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SUPREME COURT
OF THE STATE OF WASHINGTON

GEORGE E. ENGSTROM and JOHN E. STOCKWELL,

Plaintiffs/Appellants,

v.

MICROSOFT CORPORATION,

Defendant/Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Sean O'Donnell)

Case No. 15-2-04785-0

BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants George Engstrom and John Stockwell are the Plaintiffs in this wrongful discharge in violation of public policy case filed in King County Superior Court against Microsoft. The case is premised on Microsoft's retaliation and termination of high-level managers Engstrom and Stockwell for their reporting of, and refusal to approve, expense reports incurred by a subordinate while entertaining corporate partners in South Korea, because they suspected those expenses masked charges for prostitution. They allege that after they reported their concerns to management and refused to give the subordinate a positive performance evaluation, their careers began a downward slide culminating in their terminations.

The public policy underlying the Plaintiffs' wrongful discharge claim is contained in the accounting provisions of the Foreign Corrupt Practices Act of 1977 ("FCPA"), which requires that all records of publicly-traded companies, including employee expense reports, "fairly" and "accurately" reflect the use of corporate funds to protect investors and the integrity of the capital market. *See* 15 U.S.C. § 78m(b)(2)(A) (App. 1);¹ *see also* CP 92-95 (Pls.' Opp'n to Mot. to Dismiss).

¹ The designation "App." refers to pages of the attached Appendices.

On June 25, 2015, the Superior Court of Washington for King County, Hon. Sean P. O'Donnell presiding, issued an Order Granting Microsoft's Motion to Dismiss pursuant to CR 12(b)(6). CP 217-19. The trial court found that the Plaintiffs' claims failed under the "jeopardy" element, ruling that adequate alternative means for promoting the public policy exist, because the "FCPA provides for comprehensive enforcement coupled with stiff penalties and robust remedies" available to whistleblowers under the Sarbanes-Oxley Act of 2002 ("SOX") and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. See CP 218-19, ¶ 5. See also RP 29-30 (stating that Plaintiffs' allegations "would not warrant dismissal" absent the trial court's finding that Engstrom and Stockwell failed to meet jeopardy prong).

This Court in Piel v. City of Federal Way, 177 Wn.2d 604, 614-15, 306 P.3d 879 (2013) explicitly recognized the need for a public policy tort despite the existence of statutory remedies, citing, as one example, Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984) (allowing claim for reporting violation of federal Foreign Corrupt Practices Act of 1977). Nevertheless, Judge O'Donnell ruled that Cudney v. ALSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011) and Korslund v. DynCorp Tri-Cities Services., Inc., 156 Wn.2d 168, 125 P.3d 119 (2005)

required the dismissal of Plaintiffs' case, which like Thompson, is premised on complying with the accounting provisions of the FCPA.

Messrs. Engstrom and Stockwell sought direct review by the Supreme Court of the trial court's ruling, as the Court of Appeals is no better positioned than the trial court to determine whether the Korslund/Cudney jeopardy analysis applies here, or whether the Piel/Thompson jeopardy analysis should apply.

Appellants ask that the Court abandon the jeopardy analysis for wrongful discharge tort claims as "incorrect and harmful." Even if the jeopardy element remains a part of the analysis for such claims, the statutes cited by the trial court as providing "strong protections for FCPA whistleblowers," CP 219, ¶ 5, expressly "declare their remedies do not preclude others, *see* 15 U.S.C. § 78u-6(h)(3); 18 U.S.C. § 1514A(d), [providing] the 'strongest possible evidence' that these remedies are inadequate, on their own, to fully vindicate public policy." *See* Becker v. Cmty. Health Sys., Inc., 182 Wn. App. 935, 948, 332 P.3d 1085 (2014), *review granted*, 182 Wn.2d 1009, 343 P.3d 759 (2015), *quoting* Piel v. City of Federal Way, 177 Wn.2d 604, 617, 306 P.3d 879 (2013).

Additionally, criminal enforcement of the FCPA by the S.E.C. was in existence when Thompson was decided and such fact did not preclude the availability of a common law tort claim for Mr. Thompson. Thus, the trial

court erred in its analysis of the jeopardy element and the lower court's decision should be reversed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in dismissing appellants' claim for wrongful discharge in violation of public policy. CP 217-19.
2. The trial erred in finding that "nothing suggests a public policy promoting accurate books and records will be jeopardized if Plaintiffs are unable to avail themselves of a civil action under state law." CP 219, ¶ 6.
3. The trial court erred in finding that "adequate means exist to promote the FCPA's requirements for accurate books and records" and that "Plaintiffs cannot establish the Jeopardy element as a matter of law." CP 218, ¶ 4.

B. Issues Pertaining to Assignments of Error

1. Whether comprehensive enforcement of the FCPA by federal agencies existed in 1984 when this Court in Thompson recognized a claim for wrongful discharge in violation of public policy based on an individual's internal efforts to comply with the FCPA?
2. Whether Piel recognized the need for a wrongful discharge in violation of public policy tort claim, despite the existence of comprehensive administrative remedies, for internal reporting of a violation of the FCPA, relying on Thompson?
3. Whether there remains a need for a public policy tort based on termination for reporting suspected violations of the FCPA, despite the existence of statutory remedies in the Sarbanes–Oxley Act of 2002 (SOX) and the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010,

statutes that declare they did not diminish the remedies of whistleblowers available under state law?

