

# CORPORATE WHISTLEBLOWER NEWS

May/June 2010

## IN THE NEWS

### **Health Care Reform Law Adds New Whistleblower Protections**

The Democrat-controlled Congress is enacting new whistleblower protections at an unprecedented pace. The much-debated health care reform legislation, for example, prohibits retaliation against health care industry employees who report potential violations of the law, as well as employees who participate in investigations or refuse to participate in unlawful activities. The protections apply only for alleged violations of Title I of the law, although Title I includes many of the core provisions of the new health care scheme, including requirements for the coverage of preexisting medical conditions. The new provision, Section 1558, adopts employee-friendly provisions similar to other recently enacted whistleblower laws, such as a burden of proof scheme favorable to employees and a ban on agreements that retaliation claims be resolved by arbitration. Although complaints must be filed initially with the DOL, the complainant can remove the claim to federal court if the DOL fails to issue a final decision within 210 days of the complaint's filing or within 90 days after OSHA issues its determination. Either party may request a jury trial if the case is removed to federal court.

### **Financial Reform Legislation Includes New Whistleblower Protections**

The Senate-approved financial regulatory reform law also includes new whistleblower protections. One provision in the Senate bill, section 922, provides a new retaliation cause of action in federal court to employees who "provid[e] information to the [SEC] in accordance with" the whistleblower reward subsection or who assist "in any investigation or judicial or administrative action of the [SEC] based upon or related to such information." Another provision, Section 1057, protects employees in the financial services industry for reporting information about fraudulent or unlawful conduct related to consumer financial products or services. The House and Senate are scheduled to meet to reconcile their differing versions of financial regulatory reform bills.

### **Audit Committees Treat Anonymous Financial Concerns, Concerns Damaging to Reputation, Less Seriously**

According to recent research that assessed how audit committee members responded to financial concerns, concerns that are reported anonymously tend to be given less credence: "Audit committee members find anonymous allegations to be less credible than non-anonymous allegations. As a result, audit committee members often choose not to investigate

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## ABOUT CW NEWS

As part of its labor and employment law and litigation practices, Conner & Winters, LLP has unparalleled, nationwide experience counseling and advising clients on proactive workplace measures that can enhance a culture of compliance and minimize the risk of whistleblower claims. *Corporate Whistleblower News* builds on our experience in this field and summarizes important developments regarding the interpretation and implementation of federal whistleblower protection statutes. This material is designed for corporate executives, in-house legal staff, ethics and compliance officers and staff, senior managers, and Human Resources and Labor Relations professionals.

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an anonymous allegation, even when the allegation indicates very serious threats . . . . When an identical allegation is not anonymous, audit committees allocate significant resources to the investigation of the allegation. . . . [W]e also find . . . [that] when audit committee members recognize that an allegation threatens their reputations, they have incentives to not investigate the allegation. These incentives cause the audit committee members to perceive that the allegation is less credible.” *Effects of Anonymous Whistle-Blowing & Perceived Reputation Threats On Investigations of Whistle-Blowing Allegations by Audit Committee Members* (2010).

## **SEC Program for Awarding Bounties to Whistleblowers Found Lacking**

The SEC Inspector General (IG) examined the agency’s program making bounties available to whistleblowers who report insider trading and reported that only about \$150,000 has been paid since the program began over 20 years ago. Only five people received bounty payments. The IG’s report recommends better public communications about the bounty program and an improved process for applying for rewards. The Senate-passed financial regulatory reform legislation (see above) includes a provision under which the SEC would be required to pay a reward to individuals who provide original information to the SEC that results in monetary sanctions of more than \$1 million.

## **OSHA Assistant Secretary Promotes Stronger Whistleblower Protections**

Newly appointed OSHA Assistant Secretary of Labor David Michaels called for reinvigorated protections under the OSHA whistleblower law and a “top to bottom” review of the agency’s administration of all the whistleblower laws within its jurisdiction. According to Michaels, the OSHA whistleblower provision, known as Section 11(c), “was a new, modern way to protect workers from retaliation for exercising their rights” when enacted in 1970. “Today, 40 years later, it’s a dinosaur.... Today no worker who does not belong to a union can feel fully protected as was intended by the creators of this law.” Michaels reportedly is making policy changes in the agency’s handling of whistleblower complaints such as giving complainants copies of information submitted by companies in their response to complaints. OSHA has also hired 25 additional investigators. Michaels suggested in a May 11 [speech](#) (“Whistleblowers and OSHA: Strengthening Professional Integrity”) that companies should be losing more whistleblower cases: “Too few complaints are reaching resolutions intended by the whistleblower protections.”

