NOTE

HOLD THE WHISTLE, START TRAINING: CIRCUMVENTING DISTORTION OF SARBANES-OXLEY WHISTLEBLOWER PROTECTIONS THROUGH COMMON-SENSE EMPLOYEE EDUCATION

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Section 806 of the Sarbanes-Oxley Act protects employees of publicly traded companies from retaliation by their employers for reporting conduct that they reasonably believe constitutes shareholder fraud or a violation of U.S. securities law. This protection empowers employees with knowledge of past, ongoing, or likely future fraud to "blow the whistle" by sharing that information with regulators, legislators, or supervisors without fear of reprisal. Like other sections of the Sarbanes-Oxley Act, the ultimate goal is to discourage, identify, and terminate fraud in public companies, thereby avoiding or mitigating harm to their respective shareholders.

Early interpretations of Section 806 by the Department of Labor's Administrative Review Board (ARB) fairly balanced the interests of the public, employers, and employees. With the ARB's guidance, courts protected whistleblowers whose reports demonstrated an objectively reasonable belief of an existing or imminent violation of securities law. However, an abrupt reversal by the ARB following a partisan presidential transition has tempted some courts to stretch the meaning of protected reporting activity beyond the intent of Section 806. Specifically, the Third and Sixth Circuits have found that an employee may be protected even if the allegations in her report fail to approximate elements of shareholder fraud

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or a violation of securities law. These expansions virtually eliminate the Section's reasonable belief requirement, rewarding reckless, premature complaints and threatening to drown out reporting activity that promotes the Act's policy goals. To avert judicial overreach in the scope of protected activity, this Note suggests that regulators develop a model policy, procedures, and training for key employees at large public companies to properly identify and report potential fraud. Such programs already complement other workplace laws and would promote the goals of Section 806 without unduly burdening employers or the public with inadequate and wasteful reporting activity.

INTRODUCTION

Christian Nielsen was employed as a Fire Engineering Manager by AECOM Technology Corporation (AECOM), a publicly traded company.[1] His responsibilities included ensuring that his subordinates' engineering plans met applicable fire-safety standards in their respective jurisdictions.[2] On March 1, 2011, Nielsen reprimanded an employee under his supervision for approving fire safety designs without properly reviewing them.[3] According to Mr. Nielsen, the employee had blindly approved more than twenty safety designs.[4] A few weeks later, Mr. Nielsen shared his concerns with the company's regional director, and with a regional vice-president days after that.[5] Both allegedly agreed that Mr. Nielsen's concerns were valid but took no action to correct the employee, who continued approving unreviewed safety designs.[6] In June, Mr. Nielsen informed his supervisors that he could no longer work at AECOM unless the issue with his supervisee was definitively resolved.[7] On June 23, 2011, AECOM allegedly fired Mr. Nielsen because he was no longer "suitable for the job."[8] After appeals to company executives and compliance staff proved fruitless, Mr. Nielsen filed a complaint with the Department of Labor alleging that he was terminated and denied reinstatement because of his complaints about, and opposition to, AECOM's "fraudulent" business practices, in violation of Section 806 of the Sarbanes-Oxley Act of 2002.[9]

At first glance, AECOM's decision to terminate Mr. Nielsen appears patently unjustifiable. Mr. Nielsen dutifully carried out his responsibilities by reviewing his subordinate's work. He flagged a concerning behavior and alerted his supervisors to a potential risk. As a matter of fact, AECOM probably should have rewarded Mr. Nielsen and corrected or terminated the subordinate employee to protect its customers and preserve its reputation. However, determining whether AECOM's decision was wise or imprudent would require a far more comprehensive

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1 Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 216 (2d Cir. 2014).

2 *Id.* at 217.

3 Complaint ¶ 20, *Nielsen*, 762 F.3d 214 (No. 12-CV-5163).

4 *See id.* ¶ 18.

5 *Id.* ¶¶ 21–23.

6 *Id.* ¶¶ 22–24.

7 *Nielsen*, 762 F.3d at 217.

8 Complaint, *supra* note 3, ¶¶ 30, 41.

9 *See Nielsen*, 762 F.3d at 217–18.

investigation of the facts. What if Mr. Nielsen was a habitual *kvetch*[10] who noisily and unfairly complained about the quality of his subordinate's work? What if he was a poor leader who damaged his subordinate's productivity or morale? What if, instead of reporting to upper-level management, Mr. Nielsen had violated AECOM's expectations of loyalty and confidentiality by going straight to external authorities?

Nielsen v. AECOM Technology Corp. illustrates the tension between at-will employment and statutory protections for whistleblowers. Employment law does not prohibit all unfair or imprudent personnel decisions—just those that violate specific legal protections. In general,[11] employment relationships in the United States are "at-will" by default, meaning they can be terminated "for a good reason, a bad reason, or no reason at all."[12] This Note briefly sketches arguments supporting and opposing the at-will default to illustrate the policy goals of anti-retaliation statutes, without taking a position on the rule. Federal anti-discrimination and anti-retaliation provisions are essentially congressional determinations that a specific policy concern justifies a limited, legislative exception to the at-will default.[13] Accordingly, such provisions should be interpreted and applied in a manner consistent with the policy concerns from which they originate. Otherwise, the exceptions become nothing more than an end-run around the at-will default.[14]

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10 For the uninitiated, *kvetch* is a Yiddish word for one who complains often. *Kvetch*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/kvetcher [https://perma.cc/2MD4-5V5N].

11 Employment at-will is the default rule for termination in forty-nine states. Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 100 (2022). Uniquely, Montana prohibits termination of a post-probationary employee without "good cause," defined as reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, material or repeated violation of an express provision of the employer's written policies, or other legitimate business reasons. Kathleen C. McGowan, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN'S L. REV. 141, 172 & n.190 (1998); MONT. CODE ANN. § 39-2-903(5) (2025).

12 Racabi, *supra* note 11, at 100.

13 *See* Michael A. Katz, *Still Crazy After All These Years: The Employment At-Will Doctrine and Public Policy Exceptions*, 10 ATL. L.J. 1, 4–5 (2007).

14 *See* Joseph E. Slater, *The "American Rule" That Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 96–100 (2007). Slater notes that today the at-will rule is "weakened and unclear" and acknowledges that some scholars believe it is already "riddled with so many exceptions that it cannot be relied upon" by employers or employees. *Id.* at 96–97 (quoting William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 261 (2002)).

Section 806 of the Sarbanes-Oxley Act is one such legislative exception. Section 806 shields employees of publicly traded companies from retaliation by their employers for reporting conduct that they reasonably believe constitutes shareholder fraud or a violation of U.S. securities law.[15] Like other provisions of the Act, Section 806 aims to deter fraud and mitigate harm to shareholders by facilitating early detection of and intervention in corporate misconduct.[16] Specifically, it empowers employees to "blow the whistle" by reporting suspected fraud to regulators, legislators, or supervisors without fear of reprisal.[17] Section 806 was part of Congress's swift response to the high-profile corporate scandals of the early 2000s.[18] These events exposed an urgent need for greater transparency and oversight in public companies to protect shareholders, employees, and the public from price manipulation, exploitation, and fraud. That concern is no less pressing today.[19]

Unfortunately, an abrupt, partisan about-face by the Department of Labor's Administrative Review Board (ARB) has led some courts to distort the limited exception to at-will provided by Section 806. Following the ARB's lead, these courts have stretched the meaning of protected activity to cover employees whose complaints provide woefully inadequate information or demonstrate no objectively reasonable suspicion that shareholder fraud has occurred. For example, a district court recently held that an employee who complained about his employer's exaggerated claims regarding the technological capabilities of its software could enjoy the protection of Section 806.[20] Another district court held that an employee who reported her coworkers for creating new accounting codes to record prizes given to a subordinate employee was engaged in protected activity under the Act.[21] While such reporting ultimately may be desirable, courts overreach by protecting those employees under the

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15 *See* 18 U.S.C. § 1514A.

16 *See* Allen K. Barrett, Note, *The Continuing Legacy of Enron: Whistleblowing under the Sarbanes-Oxley Act after* Lawson v. FMR LLC, 21 SUFFOLK J. TRIAL & APP. ADVOC. 109, 114–15 (2016).

17 *See id.* at 127–28.

18 *Id.* at 109.

19 *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges the Kraft Heinz Company and Two Former Executives for Engaging in Years-Long Accounting Scheme (Sep. 3, 2021), https://www.sec.gov/newsroom/press-releases/2021-174 [https://perma.cc/C5BE-UWPP].

20 Wirth v. Salesforce, Inc., 749 F. Supp. 3d 231, 241 (D. Mass. 2024).

21 *See* Kuba v. Disney Fin. Servs., LLC, 623 F. Supp. 3d 1290, 1298–99, 1303 (M.D. Fla. 2022).

Sarbanes-Oxley Act. Construing the scope of protected activity too narrowly would stifle useful reports and complaints supported by adequate information. Yet, an overbroad interpretation of protected activity under Section 806 unfairly burdens law-abiding employers and can even thwart the Act's underlying policy goals.

Rather than waiting for courts to continue expanding the scope of protected activity beyond its intended limits, a proactive regulatory approach is needed. This Note suggests that regulators develop a model policy and training program to better educate employees at public companies on how to properly identify and report potential fraud while understanding their rights under Section 806. There is precedent for such model programs under other federal and state employment statutes, and better training should lead to higher-quality, more targeted reporting. This solution would also help obviate the perceived need for overinclusive judicial interpretations of Section 806, which have sheltered wasteful reporting behavior. Thus, a well-crafted model policy and training program would further the Act's policy goals without unduly interfering with managerial discretion or burdening courts and the public with premature complaints.

