THE POSSIBLE EXPANSION OF ANTI-RETALIATION PROTECTION TO CORPORATE WHISTLEBLOWERS

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Sarbanes-Oxley Act of 2002 (SOX) gave front teeth to whistleblowers. Has the recent Supreme Court decision in *Burlington Northern & Santa Fe R.R. Co. v. White*, No. 05–259 (June 22, 2006) given them a powerful underbite? White is an employment discrimination case, but because of the interrelation and similarities between Title VII anti-discrimination and anti-retaliation statutes and Sarbanes Oxley's whistleblower provisions the case may have repercussions for SOX litigants.[1]

In *White,* the Court ruled that Title VII complainants did not have to show the Company's retaliatory conduct was work related. Instead, they simply had to show that an employer's adverse employment decision was material in the relevant sense. The relevant sense, *White* held, is simply whether "the employer's actions were harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[2]

SOX petitioners will argue that the reasoning in *White*, which led to the adoption of the materiality standard, implies an expansion of rights and remedies for whistleblowers just as it does for those who experience retaliation because they filed a racial or sexual harassment complaint.[3] Respondents may argue the opposite, contending important aspects of White's reasoning still restrict the type of conduct that counts as retaliatory under the corporate whistleblower statute. Both sides have decent arguments for their opposite positions. This paper examines the quandary the Court has created.

I. THE SUPREME COURT'S DECISION IN *BURLINGTON NORTHERN & SANTA FE R.R. CO. v. WHITE*

On June 23, 1997, Burlington Northern & Santa Fe hired Sheila White to work in its Maintenance of Way department at the Tennessee Yard.[4] The roadmaster of the yard assigned White to operate the forklift. However, White's job description also encompassed standard work as a railway track laborer.

White was the only female working in the Maintenance of Way department at the Tennessee Yard. Her supervisor, by his own admission, treated her differently because of her gender. The supervisor did not believe that the Maintenance of Way department was an appropriate place for women to work and repeatedly expressed this belief to her while she was working under his supervision, as did several other employees. White, therefore,

filed a complaint for sexual harassment. The Railroad investigated, vindicated White and suspended the supervisor.

Subsequently, White learned of the suspension. She also learned that several track laborers had complained about her working in the forklift position, and that as a result she would be reassigned to a standard track laborer position. Her pay and benefits remained the same, but her new job was, by all accounts, more arduous and "dirtier" than the forklift position.

White responded to the re-assignment by filing complaints with the Equal Employment Opportunity Commission for sexual discrimination and retaliation. Approximately six months after reassignment to track laborer, the Railroad suspended White for alleged insubordination and withheld pay for 37 days. She received back pay when she was found not to have been insubordinate, but she filed another retaliation complaint because of the suspension without pay.

After exhausting administrative remedies, White sued Burlington Northern in federal court, claiming the job reassignment and pay suspension were retaliatory acts under Title VII of the Civil Rights Act of 1964. A jury awarded White $43,500 in damages for retaliation claims and $55,000 in attorney's fees. The district court instructed the jury that punitive damages may be considered if White showed by "clear and convincing" evidence that Burlington Northern acted "either intentionally, recklessly, maliciously, or fraudulently." The jury did not award punitive damages.

A divided 6th Circuit Court of Appeals panel reversed the district court, siding with Burlington Northern's contention that its allegedly retaliatory actions toward White were not actionable because they were not "ultimate employment decisions." White petitioned for a rehearing. A full panel unanimously agreed to reinstate the judgment against the Railroad. However, an eight judge majority "insisted upon a close relationship between the retaliatory action and employment," holding that a plaintiff must show an "adverse employment action," which it defined as a "materially adverse change in the terms and conditions of employment." Five of the judges agreed that Burlington Northern's actions constituted retaliation, but they reached the same conclusion using a different standard: any actions that are "reasonably likely to deter" employees from complaining about discrimination. Because the full circuit reinstated White's claim and her jury award, it also addressed the issues of attorney's fees and punitive damages. Though all the judges agreed to reinstate the attorney's fees, they divided on the issue of punitive damages, with eight judges allowing them and five dissenting.