4. Whether the Court should abandon the jeopardy element altogether in wrongful discharge case analysis, because reasonable trial courts cannot determine when the Korslund/Cudney jeopardy analysis applies to a particular set of facts, and when the Piel/Thompson jeopardy analysis applies to the same set of facts, and the consequence of each determination is always outcome determinative in pretrial motion practice?

III. STATEMENT OF THE CASE

In response to Microsoft's motion to dismiss under CR 12(b)(6), Appellants Engstrom and Stockwell asked the trial court to consider the following allegations from the Complaint, along with hypothetical facts consistent with the Complaint's allegations.² See CP 83-90.

- A. **Plaintiffs Were Unassigned From Important Projects They Developed; Had the Bulk of Their Staff Reassigned to Others; and Were Ultimately Terminated, After They Reported a Subordinate's "Entertainment Expenses" As Being Suspected to be Microsoft Money Spent at Korean Hostess Bars Known to Sell Sexual Services.**

Plaintiffs Engstrom and Stockwell had successful careers at Microsoft in the 1990s,³ left the company in 1999 and 1998, respectively, and were rehired by the company in 2008, joining the ranks of the top 1%

² In reviewing a CR 12(b)(6) motion to dismiss, "[t]he court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims." Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

³ Plaintiff Engstrom is credited as one of three inventors of DirectX, a collection of application programming interfaces upon which the Xbox and many other significant technologies are based. CP 2 (Compl.), ¶ 2.1.

and 3% of Microsoft's workforce (*i.e.*, within the "partner" and "principal" bands). CP 2-3 (Compl.), ¶¶ 2.1-2.6. In January 2010, Microsoft selected Engstrom to lead the Bing Mobile group as a Level 70 employee—one level below the level of Corporate Vice Presidents. CP 3, ¶¶ 2.9, 2.41. To get the job, Engstrom interviewed with Qi Lu, the President of the Online Services Division ("OSD"); then Sr. Vice President ("SVP") Satya Nadella, and Corporate Vice President ("CVP") Erik Jorgensen. CP 3, ¶ 2.9.

In April 2010, Microsoft and Engstrom selected Stockwell, as a Senior Director and Level 67 employee, to manage a new group, Bing Mobile International. CP 2, 4, ¶¶ 2.3, 2.14.

CVP Harry Shum led Microsoft's Search Technology Center Asia ("STC-Asia"). CP 4, ¶¶ 2.12, 2.17. Shum is a close friend of Engstrom's skip-level manager, Qi Lu; Lu credits Shum with getting him the job as President of OSD. *Id.*, ¶ 2.12. "John Doe"⁴ was working in Shum's organization (STC-Asia) in September 2010. *Id.*, ¶ 2.16-.17. Shum and Doe were close friends and had a mentor-mentee relationship. *Id.* Shum's organization loaned Doe to Engstrom and Stockwell's team in Bing

⁴ Microsoft was provided with a draft version of the plaintiffs' complaint before it was filed. The company responded by asking, *inter alia*, that certain references disclosing confidential Microsoft and employee information, including the actual name of John Doe, be removed, which the plaintiffs agreed to do. *See* CP 22, fn. 1.

Mobile International to assist them in pitching a pilot project to a Microsoft corporate partner, because Doe had a close friendship with an executive who worked for Microsoft's corporate partner. *Id.*, ¶ 2.18.

Doe incurred travel and business expenses while working in Korea, which he submitted in expense reports to his supervisor, Stockwell, for approval. CP 5, ¶ 2.20. For purposes of CR 12(b)(6), the Court may hypothesize that Microsoft maintains policies and “internal controls” intended to comply with the Foreign Corrupt Practices Act (“FCPA”),⁵ which required that managers Engstrom and Stockwell report “concerns”, “red flags”, and “any possible or suspected violation of the law” related to, *inter alia*, subordinates’ expense reports. CP 84.

In or about early March 2011, Stockwell became concerned with vaguely described “entertainment expenses” that Doe submitted for reimbursement. CP 5, ¶ 2.22. When the two next met, Doe told Stockwell he was meeting with executives of the corporate partner at “*hostess bars*.” *Id.* Microsoft in its motion to dismiss described hostess bars as “bars that charge a premium for alcohol and cater to Asian businessmen by providing female staff for conversation and company—*i.e.*,

⁵ See 15 U.S.C. § 78m(b)(2)(B)(i)-(iii) (requiring internal accounting controls sufficient to provide reasonable assurances that “transactions are executed in accordance with management's general or specific authorization; and that “transactions are recorded as necessary ... to permit preparation of financial statements in conformity with generally accepted accounting principles”).

companionship, not prostitution.” CP 23. Messrs. Engstrom and Stockwell have a different conception of the South Korean “hostess bar” phenomenon. They were aware that although prostitution is illegal in Korea, “corporate practices have developed there in which business clients or partners may be entertained in bars with female ‘hostesses’ providing sex services.” See Kim, Ji Hye. *Korea’s New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature’s Intent to Protect Prostitutes from Abuse*, 16 Pac. Rim L. & Pol’y J. 493, 494, 497 (2007); CP 6, ¶ 2.23. In Korea, it is not uncommon for a “hostess bar” and a hotel to be located in the same building. CP 84.