I
At-Will Employment and Anti-Retaliation Policy Goals

A. Employment Relationships in the United States Are Presumed At-Will

Employment at-will has been the default, "inflexible" rule of indefinite private-sector employment relationships in the United States for more than a century.[22] Scholars vigorously debate the origins[23] and wisdom of the at-will presumption, but

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22 *See* Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 Ariz. St. L.J. 551, 551–52, 558 (1990); Racabi, *supra* note 11, at 100.

23 Horace G. Wood is widely credited as the first to identify at-will as the default rule of employment in the United States in his 1877 treatise *The Law of Master and Servant*. *See* Freed & Polsby, *supra* note 22, at 551–52, 552 n.2. Few dispute that the rule's dominance solidified following the publication of Wood's treatise. *See id.* at 558. However, scholars fiercely contest whether Wood accurately described the rule's prevalence at the time of his writing. *Contrast* Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 Mo. L. Rev. 679, 681 (1994) (asserting that the at-will rule was adopted by several states and included in at least one federal law before Wood published his treatise), *and* Freed & Polsby, *supra* note 22, at 554–56 (arguing that the at-will rule was generally accepted and supported by case law before

its dominance today is not seriously contested.[24] Some critics argue that the rule is unfair because it exposes workers to their employers' whims without adequate process.[25] Others hold that the rule is economically inefficient because it allows employers to terminate employees for petty, personal reasons that are unrelated to the employee's productive capacities.[26]

Proponents of employment at-will counter on economic and policy grounds. They posit that an at-will default promotes mobility for employees and flexibility for employers, who must adjust to shifting economic conditions.[27] They argue that employees are protected from arbitrary discharge because employers are economically self-interested and bound, to some extent, by social norms.[28] One policy-based justification is that the rule's simplicity creates certainty and makes it easy to administer.[29] A doctrinal explanation is that a business is its owner's property, so employment decisions are entirely within the owner's discretion except where restricted by law.[30] From this perspective, the right to terminate employment at-will is simply an extension of the owner's right to exclude others.[31] The scholarly discourse on employment at-will is voluminous and fascinating, but regrettably beyond the scope of this Note. It is sufficient to say that at-will employment is supported by some legitimate economic and policy rationales and is presently the default rule in the United States.

Even proponents of the at-will default acknowledge that it provides only a rebuttable presumption of the parties' intent,

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Wood's articulation), *with* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976) (opining that Wood's restatement of the at-will rule was made "in the absence of valid legal support" and lacked his typical "comprehensiveness and concern for detail").

24 *See, e.g.*, Racabi, *supra* note 11, at 100; RESTATEMENT OF EMP. L. § 2.01 (A.L.I. 2015).

25 *See* Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 506, 520 (1976); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORN. L. REV. 105, 107–08 (1997).

26 *See* Peter Stone Partee, *Reversing the Presumption of Employment at Will*, 44 VAND. L. REV. 689, 704–05 (1991).

27 *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 982 (1984).

28 *See id.* at 967–68.

29 Morriss, *supra* note 23, at 682–83.

30 *See* Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305, 306–07 (1994); *see also* Gali Racabi, *At Will as Taking*, 133 YALE L.J. 2257, 2277 (2024).

31 *See* Estlund, *supra* note 30, at 312.

and that it is subject to exceptions.[32] For example, an employer and an employee could manifest a clear intention that their relationship not be terminable at-will.[33] Employees covered by a collective bargaining agreement are almost always contractually protected against arbitrary termination through a "just cause" requirement for discipline or termination.[34] Government employees are often covered by civil service rules that protect them from arbitrary discharge and benefit from constitutional limitations on government takings.[35] Some jurisdictions recognize tort claims for "wrongful discharge in violation of public policy," which can provide an employee with some measure of damages if the circumstances of their discharge jeopardize a state's public policy.[36]

However, the most well-known exceptions to employment at-will are codified in federal and state law.[37] For example, Title VII of the Civil Rights Act of 1964,[38] the Americans with

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32 *See* Restatement of Emp. L. § 2.01 (A.L.I. 2015); Kyle Black, *The Three Main Exceptions to the At-Will Employment Presumption*, Laws. J., Aug. 19, 2016, at 13; Scott v. Extracorporeal, Inc., 545 A.2d 334, 336 (Pa. Super. Ct. 1988); Hunt v. Banner Health Sys., 720 N.W.2d 49, 51–52 (N.D. 2006); Am. Lantern Co. v. Hamilton, No. 04-95-00517-CV, 1997 WL 667167, at *2 (Tex. App. Oct. 22, 1997); La Duke v. Hepburn Med. Ctr., 657 N.Y.S.2d 810, 812 (App. Div. 1997); McCrone v. Acme Mkts., 561 F. App'x 169, 172 (3d Cir. 2014).

33 *See, e.g.*, Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1264–66 (N.J. 1985), *modified*, 499 A.2d 515 (N.J.) (finding that a personnel policy manual that detailed employment termination procedures and stated that the company's would retain the services of effective employees protected the plaintiff-employee from arbitrary discharge). However, it is exceptionally difficult to prove that an employer has made an implied promise that employment is not at-will. *See, e.g.*, Skagerberg v. Blandin Paper Co., 266 N.W. 872, 876–77 (Minn. 1936) (finding that defendant's offer of a "permanent" job did not overcome the at-will presumption even where plaintiff had turned down another attractive job offer, agreed to purchase the employer's house, and was required to abandon his own lucrative business).

34 Mario F. Bognanno et al., *The Conventional Wisdom of Discharge Arbitration Outcomes and Remedies: Fact or Fiction*, 16 Cardozo J. Conflict Resol. 153, 154 (2014). Arbitrators have found that the requirement of just cause exists in the union context even if a collective bargaining agreement does not contain an explicit just cause provision. *Id.* at 154 n.2.

35 Slater, *supra* note 14, at 83.

36 *Id.* at 96–99. However, states that recognize this tort have defined public policy narrowly, "such that only a 'handful of employees'" can use it. *Id.* at 98 (quoting Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 Am. U. L. Rev. 849, 868 (1994)). *See generally* Richard J. Kohlman, *Wrongful Discharge of At-Will Employee*, 31 Am. Jur. Trials 317 (1984).

37 *See* Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 Ind. L.J. 1069, 1089–97 (2014).

38 42 U.S.C. § 2000e-2(a)(1).

Disabilities Act,[39] and the Family and Medical Leave Act[40] all contain provisions that prohibit employers from making adverse employment decisions against their employees under circumstances deemed unlawful by statute. These laws provide employees with a private right of action when an employer violates the law.

B. Anti-Retaliation Provisions Limit Employment At-Will and Must Serve the Law's Underlying Policy Goal

Statutory restrictions on employment at-will recognize a delicate balance between three stakeholders in every employment relationship: employees, employers, and the public.[41] They are driven by substantial policy goals that theoretically benefit all parties.[42] However, the "inflexible" default of at-will employment demands that, unless expressly limited by statute or other law, an employer retains the power to hire or fire employees at their pleasure. For example, Title VII prohibits an employer from discriminating against an employee on the basis of a protected characteristic, such as race, enumerated by the statute.[43] So, if an employer disliked Asian people, he could not legally refuse to hire a qualified Asian applicant to avoid working with her.[44] On the other hand, the employer could refuse to hire the applicant on any other grounds permitted by law.[45] One of the major policy goals that pushed Congress to pass Title VII was remedying the systemic disenfranchisement and exclusion of minority groups from employment opportunities.[46] Accordingly, that law prohibits employer behavior that directly contributes to the harm it seeks to address but otherwise leaves the employer's discretion to hire and fire at-will intact.

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39 *Id.* § 12112(a).

40 29 U.S.C. § 2615(a)(1).

41 *See* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1193–97 (2011).

42 *See id.*

43 42 U.S.C. § 2000e-2(a)(1).

44 *See, e.g.*, Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 153 (2d Cir. 2012).

45 Of course, an employer cannot invent a reason to serve as a pretext for discrimination. *See, e.g.*, Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000). Furthermore, the employer may not make adverse employment decisions motivated by illegitimate purposes, even if they are also motivated by legitimate purposes. 42 U.S.C. § 2000e-2(m).

46 Rachel A. Spector, *"Dignified Jobs at Decent Wages": Reviving an Economic Equity Model of Employment Discrimination Law*, 36 BERKELEY J. EMP. & LAB. L. 123, 127–38 (2015).

1. *The Public's Interest in Anti-Retaliation Provisions*

Anti-retaliation provisions play an important role in safeguarding employee rights created by statutory exceptions to employment at-will. Generally, anti-retaliation provisions prohibit an employer from making adverse employment decisions against an employee because they have exercised or acted to protect some statutory right.[47] For example, Title VII prohibits employers from discriminating against an employee or applicant for opposing any practice forbidden by the law or participating in any proceeding pursuant to the law.[48] If an employer fired an employee for filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), the employee would have an independent claim against the employer for retaliation even if the underlying discrimination claim is dismissed.[49]

Anti-retaliation provisions reflect a legislative judgment that society benefits by encouraging employees to identify, report, and pursue violations of certain laws, even at the expense of entrepreneurial control and freedom of contract.[50] In many situations, it would be inefficient and prohibitively expensive for the government to constantly monitor businesses for compliance.[51] When a law contains an anti-retaliation provision, it aligns the employee's interests, which include fulfillment and job security, with the law's underlying policy goals.[52] When employees report their suspicions with specific, reliable detail, they reduce government monitoring costs and enable the government to better identify and prosecute likely violations. Thus, anti-retaliation provisions promote a law's underlying policy goals by protecting employees who report valuable information about their employer's (non-)compliance.[53]

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47 *See*, for example, 29 U.S.C. § 2615(b), which prohibits discrimination against an individual for engaging with a proceeding related to the Family and Medical Leave Act.