## **SOX SECTION 806 ROUND-UP**

### **ARB Invites Amici Briefs on Section 806's Coverage of Private Companies**

In an unusual development, the DOL’s Administrative Review Board (ARB) has invited briefs that address the applicability of section 806 to non-publicly traded employers. The ARB seemed to have resolved many questions about the application of section 806 in a holding last year that a private subsidiary of a publicly traded company could be liable under section 806 only if the non-public employer was acting as an agent for the publicly traded company. With two new Obama-appointed ARB members, the board appears poised to reconsider its prior ruling. The recent Order inviting briefs, signed by the ARB’s General Counsel, points to conflicting rulings about section 806 by Administrative Law Judges (ALJ). Briefs must be filed by July 15. *Johnson v. Siemens Building Tech.*, ARB No. 08-032.

### **Appeals Court Rejects Broad Scope of SOX Coverage**

Notwithstanding the ARB’s potential to expand section 806, the Chicago-based federal Court of Appeals rejected a former American Medical Association employee’s SOX claim because the AMA is not a covered employer: “We don’t share [complainant] Fleszar’s belief that the phrase ‘contractor, subcontractor, or agent’ means anyone who has any contract with an issuer of securities. Nothing in [section 806] implies that, if the AMA buys a box of rubber bands from Wal-Mart, a company with traded securities, the AMA becomes covered .... In context,

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## **PUBLICATIONS AVAILABLE**

Employers in safety-sensitive industries may be interested in two workforce publications designed to promote effective resolution of employee safety concerns. ***Safety Conscious Work Environment: The Practical Guide for Leaders*** identifies key ways in which supervisors, managers, and site executives can foster a work environment that encourages employees to participate in raising and resolving concerns. ***Safety Conscious Work Environment: Practical Pointers for the Individual Contributor*** advises non-supervisory workers, including contract workers, how they can contribute to the desired work environment. [More information.](#)

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'contractor, subcontractor, or agent' sounds like a reference to entities that participate in the issuer's activities. The idea behind such a provision is that a covered firm, such as IBM, can't retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in 'Up in the Air'). But whether or not this is the right way to understand 'contractor, subcontractor, or agent', Fleszar did not produce evidence that the AMA fits this category." *Fleszar v. U.S. DOL*, No. 09-2423 (7th Cir.).

## **Federal Court Expands SOX Section 806 Coverage**

Figuratively riding a road paver over all defenses that Fidelity Investments mounted against the SOX whistleblower claims of two former employees, a federal district court recently held that (1) the adverse ruling on one employee's claims by an ALJ had no bearing on his claim once he refiled it in federal court, and (2) section 806 applies not just to employees of publicly traded companies but to employees of all such companies' affiliates. Complainants Lawson and Zang alleged in separate cases that various Fidelity entities retaliated against them for raising fraud concerns. An ALJ granted summary judgment to Fidelity on Zang's claim on the ground that he was not employed by a publicly traded company. The federal court held that it was free to ignore that ruling because Zang had appealed it to the ARB, the ruling thus was not the final order of the DOL, and Zang had the right to "de novo" proceedings in federal court. The court then went on to hold that section 806 covered Lawson and Zang because—contrary to ARB precedent on this point—the statute "protects employees of any related entity of a public company." The court also found that Lawson and Zang sufficiently alleged protected activity—Lawson because she reported "specific problems in corporate conduct" that she could reasonably have viewed as fraudulent because they "involved the delicate and regulated relationship between mutual fund and investment adviser," and Zang because he "alleged facts relating to improper communications to the SEC regarding manager compensation." *Lawson v. Fidelity Mgmt. & Research Co.*, No. 08-10466 (D. Mass.).

## **SOX Section 806 Does Not Preclude a State Wrongful Discharge Claim**

Jones filed two claims against Home Federal Bank challenging her termination: that the termination violated section 806 and that it constituted wrongful discharge in violation of the public policy of Idaho. Home Federal argued that Jones could not pursue federal *and* state claims because the public policy underlying the state claim was identical to the policies protected by SOX. The court disagreed, reasoning that section 806 explicitly states that it does not diminish an employee's rights under any other law and dismissing the state-law claim would "deny Plaintiff's constitutional right to trial by jury" on that claim. Moreover, the court was unwilling at the early stage of the case to assume that SOX was "the exclusive articulation of the public policy" supporting the state-law claim. *Jones v. Home Federal Bank*, No. CV09-336 (D. Idaho).