When Stockwell asked Doe if he was “expensing prostitution services of hostesses,” Doe denied the allegation. CP 5, ¶ 2.22. Stockwell subsequently determined that the expense reports Doe submitted were an entire order of magnitude greater than what Stockwell initially understood. Id., ¶ 2.23.⁶

In accordance with Microsoft’s policies, Stockwell told his manager, Engstrom, about the size of the expenses and that, although it was not stated in Doe’s expense reports, Stockwell believed Doe was

⁶ Initially, Stockwell believed he was approving \$700 expense reports for dinners with executives from the corporate partner. Later he determined some of reports he approved were in excess of \$7,000. The reports were difficult to analyze because expenses were incurred in South Korean Won and converted to Japanese Yen in the report. It required a further conversion to U.S. Dollars, which was not provided in the report Doe submitted for approval, to make sense of it. CP 5, ¶ 2.20-21.

“expensing hostess bars” and potentially prostitution. Engstrom then reported to his boss, CVP Erik Jorgensen, that he and Stockwell believed Doe was “expensing hostess bars” and potentially prostitution. CP 6, ¶ 2.24. CVP Jorgensen referred Engstrom and Stockwell to Human Resources Manager Jeff Williams, who received the same report from Plaintiffs. *Id.* Stockwell provided HR a spreadsheet showing more than \$22,000 in “entertainment expenses” that Doe incurred while assigned to work on Stockwell’s team in Korea. *Id.*, ¶ 2.26. Microsoft commenced an investigation into the expense reports and Engstrom and Stockwell requested, pending completion of the investigation, to not have to approve further expenses of Doe. *Id.*, ¶ 2.27. In June 2011, Stockwell proposed a negative rating for Doe, reflecting in part the expense report issue.⁷

In June 2011, HR Manager Williams then called Stockwell, after hours at home, to ask that he drop the complaint against Doe and raise Doe’s performance rating. CP 7, ¶ 2.30. Stockwell responded that he would do as requested, but only if CVP Jorgenson sent an email asking him to agree to the plan and confirming what was requested. The HR Manager responded, “Oh, wow” and dropped the request. *Id.*, ¶ 2.31. Doe was not fired and Microsoft raised his performance rating without the involvement of Stockwell or Engstrom, Doe’s managers—a significant

⁷ See CP 7, ¶ 2.29.

departure from company practice. Id., ¶ 2.32. The change to Doe’s rating permitted him to transfer out of the division. Id. Stockwell was told that CVP Harry Shum stepped in to have the charges against Doe dismissed. Id.

After Engstrom and Stockwell reported Doe for suspicion of “expensing hostess bars” and potentially prostitution, their managers sent their careers off track. Their projects were sabotaged, and members of their staff were transferred from under their supervision. They were demoted, given poor performance evaluations, and in December 2013 and January 2014, Engstrom and Stockwell were terminated. *See* CP 4, 7-11, Compl., ¶¶ 2.16, 2.33, 2.35-.36, 2.40-.41, 2.45, 2.47, 2.50.

B. After Engstrom and Stockwell Sued, Microsoft Successfully Moved To Dismiss Their Complaint Under CR 12(b)(6).

Following their terminations, Engstrom and Stockwell jointly filed claims for wrongful discharge in violation of public policy. CP 12, ¶ 3.2. Microsoft moved to dismiss their complaint pursuant to CR 12(b)(6), challenging the pair’s ability to meet three of the tort’s four current elements, specifically: (1) clarity, (2) jeopardy, and (3) causation. CP 27. King County Superior Court Judge Sean O’Donnell heard the motion to dismiss and ruled that Engstrom and Stockwell’s claims failed only with

respect to one element: jeopardy. *See* RP 29-30; CP 218-19. Plaintiffs appealed that ruling, seeking direct review by the Supreme Court. CP 213.

IV. ARGUMENT

A. Standard of Review

A trial court's ruling to dismiss a claim under CR 12(b)(6) is reviewed de novo. ... Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery. ... The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims. ... A motion to dismiss is granted sparingly and with care and, as a practical matter, only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (internal citations and quotation marks omitted).

B. Plaintiffs' Complaint States A Legal Claim For Which Relief May Be Granted.

The claim of wrongful discharge in violation of public policy is specifically designed to further "the strong state interest" in fostering "the employer's duty to conduct its affairs in compliance with public policy."⁸ The claim usually arises where the employer discharges the employee for (1) "refusing to commit an illegal act"; (2) "performing a public duty or obligation"; (3) "exercis[ing] a legal right or privilege"; or (4) engaging in

⁸ Smith v. Bates Technical College, 139 Wn.2d 793, 801, 803, 804, 991 P.2d 1135 (2000).

“‘whistleblowing’ activity.” Dicomes v. State, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989). Engstrom and Stockwell refused to approve a subordinate’s expense reports, because they were concerned that the reports masked payments for prostitution. *See, e.g.*, CP 6, ¶ 2.27. They reported their concerns up their chain of command, and their career paths plummeted after that culminating in their terminations. *See id.*, ¶¶ 2.24, 2.26.

With its seminal decision in Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984), this Court recognized the private common law tort remedy for cases in which an employer discharges an at-will employee “for a reason that contravenes a clear mandate of public policy.” *Id.* at 233. In Thompson, like here, the plaintiff relied on the public policies underlying the Foreign Corrupt Practices Act of 1977, 91 Stat. 1494. *Id.* at 234. There, like here, the employer was “subject to the reporting requirements of the Securities Exchange Act of 1934 and, therefore, had to comply with that act’s accounting requirements.” *Id.* The Court held that the plaintiff in Thompson was protected from “discharge ... premised upon his compliance with the accounting requirements of the Foreign Corrupt Practices Act.” 102 Wn.2d at 234. Engstrom and Stockwell likewise allege their terminations were premised on actions taken to comply with the FCPA. *See supra*, at 7 and footnote 5.

