Purpose

Section 806 of the Sarbanes-Oxley Act, 15 U.S.C. § 1514A, seeks to combat what Congress identified as a corporate "culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." S.Rep. No. 107-146, at 5 (2002). To accomplish this goal, § 1514A "protects 'employees when they take lawful acts to disclose information or otherwise assist ... in detecting and stopping actions which they reasonably believe to be fraudulent.' " *Guyden v. Aetna, Inc.,* 544 F.3d 376, 383 (2d Cir.2008) (quoting S.Rep. No. 107-146, at 19). Specifically, § 1514A makes it unlawful for publicly traded companies to "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 ... to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of" certain laws, rules, and regulations addressing various types of fraud. 18 U.S.C. § 1514A(a)(1). *Bechtel*

SOX is meant to "protect people who have the courage to stand against institutional pressures and say plainly, 'what you are doing here is wrong' . . . in the particular way identified in the statue at issue." An employee has fulfilled that purpose if they disclose conduct that is within the "ample bounds" of the anti-fraud statutes. Such an employee is therefore protected even if they lacked "access to information sufficient to form an objectively reasonable belief" as to the specific elements of fraud. And they are similarly protected even if their belief is "reasonable but mistaken." *Third Circuit*

0. DOL OSHA: Reasonable Cause

The U.S. Department of Labor Occupational Safety and Health Administration ("OSHA") administers the anti-retaliation provision of SOX. A SOX whistleblower claim must be filed initially with OSHA. OSHA will then investigate the complaint and may order preliminary reinstatement of the whistleblowers if it finds "reasonable cause" to believe that retaliation occurred.

OSHA finds "reasonable cause" when it determines that a reasonable judge could rule for the whistleblower. And a reasonable judge could rule so only where there is evidence supporting each element of a SOX retaliation claim. Generally, though, less evidence is required to establish "reasonable cause" at this stage than to prevail at trial. "OSHA's responsibility to determine whether there is reasonable cause to believe a violation occurred is greater than the complainant's initial burden to demonstrate a *prima facie* allegation that is enough to trigger the investigation."63 But OSHA need not "resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that a violation occurred." In practice, however, OSHA rules for SOX complainants only in the strongest cases, which is due in part to the burden that OSHA must bear to order preliminary reinstatement of a whistleblower.

A SOX whistleblower must file a complaint within 180 days after they either experience or become aware of the unlawful retaliation.64 The clock starts ticking once "the discriminatory decision has been

both made and communicated to the complainant."65 A complaint is considered filed once the Department of Labor receives it. A complaint sent by mail, however, is considered filed on the date of its postmark.

Though a discrete retaliatory act "occurs" on the day it happens and the complaint must be filed within 180 days, retaliatory acts outside the statute of limitations period are actionable where there is an ongoing hostile work environment and at least one of the acts occurred within the 180-day statute of limitations.

A SOX complaint need not plead every element of the claim in detail, but it must provide "fair notice" of the claim, which entails a showing of: 1) some facts about the protected activity; 2) some facts about the adverse action; 3) an assertion of causation, and 4) a description of the relief or damages sought by the whistleblower.66

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1. Petitioner: Prima Facie (Preponderance of Evidence)

To prevail, a SOX whistleblower must prove by a preponderance of the evidence that:

- 1) they engaged in protected activity (they made a protected disclosure under Section 806);
- 2) the employer knew that they engaged in the protected activity;
- 3) they suffered an unfavorable personnel action;
- 4) the protected activity was a contributing factor in the unfavorable action. *Bechtel v. Admin. Review Bd.,* 710 F.3d 443, 447 (2d Cir. 2013)

Once a SOX whistleblower has proven these elements by a preponderance of the evidence, the burden is on the employer to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the employee engaging in protected activity.

To prevail under [§ 1514A], an employee must prove by a preponderance of the evidence that

(1) She engaged in protected activity

A) Content

- Section 1514A contains six provisions that enumerate six specific forms of misconduct which, if reported by an employee, protect the whistleblower from employer retaliation
  - The first four provisions are statutes that, as written by Congress, are not limited to types of fraud related to SOX.
  - (1) § 1341 (mail fraud);
  - (2) § 1343 (wire fraud);
  - (3) 18 U.S.C. § 1344 (bank fraud);
  - (4) 18 U.S.C. § 1348 (securities fraud);
  - **(5) any rule or regulation of the SEC; (**may or may not involve fraud – Day v Staples)
  - **(6) any provision of federal law relating to fraud against shareholders.**
  - § 1514A clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to "shareholder" fraud.

- Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws . . . standing alone, is not protected conduct under the SOX." *Harvey* , slip op. at 14. To bring himself under the protection of the act, the information the employee provides must directly relate to the listed categories of fraud or securities violations. 18 U.S.C.A. § 1514A(a); 29 C.F.R. §§ 1980.104(b), 1980.109(a) (*Levi v Aneheuser*)

Gjovik Evidence:

- 4/15 Email to Apple Senior Director & Ethics Leader
  - I raise ethical concerns to Senior Director in HR org who is ethics leader at Apple about Apple not informing employees that they work on Superfunds. I note that Alisha Johnson told the press that Apple goes "well beyond legal requirements" but that EH&S told me they only do what is absolutely legally required. Also raised concerns that Lisa Jackson was making public statements about "healthy communities" and Apple's internal behavior is the opposite.
- 6/7 – Federal EPA, Margot, responds and tells me:
  - "Thank you for conveying that during the wildfires last year the HVAC system was turned off, as it is important for EPA to be aware if there's a significant change to site conditions."
- 7/4 – I email Antonio Lageres, Apple Employee Relations Sr Manager
  - The only reason I can think of that they're refusing to do this testing after they previously planned on doing it, was that all the questions I was asking were very good questions and revealed major gaps/issues — so they're going out of their way to not have evidence of their negligence. I think everyone is forgetting I work in engineering & I'm in law school. I know how toxic torts work…. right now it feels like I'm not only being harassed by my manager and my HR BP, but it appears there's a **conspiracy** to force me back into what appears to be a very physically unsafe office building.
- 7/7 – I email Federal EPA
  - Also, as you mentioned *"it is important for EPA to be aware if there's a significant change to site conditions,"* I would hope you've already been informed that there are apparently cracks in the floor of Stewart 1 and Apple is pursuing a "floor sealing plan."
- 7/18 – I post on Apple "Slack" where all Apple employees can see
  - "And yeah, for context the remote work ADA process was actually suggested to me by Employee Relations as some sort of accommodation in response to me yelling for months about their negligence with my office/the property it's on, failure to address my work place safety concerns, and misrepresentation of their policies/protocols. Also, yup I already reported her comments and my dissatisfaction with this whole mess of a process to Employee Relations. I have a big 90m meeting with two ER people this week to go over all this, in addition to my outstanding complaints about work place safety, sexism, sexual harassment, failure to address hostile work env, failure to report work place injuries, FMLA & ADA violations, intimidation and retaliation for raising concerns about all of the above, whistleblower retaliation, and a whole bunch more…"
- 7/19 – I email Federal EPA
  - "Checking in — any update? I'm locking this down with a national journalist. P.S. if you haven't already connected the dots, the "responsible party" for the Sunnyvale TRW

Microwave site is *Northrup Grumman,* who's ex-CEO and ex-President (and ex-CFO of TRW Microwave), Ronald Sugar, is a current & long time Apple board member (10yrs+). So the guy who was running the companies responsible for this site's pollution, clean-up, vapor intrusion etc — is one of only eight Apple board members. He also chaired Apple's Audit & Finance committee, which I assume would oversee budgets for things like... Apple's facility and safety oversight. If you're trusting they're all doing the right thing, maybe they are, but I'd hope you might poke around a bit and see what exactly this whole floor crack / floor sealing thing is about — in additional to the lack of air testing, and refusal to test the air before they seal the floor