48 42 U.S.C. § 2000e-3(a).

49 *See, e.g.*, Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1176, 1184 (2d Cir. 1996) (affirming lower court's denial of defendant-employer's motion for judgment as a matter of law against plaintiff-employee's retaliation claim, where employee had voluntary withdrawn her underlying hostile work environment claims).

50 *See* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RSRV. L. REV. 375, 381–82 (2010).

51 Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525, 571–72 (2011).

52 *See generally* Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 276–81 (2009).

53 *See* Long, *supra* note 51, at 572.

When a court interprets the scope of protected activity under anti-retaliation provisions, the relevant law's underlying policy goal should feature prominently in its analysis.[54] Employee reports that contain inadequate information are wasteful because they do not tend to reveal, prevent, or terminate prohibited conduct. Wasteful reports also burden the government because they can spur costly investigations, prosecutions, or adjudications that are likely to be fruitless.[55] Wasteful reports also create noise that diverts resources and attention away from useful reporting activity.[56] Accordingly, when a law contains an anti-retaliation provision, courts promote the law's underlying goal by excluding wasteful reports from the scope of its protection.

2. *Employers' Interests in Anti-Retaliation Provisions*

Courts interpreting the scope of protected activity under an anti-retaliation provision must also consider the costs and benefits of such decisions on employers. If employees believe that anti-retaliation provisions will protect their reporting activities, they will be more likely to report suspected violations.[57] Employers generally encourage employees to report suspected misconduct to a supervisor, human resources function, or compliance team.[58] Employers benefit by identifying

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54 *See, e.g.*, Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 12 (2011) (noting that the FLSA's "antiretaliation provision makes [the law's] enforcement scheme effective by preventing 'fear of economic retaliation' from inducing workers 'quietly to accept substandard conditions'" (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960))); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62–63 (2006) (explaining that Title VII's anti-retaliation provision seeks to secure the Act's "primary objective" by deterring employer interference with efforts to "advance enforcement of the Act's basic guarantees"); Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 220–21 (N.J. 2010) (beginning analysis of anti-discrimination law's anti-retaliation provision by recognizing the law's "essential purpose" which is "the 'eradication "of the cancer of discrimination"'" (quoting Fuchilla v. Layman, 537 A.D.2d 652, 660 (N.J. 1988))).

55 *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 358 (2013) (noting that proper interpretation and implementation of Title VII's retaliation provision is particularly important because the filing of frivolous claims siphons resources from efforts by employers, agencies, and the courts to combat workplace harassment). *But see* Daiquiri J. Steele, *Rationing Retaliation Claims*, 13 U.C. IRVINE L. REV. 993, 1001–05 (2023) (arguing that courts using "floodgates" arguments to justify restrictive interpretations of anti-retaliation provisions ultimately dilute enforcement of the underlying law).

56 *See Nassar*, 570 U.S. at 358.

57 Empirical data suggests that employees tend to overestimate statutory job protections. *See* Kim, *supra* note 25, at 133.

58 *See* Carlson, *supra* note 52, at 297–98.

and resolving misconduct before it creates serious legal liability or damages the firm's reputation. Employers might also encourage employees to speak up to avoid perceptions of a toxic work environment or reduce turnover due to perceived hostility.[59]

However, anti-retaliation provisions also create costs for employers, especially when they protect wasteful reporting activity. Like any other exception to the default rule of at-will employment, anti-retaliation provisions implicate the employer's power to control and manage the workforce. Anti-retaliation provisions can discourage employers from making lawful management decisions. For example, a manager facing budget cuts might avoid laying off an underperforming employee who recently testified in a discrimination suit, fearing a potential retaliation claim. As a result, the manager could feel forced to terminate a higher-performing employee instead. If an underperforming employee becomes aware of impending layoffs, they might even preemptively file a complaint to shield themselves from termination.[60]

Furthermore, when anti-retaliation provisions are interpreted to cover activity beyond the scope of the law's policy goals, employees are effectively invited to challenge legitimate business decisions that should be within the employer's discretion.[61] Firms are not small democracies, and accepting input from every employee in the organization can needlessly impede decision-making.[62] If employees feel entitled to report coworkers and managers without adequate information, a cautious employer may feel compelled to waste resources investigating meritless reports and complaints.[63] Additionally, an employee's report may cause significant reputational harm to the employer. That reputational harm may ultimately be deserved, but an employee should not be protected if he makes damaging

59 *See* Leora Eisenstadt & Deanna Geddes, *Suppressed Anger, Retaliation Doctrine, and Workplace Culture*, 20 U. Pa. J. Bus. L. 147, 150, 183 (2017).

60 *See* Carlson, *supra* note 52, at 298.

61 *See id.* at 286–87.

62 *See id.* at 286–87, 297–300.

63 A study by the Government Accountability Office found that in 2007 only about 21% of purported whistleblower complaints filed with the Department of Labor were determined to have merit. U.S. Gov't Accountability Off., GAO-09-106, Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency 4, 24 (2009) [hereinafter GAO Report on Whistleblowers], https://www.gao.gov/new.items/d09106.pdf [https://perma.cc/3MH2-DADG].

accusations against his employer without a sufficient basis for doing so.[64]

3. *Employees' Interests in Anti-Retaliation Provisions*

The benefits of an anti-retaliation provision for employees are readily apparent, but there is value in articulating them precisely. Employees may report suspected workplace misconduct for several reasons.[65] For some, it is a job responsibility. Many employers tell employees that they must report suspected misconduct, and some even punish employees for failing to do so.[66] Employees may choose to report because they are concerned about their work environment, or because they want to protect the enterprise from liability. Employees may also report to act in accordance with their values. Whatever the reason, anti-retaliation provisions empower employees to report suspected misconduct without risking their employment and livelihood.

However, employees may also report coworkers or managers for unsavory reasons, even without a genuine suspicion of prohibited conduct. An employee may complain because they personally dislike a colleague or a quality of their work. An employee's report can be made in retaliation against another for some interpersonal slight. An employee can even exploit a firm's complaint process to protect their job security.[67] Meritless reports are commonplace under whistleblower protection provisions like Section 806 of the Sarbanes-Oxley Act,[68] and an especially frequent problem with white-collar "bounty" programs under the False Claims Act[69] and Dodd-Frank Act.[70]

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64 *See* Christopher Wiener, *Blowing the Whistle on* Van Asdale*: Analysis and Recommendations*, 62 HASTINGS L.J. 531, 550 (2010).

65 *See id.* at 548–51.

66 Many companies also have a business hotline for employees to report concerns, and nearly all Fortune 500 companies have ethics officers and programs. Marianne M. Jennings, *Restoring Ethical Gumption in the Corporation: A Federalist Paper on Corporate Governance—Restoration of Active Virtue in the Corporate Structure to Curb the "Yeehaw Culture" in Organizations*, 3 WYO. L. REV. 387, 494 n.520 (2003).

67 *See* Wiener, *supra* note 64, at 550; *see also* Carlson, *supra* note 52, at 298.

68 *See* GAO REPORT ON WHISTLEBLOWERS, *supra* note 63, at 24.

69 As of 2010, the DOJ's Fraud Statistics reflected "that 74.4% of all *qui tam* actions filed under the FCA were dismissed without a settlement or judgment." Patrick A. Barthle II, *Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program*, 69 WASH. & LEE L. REV. 1201, 1229 (2012); *see also* Wiener, *supra* note 64, at 549–50.

70 The SEC pursues a small fraction of the reports it receives under the bounty program established by Dodd-Frank Act. "[I]n 2018, the SEC received over 5,200 tips [but] paid out awards to 13 individuals. . . . The percentage of

Courts should seek to exclude these bad actors from the protection of an anti-retaliation provision, especially when their bad-faith complaints lack useful information about the alleged misconduct.

In short, anti-retaliation provisions should be interpreted broadly enough to protect employees who report information that advances the law's underlying policy goals, but not so broadly that they shield employees who provide inadequate, irrelevant, or unhelpful reports. All stakeholders in the employment relationship benefit when employees report suspected misconduct based on sufficient information, even if no actual violation is found. However, employers and the public are harmed when employees engage in wasteful reporting behavior. The scope of protected activity under an anti-retaliation provision should function as a filter—including reports that further the law's policy objectives while excluding irresponsible complaints that needlessly burden firms and the public.

C. Section 806 of the Sarbanes-Oxley Act Was Designed to Protect Employees Who Identify and Report Corporate Fraud

In the 1990s, Enron was an energy titan.[71] It began life as a pipeline operator, born from the 1985 merger of two American energy companies.[72] It then became a broker between gas producers and customers as the United States pursued a policy of energy deregulation under the Bush administration.[73] Under the guiding hand of the charismatic[74] Jeffrey Skilling, who served as Enron's COO and later as its CEO, Enron

successful tips . . . has moved from a low of 0.12% in 2013 to a high of 0.81% in 2016." Usha R. Rodrigues, *Optimizing Whistleblowing*, 94 Temp. L. Rev. 255, 285 (2022). Moreover, the SEC received approximately 24,980 whistleblower tips in fiscal year 2024, but over 14,000 of them were submitted by two individuals, revealing a troubling pattern of fraudulent tipsters spamming the SEC's referral system. Jane Norberg, Daniel M. Hawke & Christian D.H. Schultz, *Top Takeaways from the Annual Report on the SEC's Whistleblower Program*, Arnold & Porter (Nov. 26, 2024), https://www.arnoldporter.com/en/perspectives/advisories/2024/11/top-takeaways-sec-whistleblower-annual-report [https://perma.cc/9H3X-RNLD].

71 *See* Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. Cin. L. Rev. 1233, 1233 (2003).

