  
(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

*Id.*

<sup>85</sup> 29 C.F.R. § 1980.104(b)( 2) (“Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action.”).

<sup>86</sup> *Id.*

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retaliatory action is made out.<sup>87</sup> If the employer “demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant’s protected behavior or conduct . . . ,”<sup>88</sup> OSHA will not commence an investigation.<sup>89</sup> If a *prima facie* case is made out by the complainant and the employer cannot show the same action would have been taken in the absence of the protected behavior, OSHA will commence an investigation.

The Assistant Secretary may issue a preliminary reinstatement to employment before final issuance of the findings if the evidence supports a preliminary finding of a violation and the employer cannot rebut that finding.<sup>90</sup> If a hearing is granted after the preliminary order, the regulations require that the Secretary of Labor issue a final order not more than 120 days after the conclusion of the hearings in front of an administrative law judge.<sup>91</sup> The final order issued by the Secretary<sup>92</sup> may include any relief necessary to make the complainant whole or a denial of relief all together.<sup>93</sup>

The provision that sets this whistleblower protection statute apart from those previously enacted is its process for filing a complaint in Federal District Court.<sup>94</sup> An employee may only reach federal court with the complaint if the Secretary of Labor has not

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<sup>87</sup> See Procedures for the Handling of Discrimination Complaints, 69 Fed. Reg. 52104, 52106 (proposed Aug. 4, 2004) (to be codified at 29 C.F.R. pt. 1980); 29 C.F.R. § 1980.104(c) & (d).

<sup>88</sup> 29 C.F.R. § 1980.104(c).

<sup>89</sup> This is subject however to filing requirements by the employer set forth in subsection (c): Within 20 days of receipt of the notice of the filing of the complaint, the named person may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the named person may request a meeting with the Assistant Secretary to present its position. 29 C.F.R. § 1980.104(c).

<sup>90</sup> *Id.* § 1980.104(d) (setting forth the details regarding the Assistant Secretary’s ability to order a preliminary reinstatement and procedures for an employer to rebut that preliminary order). For more details on OSHA’s regulations regarding investigation of complaints, issuance of findings, and judicial review of OSHA findings, see 29 C.F.R. § 1980.105 through § 1980.113 (2004).

<sup>91</sup> Procedures for the Handling of Discrimination Complaints, *supra* note 57, at 31861 (“The Secretary then has 120 days after the ‘conclusion of a hearing’ in which to issue a final order.”).

<sup>92</sup> A final order from the Secretary is considered to be the final order of the administrative law judge if a timely petition for review is not filed with the Administrative Review Board. *Id.* at 31867.

<sup>93</sup> *Id.* at 31861 (“If the Secretary finds that a violation has occurred, the Secretary will order appropriate make whole relief. If the Secretary finds that the complaint is frivolous or has been brought in bad faith, the Secretary may award each prevailing named person a reasonable attorney’s fee not exceeding \$ 1,000.”).

<sup>94</sup> *Id.* (“This statutory structure creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal court while the case is pending on review by the Board.”).

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issued an opinion within 180 days after filing of the complaint.<sup>95</sup> The failure to issue an opinion within the 180 days must not be due to “the bad faith of the claimant.”<sup>96</sup> Any bad faith on the part of the complainant which results in the Secretary failing to issue an opinion within the time constraint precludes any suit on the issue in district court. Further, the statute arguably allows for the filing of a complaint in district court, even if a decision has been made, as long as it is handed down after the passing of the 180 day period.<sup>97</sup> The complainant must give advance notice of an intent to file a complaint in federal court to all the parties involved<sup>98</sup> fifteen days prior to filing the complaint.<sup>99</sup> After the issuance of a final order by the administrative law judge or the administrative review board, if appealed,<sup>100</sup> any person “adversely affected or aggrieved by the order” is permitted to file an appeal with the United States Court of Appeals.<sup>101</sup>

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<sup>95</sup> 18 U.S.C.S. § 1514A(b)(1)(B) (2002):

[I]f 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, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

*Id.*; 29 C.F.R. § 1980.114(a) (2004).

<sup>96</sup> 18 U.S.C.S. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a).

<sup>97</sup> Procedures for the Handling of Discrimination Complaints, *supra* note 57, at 31863 (“The Act might even be interpreted to allow a complainant to bring an action in Federal court after receiving a final decision from the Board, if that decision was issued more than 180 days after the filing of the complaint.”).

<sup>98</sup> In addition to all parties receiving prior notice, “[i]f the Assistant Secretary is not a party, a copy of the notice must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards . . . .” 29 C.F.R. § 1980.114(b).

<sup>99</sup> *Id.*

<sup>100</sup> A party can appeal the decision of the administrative law judge to the Administrative Review Board. Any decision by the board is considered the final order of the Secretary. Procedures for the Handling of Discrimination Complaints, *supra* note 57, at 31867; 29 C.F.R. § 1980.110 (2004).

<sup>101</sup> 29 C.F.R. § 1980.112(a) (2004):

Within 60 days after the issuance of a final order by the Board (Secretary) under § 1980.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

*Id.*

## E. Remedies Available under Section 806

Sections 806 and 1107 of the Sarbanes-Oxley Act provide the relevant civil and criminal penalties for those employers who violate the provisions of the whistleblower protection statute.<sup>102</sup> Essentially, section 806(c) provides that all remedies are available to plaintiffs claiming retaliatory action in order to fully compensate the employee for the illegal actions of the employer.<sup>103</sup> Specifically, employees may seek reinstatement, back pay, and other damages incidental to the retaliatory actions.<sup>104</sup> Section 1107 allows for a term of imprisonment up to ten years for violations of its provisions.<sup>105</sup> In its wording, section 1107 is “broader and narrower than the scope of the private civil remedies.”<sup>106</sup>

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<sup>102</sup> 18 U.S.C. § 1514A(c) (2002); 18 U.S.C. § 1513(e) (2002).

<sup>103</sup> 18 U.S.C.S. § 1514A(c)(1) (“An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.”).

<sup>104</sup> *Id.* § 1514A(c)(2) contains the following language pertaining to compensatory damages available to the employee:

(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.

*Id.*

<sup>105</sup> 18 U.S.C. § 1513(e).

Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

*Id.*; see also *SARBANES-OXLEY ACT OF 2002: LAW AND EXPLANATION*, *supra* note 55, at 85.

<sup>106</sup> Steinberg & Kaufman, *supra* note 1, at 455-456 (2005):

The criminal penalties are broader than the civil remedies because they apply to “action harmful to any person.” In contrast, section 806 (the civil private remedy) prohibits only specific acts. Section 1107 is narrower than section 806 because to be invoked, a whistleblower must provide truthful information to a law enforcement officer. On the other hand, section 806 becomes applicable when a whistleblower provides information based on a reasonable belief related to a protected subject matter to Congress, internal supervisor(s), law enforcement officer(s), or specified others.