- 7/20 – I email Federal EPA
  - "Did you talk to Apple & NG about the cracks in the floor and floor sealing plan? They told me they didn't notify the EPA about and didn't plan to, despite me telling them they probably are required too.
- 7/27 – I forward entire email exchange between me & Federal EPA to Apple Employee Relations
  - I write: "Hello! FYI, update on the EPA / EH&S / Stewart 1 situation. The Federal EPA said they're meeting with the "site team" this week — I assume they mean EH&S. Even though y'all said you weren't looking into this, I'll add this to the *Work Place Safety Concerns* folder."
  - Forwarded emails includes my complaints to Federal EPA about:
    - Concerns about conflict of interest with Ronald Sugar on Board of Directors
    - Apple won't answer my questions about safety
    - Intimidated to not speak about safety concerns
    - Had to remind Apple about "labor laws & stuff"
    - EPA says "it is important for EPA to be aware if there's a significant change to site conditions"
- 7/28 – Federal EPA replies
  - I look forward to hearing how the conversation goes and if any changes will be made to the plan of record," & Margot replying "Thanks again for your continued interest in this site and providing your on-the-ground observations. EPA communicates regularly with responsible parties on issues related to superfund sites as part of the agency's CERCLA obligations. Similarly, EPA also routinely follows up on concerns raised by the public in regards to superfund sites. The agency takes these communications and on-the-ground observations seriously. Please continue to check the website for any site updates. Please do connect me with the reporter you're working with on this and thank you again for voicing your concerns and providing us with such detailed information."
- 8/23 – I submit "Concern" to Apple Business Conduct & Global Compliance
  - Form says: Apple takes all concerns seriously and has a zero-tolerance policy on retaliation.
  - Explain what happened, "Ronald Sugar used to be CEO/President of TRW Microwave & Northrup Grumman. Sugar is now on the Board of Directors for Apple as chair of the finance & audit committee, which appears to oversee the due diligence programs for offices on chemical clean-up sites, including the TRW Microwave Superfund. His previous companies caused the contamination that is now being cleaned up under my office. See page 33 of attached PDF."

- Have you reported this to anyone else? If so, who? "Yes, Employee Relations in July 2021"
- **Apple Real Estate Environment, Health, & Safety: Overall**
- **Concerns:** RICO; Negligence, Misrepresentation; Fraud; Recklessness; Violations of Env Laws; OSHA, & Right to Know; Toxic Torts; Corporate Corruption; Organized Intimidation; Organized Witness Tampering
- **EH&S: Michael Steiger**
- **Concerns:** Fraud, Misrepresentation, Negligence, Recklessness
- **Board of Directors I. Finance & Audit Committee : Ronald Sugar**
- **Concerns:** Conflict of Interest, Corruption; Fraud
- Is Sugar overseeing the due diligence program for clean-up, testing, employee complaints, finance for this office that his previous company caused the pollution for & is still responsible to clean up?
- Did he notify the General Counsel of this conflict of interest?
- Has he taken any actions that are favorable to NG/TRW and forsake proper safety & protection for Apple employees?
- I have been reporting safety concerns in that office since March 2021 and have escalated further concerns that EH&S has been negligent, reckless, misrepresented their activities, and have intimidated me to not speak out about the safety concerns.
- The Federal EPA was notified. of my concerns & notified Apple ER & EHS of my contact with the gov at that time."

- 8/23 – I email Apple Employee Relations
  - I also elaborated on my concerns around conflicts of interest & **corruption** related to Ronald Sugar. I filed a Business Conduct ticket with my concerns & also attached this document. It's ticket HRC000017207, as noted in the v3 document.
- 8/29 - Complaint to Federal EPA
  - " As reported to the EPA Superfund site community contact (Margot PerezSullivan), I've had concerns since March 2021 about Apple's oversight & lack of due diligence for the safety of their employees in the TRW Microwave Superfund site (825 Stewart). I've expressed concerns about negligence and even recklessness, possible violations of Right to Know & OSHA. Worse, Apple's response has been to **misrepresent** their activities and the site, intimidate me to not speak about workplace safety concerns related to the site, and have refused to notify the Federal EPA of changed circumstances at the site (e.g. cracks in the cement floor requiring repair). Apple has frequently told me they refuse to answer any of my questions about safety or the site, and even pressured me into requesting an ADA accommodation request to work remotely to not be exposed to the chemicals at the site, after pressuring me to file a worker's comp claim for a fainting spell I had in 2019, which I believe to be caused by vapor intrusion. Apple has refused to test the indoor air for vapor intrusion until after they seal the cracks, despite the last testing being done in 2015 and was limited (10hrs) and the only time the results ever came back without vapor intrusion above max EPA industrial limits (there was a long history of toxic indoor air vapor intrusion in the building). Further, Northrup Grumman is the responsible party and their ex-CEO/President, Ronald Sugar, is now on the Board of Directors of Apple & the Chair of the Finance & Audit committee. I can provide documentation for all of the above. I reported my **concerns about conflicts of** interest to

Apple. I've also filed DOL OSHA Whistleblower retaliation complaints, and claims with the EEOC, NLRB, & CA DEFH.