- In the above-summarized cases against Fidelity Investments, the court held to the contrary that "the SOX statutory scheme precludes relief at common law because Congress has already spoken on how (and to whom) remedies should be made available." Because "the public policy articulated at the federal level [in SOX] is already protected through an adequate remedial scheme [in section 806]," the court dismissed the employees' wrongful discharge claims under Massachusetts law.

## **ALJ Allows SOX Complainant to Proceed in Federal Court; Respondent Failed to Show She Delayed DOL Proceedings in "Bad Faith"**

When more than 180 days passed after Miller filed a complaint under section 806, she filed a Notice of Intent to pursue her claim in federal court. Respondent Stifel, Nicolaus & Co. objected, citing the provision that disallows a complainant from re-filing in federal court if her bad faith delayed the DOL proceedings. Stifel argued that Miller failed to timely participate in discovery and had changed attorneys three times. The ALJ noted that "[g]enerally, a legal showing of bad faith requires some evidence of scienter or mal intent on the part of the party alleged to have acted wrongfully." Here, Stifel "merely alleged the bare existence of bad faith"

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without supporting facts. To Stifel's argument that Miller never responded to its interrogatories or document requests, the ALJ responded that a "general lack of cooperation" is not tantamount to "bad faith delay on the part of a SOX complainant." The ALJ also observed that Stifel had requested one continuance that contributed to the delay. He denied Stifel's objections to Miller's notice. *Miller v. Stifel, Nicolaus & Co.*, ALJ No. 2009-SOX-57.

## **RECENT DECISIONS**

### **Appeals Court Affirms ARB's Ruling that Warning Letter Was Not Adverse Action**

In a case arising under the trucking industry whistleblower provisions, the U.S. Court of Appeals for the Sixth Circuit affirmed the ARB's ruling that a warning letter issued to the driver-complainant was not an adverse action. Yellow Transport issued a warning letter to Melton that stated, in part: "This is a letter of warning for using fatigue as a subterfuge to avoid work (absenteeism). Any further occurrences of this nature will subject you to more severe disciplinary action." Melton argued that the threat of future discipline could dissuade a reasonable person from pursuing whistleblower rights. The Court disagreed, approving the ARB's reasoning that the warning functioned merely as a pre-condition to discipline set out in and controlled by the terms of the collective bargaining agreement; the warning could not be considered "materially adverse" because Melton experienced no change in pay, benefits, or working conditions; and the warning letter would not deter a reasonable employee from later exercising his or her rights under the Act, especially since the effect of the original warning would expire six months after its issuance. The Court also noted that the warning letter was too insignificant even to be grievable under the labor contract between Yellow Transport and the drivers' union. *Melton v. U.S. Dep't of Labor*, No. 08-4441 (6th Cir.).

### **ARB Permits Late Complaints under Equitable Estoppel Theory**

The two newly appointed Democrat ARB members ruled that a company may not rely on the statute of limitations defense where it lulled the complainant into not filing a whistleblower complaint. The complainant, Hyman, claimed that KD Resources fired him in violation of SOX section 806, but he missed the 90-day filing deadline. After the ALJ dismissed his complaint, Hyman appealed to the ARB and argued that management agreed that he had been wrongfully discharged, promised to compensate him, and discussed reinstating him—promises that (if made) did not pan out. The ARB noted that Hyman produced emails in which he memorialized the discussions and stated: "[W]e glean from the evidentiary documents submitted by Hyman... that one or more of the Respondents' officials... led Hyman to reasonably believe that he would be returned to his former employment or alternatively given a one-year consulting contract, that he would be financially compensated for having been wrongfully terminated (including payment of back salary), and that KD Resources would resolve the SOX compliance issues that Hyman had raised. This showing is ... sufficient to establish a basis for applying equitable estoppel to toll the running of the SOX 90-day limitations." The third ARB member dissented, citing precedent that "participation in settlement discussions does not toll the limitations period in a whistleblower case." In his view, Hyman "was relying on hope but no promise that things would work out." *Hyman v. KD Resources*, ARB No. 09-076.