*Id.*

320 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 8:305]III. ACTIONS BROUGHT IN FEDERAL COURT AFTER FILING  
WITH THE SECRETARY OF LABOR

As noted above, a complainant under the Sarbanes-Oxley whistleblower protection statute is permitted to file a claim in federal district court if the Secretary of Labor has not issued a final order within 180 days of the initial filing of the complaint.<sup>107</sup> Alternatively, as has been argued, a complainant may also file in district court, despite a final order being made by the Secretary, if that order is not made within the 180 day time limit.<sup>108</sup> The implications of permitting a complainant to file in district court have yet to be fully gauged given the young life of the Act. However, agreements to arbitrate in employment contracts and other employment related materials have created a significant impediment to employees adjudicating their complaints in district court under this statute.<sup>109</sup>

In 2003, the District Court for the Southern District of New York heard a whistleblower retaliation case in which the plaintiff relied upon section 806 of Sarbanes-Oxley.<sup>110</sup> In *Boss v. Salomon Smith Barney, Inc.*, the court found in favor of the employer, Salomon Smith Barney, requiring the employee to arbitrate his claim of retaliation under the statute.<sup>111</sup> This was a critical victory for pro-arbitration supporters and employers in the securities and accounting industries, as well as for any employer who prefers to arbitrate employee disputes rather than adjudicate them in court.<sup>112</sup>

Kenneth Boss, a research analyst for Salomon Smith Barney, filed a complaint with the Secretary of Labor for retaliation after he was terminated from the defendant's company.<sup>113</sup> He alleged his discharge was in retaliation for failing to comply with an unethical request to share an early draft of his research with investment bankers and further, to change the recommendations contained in

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<sup>107</sup> 18 U.S.C.S. § 1514A(b)(1)(B).

<sup>108</sup> Procedures for the Handling of Discrimination Complaints, *supra* note 57, at 52104, 52111 (proposed Aug. 4, 2004) (to be codified at 29 C.F.R. pt. 1980).

<sup>109</sup> *Boss*, *supra* note 13.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 685.

<sup>112</sup> Morgan Lewis, *supra* note 22 ("This decision provides strong support to employers wishing to compel arbitration of Sarbanes-Oxley whistleblower claims asserted in court proceedings by employees subject to mandatory arbitration agreements.").

<sup>113</sup> *Boss*, *supra* note 13.

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his report.<sup>114</sup> The complaint eventually reached Federal District Court, and Salomon Smith Barney “moved to stay this litigation and compel arbitration.”<sup>115</sup> Salomon Smith Barney pointed to a U-4 application,<sup>116</sup> two employment documents signed by Boss in an employment contract,<sup>117</sup> and the employee handbook as evidence requiring Boss to submit to arbitration rather than adjudicate his claim in court. Each of the documents contained language through which Boss agreed to arbitrate any employment disputes that would arise in connection with his employment at Salomon Smith Barney.<sup>118</sup>

The District Court held the claims were precluded by the arbitration agreements, contrary to Boss’s contention that claims under section 806 are exempt from the presumption in favor of arbitration.<sup>119</sup> Specifically, Boss argued that the inclusion of a process by which a complaint of retaliation under the Act could reach federal court meant Congress intended that contractual agreements to arbitrate be precluded.<sup>120</sup> The court undertook a brief analysis of this claim based upon the reasoning in a similar case, *Oldroyd v. Elmira Savings Bank*.<sup>121</sup> The presumption in favor of arbitration given to a statute may be overridden if either the legislative history, the text of the statute, or a conflict between arbitration and

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<sup>114</sup> *Id.* (“He alleges that contrary to established rules, policies, and procedures, he was ordered to share a draft research report with Salomon’s investment bankers. He alleges further that he was pressured by Salomon to change his recommendations, and when he failed to do so, Salomon retaliated by terminating his employment.”); *see also* Cherry, *supra* note 9, at 108 (indicating “[t]hese are serious allegations, because, as noted in Part II.A.1, the Sarbanes-Oxley Act prohibits investment bankers from interfering with the research reports written by analysts within their organizations.”).

<sup>115</sup> *Boss*, *supra* note 13.

<sup>116</sup> *See* Cherry, *supra* note 9, at 1081 (explaining that the U-4 application is the “the registration form required by the National Association of Securities Dealers (NASD).”).

<sup>117</sup> *See id.* (explaining “[t]his contract was one of the routine form Smith Barney required employees to sign upon joining the firm.”).

<sup>118</sup> Morgan Lewis, *supra* note 22.

At the time of his hire, Boss executed a Form U-4 application for registration with the NASD, in which he agreed to arbitrate any ‘dispute, claim or controversy’ arising out of his employment or the termination of his employment. The Form U-4 was supplemented by two other documents that specifically stated that all employment disputes were subject to mandatory arbitration.

<sup>119</sup> *Boss*, *supra* note 13 (“Notwithstanding the Salomon employment documents and his own U-4, Boss contends that his claims brought pursuant to the recently-enacted Sarbanes-Oxley Corporate Reform Act of 2002, are exempt from mandatory industry arbitration.”).

<sup>120</sup> *Id.* at 685. In addition to Boss’ claim that the statute precluded arbitration, he conceded “that neither ‘the text of Sarbanes-Oxley nor its legislative history explicitly precludes arbitration.’” *Id.*

<sup>121</sup> *Oldroyd*, *supra* note 19.

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the statute's underlying purposes evidences Congress' intent to override the presumption.<sup>122</sup> The court quickly, and without expansive analysis, concluded "[t]here is nothing in the text of the statute or the legislative history of the Sarbanes-Oxley act evincing intent to preempt arbitration of claims under the act. Nor is there an inherent conflict between arbitration and the statute's purposes."<sup>123</sup>

The implications of the court's decision in *Boss* may potentially be far reaching, in particular for employees who claim retaliation for whistleblowing under section 806. The brevity of the holding in *Boss* is also troubling because it may signal the courts' unwillingness to conclude that the Act will ever preempt arbitration agreements.<sup>124</sup> This Note focuses upon the outcome in *Boss*, and whether future cases should follow the conclusions of the Southern District of New York. The subsequent sections explore whether the goals of arbitration further the goals of the whistleblower protection provision of the Sarbanes-Oxley Act or whether adjudication in a judicial forum is more appropriate in furthering the goals of the provision and possibly intended by Congress to be the exclusive forum to resolve retaliatory complaints.

A. Development of Courts' Pro-Arbitration Position<sup>125</sup>

Exploration of the development of the presumption in favor of arbitration, both in the courts and Congress, is of particular importance to this topic given the District Court's limited explanation of its holding in *Boss v. Salomon Smith Barney, Inc.* This lack of explanation leaves us with many questions about how future cases

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<sup>122</sup> *Boss*, *supra* note 13, at 685 ("Congress may override the presumption in favor of arbitration if it manifests its intent to do so 'in the text of the [statute], its legislative history, or an inherent conflict between arbitration and the [statute's] underlying purposes.'") (citing *Oldroyd*, 134 F.3d at 77-78 (quoting *Gilmer*, 500 U.S. 20)).