On Dec. 5, 2005, the U.S. Supreme Court accepted review in the case, limited to the first question in Burlington Northern's petition. On June 22, 2006, the Court held 9-0 for White, but the Court did so for reasons remarkably different than the Sixth Circuit panel's. The Court accepted the Railroad's contention that the retaliation of which White complained was not related to terms and conditions of employment. However, after contrasting language in the anti-discrimination provision indicating to be actionable racial or sexual discrimination has to be work related, the Court held,

> "that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

II. THE STATUTORY BACKGROUND

Although SOX is a relatively new law, there is extensive administrative and judicial case authority available for interpreting provisions of the statute. This is because SOX's whistleblower protection provision is modeled on other whistleblower laws administered by the U.S. Department of Labor (DOL),[5] such as the laws protecting airline employees,[6] and employees who raise nuclear safety complaints.[7] The DOL procedures incorporated into the SOX come from the airline whistleblower protection provision, 42 U.S.C. § 42121(b).[8] Furthermore, the language is these ancestral whistleblower provisions, as well as the tests and standards used to analyze whistleblower complaints, has roots in employment discrimination jurisprudence.[9] (One significant difference, though, is that after an employee alleges a prima facie case of retaliation under SOX, employers may face liability unless they can show by clear and convincing evidence that they would have taken the same adverse employment action.[10] Under Title VII, if employee makes a *prima facie* case, employer only has to proffer a single legitimate reason for the adverse action and the burden shifts back to the employee to disprove it by a preponderance.[11]) Important terms in the whistleblower statutes, including SOX's, are found in Title VII's provisions. However, comparison of the statutes shows that the SOX whistleblower provision reflects Title VII's anti-discrimination section more so than the Title VII section prohibiting retaliation against employees who complain of discrimination on the basis of race or sex. It is this that sets up a potential problem *post White*.

Section 703(a) sets forth Title VII's core **anti-discrimination** provision in the following terms:

> "It shall be an unlawful employment practice for an employer —
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." § 2000e-2(a) (emphasis added).

Section 704(a) sets forth Title VII's anti-retaliation provision in the following terms:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." § 2000e-3(a).

Section 806 of Sarbanes-Oxley, also known as the Corporate and Criminal Fraud Accountability Act of 2002 and codified at 18 U.S.C. § 1514A, provides "whistleblower" protection to employees of publicly traded companies as follows:

> (a) Whistleblower Protection for Employees of Publicly Traded Companies — No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under section 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, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the **terms and conditions of employment** because of any lawful act done by the employee — (Emphasis added).

SOX § 1514(a) does not exactly mirror Title VII Section 703(a). The SOX whistleblower statute contains additional terms – "threaten", "harass" – that arguably expand the conduct actionable under SOX beyond what counts as an adverse employment decision based on race, sex or nationality.[12] On the other hand, SOX does not explicitly prevent discrimination with regard to "privileges" of employment, unlike Title VII and other whistleblower statutes, which suggests that certain decisions considered retaliatory when taken against employees for reporting safety violations in the nuclear or airline industry, for example, may not be actionable under SOX.[13]

However, at a glance it is evident that the whistleblower provision and Title VII's **anti-discrimination** clause share language vital to the *White* decision in common. Both

contain the phrase "terms and conditions of employment." It is this "limiting language" that the Supreme Court fastened upon when it held that Title VII's **anti-retaliation clause**, which lacks phrases such as this, protects claimants against a wider range of conduct than the anti-discrimination clause.

The basis of the Supreme Court's ruling in *White* regarding the relative scope of Title VII's discrimination and retaliation clause is the following:

> "The underscored words in the substantive provision [of the anti-discrimination provision] — "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" — explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in [Title VII's] anti-retaliation provision. Given these linguistic differences, the question here is not whether identical or similar words should be read in *pari materia* to mean the same thing. *See, e.g., Pasquantino v. United States*, 544 U.S. 349, 355, n. 2 (2005); *McFarland v. Scott*, 512 U.S. 849, 858 (1994); *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990). Rather, the question is whether Congress intended its different words to make a legal difference. We normally presume that, where words differ as they differ here, "'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983)."

Importantly, the Court did not proceed to infer "legal difference[s]" from "linguistic differences" alone. That is, it did not rule that the absence of limiting language in Title VII anti-retaliation statute, by itself, meant that claimants could hold employers liable for actions that might not affect employment or alter the conditions of workplace as well as those that did. If that is what had happened, then it would appear that *White* would provide relief to Title VII petitioners from many kinds of retaliatory actions, yet require courts to reject summarily SOX complaints based on identical retaliatory conduct. For example, it would be quite clear that while the railroad company could not transfer White from forklift to railway work because she filed a Title VII complaint, it could transfer her with impunity if White had filed a SOX complaint, even one that was highly meritorious.