Thompson is still good law, in spite of the holdings in Korslund and Cudney, because in Piel, this Court specifically held that Thompson, and other cases that preceded Korslund and Cudney, were not overruled and are still viable. See Piel v. City of Federal Way, 177 Wn.2d 604, 614-15, 306 P.3d 879 (2013) (stating in regards to Korslund and Cudney, “neither case purported to overrule anything”).

C. Engstrom and Stockwell Satisfied the Clarity and Causation Elements.

In opposing Microsoft’s motion to dismiss, Engstrom and Stockwell argued that the “[t]he accounting provisions of the FCPA establish a clear public policy that the records of publicly-traded company must ‘fairly’ and ‘accurately’ reflect the use of corporate funds to protect investors and the integrity of the capital market.” CP 92-95; *accord* 15 U.S.C. § 78m(b)(2)(A) (App. 1 hereto).

“The SEC report proposing the legislation concerning accounting and recordkeeping practices, which was in large part ultimately adopted as part of the FCPA, stated that ... [‘]The integrity of corporate books and records is essential to the entire reporting systems administered by the SEC.’”⁹ Thus, Plaintiffs’ reporting of Doe implicates the “public policy of

⁹ CP 93-94, quoting Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record- Keeping Provisions of the Foreign Corrupt Practices Act*, 96 J. Crim. L. & Criminology 465, 469 (2006) (quoting Report of the Securities and

honesty in corporate financial reporting” recognized in Becker v. Cmty. Health Sys., Inc., 182 Wn. App. 935, 953, 332 P.3d 1085 (2014). See CP 94.

“Public confidence in securities markets [is] enhanced by assurance that corporate recordkeeping is honest.” S. Rep. No. 95-114 (1977), at 7 (a copy of the Senate Report is provided at CP 59). In enacting the FCPA accounting provisions, Congress reported that the law’s “purpose” was “to strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitute the foundations of our system of corporate disclosure.” Id. “The establishment and maintenance of a system of internal controls and accurate books and records are fundamental responsibilities of management. The expected benefits to be derived from the conscientious discharge of these responsibilities are of basic importance to investors and the maintenance of the integrity of our capital market system.” Id., at 8 (CP 59). Thus, Congress enacted the FCPA’s accounting provisions, which apply to “virtually any tangible embodiment of information made or kept” by a publicly traded company; and thereby gave the S.E.C. “authority over the entire financial management ... of publicly-held United States

Exchange Commission on Questionable and Illegal Corporate Payments and Practices, *submitted to* S. Comm. on Banking, Hous. and Urban Affairs 3 (May 12, 1976) (CP 154)).

corporations.” S.E.C. v. World–Wide Coin Investments, Ltd., 567 F.Supp. 724, 746, 748-49 (N.D.Ga.1983). The accounting provisions assure that corporate “assets are used for proper corporate purpose[s].” S. Rep. No. 95-114, at 7 (CP 59).

Taking the text of the FCPA and the above-discussed legislative history into account, the trial court found that Engstrom and Stockwell met the “clarity” element of the public policy tort. *See* RP 29-30 and CP 217-19. Judge O’Donnell also found that Plaintiffs’ complaint was adequate to establish “causation.” *See id.* (“[T]he so-called bad fact here for Microsoft is the conversation with the HR representative and the links that I would make at the pleadings stage in Plaintiffs’ favor [which] would not warrant dismissal if I hadn’t got to the jeopardy issue.”). Microsoft has not appealed the trial court’s determination that Engstrom and Stockwell satisfied the clarity and causation elements of their claim.

D. The Trial Court Erred In Finding That Microsoft’s Alleged Retaliatory Termination of Engstrom and Stockwell Did Not Jeopardize the Public Policy Expressed in the FCPA.

The Court should abandon the wrongful discharge tort’s “jeopardy” element as incorrect and harmful. *See* IV.E., *infra*. In addition, trial courts should not be permitted to revisit and overturn policies that have been previously approved by this Court.

In the face of Thompson and Piel, the trial court found that other, external means for promoting the public policy (“comprehensive enforcement [of the FCPA] coupled with stiff penalties and robust remedies,” CP 218-19) were adequate. Owing to the present state of jeopardy analysis, the trial court confidently revisited those policies, even though the enforcement of the FCPA’s books-and-records and other accounting provisions is not new; enforcement actions by the S.E.C. and Dept. of Justice for corporate recordkeeping violations and internal control inadequacies were already well established when Thompson was decided in 1984. *See S.E.C. v. World-Wide Coin Investments, Ltd.*, 567 F.Supp. 724, 747-49, nn. 39-41 (N.D.Ga.1983) (summarizing the S.E.C.’s enforcement powers under the FCPA and collecting cases of S.E.C. enforcement between 1978 and 1982). Nothing in current jeopardy jurisprudence prevented the trial court from searching for new facts to make a well-established policy that supported a wrongful discharge claims for decades, now inapplicable to wrongful discharge.

