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RESPONDING TO THE CCFA WHISTLE AT DOL

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By Mary E. Pivec, Esq.[1]

Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (CCFA) (popularly known as the Sarbanes-Oxley Act) provides whistleblower protection to employees of "publicly traded companies," a term which includes any "company with a class of securities registered under §12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781), or that is required to file reports under §15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company." 18 U.S.C. § 1514A(a).

CCFA whistleblower protections extend to any employee who provides information which the employee "reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1). As defined, the scope of protected activity is extremely broad. Under CFFA, covered employers are prohibited from discharging or in any manner discriminating against an employee because the employee provided information, caused information to be provided, or assisted in an investigation by a federal regulatory or law enforcement agency, a Member or committee of Congress or an internal investigation by the company itself, relating to an alleged violation of mail fraud, wire fraud, bank fraud, securities fraud, or violating SEC rules or regulations or federal laws relating

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to fraud against shareholders. In addition, covered employers are prohibited from discharging or in any manner discriminating against an employee because the employee filed, caused to be filed, participated in or assisted in a proceeding under any of the foregoing laws or regulations.

The legislative history of the Act indicates that Congress intended the reasonableness test to include "all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." Legislative History of Title VIII of HR 2673: The Sarbanes Oxley Act of 2002, Cong.Rec. S7418 (daily ed. July 26, 2002), available at 2002 WL 32054527, citing *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474 (3rd Cir. 1993)(a case in which even erroneous employee assumptions regarding environmental hazards were deemed protected under the reasonableness standard). The legislative history further makes clear that Congress intended to include intracorporate disclosures as well as reports to Congress, the SEC and state regulatory authorities. *Id.*

The legal burdens of proof in CCFA cases are taken from the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (popularly known as "AIR 21"), 49 U.S.C. § 42121. 18 U.S.C. § 1514A(b)(2)(C). Thus, under CCFA, an employee must show by a preponderance of the evidence that (1) the employee engaged in protected activity; (2) the employer knew of the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. The same proof burden exists under Energy Reorganization Act, 42 U.S.C. § 5851, and the Surface Transportation Assistance Act, 49 U.S.C. § 31105. Proximity in time is sufficient to raise an inference of causation. *Bechtel Const.Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995). The employer can escape liability only if it can demonstrate by clear and

convincing evidence that it "would have taken the same unfavorable personnel action in the absence of [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv).

In the two years following enactment of CCFA, whistleblowers have filed more than 300 administrative complaints with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA").[2] According to a recent *Wall Street Journal* article, OSHA found in favor of the employee in 38 cases.[3] CFFA § 806 authorizes the agency to dismiss a complaint prior to an investigation if a complainant fails to make a prima facie showing or the employer can show by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. Tom Marple, Director of the OSHA Office of Investigative Assistance, reports that in FY 2004 the average OSHA processing time of CFFA cases was 125 days from filing until final determination.[4]

A CFFA complaint must be filed within 90 days of an alleged adverse action. 18 U.S.C. § 1514A(b)(1)(A); 29 C.F.R. § 1980.103. OSHA accepts complaints by phone, online, or in person. If a final administrative decision is not issued within 180 days of the filing of the complaint and "there is no showing that such delay is due to the bad faith of the claimant," an employee may bring an action at law or in equity for de novo review in federal court, including the right to jury trial. 18 U.S.C. § 1514A(b)(1)(B). The employer has no right to circumvent the DOL administrative process, if the employee chooses to litigate in that forum.

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2 CCFA provides that an employee must file a complaint with the Secretary of Labor. 18 U.S.C. § 1514(b)(1)(A). The Secretary delegated responsibility for CCFA investigations to the Assistant Secretary for Occupational Safety and Health. 67 Fed.Reg. 65008-01 (Oct. 22, 2002).

3 2004 WL-WSJ 56942606 (*Wall Street Journal*, D. Solomon, Oct. 4, 2004).