In *White* the Court turned to general principles for ascertaining legislative purpose in order to establish what the omission of limiting language such as "terms and conditions of employment" from the Title VII's anti-retaliation clause signified. In doing so it used language that makes it difficult to insist that SOX whistleblowers enjoy less protection than Title VII retaliation complainants. The Supreme Court stated that:

> **"[O]ne cannot secure the second objective [non-retaliation] by focusing only upon employer actions and harm that concern**

> **employment and the workplace.** Were all such actions and harms eliminated, the anti-retaliation provision's objective would not be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace. See, e.g., Rochon v. Gonzales, 438 F. 3d, at 1213 (FBI retaliation against employee "took the form of the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] and his wife"); Berry v. Stevinson Chevrolet, 74 F. 3d 980, 984, 986 (CA10 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination). A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms." Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)."

The paradox or conundrum, therefore, stands out. There is limiting language in Title 18 U.S.C. § 1514A, whistleblower provision. Can this possibly mean Congress intended to leave employers "many forms" for "effective retaliation" against SOX whistleblowers that it took pains to prohibit against those who allege discrimination? If not, must DOL and the courts incorporate *White's* retaliation standard into its analysis of SOX whistleblower complaints?

III. WHY COURTS MIGHT LIMIT SOX WHISTLEBLOWER PROTECTIONS RATHER THAN EXPAND THEM

Despite the tension caused by expanding whistleblowing rights under Title VII and restricting them under SOX, there are several reasons why courts may distinguish the two retaliation statutes in such a way that rights under one are strengthened, and under the other limited. The most powerful argument for this uneasy position is one based on basic principles of statutory interpretation. The *White* Court made clear that the function of the phrase, "terms and conditions of employment" in Title VII anti-discrimination clause is to "explicitly limit the scope" of actionable conduct "to actions that affect employment or alter the conditions of the workplace."

It would be difficult enough to insist that the identical phrase has some other function in SOX's whistleblower provision even if it were not transplanted there from employment law jurisprudence. Because "terms and conditions of employment" comes from the employment law context, the idea that the phrase has a different sense or function in SOX appears too extraordinary. The ordinary meaning of "terms" and "condition" is very broad and flexible, but the phrase "terms and conditions of employment" is "a specialized term of art in federal labor law."[14] A narrower meaning from the context wherein it arises and develops ordinarily must be ascribed to the phrase:

> Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of feudalism. * * * The peculiar idiom of business or of administrative practice often modifies the meaning that ordinary speech assigns to language.[15]

More generally, the Supreme Court has instructed that "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."[16]

Second, litigation of whistleblower provisions from which SOX's is derived indicate actionable conduct must be related to the workplace.[17] This is done even though the wording of implementing regulations may be very open-ended. The evidentiary framework DOL uses to analyze SOX whistleblower claims comes straight from 49 U.S.C. 42121(b), the airline whistleblower protection provision.[18] The regulation, namely, 29 C.F.R. § 1979.102(b), implementing the airline legislation, broadly states that "[i]t is a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee." On the other hand, 29 C.F.R. § 1980.102 implementing SOX §806 contains the limiting phrase "with respect to the terms, conditions, or privileges of employment." Hence, it is even more difficult to argue in the SOX context for use of *White*'s broad standard then it would be to import that standard to analyze retaliation complaints levied by airline employees.

Third, it is also possible to argue that the different primary conduct that the acts aim to prevent warrant retaliation clauses of different scope. The primary conduct the SOX petitioner exposes is corporate wrongdoing. In particular, the statute targets fraudulent accounting and financial machinations. The conduct often involves manipulating and misrepresenting highly confidential information. Reporting this conduct, therefore, means revealing, in many instances, the types of deals and data that corporations have legitimate reasons to keep close to the vest. On the other hand, reporting discrimination on the basis of race, sex or nationality, generally does not involve disclosing confidential corporate information. Congress could reasonably suppose that a company's legitimate concerns about preventing additional revelations may justify precautionary measures, extra clearance, or monitoring of activities that would appear unnecessary and retaliatory in the Title VII context. Indeed, one might argue that Congress excised the phrase, "privileges of employment," from the SOX statute for this very reason.