- 9/1 SEC Filings (pre-termination)
    - "In your own words, describe the conduct or situation you are complaining about. One of Apple Inc's board of directors is Ronald Sugar, who joined the board in 2021. Sugar is and has been chair of the Finance & Audit Committee. Sugar used to be CEO/President of Northrup Grumman, and TRW Microwave before that, for many years. In 2014, Apple began to lease an office building at 825 Stewart Dr in Sunnyvale, CA. 825 Stewart Dr is an active EPA Superfund site (the "TRW Microwave" site). Apple calls this building "Stewart 1" and has 100+ employees working there, including myself. The EPA's "responsible party" for the clean up of the toxic chemicals under the building, is Northrup Grumman (and TRW Microwave before that, until Northrup Grumman acquired TRW Microwave). This 825 Stewart building was the California HQ for TRW Microwave, so Sugar must be very familiar with it. I have a separate complaint with the Federal EPA about my concerns about hazardous waste vapor intrusion in the indoor air of the building -- and negligent, if not reckless & **fraudulent** due diligence of the safety & health oversight of the employees by Apple. I was even intimidated by my Manager & Apple Employee Relations to not speak openly about my workplace safety concerns. I have since faced multiple types of retaliation for continuing to speak about my concerns about work place safety & Apple's unethical, if not **illegal**, behavior related to the building. (I have a separate NLRB complaint for all that). Meanwhile Ronald Sugar is supposed to be overseeing Finance & Audit for Apple, which I assume includes the budget and oversight of due diligence programs like this. This seems like a very big conflict of interest… also complained that Lisa Jackson and Alisa Johnson seem to be heavily involved in Apple's haz waste public relations (see 2x 2016 DTSC settlement PDFs attached). It worries me this is a Federal EPA Superfund site already with 1 conflict of interest with Sugar, but also more if Lisa Jackson's team is doing PR about Apple's hazardous waste **crimes/infractions** -- and Lisa used to run the Federal EPA & Alisa was the press secretary for Lisa at the Federal EPA. I complained about this apparent **conflict of interest** to Apple Business Conduct on Aug 23, 2021.
    - "I complained verbally to Apple Employee Relations several times in July 2021 and asked them to look into it and they refused to look into it. I asked them who I could complain to or where I could file a complaint, and they said "no idea." I complained to the federal EPA (via Margot Perez-Sullivan) on July 19th 2021, via email. She didn't acknowledge my concern about a **conflict of interest**. I complained about this apparent **conflict of interest** to Apple Business Conduct on Aug 23, 2021. On Aug 28, 2021 Apple Business Conduct closed my ticket and said, "Thank you for raising your concerns to the Business Conduct Helpline. Apple takes your concerns seriously, and we have shared them with the appropriate internal teams for review and investigation. This request is closed and can't be reopened. If you need more help with this issue, create a new request."
- 9/2 - Bloomberg article (public)
    - Publishes article mentioning my NLRB complaint, Fed OSHA, CA DOL, & EEOC claims against Apple
    - https://www.bloombergquint.com/technology/national-labor-relations-board-fields-complaints-about-apple

- 9/6 Tweet https://twitter.com/ashleygjovik/status/1434836915086188544
  - "@NLRB Case: 32-CA-282142
  - @OSHA_DOL Whistleblower Claim: 1218-023
  - @USEEOC Case: 556-2021-00608
  - **@SEC_Enforcement** Whistleblower Claim: 16304-612-987-465
  - @CA_DIR Whistleblower Claim: RCI-CM-842830

B) Belief & Reasonableness

- Employee must have
  - (1) a **subjective belief** that the conduct being reported violated a listed law, and
    - Plaintiff's particular educational background and sophistication [is] relevant to the subjective component. Subjective reasonableness requires that the employee 'actually believed the conduct complained of constituted a violation of pertinent law.' (*Day v Staples*)
    - an employee's "belief" in their employer's wrongdoing is "central" to the analysis of SOX-protected conduct.