4 Telephone interview, October 12, 2004.

On August 28, 2004, OSHA published a final rule setting forth procedures for the handling of CFFA discrimination complaints; the final rule closely tracks the interim final rule which was published in May 2003. The rules provides that within a scant 20 calendar days of receiving notice of a CFFA complaint (a blank copy of the OSHA complaint form is marked as Attachment A), the employer must conduct an investigation of the allegations, submit a statement of position supported by affidavits and other evidence, and meet with OSHA representatives to present its position. By the time the complaint is served upon the employer, OSHA has already determined that the employee engaged in protected activity and was subject to retaliation. The company has an uphill battle to overcome that presumption, and further must prove that it would have taken the same action against the employee in the absence of behavior protected by the Act. If the company fails to satisfy the clear and convincing standard of proof with respect to the bona fides of its actions, a broader investigation will ensue, during which OSHA will interview witnesses identified by both sides. The company is not entitled to the identities of the employee's sources.

According to regulation, within 45 days of the filing of the complaint, OSHA will issue a "due process" letter to the company (see Attachment B). If OSHA finds reasonable cause to believe the employee's allegations, it will serve a preliminary order on the company setting forth the evidence supporting the allegations and the proposed relief. The employer must then present rebuttal evidence within 10 calendar days of service of the findings and preliminary order, or as soon after as the employer and OSHA can agree. If the employer has evidence that reinstatement of the employee pending further litigation would pose a security risk, it should be presented at this time since failure to do so will probably result in an order directing reinstate as well as back

pay, even though the employer has the right to seek a de novo hearing before an administrative law judge .

Within 60 days of the filing of the complaint, OSHA generally must issue final written findings as to whether there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act. These are served on all parties by certified mail, return receipt requested. A copy of the findings is also sent to the SEC, which may request approval to inspect the whole of the OSHA investigative file and request copies of any documents supporting OSHA's determination.

If a reasonable cause finding issues, and the named party fails to convince OSHA that reinstatement of the complainant would pose a security risk, it will be accompanied by another order containing all relief necessary to make the complainant whole, including, were appropriate: reinstatement, back pay with interest, and compensation for special damages such as litigations costs, expert witness fees, and reasonable attorneys fees. Where the named party proves the existence of a security risk, the complainant will nevertheless be entitled to "economic reinstatement" pending the outcome of any appeals.

Both the employee and the employer have the right to file objections and request a hearing, provided they serve notice of the same upon the Chief Administrative Law Judge of the U.S. Department of Labor within 30 days following service of the findings. The employer can also seek an award of attorney's fees from the administrative law judge if the employer alleges that the complaint was frivolous and brought in bad faith. A failure to appeal within 30 days will convert the findings and preliminary order into a final order subject to judicial enforcement.

Hearing Procedures Before The OALJ

As set forth in the CCFA procedural rules published by OSHA, the pre-trial and hearing procedures the Department of Labor Office of Administrative Law Judges ("OALJ") are

supposed to be expedited in order to accomplish finality within 180 days. Although similar strictures apply under other whistleblower statutes, in reality most litigants waive the speedy trial rules because they simply cannot complete meaningful discovery and prepare their case for trial within the time provided.

The Rules of Practice and Procedure for Administrative Hearings Before OALJ are set out at 29 C.F.R. Part 18. Pre-trail practice before OALJ mirrors procedures provided under the federal civil procedure rules in United States district court cases, including rights to broad discovery and motions practice. There is one notable exception: administrative law judges lack authority to compel the appearance of non-party witnesses at deposition or trial except to the extent such power has been vested in the Secretary by statute. The United States District Court for the District of Columbia has held that ALJ's do not have authority to issue subpoenas in whistleblower cases brought under the Clear Air Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Federal Water Pollution Control Act and the Toxic Substances Control Act – all of which were implicated in the whistleblower action at issue.[5] Because the Secretary has not been granted subpoena authority under CCFA or AIR 21, a similar result would probably obtain in cases brought under the CCFA .

The OALJ summary decision procedure provides the opportunity to truncate costly discovery by moving for dismissal on preliminary jurisdictional issues such as timeliness and the identity of the respondent. Because the Administrative Review Board has held that CCFA only

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5 *See Bobreski v. U.S. Environmental Protection Agency*, No. 02-0732(RMU) (D.D.C. Sept. 30, 2003).

covers companies with securities registered under § 12 or companies required to file reports under § 15(d) of the Exchange Act, *see Flake v. New World Pasta Co.*, ARB No. 03-126, ALJ No. 2003-SOX-18 (ARB Feb. 25, 2004), employers have successfully defeated claims in which the employee has sued a subsidiary rather than a covered parent. *See Klopfenstein v. PPC Flow Technologies Holdings, Inc.*, 2004-SOX-11 (ALJ July 6, 2004). Raising the issue too earlier, however, may simply result in an amendment of the complaint to include the parent, and a coordinate expansion of the litigation. *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004)(amendment permitted under 29 C.F.R. § 18.5(e) and FRCP 15(c). *Cf: Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Mar. 5, 2003)(ALJ rejected attempted amendment stating that the employee could not "get around the fact that her Employer, Pinnacle, is not a publicly traded company by unilaterally adding another corporate entity that is publicly traded, *i.e.*, Northwest Airlines, Inc. as a respondent, after the investigation and determination by OSHA.")