Further, the whistleblower may be asked to cooperate on an ongoing basis with federal departments, such as the Securities Exchange Commission, the Public Company Accounting Oversight Board or the Department of Justice. The position of the employee may be akin to that of a government agent. Reporting corporate misconduct outside the company may expose the company, superiors and co-workers to criminal prosecution. How reasonable, at that point, would it be to continue to allow a whistleblowing

employee the same access to information he or she had before, rather than limiting it to what is necessary to perform tasks central to his or her job? Finally, the idea that the Supreme Court has become pro-employee should be held in check.[19]

IV. THE CASE FOR EXPANDING SOX WHISTLEBLOWER RIGHTS

Nonetheless, SOX complainants have an argument that *White's* broad materiality standard should be used to analyze their whistleblower complaints, making retaliation beyond the workplace actionable under Sarbanes Oxley. First, the plain language approach is not completely one sided in favor of defendants seeking to confine SOX. Title VII's **anti-discrimination** provision is larded with limiting language making Congress's intent to confine this provision to conduct clearly related to the workplace unmistakable. On the other hand, the limiting language in the SOX whistleblower statute, although unquestionably prominent, consists in three verbs "discharge, demote, suspend" and a phrase "terms and conditions of employment." Arguably, this indicates Congress was less concerned about limiting the type of actions whistleblowers can complain about.

However, the argument based upon plain language is decidedly weak. Indeed, defendants may argue that the language of §1514(A) carefully expands SOX to include threatening and harassing conduct that may not be actionable under Title VII's anti-discrimination clause, but still requires analysis of whether the conduct was related to the workplace. From a practical point of view, as well, this position may appear attractive. *White* criticized Circuit Courts that have confined actionable conduct to "ultimate employment decisions." Section 3(b) of SOX grants jurisdiction to the SEC to enforce all SOX provisions, including §806.[20] SOX also provides for criminal penalties for any violation of the whistleblower-related provisions. In sum, an argument can be made that there are adequate tools in place for reaching a broad range of conduct, and for deterring employers from tacking too close to the wind.

Still, the Supreme Court's pronouncements in *White* about effective anti-retaliation legislation and legislative purpose have to be dealt with. In *White* the Court stated that unless Title VII's anti-retaliation statute reached conduct beyond the workplace, the goal of the anti-retaliation provision would be ineffectual. Clearly, the same argument should hold in the case of SOX's whistleblower statute. The whistle-blower provision also will be ineffectual unless it reaches behavior that may not be related to terms and conditions of employment.

Importantly, this argument does not rest simply on policy considerations. It is supported by staid principles of statutory interpretation. While "[s]tatutory interpretation begins with the language of the statute itself,"[21] and ordinarily courts "do not have the authority to disregard the plain language of a statute,"[22] there are exceptions. If literal application would lead to an absurd result, for example, the Court may look beyond language to Congressional intent.[23]

Nothing in the Congressional debates indicates an actual intention to restrict whistleblowers access to administrative and judicial processes. The Senate Judiciary Committee's report on SOX listed whistleblower protection as one of three main purposes of the Act, alongside criminal liability for wrongdoers and bars to bankruptcy discharge. S.Rep. No. 107-146, at 2 (2002) ("Senate Report"). As the *amicae* in *White* pointed out on behalf of Sheila White, "Congress continues to recognize that robust protection from retaliation is necessary because employers continually adapt their behavior to retaliate within the confines of the law." Senate commentary indicates Congress clearly aware of the very concerns that motivated the Court in *White* to fashion a broad retaliation standard. The protections ultimately enacted in § 806 of the Sarbanes-Oxley Act were necessary because"[u]nfortunately, ... most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law."[24] By comparison, Title VII was far more controversial. Indeed, it was bitterly opposed, filibustered and stripped down. Southern politicians intent on maintaining racial domination complained that "discrimination" was overly-broad, and charged the legislation meant hiring quotas and infringed First Amendment rights of expression and association.