  - (2) this belief must be **objectively reasonable.**
    - To have an objectively 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. 'Securities fraud' itself has additional relevant elements. The elements of a cause of action for securities fraud 'resembl[e] . . . common-law tort actions for deceit and misrepresentation.' Those elements typically include a material misrepresentation or omission, scienter, loss, and a causal connection between the misrepresentation or omission and the loss. The employee need not reference a specific statute, or prove actual harm, but he must have an objectively reasonable belief that the company intentionally misrepresented or omitted certain facts to investors, which were material and which risked loss. Securities fraud under section 10(b) and Rule 10b-5 requires: (*Day v Staples*)
    - "[t]o have an objectively 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. Mistaken belief of a SOX violation is protected (*Van Asdale v International Game*) The reasonableness of [a plaintiff's] belief for purposes of § 1514A must be measured against the basic elements of the laws specified in the statute. 'Fraud' itself has defined legal meanings and is not, in the context of SOX, a colloquial term. 'The hallmarks of fraud are misrepresentation or deceit.'"
- Motive does not matter
  - No: a whistleblower's motives for engaging in protected conduct are irrelevant, per longstanding ARB precedent.32 The whistleblower need only have a reasonable belief that the conduct violates federal securities laws or the other categories of protected conduct in Section 806 of SOX.

C) Does not have to be **actual violation**

- A SOX retaliation plaintiff need not demonstrate that they disclosed an actual violation of securities law; only that they reasonably believed that their employer was defrauding shareholders or violating an SEC rule.9 Indeed, a reasonable but mistaken belief is protected under SOX.

- Section 806 specifically states that the reasonableness test "is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence."
- To be protected under SOX, an employee's report "need not 'definitively and specifically' relate to one of the listed categories of fraud or securities violations in § 1514A." Whistleblowers are protected if they show that they reasonably believed that the conduct they complained of violated one of the enumerated violations in Section 806. Whistleblowers are not required, however, to tell management or the authorities why their beliefs are reasonable. Nor must their disclosures allege, prove, or approximate the elements of fraud.

D) Does not have to be **Material**

- The great weight of authority holds that there is no independent materiality element to establish protected whistleblowing under Section 806 of SOX.
- Complaints about purely internal practices that are not financial in nature and are not reported to shareholders do not meet the materiality requirement for an objectively reasonable belief in shareholder fraud: (*Day v Staples*)

Evidence: 2020 & 2021 Apple Inc 10-Ks

- Risk Factors ("When any one or more of these risks materialize from time to time, the Company's business, reputation, results of operations and financial condition, as well as the price of the Company's stock, can be materially and adversely affected.")
  - The Company's financial condition and operating results could be adversely impacted by unfavorable results of legal proceedings or government investigations**.** [The Company is subject to various claims, legal proceedings and government investigations that have arisen in the ordinary course of business and have not yet been fully resolved, and new matters may arise in the future. The number of claims, legal proceedings and government investigations involving the Company, and the alleged magnitude of such claims, proceedings and government investigations, has generally increased over time and may continue to increase. [2020, 2021]
  - The Company's business can be impacted by political events, trade and other international disputes, war, terrorism, natural disasters, public health issues, industrial accidents and other business interruptions. [Risk of material impact due to industrial accidents; public health issues – 2020, 2021]
  - The Company is subject to complex and changing laws and regulations worldwide, which exposes the Company to potential liabilities, increased costs and other adverse effects on the Company's business**.** [Including: labor and employment; environmental health & safety – 2020, 2021]
    - The Company has implemented policies and procedures designed to ensure compliance with applicable laws and regulations, but there can be no assurance that the Company's employees, contractors or agents will not violate such laws and regulations or the Company's policies and procedures. If the Company is found to have violated laws and regulations, it could materially adversely affect the Company's reputation, financial condition and operating results.
  - **Properties**: The Company's headquarters are located in Cupertino, California. As of September 26, 2020, the Company owned or leased facilities and land for corporate functions, R&D, data centers, retail and other purposes at locations throughout the U.S. and in various places outside the U.S. The Company believes its existing facilities and equipment, which are used by all

reportable segments, are in good operating condition and are suitable for the conduct of its business. [2020, 2021]
https://investor.apple.com/investor-relations/sec-filings/