<sup>123</sup> *Boss*, *supra* note 13, at 685.

<sup>124</sup> Cherry, *Whistling*, *supra* note 9, at 1082:

The court's disposal of the issue in such a brief fashion flows from the Supreme Court jurisprudence on mandatory arbitration and the failure of Congress to mention arbitration specifically in Sarbanes-Oxley. The court apparently assumed that Congress would be aware of the legal landscape that currently favors arbitration and would also be aware of the fact that, if there was no mention of mandatory arbitration, courts would assume that arbitration was an adequate remedy.

*Id.*

<sup>125</sup> An analysis of this development is also present in Cherry, *Whistling*, *supra* note 9, at 1075-80.

might be decided as well as upon what grounds the court came to hold in favor of arbitration. However, the court did cite the criteria through which it will determine if Congress intended to override the presumption in favor of arbitration articulated in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>126</sup> This is indicative of the fact that the court decided the case among the backdrop of the development of the pro-arbitration position.

The development occurred in three landmark cases that reached the Supreme Court beginning with *Alexander v. Gardner-Denver Co.*<sup>127</sup> and subsequently, with *Gilmer v. Interstate/Johnson Corp.*<sup>128</sup> and *Circuit City Stores, Inc. v. Adams*.<sup>129</sup> *Alexander* involved a Title VII claim brought by an employee of the defendant. Gardner-Denver Co. moved to have the case dismissed to arbitration based upon a provision contained in the union collective bargaining agreement.<sup>130</sup> In holding that the Title VII claim would not be dismissed in favor of the arbitral award, Justice Powell concluded that the arbitral process is not suitable for vindicating statutory rights.<sup>131</sup>

According to the Court in *Alexander*, arbitration of statutory rights<sup>132</sup> cannot provide employees with the proper forum for attaining the purposes of the statute, even if the two parties agreed to arbitrate the statutory rights in a collective bargaining agreement.<sup>133</sup> This conclusion rests upon the court's determination that the role of the arbitrator is to make a ruling based on the intent of the parties, which is incongruous with the need to rule based on the

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<sup>126</sup> The court cited *Gilmer* through its inclusion in the decision of *Oldroyd*, *supra* note 19.

<sup>127</sup> *Alexander*, *supra* note 17.

<sup>128</sup> *Gilmer*, *supra* note 18.

<sup>129</sup> *Circuit City*, *supra* note 24.

<sup>130</sup> *Alexander*, *supra* note 17, at 40 ("The [collective bargaining] agreement also contained a broad arbitration clause covering 'differences aris[ing] between the Company and the Union as to the meaning and application of the provisions of this Agreement' and 'any trouble aris[ing] in the plant.'").

<sup>131</sup> *Id.* at 56 ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."). The *Alexander* opinion points out "the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement." *Id.* at 56-7. Further, Justice Powell added that this conclusion in addition to some drawbacks of arbitration made the vindication of statutory rights, particularly under Title VII, more suitable for adjudication in federal court. *Id.* at 57-8.

<sup>132</sup> In this case, the statutory right is under Title VII and the arbitration provision was contained in the union collective bargaining agreement.

<sup>133</sup> *Alexander*, *supra* note 17, at 56.

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statutory rights available to an employee,<sup>134</sup> that arbitrators are specialized in the knowledge of a particular industry and not in general legal expertise,<sup>135</sup> and that “the fact-finding process in arbitration usually is not equivalent to judicial fact-finding.”<sup>136</sup> The court in *Alexander* did not reverse the presumption in favor of arbitration but rather distinguished it. The effect of the ruling is to permit arbitration where contractual rights are at issue and to allow adjudication of statutory rights in a judicial forum, even after there has been an arbitral decision.<sup>137</sup>

Seventeen years after *Alexander*, in a landmark victory for those in favor of arbitration, the Court decided *Gilmer v. Interstate/Johnson Lane Corp.*<sup>138</sup> This case is distinguished from *Alexander*

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<sup>134</sup> *Id.* at 56-57 (“This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement.”); *see id.* at 53-4:

If an arbitral decision is based ‘solely upon the arbitrator’s view of the requirements of enacted legislation,’ rather than on an interpretation of the collective-bargaining agreement, the arbitrator has ‘exceeded the scope of the submission,’ and the award will not be enforced. Thus the arbitrator has authority to resolve only questions of contractual rights . . . .

*Id.* (citations omitted); *Id.* at 53:

As the proctor of the bargain, the arbitrator’s task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the ‘industrial common law of the shop’ and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties. . . .

*Id.* (citations omitted).

<sup>135</sup> *Id.* at 57:

[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

*Id.* (citations omitted).

<sup>136</sup> *Id.* at 58.

<sup>137</sup> *Id.* at 59-60:

We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.

*Id.*; *Id.* at 53 (“Both rights have legally independent origins and are equally available to the aggrieved employee.”). However, this distinction may not have the same effect in a situation where the provision at issue is not in a collective bargaining agreement and where the provision is worded differently.

<sup>138</sup> *Gilmer*, *supra* note 18.

in that *Alexander* can be held to apply only in situations involving a collective bargaining agreement,<sup>139</sup> whereas *Gilmer* is more analogous to the factual setting in *Boss*. Robert Gilmer was hired as manager of financial services by Interstate/Johnson in 1981 and upon his hire, he was required to register with various stock exchanges.<sup>140</sup> The registration application contained a provision requiring Gilmer to arbitrate any claims according to the rules of the exchanges where he was registered.<sup>141</sup> In this case his claim was governed by the applicable rules under the New York Stock Exchange (NYSE) and the exchange required the arbitration of disputes between those who register and their employers.<sup>142</sup>

Gilmer brought his claim of age discrimination under the ADEA when he was terminated at the age of 62. He argued that the *Alexander* line of cases applied and therefore he should not be compelled to arbitrate his claim. Further, he argued that the goals of the ADEA conflicted with the arbitral process and thus he should be permitted to adjudicate his claim in court.<sup>143</sup> The Court rejected each of his contentions<sup>144</sup> and held instead that an agree-

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<sup>139</sup> There are different concerns when examining an arbitration agreement contained in a collective bargaining agreement as opposed to a provision in a securities registration application, for example. The Court in *Gilmer* distinguished *Alexander* on three grounds: 1) *Alexander* did not involve an agreement to arbitrate statutory claims whereas the provision in the NYSE registration did; 2) there was a conflict of interest in the employee being represented by his union under the collective bargaining agreement, which is not present in the *Gilmer* case; and 3) *Gilmer*, as opposed to *Alexander*, is brought under the Federal Arbitration Act which favors arbitration. *Gilmer*, *supra* note 18, at 35.

<sup>140</sup> *Id.* at 23.