Nor did the Court’s holding in Piel deter the trial court from revisiting the applicability of the FCPA policies to wrongful discharge, even though, in Piel, this Court recognized its “long line of precedent allowing wrongful discharge tort claims to exist alongside sometimes *comprehensive* administrative remedies.” 177 Wn.2d at 615 (emphasis

added). The opinion acknowledged several “cases which have recognized the need for a public policy tort despite the existence of statutory remedies,” and, as an example, specifically cited the Foreign Corrupt Practices Act and its decision in Thompson. Id. The Court cautioned against “an overbroad reading” of later decisions in Korslund and Cudney, clarifying that “neither case purported to overrule anything.” Id., at 615. The Court in Piel declined to find “a wrongful termination tort claim dead on arrival in the face of administrative remedies,” and “refuse[d] to disregard the body of law [it has] developed addressing wrongful termination claims in the context of statutory schemes providing for administrative remedies.” Id., at 615.

The recent decision by Division Three of the Court of Appeals in Becker v. Cmty. Health Sys., Inc., 182 Wn. App. 935, 332 P.3d 1085 (2014), issued in the wake of Piel, is also instructive. Mr. Becker was a chief financial officer who refused to submit financial information that he “reasonably believed would require overstating income and understating expenses, fraudulently misleading investors and creditors in violation of criminal laws.” 182 Wn. App. at 939. He was then given poor job performance ratings, placed on a performance improvement plan and threatened with his job. Id. He then reported his concerns about potential financial fraud to the company’s CEO and internal auditor. Id. at 939-40.

He “did not report misconduct to law enforcement agencies.” Id. After the company refused to change course in the face of Becker’s reporting, it accepted his resignation. Id.

Becker then filed a whistleblower retaliation complaint with OSHA. Id. He also filed suit for wrongful discharge in violation of public policy. Id. Becker’s employer moved to dismiss his suit under CR 12(b)(6), a motion the trial court denied. The case was certified for interlocutory review as to whether Becker could establish the “jeopardy” element of his claim. The employer argued that a “myriad of statutes and regulations adequately promote the public policy of honesty in corporate financial reporting, rendering a private common law tort remedy superfluous.” Id. at 941. After a comprehensive review of wrongful discharge jurisprudence, including Thompson and Piel, the Court of Appeals recognized that its previous “jeopardy analysis overemphasized the abstract adequacy of statutes and regulates” and “actually undermined public policy enforcement by chilling employee conduct advocating compliance with statutes and regulations.” Id., at 946-47.

The Court determined that Becker’s refusal¹⁰ to submit a “false or misleading” financial projection “undoubtedly” was the “only available

¹⁰ The opinion notes it was disputed whether the case concerned discharge “for refusing to commit an illegal act, engaging in whistleblower activity, or both.” Id. at 1091. The

adequate means for promoting the public policy” of honesty in corporate financial reporting. *Id.*, at 947. Still, the Court recognized that both the Sarbanes–Oxley Act of 2002 (SOX) and the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010—the same statutes cited below by Microsoft and the trial court in Engstrom and Stockwell’s case¹¹ —“provide[d] comprehensive whistleblower protections” for Mr. Becker. *See* 182 Wn. App. at 948, *citing* 15 U.S.C. § 78u–6(h)(1)–(2); 18 U.S.C. § 1514A(a)–(c). However, “because these statutes declare their remedies do not preclude others, *see* 15 U.S.C. § 78u–6(h)(3);¹² 18 U.S.C. § 1514A(d),¹³ we have the ‘strongest possible evidence’ these remedies are inadequate, on their own, to fully vindicate public policy.” *Becker*, 182 Wn. App. at 948, *quoting Piel*, 177 Wn.2d at 617.

It is uncontested that prior to the enactment of SOX and Dodd-Frank, whistleblowers and employees like Engstrom and Stockwell, who acted in compliance with the FCPA and were discharged for such action, had a common law tort remedy under Thompson and state law. Such right

Court found Becker had “clearly elected his legal theory where he alleged, ‘Rockwood and CHS engaged in retaliation ... for his refusal to engage in improper accounting practices...’” *Id.*

¹¹ *See* CP 38, at fn. 8; CP 219.

¹² *See* App. 2 at 16 (“**Rights retained.** Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.”)

¹³ *See* App. 3 at 4 (“**Rights Retained by Employee.**— Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.”)

should not be altered by the inclusion of certain remedies in SOX and Dodd-Frank, where the plain language of that legislation made clear that employees “retained” all existing whistleblower rights and that “[n]othing in th[ese laws] shall be deemed to diminish the rights, privileges, or remedies of any employee [or whistleblower] under any ... State law.” See 15 U.S.C. § 78u-6(h)(3) and 18 U.S.C. § 1514A(d) (App. 2 at 16 and App. 3 at 4). Cf. Piel, 177 Wn.2d at 617 (“[W]hen the very statutory scheme that announces the public policy at issue also cautions that its administrative remedies are intended to be additional to other remedies..., [t]his language is significant because it respects the legislative choice to allow a wrongfully discharged employee to pursue additional remedies beyond those provided by statute.”). Accord Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 821 P.2d 18 (1991) (holding that statutory remedy for wrongful discharge based on filing worker’s compensation claim was not exclusive, where statute, *inter alia*, “contain[ed] no express language of exclusivity, nor ... even contain language strongly suggestive of exclusivity” and did “not clearly authorize all damages which would be available in a tort action,” such as emotional distress damages).

In Becker, after the Court of Appeals discussed the “comprehensive criminal, civil, and administrative enforcement mechanisms promoting the important public policies they secure,” the

Court found it was “essential” that private common law tort remedies “coexist” with other available enforcement mechanisms, lest the threat of discharge jeopardize the public policy of honesty in corporate financial reporting. 182 Wn. App. at 951. The same logic applicable in Piel and Becker applies in this case and establishes the “jeopardy” element to Engstrom and Stockwell’s claims. To allow the trial court’s re-examination of the FCPA encourages never ending litigation, and destroys stare decisis.