Apple Inc Finance & Audit Committee Charter, as required by the SEC

- The Finance & Audit committee 2020 charter includes responsibilities such as: The purpose of the Committee is to: 1. Assist the Board in oversight and monitoring of: compliance with legal, regulatory and public disclosure requirements; the independent auditors, including their qualifications and independence; enterprise risk management
- Guidelines Regarding Director of Conflicts of Interest says Directors should take all reasonable steps to avoid conflicts of interest with the corporation. Any director who becomes aware of an actual or potential conflict of interest with the Corporation at any time shall notify the Corp GC promptly in writing of the material facts of the actual or potential conflict of interest.
- Corporate Governance Guideline say: The Board expects its directors, as well as officers and employees, to act ethically. Directors are expected to adhere to the Corporation's Business Conduct Policy and the Guidelines Regarding Director Conflicts of Interest.
- https://s2.q4cdn.com/470004039/files/doc_downloads/2020/20200819-Corporate-Governance-Guidelines.pdf
- https://www.apple.com/newsroom/2010/11/17Ronald-D-Sugar-Joins-Apples-Board-of-Directors/
- https://s2.q4cdn.com/470004039/files/doc_downloads/2020/20200819-Audit-and-Finance-Committee-Charter.pdf
-

(2) the employer knew that she engaged in the protected activity
A whistleblower may establish employer knowledge by demonstrating that a supervisor or senior executive knew of the activity (actual knowledge) or that a person with knowledge of the disclosure influenced the official who decided to take the retaliatory action (constructive knowledge).

A) Actual Knowledge (if possible, not required)

- The court stated that "[t]he employee must show that his communications to the employer specifically related to one of the laws listed in § 1514A. The employee is not required to provide the employer with the citation to the precise code provision in question. The employee is not required to show that there was an actual violation of the provision involved." (*Day v Staples*)

Gjovik Evidence: yes, see timeline

B) Constructive Knowledge

- A complainant is not required to prove "direct personal knowledge" on the part of the employer's final decision-maker that he engaged in protected activity. The law will not permit an employer to insulate itself from liability by creating "layers of bureaucratic ignorance" between a whistleblower's direct line of management and the final decision-maker Therefore, constructive knowledge of the protected activity can be attributed to the final decision-maker (*Frazier v Merrit Systems*)

Gjovik Evidence: yes, see timeline

C) Anyone with **supervisor capacity,** not only direct manager
- The employee must show that he or she provided the information to some person at the company with supervisory authority over the employee." (*Collins v Beazer*)

Gjovik Evidence: yes, see timeline

(3) she suffered an unfavorable personnel action (*Burlington Northern*: materially adverse & act might have dissuaded reasonable workers from engaging in the protected activity)
- Termination, suspension, demotion, etc .

Gjovik Evidence:
- Actions:
    - May-July - Smaller stuff
    - 8/4 – forced on indefinite paid admin leave
    - 9/9 – terminated
- Impact on coworkers, examples:
    - Coworkers created the term "Gjoviked" and used it to refer to getting fired for speaking up and even shared it on message boards and Twitter (You're going to get "Gjoviked")
    - A submission from an employee to the AppleToo employee group mentioned "Even as we're writing this, we write it with fear, fear of getting single out and retaliate against, even though HR policy stats that Apple do not tolerate retaliation, after reading what Ashley Gjovik went through, We think the retaliation is real." https://medium.com/appletoo/appletoo-digest-20-aeca5c8aa298

(4) the protected activity was a contributing factor in the unfavorable action; circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. Proximity in time is sufficient to raise an inference of causation.
- Employee must prove contributing factor: any factor which alone or in combination with other factors, tends to affect in any way the outcome of the decision. (*Halliburton v Admin Review Board*)

Complainant proved by a preponderance of the evidence that her protected activity was a
- "A contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Id.* (quoting *Klopfenstein v. PCC Flow Techs. Holdings, Inc.,* ARB No. 04-149, 2006 WL 3246904, at *13 (DOL May 31, 2006)).

A) Direct Evidence (optional, if any)
- Direct evidence of retaliatory motive, i.e., "statements or acts that point toward a discriminatory motive for the adverse employment action."

B) Circumstantial Evidence
- Shifting or contradictory explanations for the adverse employment action. *(Clemmons v. Ameristar Airways, Inc.)*
    - Gjovik evidence: https://gizmodo.com/apple-wanted-her-fired-it-settled-on-an-absurd-excuse-1847868789