<sup>141</sup> *Id.* at 35 (The registration application contained the following language, “that Gilmer ‘agreed to arbitrate any dispute, claim or controversy’ arising between him and Interstate ‘that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register.’”) (citations omitted).

<sup>142</sup> *Id.* at 35 (“Of relevance to this case, NYSE Rule 347 provides for arbitration of ‘any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.’”) (citing App. to Brief for the Respondent 1).

<sup>143</sup> *Gilmer* conceded that “nothing in the text of the ADEA or its legislative history explicitly precludes arbitration.” *Id.* at 26.

<sup>144</sup> The contentions are numerous and each claim and the court’s reasoning are contained in the case among pages 27-35. Specifically, *Gilmer* contended the following were reasons to preclude arbitration: 1) “the ADEA is designed not only to address individual grievances, but also to further important social policies.” *Id.* at 27-28; 2) “that arbitration will undermine the role of the EEOC in enforcing the ADEA.” *Id.* at 28-29; 3) “that compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA.” *Id.* at 29; 4) “that arbitration panels will be biased.” *Id.* at 30-31; 5) “that the discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination.” *Id.* at 31; 6) “that arbitrators often will not issue written opinions resulting in a lack of public knowledge of employers’ discriminatory policies, an inability to obtain effective

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ment to arbitrate statutory claims precludes adjudication of a claim under the ADEA in a judicial forum.<sup>145</sup>

In addition to distinguishing *Alexander*, Justice White, writing for the majority, reasoned that, in a non-collective bargaining context, an employee himself, agreed to arbitrate any claims. Consequently, the presumption in favor of arbitration stands unless the employee can demonstrate congressional intent to override that presumption or that the purposes of the statute conflict with arbitration of the claim.<sup>146</sup> Given that *Gilmer* could not demonstrate either of these points, the Court upheld the motion to compel arbitration by Interstate/Johnson.<sup>147</sup>

The Court brought this debate to a head in *Circuit City Stores, Inc. v. Saint Clair Adams*, albeit in a limited manner.<sup>148</sup> This case involved a sales counselor for Circuit City, Saint Clair Adams, who filed an employment discrimination suit against the defendant. Her suit was subsequently enjoined and she was compelled to arbitrate her claims based upon a provision she signed in her employment application.

The heart of the case dealt with the §1 exception from the Federal Arbitration Act<sup>149</sup> for certain employment contracts involving mandatory arbitration clauses.<sup>150</sup> However, the court pointed out that it settled the question in *Gilmer* regarding arbitration clauses and their possible conflict in vindicating statutory rights. Specifically, “[t]he Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law.”<sup>151</sup> Further, the court noted a statement previously made in the *Gilmer* opinion that “by agreeing to arbitrate a statutory claim, a party does not forgoe the substantive rights afforded

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appellate review, and a stifling of the development of the law.” *Id.* at 31-32; 7) “that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions.” *Id.* at 32; and 8) “that there often will be unequal bargaining power between employers and employees” in bargaining for the arbitration provision. *Id.* at 32-33.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 35.

<sup>148</sup> *Circuit City*, *supra* note 24.

<sup>149</sup> 9 U.S.C. §§ 1-16 (2000).

<sup>150</sup> Cherry, *Whistling*, *supra* note 9, at 1078 (“After analyzing the text of the Federal Arbitration Act (hereinafter “FAA”), the Court concluded that the exception contained within the FAA for certain contracts of employment applied only to transportation workers.”).

<sup>151</sup> *Circuit City*, *supra* note 24, at 123.

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by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>152</sup>

As Ms. Cherry points out in her Washington Law Review article,<sup>153</sup> “the overwhelming impression that one derives from the *Circuit City* and *Waffle House* decisions is that courts have shifted from viewing mandatory pre-dispute arbitration contracts with suspicion to distinctly favoring them.”<sup>154</sup> Given the presumption in favor of arbitration, the passage of the FAA, and the opinions of the Court, it is clear that one must demonstrate persuasive and solid evidence of congressional intent to preclude arbitration in order to defeat arbitration provisions in employment contracts or securities registration forms.<sup>155</sup> However, the question that remains is whether the *Boss* decision, more specifically the courts ruling that whistleblower retaliation claims under Sarbanes-Oxley may be stayed pending arbitration under an employment agreement and securities registration application, is correct and, regardless, whether arbitration furthers the Congressional goals of section 806.

#### IV. ARBITRATION VERSUS ADJUDICATION: A GOALS COMPARISON UNDER SECTION 806

Labor and employment disputes, like so many other contests, hold their own distinct position in the legal arena. The resolution of employment disputes has, for the most part, implicated two main forms of dispute resolution: traditional adjudication in court and binding arbitration.<sup>156</sup> Traditional adjudication in the United States is the most well known of all dispute resolution tech-

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<sup>152</sup> *Id.* at 123 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)); *see also* Cherry, *Whistling*, *supra* note 9, at 1078 (claiming the *Circuit City* decision was “tempered” in *Equal Employment Opportunity Commission v. Waffle House*, 534 U.S. 279 (2002). “There, the Court held that even though the plaintiff had signed a mandatory arbitration contract, the contract did not preclude the EEOC from pursuing an enforcement action for victim-specific relief.” (citing *Waffle House*, 534 U.S. 279 at 297)).

<sup>153</sup> Cherry, *Whistling*, *supra* note 9.

<sup>154</sup> *Id.* at 1078.

<sup>155</sup> *Id.* at 1079 (“In light of this doctrinal background, a statute must clearly preclude mandatory arbitration, or the court will assume that the statutory claim is one that can be sent to arbitration.”).

<sup>156</sup> This is not to say other forms of ADR are not implicated or utilized in employment and labor disputes.

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niques.<sup>157</sup> While it contains both advantages and disadvantages, the world of ADR provides attractive alternatives to the traditional legal process.

Employers embraced binding arbitration as a favored alternative to court-based adjudication and other ADR techniques.<sup>158</sup> Arbitration “is the private, judicial determination of a dispute by an independent third party.”<sup>159</sup> In general, arbitration uses a neutral third party decision maker to adequately and fairly resolve a dispute in the best interests of all parties to the dispute.<sup>160</sup> The arbitrator can either be an individual or a tribunal, and the parties can choose the arbitrator(s) themselves at the time of dispute, have the arbitrator(s) appointed by an outside party, or determine who or how the arbitrator(s) will be chosen through contractual provisions far in advance of any dispute.<sup>161</sup> State and federal statutes may govern a particular dispute and therefore dictate the process in choosing an arbitrator or provide for who will make the determination.

The arbitral process is initiated when one party requests that a dispute with another party be submitted to arbitration. This request need not always be made to the other party. In certain contexts, such as employment disputes where the parties agree to arbitrate all disputes prior to the current matter, the request may be made in court for all proceedings to be stayed in favor of the arbitral agreement.<sup>162</sup> Initiation of the arbitral process is followed by the selection of an arbitrator or tribunal; preliminary meetings

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<sup>157</sup> Daniel Renken, *The ABC's of ADR. A Comprehensive Guide to Alternative Dispute Resolution*, December 2002, <http://www.mediate.com/articles/renkenD.cfm> (last visited Apr. 6, 2007) (“[A]gency or court adjudication are traditional ways of settling disputes.”).