72 *See* Patty M. DeGaetano, *The Shareholder Direct Access Teeter-Totter: Will Increased Shareholder Voice in the Director Nomination Process Protect Investors?*, 41 Cal. W. L. Rev. 361, 366 (2005).

73 *See* O'Connor, *supra* note 71, at 1274–75.

74 Enron employees reported being "fanatically loyal" to Skilling and media outlets described a "cult-like" atmosphere at the company. *Id.* at 1264.

aggressively entered and made new markets for derivatives in electricity, coal, paper, steel, and even the weather.[75] The company expanded rapidly and promised enormous returns to its investors.[76] Some of these ventures became spectacular failures,[77] but the company refused to admit defeat.[78] Instead, it assigned the losses it incurred to legally separate "special purpose entities," allowing Enron to understate its liabilities and overstate its earnings.[79] Eventually, reporters and investors discovered the ruse. Enron posted a loss of $638 million in the third quarter of 2001 and reduced the company's stated equity by $1.2 billion.[80] Thousands of investors and employees at the company lost their retirement savings held in company stock.[81]

WorldCom evolved from a generic long-distance telephone service provider into one of the largest telecommunications companies in the world[82] under the leadership of founder and CEO Bernard Ebbers.[83] It thrived following the breakup of AT&T by rapidly acquiring other domestic and international long-distance providers, sending its stock price through the roof.[84] But the dotcom crash of the early 2000s eliminated many of WorldCom's biggest customers and demand for

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Supposedly, one former executive compared the fervor at Enron to the religious zealotry of the Taliban. *Id.*

75 *See* Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons from Enron*, 55 VAND. L. REV. 1787, 1790–91, 1795 (2002).

76 *See* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1288, 1302–04 (2002); *see also* O'Connor, *supra* note 71, at 1271–73 ("Enron [was criticized] for engaging in 'significant transactions that were apparently designed to accomplish favorable financial statement results . . . .'" (quoting WILLIAM C. POWERS, JR., RAYMOND S. TROUBH & HERBERT S. WINOKUR, JR., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. 4 (2002))).

77 *See* Bratton, *supra* note 76, at 1299–305.

78 *See* O'Connor, *supra* note 71, at 1253–54.

79 *See id.* at 1233 n.4, 1233–34. *See generally* Steven L. Schwarcz, *Enron and the Use and Abuse of Special Purpose Entities in Corporate Structures*, 70 U. CIN. L. REV. 1309 (2002).

80 Steven Pearlstein & Peter Behr, *At Enron, the Fall Came Quickly*, WASH. POST, Dec. 2, 2001, at A1.

81 *Enron Shareholders Look to SEC for Support in Court*, N.Y. TIMES (May 10, 2007), https://www.nytimes.com/2007/05/10/business/worldbusiness/10iht-enron.1.5648578.html [https://perma.cc/V3VY-ZBSM].

82 *See* Shannon Rose Selden, *(Self-)Policing the Market: Congress's Flawed Approach to Securities Law Reform*, 33 J. LEGIS. 57, 85 (2006).

83 *See* Satish C. Pandey & Pramod Verma, *WorldCom Inc.*, 29 VIKALPA 113, 116 (2004).

84 *See id.*

telecommunications services, threatening the company's astronomical profits.[85] The Securities and Exchange Commission (SEC) began investigating WorldCom in 2002 after receiving reports that the company had loaned Ebbers more than $400 million.[86] It turned out that Ebbers had been using the company's money to cover his personal debts.[87] Ebbers resigned just weeks after the SEC's probe began.[88]

Cynthia Cooper, WorldCom's Vice President of Internal Audit, decided to review the company's accounts for other discrepancies.[89] Cooper encountered resistance and hostility from her colleagues and the company's external auditor,[90] but she continued her investigation in secret, returning to the office at night to review records.[91] She discovered that WorldCom had hidden hundreds of millions of dollars in losses by capitalizing routine expenses, inflating its profits by $3.8 billion.[92] Cooper bravely reported her discovery to the company's audit board and eventually the Federal Bureau of Investigation and the SEC.[93] Cooper[94] later shared that her zealous investigation and disclosure were motivated by her loyalty to the company.[95]

These and other[96] massive accounting scandals prompted Congress to take immediate action. Provisions of what became

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85 *See id.*

86 *See id.* at 117.

87 *See id.*

88 *See id.*

89 Silvia X. Liu, *When Doing the Right Thing Means Losing Your Job: Reforming the New York Whistleblower Statute*, 7 N.Y.C. L. REV. 61, 62 (2004).

90 Julie Jones, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-at-Will Doctrine*, 34 TEX. TECH L. REV. 1133, 1135 (2003).

91 *See* Liu, *supra* note 89, at 62 & n.13.

92 *See id.* at 62.

93 *See id.*

94 Cooper's legacy is often overshadowed by the whistleblower from Enron, Sherron Watkins. Watkins communicated her concerns to Enron's external accounting firm and legal counsel, to no effect. Enron simply asked its lawyers at Vinson and Elkins to investigate Watkins' allegations, and the firm provided assurances that no further investigation was necessary. *See* Elizabeth C. Tippett, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL'Y J. 1, 37 (2007).

95 Katie Maxwell, *Blowing the Whistle Falls on Deaf Ears: Revamping Texas's Whistleblower Jurisprudence by Applying the Lessons of Garcetti and Sarbanes-Oxley*, 43 TEX. TECH L. REV. 647, 680 n.365 (2011).

96 Tyco, another public company revealed to have engaged in massive shareholder fraud, is often mentioned in the same breath as Enron and WorldCom. Tyco was established in the 1960s and became a diversified enterprise with

the Sarbanes-Oxley Act were introduced to the floor of the House in early 2002,[97] and several additional sections were appended by the Senate without debate just weeks before the Act's passage in late July.[98] The Act promised broad structural reforms that codified and expanded upon existing best practices in accounting and corporate governance.[99] Title I established the Public Company Accounting Oversight Board to develop standards and investigate and monitor public companies' compliance with ethical accounting practices.[100] Title II established approval requirements for auditors and required companies to rotate auditors every few years to discourage the formation of inappropriate relationships between auditors and client companies.[101] Titles III, IV, and V forced executive officers to accept greater legal accountability for actions of the companies they served and created more transparency by requiring enhanced financial disclosures.[102]

No government agency could be adequately staffed or funded to effectively monitor every public company's compliance with the Act and its new protective measures.[103] Consequently, robust internal reporting was essential. Yet, testimony before Congress revealed that most corporate insiders would not blow the whistle without adequate assurances of protection.[104] Indeed, an investigation into the Enron scandal revealed that, days after Sherron Watkins warned CEO Ken Lay of an impending "wave of accounting scandals," the company consulted

manufacturing, energy, and security divisions. *See* Jennings, *supra* note 66, at 454–65. It met its downfall at the hands of its CFO and president Dennis Kozlowski, yet another charismatic, hard-driving leader. Kozlowski spent lavishly on motorcycles, boats, a plane, and multiple houses. *Id.* at 470–74. He burned the company's money, too, through aggressive acquisitions. *Id.* at 457–61. The SEC began to investigate Tyco after the company announced a $20 million payment to one of its outside directors in connection with a merger. *Id.* at 456–57. The investigation uncovered multiple fraudulent practices, such as classifying acquisitions as "goodwill" to avoid depreciation. *Id.* at 457–58.

97 *See generally* Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002, H.R. 3763, 107th Cong. (2002).

98 Renee M. Jones, *Sarbanes-Oxley's Insight: The Role of Distrust*, 3 J. Bus. & Tech. L. 437, 437–38 (2008); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 Yale L.J. 1521, 1559–63 (2005).

99 *See* Jones, *supra* note 98, at 438.

100 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 101, 116 Stat. 745, 750–53 (codified as amended at 15 U.S.C. § 7211).

101 *Id.* §§ 202–203, 116 Stat. at 772–73 (codified as amended at 15 U.S.C. § 78j-1).

102 *See, e.g.*, *id.* § 302, 116 Stat. at 777–78 (codified at 15 U.S.C. § 7241).

103 *See* Carlson, *supra* note 52, at 288–89.

104 148 Cong. Rec. 14447 (2002).

its outside counsel about "the possible consequences of discharging employees who reported accounting irregularities."[105] At that time, employees were covered by a patchwork of inconsistent whistleblower protection laws that varied widely by state.[106] Enron's outside counsel had reassured Lay that Texas law at the time did not protect corporate whistleblowers, so Watkins could be fired with impunity.[107] Before the Sarbanes-Oxley Act, employees were rightly scared that if they spoke up they might be fired or punished.[108]

Thus, Section 806 was created to protect such employees and empower them to speak up and reveal shareholder fraud at public companies.[109] Congress housed the administration of the Act's anti-retaliation provision within the Occupational Safety and Health Administration,[110] which is itself an arm of the Department of Labor.[111] The language of Section 806 is straightforward. Essentially, no public company or agent thereof may discriminate against an employee because

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105 Sherron Watkins, *Twenty Years Later, Could Another Enron Happen?*, FRAUD MAG. (Nov. 1, 2021), https://www.acfe.com/fraud-magazine/all-issues/issue/article?s=2021-novdec-enron-whistleblower-20-years-later [https://perma.cc/F48D-WJWX]; *see* Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 5 (2012); Alexei Barrionuevo, *Warning on Enron Is Recalled*, N.Y. TIMES, Mar. 16, 2006, at C1.

106 Tippett, *supra* note 94, at 29. Even today, the scope of state whistleblower protection laws differs dramatically by jurisdiction. *Contrast* N.Y. LAB. LAW § 740 (McKinney 2025) (prohibiting retaliatory action against an employee for disclosing any practice that the employee reasonably believes violates a law, rule, or regulation or threatens public health or safety), *with* TEX. GOV'T CODE ANN. § 554.002 (West 2025) (prohibiting adverse personnel action only against a public employee who reports a violation of law by the employing governmental authority or another public employee to an appropriate law enforcement agency).