V. IMPLICATIONS FOR SOX REMEDIES

What Title VII's language means for SOX has already caused a split within the federal judiciary. Two district courts have arrived at diametrically opposed views about causes of action and remedies available to SOX whistleblowers. In *Murray v. TXU Corp.*, Civil Action No. 3:03-CV-0888-P (N.D.Tex. 2005), the district court stated the Act does not appear to allow claims for retaliation that injures to reputation, or compensation for non-pecuniary damages such as pain and suffering, mental anguish. According to the Court, "remedies under the Sarbanes-Oxley Act analogous to remedies under Title VII prior to its 1991 amendment." At the time, Title VII provided:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.[25]

The district court drove home the point that the Supreme Court had concluded that "nothing in this remedial scheme purports to recompense a Title VII plaintiff for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages."[26]

In *Hanna v. WCI Communities, Inc.* (S.D.Fla. 2004), the district court turned to Title VII jurisprudence to determine what it would take to make the petitioner whole under SOX and came up with results diametrically opposed to the North Texas court's. *Hanna* acknowledged *Burke*'s interpretation of the Title VII statute, but ignored the similarity between §806 and the language in the pre-1991 version of the employment law statute. Instead, it relied on the act as amended in 1991, reasoning that while "42 U.S.C.

§1981a(b)(3) never specifically mentions "reputation damages," courts have held that "injury to character and reputation . . . [are] non-pecuniary losses compensable under the 1991 Act."[27] The SOX complainant, having stated a claim for reputational damage, was therefore entitled to compensation.

If *White's* standard does **not** find its way into whistleblower jurisprudence, the conflict between and *Hanna* and *Murray* may remain unresolved. If the *White* standard is incorporated, it will open up arguments for acknowledging a wider range of cognizable retaliatory conduct. With the recognition of these grounds for a cause of action, federal agencies and courts will be pressed to fashion relevant remedies.[28] In this second scenario, the *Hanna* court's position is more likely to prevail.

CONCLUSION

We predict *White* will result in an uneven pattern of justice. DOL may try to set a policy adopting the *White's* standards, but different administrative law judges could well disagree. However, clarification from the federal courts about whether the standards apply to SOX whistleblowers could be a long time coming. This is because SOX whistleblower claims are subject to arbitration,[29] and nearly everyone in position to report financial misstatements, violations of GAAP and the like, are subject to mandatory arbitration clauses. In general, companies can force alternative dispute resolution as late, or as early, in the administrative process as they want without waiver of the right to arbitrate.[30] Many whistleblower complaints will not come before an administrative law judge. The vast majority will not reach district court. By and large SOX petitioners will be whistling in the dark no matter what *White* implies unless a government agency – the SEC, the DOJ – takes up their cause.[31]

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[1] "Title VII" in this paper always refers to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000(e) to 2000e(17).

[2] Id.

[3] Preliminary forecasts by some members of the plaintiff and defense bars are that *White* will be extremely influential in many areas besides Title VII. *See,* A new world for retaliation claims: High court shifts balance of power in the workplace. Marcia Coyle/Staff reporter, The National Law Journal, June 26, 2006.

[4] *White v. Burlington Northern & Santa Fe Railroad Co.*, 364 F.3d 789, 792 (6th Cir. 2004).

[5] *See, Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 13, n. 12 (1st Cir. 2005) (citing S. Rep. 107-146, at 26).

[6] 42 U.S.C. § 42121

[7] 42 U.S.C. § 5851

[8] 18 U.S.C. § 1514A(b)(2)(a)

[9] *See, e.g., Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (Airline); *Kahn v. United States Sec'y of Labor*, 64 F.3d 271, 277-78 (7th Cir. 1995) (ERA); *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 480-81 (3d Cir. 1993) (adapting *McDonnell Douglas* prima facie standard governing Title VII claims to retaliatory discharge claim under the Clean Water Act, 33 U.S.C. § 1367(a)); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (same, under the Surface Transportation Assistance Act, 49 U.S.C. § 2305(a)).

[10] *See,* 49 U.S.C. § 42121(b)(2)(B)(i) (setting forth DOL complaint procedures and standards guiding government investigation).

[11] Compare, *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004); (clear and convincing evidence needed to rebut competent SOX allegations and avoid further DOL investigation) with, e.g., *Calmat Company v. U.S. Department of Labor*, 364 F.3d 1117 (9th Cir. 2004) (describing burden shifting and standards under Title VII); *Casarez v. Burlington Northern/Santa Fe Co.*, 193 F.3d 334, 337 (5th Cir. 1999) (same).

