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Richard E. Moberly

University of Nebraska, [rmoberly2@unl.edu](mailto:rmoberly2@unl.edu)

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This article summarizes a longer study, “Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win,” which was first published in Volume 49 of the *William and Mary Law Review* in 2007.

## Why Sarbanes-Oxley Whistleblowers Don’t Win

Richard Moberly

University of Nebraska College of Law

Whistleblowers played a significant role in revealing and disrupting corporate malfeasance at the beginning of the 21st century, as scandals at corporations such as Enron and WorldCom came to public light through the efforts of whistleblowing employees. Subsequently, Congress recognized the importance of whistleblowing and included strong and unprecedented anti-retaliation protection for corporate employees as part of the Sarbanes-Oxley Act of 2002 (the Act), the mammoth congressional reaction to these corporate scandals.

### The Initial Reaction

After the Act was passed, scholars and whistleblower advocates believed that Sarbanes-Oxley whistleblower protections would often result in favorable outcomes for whistleblowers. For example, soon after the Act’s enactment, Professor Robert Vaughn asserted that the statute is “the most important whistleblower protection law in the world.” Tom Devine, legal director for the Government Accountability Project, a whistleblower advocacy group, described the Act as “the promised land. ... [T]he law represents a revolution in corporate freedom of speech [that] far surpasses, indeed laps, the rights available for government workers.” Taxpayers Against Fraud called the statute “the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation’s financial markets.”

The language of Sarbanes-Oxley’s anti-retaliation protections justified this initial reaction. Prior to Sarbanes-Oxley, millions of workers were protected from retaliation for revealing corporate wrongdoing only sporadically, if at all. The Act now purports to protect these workers by permitting them to file claims with the Occupational Safety and Health Administration (OSHA), a federal agency that will initially investigate such complaints. If OSHA finds that an employer retaliated against a whistleblower, the Act provides significant remedies for the employee,

including back-pay, non-economic damages and reinstatement. Moreover, the congressionally mandated burden of proof for causation favors employees more than many retaliation protections. Indeed, a few early victories for employees sparked outrage from management attorneys, who argued that Sarbanes-Oxley’s protections were too broad and overly burdensome for employers—a sign that perhaps the Act provided real protections for whistleblowers.

### The Reality: Low “Win” Rate So Far

Despite Sarbanes-Oxley’s pro-whistleblower provisions and a few early employee victories, however, administrative decisions over the first three years of the Act’s life failed to fulfill these expectations that a strong anti-retaliation provision would protect whistleblowers. During this time, 491 employees filed Sarbanes-Oxley complaints with OSHA. OSHA resolved 361 of these cases and found for employees only 13 times, a win rate of 3.6 percent. On appeal from 93 OSHA decisions, Administrative Law Judges (ALJs) in the Department of Labor found in favor of six employees, a win rate of 6.5 percent.

The win rate is surprisingly low compared to other employment-related statutes. For example, even though Congress based Sarbanes-Oxley’s protections upon the provisions of a whistleblower statute that protects airline industry whistleblowers, these airline whistleblowers succeeded at more than twice the rate of Sarbanes-Oxley whistleblowers (9.8 percent) in OSHA investigations. The EEOC finds for employees 14.1 percent of the time in sexual harassment cases, and 13.0 percent of employees win employment-related cases in federal court.

### Analyzing the Low Win Rate

While the low win rate is surprising and important, we should also be concerned with the way in which OSHA and the ALJs decided Sarbanes-Oxley

whistleblower cases. After examining over three years worth of cases, I found that there are two explanations for Sarbanes-Oxley's low employee win rate. First, employees frequently lost because OSHA and the ALJs determined that a large number of employees either violated a procedural rule or did not meet Sarbanes-Oxley's statutory requirements as a matter of law (*i.e.*, the employees did not demonstrate that their claim fit within the Act's legal "boundaries"). Thus, OSHA and the ALJs rejected a large percentage of cases (66.7 percent for OSHA, 95.2 percent for ALJs) for failing to fit within the legal parameters of a Sarbanes-Oxley claim, thereby avoiding any determination of the factual merits of an employee's allegations.

In so doing, these administrative decision makers often strictly interpreted Sarbanes-Oxley's legal requirements. For example, whistleblowers rarely were equitably excused for missing a procedural deadline, such as the statute of limitations. Moreover, although Sarbanes-Oxley applies to a "contractor, subcontractor, or agent" of any publicly-traded company, ALJs consistently determined that the Act did not protect employees of privately-held subsidiaries and contractors of publicly-traded companies. Furthermore, ALJs and the Administrative Review Board (ARB) (the last level of administrative review) required extraordinary specificity from whistleblowers regarding their disclosure of illegal activity and refused to protect whistleblowers who disclosed general fraud as opposed to fraud related specifically to securities.