- Evidence of after-the-fact explanations for the adverse employment action. "[T]he credibility of an employer's after-the-fact reasons for firing an employee is diminished if these reasons were not given at the time of the initial discharge decision." *(Clemmons v. Ameristar Airways, Inc.)*
    - Gjovik evidence: https://gizmodo.com/apple-wanted-her-fired-it-settled-on-an-absurd-excuse-1847868789
- Animus or anger towards the employee for engaging in a protected activity.
    - Gjovik evidence: Personal effects shipped to me with box of rocks & broken glass: https://twitter.com/ashleygjovik/status/1443702363299188741
- Significant, unexplained or systematic deviations from established policies or practices, such as failing to apply a progressive discipline policy to the whistleblower. (*Bobreski v. J. Givoo Consultants, Inc.,*)
    - Gjovik evidence:
        - No warnings, no previous discipline
        - Very unusual EH&S activity at my Superfund office after I'm gone (assessments, work, etc)
            - Aug 4 All day
            - Aug 6 Fri 3pm-Sun end of day
            - Aug 11 9am-12pm
            - Aug 13 Fri 3pm-Sun end of day
            - Aug 18 9am-12pm
            - Aug 19 9am-12pm
            - Aug 20 Fri 3pm-Sun end of day
            - Aug 27 Fri 3pm-Sun end of day
            - Sept 3 Fri 3pm-Sun end of day
- Singling out the whistleblower for extraordinary or unusually harsh disciplinary action. (*See Overall v. TVA)*
    - Gjovik evidence: immediate termination
- Disparate treatment or proof that employees who are situated similarly to the plaintiff, but who did not engage in protected conduct, received better treatment.
    - Gjovik evidence: yes
- Close temporal proximity between the employee's protected conduct and the decision to take an actionable adverse employment action.
    - Gjovik evidence: back to back
- Evidence that the employer conducted a biased or inadequate investigation of the whistleblower's disclosures, including evidence that the person accused of misconduct controlled or heavily influenced the investigation.
    - Gjovik evidence: no updates whatsoever; person I reported is the person who investigates so he investigates himself?
- The cost of taking corrective action necessary to address the whistleblower's disclosures and the decision-maker's incentive to suppress or conceal the whistleblower's concerns.
    - Gjovik evidence: yes
- Corporate culture and evidence of a pattern or practice of retaliating against whistleblowers.
    - Gjovik evidence:
        - https://www.nytimes.com/2021/10/15/technology/appletoo-apple-janneke-parrish.html
        - https://www.nytimes.com/2021/11/02/technology/apple-worker-retaliation.html

- https://www.theguardian.com/technology/2021/oct/15/apple-janneke-parrish-fired-appletoo
- https://www.bloomberg.com/news/articles/2021-10-12/apple-ceo-s-anti-leak-edict-broke-the-law-ex-employee-alleges

C) Temporal Proximity – Gjovik: days/weeks

- Close temporal proximity between the protected conduct and the adverse action is sufficient to establish causation. *Vannoy v. Celanese Corp, 2011*
- The Ninth Circuit has held that "[c]ausation can be inferred from timing alone when an adverse employment action follows on the heels of protected activity." *Van Asdale v. International Game Technology, 2009*
- A "contributing factor" in her discharge. First, there was temporal proximity between the protected activity and her discharge. Second, there was evidence of pretext and retaliatory animus. (*Kalkunte v DVI Financial*)
- The court cited caselaw to the effect that where a plaintiff relies solely on temporal proximity to prove causation, the protected activity and the adverse action must be very close in time, and that a lapse of 2.5 to 3 months had been found to preclude temporal proximity as the sole causal proof. However, where an employee provides other evidence indicating a connection between his protected activity and his termination, the courts in its circuit allow for a more relaxed temporal proximity.(*Leshinksy v Telvent GIT*)

D) Don't have to prove **pre-text**

- A SOX whistleblower is not required to disprove the employer's allegedly legitimate, non-retaliatory reason for taking an adverse employment action.50 But proof of pretext can prove causation. As the ARB observed in *Palmer,* "[i]ndeed, at times, the factfinder's belief that an employer's claimed reasons are false can be precisely what makes the factfinder believe that protected activity was the real reason."51
- In proving that protected activity was a contributing factor in the adverse action, a complainant need not necessarily prove that the respondent's articulated reason was a pretext. *See Henderson v. Wheeling & Lake Erie Railway,* ARB No. 11-013, ALJ No. 2010-FRS-12 (ARB Oct. 26, 2012) (citing *Klopfenstein v. PCC Flow Techs. Holdings, Inc.,* ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006)).
- A complainant can prevail by showing that the respondent's reason, while true, is only one of the reasons for its adverse conduct and that another reason was the complainant's protected activity. *Klopfenstein,* ARB No. 04-149 at 19.