Hearings before the OALJ are subject to the more liberal rules of evidence generally applicable in administrative hearings. 29 C.F.R. Part 18, Subpart B. ALJ's are not bound by the Federal Rules of Evidence, except with respect to the rules governing privilege. Because of the relaxed evidentiary standards, OALJ trials tend to be longer than would obtain in federal court. Post-hearing procedures add to the adjudication time table. Submission of post-hearing briefs typically is set for 60 days following delivery of the trial transcript. There is no time limit for the issuance of a decision.

Published OALJ Decisions[6]

Because of its recent enactment, only four CCFA whistleblower cases are the subject of a decision following an evidentiary hearing before the OALJ. Notably, two of the cases were brought by employees who were not employed in financial or accounting positions and who would not have been thought likely whistleblowers under the Sarbanes Oxley scheme. Of the four reported OALJ merits decisions, three were decided in favor of the employee, despite earlier being dismissed by the OSHA investigator. Some may interpret those odds as pretty depressing from the viewpoint of the employer.

In *David E. Welch v. Cardinal Bankshares Corporation*, 2003-CFFA-15 (ALJ Jan. 28, 2004) the employee was the chief financial officer for a bank holding company until he was terminated in September 2002. For approximately one year prior to his termination, Mr. Welch had questioned several irregular financial entries and transactions that he believed affected the employer's stock price. He also complained that his access to outside auditors was restricted unduly and that the employer had inadequate internal controls over who could make financial entries without his knowledge. When directed to meet with outside auditors about his complaints and recent refusal to sign financial statements, he requested that the meeting be postponed until his personal attorney could attend. The employer refused and terminated his employment, claiming that Mr. Welch was terminated for insubordination because he refused to meet with the outside auditors without his personal attorney.

Although OSHA dismissed his complaint, Mr. Welch appealed and the administrative law judge found liability on the part of the employer. The court found that insubordination was a

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[6] OALJ maintains an on-line library of whistleblower decisions which can be accessed at www.oalj.dol.gov. The site includes links to the Whistleblower Newsletter which is published regularly by OALJ and includes digests of recent decisions issued by the DOL Administrative Review Board and OALJ.

pretext for an unlawful termination because the employer had already begun adverse action beforehand, and that earlier adverse action occurred on the heels of Mr. Welch's protected activity. Concluding that there was no clear and convincing evidence that the employer would have taken this action in spite of the protected activities, the court found for the employee and ordered back pay, with interest, and attorneys fees and costs. This case is now on appeal with before the Administrative Review Board.

In *Stacey M. Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-CFFA-27 (ALJ Apr. 30, 2004), the employee was a labor relations representative for the employer. During the course of her employment, she began tracking potential losses incurred by the employer because of unauthorized free flights by pilots who were union representatives. She believed that because contract negotiations were at a critical stage, extra compensation was being funneled to senior union members to convince them to agree to contract concessions favorable to the employer. Within days of forwarding a written report about her concerns to her supervisor, she was informed that she was under investigation for suspected misconduct. Shortly thereafter, she was terminated for maintaining a secret, romantic relationship with a union leader.

Ms. Platone filed a CCFA whistleblower complaint with OSHA, which found no violation. She appealed to OALJ, where she prevailed. The administrative law judge found that Ms. Platone's internal complaints were protected activity because they involved potential fraud or misuse of funds and that her complaints played a role in the decision to terminate her employment. Although the ALJ further found that Ms. Platone had a conflict of interest that could have served as grounds for dismissal, the fact that her misconduct was discovered in connection with the investigation of otherwise protected activity colored the employer's

credibility as to the reason for the termination and prevented the employer from meeting the clear and convincing standard of proof.