107 Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 362 (2003).

108 *See* Carlson, *supra* note 52, at 238–39.

109 *See* Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 197 (2007); Sylvester, ARB No. 07-123, 2011 WL 2165854, at *7 (U.S. Dep't of Lab. Admin. Rev. Bd. May 25, 2011) (citing a Senate Report that described the whistleblower protection provision as "crucial" to detection, prevention, and prosecution of violations of the Act).

110 *See* Moberly, *supra* note 105, at 9.

111 John Fatino notes that some have argued that the decision to house enforcement of the Act's anti-retaliation provision with the Department of Labor was an attempt to undermine its efficacy. John F. Fatino, *The Sarbanes-Oxley Act of 2002 and the New Prohibition on Employer Retaliation Against Whistleblowers: For Whom the Bell Tolls or Tooting One's Own Horn?*, 51 S.D. L. REV. 450, 461 (2006). This seems unlikely because the Act enjoyed overwhelming support in Congress (ninety-nine for, zero against in the Senate) and the Department of Labor holds specialized experience with the unique doctrines and frameworks associated with employment law. *See id.*; *see also* Ramirez, *supra* note 109, at 184.

the employee (1) has provided information to or assisted in an investigation conducted by a federal agency, Congress, or a supervisor regarding any conduct the employee *reasonably believes* constitutes a violation of any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders or (2) has participated or assisted in a proceeding relating to an alleged violation of any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders.[112] The section's procedures[113] were modeled on federal whistleblower protections in the airline, mining, and energy sectors, which also fall under the Department of Labor's authority.[114]

II
An Overbroad Scope of Protected Activity Under Section 806 Undermines the Sarbanes-Oxley Act's Goals

A. Early Interpretations of Section 806 Balanced Competing Interests by Establishing a Reasonable Scope of Protected Activity

Section 806 serves as an essential tool in supporting the identification and prevention of fraud in public companies. Unfortunately, like any other tool, it causes damage when used improperly. The Department of Labor's Administrative Review

112 *See* 18 U.S.C. § 1514A(a).

113 *See OSHA Fact Sheet: Filing Whistleblower Complaints under the Sarbanes-Oxley Act*, Occupational Safety & Health Admin. (2011) [hereinafter *OSHA SOX Fact Sheet*], https://www.osha.gov/sites/default/files/publications/osha-factsheet-sox-act.pdf [https://perma.cc/E97T-SM9K]. An employee alleging a violation of Section 806 seeks relief by filing a complaint with OSHA within 180 days of the alleged discrimination. *Id.* at 2. OSHA will then investigate the complaint and make an initial determination regarding the employee's claim, similar to an EEOC investigation. *See id. Compare* 29 C.F.R. §§ 1980.103–.104 (2025) (OSHA procedures for investigation of a Section 806 claim), *with* 29 C.F.R. §§ 1614.106–108 (2025) (EEOC procedures for investigation of a discrimination claim). If the investigation supports the employee's claim, OSHA may issue an order requiring reinstatement and any other make-whole relief. *OSHA SOX Fact Sheet*, *supra*, at 2. Either party "may request a full hearing before an administrative law judge of the Department of Labor." *Id.* The administrative law judge's decision may be appealed to the Department's Administrative Review Board (ARB). *Id.* The ARB's final decision may be appealed to the appropriate circuit court of appeal. If a final agency order is not issued within 180 days from the date the employee files their complaint, the employee may refile in the appropriate United States district court for *de novo* review. *See id.* For more information on the efficacy of these procedures, please see Ramirez, *supra* note 109, at 209–13.

114 *See* Moberly, *supra* note 105, at 13. Later on, Congress amended some of these laws to match emerging jurisprudence created through administrative and federal court decisions pursuant to Sarbanes-Oxley. *See id.* at 14.

Board (ARB) and federal courts have shaped and clarified the application of Section 806 significantly since its enactment. However, an overinclusive expansion to the scope of protected activity, suggested by the ARB and adopted by some courts, threatens to undermine the Act's policy goals and unduly burden employers and the public.

Many cases interpreting the scope of Section 806 have been well-reasoned and necessary to carry out the Act's policy goals.[115] The Fifth Circuit was the first federal appellate court to review a claim for relief under Section 806.[116] In *Allen v. Administrative Review Board* (2008), former employees of a publicly traded funeral home and cemetery company alleged that they were terminated for complaining about faulty interest calculations, untimely refunds, and billing problems to their supervisors.[117] The court affirmed the ARB's dismissal of the case on the grounds that the petitioners did not engage in protected activity.[118]

To make this determination, the court adopted the ARB's "reasonable belief" standard.[119] That standard requires an employee seeking relief under Section 806 to demonstrate that they held both a subjectively and objectively reasonable suspicion that they were reporting likely shareholder fraud or a violation of securities law at the time they made the report.[120] In this case, the court upheld the ARB's dismissal of the case in part because the employees failed to demonstrate a reasonable belief that the company acted with the requisite element of scienter.[121]

The court clarified that the objective reasonableness of an employee's report is evaluated "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[122] One plaintiff, a licensed CPA with an "extensive

115 *See generally* Wiener, *supra* note 64, at 539–47.

116 *See id.* at 540.

117 514 F.3d 468, 471–72 (5th Cir. 2008).

118 *Id.* at 476–77.

119 *Id.*; *see also* Welch, ARB No. 05-064, 2007 WL 1578493, at *7–8 (U.S. Dep't of Lab. Admin. Rev. Bd. May 31, 2007).

120 *Allen*, 514 F.3d at 477 (noting the similarity between the reasonable belief standard used here and the one used for retaliation claims under Title VII claims).

121 *Id.* at 480; *see also Scienter*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining scienter in the securities fraud context as "[a] mental state consisting in an intent to deceive, manipulate, or defraud").

122 *Allen*, 514 F.3d at 477.

accounting background," should have known that the faulty interest calculations did not violate any SEC rules because the calculations were for the company's internal financial documents.[123] The court declined to answer whether she would have been protected if she had been a layperson without "extensive accounting knowledge."[124] Congress clearly imagined that Section 806 would protect accountants and "corporate insiders" like Sherron Watkins or Cynthia Cooper.[125] Yet, nothing in Section 806 confines coverage to accountants and executives, and a too-narrow interpretation would thwart the provision's usefulness in flagging likely misconduct.

Just over a year later, the First Circuit developed *Allen*'s latent question about lay employees and clarified what information an employee needed to report to fall under the protection of Section 806. In *Day v. Staples, Inc.* (2009), a freshly-minted college graduate working as a "Reverse Logistics" analyst at Staples was fired after complaining about the company's internal tracking systems and return processes.[126] He had worked in the returns department for just seven weeks, two of which were spent in training.[127] The district court had granted summary judgment in favor of Staples on the ground that Day lacked "the knowledge, training and experience to harbor a reasonable belief of fraud."[128]

The First Circuit affirmed the district court's decision, but focused on a separate issue regarding Day's lack of reasonable belief.[129] The court ruled that, "[t]o have an objectively

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123 *Id.* at 478–79.

124 *Id.* at 479 n.7.

125 *See* 148 Cong. Rec. 14447 (2002); *see also* Mahony v. KeySpan Corp., No. 04-CV-554, 2007 WL 805813, at *5 (E.D.N.Y. Mar. 12, 2007) ("[A]lthough Plaintiff's actions clearly did not rise to the level of Enron whistleblower Sherron Watkins, the 'mere fact that the severity or specificity of [his] complaints does not rise to the level of action that would spur Congress to draft legislation does not mean that the legislation it did draft was not meant to protect [him].'" (alterations in original) (quoting Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1377 (N.D. Ga. 2004))).

126 555 F.3d 42, 45, 56 (1st Cir. 2009). The court characterized Day's complaints as "criticisms of Staples business practices." *Id.* at 45. Specifically, Day complained that (1) his department issued credits to customers before receiving proper documentation that goods were returned; (2) his department "withheld" money from customers by under-issuing credits over $25.00; and (3) his department canceled and reissued return pick-up orders to reduce the recorded time between the order and actual pick up. *Id.* at 46–47.

127 Day v. Staples, Inc., 573 F. Supp. 2d 336, 346–47 (D. Mass. 2008), *aff'd*, 555 F.3d 42 (1st Cir. 2009).

128 *Id.* at 346.

129 555 F.3d at 56–57.

reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud *must at least approximate the basic elements of a claim of securities fraud*."[130] Day vaguely alleged that Staples engaged in "data manipulation" leading to "needless loss of revenue," that it had violated "general accounting principles," and that it was failing to issue refund credits to customers appropriately.[131] Day had not alleged that these inaccuracies or errors had been reported to shareholders, violated GAAP, or constituted fraud.[132] The court sagely observed that a "complaint about corporate efficiency is . . . not within the intended protection of SOX."[133] The court characterized Day's complaints as criticisms about Staples' business practices and found that his assertions did not meet "the basic components of fraud or of securities fraud."[134] Given the chasm between the information in Day's report and a basic articulation of conduct that could constitute shareholder fraud, the First Circuit affirmed summary judgment for Staples.[135] Subsequently, the Ninth Circuit found *Day*'s approximation standard persuasive and adopted it in *Van Asdale v. International Game Technology* (2009).[136] The Sixth Circuit also adopted the approximation standard in *Riddle v. First Tennessee Bank* (2012).[137]

The First Circuit cited no authority or precedent for the approximation standard, but the language was nearly identical to part of the ARB's decision in *Platone v. FLYi, Inc.* (2006).[138] In *Platone*, the ARB reversed an administrative law judge's finding that labor relations manager Stacy Platone had engaged in protected activity when she discovered union-leave billing discrepancies between the Air Line Pilots Association (ALPA, her former employer) and Atlantic Coast Airlines (ACA, later FLYi Inc., her new employer) and complained about them to her supervisor.[139] Specifically, Platone discovered that ALPA pilot-representatives were scheduling trips on days they would have union business, then canceling them to qualify for ACA

130 *Id.* at 55 (emphasis added).