<sup>158</sup> Michele L. Giovagnoli, *To Be or Not To Be? Recent Resistance to Mandatory Arbitration Agreements in The Employment Arena*, 64 *UMKC L. REV.* 547, 549 (1996) (“Thus, with the increase of employment related disputes, the creation of specific individual rights and the impact of these claims on the traditional legal system, many employers are utilizing alternative dispute resolution (ADR) techniques.”).

<sup>159</sup> Leslie Grant, *What is Arbitration?*, April 20, 2000, <http://www.mediate.com/articles/grant.cfm> (last visited Apr. 6, 2007).

<sup>160</sup> *Id.* (“The object of arbitration is to obtain a fair resolution of disputes by an impartial third party without unnecessary expense or delay.”).

<sup>161</sup> Renken, *supra* note 157 (“The individual arbitrator or the tribunal (arbitration panel) is appointed either directly by the disputing parties, or by existing arbitration panel members, or by an external party e.g., the court.”); see Grant, *supra* note 159.

<sup>162</sup> Upon motion by Salomon Smith Barney the court stayed the proceedings in favor of the arbitration agreement signed by Boss when he entered into employment with the defendant and upon registering with the NASD. *Boss*, *supra* note 13, at 684.

usually regarding the “process and timetable”<sup>163</sup> for the arbitration; submission by the claimant of a statement of claim and a statement of response by the respondent;<sup>164</sup> a discovery and inspection process in which the parties exchange evidentiary documents;<sup>165</sup> the handing over of certain evidence to the arbitrator for review;<sup>166</sup> a hearing in front of the arbitrator where the claimant and respondent have an opportunity to make their respective cases;<sup>167</sup> submissions by the parties to the arbitrator in summary form of the evidence they presented and the laws applicable to their arguments;<sup>168</sup> and, finally, the arbitrator decides the dispute in what is commonly known as the arbitral award. The award is final and binding on all parties to the dispute.<sup>169</sup>

Although, in the employment context, arbitration tends to be voluntary, in that the employer and employee agree to arbitrate their disputes in private agreements before they arise, arbitration

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<sup>163</sup> Grant, *supra* note 159 (“It is a good idea to have a meeting between the arbitrator and the parties, along with their legal council, to look over the dispute in question and discuss an appropriate process and timetable.”); Renken, *supra* note 157.

<sup>164</sup> Grant, *supra* note 159:

The claimant sets out a summary of the matters in dispute and the remedy sought in a statement of claim. This is needed to inform the respondent of what needs to be answered. It summarizes the alleged facts, but does not include the evidence through which facts are to be proved. The statement of response from the respondent is to admit or deny the claims. There may also be a counterclaim by the respondent, which in turn requires a reply from the claimant. These statements are called the ‘pleadings’. Their purpose is to identify the issues and avoid surprises.

*Id.*

<sup>165</sup> Renken, *supra* note 157 (“a listing by each party of relevant documents in their control (discovery) and their inspection.”).

<sup>166</sup> *Id.* (“a handing over of an agreed upon selection of documents to the arbitrator.”); Grant, *supra* note 159 (“The written evidence is exchanged and given to the arbitrator for review prior to the hearing.”).

<sup>167</sup> Renken, *supra* note 157 (“[A] hearing including oral statements, questioning of witnesses and clarification of issues.”); Grant, *supra* note 159:

The hearing is a meeting in which the arbitrator listens to any oral statements, questioning of witnesses and can ask for clarification of any information. Both parties are entitled to put forward their case and be present while the other side states theirs. A hearing may be avoided however, if the issues can be dealt with entirely from the documents.

*Id.*

<sup>168</sup> Grant, *supra* note 159 (calling this “Legal Submissions” and describing the process as one in which “the lawyers of both parties provide the arbitrator with a summary of their evidence and applicable laws. These submissions are made either orally at the hearing, or put in writing as soon as the hearing ends.”).

<sup>169</sup> *Id.* (“The arbitrator considers all the information and makes a decision. An award is written to summarize the proceedings and give the decisions. The award usually includes the arbitrator’s reasons for the decision.”).

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may also be mandatory.<sup>170</sup> Arbitration is mandatory when submission is dictated by court rules, statutory rules, or an organization's rules for dispute resolution.<sup>171</sup> Labor and employment disputes do not fit into distinct types of claims or categories. They vary greatly just like any other area of law, and arbitrators are called upon to resolve a great variety of issues.<sup>172</sup> The parties can be employers, employees, or trade unions, and the arbitrator resolves claims related to the agreement(s) between the parties.<sup>173</sup>

In the abstract, there are a number of advantages and disadvantages attributed to traditional adjudication and arbitration.<sup>174</sup> However, the true benefits and drawbacks to any dispute resolution process can only be measured in their particular contexts, and even then they are not always easy to quantify.<sup>175</sup> Some of the advantages that have been proffered in favor of arbitration over traditional adjudication are greater efficiency,<sup>176</sup> privacy,<sup>177</sup> convenience,<sup>178</sup> flexibility,<sup>179</sup> finality,<sup>180</sup> and cost savings.<sup>181</sup> On the other

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<sup>170</sup> Parties could also agree to arbitrate after a dispute has arisen but before the court makes its final judgments. Renken, *supra* note 157.

<sup>171</sup> *Id.* As was seen in *Boss*, organizations such as the National Exchange of Securities Dealers (NASD) require as part of their registration that all persons who register agree to submit any disputes with their employers to arbitration. Given that anyone who is employed to deal securities must register with the NASD, the agreement in its entirety and the arbitration clause is mandatory. *Boss*, *supra* note 13, at 685; see also Renken, *supra* note 157 (using the NASD as an example of mandatory arbitration).

<sup>172</sup> Grant, *supra* note 159.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *STAN. L. REV.* 1557 (2005) (researching arbitration versus traditional adjudication specifically in the employment context and pointing out the limitations of such studies).

<sup>176</sup> Grant, *supra* note 159 (“Efficiency - Arbitration can usually be heard sooner than it takes for court proceedings to be heard. As well, the arbitration hearing should be shorter in length, and the preparation work less demanding.”).

<sup>177</sup> *Id.* (“PRIVACY – Arbitration hearings are confidential, private meetings in which the media and members of the public are not able to attend. As well, final decisions are not published, nor are they directly accessible. This is particularly useful to the employer who does not want his ‘dirty laundry’ being aired.”).

<sup>178</sup> *Id.* (“Hearings are arranged at times and places to suit the parties, arbitrators and witnesses.”).

<sup>179</sup> *Id.* (“The procedures can be segmented, streamlined or simplified, according to the circumstances.”).