### **Human Resources Director Permitted to Pursue an ERISA Whistleblower Retaliation Claim**

Firming up the view of a majority of courts, a federal district court in Ohio held that ERISA section 510 protects employees when they make internal requests for plan information. The plaintiff, Momchilov, was the Human Resources Director for McIlvaine Trucking as well as a participant in an Employee Stock Ownership Plan (ESOP) and a member of the ESOP committee. She and others became concerned that McIlvaine's president was mismanaging the company, to the detriment of the ESOP, and began to investigate the company's operations. She requested plan documents from an ESOP trustee who was also the company's CFO. McIlvaine fired her soon thereafter on the ground that she was not "trustworthy." McIlvaine filed a complaint, citing the section 510 provision that it is unlawful to discharge a person because she "has given information or has testified or is about to testify in

any inquiry or proceeding" relating to ERISA. The court held that an internal investigation, such as the one Momchilov commenced, constitutes an "inquiry" within the scope of section 510. The court therefore denied McIlvaine's motion for summary judgment on Momchilov's whistleblower claim. *Momchilov v. McIlvaine Trucking Co.*, No. 5:09CV1322 (E.D. Ohio).

## INDUSTRY BRIEFS

### Aviation

***The U.S. Court of Appeals for the Ninth Circuit ruled that the Aviation Deregulation Act (ADA), as amended by AIR21, did not preempt a flight engineer's claims under California law for wrongful discharge and violation of a whistleblower protection statute.*** The court noted that its analysis of the preemption issue was guided by the presumption that "States are independent sovereigns in our federal system [and] Congress does not cavalierly preempt state-law causes of action," a principle that remains especially applicable in the area of employment law, which "falls within the traditional police power of the State." Whether the ADA preempted the state whistleblower protection laws depends on whether the actions protected by those laws were "related to a service," a term the Ninth Circuit has narrowly defined as "the prices, schedules, origins, and destinations of the point-to-point transportation of passengers, cargo, or mail." Ventress reported safety violations six months after they occurred and after completion of the scheduled flights. There was no indication that he grounded or had the potential to ground a flight. Thus, Ventress did not interrupt "service" and the ADA did not preempt his state whistleblower claims. *Ventress v. Japan Airlines, et al.*, No. 08-16122 (9th Cir.).

***OSHA ordered Worldwide Jet Charter LLC to reinstate a pilot.*** According to a press release, OSHA found that Worldwide—a Phoenix-headquartered charter company—fired a New Jersey-based pilot in violation of AIR21. The pilot reportedly was fired in 2006 after he told his employer he intended to file complaints with the FAA. OSHA ordered Worldwide to reimburse the pilot for all lost wages and bonuses plus interest, and to pay compensatory damages totaling over \$21,000 as well as attorney's fees. OSHA also ordered the air carrier to expunge disciplinary actions against the pilot regarding the complaints and inform employees of their whistleblower rights.

### Banking/Financial

***An OSHA Regional Administrator recently awarded the former CFO of Tennessee Commerce Bank reinstatement, backpay (including a bonus in excess of \$300,000), compensatory damages, and attorney's fees.*** OSHA found that the Bank fired Fort in retaliation for reporting alleged securities violations. When he was promoted to CFO in 2006, Fort assumed responsibilities for the publicly traded Bank's compliance with SEC regulations and SOX. In late 2007 and early 2008, he raised concerns with the President and CEO regarding lack of internal controls, suspicious insider trading activity, and potential noncompliance with SOX regulations. Fort also addressed his concerns with the Bank's counsel and the FDIC. Despite praiseworthy work performance during his first year of employment, the Bank put Fort on administrative leave in early 2008 and terminated him two months later, and Fort filed a SOX retaliation complaint. The OSHA Regional Administrator noted that the temporal proximity of the adverse employment actions to Fort's protected activity created a strong inference of retaliation and, further, that the Bank's explanations of its actions were not supported by the evidence. "The supposed purpose of the administrative leave was to allow [Fort] to focus his full attention on the investigation of the internal control allegations," but Fort was unable to access the Bank's computer system or other information necessary for him to assist the independent auditor. Emails indicated that the Bank made its decision to terminate Fort almost one month prior to the date it contended it made the decision, and, according to OSHA, the emails evidenced the Bank's animus and intent to retaliate against Fort. For its part, the Bank contended that Fort "grossly neglected his duties" and "displayed poor management and communications skills," but OSHA found that the evidence did not support those contentions. *Fort v. Tennessee Commerce Bancorp, Inc.*, No. 4-1760-08-017

(March 17, 2010).