E. The Jeopardy Element Added In Gardner, Which Cudney Significantly Expanded Upon, Should Be Abandoned as Incorrect and Harmful, and the Tort Should Be Returned To Its Origins and to the Burdens of Proof Described in Thompson.

A basic function of any legal system is to provide rules by which people may guide their conduct in society. To fulfill this purpose, it is essential that the law be reasonably certain, consistent and predictable. In this respect, stare decisis serves an important and valid function.

Matter of Mercer, 108 Wn.2d 714, 720, 741 P.2d 559 (1987) (citation omitted). Piel creates a safe harbor for cases brought under the same public policies as those cases cited by the Piel Court, including “allowing [a] claim for reporting violation of federal Foreign Corrupt Practices Act of 1977” under Thompson, which preceded the holdings in Korslund and Cudney. Piel, 177 Wn.2d at 614-15. And although the Respondent may argue that the remedies under the FCPA have evolved since Thompson

was decided, they have not evolved since the date of the Piel decision. Moreover, the alleged new legislation cited by the trial court and the respondent as evidence of new robust federal remedies, specifically permits additional remedies beyond those provided by the statute, so prohibiting this claim would also contravene congressional intent. Stare decisis demands that the holding in Piel be honored, and that Thompson's recognition of the FCPA as a valid basis for a wrongful discharge tort claim be left alone by trial courts.

Yet, “[s]tare decisis... is not an absolute impediment to change”; the Court is empowered to abandon an established rule where it is shown that the rule is “incorrect and harmful.” Matter of Mercer, 108 Wn.2d at 720. Here, the jeopardy element has run its course and should be abandoned as an aberration, because it does not work—its application is unpredictable to say the least, and the overwhelming majority of jurisdictions do not embrace jeopardy as an element of wrongful discharge, perhaps because it cannot be rationally applied.

At the hearing on Microsoft’s motion to dismiss, Appellants’ counsel referenced the two-judge concurrence authored by the Honorable George Fearing in Becker. RP 25 (“[I]f you were to read and adopt Ju[dge] Fearing’s concurrence, ... he’s arguing against the four-part test”); *see* Becker, 182 Wn. App. at 954-65 (Fearing, J. concurring, joined by

Lawrence-Berry, J.) (“[T]he law of wrongful discharge in violation of public policy may advance by turning back time to before Gardner, when the employee only needed to show his discharge implicated a clear mandate of public policy.”); *id.*, at 963-64 (stating that Ohio, Iowa, Utah and Guam are the only jurisdictions besides Washington to have adopted Perritt’s four elements for the tort; and that “jeopardy” and “the lack of another adequate remedy” appear to not be part of the nation’s “majority rule” for the tort).

When this Court first recognized the wrongful discharge tort in Thompson, the Plaintiff’s burden was described as follows: “The employee has the burden of proving his dismissal violates a clear mandate of public policy. Thus, to state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened.” 102 Wn.2d at 232. The Court directed trial courts “to weed out cases that do not involve any public policy principle.” *Id.*; *accord* Sedlacek v. Hillis, 145 Wn.2d 379, 393, 36 P.3d 1014, 1021 (2001) (“Whether or not a clear mandate of public policy exists... is a question of law.”) (citing Dicomes, 113 Wn.2d at 617). The Court additionally required that “once the employee has demonstrated that his discharge may have been motivated by reasons that contravene a clear mandate of public policy, the burden shifts to the employer to prove that

the dismissal was for reasons other than those alleged by the employee.” Thompson, 102 Wn.2d at 232-233. Later, the Court refined the standard for proving the employer’s motivation and adopted the “substantial factor” test that is now familiar through its use in RCW 49.60 cases. *See* Wilmot, 118 Wn.2d at 71-73.

The jeopardy element that was later added to the tort in Gardner is incorrect and harmful and ought to be abandoned, if the rule of law in wrongful discharge cases is to be reasonably certain, consistent and predictable. *Compare, e.g.,* Becker, 182 Wn. App. at 948 (holding that because Sarbanes–Oxley Act of 2002 (SOX) states that its remedies do not preclude others, *see* 18 U.S.C. § 1514A(d), the remedies in SOX are inadequate, on their own, to fully vindicate public policy), *with* Nunnally v. XO Commc’ns., 2009 WL 112849, at *11-12 (W.D. Wash. 2009) (holding that plaintiff failed to show jeopardy based on alleged whistleblowing about “financial improprieties” by her employer because “the other means for promoting the public policy at issue are adequate,” including SOX). So long as the jeopardy element persists, the business and legal community will be left to guess which sources of public policy are adequate, until the State’s highest court has made a determination as to each statute or regulation offering possible administrative remedies to wrongful discharge plaintiffs.

“Nearly all, if not all, public policies have an alternative means for enforcement” Becker, 182 Wn. App. at 954 (Fearing, J. concurring). The Court should let the marketplace decide whether a particular claim may be brought as a wrongful discharge claim rather than seeking to oversee the complex and unpredictable world of “jeopardy analysis.” If the administrative process is robust and effective, the plaintiff will likely utilize that process, but if the process is perceived as ineffective and weak, society will benefit by permitting the prosecution of wrongful discharge claims, because society wants accountability, and if the wrongful discharge claim prevails, that victory promotes a fair and just society, because those who would defy and ignore important public policies will have been held accountable. That should be this Court’s primary concern.