<sup>180</sup> *Id.* (“There is, in general, no right of appeal in arbitration. ( Although, the court has limited powers to set aside or remit an award).”).

<sup>181</sup> *Id.* This article grouped the “Choice of Decision Maker” as its own category. However, I believe it is better grouped under the “Flexibility” category and therefore is not listed as its own separate grouping. Further, the article does not list “cost savings” as an advantage to the arbitral process while I believe this is an important advantage. The article does point out, however,

hand, there are drawbacks to the use of arbitration over traditional adjudication and the proponents of adjudication believe these demonstrate reasons for the continued viability of courtroom dispute resolution.<sup>182</sup> A few of the more common drawbacks to arbitration usually mentioned are the lack of realistic cost savings,<sup>183</sup> a “splitting the baby”<sup>184</sup> effect in which complete relief is not granted to one party, but rather relief is split among the parties to give each what they sought, the absence of an appeals process from an arbitral award,<sup>185</sup> and the chilling and narcotic effects<sup>186</sup> that result from a preference in favor of arbitration.<sup>187</sup>

Evidence has been introduced and arguments made from both sides, based upon these points, advocating in favor and against arbitration as a viable alternative in dispute resolution.<sup>188</sup> Throughout the past thirty-six years, the Supreme Court tiptoed its way to its current position where a presumption in favor of arbitration is read into a statute unless Congress evinces a *clear* intent to over-

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under the cost category as a disadvantage that “supporters of arbitration argue that this should be more than compensated for by the potential for the increase in the efficiency of arbitration to reduce the other costs involved.” *Id.*

<sup>182</sup> See Sherwyn, Estreicher & Heise, *supra* note 175, at 1563 (providing arguments given by critics of mandatory arbitration); *but see id.* (Arguing in favor of arbitration based on their study); *see generally* Cherry, *Whistling*, *supra* note 9, at 1082-1086 (arguing that in the context of section 806 in the Sarbanes-Oxley Act and in employment disputes in general, arbitration is inadequate. Given that the current alternative to arbitration under section 806 is adjudication in court, the arguments imply that adjudication would be the better alternative.)

<sup>183</sup> Grant, *supra* note 159:

One or both of the parties will pay for the arbitrator’s services, while the court system provides an adjudicator who does not charge a fee. The fees for an arbitrator can be hefty. To give an example, for an amount of claims up to \$100,000, the minimum fee for a single arbitrator is \$2,000. The maximum fee can reach ten percent of the claim.

*Id.*

<sup>184</sup> *Id.*:

Thomas Crowley states that because of the relaxation of rules of evidence in arbitration, and the power of the arbitrator to ‘do equity’ (make decisions based on fairness), the arbitrator may render an award that, rather than granting complete relief to one side, splits the baby by giving each side part of what they requested. Thus both parties [sic] leave the table feeling that justice was not served.

*Id.*

<sup>185</sup> *Id.* (“Unless there is evidence of outright corruption or fraud, the award is binding and usually not appealable.”).

<sup>186</sup> *Id.* (arguing that these two effects are “inadequacies” of arbitration, that the “chilling [effect] occurs when neither party is willing to compromise during negotiations in anticipation of an arbitrated settlement” and the “narcotic effect refers to an increasing dependence of the parties on arbitration, resulting in a loss of ability to negotiate.”).

<sup>187</sup> *Id.*

<sup>188</sup> *See generally* Sherwyn, Estreicher & Heise, *supra* note 175.

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rule that presumption.<sup>189</sup> Parties in favor of traditional litigation, or those who attempt to defeat a motion to stay proceedings in favor of arbitration, advance numerous arguments claiming arbitration is an inadequate forum to resolve a dispute. However, the Court decisively stated in *Circuit City Stores*<sup>190</sup> that “[the Court] ha[s] been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.”<sup>191</sup> Nevertheless, it is illustrative and instructive to look at the arguments that were made and the reasons for their rejection.

Classic arguments against arbitration in the employment context are littered throughout the cases brought before the Supreme Court.<sup>192</sup> *Gilmer* lays out many arguments parties have made in opposing arbitration and the reasons for the Courts’ rejection of these arguments.<sup>193</sup> Each and every one of the plaintiff’s contentions that arbitration is an inadequate alternative to traditional adjudication were struck down by the *Gilmer* court.<sup>194</sup> While some of the contentions have merit, the Court made it clear that the presumption in favor of arbitration is not clearly displaced and arbitration does in fact have beneficial aspects.<sup>195</sup>

The *Gilmer* court only briefly addressed the claims regarding arbitrations’ inadequacies demonstrating the strong presumption favoring arbitration and their belief that the claimed deficiencies are misconceived.<sup>196</sup> The plaintiff attacked the procedures available to complainants in arbitration, arbitration’s ability to further public policy goals, the availability of remedies in arbitration, and using contractual arguments raised issues regarding unequal bargaining power.<sup>197</sup> For every contention, Justice Stevens responded with brevity demonstrative of his dismissive response to the lack-

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<sup>189</sup> See *Alexander*, *supra* note 17; *Gilmer*, *supra* note 18; *Circuit City*, *supra* note 24.

<sup>190</sup> *Circuit City*, *supra* note 24, at 123.

<sup>191</sup> *Id.* at 123 (citing *Gilmer*, 500 U.S. at 30-32).

<sup>192</sup> *Alexander*, *supra* note 17, at 57-58; *Gilmer*, *supra* note 18, at 27-35.

<sup>193</sup> *Gilmer*, *supra* note 18; see note 144 for a detailed layout of *Gilmer*’s contentions regarding the inadequacies of arbitration.

<sup>194</sup> *Gilmer*, *supra* note 18, at 27-35.

<sup>195</sup> *Id.*

Such generalized attacks on arbitration “rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,” and as such, they are “far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.”

*Id.* at 30 (citing *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 481 (1989)).

<sup>196</sup> *Gilmer*, *supra* note 18, at 30-34.

<sup>197</sup> *Id.* at 30-34.

luster contentions.<sup>198</sup> The Court embraced the simplicity, flexibility, economical and time saving aspects of arbitration in responding to the plaintiff, in addition to pointing out the protective procedures embodied in the arbitration clause itself.<sup>199</sup> While some of the responses can be rebutted when applied to section 806, the overall response is still applicable. The benefits or drawbacks to employees going to arbitration under the Sarbanes-Oxley whistleblower provision have not yet been gauged but there may be an issue regarding the compatibility of arbitration with the intended effect of the provision. The remainder of the Note will attempt to evaluate the possible effects.<sup>200</sup>

## V. ANALYSIS

The whistleblower provision of the Sarbanes-Oxley Act, studied against the backdrop of the Court's strong position in favor of arbitration and the benefits touted by the court and pro-arbitration advocates, provides a relatively certain fate for whistleblower claims brought in District Court. At least for the foreseeable future it appears whistleblower claims under the Sarbanes-Oxley Act will be sent to arbitration if the employer can point to an arbitration clause signed by the employee in an employment agreement, employee handbook or a securities registration form.<sup>201</sup> What remains to be seen is where the courts will establish the boundaries of the *Boss* precedent as it affects retaliation claims under the whistleblower provision.<sup>202</sup>

There are critics who oppose the use of arbitration in the employment context and, more specifically, as used in relation to the Sarbanes-Oxley Act's whistleblower protections.<sup>203</sup> Given the

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<sup>198</sup> *Id.* at 27-35. Each of *Gilmer's* contentions are followed by a brief finding of the court dismissing his complaints regarding the inadequacies of arbitration.