- More recently, a federal district court ruled in favor of the Secretary of Labor, who filed suit to force the bank to reinstate Fort. The bank argued that the court lacked jurisdiction to enforce preliminary (as opposed to final) orders of the DOL and that forcing Fort's reinstatement violated the bank's due process rights. The court disagreed and found that the public interest in Fort's reinstatement outweighed any harm to the bank. *Solis v. Tennessee Commerce Bank*, No. 3:10-00472 (M.D. Tenn.). However, the bank appealed that ruling and the U.S. Court of Appeals for the Sixth Circuit stayed the district court's order. The appeals court held that there is a "substantial question" whether a court can enforce a preliminary order and that reinstating the CFO could "cause disruption to the bank's personnel and operations that cannot be undone" if the bank prevails.

***A lender's general counsel was too experienced to reasonably believe that her CEO made an unlawful public disclosure.*** Harkness, formerly the General Counsel for Fieldstone Investment Corp. (now C-Bass Diamond), filed a SOX section 806 complaint alleging that Fieldstone fired her for reporting that the CEO, Sonnenfield, may have violated an SEC regulation governing disclosure of material nonpublic information, Regulation FD. After Harkness refiled her complaint in federal court, Fieldstone moved for summary judgment on the basis that Harkness did not engage in SOX-protected activity. The court observed that protected activity encompasses both subjective and objective attributes and that Harkness had to show she actually believed Sonnenfield's conduct to be a violation of pertinent law and that a reasonable person in her position would so believe. Harkness retained a securities law expert who provided testimony that, because Fieldstone was in the process of going public at the time of the allegedly improper disclosure, it was reasonable for her to believe that Regulation FD applied. Nonetheless, the court found that Harkness took no steps to determine whether Regulation FD actually applied to Sonnenfield's actions, so she had no basis to believe that his actions violated the regulation. The court observed that Harkness had "20 years of legal experience, much of it spent as in-house counsel for large domestic and international corporations" and should have been familiar with performing legal research to ascertain the applicability of the regulation. According to the court, Harkness' failure to investigate whether Regulation FD applied or to conduct an investigation prior to reporting Sonnenfield's actions was not objectively reasonable. The court therefore granted summary judgment for Fieldstone. *Harkness v. C-Bass Diamond, LLC*, Case No. CCB-08-231 (D. Md.).

***An ALJ held that BB&T violated SOX Section 806.*** Stroupe was a Corporate Investigator for Winston-Salem based BB&T hired to investigate suspicious activities and prepare reports for regulators and law enforcement. In connection with her investigations, Stroupe reported potential fraud in the financing of a real estate development. BB&T argued that Stroupe's concerns did not constitute protected activity: while she may have suspected fraud, she did not suspect that BB&T was engaged in the fraud. The ALJ disagreed: "[A]ll [SOX section 806] requires is that the employee reasonably believes that a violation of one of the enumerated statutes has occurred." The ALJ also rejected BB&T's argument that Stroupe's investigation findings were not protected because she was hired to be a corporate investigator. The ALJ went on to hold that BB&T fired Stroupe because of her protected concerns, finding evidence that certain managers were upset with her findings. The ALJ rejected BB&T's argument that Stroupe was fired for performance reasons: "I find it virtually unfathomable that BB&T would fire an employee as highly regarded as Stroupe, and who had recently provided invaluable service to BB&T, over one or two essentially minor issues and without following its progressive disciplinary system." Among other remedies, the ALJ ordered BB&T to reinstate Stroupe as a Corporate Investigator. Subsequent news reports indicate that BB&T has refused to reinstate Stroupe because the company has been laying off Corporate Investigators. *Stroupe v. BB&T*, ALJ No. 2008-SOX-47.