[12] Under Title VII, harassment is actionable discrimination if it is "severe or pervasive enough" to create "an environment that a reasonable person would find hostile or abusive." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Von Gunten v. Maryland*, 243 F.3d 858, 870 (4th Cir. 2001). The express prohibition of threatening or harassing conduct under SOX may mean whistleblowers can support a claim without having to make a showing that the conduct is "pervasive" or created a "hostile or abusive" work environment even if *White's* standard is not extended into the SOX context.

[13] The DOL evidently does not consider the omission of the term "privileges" significant. In fact implementing legislation included the omitted term. 29 C.F.R. 1980.102(a) governing DOL's handling of SOX whistleblower complaints states that,

> No company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee's compensation, terms, conditions, **or privileges** of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section. (Emphasis added)

One reason for this attitude is that little authority exists in which "privileges" of employment are distinguished from "terms and conditions." Americans with Disabilities Act litigation delineating equal access to benefits and privileges of employment under Title VII may provide some guidance. *See, e.g., Roloff v. Sap America, Inc.*, Civil No. 04-756-HU (Or. 2006) (Order) (noting that in the particular case benefits and privileges had been "defined as access to ... meeting rooms, and other employer-sponsored services such as health programs, transportation, and social events.").

[14] *Sheet Metal Workers v. Arch. Metal Works*, 259 F.3d 418, 433 (6th Cir. 2001).

[15] *Alinco Life Ins. Co. v. United States*, 373 F.2d 336, 352 (Ct.Cl.1967) (quoting Justice Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col.L.Rev. 527, 536-537 (1947)).

[16] *Evans v. United States*, 504 U.S. 255, 260 & n.3 (1992) (quoting *Reflections on the Reading of Statutes, supra*, at 537).

[17] *See, Vieques Air Link, Inc.*, 437 F.3d at 108.

[18] *See, Bechtel v. Competitive Technologies, Inc., 448 F.3d 469* (2nd Cir. 2006) (Leval, J., concurring) ("Complaints filed with the Secretary of Labor concerning violations of the whistleblower-protection provisions of § 806 are governed by provisions of AIR21(b), 49 U.S.C. § 42121(b)."); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1375-76 (N.D. Ga. 2004).

[19] *See Garcetti v. Ceballos*, 126 S. Ct. 1951 (May 30, 2006) (holding in a civil rights suit brought under Title 42 U.S.C. § 1983, that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline).

[20] *Id.* (stating that "a violation by any person of this Act [i.e. the SOX] . . . shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934.").

[21] *Penn. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990)).

[22] *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (internal quotation marks omitted).

[23] *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940); *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87, 19 L.Ed. 278 (1868). ("'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to . . . an absurd consequence. . . . The reason of the law in such cases should prevail over its letter.' The Court, therefore, reserves "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute."' *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-511 (1941)); *Schiaffo v. Helstoski*, 492 F.2d 413, 428 (3d Cir. 1974) (Even "the use of the words of the statute as the primary guide to its interpretation requires an appreciation of the general purpose of the legislation so that literalism does not frustrate that purpose.").

[24] S. Comm. on the Judiciary, The Corporate Criminal Fraud Accountability Act of 2002, S. Rep. 107-146, at 19 (2002).

[25] 42 U.S.C. § 2000e-5(g) (1991) (emphasis added).

[26] *Murray, supra* (quoting *United States v. Burke*, 504 U.S. 229, 239 (1992)).

[27] *Hanna, supra* (quoting, *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953 (7th Cir. 1998).

[28] *Bell v. Hood*, 327 U.S. 678, 684 (1946) (stating that it is "well settled" that where legal rights have been infringed, "federal courts may use any available remedy to make good the wrong done"); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 238-240 (1969); *Steele v. Louisville & Nashville R.R Co.*, 323 U.S. 192, 207 (1944).

[29] *Boss v. Salomon Smith Barney Inc.*, 263 F.Supp.2d 684, 685 (S.D.N.Y. 2003) (finding nothing in the text or legislative history of the SOX that evinces an intent to preempt the Federal Arbitration Act).

[30] *See, Ulibarri v. Affiliated Computer Services*, 2005-SOX-46 and 47 (ALJ Jan. 13, 2006) (staying proceedings pending arbitration).

[31] See, Miriam A. Cherry, Whistling in the Dark? Corporate Fraud, Whistleblowers and the Implications of the Sarbanes-Oxley Act for Employment Law, 79 Wash. L. Rev. 1029 (2004).