Gjovik Evidence:

- IP Nonsense Pretext:
  - https://gizmodo.com/apple-wanted-her-fired-it-settled-on-an-absurd-excuse-1847868789
- Policy on Reporting Questionable Accounting or Auditing Matters
  - "Any employee of Apple may notify the Audit and Finance Committee of Apple's Board of Directors of any concerns regarding accounting or auditing matters at Apple by calling the Business Conduct Helpline, which is available to all employees worldwide and is active 24/7. The Business Conduct Helpline is available on AppleWeb. When you, in good faith, notify the Audit and Finance Committee of Apple's Board of Directors of any

concerns regarding accounting or auditing matters at Apple, you are protected from any form of retaliation. Retaliation will not be tolerated.
  - https://s2.q4cdn.com/470004039/files/doc_downloads/gov_docs/101116-Reporting-Questionable-Accounting-(reformatted-to-SF-Hello).pdf

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2. ALJ: Mixed Motive Analysis

(5) ALJ: Was the adverse employment action made with retaliatory intent?

- Inference does not arise automatically if the four criteria are met, but only when the circumstances are sufficient to raise an inference and because the employee must show that he engaged in the protected activity. *(Day v Staples)*
- "whether or not the respondent has articulated a reason, the complainant in order to obtain relief must prove each element of his case by a preponderance of evidence. Only if the complainant so proves must the ALJ apply a mixed motive analysis and determine whether the complainant's employment would have been terminated anyway." *(Henrich v. Ecolab, Inc.)*
- Temporal proximity does not establish retaliatory intent, but may establish the causal connection component of the prima facie case. The ultimate burden of persuasion that the respondent intentionally discriminated because of complainant's protected activity remains at all times with the complainant

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3. Respondent (Clear and Convincing Evidence)

If the employee establishes these four elements, the employer may avoid liability if:

(6) it can prove 'by clear and convincing evidence' that it 'would have taken the same unfavorable personnel action in the absence of that protected behavior.' *(Bechtel v Competitive Tech)*

A) Clear & Convincing
- First, the employer's evidence must meet the plain meaning of "clear" and "convincing." The employer must present a "highly probable," unambiguous explanation for the adverse employment action. As the Supreme Court has held, evidence is clear and convincing only if it "immediately tilts the evidentiary scales in one direction." *Colorado v. New Mexico,* 467 U.S. 310 (1984).

B) Would have
- The operative phrase here is "would have." An employer fails to meet its burden if it establishes merely that it *could* have taken the same adverse action. "Clear and convincing" evidence can be quantified as establishing the probability of a fact at issue "in the order of above 70%

- Second, the employer's evidence must subjectively indicate that the employer "would have" taken the same adverse action absent the employee's protected activity.

C) **Mixed Motive** cases

- And finally, material facts that the employer relied on to take the adverse personnel action must not change in the hypothetical absence of the protected activity. Here, the court evaluates how relevant facts would have differed without the protected activity.
- A SOX whistleblower will typically prevail in a mixed-motive case because the SOX whistleblower's burden is merely to show that protected activity played "any role whatsoever"—*i.e.,* that it was a "contributing factor"—in the adverse employment action. If the decision-maker placed *any* weight whatsoever on the protected activity, then the whistleblower will establish causation.
- The ARB has instructed ALJs to apply the following analysis in mixed-motive cases: If the ALJ believes that the protected activity and the employer's non-retaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question. Thus, consideration of the employer's non-retaliatory reasons at step one will effectively be premised on the employer pressing the factual theory that nonretaliatory reasons were the only reasons for its adverse action. Since the employee need only show that the retali- ation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity. *Palmer v. Canadian National Railway,* ARB No. 16-035 at 56-57

Employer evidence examples:

- **X** the whistleblower recently performed poorly or otherwise gave the employer reason to take action;
  - No
  - 2020 Review: Exceeds expectations in Teamwork, Achieved expectations in Innovation & Results
  - 2019 Review: Exceeds expectations in Results, Achieved expectations in Innovation & Teamwork
  - 2018 Review: Exceeds Teamwork & Results; Achieved expectations Innovation Promoted from ICT3 to ICT4
- the employer's reason for taking the adverse action materialized before the company allegedly engaged in misconduct or the employee blew the whistle; or
  - No
- the whistleblower's personnel file supports the employer's explanation and details the employer's intent to take the adverse action.
  - Unlikely

NO ~~AFTER ACQUIRED EVIDENCE RULE~~