## **Health Care/Pharmaceuticals**

***A pair of hospital lab workers failed to survive summary judgment on FCA retaliation claims.*** Abner and Kendall alleged that they were fired because they reported various concerns about medical sample testing processes and brought retaliation claims in federal

district court under the False Claims Act (FCA). The defendants, Jewish Hospital Health Care Services and Scott Memorial Hospital, moved for summary judgment, which the court granted. The court observed that while the FCA did not protect complaints by Abner and Kendall about the quality of lab work, the workers might have been able to persuade a jury that they engaged in protected activity when they complained about “various billing improprieties.” Even though they did not have evidence of any specific false claim for Medicare reimbursement presented to the government (and for that reason did not establish a substantive claim for fraud under the FCA), they were protected during the time period they were trying to “put all the pieces of the [fraud] puzzle together.” Nonetheless, they presented no evidence that their complaints motivated the terminations. The court pointed out that they were disciplined before they reported their concerns and the legitimate reasons for termination were well documented. “This is not a case of an employer who suddenly became dissatisfied with a previously satisfactory employee after that employee engaged in protected conduct.” *U.S. ex rel. Abner v. Jewish Hosp. Health Care Serv.*, No. 4:05-cv-106 (S.D. Ind.).

***An employee’s release of liability precluded a qui tam lawsuit.*** The Fourth Circuit Court of Appeals ruled that an employee’s release of all claims against his employer upon his separation barred him from filing a claim under the FCA. Radcliffe, a former sales manager for Purdue Pharma, became concerned that the company was making false claims about its product, OxyContin. In addition, the Department of Justice began addressing related concerns about Purdue’s marketing of the drug. Radcliffe later accepted a separation package during a reduction in force and executed a release absolving Purdue of all liability. The following month he filed a *qui tam* suit against Purdue, which Purdue moved to dismiss, citing Radcliffe’s release. Radcliffe argued that for public policy reasons the release could not be enforced against a *qui tam* claim. Although the district court agreed with Radcliffe on this issue, the appellate court ruled for Purdue. The court made clear, however, that the release was only enforceable because the federal government was aware of the potential fraud before Radcliff filed suit. “[W]hen, as in this case, the government was aware, prior to the filing of the *qui tam* action, of the fraudulent conduct represented by the [employee’s] allegations, the public interest [in identifying fraud] has been served and the release should be enforced.” *U.S. ex rel. Radcliffe v. Purdue Pharma*, No. 09-1202 (4th Cir.).

## **Transportation/Trucking**

***Management’s reliance on an inspection report finding wrongdoing by a driver was a pretext for retaliation against him.*** After Testa and another driver complained that a truck had been improperly deemed safe, ConEd’s safety department reviewed the complaint. When that review concluded that the truck was safe, the drivers argued that the review was based on forged documents. Given the forgery assertion, the company’s Auditing Department began an independent review. That review concluded the truck was safe to drive, the drivers’ forgery allegations were meritless, Testa falsified documents and lied about this fact in his interview by Auditing, and Testa failed to perform a second inspection on the truck. Testa was fired and responded with a retaliation claim under the Surface Transportation Assistance Act—and won. According to the ARB, Testa engaged in protected activity when he complained about the truck’s safety and there was evidence that management was aggravated because he was “always complaining.” ConEd argued that, nevertheless, the manager who fired Testa truly believed that he engaged in the misconduct identified in Auditing’s report and fired him for that nondiscriminatory reason. The ARB examined the report and largely dismissed its findings, noting among other things that there was “little significance to the alleged falsification” by Testa. To ConEd’s argument that the manager reasonably relied on the report even if it had deficiencies, the ARB agreed that a company does not violate the STAA simply because information supporting a termination is erroneous and that flaws in an investigation “do not necessarily taint” a decision made in good faith. Here, however, the supervisors and managers who participated in the termination decision also participated in the investigation, and the ARB could “not divorce the audit interviews” from the termination decision or consider that decision in “a vacuum.” *Testa v. Consolidated Edison Co. of N.Y.*, ARB No. 08-029.

***An ALJ awarded emotional distress and punitive damages to a driver.*** New Prime terminated its lease with Ferguson, who had been a driver for the company only four months, five days after a trip in which she repeatedly refused to drive through hazardous weather.