131 *Id.* at 56–57.

132 *Id.* at 57–58.

133 *Id.* at 56.

134 *Id.* at 45, 56.

135 *See id.* at 55, 60.

136 577 F.3d 989, 1001 (9th Cir. 2009).

137 497 F. App'x 588, 595–96 (6th Cir. 2012).

138 Platone, ARB No. 04-154, 2006 WL 3193772, at *3, *10–11 (U.S. Dep't of Lab. Admin. Rev. Bd. Sep. 29, 2006).

139 *Id.* at *1–3.

paid union-leave.[140] Platone informed her supervisor over email that ALPA's policies forbade reimbursement for days originally scheduled as off days.[141] ALPA assured the supervisor that outstanding debts would be paid, and the supervisor instructed Platone to stop pressing the issue.[142] In a subsequent meeting, Platone insisted that what "the pilots were doing" was "illegal" and that "they were cheating . . . the company out of money."[143] She was terminated seven days later, ostensibly for her failure to disclose a conflict of interest stemming from her romantic relationship with a high-ranking ALPA pilot.[144]

To determine whether Platone engaged in protected activity, the ARB looked to what Platone had actually communicated to ACA before her termination.[145] The ARB ruled that, "under the SOX, [an] employee's communications must 'definitively and specifically' relate" to a category of fraud or securities violation enumerated under Section 806.[146] The Board drew the terms "definitively and specifically" from its decisions in whistleblowing cases under the Energy Reorganization Act's similarly-worded anti-retaliation statute.[147] Over the next five years, *Platone*'s "definitively and specifically" standard was adopted by the First, Fourth, Fifth, and Ninth Circuits.[148]

The ARB found that Platone's email to her supervisor had "raised a possible violation of internal union policy . . . but nothing approximating fraud against shareholders."[149] Similarly, the ARB found that Platone's meeting with the supervisor did not constitute protected activity because "[s]he did not provide any information about fraud *against shareholders*" and "the real victim of any alleged impropriety was ALPA."[150] Even after filing her complaint with OSHA, Platone failed to allege a connection between the pilots' conduct and the purchase or

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140 *Id.* at *3.

141 *Id.*

142 *See id.* at *11.

143 *Id.*, at *12.

144 *See id.* at *5–6.

145 *See id.* at *8.

146 *Id.* at *9.

147 *See id.* at *9 & n.114. *See generally* Moberly, *supra* note 105, at 13.

148 *See, e.g.*, Day v. Staples, Inc., 555 F.3d 42, 55 (1st Cir. 2009); Welch v. Chao, 536 F.3d 269, 275 (4th Cir. 2008); Platone v. U.S. Dep't of Lab., 548 F.3d 322, 327 (4th Cir. 2008); Allen v. Admin. Rev. Bd., 514 F.3d 468, 476–77 (5th Cir. 2008); Van Asdale v. Int'l Game Tech., 577 F.3d 989, 996–97 (9th Cir. 2009).

149 *Platone*, 2006 WL 3193772, at *10.

150 *Id.* at *12 (emphasis added).

sale of any security, and testified to less than $1,500 of potential losses to ACA, which no reasonable shareholder would find material.[151] Accordingly, the ARB found that Platone failed to "even approximate any of the basic elements of a claim of securities fraud."[152]

Although the *Platone* ARB used approximation of the elements as a benchmark, it did not formally announce an approximation rule.[153] Nonetheless, circuit courts began adopting and applying what could be called an "approximation requirement."[154] Like the ARB in *Platone*, courts reviewed the information shared by a complaining employee during the alleged protected activity, and required that it at least approximate basic elements of shareholder fraud to support an objectively reasonable belief. The ARB and Department of Labor administrative law judges continued to apply the "approximation requirement" in their decisions until the ARB's abrupt reversal five years later in *Sylvester*.[155]

The ARB's decision in *Platone* demonstrates the necessity of the approximation requirement to ensure that Section 806 remains a targeted mechanism for uncovering shareholder fraud, rather than a catch-all protection for workplace grievances. The ARB rightly rejected Platone's claim because her report, while alleging impropriety, failed to even approximate the elements of securities fraud. The approximation requirement aligns Section 806 whistleblower protection with its intended function: placing companies and regulators on notice of potential shareholder fraud. Without the approximation requirement, employees can claim protected status based on generalized concerns about company practices, even if their reports lack the specificity needed to trigger a meaningful investigation. Moreover, reports that fail to articulate a plausible connection to shareholder fraud dilute the impact of disclosures supported by an objectively reasonable belief. They also unnecessarily alarm shareholders and burden employers with meritless claims.

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151 *Id.*

152 *Id.*

153 At least one court has incorrectly referred to *Platone*'s persuasive reasoning as a rule. *See* Beacom v. Oracle Am., Inc., 825 F.3d 376, 380 (8th Cir. 2016).

154 *See, e.g.*, Allen v. Admin. Rev. Bd., 514 F.3d 468, 480 n.9 (5th Cir. 2008); Day v. Staples, Inc., 555 F.3d 42, 55 (1st Cir. 2009); Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1001 (9th Cir. 2009).

155 *See, e.g.*, Prioleau, No. 2010-SOX-00003, 2010 WL 1953808, at *12 (U.S. Dep't of Lab. A.L.J. Feb. 3, 2010).

The *Platone* ARB recognized the dangers of overprotection. Without a meaningful threshold, any internal complaint about accounting discrepancies, operational inefficiencies, or corporate policies could be mischaracterized as whistleblowing, forcing employers to retain employees who made incomplete, irrelevant, or incompetent reports. The ARB's later rejection of the approximation requirement in *Sylvester* ignored this concern, creating an environment where even vague suspicions, unsupported by any real understanding of fraud, could qualify as protected activity. Its expansive construction of Section 806 risks straining employers and the legal system and undermines Section 806's legitimacy as a tool for uncovering real financial misconduct.

B. *Sylvester* Distorted the Scope of Protected Activity Under Section 806 Beyond the Sarbanes-Oxley Act's Policy Goals

In May 2011, the ARB tossed *Platone*'s precedent aside and dramatically expanded the scope of protected reporting activity under Section 806 in its *Sylvester* decision.[156] In *Sylvester*, two employees of a publicly traded pharmaceutical research company alleged that they were terminated in violation of Section 806 after they reported deviations from the Food and Drug Administration's "Good Clinical Practice" standards, which Parexel publicly claimed to adhere to.[157] The ALJ dismissed the employees' claims because they failed to demonstrate that they had engaged in protected activity.[158] Notably, the ALJ found that the former employees had failed to report

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156 Sylvester, ARB No. 07-123, 2011 WL 2165854 (U.S. Dep't of Lab. Admin. Rev. Bd. May 25, 2011). Note that a majority of the Board in *Platone* were appointed by President George W. Bush, while a majority of the *Sylvester* Board were appointed by President Barack Obama. Timothy J. Fitzmaurice, Note, *The Scope of Protected Activity Under Section 806 of SOX*, 80 FORDHAM L. REV. 2041, 2066 n.196 (2012). An ARB decision from 2020 (the end of President Donald Trump's first term in office) stated that a "complaint must contain some approximation or tethering" to shareholder fraud or a violation of securities law, but this decision has not been cited for this proposition in any case on Lexis+ or Westlaw. *See* Thibodeau, ARB No. 2017-0078, 2020 WL 8182902, at *10 (U.S. Dep't of Lab. Admin. Rev. Bd. Dec. 17, 2020). An ARB decision from the end of the Biden administration cited the approximation standard from *Sylvester*. *See* Williams, ARB No. 2020-0019, 2023 WL 1927097, at *6 n.68 (U.S. Dep't of Lab. Admin. Rev. Bd. Jan. 17, 2023).

157 *Sylvester*, 2011 WL 2165854, at *2; *see also* Fitzmaurice, *supra* note 156, at 2066.

158 Sylvester, No. 2007-SOX-39, 2007 WL 7135793, at *11 (U.S. Dep't of Lab. A.L.J. Aug. 31, 2007).

misconduct that "definitively and specifically" related "to fraud involving shareholders as required by the Act, *Platone* . . . and other authorities."[159] The ALJ concluded that the complaint did not "reasonably extend beyond" allegations that the complainants were terminated for raising concerns about medical testing protocols, and accordingly granted the defendant's motion to dismiss for lack of subject-matter jurisdiction.[160]

The *Sylvester* Board disagreed with the ALJ and rejected the "definitive and specific" relationship standard on questionable grounds. First, the majority claimed that the ALJ "failed to acknowledge the basic requirements for establishing protected activity" under Section 806.[161] However, it is striking that the ARB overlooked the ALJ's detailed analysis of the scope of activity protected under the Act, as well as the ALJ's reliance on established standards from *Platone* and other precedent under Section 806.[162] Moreover, the ARB's reasoning disregarded the well-established role of interpretive frameworks and doctrinal principles in applying employment law to fact-intensive disputes.[163]

Then, the Board attacked the standard's pedigree. The ARB insisted that because the "definitively and specifically" standard originated from decisions interpreting the scope of whistleblower protections under the Energy Reorganization Act, it should not have been imported to Section 806 cases.[164] The ARB highlighted the ERA's "catch-all provision" protecting employees who "assist or participate in 'a proceeding . . . or any other action'" to carry out the ERA's purposes.[165] According to the ARB, courts narrowed the ERA's protection by requiring that an employee's actions "definitively and specifically" implicate safety.[166] A concurring opinion further explained

159 *Id.* at *10–11.