In *Margot Getman v. Southwest Securities, Inc.*, 2003-CFFA-8 (ALJ Feb. 2, 2004), the complainant was a stock research analyst who was terminated for sending an email to a competitor stating that she had referred a current customer to him. Ms. Getman alleged that the real reason for her termination was her refusal to change a stock rating for a company that her employer desired to partner with in a lending deal. During the OSHA investigation, the employer's representative signed an affidavit admitting to a key meeting at which the stock rating was discussed but otherwise claimed that Ms. Platone's performance prior to the meeting was unsatisfactory as documented in contemporaneous disciplinary notes and records. This affidavit would prove to be a critical piece of evidence at the administrative hearing, where employer witnesses denied that any such meeting had occurred. This inconsistency created a credibility problem that was exacerbated by an admission that the records of poor performance allegedly predating the protected activity had been created at a later point in time. The administrative judge otherwise concluded that Ms. Getman was highly credible and that the email to the competitor was neither extraordinary nor a fit justification for termination. Despite the 9-month gap between Ms. Getman's objection to the rating decision and her termination, the ALJ concluded that the termination decision was triggered by her refusal to accede to the employer's pressure to raise the stock rating.

The only merits decision in which the employer prevailed is *Ammar Halloum v. Intel Corporation*, 2003-CFFA-7 (ALJ March 4, 2004). Mr. Halloum was a probationary group leader in a manufacturing facility with documented performance problems of which he was repeatedly informed. On the day he was to receive a performance improvement plan, he

complained of harassment. After receiving his improvement plan, Mr. Halloum immediately took medical leave for work-related stress during which he reported alleged improprieties to the SEC and the employer's CEO consisting of instructions from his supervisor to delay payment of invoices until subsequent quarters in order to meet Wall Street expectations. While away on leave, he requested and was granted a change of assignment to alleviate his alleged work stress.

Shortly after returning to work, Mr. Halloum quit his job and filed a CFFA complaint with OSHA, claiming constructive discharge. OSHA dismissed the complaint and Mr. Halloun appealed. The administrative law judge found that Mr. Halloum's report to the SEC was protected. The ALJ nevertheless found for the employer, holding that Mr. Halloum had failed to satisfy the causation element of a prima facie case because the documented reports of poor performance pre-dated his protected activity. Alternatively, the administrative law judge concluded that the employer proved by clear and convincing evidence that it would have terminated Mr. Halloum for unsatisfactory performance.

Federal Court Decisions Under CCFA

As of this writing, we are aware of only one federal "merits" decision under CCFA, wherein the court denied a motion for summary judgment filed by the employer. *Collins v. Beazer Homes USA, Inc.*, 1:03-CV-1374, N.D. Ga. (Order, Sept. 2, 2004), reported at the OALJ website. As revealed in the pages of that decision, Ms. Collins exhibited traits of the typical whistleblower and was indeed a difficult employee to manage. She was hired as director of marketing for the Jacksonville, Florida division of the employer's home building business. From the outset she had conflicts with her division manager and sales director over the use of a particular advertising agency. Ms. Collins escalated her complaints to the corporate vice president for marketing, adding allegations of improper payments to the ad agency she disapproved of. Ms. Collins was then referred to the corporate vice president for human

resources for an investigation of the claims of fiscal impropriety. Collins tape recorded her session with this vice president, wherein she added additional complaints against her division management, some of which had a potential fraud component. The investigation that followed included consultation with both the company's executive vice president and chief operating officer and the chief executive officer. Six days after her meeting with the vice president for human resources, Ms. Collins sent an email to the company's chief executive asserting that a cover up of corruption was under way. Ms. Collins continued her email campaign a few days later in a four page message to the vice president of sales and marketing, complaining that the investigation was being mishandled and adding a new allegation – suspected kickbacks in lumber purchases.

In the midst of the investigation, the human resources director discussed the possibility of terminating Collins' employment with her division president. This discussion preceded a meeting between Collins and the division president to discuss her complaints, which Collins again tape recorded. At the end of the meeting, the division president gave notice that he was terminating Collins because she could not get along with her fellow employees. Then Collins filed her complaint with OSHA. On May 20, 2003 – 8 months after filing her administrative complaint, Collins filed a complaint in federal court, asserting claims under CCFA and the Florida Whistleblower Act. On May 22, 2003, OSHA issued its determination finding no violation. Needless to say, the OSHA determination had no impact upon the federal court proceedings.

