

## SARBANES-OXLEY

# Employers scoring in whistleblower actions

Tresa Baldas / Staff reporter  
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A law that was designed to protect whistleblowers who reveal corporate fraud has produced robust victories for employers, which have plaintiffs' lawyers and employee-rights advocates reeling.

Since the passage of the Sarbanes-Oxley Act of 2002 — which offers corporate whistleblowers protection from retaliation — about 1,000 claims have been filed, but only 17 have been found to have merit, according to U.S. Department of Labor statistics.

And of those 17 cases, only six have kept their wins after full hearings before administrative law judges.

Management-side attorneys believe the law is working just fine, holding that Sarbanes whistleblowers rarely win because they are misusing the law as a weapon in garden-variety workplace disputes.

### Raw deal?

Plaintiffs' lawyers, meanwhile, believe that employees are getting a raw deal.

"I think the retaliation provision of Sarbanes-Oxley is a major disappointment," said Jason Zuckerman of The Employment Law Group in Washington, who is handling five Sarbanes-Oxley claims on behalf of employees.

"What's so problematic for me is that I get calls from clients all the time — usually in the accounting and legal profession — who did the right thing," Zuckerman said. "They naïvely believed that they would be rewarded for doing the right thing. They're now out of work and they come to me and I am in the unfortunate position of having to explain to them how this great law that was enacted only five years ago has been significantly undermined."

The Labor Department's Office of Administrative Law Judges said in an e-mail response that Sarbanes cases are decided by the presiding judge "based on the facts and law peculiar to those cases. Many cases are dismissed for reasons of lack of jurisdiction, while others are decided by a judge after a full and fair hearing, either in favor of or against the alleged whistleblower based on the facts of each case."

Under Sarbanes-Oxley, an employee claiming retaliation for reporting corporate fraud must first file a claim with the Occupational Safety and Health Administration, the agency charged with investigating initial complaints. Employees can proceed to federal court after 180 days, or appeal to an administrative law judge, if they disagree with OSHA's finding.

Lawyers note that a sticking point in these cases is what is considered protected activity. In other words, what did the employee reveal that led to retaliation?

Under Sarbanes-Oxley, the whistleblower's information must relate to one of three things: a violation of securities laws, a fraud on shareholders or a violation of rules and regulations set by the U.S. Securities and Exchange

Commission. The law also specifies that an actual violation does not need to be reported, only that an employee must "reasonably believe" that a violation occurred.

On Nov. 1, a closely watched Sarbanes-Oxley case is scheduled to be heard in the 4th U.S. Circuit Court of Appeals, involving an employee who complained that he was retaliated against after reporting that certain employees were not properly trained in manufacturing a vaccine — a potential violation of federal training requirements. A lower court held that his complaint was not protected under Sarbanes-Oxley. *Livingston v. Wyeth*, 2006 WL 2129794.

"I think the act has been interpreted by the [Labor Department] and the courts precisely the way it was intended to be interpreted," said Michael Delikat, who is representing the defendant in *Livingston*.

Delikat, who chairs Orrick, Herrington & Sutcliffe's employment law practice from the firm's New York office, rejects the argument that Sarbanes-Oxley isn't working because employees are losing their cases. He said the statute has been successful in changing corporate conduct, prompting employers to implement whistleblower hotlines and ensure that people who come forward do not face retaliation.

Bradford Newman, who chairs the labor and employment practice in the Palo Alto, Calif., office of Paul, Hastings, Janofsky & Walker and represents management, said plaintiffs are losing their cases because they're filing a host of claims that are not covered under the act. For example, an employee might complain he or she was fired for disclosing an environmental problem, a defective product or discrimination. But those aren't protected under the act.

Employee rights attorney Lynne Bernabei disagrees. She believes administrative law judges and courts are placing too high a burden of proof on employees, often requiring employees to prove an actual violation or striking down a claim because they believed that shareholder fraud specifically was not proven.