160 *Id.* at *11.

161 *Sylvester*, 2011 WL 2165854, at *11, *15.

162 *Sylvester*, 2007 WL 7135793, at *8.

163 *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–05 (1973) (setting forth burden shifting framework for discrimination claims under Title VII); Faragher v. City of Boca Raton, 524 U.S. 775, 801–08 (1998) (establishing a non-statutory affirmative defense to sexual harassment claims under Title VII). *See generally* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 111–23 (2017); Michael D. Moberly, *Cranking the Wrongful Discharge Ratchet: Judicial Abrogation of Legislative Limitations on the Public Policy Exception*, 24 SETON HALL LEGIS. J. 43 (1999).

164 *Sylvester*, 2011 WL 2165854, at *14–15.

165 *Id.* at *14 (quoting 42 U.S.C. § 5851(a)(1)(F)).

166 *Id.*

that the standard promoted the ERA's purpose of protecting acts implicating nuclear safety by distinguishing "explicit safety complaints," which would be protected, from "general inquir[ies] regarding safety which would not."[167]

The ARB claimed that Section 806 contained no similarly broad language, despite acknowledging in a footnote that Section 806 protects reports about "any provision of Federal law relating to fraud against shareholders."[168] The ARB decided that such language is "far more specific" than the ERA's provision, obviating the need for the definitive and specific standard.[169] Ironically, the majority opinion did not substantively discuss Section 806's vague coverage for "any lawful act done by [an] employee . . . to provide information . . . regarding any conduct which the employee *reasonably believes* constitutes a violation of" federal securities law.[170] As one judge noted in partial dissent, it is unclear why the ERA's definitive and specific standard would not be helpful in distinguishing "vague statement[s] of concern" from "factually specific" reports that would "provide[] sufficient notice to the employer that the employee is raising concerns about conduct" described in Section 806.[171]

The *Sylvester* ARB's final ground for rejecting the *Platone* standard was the most dismissive. The ARB abruptly decided that the *Platone* test was "inappropriate" and "applied too strictly" for their taste.[172] There are certainly rational arguments one could put forth as to why the definitively and specifically standard demanded too much of potentially useful whistleblowers,[173] but the *Sylvester* ARB failed to articulate them. Nevertheless, every circuit assessing the scope of protected activity since *Sylvester* has deferred to this part of the ARB's decision and dropped the "definitive and specific" communication requirement.[174]

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167 *Id.* at *30 (Brown, J., concurring in part and dissenting in part).

168 *Id.* at *14 & n.11 (majority opinion).

169 *Id.*

170 18 U.S.C. § 1514A(a) (emphasis added).

171 *Sylvester*, 2011 WL 2165854, at *31 (Brown, J., concurring in part and dissenting in part).

172 *Id.* at *15 ("We find that the standard announced in *Platone* has evolved into an inappropriate test and is often applied too strictly.").

173 *See* Fitzmaurice, *supra* note 156, at 2069–73.

174 *See* Beacom v. Oracle Am., Inc., 825 F.3d 376, 380 (8th Cir. 2016) (citing cases from the Second, Third, and Sixth Circuit that have dropped the definitive and specific communication requirement).

However, the *Sylvester* ARB stretched the meaning of protected activity even further. The ARB asserted that the purpose of Section 806 is to "protect and encourage greater disclosure," yet it reflected little on the accuracy or utility of such reports.[175] One judge went so far as to state that "whistleblower activity that merely 'implicates' or 'touches on' the substantive statute is protected."[176] This represented a drastic departure from the ARB's prior interpretation in *Platone*. Nonetheless, the ARB determined that a complainant could hold an objectively reasonable belief of a violation of the laws enumerated in Section 806 "even if the complainant fail[ed] to . . . approximate specific elements of fraud."[177]

The ARB then specified that a report could be protected even if the misconduct it alleged was immaterial.[178] This utter departure from the approximation requirement invited inexperienced employees to file inadequate or meritless complaints, potentially shielding them from legitimate disciplinary action while exposing employers to unnecessary legal battles. By abandoning a clear, workable benchmark for objective reasonableness, the ARB also increased the risk of frivolous litigation that may withstand early dismissal, forcing employers to put on costly defenses against legally tenuous claims. Ultimately, the ARB failed to adequately consider whether its overbroad definition of protected activity actually advanced the policy goals of Section 806, or merely burdened employers and the legal system with wasteful reports that do little to promote corporate accountability.

The judicial response to *Sylvester*'s abandonment of the approximation requirement has been varied. Three circuits have explicitly abandoned the approximation requirement. In *Wiest v. Lynch* (2013), the Third Circuit accorded *Chevron* deference to the ARB's reasoning but agreed with the dissent that a "plaintiff's intra-corporate communications [must] relate in an understandable way to one of the stated provisions of federal law [in § 806]."[179] At first, the Sixth Circuit maintained the

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175 *Sylvester*, 2011 WL 2165854, at *18. A concurrence in *Sylvester* noted that Congress intended that the Act would help "protect investors by improving the accuracy *and reliability* of corporate disclosures." *Id.* at *35 (Brown, J., concurring in part and dissenting in part) (emphasis added).

176 *Id.* at *27.

177 *Id.* at *18 (majority opinion).

178 *Id.* ("[W]e do not impose a materiality requirement on the communication that the complainants contend is protected activity.").

179 710 F.3d 121, 134 (3d Cir. 2013) (alterations in original).

approximation requirement in a post-*Sylvester* case called *Riddle v. First Tennessee Bank* (2012).[180] However, the court later embraced the ARB's generous definition of protected activity in *Rhinehimer v. U.S. Bancorp Investors, Inc.* (2015).[181]

Likewise, the Ninth Circuit continued to apply the approximation requirement in *Rocheleau v. Microsemi Corp.* (2017),[182] then reversed course in *Wadler v. Bio-Rad Laboratories, Inc.* (2019).[183] Even then, the Ninth Circuit did not specifically reject the approximation requirement but confirmed that it would no longer examine "whether the complainant actually communicated" a reasonable belief of an ongoing or imminent violation of securities law.[184]

Several other circuits have clearly refused *Sylvester*'s invitation to abandon the approximation requirement. In *Nielsen v. AECOM Technology Corp.* (2014), the Second Circuit found that *Sylvester*'s rejection of the approximation requirement was not entitled to deference and noted that a "purported whistleblower's belief cannot exist wholly untethered" from allegations of shareholder fraud or a violation of securities law.[185] In *Northrop Grumman Systems Corp. v. Department of Labor* (2019), the Fourth Circuit found that "the plain text of the statute" compelled the conclusion that "the reasonableness of an employee's belief . . . requir[es] approximation of the elements of shareholder fraud."[186] Most recently, in *Ronnie v. Office Depot, LLC* (2023), the Eleventh Circuit agreed with the Second and Fourth Circuits that an employee must "make some showing of scienter, materiality, reliance, or loss in order to enjoy SOX protection."[187]

Other circuits have not expressed a clear position on the approximation requirement since *Sylvester*. The Eighth Circuit joined "[t]he Second, Third, and Sixth Circuits" in rejecting *Platone*'s "definite and specific" standard but provided

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180 497 F. App'x 588, 595–96 (6th Cir. 2012).

181 787 F.3d 797, 809–11 (6th Cir. 2015) (according *Skidmore* deference to the ARB and holding that an employee should be protected even if he or she did not have "information sufficient to form an objectively reasonable belief that there was an intent to defraud or [that] the information communicated . . . was material to a shareholder's decision" (quoting *Wiest*, 710 F.3d at 132)).

182 680 F. App'x 533, 535–36 (9th Cir. 2017), *cert. denied*, 583 U.S. 827 (2017).

183 916 F.3d 1176 (9th Cir. 2019).

184 *Id.* at 1188 (quoting Sylvester, ARB No. 07-123, 2011 WL 2165854, at *12 (U.S. Dep't of Lab. Admin. Rev. Bd. May 25, 2011)).

185 762 F.3d 214, 221 n.6 (2d Cir. 2014).

186 927 F.3d 226, 235 n.9 (4th Cir. 2019).

187 81 F.4th 1345, 1351 (11th Cir. 2023).

no conclusive answer regarding the approximation requirement.[188] Likewise, the Tenth Circuit has rejected the definitive and specific standard without discussing the approximation requirement.[189] In *Wallace v. Tesoro Corp.* (2015), the Fifth Circuit declined to reconsider its adoption of *Platone*'s definitive and specific standard and emphasized that Sarbanes-Oxley's "critical focus is on whether the employee *reported conduct* that he or she *reasonably believes* constituted a violation of federal law."[190] Finally, the First Circuit has not reconsidered the approximation requirement that it first applied in *Day*, but a federal district court in Massachusetts very recently declined to apply that precedent.[191]

The Third, Sixth, and Ninth Circuits have charted a perilous course that threatens the effective operation and governance of public companies throughout the United States. As Judge Jordan writes in his dissent in *Wiest*, "[w]histleblower statutes like SOX § 806 seek to protect people who have the courage to stand against institutional pressures and say plainly, 'what you are doing here is wrong'—not wrong in some abstract or philosophical way, but wrong in the particular way identified in the statute at issue."[192] The protection of Section 806 depends upon the identification of specific wrongdoing made illegal by federal laws targeting shareholder fraud. "[G]eneral allegations of misconduct" are simply not covered.[193] A report that fails to even approximate a charge of fraud is wasteful because it is highly unlikely to put a company or a government authority "on notice" that a fraud has been identified.[194] That diverts time, attention, and resources away from useful reporting behavior.