<sup>199</sup> *Id.* at 30-34.

<sup>200</sup> I do recognize that answering this issue will require some prophesizing given the early age of the statute and the haste within which it was passed.

<sup>201</sup> Morgan Lewis, *supra* note 22 (stating it is unclear what the criteria of the courts decision in *Boss* was based upon. Therefore, it remains to be seen how far or under what circumstances the court will go in sending parties to arbitration where there is an agreement in place.); Cherry, *Whistling*, *supra* note 9, at 1083 ("a realistic view is that these Sarbanes-Oxley whistleblower cases will be sent to arbitration, as was the case with *Boss*.").

<sup>202</sup> Morgan Lewis, *supra* note 22.

<sup>203</sup> Cherry, *Whistling*, *supra* note 9, at 1070:

After an examination of the Act's weaknesses, this Article concludes that Sarbanes-Oxley should have provided more protection for whistleblowers. First, the Act lacks

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haste with which the statute was created and passed, it is easy to see where critics find fertile ground for their positions.<sup>204</sup> Critics have pointed to the unequal bargaining power and the supposed inherent tendency for arbitration to favor employers as reasons why mandatory arbitration is a weakness of section 806.<sup>205</sup>

Employment agreements are “take it or leave it”<sup>206</sup> contracts where the employee has little or no bargaining power. They are frequently contracts of adhesion in which the employer dictates the terms and the future relationship between the parties.<sup>207</sup> Further, when the employee accepts employment and signs an agreement, it is usually not apparent to the employee the extent to which he may be giving up rights in the future.<sup>208</sup> Employers’ control over this process results in their control over the choice of arbitrator and other details of the arbitral process.<sup>209</sup> The resulting argument by employees is that this system favors the employers.<sup>210</sup> Therefore,

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procedures for responding to a whistleblower’s report. Second, a whistleblowing case can apparently be sent to arbitration, a forum that this Article argues weakens the rights of employees.

*Id.*

<sup>204</sup> *Id.* (referring to the act as “a product of political compromise”).

<sup>205</sup> *Id.* at 1079-1083.

<sup>206</sup> See Miriam A. Cherry, *A Negotiation Analysis Of Mandatory Arbitration Contracts*, 4 HARV. NEGOT. L. REV. 269, 277-8 (1999) [hereinafter Cherry, *Mandatory Arbitration Contracts*]:

Following this analysis, it becomes clear that the process surrounding the contract formation in Rosenberg was the equivalent of a “take it or leave it” negotiating offer. After all, the contract was presented as a condition of employment. In most situations similar to the one occurring in Rosenberg, if an employee refused to sign the contract, or requested that the portion of the contract containing the arbitration clause be excised from the contract, the securities firm would simply fire, or refuse to hire, the employee. The way that the arbitration contract was presented to Rosenberg—typical of many companies instituting mandatory arbitration policies—could be considered unclear, vague, and does not allow the employee the opportunity to make, or bargain for, a meaningful choice.

*Id.*; Miriam A. Cherry, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis To Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN’S L.J. 269, 279 (1998) (“At the time of contracting, an employee is relatively powerless to negotiate the terms of employment, especially in regard to these arbitration clauses.”)[hereinafter Cherry, *Not-So-Arbitrary*].

<sup>207</sup> Cherry, *Whistling*, *supra* note 9, at 1083 (“[mandatory arbitration] is a one-sided provision foisted upon employees through a contract of adhesion.”).

<sup>208</sup> Not only do many employees not know or even understand many of the contract provisions, but those who do may prefer alternative provisions or even to wait until later to determine the issues should when and if they arise. See Cherry, *Mandatory Arbitration Contracts*, *supra* note 206, at 278.

<sup>209</sup> Cherry, *Not-So-Arbitrary Arbitration*, *supra* note 206, at 279 (“Even if an employee is made fully aware of the differences between arbitration and a trial by jury of her peers, it is unlikely that she would be able to negotiate different terms.”).

<sup>210</sup> Cherry, *Whistling*, *supra* note 9, at 1082 (“[A]rbitration of employment disputes should be taken with a healthy dose of skepticism, as arbitration in general tends to favor the employer.”).

the supposed Congressional intent to provide employees with judicial forums for their complaints and remedies results in the employee without much of either.<sup>211</sup>

Although arbitration clauses are generally required when employment begins, it does not necessarily follow that arbitration works against the employee.<sup>212</sup> Nor will mandatory arbitration favor employers in every case. In fact, the Supreme Court's position in *Gilmer* clearly shows that these types of generalized contentions against arbitration do not contain significant merit.<sup>213</sup>

In debating the merits of mandatory arbitration versus adjudication under section 806, one must first determine if Congress intended to override the presumption in favor of arbitration. Outlined previously under the analysis of the *Boss* and *Gilmer* cases, the presumption will only be overridden when Congress demonstrates its intent to do so in the text of the statute, its legislative history or if there is a conflict between the statutes underlying purposes and arbitration.<sup>214</sup> Neither the text of section 806 nor its legislative history lends any support to a conclusion that arbitration was precluded by Congress.<sup>215</sup> The analysis then proceeds to any conflicts between arbitration and the statute's purposes, which more than supporting either side, is pertinent to the conclusion of this Note that arbitration does not in fact conflict with the statutes

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<sup>211</sup> Cherry, *Not-So-Arbitrary Arbitration*, *supra* note 206, at 280:

An employment discrimination plaintiff wishing to bring a case under an established theory of discrimination might find herself without a remedy if she were in front of an arbitrator. In fact, arbitrators are not bound to follow the law or even be cognizant of it; nor do they necessarily have to issue written opinions explaining the basis for their decisions. Furthermore, arbitration awards are subject to extremely limited judicial review; if the arbitrator has misapplied the law, the losing party is most likely out of luck.

*Id.*; Cherry, *Whistling*, *supra* note 9, n. 377 (Another argument is that given that arbitration has less protections for the employee the settlement value of the employee's case is certainly decreased.).

<sup>212</sup> *But see* Cherry, *Whistling*, *supra* note 9, at 1083

[I]f the alternative dispute resolution (ADR) movement values fair process and a mutual meeting of the minds to bargain for a fair solution to underlying goals, then the values of the movement are not consonant with mandatory arbitration. That is because mandatory arbitration is not the result of the parties determining that ADR is the best way to resolve a dispute; rather, it is a one-sided provision foisted upon employees through a contract of adhesion.