The tort should be returned to its origins. The existence of a clear public policy should be determined as a matter of law, and then here, as an example, assuming supporting evidence at summary judgment, issues of fact may be tried to a jury addressing, for each plaintiff:

1) Did plaintiff refuse to sign his subordinate’s expense report, or report the subordinate’s activity to higher authority, or refuse to drop the concern he raised about the subordinate’s expense report when requested by management, or refuse to give a favorable performance evaluation to the subordinate?;

2) Was plaintiff discharged?; and

3) Was plaintiff's refusal to sign the subordinate's expense report, his report of the subordinate's suspected improper activity to higher authority, his refusal to drop the concern when requested by management, or his refusal to give a favorable performance evaluation to the subordinate in light of the subordinate's conduct, a substantial factor in the decision to terminate the plaintiff?

See also, Becker, Amicus by Washington State Association for Justice Foundation at 30-31.

V. ATTORNEY FEES AND COSTS

Recognizing that this case must be tried to a jury, assuming remand, Appellants respectfully request that attorney fees for this appeal be awarded under RCW 49.48.030 at that time,¹⁴ and that costs of this appeal be awarded in accordance with the Rules of Appellate Procedure.

VI. CONCLUSION

For all of reasons stated above, this Court should accept direct review of the Superior Court's decision.

¹⁴ Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 451, 815 P.2d 1362 (1991).

RESPECTFULLY SUBMITTED this 3rd day of August, 2015.

THE SHERIDAN LAW FIRM, P.S.

By: s/ John P. Sheridan

John P. Sheridan, WSBA # 21473

Mark Rose, WSBA# 41916

Attorneys for Appellants

DECLARATION OF SERVICE

Jodie Branaman states and declares as follows:

1. I am over the age of 18. I am competent to testify in this matter, and am a legal assistant for the Appellants' attorney of record. I make this declaration based on my personal knowledge and belief.

2. On August 3, 2015, I emailed and had copies hand delivered to the following attorneys:

Robert J. Maguire
Email: robmaguire@dwt.com
Taylor S. Ball
Email: taylorball@dwt.com
John A. Goldmark
Email: johngoldmark@dwt.com
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
Phone: (206) 757-8094

a copy of the BRIEF OF APPELLANTS.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of August, 2015, at Seattle, King County, Washington.

s/Jodie Branaman
Jodie Branaman, Legal Assistant

APPENDIX 1

United States Code Annotated Title 15. Commerce and Trade Chapter 2B. Securities Exchanges (Refs & Annos)

15 U.S.C.A. § 78m

§ 78m. Periodical and other reports

Effective: August 10, 2012

Currentness

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security--

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange. In any registration statement, periodic report, or other reports to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its first registration statement that became effective under this chapter or the Securities Act of 1933 and, with respect to any such statement or reports, an emerging growth company may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 7201 of this title)

is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b) Form of report; books, records, and internal accounting; directives

(1) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter (except that such rules and regulations of the Commission may be inconsistent with such requirements to the extent that the Commission determines that the public interest or the protection of investors so requires).

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall--

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that--

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary **(I)** to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and **(II)** to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 7219 of this title.

(3)(A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

(c) Alternative reports

If in the judgment of the Commission any report required under subsection (a) of this section is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof the submission of such reports of comparable character as it may deem applicable to such class or classes of issuers.

(d) Reports by persons acquiring more than five per centum of certain classes of securities

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78l of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.] or any equity security issued by a Native Corporation pursuant to section 1629c(d) (6) of Title 43, or otherwise becomes or is deemed to become a beneficial owner of any of the foregoing upon the purchase or sale of a security-based swap that the Commission may define by rule, and is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition or within such shorter time as the Commission may establish by rule, file with the Commission, a statement containing such of the following

APPENDIX 2

United States Code Annotated

Title 15. Commerce and Trade

Chapter 2B. Securities Exchanges (Refs & Annos)

15 U.S.C.A. § 78u-6

§ 78u-6. Securities whistleblower incentives and protection

Effective: July 22, 2010

Currentness

(a) Definitions

In this section the following definitions shall apply:

(1) Covered judicial or administrative action

The term “covered judicial or administrative action” means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding \$1,000,000.

(2) Fund

The term “Fund” means the Securities and Exchange Commission Investor Protection Fund.

(3) Original information

The term “original information” means information that--

- (A) is derived from the independent knowledge or analysis of a whistleblower;

- (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

- (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(4) Monetary sanctions

The term “monetary sanctions”, when used with respect to any judicial or administrative action, means--

- (A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

- (B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(5) Related action

The term “related action”, when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i)

that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(6) Whistleblower

The term “whistleblower” means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(b) Awards

(1) In general

In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to--

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) Payment of awards

Any amount paid under paragraph (1) shall be paid from the Fund.

(c) Determination of amount of award; denial of award

(1) Determination of amount of award

(A) Discretion

The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria

In determining the amount of an award made under subsection (b), the Commission--

(i) shall take into consideration--

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration the balance of the Fund.

(2) Denial of award

No award under subsection (b) shall be made--

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the commission, a member, officer, or employee of--

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a self-regulatory organization;

(iv) the Public Company Accounting Oversight Board; or

(v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1); or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

(d) Representation

(1) Permitted representation

Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

(2) Required representation

(A) In general

Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

(B) Disclosure of identity

Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

(e) No contract necessary

No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission by rule or regulation.