The docket report in *Collins v. Beazer Homes, USA* indicates an expensive discovery process including the videotaped depositions of all of the senior corporate officers who had been involved in the investigation of Ms. Collins' internal complaints. Ultimately, defendants' efforts

to defeat the claims at the summary judgment stage proved unsuccessful. Ms. Collins' beat back preliminary legal challenges to federal court jurisdiction due to defendants' failure to prove that the processing delays at OSHA resulted from bad faith on her part. She also defeated defendants' attempts to disqualify her as a covered employee under the CCFA; although she did not work for a covered entity, the court found her protected because her employment could be affected by the officers of the parent company, which is a covered entity.

On the merits, the court held that Ms. Collins had established sufficient proof of protected conduct to survive summary judgment and to take her case to a jury, despite defendants' contention that her complaints never specifically alleged securities or accounting fraud, were too vague and were intertwined with personality disputes and differences in marketing strategy. Four disclosures were found "arguably" protected under CCFA: the allegation that the division was knowingly overpaying invoices to the ad agency; the allegation that the division was using the ad agency because of a personal relationship between management and the vendor; the allegation that sales agents who were personal friends of management were being over paid; and the allegation that there were kickbacks involving the purchase of lumber.

Defendants next lost the battle under the "contributing factor" analysis. The court ruled that the temporal proximity between the time when Collins made her complaints and the time she was terminated was sufficient to establish circumstances which suggest that protected activity was a contributing factor to her termination, citing 29 C.F.R. § 1980.104(b)(2)(DOL Procedures for the Handling of Discrimination Complaints Under Section 806 Of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002). Here again, the court determined that reasonable jurors could find for Collins on the causation issue.

Finally, defendants failed to establish by clear and convincing evidence that they would have terminated Collins absent her participation in protected activity. Significantly, none of Collins' supervisors ever met with her to discuss her job performance or the personality conflicts with her supervisors and co-workers until she was being terminated. Thus, despite the fact that Collins was in a probationary period when she was terminated, and there was ample evidence of her inability to get along with peers and supervisors, the court held that it should be up to a jury to decide whether she would have been fired despite her complaining.

No trial date has yet been set in this case and the docket report indicates that pretrial activity has been stayed pending the outcome of mediation.

Recommendations For Responding To The CCFA Whistleblower Challenge

1. Because of the extremely short time frames adopted by OSHA for investigation of CFFA complaints, covered employers should consider establishing a CFFA response team to receive notice and manage the company's internal investigation and response. Members of the team should be trained in the procedural and substantive requirements of CFFA whistleblower law, the financial management and securities issues which underlie these complaints and the personnel policies and procedures that govern the complainant's employment. Having trained personnel at the ready may enable an employer to avoid committing to testimony and positions that cannot be defended in proceedings before a judge or jury.

2. Covered employers may also want to adopt written policies and procedures defining and prohibiting harassment and discrimination based on protected CFFA activity. Such a policy should provide a complaint procedure for reporting unlawful discrimination, and promise prompt investigation and remediation of any unlawful activity without fear of retaliation. The United States Court of Appeals for the Fifth Circuit recently recognized the existence of an affirmative defense to a claim of hostile environment in an environmental

whistleblower case based upon the existence of such a policy. *See Williams v. Administrative Review Board, USDOL*, __ F.3d __, No. 03-60028 (5th Cir. July 15, 2004)) (available at 2004 WL 1440554). Aside from providing a potential affirmative defense in CFFA whistleblower cases, the policy provides a basis for rebutting allegations of unlawful intent, and the complaint process provides an early warning system for potential claims.

3. Covered entities may want to consider adopting mandatory arbitration policies that specifically cover CCFA complaints. In *Boss v. Salomon Smith Barney* Inc**.**, No. 02 Civ. 7539(RO) (S.D.N.Y. May 16, 2003) (available at 2003 WL 21146653), the United States District Court for the Southern District of New York held that a mandatory arbitration agreement required covered employees to arbitrate claims under CCFA, foreclosing the right to go to federal court. The court's rationale for denying jurisdiction may extend to OSHA and OALJ as well, since, unlike the Equal Employment Opportunity Commission, the Department of Labor has not been granted independent authority to investigate and prosecute claims of whistleblower discrimination under the Securities Laws.