*Id.*

<sup>213</sup> *Gilmer*, *supra* note 18, at 30.

<sup>214</sup> *Id.* at 26.

<sup>215</sup> 18 U.S.C. § 1514A (2002). For a listing of all Senate and House debates and hearings regarding the Sarbanes-Oxley Act, see 2 CIS PL 107204 on LexisNexis.

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purposes and is therefore a satisfactory ADR technique to traditional adjudication.

While it is true that employees have little or no opportunity to assert their preferences regarding the arbitration provisions of the employment contract and securities registration applications, the flexibility, time savings, and cost savings to the employee more than compensate for their lack of initial bargaining power. The recent corporate scandals that surfaced due to internal whistleblowers demonstrate the enormous life that fraud takes on in the press and in the public eye. Given the massive public scrutiny, any trial will likely cost the employee large sums in legal fees and time. Arbitration, on the other hand, provides the employee claiming retaliation with a private, streamlined process to resolve the dispute. Whether satisfied with the findings of the arbitrator or not, the result for the employee will be a smoother, less costly, and less time consuming battle.

Congress must have had the whistleblowers best interests in mind when it inserted section 806 into the statute. The whistleblower provision is neither a mirror image of previous whistleblower statutes nor a mixture of previous attempts at protection. The provision combines civil and criminal penalties with a standard less than actual knowledge of wrongdoing to provide an employee greater protections. Clearly, the purpose of the statute was greater protections for those who whistleblow on corporate and securities frauds. If Congress felt that arbitration could not provide these protections to employees then why did they not include language overriding the precedents favoring mandatory arbitration clauses? In fact, the legislative history demonstrates that language was originally part of the provision but was removed during committee hearings.<sup>216</sup>

Without claiming that Congress' purpose in enacting section 806 was not to provide greater protections for whistleblowers, it cannot be argued that mandatory arbitration conflicts with the underlying purposes of the provision. It must be presumed that Congress understood that without expressing a clear intent to preclude arbitration the *Boss* result would come to fruition. Therefore, unless Congress revises the statute, arbitration should continue to be dealt with as satisfying the purposes of section 806.

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<sup>216</sup> Cherry, *Whistling*, *supra* note 9, at 1080 ("Earlier drafts of the Act included a provision within the whistleblowing section that banned mandatory arbitration. However, those portions of the bill were excised in committee. . . Nevertheless, the committee did eliminate the provision, which does not bode well for a plaintiff arguing for his or her day in court.").

In fact, the lower courts previously had opportunities to rule on these very issues with regard to other statutes that contemplate litigation claims by whistleblowers. At issue in *Oldroyd v. Elmira Savings Bank*<sup>217</sup> was the whistleblower protection provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) in which Congress provided for litigation of retaliation claims.<sup>218</sup> Here, as in section 806, there is language included in the whistleblower statute speaking to litigation of claims under the provision. Specifically, subsection (b) provides that an employee claiming a violation of the FIRREA “may file a civil action in the appropriate United States district court.”<sup>219</sup> The Second Circuit held Congressional intent to preclude arbitration is not demonstrated simply by the inclusion of avenues for litigation of retaliation claims.<sup>220</sup>

This was in line with the position taken in *Bird v. Shearson Lehman/American Express*.<sup>221</sup> The Second Circuit held that, although the provision in the Employee Retirement Income Security Act (ERISA)<sup>222</sup> provided a judicial forum for litigation of claims, it did not automatically follow that Congress intended to preclude other forums.<sup>223</sup> Similarly, the Eighth Circuit took this position in *Sulit v. Dean Witter Reynolds*.<sup>224</sup> Although *Gilmer* went to the Supreme Court, this case is an example of a statute held not to preclude arbitration of claims arising under it despite the present of jurisdictional language regarding litigation. Prior to reaching the Supreme Court, the Fourth Circuit held *Gilmer*’s claim, that the statute contemplated judicial litigation therefore precluding arbitration, to be untenable.<sup>225</sup> The Fourth Circuit stated that any provision for judicial intervention does not necessarily indicate and

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<sup>217</sup> *Oldroyd*, *supra* note 19.

<sup>218</sup> 12 U.S.C.S. § 1831j(b) (1989).

<sup>219</sup> *Id.*

<sup>220</sup> *Oldroyd*, *supra* note 19, at 78 (“The fact that portions of the statute contemplate litigation of § 1831j claims does not demonstrate congressional intent to preclude arbitration of such claims.”).

<sup>221</sup> *Bird v. Shearson Lehman/American Express*, 926 F.2d 116 (2d 1991) (discussing jurisdictional language in the statute in relation to the arbitration of claims under that statute; illuminates the Second Circuit’s position regarding this issue).

<sup>222</sup> See 29 USCS § 1132(e) (1988).

<sup>223</sup> *Bird*, *supra* note 22, at 120 (“[T]he fact that Congress provided for exclusive federal jurisdiction of claims brought to enforce ERISA’s substantive provisions. . . speaks only to which judicial forum is available, not to whether an arbitral forum is available.”).

<sup>224</sup> 847 F.2d 475, 479 (8th Cir. 1988).

<sup>225</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990).

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intent to preclude arbitration.<sup>226</sup> Therefore, despite Sarbanes-Oxley's contemplation of judicial litigation of retaliation claims, it appears that the lower courts are firm in their position that this alone does not demonstrate Congressional intent to preclude arbitration of retaliation claims. This is yet another factor in this papers position that future cases brought by employees under section 806 will be stayed in favor of mandatory arbitration provisions.

## VI. CONCLUSION

Arbitration, for all its faults, is an effective tool in the adjudication of retaliation claims in the context of our judicial system and culture. If our goal in corporate America is increased disclosure and honesty with the shareholders and the investment public, then whistleblower protections are necessary to accomplish these goals. Arbitration neither conflicts with the purposes of the Section 806 nor does it impede its effectiveness. Congress did not include language overriding the presumption in favor of arbitration even though they had the opportunity to do so. Arbitration can accomplish the goals of section 806 while providing employees with a less public forum in which to air their grievances. In fact, it will likely be a welcome relief to those employees that have been engulfed in media attention following the whistleblowing of corporate fraud.

Protecting whistleblowers is the aim of the Sarbanes-Oxley whistleblower provision and in the coming years we will see just how deep this protection extends. For now, it appears that the courts and Congress believe mandatory arbitration will provide the same, if not greater, protection as traditional adjudication. To come forward and report illegal activity takes great courage and we should do all we can to not only encourage it, but to help those who, in the end, are really helping us.

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<sup>226</sup> *Id.* at 199 (“Congress’ choice of an enforcement scheme in which ADEA suits are brought in a judicial forum simply does not manifest an intention to prevent parties from reaching a private contractual agreement to submit their disputes to arbitration.”).