(f) Appeals

Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission. The court shall review the determination made by the Commission in accordance with section 706 of Title 5.

(g) Investor Protection Fund

(1) Fund established

There is established in the Treasury of the United States a fund to be known as the “Securities and Exchange Commission Investor Protection Fund”.

(2) Use of Fund

The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for--

(A) paying awards to whistleblowers as provided in subsection (b); and

(B) funding the activities of the Inspector General of the Commission under section 4(i).

(3) Deposits and credits

(A) In general

There shall be deposited into or credited to the Fund an amount equal to--

(i) any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to victims of a violation of the securities laws, or the rules and regulations thereunder, underlying such action, unless the balance of the Fund at the time the monetary sanction is collected exceeds \$300,000,000;

(ii) any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for whom the Fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds \$200,000,000; and

(iii) all income from investments made under paragraph (4).

(B) Additional amounts

If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the covered judicial or administrative action on which the award is based.

(4) Investments

(A) Amounts in Fund may be invested

The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the discretion of the Commission, required to meet the current needs of the Fund.

(B) Eligible investments

Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission on the record.

(C) Interest and proceeds credited

The interest on, and the proceeds from the sale or redemption of, any obligations held in the

Fund shall be credited to the Fund.

(5) Reports to Congress

Not later than October 30 of each fiscal year beginning after July 21, 2010, the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report on--

(A) the whistleblower award program, established under this section, including--

(i) a description of the number of awards granted; and

(ii) the types of cases in which awards were granted during the preceding fiscal year;

(B) the balance of the Fund at the beginning of the preceding fiscal year;

(C) the amounts deposited into or credited to the Fund during the preceding fiscal year;

(D) the amount of earnings on investments made under paragraph (4) during the preceding fiscal year;

(E) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

(F) the balance of the Fund at the end of the preceding fiscal year; and

(G) a complete set of audited financial statements, including--

(i) a balance sheet;

(ii) income statement; and

(iii) cash flow analysis.

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

(B) Enforcement

(i) Cause of action

An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) Subpoenas

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) Statute of limitations

(I) In general

An action under this subsection may not be brought--

(aa) more than 6 years after the date on which the violation of subparagraph (A)

occurred; or

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Required action within 10 years

Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) Relief

Relief for an individual prevailing in an action brought under subparagraph (B) shall include--

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

(2) Confidentiality

(A) In general

Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of Title 5, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of Title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

(B) Exempted statute

For purposes of section 552 of Title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(C) Rule of construction

Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(D) Availability to Government agencies

(i) In general

Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this chapter and to protect investors, be made available to--

(I) the Attorney General of the United States;

(II) an appropriate regulatory authority;

(III) a self-regulatory organization;

(IV) a State attorney general in connection with any criminal investigation;

(V) any appropriate State regulatory authority;

(VI) the Public Company Accounting Oversight Board;

(VII) a foreign securities authority; and

(VIII) a foreign law enforcement authority.

(ii) Confidentiality

(I) In general

Each of the entities described in subclauses (I) through (VI) of clause (i) shall

maintain such information as confidential in accordance with the requirements established under subparagraph (A).

(II) Foreign authorities

Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

(3) Rights retained

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

(i) Provision of false information

A whistleblower shall not be entitled to an award under this section if the whistleblower--

(1) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; or

(2) uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.

(j) Rulemaking authority

The Commission shall have the authority to issue such rules and regulations as may be

necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

CREDIT(S)

(June 6, 1934, c. 404, Title I, § 21F, as added July 21, 2010, Pub.L. 111-203, Title IX, § 922(a), 124 Stat. 1841.)

Notes of Decisions (27)

15 U.S.C.A. § 78u-6, 15 USCA § 78u-6

Current through P.L. 114-25 (excluding P.L. 114-18) approved 6-15-2015

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APPENDIX 3

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 73. Obstruction of Justice (Refs & Annos)

18 U.S.C.A. § 1514A

§ 1514A. Civil action to protect against retaliation in fraud cases

Effective: July 22, 2010

Currentness

(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. 78f), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c),¹ or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, 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--

(1) 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 section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) Enforcement Action.--

(1) **In general.--**A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by--

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) Procedure.--

(A) **In general.--**An action under paragraph (1)(A) shall be governed under the rules and

procedures set forth in section 42121(b) of title 49, United States Code.

(B) Exception.--Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) Burdens of proof.--An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of Title 49, United States Code.

(D) Statute of limitations.--An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) Jury trial.--A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

(c) Remedies.--

(1) In general.--An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) Compensatory damages.--Relief for any action under paragraph (1) shall include--

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) Rights Retained by Employee.--Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

(e) Nonenforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes.--

(1) Waiver of rights and remedies.--The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(2) Predispute arbitration agreements.--No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

CREDIT(S)

(Added Pub.L. 107-204, Title VIII, § 806(a), July 30, 2002, 116 Stat. 802; amended Pub.L. 111-203, Title IX, §§ 922(b), (c), 929A, July 21, 2010, 124 Stat. 1848, 1852.)

Notes of Decisions (103)

Footnotes

1

So in original. Another closing parenthesis probably should precede the comma.

§ 1514A. Civil action to protect against retaliation in fraud cases, 18 USCA § 1514A

18 U.S.C.A. § 1514A, 18 USCA § 1514A

Current through P.L. 114-25 (excluding P.L. 114-18) approved 6-15-2015

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