This strict legal scrutiny might have many causes; I posit that it likely resulted from the push and pull of defining a new statute's legal boundaries. Employees, perhaps relying on expectations generated by scholars and whistleblower advocates, brought claims that tested the boundaries of this new statute. Administrative decision makers responded by interpreting potentially ambiguous provisions of the statute narrowly.

A second reason for the low employee win rate is that OSHA tended to misapply Sarbanes-Oxley's burden of proof for the few cases that survived the agency's strict legal scrutiny. Despite a burden of proof for causation that clearly favors employees, OSHA decided in favor of the employee in only 10.7 percent of the cases in which it evaluated the causation element of an employee's allegations (meaning cases in which a decision maker determined that the case fell

within the legal "boundaries" of a Sarbanes-Oxley claim). By contrast, when ALJs adjudicated causation, employees won 55.6 percent of the time. I suggest that OSHA's regulations and budgetary restraints contributed to its failure to apply Sarbanes-Oxley's burden of proof appropriately.

Amending the statute could address the interpretative and investigative problems I identified, which would better reflect Congress' goals of protecting whistleblowers and remedying retaliation. First, fully one-third of all employees who lost at the ALJ Level and 18 percent who lost at the OSHA Level lost because the employee failed to satisfy Sarbanes-Oxley's short 90-day statute of limitations. Because this procedural issue has little to do with the substantive merits of the whistleblower's claim, I suggest extending this statute of limitations to a minimum of 180 days. This extension will make the Act's limitations period similar to those found in equivalent whistleblower protection statutes and also should provide a more reasonable period of time for whistleblowers to file complaints.

Second, the Act's legal "boundaries" should be clarified. When OSHA and the ALJs interpreted Sarbanes-Oxley's statutory boundaries, these administrative decision makers strictly examined two areas in particular: whether the respondent was a "covered employer" and whether the employee engaged in "protected activity." For example, Congress should clarify that the Act protects employees of privately-held companies when they report fraud at publicly-traded corporations. Moreover, Congress should amend the Act to explicitly overrule administrative decisions that require a whistleblower disclosure to relate to securities fraud, as opposed to general fraud, and decisions that fail to protect employees who refuse to engage in illegal activity. OSHA and the Office of Administrative Law Judges also should publicize and disseminate certain statistical and substantive information about Sarbanes-Oxley cases in order to further clarify their interpretations of the Act's legal protections and to moderate any bias toward a particular party.

Third, the Act's employee-friendly burden of proof regarding causation needs to be revitalized by altering OSHA's investigative procedures and providing OSHA more investigative resources. As an alternative, I suggest removing OSHA from its current investigative role and replacing OSHA's process with one of three substitutes: (1) permitting whistleblowers to

file claims directly in federal court; (2) beginning the Sarbanes-Oxley administrative process with hearings before an ALJ rather than with an OSHA investigation; or (3) assigning OSHA's investigative responsibilities to another agency, such as the Securities and Exchange Commission (SEC). Any of these options could address OSHA's current misapplication of the Act's burden of proof scheme.

Finally, Sarbanes-Oxley's failures should cause Congress to consider broader whistleblower protections. For example, Sarbanes-Oxley currently applies only to employees of publicly-traded corporations. To avoid the difficult line-drawing issues apparent in Sarbanes-Oxley administrative decisions, a broader whistleblower provision could apply to employers with a specific number of employees, which would clarify the Act's applicability by importing a well-known standard from other employee protection statutes. Furthermore, the Act currently protects only employees who disclose illegalities related to six specific areas of federal law. Providing statutory protections for whistleblowers who report any unlawful activity by their employer would clarify the extent of protections available to employees.

Ultimately, Sarbanes-Oxley failed to fulfill the great expectations generated by the Act's purportedly strong anti-retaliation protections. This failure may be dangerous to efforts for improved corporate governance, because the recent corporate scandals powerfully reinforced the notion that employees are uniquely positioned to identify and to report corporate misconduct. Employees' internal placement in the corporate structure often provides them with better information about wrongdoing than external corporate monitors, such as the government or outside attorneys and accountants.

This monitoring can only be effective, however, if the law protects whistleblowers from retaliation. Employees will report wrongdoing less frequently unless they are given credible assurances that they will be safe from retaliation. Unfortunately, during the first years of its existence, Sarbanes-Oxley did not sufficiently protect whistleblowers and thus cannot provide such assurances. As a result, Sarbanes-Oxley requires further congressional and administrative scrutiny in order to fulfill Congress' and employees' expectations that whistleblowers will be protected from retaliation for blowing the whistle on corporate malfeasance.