Each time she refused, she told her supervisor/dispatcher about the dangerous conditions and explained why she considered it unsafe to proceed. Ferguson filed a complaint under the STAA. The ALJ found that she engaged in protected activity: “The evidence is undeniable that Complainant would have violated 49 C.F.R. §§ 392.14 and 396.7 had she continued to drive in these hazardous weather conditions” and that she “demonstrated that she had a reasonable apprehension of serious injury if she ... had continued to drive in each of the four instances when [she] ceased driving due to poor weather.” Noting that Ferguson’s supervisor/dispatcher filed an incident report recommending that she be terminated in part because of her protected activity, as well as the temporal proximity between her protected activity and the termination, the ALJ concluded that New Prime terminated Ferguson’s lease in part because of her protected activity. The ALJ also found that Ferguson’s lease was terminated in part because she drove relatively few times and was not profitable. To avoid liability in such a “mixed motive” case, the ALJ stated that New Prime had to show it would have taken the same action absent protected activity but New Prime failed to offer any compelling evidence to meet that showing. As a result, Ferguson was entitled to automatic reinstatement and backpay from the date of her termination. The ALJ awarded Ferguson emotional distress damages of \$50,000 based on her testimony that she felt “like a failure since her termination and that as a result of losing her job her house is about to be foreclosed, she lost her medical insurance, phone, and internet service, and she must obtain food from a shelter.” The ALJ awarded punitive damages of \$75,000 to serve the STAA’s purpose of combating the “increasing number of deaths, injuries, and property damage due to commercial vehicle accidents.” The ALJ noted that Ferguson’s supervisor/dispatcher “intentionally violated” the STAA when he pressured Ferguson to keep driving “although Complainant had informed him of the extremely hazardous driving conditions that existed” and, in so doing, he “demonstrated a total disregard not only for [Ferguson’s] safety but for the safety of other drivers on the road.” The ALJ considered such conduct “both reprehensible and inimical to the purpose of” the STAA. *Ferguson v. New Prime, Inc.*, ALJ No. 2009-STA-47.

***An ALJ sided with an employer in a case brought by a too-zealous compliance***

***coordinator.*** IESI, a commercial trash removal company, employed Jordan as a safety and traffic coordinator. He investigated accidents, ensured compliance with OSHA and DOT regulations, and monitored employee qualifications and performance. Jordan made several complaints to his supervisors—as well as to state and federal agencies—about a visually impaired employee who, according to Jordan, lacked proper medical certifications and was physically unqualified to safely operate company vehicles. While the ALJ acknowledged that Jordan’s complaints were protected activity under the STAA, he agreed that Jordan was “discharged solely for his intemperate, volatile, insubordinate, and antagonistic conduct.” Despite his immediate supervisor’s directive to refrain from further investigation of the other employee’s medical card until he returned from vacation, Jordan aggressively pursued the matter, even contacting the employee’s doctor and requesting certain medical information. Because of Jordan’s actions, the other employee sued IESI for invasion of privacy and HIPAA violations. The ALJ noted: “Even if he was right about [the other employee’s] qualifications, the Complainant defiantly ignored his supervisor’s instructions and carried out his duties on his own terms.” The ALJ found that the evidence, including the testimony of several of supervisors as well as Jordan’s own testimony, supported the company’s concern that Jordan focused his efforts exclusively on compliance with DOT regulations without regard to other regulations or business considerations, and reflected “the defiant attitude the Complainant had towards his superior and his consistent failure to follow instructions when he felt he was right.” Jordan alleged that “any frustration or impulsive behavior” that the company viewed as insubordination was nonetheless protected by the so-called leeway doctrine, which balances the right to engage in protected activity with some leeway for impulsive behavior against the employer’s right to maintain order and respect by correcting insubordinate acts. The ALJ held that Jordan’s “insubordinate behavior and improper language was clearly not impulsive as it was memorialized in lengthy e-mails that permitted him time to reflect before actually sending them to his superior and colleagues.” *Jordan v. IESI PA Blue Ridge Landfill Corp.*, ALJ No. 2009-STA-62.

***The ARB held that a driver was unlawfully fired for refusing to drive on a weight-***

***restricted road.*** Pollock, a driver for Arkansas-based Continental Express, had trouble finding a facility where he was to pick up a load. Neither the dispatcher nor people Pollock stopped to

ask could provide directions. Pollock used a computer-based map in his truck, but that directed him to a road that was posted to prohibit trucks exceeding 10 tons, such as his. According to Pollock, the dispatcher told him to proceed to the facility and that if he had “any problem” the company would “take care of it.” When he refused, he was pulled off the assignment for not picking up the load and later fired for not making reasonable efforts to complete the assignment. The ARB held that Pollock’s refusal to use the weight-restricted road was a protected activity because doing so would have violated state laws, and that he was fired because of his protected activity. *Pollock v. Continental Express*, ARB No. 07-073.

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