The Department of Labor's position that Section 806 will be thwarted by requiring complainants to "actually say something pointing out [shareholder] fraud" is untenable.[195] Complaints must relate to at least some elements of securities fraud, or else "virtually any internal questioning of an accounting mistake

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188 Beacom v. Oracle Am., Inc., 825 F.3d 376, 380 (8th Cir. 2016).

189 *See* Genberg v. Porter, 882 F.3d 1249, 1255 (10th Cir. 2018) (finding that the "definitive and specific" standard was obsolete post-*Sylvester* only because the Act's ambiguity entitled the Department of Labor to deference under *Chevron*).

190 796 F.3d 468, 479 (5th Cir. 2015) (quoting Villanueva v. U.S. Dep't of Lab., 743 F.3d 103, 109 (5th Cir 2014)).

191 Wirth v. Salesforce, Inc., 749 F. Supp. 3d 231, 238 (D. Mass. 2024).

192 Wiest v. Lynch, 710 F.3d 121, 138 (3d Cir. 2013) (Jordan, J., dissenting).

193 *Id.* at 138–39.

194 *Id.* at 140.

195 *Id.*

or a judgment call turns the questioner into a [protected] whistleblower."[196] Wasteful, premature reports are alarming to shareholders and coworkers and can needlessly damage a company's reputation. Rather than reward employees who make incomplete, incompetent, or irrelevant reports with a legal entitlement to remain in their position, courts should calibrate the scope of protected activity under Section 806 to encourage useful reporting that promotes the purposes of the Act while leaving the discretion of law-abiding employers intact.

III
Regulators Should Establish Model Policies, Procedures, and Training for Corporate Employees to Better Identify and Report Potential Shareholder Fraud

The circuits that have adopted or deferred to *Sylvester*'s expansion of protected activity have done so in the interest of encouraging and protecting a greater number of reports.[197] But many employees are unlikely to recognize an employer's violations of securities law without adequate training.[198] Opening the floodgates of protection to all employee complaints creates unreasonable costs for employers and society, but closing the door to any employee who is not intimately familiar with the "niceties of federal securities law" would indeed thwart the purposes of the Act.[199]

Instead of sitting back and waiting for more circuits to undercut the approximation standard and expand the scope of Section 806 beyond Congress's intent, government regulators should give employees the tools to make useful, thorough reports that promote the Act's goals. In other areas of employment law, federal and state authorities have successfully developed model policies and procedures to inform employees of their statutory rights in the workplace. The same model should be applied to advise employees of their rights and obligations under Section 806.

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196 *Id.* at 146.

197 Rhinehimer v. U.S. Bancorp Invs., Inc., 787 F.3d 797, 811 (6th Cir. 2015) (expressing concern that requiring that protected communications relate "definitively and specifically" to shareholder fraud will defeat claims by lay employees who reported in good faith).

198 *See* Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 221 (2d Cir. 2014) ("Many employees are unlikely to be trained to recognize legally actionable conduct by their employers."); *see also* GAO Report on Whistleblowers, *supra* note 63.

199 *See Rhinehimer*, 787 F.3d at 811.

For example, New York has developed a veritable curriculum of training and materials to inform employees of their rights and empower them to report perceived workplace misconduct. New York employers must provide employees with training on sexual harassment annually[200] and adopt an adequate sexual harassment prevention policy.[201] They must also post a sexual harassment prevention poster in an obvious place.[202] Depending on the employer's size, they may also be required to advise employees about state whistleblower protections,[203] minimum wage, overtime, and fringe benefit requirements,[204] and other industry-specific compliance requirements.[205] New York provides several free, legally sufficient and compliant training resources and materials,[206] but grants employers the flexibility to use their own materials if they meet or exceed state requirements.[207] Other states have also developed substantial workplace know-your-rights requirements and resources.[208]

Federal agencies that regulate and administer employment laws also require employers to publicly post notices advising

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200 N.Y. Lab. Law § 201-g(2) (McKinney 2025) ("Such model sexual harassment prevention training program shall be interactive and include: (i) an explanation of sexual harassment . . . (ii) examples of . . . sexual harassment . . . and (iv) information concerning employees' rights of redress and all available forums for adjudicating complaints.").

201 *Id.* § 201-g(1) (mandating, among other requirements, that the policy "clearly state that retaliation against individuals who complain of sexual harassment or . . . assist in any proceeding under the [human rights] law is unlawful").

202 N.Y. Comp. Codes R. & Regs. tit. 9, § 466.1 (2022) (requiring employers to post notices furnished by the Division of Human Rights "conspicuously in easily accessible and well-lighted places customarily frequented by employees").

203 Lab. § 740(8) (requiring every employer to inform employees of their protections, rights, and obligations under broad state whistleblower protection law by posting a notice in an accessible and visible location).

204 *See, e.g.*, *id.* § 195 (requiring employers to provide notice or publicly post "policy on sick leave, vacation, personal leave, holidays and hours").

205 *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 12, § 146-2.4 (2021) (requiring covered employers in the hospitality industry to post notices from the state Department of Labor about wage and hour laws, tip appropriations, and any other labor laws that the commissioner deems appropriate).

206 *See, e.g.*, *Sexual Harassment Prevention Model Policy and Training*, N.Y. State, https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training [https://perma.cc/XD2E-DRBT] (offering free model policy, notice of model policy, complaint form, training requirements, training videos, and translated training videos).

207 Lab. § 201-g(1)(b), (2)(c) (instructing that employees may establish sexual harassment policies and training programs that "equal[] or exceed[] the minimum standards" set by New York's model policy and training requirements).

208 For example, California requires employers with at least five employees to provide "effective interactive training" on preventing sexual harassment and abusive conduct every two years. Cal. Gov't Code § 12950.1(a)(1) (West 2025).

employees of certain rights. The Department of Labor has required all employers covered by the Fair Labor Standards Act to display a poster describing workers' wage and hour rights since 1949.[209] Employers are also required to post notices furnished by OSHA informing employees of certain protections and obligations related to health and safety.[210] While these posted notices do not reach every employee, they are a channel to inform employees generally of their rights and the remedial procedures available to them for violations of the law.[211] Even if individual employes overlook the posted notices, they benefit from greater awareness of these rights within their communities and social networks.[212]

If regulators develop, and perhaps require, model training, policies, and procedures for reporting concerns pursuant to the Sarbanes-Oxley Act, employees could be made better aware of the nature and extent of their rights under the law. A firmer understanding of shareholder fraud, securities law, and appropriate information to include in a report would lead to higher-quality and more accurate reporting activity, circumventing the need for courts to develop overinclusive definitions of protected activity. Better-informed employees will be less likely to mistakenly report lawful conduct by their employers, saving employers and the government the cost of investigating frivolous reports or adjudicating separations with bad-faith complainants. Furthermore, better reporting will expedite government and employer investigation of useful reports. Many employers already voluntarily seek out Sarbanes-Oxley and Section 806 compliance materials and training,[213] but the Department of

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209 Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 Conn. L. Rev. 177, 198 (2015); *see also* 29 C.F.R. § 516.4 (2025).

210 29 C.F.R. § 1903.2(a) (2025).

211 *See* Alexander, *supra* note 209, at 215. *See generally* Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 Stan. L. Rev. 351 (2011).

212 *But see* Alexander, *supra* note 209, at 212–13 ("[A]necdotal accounts abound about the ineffectiveness of break room posters: their very ubiquity may mean that they tend to fade into the background of the workplace. For example, in the rulemaking process concerning the NLRB's now-defeated break room poster requirement, the agency received comments from employers that . . . 'adding one more notice to the many that are already mandated . . . contributes to employees' disinclination to pay attention to posted notices.'").

213 For example, management-side firm Littler offers trainings on federal and state whistleblower protection statutes and specifically mentions whistleblower protection statutes in the context of a "publicly traded company's accounting practices and financial disclosures." *Whistleblowing, Compliance and Investigations*, Littler, https://www.littler.com/practice-areas/whistleblowing-compliance-and-investigations [https://perma.cc/6WHF-JPC4].

Labor should establish a model with minimum requirements as many states have done for other employment laws.

The model policy should be written, accessible, and periodically distributed to and reviewed by the employees who would be most likely to observe fraudulent conduct. Executives, accountants, and lawyers should certainly receive this information, as well as the employees who work in their respective departments. The model policy should convey that the company does not condone fraud, that it relies on its employees to report concerning conduct, and that employees will not be punished for making good faith reports in accordance with the policy. The policy should articulate how employees should report their concerns, and to whom. In light of the discussion above, it would be wise to explain what shareholder fraud is, and what kind of information an employee should gather before alleging misconduct. Most importantly, the policy should review the elements of shareholder fraud and advise employees that they should include as much information in their report as possible to demonstrate how any suspected misconduct reflects those elements.

Model training programs should reflect the requirements of the model policy and should be conducted periodically. Trainings should be interactive and require the participation of employees who would be likely to observe fraudulent conduct related to securities law. Trainings would also provide an excellent opportunity to remind employees that internal reporting is an important element of compliance and should be viewed as an act of loyalty. At the same time, an employer should make clear that not all reports fall under the special protection of Section 806. Trainings should also review the company's procedures for conducting investigations and establish a rough time frame for their completion. Employees should be assured that if they do report, they will be informed of the investigation's results when possible, and that if the company finds no misconduct, the employee will receive an appropriate explanation as to why.

The development and promulgation of such model policies, trainings, and procedures will further the policy goals of the Sarbanes-Oxley Act and Section 806 without resorting to an overinclusive scope of protected activity. This will increase the accuracy and utility of reports made under the Act for employers and society and reduce the costs of wasteful reporting behavior.